

diction." If that be the meaning of the word accused, as we think it is, the learned Sessions Judge was bound to hear the pleader appointed by the petitioner.

We therefore set aside the order of the Sessions Judge, and direct that he give the accused person's pleader an opportunity of being heard. After hearing the pleader, he will pass such order in the case as he may think it right and proper to do.

S. C. B.

Before Mr. Justice Banerjee and Mr. Justice Gordon.

DUPEYRON AND ANOTHER (PETITIONERS) v. DRIVER (OPPOSITE PARTY).^{*}

Transfer of criminal case—Criminal Procedure Code (Act X of 1882), section 526—Reasonable apprehension in the mind of the accused—Real bias—Incidents calculated to create apprehension of bias.

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In dealing with applications for transfer what the Court has to consider is not merely the question whether there has been any real bias in the mind of the presiding Judge against the accused, but also the further question, whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Judge, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial.

THE petitioners were charged with committing offences under sections 417 and 420 of the Penal Code, and pending the trial this application was made for the transfer of the case from the file of the Deputy Commissioner of Manbhum to some other Court in the same District, or in any other District competent to try the same. This case was the third of a series of cases between the same parties. The application for transfer was made on various grounds stated in three affidavits put in on behalf of the applicants. The following statements contained in paragraphs 16, 17, 34 and 35 of the second affidavit made in one of the two earlier cases are material for the purposes of this report :—

"16. That on the next day, at about 5-30 P.M., the Deputy Commissioner came to Court to deliver judgment and asked the accused whether he admitted a letter, purporting to have been written by him. The accused wanted

^{*} Criminal Miscellaneous Case No. 10 of 1896.

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to see the letter ; but the letter not being with the record, the Deputy Commissioner left the Court, and after a few minutes came back, followed by Mr. Driver, the complainant, with a letter in his hand.

"17. That the Court then handed over the letter in question to the accused and asked him whether he admitted the letter ; but the accused said that as the prosecution had been closed as well as the defence and the Court had come prepared with the judgment for delivery, he was advised not to answer any further question.

"34. That after the arguments were finished the Court ordered the accused to remain in Purulia and to report himself daily at noon to him, and in his absence to the senior Deputy Magistrate, although bail had been furnished by the accused.

"35. That on the next day, after reporting himself, the accused asked for permission to go to Chaibassa and to Calcutta on business. The Court only permitted him to go to Chaibassa for four days, provided that he would report himself to the Deputy Commissioner while there, but refused to allow him to go to Calcutta."

Mr. W. Gregory and Babu Nagendro Nath Chatterji for the petitioners.

Mr. Sinha and Babu Jyoti Prosad Sarbadhicary for the opposite party.

The judgment of the High Court (BANERJEE and GORDON, JJ.) is as follows :—

This is a rule calling upon the Magistrate of the District to show cause why the case should not be transferred from the file of the Deputy Commissioner of Manbhura to some other Court in the same District, or in any other District competent to try the same.

Various grounds are stated in the three affidavits put in on behalf of the petitioners upon which we are asked to grant this application for transfer. Some of these statements appear from the explanation submitted by the Deputy Commissioner to be inaccurate, and there are others that appear to be disingenuous. The conduct of the petitioners, who are the deponents in these affidavits, in making statements of this sort, is, we need hardly add, highly reprehensible. Whilst expressing our strong disapprobation of the conduct of the petitioners in making statements like these, we do not think that they can be regarded as sufficient ground for refusing the application, if, leaving out the

statements to which our remarks apply, there still remains enough to make a transfer of the case desirable for the ends of justice.

The statements which in our opinion render such transfer desirable are those contained in paragraphs 16, 17, 34 and 35 of the second affidavit put in on behalf of the petitioners. The statements made in the 16th and 17th paragraphs run thus :—

“ 16. That on the next day, at about 5-30 P.M., the Deputy Commissioner came to Court to deliver judgment and asked the accused whether he admitted a letter purporting to have been written by him. The accused wanted to see the letter, but the letter not being with the record, the Deputy Commissioner left the Court, and after a few minutes came back, followed by Mr. Driver, the complainant, with a letter in his hand.

“ 17. That the Court then handed over the letter in question to the accused, and asked him whether he admitted the letter ; but the accused said that as the prosecution had been closed as well as the defence, and the Court had come prepared with the judgment for delivery, he was advised not to answer any further question.”

It was contended by Mr. Sinha, who appeared to show cause, that as these statements relate to a previous trial which has come to an end, they cannot be taken to affect the present question. We do not think that this argument is sound. The case that is now pending, and for the transfer of which this application has been made, is one of three cases which are connected with one another, and the case, in the course of which the incidents narrated in paragraphs 16 and 17 of the affidavit quoted above occurred, was the first of the three. The complainant in the present case is Mr. Driver, the complainant in the first case ; and therefore the statements made in these two paragraphs of the affidavit are, in our opinion, not altogether immaterial to the present question. With reference to these two paragraphs of the affidavit, the learned Deputy Commissioner, in his explanation, does not say anything specifically. We may therefore take it that the statements are correct.

It was contended, however, that, though the statements may be correct, they do not necessarily show any bias on the part of the Magistrate against the accused. That may be true ; but in deal-

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ing with applications for transfer like this, what this Court has to consider is, not merely the question whether there has been any real bias in the mind of the presiding Magistrate against the accused, but also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Magistrate, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension, that he may not have a fair and impartial trial. Of course, it is not every apprehension of this sort that should be taken into consideration ; but where the apprehension is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the fact of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer, such as the one that has been asked for. In matters like these, " the law, " to use the words of Lush, J., in the case of *Serjeant v. Dale* (1), " has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice, which is so essential to social order and security." And the same view was expressed by this Court in *Grish Chander Ghose v. The Queen-Empress* (2).

The same remarks, we think, apply to the statements contained in paragraphs 34 and 35. The Magistrate, notwithstanding that he released the accused on bail during the trial of the second case, still required him to report himself to the authorities at Purulia, and when the accused applied for leave to go to Chaibassa and to Calcutta, his prayer was granted only so far as his going to Chaibassa was concerned, the other part of his prayer being refused. The Magistrate says he did this because he had reason to think that the accused might abscond. The order is not warranted by law, and was calculated to create apprehension in the mind of the accused that the Magistrate was biased against

(1) L. R. 2 Q. B. D., 558.

(2) I. L. R. 20 Calc., 857.

him. We do not say that this shows that there was any real bias in the mind of the Magistrate. On the contrary, we accept his explanation as to the reason why, notwithstanding that he released the accused on bail, he made this order. But, as we have said above, the order was calculated to create a reasonable apprehension in the mind of the accused that there was a bias against him.

That being so, we think it expedient for the ends of justice that the transfer applied for should be granted under clause (e) of section 526 of the Code of Criminal Procedure.

The next question is, to what Court should the case be transferred. Mr. Sinha for the complainant suggests that the case should be transferred to the Court of the District Magistrate of Burdwan as being the Court nearest to Purulia. We think that the suggestion is a fair one, and we accordingly direct that the case be transferred to the Court of the District Magistrate of Burdwan for trial.

S. C. B.

Before Mr. Justice Hill and Mr. Justice Rampini.

UPENDRA NATH BHUTTACHARJEE (PETITIONER) v. KHITISH
CHANDRA BHUTTACHARJEE AND ANOTHER
(OPPOSITE PARTY.)*

Procedure—Jury, Constitution of—Criminal Procedure Code (Act X of 1882), sections 133 to 138—Nomination of jury by Magistrate—Bona fides of claim. 1896
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In the nomination of those members of the jury, the nomination of whom devolves upon the Magistrate under the provisions of section 138 of the Criminal Procedure Code, it is his duty to exercise his own independent discretion, and not merely to accept persons who may be put forward by the party opposed to the applicant.

A jury constituted in violation of the provisions of section 138 is not legally constituted, and is incapable of making a legally binding award.

Dino Nath Chuckerbutty v. Hur Gobind Pal (1) and Shatyanundo Ghosal v. Camperdown Pressing Co. (2) followed.

* Criminal Revision No. 51 of 1896, against the order passed by A. Ahmad, Esq., Sessions Judge of Nuddea, dated the 17th December 1895, affirming the order passed by W. N. Delevengue, Esq., District Magistrate of that District, dated the 13th of November 1895.

(1) 16 W. R., Cr., 23.

(2) 21 W. R., Cr. 43.

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