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could be shown to me that the action of the Sessions Judge had caused a failure of justice and had prejudiced the accused in their defence, I should without hesitation set aside so much of the proceedings as related to the charge under s. 323. That a party might in some cases be so prejudiced is quite clear; but in this particular case the Sessions Judge was addressed by the gentleman who appeared for the prisoners, and he heard all the objections raised, and if the pleader had so desired, he might have called fresh witnesses as to this charge. This being so, I do not think that the objections now urged are of sufficient weight, and I consider that the provisions of s. 537 of the Code meet the case. As to the merits, I am of opinion that there is ample evidence to support the findings, and I do not see how the Judge could have come to any other conclusion than that the men were guilty. The appeals are dismissed.

Appeals dismissed.

CRIMINAL REVISIONAL.

1886
September 20.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF THE RAJAH OF KANTIT.

Witness for defence—Refusal by Magistrate to summon witness under Criminal Procedure Code, s. 216—Witness summoned by Sessions Court—Power of Sessions Judge to summon witness—Criminal Procedure Code, ss. 291, 540.

Upon the committal of certain persons for trial before the Sessions Court for offences under the Penal Code, each of the prisoners, under s. 211 of the Criminal Procedure Code, gave in a written list of the persons whom he wished to be summoned to give evidence at the trial. On each of these lists, the name of a particular person was entered, who objected under s. 216 to being summoned, on the ground that the summons was desired for vexatious purposes only, and that there were no reasonable grounds for believing that any evidence he could give would be material. Upon this objection, the committing Magistrate passed an order requiring the prisoners to satisfy him that there were reasonable grounds for believing that the objector's evidence was material, and, having heard arguments on both sides, passed an order refusing to issue the summons. The only ground stated by the Magistrate for this order was that he thought the reasons assigned for the application to have the objector summoned were insufficient. Subsequent to the order, and before the trial in the Sessions Court had begun, the Sessions Judge, upon an application filed on behalf of the prisoners, passed an order directing that the objector should be summoned to give evidence. The order assigned no reasons, and was passed in the absence of the objector or of any person representing him, and without notice to show cause being issued to him. The objector

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applied to the High Court for revision of the order on the ground that the Sessions Judge had no jurisdiction to make it.

Held that when a Magistrate refuses, under s. 216 of the Criminal Procedure Code, to summon a witness included in the list of the accused, he must record his reasons for such refusal, and such reasons must show that the evidence of such witness is not material; that the ground stated by the Magistrate, *viz.*, that the reasons assigned for the application to have the objector summoned were insufficient, did not show that the evidence was not material; that the Sessions Judge had jurisdiction to make the order complained of; and that, even if he had not, it would not under the circumstances be desirable to interfere with his order in revision.

Per STRAIGHT, J., that s. 540 is not the only provision of the Criminal Procedure Code which confers on a Sessions Judge powers of the kind exercised by him in this case. Under s. 291, though the summoning of witnesses by an accused through the medium of the Sessions Judge is not a matter of right, yet the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the committing Magistrate.

THIS was an application for revision of an order passed by Mr. W. Martin, Sessions Judge of Mirzapur, on the 11th September, 1886, directing the Deputy Magistrate to summon the applicant, the Rajah of Kantit, as a witness in a case committed for trial before the Sessions Judge.

The applicant stated in his application as follows:—

"1. That on the 24th August, 1886, certain persons, Lallu Singh, Sheo Singh, and others, were committed by the Deputy Magistrate of Mirzapur for trial by the Court of Session upon charges under ss. 147, 436, and $\frac{436}{114}$ of the Penal Code.

"2. That under s. 211 of the Criminal Procedure Code, the said Lallu Singh and Sheo Singh each gave in a written list of the persons whom they wished to be summoned to give evidence at the trial, and that on each of the said lists the name of your petitioner was entered.

"3. That on the 24th August, 1886, a petition was filed in the Court of the Deputy Magistrate on behalf of your petitioner, under s. 216 of the Criminal Procedure Code, objecting to the summoning of your petitioner on the ground that his name had been entered in the said lists for vexatious purposes only, and that there were no reasonable grounds for believing that any evidence he could give would be material.

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"4. That on the same date the Deputy Magistrate passed an order, requiring the said Lallu Singh and Sheo Singh to satisfy him that there were reasonable grounds for believing that your petitioner's evidence was material, and on the 25th August, having heard arguments on both sides, passed an order refusing to summon your petitioner.

"5. That on the 2nd September, an application was filed on behalf of the said Lallu Singh and Sheo Singh in the Court of the Sessions Judge of Mirzapur, praying that your petitioner might be 'summoned to give evidence for the defence,' and stating generally that his evidence was 'important,' but setting forth no grounds for the belief that it was material.

"6. That on the 11th September the Sessions Judge passed an order, directing that a copy of the application should 'be sent to the Criminal Court in order to summon Rajah Bhupendra Bahadur Singh as a witness,' and in pursuance of this order a summons has been served upon your petitioner by the Deputy Magistrate.

"7. That the above-mentioned order of the Sessions Judge assigns no reason for reversing the decision of the Deputy Magistrate, and was passed in the absence of your petitioner, and of any person representing him, and without any notice being issued to him, or other opportunity afforded to him of showing cause against the passing of such order.

"8. That the trial in the Court of Session has not yet begun, and the 21st September, 1886, is fixed for its commencement.

"9. That under the circumstances above set forth, your petitioner humbly submits that the Sessions Judge had no jurisdiction to make the above-mentioned order of the 11th September, 1886.

"10. That for the reasons contained in the affidavits hereto annexed, your petitioner believes that the inclusion of his name among the witnesses desired to be summoned is purely vexatious, and that no evidence which he could give would be material to the case.

"11. Your petitioner therefore prays that this Hon'ble Court may be pleased to set aside the Sessions Judge's order of the 11th September, 1886, and to exempt him from appearing under the summons issued in pursuance thereof."

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Mr. *A. Strachey*, for the petitioner.

EDGE, C. J.—I am of opinion that this application must be dismissed. I am not satisfied that the Sessions Judge did not act within his powers in passing the order he did. Under s. 216 of the Criminal Procedure Code, a Magistrate is not entitled to require an accused to satisfy him, the Magistrate, that there are reasonable grounds for believing that the evidence of a witness, whom the accused desires to be summoned and be included in the list, is material, unless the Magistrates think that such witness "is included in the list for the purpose of vexation or delay, or of defeating the ends of justice." When a Magistrate does refuse under this section to summon a witness included in the list of the accused, he must record his reasons for such refusal, and such reasons must show that the evidence of such witness is not material. The only ground stated by the Magistrate for refusing to summon the witness appears, from the uncertified copy of the Magistrate's order before me, to be that he thought the reasons assigned for the application to have the Rajah summoned as one of the defendant's witnesses were insufficient. This does not show that the Rajah's evidence was not material. Even if I thought the Sessions Judge had not jurisdiction to make the order complained of, which I do not, I should not interfere in this case. I think it desirable that it should be generally understood that these objections to appearing to give evidence in a Criminal Court cannot be entertained. It is the duty—and it should be a cheerful duty—of every one to attend a Court of Justice when summoned to give evidence as a witness, particularly on behalf of an accused.

STRAIGHT, J.—I am of the same opinion. It appears that the Sessions Judge, having to try certain persons committed by the Magistrate, and having been satisfied that the Rajah of Kantit was a material witness for the defence, ordered the Magistrate to summon him as a witness, and a summons was issued to that distinguished personage. I think the order of the Judge was right. The suggestion of the learned counsel for the applicant, that s. 540 alone confers powers on a Sessions Judge, appears to me an incorrect contention, and I am not prepared to adopt it; for to lay down any such rule might lead to great inconvenience and possible injustice to accused persons. It is clear to my mind, under s. 291 of the

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Criminal Procedure Code, that though the summoning of witnesses by an accused through the medium of the Sessions Judge is not a matter of "right," yet that the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the committing Magistrate. It is impossible for me to say, upon the affidavits before me, that the Rajah will not be a material witness to the defendant's case, and though it may be distasteful and unpleasant to him to appear as a witness in a Criminal Court, it is his duty, as one of Her Majesty's subjects, living under the protection of the law, to obey that law, and attend before the Judge in obedience to the summons. I have no doubt the Judge will make every arrangement to make such attendance as convenient and unobjectionable as is possible and consistent with the interests of the accused.

Application rejected.

APPELLATE CRIMINAL.

1886
September 21.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

QUEEN-EMPRESS *v.* ISHRI SINGH.

Criminal Procedure Code, s. 512— Act I of 1872 (Evidence Act), ss. 33, 157— Witness, threatening—Duty of Magistrate.

In 1874, five out of six persons who were named as having committed a murder were arrested and after inquiry before a Magistrate were tried before the Court of Session and convicted. At the time of the inquiry before the Magistrate, the sixth accused person absconded, as was recorded by the Magistrate. In their examination before that officer, the witnesses deposed to the absconder having been one of the participators in the crime charged against the prisoners then under trial. In the Sessions Court the Judge did not record that the sixth accused person had absconded, and the evidence was recorded against the prisoners then under trial only. In 1886 the absconder was apprehended and tried before the Court of Session upon the charge of murder. At that time most of the former witnesses were dead, and the Sessions Judge, referring to s. 33 of the Evidence Act, admitted in evidence against the prisoner the depositions given in 1874 before both the Magistrate and the Sessions Court. He also admitted the deposition of a surviving witness which had been given in 1874 before the Sessions Court. This witness now also gave evidence against the prisoner.

Held that the depositions were not admissible in evidence under s. 33 of the Evidence Act, the prisoner not having been a party to the former proceedings and not having then had an opportunity of cross-examining the witnesses.