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was performed subsequent to his death the elder brother of the boy made the formal gift. The learned Judges holding that there was giving and taking in the lifetime of the natural father, upheld the adoption on the ground that the religious rite was essential only to complete the adoption. *Subbarayar* v. *Subbammal*(1) is, however, a parallel case. The boy was given and taken and subsequently the adoptive father died. The ceremony of datta homam was performed by his widow and the adoption was held valid. The principle underlying these cases is, that giving and taking is of the essence of the adoption and the religious part of it can be deferred to a subsequent period. I am prepared to follow these cases and on this ground also I confirm the adoption.

The result is, the appeal is allowed and the plaintiff's suit is dismissed. The defendants will have their costs of this appeal, but the parties will bear their own costs in the lower Courts. K.R.

APPELLATE CRIMINAL.

Before Mr. Justice Wallace.

1923, March 26.

K. C. MENON (COMPLAINANT), PETITIONER,

v.

P. KRISHNAN NAYAR (ACCUSED), RESPONDENT.*

Criminal Procedure Code, 1898, *sec.* 252—*Warrant case—Evidence produced by prosecution taken—Application by complainant to summon other persons as being able to prove his case—Arbitrary refusal by Court, improper.*

Though section 252 of the Criminal Procedure Code, unlike sections 208 (3) and 244 (2) of the Code, does not impose on a Magistrate trying a warrant case the duty of issuing summonses

(1) (1898) I.L.R., 21 Mad., 497.

* Criminal Revision Case No. 153 of 1926.

to witnesses named by the complainant, yet its effect is to throw a greater responsibility upon him than in a summons case, as he is not empowered to arbitrarily refuse to summon such witnesses, but is bound to summon such as he thinks are likely to give useful evidence.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Subdivisional Magistrate of Calicut, dated 19th December 1925, in Calendar Case No. 136 of 1925.

The facts necessary for this report appear from the judgment.

K. S. Jayarama Ayyar for the petitioner.

V. L. Ethiraj for *M. C. Sridharan* for the respondent.

A. S. Sivakaminathan for the *Public Prosecutor* for the Crown.

JUDGMENT.

This is a petition to revise the order of the Subdivisional Magistrate of Calicut refusing the petitioner's petition to summon certain witnesses for the prosecution. The petitioner is prosecuting the accused for offences under section 477-A of the Indian Penal Code and section 282 of the Indian Companies Act for concocting false balance sheets, when he was the Managing Director of the Manorama Printing Works in 1921 and 1922, in particular for showing an inflated and false value of the stock in hand and including in the company's stock the full value of books only sent to them for sale on commission. The petitioner filed his complaint on 3rd November 1925 naming three witnesses. At that time the books of the company had been impounded and were in the Lower Court.

His witnesses were examined on 23rd and 24th November 1925 and cross-examined on 5th and 6th December 1925. The petitioner put in a further list of

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four witnesses styled "Experts in valuation," and the Magistrate examined these on 12th December 1925 and 19th December 1925. On 17th December 1925 the petitioner put a further list of witnesses stating that he had got further information about the inclusion in the stock list of books which never belonged to the company and were not in its possession, some of which the petitioner had secured. The lower Court refused to summon these on the ground that it was new matter, and the petitioner has put in this revision petition.

His chief point is that at the stage which the case has reached, the Magistrate has no option to refuse to examine witnesses cited by him, and he relies on section 252 of the Criminal Procedure Code. That section lays down that not only shall the Magistrate take all the evidence which may be produced in support of the prosecution but shall himself ascertain the names of other persons able to give evidence for the prosecution and summon such of the latter as he thinks necessary. In the present case, the new list of witnesses is one offered by the complainant himself, just as his previous list of expert witnesses was offered, some time after the complaint was filed and after the trial had begun. What then is the proper attitude for the Court to take up regarding such a list? The section does not appear to me to be very clear on the point; but, as I read it, it means first that the complainant should himself produce what evidence he can in support of the prosecution and the Magistrate shall proceed to hear it. The Court is apparently not bound to issue process for such witnesses, or to grant time for the production of such witnesses, but if produced it must record their evidence. There is no section here corresponding to section 208(3) in the case of committal proceedings or section 244 (2) in the case of trial in summons cases. This is a

remarkable omission, as otherwise the language "shall take all such evidence, as may be produced in support of the prosecution" is the same in all the three sections; and section 257 gives the *accused* the power of asking the Magistrate to issue compulsory process, while section 252 itself gives the Magistrate power to summon persons whom he has himself ascertained to be acquainted with the facts of the case. Next when the complainant has done all he can without the assistance of the process of the Court, it is then for the Magistrate to ascertain *from the complainant* or otherwise the names of other persons likely or able to give evidence, and he must summon such of those as he thinks necessary, i.e., such of those he thinks will be of value in assisting the prosecution case. He cannot, I take it, arbitrarily refuse to summon such witnesses.

It is his duty to assist, and not to hamper, the prosecution, and for that purpose he must issue summons to persons, of whom the complainant has informed him, who, he considers, are likely to give useful evidence. Obviously, I take it that the Magistrate is not bound to, or expected to, exercise this duty of "ascertaining" more than once, and the proper time is when the evidence "produced" in support of the prosecution has been taken, and that ordinarily includes the cross-examination, if any, and re-examination, if any, before the charge (see *Varisai Rowther* v. *King Emperor*) (1).

Now, I find from the Magistrate's order that, though he asked the complainant after the examination-in-chief of his original witnesses, whether he had any more witnesses to examine, he did not and has not yet asked him that question after the examination of the original witnesses was over, nor was the question in the

(1) (1923) I.L.R., 46 Mad., 449 (F.B.).

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proper form. The question to be asked is not whether complainant has any more witnesses whom he can produce without summons, but whether he can inform the Court of any witnesses who will have to be brought by process. The Magistrate has therefore, in my view, not complied with the law. The stage of examining the original witnesses produced by the complainant is over. But still the Court has to ascertain from the complainant whether there are any other persons able to give evidence in support of the prosecution. The Court must remedy this defect and must do so now.

As to whether the petitioner has traversed new grounds, the consideration of that matter seems to me not at all a matter of procedure on which I can at this stage be properly called upon to give a decision. The discretion to summon or not to summon lies with the Magistrate. But he is not to interpret that discretion in a narrow or purely technical sense. He must look at the prosecution case broadly, decide what are the broad allegations of facts on which the complaint is founded and then determine whether the evidence offered is not necessary to assist in the establishment of that case. A useful test will be whether if the accused were acquitted in this case, it would be open to the complainant to put in a fresh complaint on the facts now put forward.

I set aside the order and direct that the petition be reheard in the light of the above remarks.

B.C.S.