APPELLATE CRIMINAL.

Before Mr. Justice Otter.

1929

May 13.

AH PHONE

v.

KING-EMPEROR.*

Criminal practice—Prosecution witnesses' failure to establish guilt—Adjournment asked for to search for other witnesses to prove case—Court's duty to refuse adjournment.

Where the witnesses relied on by the prosecution would not give the evidence expected of them and the prosecution endeavoured to put matters right by wanting to make a search in the hope of finding others who would prove more satisfactory and asked for an adjournment, *held*, that the Court should refuse it.

Hay for the applicant.

OTTER, J.—This case is referred by the Sessions Judge, Henzada, with a view to setting aside an order made by the Subdivisional Magistrate, Henzada.

The charge was under section 64A of the Excise Act for earning a livelihood by the sale of illicit *seinye*. On 9th February 1929 the Subdivisional Magistrate issued notice to "all prosecution witnesses to appear on 19th February."

On this day the accused Ah Phone appeared with his advocate; no less than four witnesses were examined for the prosecution. All these persons with one exception denied categorically that the accused was reputed to earn his livelihood by selling illicit *seinye*. A headman however did say that he had heard from some one whom he did not remember and whose accuracy he was not able to vouch for that the accused did earn his levelihood in the manner suggested.

* Criminal Revision No. 151B of 1929 of the order of the Subdivisional (Special Power) Magistrate, Henzada, in Criminal Miscellaneous No. 35 of 1929.

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According to the diary the Court Prosecutor being in this unfortunate position intimated that he would file a further list of additional witnesses later. Thus it is evident that he came to Court intending to base his case upon the evidence of the four witnesses he called. He had already in effect closed his case. In order to allow a roving commission to obtain other evidence the Subdivisional Magistrate adjourned the case. This he certainly should not have done. There was no intimation that further evidence was forthcoming, and it is perfectly clear that as the witnesses relied on by the prosecution would not give the evidence expected of them an endeavour was made to put matters right by making a search in the hope of finding others who would prove more satisfactory, and ordering the accused to attend whenever summoned.

It is true that at a later date three prosecution witnesses are said to have attended the Court, but this application had been filed meanwhile.

The facts I have set out above are taken from the diary in the case, but the Sessions Judge was of opinion that the Magistrate on the conclusion of the hearing on 19th February said he would pass orders later in the day, but instead ordered the adjournment I have referred to ; and moreover the Sessions Judge also thought that the Court Prosecutor was not instructed at all. If so of course the Magistrate is still more to blame for not disposing of the case once and for all. Cases should not be adjourned *sine die* for further evidence unless there is some real foundation for believing that such evidence in fact exists ; and moreover accused persons should not be kept under the shadow of a charge in circumstances such as these. The action of the Magistrate was certainly oppressive.

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There is no doubt of course that cases may arise where evidence is difficult to procure and numerous and lengthy adjournments must be granted, but when once the case is ready for hearing as this case apparently was, adjournments should not be made in order to search for evidence, the existence of which is entirely problematical.

One further point must be referred to. I observe that the Magistrate has sig__d the certificate appearing upon the usual form provided for recording the statement of the accused. The certificate is of course that such statement was taken "in the presence and hearing etc. of the Magistrate." But no statement whatever is recorded. This absurd and irregular action of the Magistrate is on a par with the general conduct of the proceedings which I have already described.

The order of 19th February 1929 is set aside, and the proceedings instituted on 22nd January 1929 are quashed.