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proceedings on the application of the creditor applying to be substituted under that section.

My answer to the second question is that substitution contemplated by section 16 is that a creditor who has been substituted in place of the original creditor can in his turn be substituted by another creditor and so on.

Thomas,
C. J.

ZIAUL HASAN, J.:—I agree.

YORKE, J.:—I agree.

BY COURT:—Our answer to the first question is that an express order of substitution is not necessary under section 16 of the Provincial Insolvency Act and that substitution can be inferred from the court continuing proceedings on the application of the creditor applying to be substituted under that section.

Our answer to the second question is that substitution contemplated by section 16 is that a creditor who has been substituted in place of the original creditor can in his turn be substituted by another creditor and so on.

REVISIONAL CRIMINAL

Before Mr. Justice Ziaul Hasan

1938

August, 23

SHEO RAM AND OTHERS, (APPLICANTS) v. KING-EMPEROR
THROUGH KALIDIN (COMPLAINANT-OPPOSITE-PARTY)*

Criminal Procedure Code (Act V of 1898), section 350(1)(a)—Transfer of case from one Magistrate to another—Trial de novo before second Magistrate—Accused cannot compel summoning a witness produced in first court whom prosecution do not want to produce and rely upon—Court not relying on witness not produced in second trial—Trial, if vitiated.

Section 350(1)(a) does not require that even a witness on whom the prosecution does not rely and whom it does not wish to produce though produced before the first court should also be produced in the second court. The trial in the second

*Criminal Revision No. 73 of 1938, of the order of S. M. Ahmad Karim, Esq., Sessions Judge of Unao, dated the 1st of June, 1938.

court is a *de novo* trial from the very beginning and the prosecution are at perfect liberty to produce whichever witness they like and they cannot be compelled to produce at the instance of the accused a witness on whose evidence they do not rely. Of course, the Court will consider the effect of the prosecution not producing a witness previously examined by them and if he should happen to be one named in the first information report, the circumstance will go against the prosecution.

A contravention of the provisions of section 350(1)(a) will vitiate the trial only when there is a refusal on the Magistrate's part to re-summon and re-hear the witnesses or when the evidence of witnesses examined against the provisions of clause (a) is relied upon by the Court. *Hnin Yin v. Than Pe*, (1), *Narayan Reddy v. Enumula Bojamma* (2), *Sidik v. Emperor* (3), and *Sobh Nath Singh v. Emperor* (4), referred to.

Mr. *Shankar Sahai*, for the applicants.

Mr. *B. K. Dhaon*, for the opposite-party.

ZIAUL HASAN, J.:—This is an application in revision against an order of the learned Sessions Judge of Unao passed on the applicants' appeal against their conviction and sentences under section 323 of the Indian Penal Code. All the four applicants were sentenced to two months' rigorous imprisonment and Rs.20 fine each by an honorary magistrate of the first class. On appeal by the applicants, the learned Sessions Judge reduced the sentence of imprisonment from two months to one month but maintained the sentences of fine.

The case against the applicants was taken up in the first instance by Mr. Prag Narain, a Magistrate of the second class, and he framed a charge against the accused. The case was then transferred to Mr. Mohammad Raza, Honorary Magistrate of the first class, and the accused applied to him to re-summon and re-hear the prosecution witnesses. All the witnesses except one Ganga Prasad were re-heard in the court of Mr. Mohammad Raza but the medical witness who had examined the injuries of the complainant was only cross-examined in his court and not examined by the prosecution.

(1) (1916) 19 Cr.L.J., 321.

(3) (1925) 27 Cr.L.J., 532.

(2) (1925) 26 Cr.L.J., 1596.

(4) (1907) 12 C.W.N., 138.

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J.

The learned counsel for the applicants argues that the trial was illegal on account of Ganga Prasad witness being withheld by the prosecution and the medical witness being produced for cross-examination only. In support of this argument he relies on section 350(1)(a) of the Code of Criminal Procedure and the cases of *Hnin Yin v. Than Pe* (1), *Narayan Reddy v. Enumula Bojamma* (2) and *Sidik v. Emperor* (3). No doubt the provisions of section 350(1) are mandatory but the question is, what is the effect of a contravention of those provisions in the present case. So far as Ganga Prasad witness is concerned, it seems to me that section 350(1) (a) does not require that even a witness on whom the prosecution does not rely and whom it does not wish to produce though produced before the first court should also be produced in the second court. The trial in the court of Mr. Mohammad Raza in the present case was a *de novo* trial from the very beginning so that what proceedings had been taken in the court of Mr. Prag Narain should in my opinion be ignored. This being so the prosecution were at perfect liberty to my mind to produce whichever witness they like and they cannot be compelled to produce at the instance of the accused a witness on whose evidence they do not rely. Of course the Court will consider the effect of the prosecution not producing a witness previously examined by them and if he should happen to be one named in the first information report, as is the case with regard to Ganga Prasad, the circumstance will go against the prosecution; but section 350(1)(a) does not appear to me to authorise an accused person to compel the prosecution to produce a witness whom they do not wish to produce.

So far as the evidence of the medical officer is concerned, it was undoubtedly a breach of section 350(1)(a) of the Code of Criminal Procedure but as his evidence was discarded by both the courts below on account of

(1) (1916) 19 Cr.L.J., 321.

(2) (1925) 25 Cr.L.J., 1596.

(3) (1925) 27 Cr.L.J., 332.

the witness not being examined-in-chief in the court of Mr. Mohammad Raza, no prejudice has been caused to the applicants by the omission of the prosecution to examine him. A contravention of the provisions of section 350(1)(a) will in my opinion vitiate the trial only when there is a refusal on the Magistrate's part to re-summon and re-hear the witnesses or when the evidence of witnesses examined against the provisions of clause (a) is relied upon by the Court. In the case of *Sobh Nath Singh v. Emperor* (1), the witnesses for the prosecution were summoned before the second Magistrate but were not examined on behalf of the prosecution and only cross-examined by the accused and it was because the Magistrate arrived at conclusions on the evidence the whole of which was not recorded by himself that it was held that the convictions and sentences were bad. I am therefore of opinion that the defects of procedure in the present case have not caused any prejudice to the applicants and do not vitiate the trial.

The learned counsel for the applicants contended that in view, of the trivial nature of the applicants' offence, their sentences might be reduced to the period of imprisonment already undergone by them. The sentences of the applicants were reduced as noted above, by the learned Sessions Judge who remarked that the injuries were only superficial and that the trying Magistrate seemed to have been influenced by the exaggerated story of the complainant. In view of these remarks of the learned Judge, I allow this application to the extent of reducing the sentences of imprisonment to the period already undergone by them. The sentences of fine will stand.

Application partly allowed.

(1) (1907) 12 C.W.N., 138.

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