REVISIONAL CRIMINAL.

1918
August, 3.

Before Mr. Justice Piggott.

EMPEROR *v.* MATHURA AND OTHERS.*

Criminal Procedure Code, sections 15, 16 *and* 350—*Honorary Magistrates—Effect of variations in composition of Bench during the course of a trial—Local Government's power to make rules.*

By rules framed by the Local Government under section 16 of the Code of Criminal Procedure it was provided (1) that when a Bench of Honorary Magistrates consisted of three members, any two of them should "form a quorum", and (2) that if the Bench held an adjourned sitting for disposal of a part heard case, and the members of the adjourned sessions were not the same as sat at the first hearing of the case, the provisions of section 350 of the Code of Criminal Procedure would be held to apply to the case.

A Bench of Honorary Magistrates consisted of three members, J, N, and P. A case under the Gambling Act came before the Bench and was partly heard by J and N. The case was then adjourned and at the next hearing came before J and P. The accused waived their right under section 350 of the Code of Criminal Procedure. The prosecution witnesses were cross-examined; the defence witnesses were heard; the accused were examined, and arguments were heard. The case was then again adjourned, and on the next occasion the Bench consisted of J and N, who proceeded to deliver judgment.

Held that, the rules framed by Local Government were not *ultra vires*; but, inasmuch as the course followed by the trial had probably been prejudicial to the accused, the trial, so far as the last day's proceedings were concerned, was set aside and the case remitted for disposal to J and P. *Hardwar Sing* v. *Khega Ojha* (1) discussed.

THE facts of this case were as follows:—

Under the powers conferred by section 15 of the Code of Criminal Procedure, the Local Government had appointed Jan Alam Khan, Nazir Ali Khan and Chaube Piari Lal to constitute a Bench of Honorary Magistrates at Kaimganj in the district of Farrukhabad. One of the rules framed under section 16 of the Code, and in force in the district of Farrukhabad, provided that when a Bench was composed of three members any two of them should "form a quorum." And the next rule provided that if the Bench held an adjourned sitting for the disposal of a part heard case, and the members at the adjourned sessions were not the same as sat at the first hearing of the case, the provisions of

* Criminal Revision No. 394 of 1918, from an order of C. L. Alexander, District Magistrate of Farrukhabad, dated the 12th of February, 1918.

(1) (1893) I. L. R., 20 Calc., 870.

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section 350 of the Code of Criminal Procedure would be held to apply to the case.

Certain accused persons were placed before the Bench for trial of an offence under the Gambling Act. On the first day of hearing, Jan Alam Khan and Nazir Ali Khan were the members present and on that day the evidence for the prosecution was recorded. At the next hearing of the case the members present were Jan Alam Khan and Chaube Piari Lal. The accused were asked whether they desired the Bench then sitting to commence the trial *de novo*, and they gave their consent in writing to the Bench proceeding with the case from the stage which it had already reached. On that date the prosecution witnesses were cross-examined, the defence witnesses were heard, the accused were examined and the arguments on both sides were heard. The case was adjourned for delivery of judgment. On the adjourned date judgment was delivered by Jan Alam Khan and Nazir Ali Khan, convicting the accused and sentencing them to a fine. The accused applied in revision to the District Magistrate, and then to the Sessions Judge, on the ground that the judgment was illegal, as it was not pronounced by the same Magistrates who had heard the case on the second date. Both the District Magistrate and the Sessions Judge dismissed the application. The accused then applied to the High Court.

Babu *Piari Lal Banerji*, for the applicants :—

When the accused consented to the trial proceeding before the two Magistrates who sat on the second day, the intention was that those two Magistrates should proceed with the case and go on to decide it. It was not merely a consent to a casual substitution of one member of the Bench for that day only. Further, the whole of the defence evidence and the arguments were heard by the Magistrates who sat on the second day, and the accused were prejudiced by judgment being delivered by a member of the Bench who had sat on the first day but had not heard the rest of the case. Under the rules framed by the Local Government the provisions of section 350 of the Code of Criminal Procedure had been made applicable to trial by a Bench of Magistrates; and according to that section the judgment was illegal. The following

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cases were cited and discussed: *Hardwar Sing* v. *Khega Ojha* (1), *Queen-Empress* v. *Basappa* (2) and Re *Subramania Ayyar* (3).

Finally, the case was of a trivial nature, and a re-trial should not be ordered; reference was made to the case of *Abdul Aziz* v. *Emperor* (4).

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown:—

The accused did not object to the constitution of the Bench on the third day of the hearing. Under section 350 of the Code of Criminal Procedure the accused had the option of raising such objection if they so desired; but they did not choose to exercise it, and the trial and conviction were legal. The Local Government had framed rules which allowed only two Magistrates out of the three to form a quorum. A quorum was naturally vested with all the powers and jurisdiction of the complete Bench. There was no want of jurisdiction at any stage of the trial. The Calcutta High Court had held in the case cited by the applicants that the rules framed by the Local Government were *ultra vires*; but that was not justified. The rules were within the competence of the Local Government.

Babu *Piari Lal Banerji*, was heard in reply.

PIGGOTT, J.:—In this case the three applicants, Mathura, Ganga Din and Jagannath, have been convicted of an offence under section 13 of the Gambling Act, No. III of 1867. The one and only question raised by the application is whether the trial of the applicants was or was not vitiated by any illegality or material irregularity in connection with the constitution of the court which tried them for this offence. The court in question was a Bench of Honorary Magistrates sitting at the town of Kaimganj. I find that the Local Government, in the exercise of the powers conferred upon it by section 15 of the Code of Criminal Procedure, had appointed three gentlemen, Mr. Jan Alam Khan, Mr. Nazir Ali Khan and Pandit Chaube Piari Lal, to be a Bench of Magistrates exercising jurisdiction in this particular place. It is not denied that the offence for which the applicants

(1) (1893) I. L. R., 20 Calc., 870. (3) (1913) I. L. R., 38 Mad., 804.

(2) (1895) I. L. R., 18 Mad., 394. (4) (1916) 15 A. L. J., 237.

were tried was one within the jurisdiction of the aforesaid Bench, or that the sentence passed was one within the competence of the said court. The point taken is as follows :—

There were three hearings of this case in the trial court. On the 5th of December, 1917, the case was taken up by Mr. Nazir Ali Khan and Mr. Jan Alam Khan and the evidence for the prosecution was recorded. On the 16th of December, 1917, when the court resumed its sitting for the trial of this case, there were present on the Bench Mr. Jan Alam Khan and Pandit Chaube Piari Lal. The accused were asked to state whether they desired this Bench to re-commence the trial *de novo*, or rather, I should say, they were asked whether they would like to have the trial adjourned until the same two Magistrates who had commenced the trial should find it convenient to sit together again. The precaution was taken of obtaining from the accused a written petition, in which they stated that they had no objection to the hearing of the case proceeding before the Bench as then constituted and added that they particularly desired that there should be no delay in the disposal of the case. I understand that at the end of the hearing of the 16th of December, 1917, the evidence had been completely taken; the accused had been examined and arguments had been heard. Nothing was left to be done except for the court to pronounce judgment. The record does not make it quite clear why, under these circumstances, an adjourment of five days was ordered, but I am inclined to suspect that this was done under a *bonâ fide* belief that the proceedings would be more regular if judgment in the case were pronounced by the same two members of the Bench of Magistrate who had commenced the trial. It is admitted that on the 21st of December, no objection was taken on behalf of the accused persons to the action of Mr. Nazir Ali Khan and Mr. Jan Alam Khan in proceeding to pass judgment. As bearing on the legality of these proceedings it requires to be noted further that, under section 16 of the Code of Criminal Procedure, the Local Government, or subject to the control of the Local Government the District Magistrate, is empowered to make rules for the guidance of the Magistrates' Benches in respect of various subjects, including, amongst others, the constitution of the Bench

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for conducting trials. The Local Government of these provinces has issued for general information a set of draft rules, and these have been generally adopted under the authority of the Magistrates of various districts. It is not suggested that these rules are not in force in the district of Farrukhabad. Indeed I understand from the orders of the District Magistrate and of the learned Sessions Judge on this record that the said rules are undoubtedly in force. Now, under the second of these rules, it is laid down in respect of a Bench consisting of not more than three members, that any two of these shall form a *quorum*. In the next rule it is provided that, if the Bench holds an adjourned sitting for the disposal of a part heard case, and the members at the adjourned sessions are not the same as sat at the first hearing of the case, the provisions of section 350 of the Code of Criminal Procedure will be held to apply to the case. The present applicants have brought the question of the legality of their trial to the notice of the District Magistrate in appeal and have also laid it before the Sessions Judge in revision. Both these courts have expressed the opinion that the proceedings of the Bench of Honorary Magistrates were justified under the rules above referred to and that the trial was, under the circumstances, a perfectly legal one. I have been referred to various decisions of the Calcutta and Madras High Courts, of which the most important is that of *Hardwar Sing* v. *Khega Ojha* (1). In that case the learned Judges of the Calcutta High Court laid it down very broadly, that an Honorary Magistrate may not give judgment and pass sentence in a case unless he has been a member of the Bench during the whole of the hearing of the case. The attention of the Hon'ble Judges had been drawn to a rule framed by the Local Government of Bengal, purporting to make the provisions of section 350 of the Code of Criminal Procedure applicable to a case like the one now in question, but they held that this rule was *ultra vires*, not being justified by anything in the provisions of section 16 of the Code of Criminal Procedure. The Madras High Court has in two reported cases adopted the same principle. I have seen the rules framed by the Local Governments of Bengal and of Madras under

(1) (1893) I. L. R., 20 Calc., 870.

section 16 aforesaid, and I may say at once that these rules differ in one material particular from those framed by the Local Government of these provinces. They contain nothing similar to the direction given by Rule 2 of the rules framed under the orders of our Local Government, by which any two members of a Bench of Honorary Magistrates consisting of three members shall form a *quorum*. As to the meaning of that expression there can, I conceive, be no room for doubt. In the case of any Board of Directors or other Committee, if there is a rule providing that so many members of the said Board or Committee shall form a *quorum*, the meaning of the rule is that, as soon as the requisite number of members is gathered together, the entire authority of the said Board or Committee vests in the *quorum* so assembled, and obviously this authority extends to the transaction of business adjourned from a previous meeting as well as to the taking up of fresh business. The first question then about which there must be a definite decision is whether a rule directing that any two members of a Bench of Honorary Magistrates consisting of not more than three members shall form a *quorum*, is one which the Local Government was entitled to make, or to cause to be made, under section 16 of the Code of Criminal Procedure. As a mere matter of judicial interpretation it seems to me that such a rule clearly falls under section 16, clause (*c*), of the Code of Criminal Procedure, being covered by the words :—"the constitution of the Bench for conducting trials." When the Local Government appointed the three gentlemen already mentioned to be a Bench of Honorary Magistrates exercising certain powers within the limits of the town of Kaimganj, the inference would be, in the absence of any rule or order to the contrary, that the Bench would not be properly constituted unless all three of the gentlemen named were present at each and all of its sittings. The Local Government regarded this as inconvenient and was of opinion that, for the convenience of the public, the work which it desired the Bench of Magistrates at Kaimganj to carry out could best be performed by appointing three Magistrates and then empowering any two of them to sit together as a complete court for the trial of cases or the transaction of other business. I repeat that in my opinion it was within the competence of the Local Government to pass

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orders to this effect under the provisions of sections 15 and 16 of the Code of Criminal Procedure.

I have now to consider what would be the result if the Local Government had issued no further directions for the guidance of this Bench of Magistrates. In my opinion the consequence would be that any trial commenced before any two members of this Bench could lawfully be continued before any other two members. The learned Judges of the Calcutta and Madras High Courts had no such rule before them as that which I have quoted regarding the number of Magistrates necessary to form a *quorum*, and the decisions pronounced by them are therefore of no direct application to the present case. In saying this I do not wish to ignore the fact that on the principles laid down in the case of *Hardwar Sing* v. *Khega Ojha* (1), it would be difficult to accept the proposition that the Legislature intended to empower the Local Government to pass any orders the effect of which would be as above stated. I think that the learned Judges of the Calcutta High Court assumed, as a sort of major premise underlying the whole of their decision, that there was something repugnant to natural justice in the suggestion that the presiding officer of any court should pass any final decision in a criminal trial, except upon evidence the whole of which had been tendered in his presence and heard by himself personally. I can only say that this proposition seems to me a very arguable one, and that under the Indian system of Criminal Procedure the exceptions to this rule seem to me to outnumber the instances. I must admit, therefore, that I do not find myself able to approach the consideration of the question quite from the same point of view as that taken by the learned Judge of the Calcutta High Court. At the same time I have endeavoured to discuss, as a pure question of law, the question whether sections 15 and 16 of the Code of Criminal Procedure, read together, do or do not authorize the Local Government to make rules, the effect of which would be that any two Magistrates out of a Bench of three or more should constitute a *quorum* for the transaction of all business and the hearing of all cases lawfully coming before such Bench for disposal, including the further hearing of a criminal trial adjourned from a

(1) (1893) I. L. R., 20 Calc., 870.

previous sitting. For the reasons stated I have come to the conclusion that the Local Government is so empowered and that the rules under which this Bench of Honorary Magistrates was constituted were perfectly legal. If I am right so far, then the question of the competence of the Local Government to make the further rule directing Magistrates' Benches, under specific circumstances, to be guided by the provisions of section 350 of the Code of Criminal Procedure requires to be discussed on a wholly different basis from that adopted in the decisions of the Calcutta and Madras High Courts. It becomes an exception in favour of accused persons, engrafted by the Government rules upon the general direction that any two members of a Bench of three Magistrates shall, for all purposes, form a *quorum*. In practice it amounts to nothing more than this, that the Local Government directs the Bench of Magistrates in question, if it should find it is sitting to take up an adjourned trial with a Bench differently constituted from that which commenced the trial of the case, and exception is taken on behalf of the accused to the trial proceeding under such circumstances, then either to re-commence the trial *de novo*, or to adjourn it to a subsequent date on which it may be found convenient for the same two Magistrates to sit who had commenced the trial of the case. It is in fact a direction to Benches of Honorary Magistrates that, under certain circumstances, they are to refrain at the request of the accused, from exercising a power which would otherwise be theirs Looked at in this way I think that the rule was one within the competence of the Local Government. If I were to hold the contrary it certainly would not help the applicants in the present case. It is merely an exception engrafted by the Local Government upon the rule which it had previously made regarding the constitution of the Bench for conducting trials.

Having said this, I now come to the consideration of what took place in this particular case. I have not the slightest hesitation in holding that the proceedings of the 16th of December, 1917, were regular and proper and within the competence of the Bench of Honorary Magistrates. Strictly speaking; this proposition is not challenged by the petition in revision which lies before me for disposal. What the petitioners object to is the procedure followed

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on the 21st of December, 1917, when two Magistrates, one of whom had not heard the cross-examination of the prosecution witnesses or the defence evidence, proceeded to dispose of the case. To the contention of the applicants on this point the courts below have in substance replied that it was for the accused persons to object on the 21st of December, 1917, when Mr. Nazir Ali Khan and Mr. Jan Alam Khan took their seats upon the Bench to pass judgment in this case. Technically the opinion expressed by the District Magistrate and by the learned Sessions Judge on this point is in accordance with the wording of the first proviso to section 350, clause (1), of the Code of Criminal Procedure; but it is important that District Magistrates, and this Court also should not overlook the second proviso to the same sub-section. It does not matter whether the accused did or did not object to the constitution of the Bench on the 21st of December, 1917; nor is it necessary for the Court to consider whether they had a reasonable opportunity of doing so, whether they may not have been taken by surprise, whether judgment may not have been pronounced under such circumstances as left them no convenient opportunity of entering a protest. The real question is whether the accused persons were prejudiced by the procedure adopted on the 21st of December, 1917. A question such as this one is which the court can only examine with reference to the general circumstances of each particular case. Ordinarily speaking, one would be inclined to hold that it is prejudicial to an accused person that judgment should be passed against him by a Magistrate who has only heard the prosecution witnesses examined in chief, and was not present at their cross-examination or at the hearing of the defence evidence. So far as the record before me goes, I cannot feel certain that Mr. Nazir Ali Khan had himself perused the entire record of the cross-examination of the prosecution witnesses and the depositions of the witnesses for the defence. He most probably did so; but he may have accepted his learned colleague's account of what had taken place at the sitting of the 16th of December. Moreover, although I am reluctant to refer to a matter of this sort, I cannot altogether shut my eyes to the fact that the accused persons are all Hindus, and that the case was one of such a nature that these accused persons may well feel that it

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was an advantage to them to have a Hindu gentleman present on the Bench when the matter was finally disposed of, specially when the question of sentence was being considered. I think therefore that the Honorary Magistrates in this case committed an error of judgment when they did not proceed to dispose of the case on the 16th of December, and I am not prepared to say that the accused may not have been prejudiced by the procedure followed at the final hearing of the case.

Under these circumstances the order which I pass is that the proceedings of the 21st of December, 1917, be set aside, the conviction and sentence be quashed, and that the case be returned to the same Bench of Honorary Magistrates to be disposed of from the stage at which, in my opinion, an error was committed. In effect my order is that the two Magistrates who presided at the hearing of the 16th of December, 1917, namely, Mr. Jan Alam Khan and Pandit Chaube Piari Lal, do proceed to consider their decision in this case and to prepare a judgment and deliver the same in due course of law. The record is returned with the above directions.

Record returned.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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May, 21, 22.

GOPI LAL AND OTHERS (PETITIONERS) *v.* LAKHPAT RAI AND OTHERS (OPPOSITE PARTIES)*

Act No. I of 1872 *(Indian Evidence Act), section* 126—*Privilege of witness—Vakil and client—Information gained by vakil in the course of former employment, though not by direct oral or written communication.*

Section 126 of the Indian Evidence Act, 1872, applies as much to what a witness has learned by observation, as, e.g., by watching a manufacturing process being carried on, as to what is communicated to him by word of mouth or writing.

In the course of his employment to defend certain manufacturers of a substance called *banslochan* against a charge of creating a nuisance in the process of manufacture, the process in question was shown to the vakil engaged by the manufacturers. *Held* that, such vakil could not afterwards, being subpoenaed as a witness for the applicant in an application for revocation of patent against the same manufacturers, be compelled to disclose what he had learned of the process in the course of his former employment.

THE facts of this case sufficiently appear from the judgment of the Court in the present case as well as from the judgment in *Lakhpat Rai*, v. *Sri Kishna Das*, p. 68 *supra*.

*Original Suit No. 1 of 1917.