In re MUTHIA MOOPAN. SUNDARA AYYAR AND PHILLIPS, JJ.

order would be of more value by quieting the dispute about possession till a Civil Court pronounces upon the merits of the titles of the combatants. At the same time it would not be right to lay down that it might not be sometimes necessary to take security from one of the opposing factions even after the passing of an order under section 145 where the Magistrate is satisfied that notwithstanding such an order, they are likely to take the law into their own hands. We are not therefore prepared to say that the order of the Sub-Divisional Magistrate in this case was passed without jurisdiction on the ground that he had already decided the dispute about possession under section 145 and restrained Seethalakshmi Ammal and her adherents from disturbing the possession of Swaminatha Moopanar. He was satisfied that in this case the preservation of the public peace required that an order under section 107 should also be passed. There is evidence against all the petitioners that they took part in the attempt to create a disturbance on the 27th June. We do not feel called upon to interfere with the order in revision. We dismiss the petitions.

APPELLATE CRIMINAL.

Before Sir Ralph Sillery Benson, the Officiating Chief Justice, and Mr. Justice Sankaran Nair.

THE SESSIONS JUDGE OF COIMBATORE, PETITIONER,

1912. September 16 and 18.

v.

IMMUDI KUMARA KANGAYA MANTRADIYAR AND SIX OTHERS (ACCUSED), RESPONDENTS.*

Criminal Procedure Code (Act XIV of 1898), secs. 208, sub-sec. (1) and (3)—Witnesses, refusal of Magistrate to summon, before commitment—Magistrate's discretion.

A Magistrate has a discretion for reasons to be recorded by him to refuse to summon witnesses under section 208, Criminal Procedure Code (Act XIV of 1898) prior to his making a commitment.

Sub-section (1), section 208, Criminal Procedure Code, contemplates the production of evidence by the prosecution or by the accused without the aid of the Magistrate. Sub-section (3) contemplates the intervention of the

* Criminal Miscellaneous Petition No. 305 of 1912.

THE SESSIONS JUDGE OF COIMBATORE v. KANGAYA MANTRADIYAR.

Magistrate to secure the attendance of witnesses and in regard to this evidence the Magistrate has a discretion for reasons to be recorded by him to refuse to issue process. When therefore section 210 requires the evidence referred to in section 208, sub-sections (1) and (3), to be recorded before a charge is drawn up it does not require the Magistrate to record the evidence of witnesses whom, in the exercise of the discretion given by sub-section (3), he has deemed it unnecessary to summon.

REFERENCE under section 438, Criminal Procedure Code (Act V of 1898), praying the High Court to quash the commitment of the accused in Sessions Case No. 8 of 1912 on the file of the Sub-Magistrate of Kangayam.

The facts of this case are set out in the order.

M. O. Parthasarathy Ayyangar for the accused.

The Hon. Mr. *B. N. Sarma* for the Public Prosecutor on behalf of the Crown.

BENSON, OFFG. C.J., AND SANKARAN NAIR, J.

ORDER.—In this case the Sessions Judge moves us to quash a commitment made to his Court on the ground that the committing Magistrate refused to summon certain witnesses whom the accused desired to be examined by the Magistrate under section 208 of the Criminal Procedure Code prior to his making the commitment. It appears that the examination and cross-examination of the witnesses for the prosecution was closed on the 5th June last and the accused were examined on the same day and stated that their vakil would file written statements on their behalf. The case was therefore adjourned to the 8th June when the written statements were put in and the vakil of the accused argued that there was no sufficient evidence for the prosecution to justify a commitment. Owing to the absence of one of the accused (who was on bail) the case was adjourned to the 11th June and then again to the 20th June and then the present application was for the first time made to summon and examine some sixteen witnesses for the defence. The Magistrate refused to do so as he held that the application was made too late, and he drew up a charge and committed the accused to the sessions on the same day. For the accused it is argued that sections 208, 209 and 210 of the Criminal Procedure Code, rendered it compulsory on the Magistrate to issue the summonses and examine the witnesses, as requested by the accused, and reliance is placed on two unreported decisions of this Court, and on the decisions *Queen Empress* v. *Ahmadi*(1) and

(1) (1898) I.L.R., 20 All., 264.

Emperor v. *Muhammad Hadi*(1). We do not think that the contention of the accused can be supported. Section 208 (1) of *the Criminal Procedure Code, no doubt requires the Magistrate* to record "all such evidence as may be *produced* in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate", and sub-section (3) of the same section enacts that "if the complainant, or officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness . . . the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so." It will be observed that sub-section (1) contemplates the *production* of evidence by the prosecution or by the accused without the aid of the Magistrate, sub-section (3) contemplates the intervention of the Magistrate to secure the attendance of witnesses and in regard to this evidence the Magistrate has a discretion for reasons to be recorded by him to refuse to issue process, if he deems it unnecessary to do so, when, therefore, section 210 requires "the evidence referred to in section 208, sub-sections (1) and (3)" to be recorded before a charge is drawn up, it does not require the Magistrate to record the evidence of witnesses whom, in the exercise of the discretion given by sub-section (3), he has deemed it unnecessary to summon. This procedure appears to be convenient and reasonable, whereas the procedure contended for by the accused, viz., that he may delay asking the Magistrate to summon his witnesses until the last minute before the charge is drawn up and then require him to summon and examine his witnesses, would lead to undue delay in the commitment of cases and the evils which such delay would entail. The proceeding before the Magistrate is only an inquiry preliminary to the trial, and while the law in order to avoid unnecessary commitments is careful to require the Magistrate to examine any witness produced before him by the accused, and provides for the Magistrate also summoning and examining witnesses for the defence before a charge is drawn up and even gives the Magistrate a discretion (section 212) to examine witnesses for the defence after the charge is drawn up and to then cancel the charge and discharge the accused (section 213), it does not compel a Magistrate to summon and

(1) (1904) I.L.R., 26 All., 177.

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examine witnesses for the defence after a charge has been drawn up or even before the charge has been drawn up if the Magistrate, for reasons to be recorded, deems it unnecessary to do so.

This distinction between the duty of the Magistrate in regard to evidence *produced* before him by the accused and evidence not produced before him, but which the accused desires him to obtain by the issue of process, has not always, we think, been borne in mind by the Courts and the omission seems to have led the learned Chief Justice of the Allahabad High Court [*Emperor* v. *Muhammad Hadi*(1)], to state the rule in terms wider than those of the code, and wider also than those used in *Queen Empress* v. *Ahmadi*(2), which he refers to in support of his statement of the rule (see also the unreported decision of this Court in Criminal Miscellaneous Petition No. 298 of 1911). Mr. Sarma for the Public Prosecutor has drawn our attention to the case of *Phanindra Nath Mitra* v. *Emperor*(3) in which it is held that section 347 of the Criminal Procedure Code lays down that when a Magistrate has made up his mind to commit an accused for trial "he shall stop further proceedings" and commit the accused for trial, and that this section is not to be read as subject to the provisions in sections 208 to 210 to which we have referred. We are unable to accept this view or to rely on section 347 in support of the Magistrate's action.

Having regard to the subject-matter of sections 346 and 347 and to the corresponding sections in the Code of 1872 (see section 221 of that Code and *Empress of India* v. *Ilahi Bakhsh*(4)), we think that the direction in section 347 to "stop further proceedings" does not justify a Magistrate in disregarding the directions in sections 208 to 210, but only requires him to stop proceeding with the case as a trial and instead to commit the case to the sessions for trial by that Court "under the provisions hereinbefore contained," *i.e.*, under the provisions of sections 208 to 210 and the other provisions in Chapter 18 of the Code. In the present case we agree with the Magistrate that the application by the accused to summon and examine their witnesses was so long delayed that the Magistrate was justified in refusing to accede to it at that stage. We therefore see no reason to quash the commitment.

(1) (1904) I.L.R., 26 All., 177.
(2) (1898) I.L.R., 20 All., 264.
(3) (1909) I.L.R., 36 Calc., 48.
(4) (1880) I.L.R., 2 All., 910.