passed by the court below, direct that the suit shall be restored and decided in accordance with law. The applicant shall have the costs of this Court from the opposite party.

REVISIONAL CRIMINAL

Before Mr. Justice Bennet, Acting Chief Justice, and Mr. Justice Verma

EMPEROR *v.* MAHTAB SINGH*

1938 *September,* 22

Criminal Procedure Code, sections 257(2), 544—*Expenses of defence witnesses—When to be borne by Government and when by accused—Rules by Government on this subject—Discretion of court—Very large number of defence witnesses from all over India, purpose being annoyance and inconvenience—Order to deposit reasonable expenses before issue of process.*

Where in a case under section 110 of the Criminal Procedure Code the accused gave a list of 288 witnesses for the defence, to be summoned from various provinces of British India and even beyond, many of whom were Government servants in various departments, and the Magistrate passed an order under section 257(2) of the Criminal Procedure Code requiring the accused to deposit a sum of Rs.500, to begin with, towards the expenses of the witnesses, failing which no summonses would be issued: *Held,* that the order was justified by sections 257(2) and 544 of the Criminal Procedure Code, that in view of those sections and the rules passed by the Local Government under the latter section the Magistrate had exercised a correct discretion in not making the Government bear the expenses of this huge number of witnesses who were obviously being called for no other reason than to cause public inconvenience and expense and annoyance to Government. The criminal courts should not lend themselves to such an abuse of the process of the court or such a waste of public money and time both of the court and of the persons summoned, as the accused desired in the present case.

Sub-sections (1) and (2) of section 257 of the Criminal Procedure Code deal with different cases, and it is not correct to say that an order under sub-section (2) should not be passed except where the conditions of sub-section (1) exist.

Mr. *S. N. Misra,* for the applicant.

The Deputy Government Advocate (Mr. *Sankar Saran*), for the Crown.

*Criminal Reference No. 197 of 1938.

1938

EMPEROR v. MAHTAB SINGH

BENNET, A.C.J., and VERMA, J.: This is a criminal reference by Mr. K. N. Joshi, the Sessions Judge of Mainpuri, recommending that the order passed by a Magistrate be set aside and he be directed to give all reasonable facilities to the accused in establishing his defence. The case before the Magistrate of Shikohabad was one under section 110 of the Criminal Procedure Code and the accused Mahtab Singh resides in a village Amore in Shikohabad sub-division. The first order of the Magistrate was on the 17th of December, 1937, and he stated that that date had been fixed for the defence witnesses at the request of counsel for the accused because it provided facility for the defence witnesses residing in the village of the accused which was close to the place where the Magistrate was holding his court. The witnesses were not produced and the Magistrate adjourned the case until the next day and said that the accused should state the next day if he did not wish to examine local witnesses, and he should prepare a list of his witnesses and file it in court. The next day, on the 18th of December, 1937, no witnesses for the defence were produced in spite of the order for production. The excuse given was that the list was not complete. The Magistrate gave a further adjournment to the 7th of January, 1938, and directed that a list of defence witnesses should be filed by the 23rd of December, 1937. No such list was filed on the 23rd of December, 1937. On the date fixed, the 7th of January, 1938, the accused handed in a list of witnesses which contained so many names that the counsel for defence has not been able to count them. The list consists of 13 pages of which 6 pages are typed and the remaining pages are in handwriting, some in English and some in Hindi. The list is arranged by departments. First of all there are 16 railway witnesses; then come 7 postal witnesses; then come 7 canal department witnesses; then come 8 witnesses of a newspaper called *Bekar Sakha;* then come 10 college

examiners; then come 6 outside officers, retired District Magistrates, etc.; then come 42 witnesses from Shikohabad town, including school masters and medical practitioners and persons of position; then come 10 candidates and diploma holders, some of whom come from places from which it is not possible to summon witnesses, such as Nepal; then come 13 witnesses from Mainpuri; 6 witnesses from Etawah; 6 witnesses from Muttra; 9 witnesses from Agra; 4 witnesses from Cawnpore; 3 witnesses from Lucknow; 3 witnesses from Allahabad; 4 witnesses from Lahore; 4 witnesses from Delhi; 5 witnesses from Aligarh; 4 witnesses from Bombay; 5 witnesses from Calcutta; 1 witness from Chandausi; 3 witnesses from Benares and 1 witness from Dacca in Bengal. These names are type-written. Then follow a large number of witnesses in handwriting from different parts of the province. The total of these in handwriting is 114. The total in the typed lists is 174, and the grand total is 288. Now, the order of the Magistrate which is under reference stated: "He has now given a very long list of witnesses which he intends to call and examine and has given no reasons for such a large number of witnesses. However, I am not inclined to interfere with his choice as far as the number of witnesses and the nature of evidence he intends to produce, but he shall be responsible for the cost. He is not in custody and there is no reason why he should not stand the cost of witnesses when he is intending to summon such a large number of them. He shall therefore deposit their approximate cost within four days from this day, otherwise no summonses can be issued to the witnesses. If he is unable to make a correct estimate of the cost at present, he should deposit at least Rs.500 to begin with and then adjust the amount later on." It is clear that there was no refusal by the Magistrate to summon any of these witnesses under section 257(1) of the Criminal Procedure Code but his order is passed under section

1938

EMPEROR v. MAHTAB SINGH

257(2) which provides as follows: "The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in court." An application was made to the Sessions Judge, stating in paragraph 2 that the applicant being on bail was no legal ground for saddling the applicant with the costs of summoning the witnesses, and, in paragraph 3, that the order of depositing Rs.500 as a condition precedent to the summoning of witnesses is practically to hamper the accused in his defence. The order of the Sessions Judge extends over three typed pages and in this order, although he refers in two places to section 257(2) of the Criminal Procedure Code, he deals with the matter as if it was a case of refusal to summon witnesses under section 257(1). The learned Sessions Judge assumes that the provision of law which is in question is section 257(1) and he has apparently got this idea from three rulings which he quoted. It is most regrettable that the learned Sessions Judge did not read the section 257(2) and apply his mind to it and apparently he has been misled by this neglect.

The first ruling to which he referred was *Parbhu* v. *Emperor* (1). This was a case where page 915, column 2, states that the Magistrate did not adjourn the case for the evidence of a defence witness, Ram Narain. He ordered that the deposition of this witness should be dispensed with. The ruling referred to section 257(1) and pointed out that the Magistrate under that sub-section had only power to refuse if the conditions of that sub-section existed. There was no question in that ruling of section 257(2).

The next ruling to which the learned Sessions Judge referred was *Debi Singh* v. *King-Emperor* (2). Page 142, column 2, shows that there was a list of 20 witnesses filed by the defence and the Magistrate

(1) A.I.R. 1929 All. 914. (2) A.I.R. 1924 Pat. 142.

ordered costs to be deposited and that accused should explain for what evidence he has summoned the Raja Saheb, and that the list should be curtailed. On the following day the accused filed a petition containing a list of 11 witnesses and stating that he could not afford to pay the costs of the witnesses which had been assessed at Rs.80. The order of the court was; "Nos. 2 to 10 may be summoned for the present but not the Deputy Magistrate and the Raja." Now it is clear therefore that the court had summoned 9 of the 11 witnesses and refused to summon two under section 257(1). On page 143, column 1, the Court pointed out that the Magistrate must record his remarks for refusal in writing, which he had not done, and added: "But the inability or even refusal to pay the costs of the witnesses would not be adequate ground in a warrant case and no *inference* can be drawn either that the accused failed to state orally to the Magistrate the reason why they desired process in respect of the Raja or that the Magistrate considered that there was ground such as is set out in section 257 for refusing process." Now so far as this ruling may be taken to indicate that the Magistrate is not entitled to pass an order for the deposit of costs prior to issuing summons under the provisions of section 257(2), we cannot agree with the learned single Judge, MACPHERSON, J. The learned Judge failed to refer to the provisions of section 544 which provides as follows: "Subject to any rules made by the Local Government, any criminal court may, *if it thinks fit,* order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such court under this Code." We do not know what are the rules passed by the Local Government in Patna in regard to this matter. But whatever those rules are, they have no bearing on the rules in this province. The Criminal Procedure Code gives a Magistrate a

1938

EMPEROR v. MAHTAB SINGH

discretion to pass an order under section 257(2) and his discretion is subject to section 544 and the rules passed by the Local Government under that section, that is a Magistrate cannot pay from Government the expenses of witnesses attending if he is not authorised to do so by the rules of the Local Government. MACPHERSON, J., was apparently under the impression that these rules would not apply in a warrant case. He is mistaken, because section 257(2) is in chapter XXI of the Criminal Procedure Code which deals solely with warrant cases. There is no doubt a similar provision in chapter XX which deals with summons cases, namely section 244, sub-section (3). Each of these chapters therefore has a similar provision and it is obvious that the provision applies not only in summons cases but also in warrant cases.

The third ruling was *Sayad Habib* v. *Emperor* (1). SHADI LAL, C.J., had before him a case where a Magistrate was trying a charge under section 353 of the Indian Penal Code of assault on a public servant in the discharge of his duty, which was a warrant case. The Magistrate passed an order that the accused were to deposit the expenses before summons for their witnesses would issue. Sir SHADI LAL stated: "But the ordinary procedure in warrant cases, and I am here dealing with a warrant case, is that the cost of causing the attendance of accused's necessary witnesses is usually borne by Government, vide Rules and Orders of the High Court, volume II, chapter VI, paragraph 67. The Magistrate has no doubt authority to depart from this usual practice, but there should be strong and cogent reasons for making the departure." It may be here pointed out that Sir SHADI LAL was giving a decision in regard to the particular rules of the Local Government in force in the Punjab and embodied in the rules of the Punjab High Court. It has not been shown by learned counsel that there has been a similar provision in this province of Agra that the ordinary

(1) A.I.R. 1929 Lah. 23.

procedure in a warrant case is for the Government to bear the costs of the accused's necessary witnesses. The rule for this province is embodied, so far as we have been able to find it, in the Manual of Government Orders, Judicial (Criminal) Department VI, paragraph 900, which is as follows: "The criminal courts are *authorised* to pay at the rates specified below the expenses of all complainants and witnesses who are legally bound to attend in such courts: Provided that no such payment shall be made from public funds to any witness in cases where under the provisions of any law in force the reasonable expenses of such witness have *by order been deposited* in court as a condition precedent to the issue of process to compel attendance." This rule of the Manual of Government Orders does not, like the Punjab High Court Rule, prescribe that usually expenses should be paid to witnesses for the accused in a warrant case. The matter is left entirely to the discretion of the Magistrate. Therefore the Magistrate has a right to exercise this discretion in accordance with section 544 of the Criminal Procedure Code, that is, if he thinks fit. he may order payment of the costs of witnesses for the accused in any case, summons case or warrant case. The section shows that the expenses should be reasonable. In the present case we are of opinion that it cannot be said that the expenses of the witnesses of the accused would be reasonable. In view of the large number and of the fact that they come from many parts of the country, we do not consider that it has been shown that these expenses would be at all a reasonable charge on Government. Therefore in our opinion the Magistrate was perfectly entitled to hold that these were expenses which could not reasonably be incurred by Government under section 544 of the Criminal Procedure Code and he was therefore correct in requiring that the expenses should be deposited prior to the issue of summons in accordance with section 257(2) of the Criminal Procedure Code. The ruling of Sir SHADI

1938

EMPEROR v. MAHTAB SINGH

LAL then proceeded to point out that the list before the Magistrate was of 121 witnesses, most of whom belonged to different districts in the province and 8 outside the province and it was stated that more witnesses of the same number would be produced. The Magistrate stated these facts in his explanation and added that he did not consider that Government should be burdened with the expenses when the accused was well-to-do and was being defended by leading lawyers. Sir SHADI LAL stated in regard to this explanation that the Magistrate could decline under section 257(1) to compel the attendance of all the witnesses if he considered that the application to summon them was made for the purpose of vexation or delay or for defeating the ends of justice but that the Magistrate had not passed that order. In view therefore of the rules of the Punjab High Court and the Local Government the order of the Magistrate as it stood was set aside and the Magistrate was directed to proceed in the manner indicated above, that is, that he was not bound to summon witnesses if he was of opinion that the application was not *bona fide* and was made for no other purpose than for vexation, delay or for defeating the ends of justice. Now, that particular ruling was passed in view of the particular order in the Punjab in regard to the payment of witnesses. The ruling will not apply to this province because there is no such order of the Local Government or of the High Court. On the contrary, we may point out that there is a rule of the High Court which has not been complied with by the accused in the present case. In the General Rules (Criminal) for courts subordinate to the High Court of this province it is provided on page 7, chapter III, rule 8, as follows: "Every application for the issue of process for the attendance of witnesses shall, if the party presenting the application is represented by a legal practitioner, contain a certificate signed by such legal practitioner that he has satisfied himself that the evidence of each of the witnesses is material in the case." We have examined the record and find that although the

accused was defended by a legal practitioner, as is also stated by the Magistrate in the first order quoted, no certificate has been filed by such legal practitioner that he has satisfied himself that the evidence of each of the witnesses is material in the case. For this reason alone the Magistrate should have refused to issue process and we invite his attention to this provision and also the attention of the learned Sessions Judge. We have been shown a number of other rulings by learned counsel for the accused, but we consider it unnecessary to refer to them because all of them deal with orders passed under section 257(1) and the present order is passed under section 257(2) and therefore the rulings have no bearing.

We refer to one ruling mentioned by learned counsel for the Crown, *Ganpat Rai* v. *Emperor* (1). This ruling stated: "Section 257(2) of the Criminal Procedure Code fully empowers a Magistrate trying a case to order that reasonable expenses of a witness shall be deposited by the applicant in court before he is summoned, and it has not been shown why the District Magistrate should not have exercised this power in this particular case." The learned Judge further points out on page 783, column 1, that if a contrary rule were followed then section 257(2) of the Criminal Procedure Code would become an entirely dead letter, that is, it is not necessary that an order should only be passed under section 257(2) if the conditions of section 257(1) exist. These two sub-sections deal with different cases. Under sub-section (1) the order which is passed is an absolute refusal to issue process for certain reasons which are recorded. Under sub-section (2) the order is a conditional one that process will be issued on a certain condition. No doubt if the accused refuses to fulfil the condition, then the process is not issued and the result is the same as if there had been an order under sub-section (1), and again the same result would ensue if the accused does not apply for the issue of process at all.

(1) (1923) 73 Indian Cases, 782.

1938

EMPEROR v. MAHTAB SINGH

There is an unreported ruling of the Allahabad High Court in *Balkrishna Sharma* v. *Emperor* (1) by KING, J., where it was laid down as follows: "The most practical check upon summoning an excessive number of witnesses is the requirement that the defence should deposit in court the reasonable expenses of summoning the witnesses. I, therefore, allow this application and set aside the Magistrate's order refusing to summon more than 10 out of the 78 witnesses. The accused will be entitled to summon any of the witnesses on his revised list if he deposits such sums for their attendance as the District Magistrate may order under section 257(2)."

This ruling shows that the order of the Magistrate in the present case was in accordance with the authority of this High Court, as the principle laid down in the ruling exactly covers the order of the Magistrate in the present case.

Learned counsel for the accused has not attempted to argue that the list of witnesses handed in by the accused and his counsel in the court below was a reasonable list. It is obvious that the witnesses called from all over the country and witnesses who are mostly officials of different departments and persons of position have been called for no other reason than to cause public inconvenience and expense and annoyance to Government. In addition to the orders of Government in the Manual of Government Orders, paragraph 900, we may refer to G. O. No. 1224(A)/VI—1369-1931, dated the 29th of July, 1932, addressed to all District Magistrates, where it is directed: "2. I am also to draw your attention to G. O. No. 1867/VI—1369-1931, dated the 16th of December, 1931, and to say that it should again be impressed on all subordinate Magistrates that they should not summon witnesses for the defence blindly without first satisfying themselves that the witnesses really are required." Again in G. O. No. 678/VI—1369-1931.

(1) Cr. Rev. No. 655 of 1931, decided on 26th October, 1931.

1938

EMPEROR v. MAHTAB SINGH

dated the 1st of May, 1933, addressed to all District Magistrates it is directed: "3. I am also to draw your attention to the provisions of section 257 of the Criminal Procedure Code, and to request that Magistrates should be enjoined to exercise their discretion under this section in the case of witnesses of accused persons." These orders make the position of Government clear, and we see no reason why the criminal courts should lend themselves to such an abuse of the processes of the court or such a waste of public money and time both of the court and of the persons summoned, as the accused desires in the present case. In our view the action taken by the accused is one which should be checked, and we are greatly surprised that Mr. K. N. Joshi who was officiating as Sessions Judge could for a moment have contemplated that the order of the Magistrate was not a proper order. . . With these remarks we reject this reference and we direct that the Magistrate should proceed with the trial of the case.

FULL BENCH

Before Mr. Justice Bennet, Acting Chief Justice, Mr. Justice Iqbal Ahmad and Mr. Justice Harries

BABU LAL (PLAINTIFF) *v.* RAM PRASAD AND OTHERS (DEFENDANTS)*

1938 *September*, 26

Appurtenance to agricultural holding—Abadi plot used by a tenant for purposes collateral to agriculture—Whether easement or license or part of holding—Ejectment—Prescription —Landlord and tenant—Acquisition of prescriptive right of easement by tenant against other land of landlord—Easements Act (V of 1882), *sections* 8, 13, 15, 18—*Presumptions of grant by landlord as an appurtenance to the holding—Burden of proof.*

The phrase "Appurtenant to an agricultural holding" means some thing which is adjunct to or part and parcel of the holding, and has been used in this sense in the judicial decisions of this country; and this is the secondary sense of the phrase in English law, as equivalent to such a phrase as

*Second Appeal No. 932 of 1936, from a decree of Akib Nomani, Additional Civil Judge of Aligarh, dated the 19th of March, 1936, modifying a decree of B. P. Elhence, Munsif of Koil, dated the 11th of March, 1935.