1931

MUHAMMAD ISHAQ KHAN v. RUP NARAIN SINGH.

quite obvious that unless the case comes within the purview of section 77 of the Act, which in express language excludes the operation of section 76(*h*), the liability of the mortgagee to give credit for the receipts in the account is absolute and the parties would not be at liberty to contract themselves out of the statutory liability.

Section 77, however, cannot apply unless there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money or in lieu of such interest and a defined portion of the principal. On the interpretation of the mortgage deed made by the Division Bench there was no such contract in the case before us. Section 77, therefore, has no application and the mortgagee does not come within the purview of the exception. He was, therefore, liable under section 76(*h*) to render account and give credit for the surplus income, if any.

In this view of the matter it is not necessary to answer the second question.

Our answer to the first question is that where the mortgage is governed by the Transfer of Property Act the mortgagee cannot contract himself out of the provisions of section 76(*h*) of the Act unless he can bring himself strictly within the exception provided by section 77.

REVISIONAL CRIMINAL

Before Mr. Justice King.

1931
July, 13.

EMPEROR *v.* LACHHMI NARAIN.*

Criminal Procedure Code, section 252—Warrant case—Right of accused to cross-examine prosecution witnesses before the framing of charge—Discretion of court.

The accused is not entitled, as a matter of right, to cross-examine prosecution witnesses in the trial of a warrant

*Criminal Revision No. 267 of 1931, from an order of F. C. Plowden, Sessions Judge of Bareilly, dated the 15th of April, 1931.

case before the framing of a charge. As a matter of practice or discretion, however, Magistrates would be well advised and would generally be exercising a proper discretion if they did permit some cross-examination at least before framing a charge, otherwise, section 253 of the Criminal Procedure Code would practically become a dead letter.

Held, also, on a consideration of sections 252, 244 and 208 of the Criminal Procedure Code, that when a Magistrate has "to take all such evidence as may be produced in support of the prosecution", he has to record not only the examination-in-chief of the prosecution witnesses, but also their cross-examination and re-examination (if any), if no other and express provision is made for cross-examination. But when express provision for cross-examination is made, as in section 256 or 208 (2), then the phrase mentioned cannot be construed as giving a separate and independent right of cross-examination.

Mr. *Nanak Chand*, for the applicant.

The Assistant Government Advocate (Dr. *M. Wali-ullah*), for the Crown.

KING, J. :—This is an application in revision against an order passed by the Sessions Judge of Bareilly confirming the order of a Magistrate of the first class refusing to allow the applicant to cross-examine the prosecution witnesses before the charge had been framed.

The complaint was instituted on the 26th of January, 1931, alleging that the accused had committed offences under sections 420 and 467 of the Indian Penal Code. When the complainant had been examined on the 1st of April, 1931, an oral request was made to the Magistrate to permit his cross-examination at once. The Magistrate rejected this request. When the next witness had been examined the defence put in a written request that the Magistrate should permit the witness to be cross-examined before the framing of the charge. This request was rejected by the Magistrate in a written order. The Magistrate took the view that section 256 of the Code of Criminal Procedure did not indicate that prosecution witnesses are to be cross-examined twice, and he could not find any justification in the Code or

1931

EMPEROR v. LACHHMI NARAIN.

in the Evidence Act for the proposition that the accused has a right to cross-examine prosecution witnesses both before and after the framing of the charge. After the prosecution witnesses had been examined the Magistrate framed a charge under section 420 of the Indian Penal Code.

The accused applied to the Sessions Judge of Bareilly asking that the Magistrate's order, refusing to allow cross-examination of prosecution witnesses before the framing of the charge, be set aside. The learned Sessions Judge discussed the point and recorded his opinion that the Magistrate was probably incorrect in his procedure, and that the accused was entitled to cross-examine a witness immediately after he had been examined and before the framing of the charge. Nevertheless, in view of the facts that all the prosecution witnesses had been examined-in-chief and the charge had been framed, and some of the witnesses had already been cross-examined after the charge had been framed, he rejected the application.

The question for determination is whether an accused person is entitled to cross-examine a prosecution witness, in the trial of a warrant case, before the charge has been framed.

Section 138 of the Evidence Act merely lays down the order of the examination of witnesses, namely, that they should be first examined-in-chief, and then (if the adverse party so desires) cross-examined, and then (if the party calling them so desires) re-examined. This does not indicate a right of cross-examination immediately after the examination-in-chief when express provision has been made for exercising the right of cross-examination at a later stage. It is perfectly clear that, under section 256 of the Code of Criminal Procedure, the accused has the right of cross-examining a prosecution witness after the charge has been framed. So, section 138 of the Evidence Act does not seem to be

of much assistance. It merely lays down that cross-examination shall be allowed at some stage after the examination-in-chief, and section 256 may well be construed as indicating the proper stage for cross-examination in the trial of warrant cases. Section 138 certainly does not indicate that the adverse party shall be entitled to cross-examine a witness more than once.

Section 252 of the Code is the section under which prosecution witnesses are examined in warrant cases. This lays down that the Magistrate "shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution". It has been argued that the word "evidence" in this phrase must include not merely the examination-in-chief of a witness, but also his cross-examination and re-examination, if any. In support of this contention reference has been made to section 244. This section lays down the procedure in the trial of summons cases, and enacts that the Magistrate "shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution . . ." The phraseology in sections 244(1) and 252(1) is identical. It is argued that under section 244 when the Magistrate proceeds to "take all such evidence as may be produced in support of the prosecution" he must certainly allow the witnesses to be cross-examined as well as examined-in-chief, and that, therefore, the word "evidence" in this phrase must include not only the examination-in-chief, but also the cross-examination and re-examination, if any. Section 244 does not contain any express provision for cross-examination. Cross-examination must certainly be allowed at some stage, and as no express provision is made for exercising this right in the trial of summons cases, we must hold that the right is exerciseable under section 244.

It is argued that as the phrase cited gives a right of cross-examination under section 244, therefore the

1931

Emperor v. Lachhmi Narain.

same phrase must be held to give a right of cross-examination under section 252. There is some force in this argument, but it is far from conclusive. One cannot lose sight of the fact that no express provision for exercising the right of cross-examination has been made in the trial of summons cases, whereas in the trial of warrant cases such express provision is to be found in section 256.

It must, moreover, be noted that when the same phrase occurs in section 208 (1), which lays down the procedure in taking evidence in inquiries into cases triable by the court of session, we find it expressly stated in sub-section (2) that "the accused shall be at liberty to cross-examine the witnesses for the prosecution." Sub-section (1) enacts that the Magistrate shall "proceed to hear the complainant (if any) and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution . . ." Once again we find the same phrase. If that phrase is construed as conferring a right of cross-examination, wherever that phrase may occur, then it must be conceded that sub-section (2) is wholly redundant. But it must be presumed that the legislature does not enact wholly redundant provisions. The inference is that the phrase in question cannot be construed as necessarily conferring or including the right of cross-examination. I conclude that when a Magistrate has "to take all such evidence as may be produced in support of the prosecution" he has to record not only the examination-in-chief of the prosecution witnesses, but also their cross-examination and re-examination (if any), if no express provision is made for cross-examination. But when express provision for cross-examination is made, as in section 256 or 208(2), then the phrase mentioned cannot be construed as giving a separate and independent right of cross-examination.

The language of section 256 supports the same conclusion. That section requires the accused to state

"whether he wishes to cross-examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken". If the legislature had intended to confer an absolute right of cross-examination before the framing of the charge, then we should expect it to lay down explicitly that the accused should be required to state whether he wishes *further* to cross-examine any of the prosecution witnesses. The omission of the word "further" seems to indicate that the cross-examination is to be deferred, as a matter of right, until after the framing of the charge.

It must also be remembered that under section 254 the Magistrate can frame a charge as soon as a *prima facie* case is established against the accused. It is not necessary to record the whole of the prosecution evidence before framing a charge. Hence, although there may be twelve prosecution witnesses, it is frequently possible and even desirable to frame a charge after only one or two witnesses have been examined. In such a case it is clear that all the "remaining witnesses" can only be cross-examined once under section 256. I doubt whether the legislature intended that witnesses examined before the charge should be cross-examined twice, as a matter of right, while those examined after the charge should only be cross-examined once. Section 257 gives a right of second cross-examination if the Magistrate thinks it necessary in the interests of justice. The interests of the accused, therefore, are fully protected even if no cross-examination is permitted as a matter of right before the framing of the charge.

Sections 286 (2) and 289 (1) have also been referred to as showing that the examination of witnesses must include cross-examination and re-examination. This is no doubt the correct interpretation of the expression "examination of the witnesses" in section 289 (1) and of the expression "examine his witnesses" in section 286(2), but that is not of much assistance in construing

1931

EMPEROR v. LACHHMI NARAIN.

the language of section 252 which is different. Moreover there is no express provision for the cross-examination of prosecution witnesses in trials before High Courts and courts of session.

The only ruling relied upon by the learned advocate for the applicant is the case of *Ashirbad Muchi* v. *Maju Muchini* (1). The judgment was very briefly expressed, but the learned Judges observed that the Magistrate "should at once give the accused an opportunity to cross-examine the prosecution witnesses, if they should so desire, even though the charge may not be framed." The ruling does not purport to lay down the proposition that the accused has an absolute right of cross-examination before the charge is framed in the trial of a warrant case. I think the ruling goes no farther than laying down that a Magistrate would be well advised to permit cross-examination before the framing of the charge, and does not support the contention that he is bound to permit cross-examination at that stage.

Reference may also be made to the case of *Queen-Empress* v. *Sagal Samba Sajao* (2) in which the learned Judges remarked that section 256 does not prohibit cross-examination before the charge has been framed. I quite agree. In *Ramyad Singh* v. *Emperor* (3) a single Judge of the Patna High Court observed : "The accused have got the right to cross-examine the prosecution witnesses once before the charge is framed, and, secondly, after the charge is framed under section 256." This observation certainly supports the applicant's contention, but it is a mere *obiter dictum* and no reasons are given. There is, therefore, no clear judicial authority, so far as I am aware, for holding that the accused is entitled, as a matter of right, to cross-examine prosecution witnesses in the trial of a warrant case before the framing of a charge, and I am

(1) (1904) 8 C.W.N., 838. (2) (1893) I.L.R., 21 Cal., 642 (663).
(3) (1920) 58 Indian Cases, 686.

unable to interpret the relevant sections of the Code of Criminal Procedure and the Evidence Act as giving the accused such a right.

As a matter of practice or discretion I think that Magistrates would be well advised to permit some cross-examination before framing a charge, otherwise, as pointed out by the learned Sessions Judge, section 253 would practically become a dead letter. It is unlikely that a Magistrate could discharge an accused person on the strength of the evidence of prosecution witnesses whose credit has not been impeached by cross-examination. Ordinarily the examination-in-chief of prosecution witnesses does make out a *prima facie* case against the accused, and it is only after the witnesses have been shown by cross-examination to be untrustworthy that the court would be justified in discharging the accused.

In my opinion, although the accused has no absolute right of cross-examination before the framing of the charge, I think that Magistrates would generally be exercising a proper discretion if they did permit some cross-examination at least at that stage.

It has been contended that no *prima facie* case has been made out against the accused, but I agree with the learned Sessions Judge that, on the facts alleged, a criminal offence would be established against the accused.

As the Magistrate has not committed any irregularity, in my opinion, in refusing to permit cross-examination before the charge, and at the most might be held to have failed to exercise a proper discretion, I see no grounds for interference at this stage. On the materials before me I cannot express any opinion whether the Magistrate should, in the exercise of his discretion, have permitted cross-examination in this case before framing the charge. The application is rejected.