REVISIONAL CRIMINAL.

Before Jwala Prasad and Macpherson, J.J.

1925.

July, 8.

RAMCHANDRA MODAK

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898, (Act V of 1898), sections 256 and 539—cross-examination before charge—right of accused to have the witnesses recalled—cost of recalling prosecution witnesses not to be imposed as a condition—affidavit, sworn before a magistrate, whether can be used in the High Court—Penal Code, 1860 (Act XLV of 1860), section 19.

Section 256, Code of Criminal Procedure, 1898, does not come into operation until the charge is framed. Therefore, a statement of the pleader for the defence made after he had cross-examined the prosecution witness before the charge that he no longer required their attendance, does not deprive the accused of his right to further cross-examine the witnesses after the framing of the charge.

A Magistrate has no power, when passing an order under section 256 to impose a condition that the expenses of recalling the prosecution witnesses should be deposited before they are recalled.

A Magistrate is a "judge" within the meaning of section 19, Penal Code, read with section 4(2), Code of Criminal Procedure, only when he is exercising jurisdiction in a suit or in a proceeding. Therefore, an affidavit sworn before a magistrate cannot be used in the High Court.

Dinobundhu Nundy v. *Sm. Hurrymutty Dassee*(1), distinguished.

Iswarchunder Guho, in the matter of(2), referred to.

The facts of the case material to this report are stated in the judgment of Jwala Prasad, J.

S. N. Basu for *A. K. Gupta*, for the petitioner.

H. L. Nandkeolyar, Assistant Government Advocate, for the Crown.

* Criminal Revision no. 255 of 1925, from an order of G. Rowland, Esq., I.C.S., Judicial Commissioner of Ranchi, dated the 14th April, 1925, affirming an order of H. J. B. LePatourel, Esq., Subdivisional Magistrate of Khunti, dated the 13th March, 1925.

(1) (1903-04) 8 Cal. W. N. xl. (2) (1887) I. L. R. 14 Cal. 653.

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JWALA PRASAD, J.—The trial in this case seems to have been vitiated by the omission on the part of the Magistrate to comply with the provisions of section 256 of the Code of Criminal Procedure.

The witnesses for the prosecution were examined on the 23rd of February, 1925, and were cross-examined and then discharged as the pleader for the defence no longer required their attendance. This happened before the charge was framed. The charge was framed the following day, namely, on the 24th February. The accused pleaded not guilty and cited defence witnesses. Later on Mr. Ghatak, pleader from Ranchi, appeared on behalf of the accused for the first time and stated that he wished to cross-examine the prosecution witnesses after the charge was framed. This request was evidently made under section 256 of the Code of Criminal Procedure.

As a matter of fact, the section requires that after the charge is framed and the accused pleads not guilty or claims to be tried,

> " he shall be required to state, *at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith*, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be re-called and, after cross-examination and re-examination (if any), they shall be discharged."

The procedure indicated herein was not observed, and the accused was not required to state whether he wished to cross-examine any of the prosecution witnesses. The words italicised have now been inserted in the section by the amending Act XVIII of 1923 and indicate the intention of the Legislature that sufficient time should be given to an accused to consider whether he wishes to cross-examine any of the prosecution witnesses after the framing of the charge, and it is only in special cases that the Magistrate can require him to state forthwith if he so wishes. The pleader for the petitioner, however, expressed a desire that the witnesses should be recalled for the purpose of cross-examination.

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Therefore, the irregularity committed by the Magistrate in not asking the accused to state if he wished to cross-examine seems to have been practically condoned, and the accused expressly stated that he wanted to avail himself of the provisions of section 256 and to exercise his right to cross-examine the prosecution witnesses after the charge.

The Magistrate as well as the learned Sessions Judge refers to the statement of the pleader for the defence made on the 23rd of February before the charge was framed, stating that he did not any longer require the attendance of the prosecution witnesses, as showing that opportunity was given to the accused to cross-examine the witnesses under section 256. This apparently is a misconception, for on the 23rd of February the stage for applying section 256 had not been reached. No charge was framed, and the cross-examination of the prosecution witnesses before the charge was under the previous sections 252 and 253. Therefore, the statement of the pleader of the defence made on the 23rd of February would not deprive the accused of his right to further cross-examine the prosecution witnesses after the framing of the charge under section 256 of the Code.

The Magistrate did, as a matter of fact, direct the prosecution witnesses to be present on the 25th of February at Bundu for the purpose of being further cross-examined. This, no doubt, was an order passed under section 256 of the Code of Criminal Procedure, but the accused could not avail himself of it inasmuch as his pleader did not go to Bundu and an application was then made to the Magistrate stating that the accused could not bring his pleader to an out-of-way place such as Bundu.

The Magistrate then passed an order directing the witnesses to be produced upon the accused depositing the cost of their attendance, and fixed the 7th of March for this purpose. This order the Magistrate states to be under section 257, clause (2), of the Code; but that stage had not yet arrived inasmuch as the further

cross-examination of the witnesses after the charge was to be under section 256 of the Code and full and proper opportunity was not given to the accused for that purpose. There was no application on behalf of the accused under clause (*1*) of section 257 applying to the Magistrate to issue any process for compelling the attendance of the prosecution witnesses for the purpose of cross-examination, and consequently clause (*2*) of that section did not apply. The application of the accused made on the 24th of February and renewed on the 25th was an application under section 256 of the Code, and the Magistrate so treated it.

Therefore, the Magistrate's order under clause (*2*) of section 257 of the Code imposing a condition upon the accused to deposit costs for the purpose of summoning, that is for the purpose of recalling the prosecution witnesses, is wrong and without jurisdiction.

If the order be taken to come under section 256 as is contended for by the learned Assistant Government Advocate, then the condition, imposed by the Magistrate, of depositing the expenses for recalling the prosecution witnesses is ultra vires. That section does not lay down any condition, nor does it vest the Magistrate with any such power.

It is then urged that such a power must be deemed to exist in the Magistrate as being inherent in him. There is no room for such a suggestion. The Code has expressly laid down the procedure for trial under Chapter XXI, and section 257 expressly vests the Magistrate with discretion to require expenses to be paid by an accused. There being no such discretion vested under section 256, the power cannot be invoked upon the ground of its being inherent in the Court. The Magistrate had no power to alter in any way the procedure laid down in those sections for the conduct of the case.

The result is that the conviction of the accused is set aside and the case is sent back to the Magistrate to try it from the stage it had reached on the 24th of

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February after the framing of the charge and to dispose of it after compliance with the provisions of section 256 of the Code of Criminal Procedure.

The learned Counsel on behalf of the petitioner urged that the case should be transferred to the file of some other Magistrate. We do not see any reason to accede to this request, for we find nothing on the record to indicate that the Subdivisional Officer, who tried the case, has any bias against the accused.

Another question has arisen in this case, which has nothing to do with the present case. The application in revision filed in this Court by the accused was not sworn to before the Commissioner appointed by this Court; in lieu thereof an affidavit sworn to before the Subdivisional Magistrate of Ranchi was filed in this case. The question is whether this affidavit can be legally used in this Court.

Section 539 of the Code of Criminal Procedure deals with affidavits and affirmations to be used before any High Court or any officer of such Court. It requires that such affidavits and affirmations should be sworn and affirmed before such Court or the Clerk of the Crown, or any Commissioner or other person appointed by such Court for that purpose, or any Judge, or any Commissioner for taking affidavits in any Court of Record in British India, etc. It is said that the Subdivisional Magistrate of Ranchi is a Judge within the meaning of section 539 and consequently the affidavit in question could be sworn before him. Reliance is placed upon section 19 of the Indian Penal Code which defines the word "Judge" as denoting

> "every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment."

The Code of Criminal Procedure does not define the word "Judge", but section 4, clause (*2*), adopts the definition of words given in the Indian

Penal Code which are not expressly defined in the Code. Therefore the definition of the word "Judge" given in section 19, Indian Penal Code, would apply to the word "Judge" used in section 539 of the Code of Criminal Procedure.

It is, therefore, said that the learned Subdivisional Magistrate of Ranchi is empowered to give a definite judgment and so he must be deemed to be a "Judge" within the meaning of the word in section 539.

The illustrations to section 19 of the Indian Penal Code would, however, show that a person other than one who is officially designated as a Judge and who is empowered to give a definitive judgment, is a Judge only when he is exercising jurisdiction in a suit or in a proceeding. So far as that suit or proceeding—revenue, civil or criminal—is concerned he is a Judge but he is not a Judge when he has not the seisin of the case in which he can give a definitive judgment. This is obvious from the last words of the section under which a body of persons may come under the definition of "judge" when it is empowered by law to give a judgment, such as arbitrators, but arbitrators can come within the term "judge" only when dealing with a case on reference to their arbitration. I need not quote the Illustrations which seem to support the aforesaid view. It would be sufficient to refer specifically to clause (*d*) which says:

> "A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a judge."

No doubt, such a Magistrate is empowered to give a definitive judgment in other cases which he is trying; still as he is not empowered to give a definitive judgment in the case in which he is only empowered to commit he is not a judge for the purpose of that case.

The Subdivisional Magistrate of Ranchi had not the seisin of the criminal case before us and he could not pronounce any judgment in respect of that case.

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Therefore, he is not a judge within the meaning of the term in section 539 of the Code.

A reference to section 539-A, clause (2), will show that a Magistrate would not come within the meaning of the word "judge" in section 539. That clause says:

"An affidavit to be used before any Court other than a High Court under this section may be sworn or affirmed in the manner prescribed in section 539, or before any Magistrate."

The "Magistrate" here is differentiated from the officers mentioned in section 539 and therefore he cannot come under section 539 and is not empowered to have an affidavit sworn before him.

No doubt, under section 139 of the Code of Civil Procedure a Magistrate is expressly empowered to receive an affidavit. That has no application to the present case, inasmuch as we are dealing with a criminal case tried by the Magistrate.

There is no authority on all fours with the present case and there seems to be a dearth of cases upon the point. There are only two cases [*Iswarchunder Guho*(1) and *Dinobundhu Nundy* v. *Sm. Hurrymutty Dasee*(2)]. The latter case related to an affidavit in connection with a civil case and it was held that the affidavit was valid as coming under section 139 which empowered a Magistrate to receive an affidavit and to administer an oath. This has no application to the present case. The other case did not relate to an affidavit to be used in the High Court and even then it was held that a Deputy Magistrate had no power to administer an oath to a person making an affidavit.

Therefore, the affidavit in this case is not a valid one and cannot be used in this Court.

The rule of the Court is as laid down in Chapter III of the Patna High Court Rules, viz.,

"The facts stated in every petition shall be verified either by the solemn affirmation of the petitioner or by an affidavit to be annexed to the petition."

(1) (1887) I. L. R. 14 Cal. 653. (2) (1903-04) 8 Cal. W. N. xl.

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The application in the present case has not been properly sworn or affirmed, and the facts stated therein cannot, therefore, be used by the petitioner. Therefore, we cannot act upon the application in the present case as regards the facts stated therein.

We have, however, dealt with the case upon the order sheet and the law on the subject, and consequently the irregularity in the affidavit does not affect the decision given by us.

JWALA PRASAD, J.

MACPHERSON, J.—I agree. The order proposed is a necessity in the circumstances. The mistaken application of section 257(2) by the Subdivisional Magistrate of Khunti practically amounted to non-compliance with the provisions of section 256 which is of fundamental importance in the trial of an accused person.

The Crown has, however, suggested that we should not interfere with the conviction because the affidavit by which the application in revision is supported is not one contemplated by section 539 of the Code of Criminal Procedure which sets out the Courts and persons before whom affidavits to be used before a High Court may be sworn. The Subdivisional Magistrate of Ranchi before whom the affidavit supporting the petitioner's application was sworn is not one of the Courts or persons named in section 539. He has not been appointed by the High Court either personally or ex officio for the purpose of the section. Obviously therefore an affidavit to be used in the High Court can only be sworn before him if he is a Judge within the contemplation of the section. But it is manifest from section 19 of the Penal Code read with the illustrations thereto and section 4(2) of the Code of Criminal Procedure that a magistrate is not a Judge within the meaning of these Codes except in relation to a case on his own file and these also only in certain circumstances. The new section 539A of the Code of Criminal Procedure also gives countenance to this view. The affidavit filed on behalf of petitioner is accordingly not one which can be used in the High

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Court and also is not one such as is required under rule 3, Chapter III of the Rules of the Patna High Court. But though the objection is made out it is technical only and should not prevail at this stage even though it might have constituted good ground for refusal to issue a rule when the defective application was lodged. The rule has been heard out on the merits, also in the course of the hearing it has appeared that the facts stated in the petition, which is faultily verified, are matters of record and indeed they are not disputed on behalf of the Crown. Moreover, regard being had to the nature of the illegality in the trial and to the fact that the Magistrate had some ground for believing the petitioner to be eccentric, I should, if necessary, be disposed to treat the case as one which has come to the knowledge of the High Court otherwise than on application wherein the Court should of its own motion exercise its powers under section 439 of the Code of Criminal Procedure.

APPELLATE CIVIL.

Before Adami and Bucknill, J.J.

1925.

June, 29, 30; July, 10.

GREAT INDIAN PENINSULA RAILWAY

v.

DATTI RAM.*

Non-delivery, suit against Railway company for—onus of proving liability—Risk Note B, nature of contract arising out of—admission of theft in a running train—failure to prove allegation, effect of—Evidence Act, 1872 *(Act I of* 1872*), section* 106.

In order to be successful in an action against the Railway Company, for damages for the loss of goods consigned, based

* Second Appeal no. 126 of 1923, from a decision of A. E. Scroope, Esq., I.C.S., District Judge of Saran, dated the 24th November, 1922, modifying a decision of B. Atal Behari Saran, Munsif of Chapra, dated the 16th March, 1922.