APPELLATE CRIMINAL.

Before Rowland and Chatterji, JJ.

1939.

Dec. 4, 5, 6, 7.

MUSAHRU

v.

KING-EMPEROR.*

Sessions Trial—procedure for summoning defence witnesses—duty of Committing Magistrate and Sessions Judge—list of witnesses, when and where to be filed—Committing Magistrate simultaneously framing the charge and passing order of commitment—departure from order of procedure—Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 210, 211, 213 *and* 216.

When a charge is framed by the Committing Magistrate he must require the accused at once to give in a list of the persons whom he wishes to be summoned to give evidence on his trial by the Court of Session. The accused is entitled to have the assistance of the Court in obtaining the attendance of all the persons whose names he gives in at once on being required to do under section 211, Code of Criminal Procedure, 1898.

Section 211 (2) of the Code gives the magistrate a discretion to allow the accused to give in any further list of witnesses at a subsequent time.

Where, however, there is a departure from the procedure contemplated by the Code and the accused present their list of witnesses not to the magistrate under section 211(2) of the Code but to the Court of Session, the correct procedure for the Sessions Judge at that time is at once to forward the application to the Committing Magistrate for disposal under section 211(2).

The power to accept the supplementary list of witnesses in any case is a discretionary one and the discretion of the magistrate is to be exercised in accordance with section 216 and subject to the provisos in that section.

*Criminal Appeal no. 224 of 1939, from a decision of N. C. Chandra, Esq., Additional Sessions Judge, Bhagalpur, dated the 18th August, 1939.

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Where the list of witnesses presented to the Sessions Judge is not a list of witnesses in addition to the number already summoned but is the first list which has been presented to any officer, it is desirable for the Judge to summon at least some of the witnesses regarding the effect of whose testimony some explanation could be given, particularly when there is no real difficulty in obtaining the attendance of the witnesses or the majority of them before the closing of the prosecution case. On the other hand, it is not desirable that the presentation of the list of defence witnesses should be postponed till the last minute when the Code contemplates that it should be done at the time when the charge is framed.

The Committing Magistrate, by simultaneously framing the charge and passing the order of commitment, departs from the order of procedure in section 210 and following sections of the Code. The charge is to be framed and explained to the accused under section 210. He is then required to give his list of defence witnesses, the magistrate being given a discretion to accept a further list at a subsequent time. The magistrate is given a discretion to summon and examine any of the defence witnesses and, on doing so, he may cancel the charge and discharge the accused if he is satisfied that there are no sufficient grounds for commitment (section 213): otherwise he makes an order committing the accused for trial. It is not of course obligatory on the magistrate to examine defence witnesses with a view to reconsidering the necessity for the charge and for a commitment; but it is undoubtedly the magistrate's duty to see to the obtaining of the list of defence witnesses.

If the accused are not ready with their list of witnesses at the date of commitment it is convenient for the magistrate to fix a day up to which the list of witnesses will be received so as to prevent the matter escaping the notice of the accused or their legal advisers.

The facts of the case material to this report are set out in the judgment of Rowland, J.

Gopal Prasad (with him *S. Naqui Imam*, *K. P. Shukul* and *S. M. Siddique*), for the appellants.

S. Jafar Imam and *Binoy Bhusan Roy*, for the respondents.

Assistant Government Advocate, for the Crown.

ROWLAND, J.—This appeal arises out of a trial in which twenty-six persons were charged some with rioting with deadly weapons (section 148); others with rioting (section 147) and again some with murder (section 302 read with section 34) and others constructively charged with murder (section 302 read with section 149). Six of the accused were acquitted and twenty have been convicted and sentenced under section 302 read with section 34 and section 302 read with section 149 respectively all to transportation for life. The occurrence giving rise to the offences charged took place in a diara within the elaka of police-station Nathnagore. There are two adjoining villages Bairiya and Dildarpur, the former being to the west of the latter. There is a boundary dispute between these villages which has led to the attachment of a large block of land which is alleged by one party to fall in village Bairiya and to be in possession of its proprietors through their tenants and by the other party to fall in village Dildarpur and to be in possession of the proprietors and tenants of that village. According to the prosecution, Sarobar Prasad Singh had grown rainchi crop in plot no. 169 of village Bairiya which was his occupancy land and was no part of the subject-matter of the section 145 proceedings. He had reaped the crop and had stored it in plot no. 126/391 of the same village. This plot is said to belong to Mahabir Kumar. It has an area of 8 bighas 13 kathas 15 dhurs and a certain part of this area falls within the subject-matter of the section 145 proceedings but part of it is outside that area and it is in this part that Sarobar Prasad by permission of Mahabir Kumar had stored his rainchi crop and kept a hut. On the 2nd February, 1939, a large mob consisting in the main of villagers of Sahebgunj who have land in Dildarpur came with deadly weapons and attacked the party of the prosecution. This party consisted of Sarobar Prasad and his brother Anandi, Jhumak Gossain, Mahabir Kumar, Biranchi and Bhothri Jha. These persons

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were sitting and talking at the khamar in plot no. 126/391. The mob coming near began to pelt them with brickbats and stones. The prosecution party scattered in different directions and were chased by members of the mob with the result that Anandi, Jhumak and Biranchi were each surrounded and killed. Another witness Pardip Singh who came to the place later than the former six persons received two lathi injuries. The mob also demolished the hut at the khamar and looted bundles of rainchi crop which had been kept there.

Substantially these allegations have been found by the Sessions Judge to be true and twenty appellants to have been sufficiently identified, some as actually taking part in the violent attacks on Anandi, Jhumak and Biranchi and others as present in the mob with knowledge that murder was likely to be committed in the prosecution of its common object. The defence appears to have consisted in questioning the correctness of the prosecution evidence and suggesting that the party of the accused and not that of the prosecution had the right to cut the crop. Reference has been made to the proceeding which was drawn under section 145 of the Code of Criminal Procedure on 29th June, 1938, and was still pending. The origin of this proceeding was a report under section 144 submitted by the Sub-Inspector of Police on the 5th April, 1938, at the instance of Musahru, one of the appellants. Notices were issued to the parties by the Subdivisional Officer on 26th April, 1938. The report it seems refers to a larger area; but the proceeding under section 145 was drawn with reference to 500 bighas of land. Pending disposal of the proceedings, the lands covered by the proceeding under section 145 were attached. On the 12th January, 1939, an application was presented to the Deputy Magistrate by members of the Bairiya party asking that the crop attached within the area covered by the section 145 proceeding might be harvested by

the police or sold and the proceeds kept in deposit in favour of the party that would eventually be successful in the proceedings. Along with this petition the magistrate considered also an application by Musahru and others of his party in which they stated that they had grown kelai crops on 22 bighas of land which fell outside the lands the, subject-matter of the section 145 proceeding. Prayer was made for permission to cut the crop of the lands which were outside the section 145 proceeding. This permission was granted. The magistrate does not seem to have taken the precaution of wording his order so as to limit the permission expressly to the 22 bighas of kelai crop and this perhaps accounts for the attitude of Musahru and his party who appear to have acted as if this order entitled them to all the crops whether of kelai or any other kind of produce growing outside the attached area. It is however quite clear that no such permission of the magistrate could give Musahru and his party any right to harvest the crops which had been grown by and were in the possession of other people, still less to take away from the possession of raiyats of Bairiya crops which the latter had not only harvested but had removed from the fields where they were grown and had stored in a khamar. The evidence of the prosecution was quite clear as to the possession of Sarobar Prasad over the plot no. 169 where the rainchi crop was said to have grown. It was not of course in that field that the occurrence took place. In fact the khamar is 1,500 paces distant from it. As to the correctness of the prosecution evidence locating the occurrence at the khamar, the Sub-Inspector found near this plot the three dead bodies, brickbats, stones, pieces of a bana, portions of a pharsa, the head bearing the inscription of Musahru's name, blood-stains on the ground and on the crops, trampled crops, the remains of the demolished hut and scattered crops. In fact it could not be seriously argued in the appeal that the place of occurrence had not been correctly located by the prosecution.

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As to the nature of the occurrence the prosecution has alleged an unprovoked attack upon them by a very large number and heavily armed mob which it is said met with no resistance or provocation. There is no evidence of any injuries on any person of the party of the accused which could suggest that there was either provocation or resistance offered by members of the prosecution party. Therefore on the evidence as it stands the view taken by the Sessions Judge is clearly to be accepted in so far as it excludes any such defence as provocation or right of private defence.

But before affirming those findings, it is necessary first to consider a point raised by Mr. Gopal Prasad for the appellants, namely, that the accused had evidence which they wished to produce and were wrongfully deprived of the assistance of the Court in obtaining the attendance of defence witnesses. The magistrate who enquired into the offences had framed charges and passed orders of commitment on 31st May, 1939. At the time of passing order, he said that the accused must file a list of their defence witnesses at once. No such list however was filed in the court of the magistrate but a petition was presented before the Additional Sessions Judge on 18th July, 1939, for summoning 44 defence witnesses. The trial had been fixed for the 31st July and the learned Judge pointed out that no explanation was offered in the application for its being filed at such a late stage; nor was the pleader for the accused in a position to say that he wanted to take out summons at his risk and cost. The learned Judge rejected the application. Another similar application was filed by the accused from jail on 20th July, 1939, with a list of 41 witnesses said to be likely to prove the possession of the accused and stating that the accused were unable to deposit the cost of process. The learned Judge observed that the application had been filed too late as the hearing had been fixed for the 31st of July, 1939. He

observed that the long list of witnesses indicated that the application had been filed for the purpose of delaying the trial and was not bona fide; but he said he was disposed to summon the witnesses at the risk of the accused on their bearing the cost of the witnesses; but the pleader for the accused expressed inability to do so. Accordingly he rejected the application.

The argument is that the witnesses named by the accused ought to have been summoned if not as of right at any rate in the exercise of the Sessions Judge's discretion. In this connection reference is made to the procedure in the Sessions Court on 31st July, 1939, when the trial opened. The Sessions Judge amended four of the charges; he added a fresh charge and this it is said entitled the accused under section 291, read with section 231, of the Code of Criminal Procedure to have any witnesses summoned whom the accused might desire to call. A further point taken is that if the Sessions Judge was of opinion that the witnesses should be summoned, he was wrong to make this conditional on any expenses being deposited. The Code of Criminal Procedure contains provisions at several places with regard to the summoning of witnesses and these vary according to the nature of the trial. In a summons case the section applicable is section 244(*2*). In this class of case the magistrate may, if he thinks fit, on the application of the complainant or accused, issue a summons to any witness. Here the issue of a summons is not obligatory and the magistrate has an option to require the parties to produce their own witnesses. In section 244(*3*) there is an express provision that 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. In warrant cases there are separate sections dealing with the summoning of witnesses for the prosecution and witnesses for the defence. Under section 252

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the magistrate is bound to hear the complainant and to take all such evidence as may be produced in support of the prosecution. The magistrate is also to ascertain from the complainant or otherwise the names of persons likely to be able to give evidence and he is to summon such of them as he thinks necessary. The section does not make it obligatory on the magistrate to summon all the witnesses whose names are given him by the complainant. The accused's right in the matter of summoning witnesses is set forth in section 257. On his applying to the magistrate for process for compelling the attendance of any witness or the production of a document, the magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground is to be recorded in writing. Under sub-section (*2*) the magistrate is authorised before summoning any witness on such application to require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in court.

For the procedure for summoning defence witnesses for a sessions trial we must refer to section 211. When a charge has been framed under section 210 the magistrate must require the accused at once to give in a list of the persons whom he wishes to be summoned to give evidence on his trial. The accused is entiteld to have the assistance of the court in obtaining the attendance of all the persons whose names he gives in at once on being required to do under section 211. Section 211(*2*) gives the magistrate a discretion to allow the accused to give in any further list of witnesses at a subsequent time. So in the case before us there was a departure from the procedure contemplated by the Code when the accused presented their list of witnesses not to the magistrate under section 211(*2*) but to the Additional Sessions Judge and probably the most correct procedure for

the Sessions Judge at that time was at once to forward the application to the Committing Magistrate for disposal under section 211(2). The power to accept the supplementary list of witnesses in any case is a discretionary power and the discretion of the magistrate is to be exercised in accordance with section 216 and subject to the provisos in that section. The second proviso is that if the magistrate thinks that any witness is included in the list for the purpose of vexation or delay or of defeating the ends of justice, the magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material and if he is not so satisfied may refuse to summon the witness recording his reasons or may before summoning him require such sum to be deposited as may seem necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses.

Assuming that it was open to the learned Sessions Judge to deal with the application to summon defence witnesses as the case had already come on his file, then the principles which he ought to follow would be the same as those which the magistrate should follow. The learned Judge in fact did give a reason for refusing to summon the witnesses except on their expenses being deposited; and we are not prepared to say that the order passed by the learned Judge was in violation of the law. At the same time we do not wish to be understood as saying that the discretion was wisely exercised. The list presented to the Sessions Judge was not a list of witnesses in addition to the number already summoned but was the first list which had been presented to any officer. It would seem in such a case desirable to summon at least some of the witnesses regarding the effect of whose testimony some explanation could be given. Moreover the trial was not expected to be finished in one day and the witnesses could have been summoned for perhaps the fifth or sixth day of the

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trial which in fact lasted until the 12th August, 1939, so that there would probably have been no real difficulty in obtaining the attendance of the witnesses or the majority of them before the closing of the prosecution case. On the other hand it is not desirable that the presentation of the list of defence witnesses should be postponed till the last minute when the Code contemplates that it should be done at the time when the charge is framed. I may point out here that the magistrate by simultaneously framing the charge and passing the order of commitment on 31st May, 1939, has departed from the order of procedure in section 210 and following sections of the Code. The charge is to be framed and explained to the accused under section 210. He is then to be required to give his list of defence witnesses (section 211), the magistrate being given a discretion to accept a further list at a subsequent time. The magistrate is given a discretion to summon and examine any of the defence witnesses and, on doing so, he may cancel the charge and discharge the accused if he is satisfied that there are no sufficient grounds for commitment (section 213): otherwise he makes an order committing the accused for trial [section 213(*1*)]. It is not of course obligatory on the magistrate to examine defence witnesses with a view to reconsidering the necessity for the charge and for a commitment; but it is undoubtedly the magistrate's duty to see to the obtaining of the list of defence witnesses. If the accused are not ready with their list of witnesses at the date of commitment it is convenient for the magistrate to fix a day, perhaps a fortnight hence, up to which the list of witnesses will be received so as to prevent the matter escaping the notice of the accused or their legal advisers.

Turning back to the facts of this case, I have pointed out above that at the outset of the trial amendments and additions were made to the charges. When such amendments are made after the commencement of the trial, the prosecutor and the accused have

the right not only to recall and resummon any witness who may have been examined but also to call any further witnesses whom the Court may think to be material. A request to summon a fresh witness under this section can, it seems, only be refused on the ground that the evidence of the witness is not thought by the Court to be material. Had the accused after the amendment of the charges made a fresh application or renewed their application to the learned Judge to have defence witnesses summoned, such application could hardly be resisted, but in fact at the trial itself no such application was made and I think it must be taken that the wish on the part of the accused to have those witnesses summoned was abandoned. It is well-known that in sessions trials defence witnesses though they may be in attendance are very seldom in fact examined. That being so, in the present case, I am not prepared to hold that there was prejudice caused to the accused by the procedure followed or by the exercise of his discretion by the Sessions Judge although I may feel that I should perhaps myself have acted differently. * * *

[His Lordship then dealt with the case of the individual appellants which turned on the question whether each of them was sufficiently identified.]

I would therefore accept the findings of the Sessions Judge as to the participation of the individual accused.

It is finally suggested that the convictions under section 302 read with section 149 should not be supported in the case of those accused who were armed not with deadly weapons but only with lathis as in their case it can hardly be said to be established that they took part in the riot knowing that murder was likely to be committed in the prosecution of the common object of the unlawful assembly. That is an argument which of course is to be considered with reference to the facts of each case and in the present instance I do not feel myself able to accede to it

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because the number of persons armed with deadly weapons was so considerable that those who carried lathis must have had good reason to believe that the deadly weapons were likely to be used with deadly effect. The fact that the attacks inflicted did not stop at one victim but that three persons were killed, that of those persons Anandi had 25 injuries, Jhumak had 13 and Biranchi 27, makes it impossible to hold that the intentions of the assembly as a whole were comparatively peaceful and were exceeded by merely one or two members.

I would dismiss the appeal.

CHATTERJI, J.—I agree.

Appeal dismissed.

S. A. K.

APPELLATE CIVIL.

Before Agarwala and Rowland, JJ.

BRAHMDEO NARAYAN

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v.

Jan. 25, 26.

BRAJBALLABH PRASAD.*

Contract Act, 1872 (Act IX of 1872), section 23—sale deed—conveyance being part of consideration for dropping criminal proceeding—consideration for the agreement, whether illegal—suit for refund of unpaid portion of consideration money or for recovery of the land—maintainability.

Whoever is a party to an unlawful contract, if he has once paid the money stipulated to be paid in pursuance thereof, he is not entitled to the help of a court to recover it.

*Appeal from Appellate Decree no. 997 of 1938, from a decision of Rai Bahadur Bhuvaneshwar Prasad Pande, Additional District Judge of Patna, dated the 31st August, 1938, reversing a decision of Babu Jugal Kishor Narayan, Subordinate Judge of Patna, dated the 30th September, 1936.