1893

TARINI CHARAN CHOWDHRY v. AMULYA RATAN ROY.

have frequently emphasised the necessity of a proceeding which forms the basis of section 145, stating the information upon which the Magistrate has reason to suppose that a breach of the peace is probable or imminent. In his explanation the Magistrate has pointed out certain proceedings under section 107, which took place in November, and showed at the time of the proceedings that there was likelihood of a breach of the peace. But the likelihood which may then have existed, and which might have reference to the probable breach of the peace referred to by the Magistrate, was not what he now refers to. He was referring to a different thing altogether. The setting aside of these proceedings may only lead to the institution of a fresh proceeding. That, of course, is a matter for the Magistrate to determine, having regard to the question whether at the present moment there is or is not likelihood of a breach of the peace. But inasmuch as the proceeding now before us does not recite anything on which the Magistrate could reasonably have supposed that there was, at the time of recording the proceeding, a likelihood of a breach of the peace, we think that all the proceedings are defective and must be set aside.

H. T. H. *Rule made absolute and order set aside.*

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

1893
April 11.

HARDWAR SING OR LALL (PETITIONER) *v.* KHEGA OJHA (OPPOSITE PARTY).*

Bench of Magistrates, absence of member of—Hearing of part of case by one Bench of Magistrates, and decision by another—Criminal Procedure Code, 1882, *ss.* 16, 350—*Rules framed by Local Government for the guidance of Benches of Magistrates under section* 16, *Criminal Procedure Code—Ultra vires.*

Rule 8 of the rules framed by the Local Government for the guidance of Benches of Magistrates is *ultra vires.*

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.

* Criminal Revision No. 101 of 1893, against the order passed by L. Hare, Esq., District Magistrate of Mozufferpore, dated the 31st January 1893, affirming the order passed by the Bench of Honorary Magistrates of Sitamarhee, dated the 18th of January 1893.

1893

HARDWAR SING OR LALL v. KHEGA OJHA.

IN this case the petitioner was convicted under sections 379 and 147 of the Penal Code, and sentenced to one month's rigorous imprisonment and a fine of Rs. 50, or in default to one week's further imprisonment. The order and sentence were passed by a Bench of Honorary Magistrates of Sitamarhee. It appeared that the evidence for the prosecution was taken before Messrs. L. J. and H. E. Crowdy, two Honorary Magistrates, and that the case was then adjourned. On being taken up again the evidence for the defence was taken by Messrs. L. J. Crowdy and Grish Chandra Sarkar, who delivered the judgment and convicted and sentenced the accused. The conviction and sentence were affirmed on appeal by Mr. L. Hare, District Magistrate of Mozufferpore. A rule was then obtained from the High Court in its Criminal revisional jurisdiction to set aside the conviction and sentence on the ground "that the evidence for the prosecution having been taken by Messrs. L. J. and H. E. Crowdy and the defence witnesses having been examined before Messrs. L. J. Crowdy and Grish Chandra Sarkar, who delivered the judgment, the trial was bad in law."

The rule now came on to be argued.

Baboo *Durga Mohun Das* for the petitioners in support of the rule.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) and Baboo *Digambur Chatterjee* for the Crown.

Baboo *Durga Mohun Das*.—The only section of the Code which empowers one Magistrate to act upon evidence recorded by another is section 350. That section, however, only applies to a case where a Magistrate ceases to exercise jurisdiction and is succeeded by another Magistrate who has and exercises such jurisdiction. To the present case that section has no application whatever. Section 350 of the Code of Criminal Procedure was enacted to meet the case of transfer of Magistrates from one district to another. In the present case it cannot be contended that Mr. H. E. Crowdy at any period ceased to exercise jurisdiction. There are numerous decisions in my favour to show that the absence at the adjourned trial of some of the Magistrates vitiates both the trial and the conviction. See *Shumbhu Nath Sarkar* v. *Ram Komul*

1893

HARDWAR SING OR LALL v. KHEGA OJHA.

Guha (1), *Sufferuddin* v. *Ibrahim* (2), and *Ram Sunder De* v. *Rajab Ali* (3).

The *Deputy Legal Remembrancer contra*.—Under the provisions of section 16 of the Code, the Local Government has framed rules (4) for the guidance of Magistrates. These rules came into force on the 15th of December 1889, and under Rule 8 this conviction is sustainable. That rule is as follows:—"Any part-heard case postponed to a further sitting of the Bench may be proceeded with if any member of the Bench has been present at the previous hearing in the case, but subject to the provisions of section 350 of the Criminal Procedure Code."

No prejudice has been shown in this case. The judgment shows that the conviction is right. The cases cited cannot override the rules framed by the Local Government. The trial by Honorary Magistrates is a new institution in this country, and it very often happens that one of the members is prevented from attending through illness or other causes, and if a trial were to be postponed on that account it would lead to endless delays.

Baboo *Durga Mohun Das*, in reply.—The rule relied on is *ultra vires*. The Legislature has allowed Local Governments to make rules "for the guidance of Magistrates," and not for any other purpose. Rule 8 cannot by any possibility be construed into a rule "for the guidance of Magistrates."

The judgment of the High Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

The only point for consideration in this case is whether the change of Magistrates operates to invalidate the conviction. The facts are stated in the petition. It appears that the evidence was taken before two Honorary Magistrates, Mr. L. J. Crowdy and Mr. H. E. Crowdy. The evidence for the defence was taken by Mr. L. J. Crowdy and Baboo Grish Chandra Sarkar. The two latter gentlemen delivered judgment. There is no doubt that, apart from any statutory provision, the only persons who can decide

(1) 13 C. L. R., 212.
(2) I. L. R., 3 Calc., 754.
(3) I. L. R., 12 Calc., 558.
(4) See *Calcutta Gazette*, 25th December 1889, Part I, page 1071.

a case are those who heard the evidence and the arguments. The question remains whether the Code of Criminal Procedure permits this to be done in this case. The only section of the Criminal Procedure Code which expressly empowers one Magistrate to act upon the evidence recorded by another is section 350, which clearly has no application to the present case. That applies only to a case where a Magistrate ceases to exercise jurisdiction and is succeeded by another Magistrate who has and exercises such jurisdiction. It does not appear that Mr. H. E. Crowdy at any time ceased to exercise jurisdiction in this case. This section is obviously intended to meet the case of transfer of Magistrates from one district to another, and to prevent the necessity of trying from the beginning all cases which may be part heard at the time of such transfer. This question is not a new one. In *Shumbhu Nath Sarkar* v. *Ram Komul Guha* (1), where, in a trial before a Bench originally constituted of a stipendiary and two Honorary Magistrates, one of the latter after the commencement of the trial was absent, and important evidence was recorded in his absence, but on the following day he signed the final order, the conviction was held to be bad.

In *Sufferuddin* v. *Ibrahim* (2), where the facts were very similar to the present case, a Bench of this Court considered the conviction illegal on the ground, amongst others, that the Magistrates who passed the final order were not the same as those who heard the evidence. In *Ram Sunder De* v. *Rajab Ali* (3) we find a similar decision. Mr. Kilby for the Crown contends that under Rule 8 of the rules, which came into force on the 15th December 1889, and are framed by the Local Government under section 16, Code of Criminal Procedure, this conviction can stand. Rule 8 is as follows:—"Any part-heard case postponed to a further sitting of the Bench may be proceeded with if any member of the Bench has been present at the previous hearing in the case; but subject to the provisions of section 350, Code of Criminal Procedure." There is no doubt that if this rule is a legal one, we could not interfere with the conviction. The only portion of section 16

(1) 13 C. L. R., 212. (2) I. L. R., 3 Calc., 754.
(3) I. L. R., 12 Calc., 558.

1893

HARDWAR SING OR LALL v. KHEGA OJHA.

under which it is contended that the Local Government has power to frame this rule, is paragraph (*c*), *viz.*, "the constitution of the Bench for conducting trials." When power is given to provide for the constitution of the Bench, we think that ordinarily means to provide for the persons who are to constitute it, that is to say, what individuals or what classes of individuals. In the ordinary acceptation of the term, it has nothing to do with the powers which that Bench can exercise, and we think it clearly cannot give the power sought for in this case, *viz.*, a power to decide a case upon evidence taken by other Magistrates. This is not a question of the constitution of the Bench. It is a question as to what are the powers of the Bench. It is a power which is only given in an extreme case in consequence of the necessities of this country, and is a power the exercise of which may frequently prejudice an accused person. Such a power would not be given by implication, and even if it could be, there is nothing in the words "constitution of the Bench" which implies such power. We think that Rule 8 is clearly *ultra vires*. We accordingly set aside the conviction and direct that the fine, if paid, be refunded and a new trial held in the cases.

Rule made absolute and conviction quashed.

H. T. H.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

1893

July 26.

IN THE MATTER OF BOLYE CHUND DUTT.

Arrest—Arrest in execution of decree—Civil Procedure Code (Act XIV of 1882), s. 341—Writ of attachment—Arrest and commitment—Release—Insolvency proceedings—Protection order, withdrawal of—Re-arrest under same decree.

The Civil Procedure Code contemplates as immaterial the circumstances under which a judgment-debtor imprisoned in execution of a decree obtains his release from prison, and there is no power in the Court to order the arrest of such judgment-debtor a second time under the same decree.