CRIMINAL MOTION.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

1886 *December* 11.

BACHU MULLAH AND OTHERS (PETITIONERS) *v.* SIA RAM SINGH AND OTHERS (OPPOSITE PARTY.)*

Irregularity in Criminal trial—Rioting, Counter-charges of—Cross cases taken—Procedure Code, Act X of 1882, *s.* 537—*Irregularity prejudicing the accused—"Failure of justice."*

A Magistrate, there being counter-charges of rioting and assault before him, took up and tried one of such cases, and having heard the evidence for the prosecution called on the counter-case, and in this latter case examined as witnesses some of the accused in the first case, eventually convicting the accused in the first case: *Held* that such a procedure constituted a grave irregularity, but that, under the circumstances of the particular case, the irregularity was cured by s. 537 of the Criminal Procedure Code.

THIS was a rule obtained by Bachu Mullah and others calling on the opposite party to show cause why the order of the Sessions Judge of Bhagulpore, confirming the order of the Deputy Magistrate of Begoo-serai, convicting Bachu and his party of rioting and sentencing them to six months' rigorous imprisonment each, with a fine of Rs. 25, and in default to a further sentence of two months' rigorous imprisonment, should not be set aside. It appeared that originally there were cross charges of rioting and assault brought in the Deputy Magistrate's Court, the one by Bachu Mullah and his party against Sia Ram Singh and his party, and the other by Sia Ram Singh and his party against Bachu Mullah and his party, and that the Deputy Magistrate first took up and heard the case of Bachu Mullah, and without passing any order thereon called on the cross case of Sia Ram Singh, and in that case called Bachu Mullah and his party as witnesses; the Magistrate eventually finding that the case against Bachu Mullah and his party had been proved, convicted them and sentenced them as above mentioned, dismissing the case against the party of Sia Ram Singh.

* Criminal Motion No. 475 of 1886, against the order passed by J. Whitmore, Esq., Sessions Judge of Bhagulpore, dated the 13th of November, 1886, confirming the order of J. T. Babonau, Esq., Deputy Magistrate of Begoo-serai, dated the 22nd of September, 1886.

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Mr. *Woodroffe* showed cause.

Mr. *M. Ghose* in support of the rule.

The order of the Court (PETHERAM, C.J., and BEVERLEY, J.) was as follows:—

We think that this rule must be discharged, at all events so far as the conviction is concerned.

The Magistrate has tried two cases in which there were practically counter-charges of riot and assault. He has tried, first of all, one party, and having taken the evidence for that party he has, without giving his decision in that enquiry, proceeded to take the evidence for the other party, and in this second enquiry he has called as witnesses some of those very persons whose conduct was enquired into in the first enquiry, and as to whose guilt or innocence he was suspending his judgment.

I think that is a course which is to be deprecated to the last degree. I think it a very great pity that Magistrates should ever adopt it. There is no doubt, to my mind, that it constitutes a very great irregularity, and the reason why it is so very objectionable is that you call a man as a witness whose conduct has been enquired into, but the decision in whose case has not been pronounced, and you hear his statement of the case given before the very person who is to decide upon his guilt or innocence; and by doing that you introduce an element into the question whether or not he will tell the truth, which ought not to be there because he has a personal interest in the enquiry; his liberty or life may be at stake on what will be the verdict in his own case, and it is not in human nature to suppose that he would, under such circumstances, give his evidence in the impartial way that it ought to be given in a Court of Justice. Therefore it seems to me that it is not only an irregularity but an irregularity of a grave kind, and in this matter I am speaking not only for myself but I believe for my brother Beverley also, and therefore I hope that in similar enquiries in future Judges and Magistrates will discontinue this irregular and highly objectionable practice. What they can do in a case of this kind is, they can try and decide it, and having decided it they can convict or acquit the accused, whose interest in the enquiry will then have come to an end, and they can then be called into the witness box and

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examined in the other case, and they will then be in a position to give their evidence without having any personal interest in the evidence which they are being called upon to give.

For these reasons we think this irregularity is very objectionable, and I hope that it will be discontinued, but as to whether it is such an irregularity as to lead us to set aside the conviction and order a new trial is another matter. Section 537 of the Code of Criminal Procedure provides that enquiries are not to be set aside for irregularity unless the Court comes to the conclusion that there has been a "failure of justice," and therefore before the proceedings can be set aside it must be shown that, by reason of the irregularity, the true facts have not come out or that there is danger that they will not come out. But that is not the case here. As I said before, the reason why this irregularity is objectionable is that persons have a very strong inducement to give evidence with a coloring in their own favor. In this case they have given their evidence, and the persons who practically object are the persons whose evidence was actually given. It cannot be said that they were prejudiced by giving evidence too strongly in their own favor. The other accused were not concerned one way or the other, and therefore we think that there is no prejudice shown to the disadvantage of any of the accused. That being so, notwithstanding the fact that the procedure was irregular, we think that irregularity is cured by that section, and we cannot interfere with the conviction, and therefore on that ground we think that the rule must be discharged.

With reference to the sentence, however, we think that the sentence of imprisonment is sufficient without the additional fine, therefore we confirm the sentence, so far as the imprisonment is concerned, and remit the fine.

T. A. P.

Rule discharged.