MISCELLANEOUS CRIMINAL.

Before Mr. Justice Harrison.

1926

Dec. 17

SAI—Petitioner

versus

THE CROWN—Respondent.

Criminal Miscellaneous No. 183 of 1926.

Criminal Procedure Code, Act V of 1898, sections 526 and 476 A—Transfer—grounds for—Complainant and Court—identical—Indian Penal Code, 1860, section 193—False evidence—contradictory statements—alternative charges.

The accused made contradictory statements as a witness in proceedings before the Sessions Judge who lodged a complaint, under section 476 A of the Criminal Procedure Code, with the District Magistrate. This complaint stated specifically that the *second* of the two statements was false. D.R.B., the Magistrate to whom the complaint was forwarded for disposal, after examining the witnesses, framed a charge of false evidence in respect of the second statement only and convicted the accused. The appeal came before the same Sessions Judge who accepted it to the extent of ordering a re-trial, whereupon, the accused petitioned the District Magistrate for transfer of the case from the Court of D.R.B. on the ground that the Magistrate had already made up his mind. The petition was rejected, and the accused then applied to the High Court for revision of the District Magistrate's order.

Held, that the accused was entitled to a decision from a Judge who approached his case with an absolutely open mind, and that the order of the Sessions Judge must be set aside on the ground that he could not be allowed to be both complainant and Judge in the same case.

Held further, (in the circumstances) that under the principle *nemo debet bis vexari*, as the initial mistake of not framing the charge in the alternative, was due to the form of the Sessions Judge's complaint, it was inadvisable to allow the fresh trial to proceed.

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Application for transfer of the case, from the Court of Lala *Daulat Ram, Bodhwar, Additional District Magistrate, Shahpur, at Sargodha, to some other competent Court.*

NIAZ MUHAMMAD, for Petitioner.

RAM LAL, Assistant Legal Remembrancer, for Respondent.

ORDER.

HARRISON J.—This is an application for transfer. It does not disclose the real flaw in the proceedings. The facts are briefly that in a section 304 case, in which Maulu absconder was tried and eventually convicted, his appeal being dismissed by the High Court, one Sai gave evidence to the effect that a man named Maulu was one of the assailants but that it was not the Maulu before the Court but a man of different parentage. In the first and second trials, therefore, this man Sai had named one Maulu as one of the assailants, but gave his father's name as Amir on one occasion and Muhammad on the other. This contradicted his previous statement and the Sessions Judge took action and sent a complaint to the District Magistrate under section 476-A of the Criminal Procedure Code. In this it was stated that the last statement of Sai accused "was decidedly false and was deliberately made with a view to help Maulu, son of Amir, in the case under section 304, Indian Penal Code." The eighth paragraph of the complaint runs as follows:—"That as Sai has given false evidence in the Court of Mr. Vishnu Bhagwan in his statement dated 2nd December 1924 (*i.e.*, his statement of the last trial). he is guilty of an offence under section 193, Indian Penal Code." A list of witnesses was sent with the complaint. The

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case was entrusted to Mr. Daulat Ram, Budhwar, by the District Magistrate. He proceeded to examine the witnesses, framed a charge to the effect that the last statement was false, and eventually convicted the accused and sentenced him to four years' rigorous imprisonment. On appeal the learned Sessions Judge wrote an order to the effect that the Magistrate had relied on the finding of the Sessions Court and the High Court in the previous trial, and that there was no data on the present record for a finding as to which of the two statements made by the accused was false. The judgment goes on: "Possibly if the Magistrate had framed an alternative charge that one or the other of the two statements of the accused was false, there would have been some reason for the conviction, but as the charge and the record stand at present, there is not an iota of evidence to substantiate the charge". The Sessions Judge, therefore, accepted the appeal, set aside the conviction and directed that Sai should be retried. Sai applied for transfer to the District Magistrate on the ground that Mr. Daulat Ram, Budhwar, had already made up his mind, and I think it would have been well had the District Magistrate granted his prayer. Sai did not then nor even when applying to this Court take the ground that the same officer was the complainant and the appellate Court. He now applies for revision of the District Magistrate's order. I propose to deal with the matter on the ground, which has not been raised, namely, that it is impossible to allow the same Judge or the same Magistrate to be the complainant and the Court.

It is urged and truly that the Sessions Judge's order is in favour of the accused in the sense that it gives him another chance though a very poor one. It

is not on the ground that the Sessions Judge is in any way biased that I take exception to the procedure, but merely on the ground of his identity with, or rather his being, the complainant. He must have believed that the accused had committed an offence or it would have been wholly impossible for him to lodge a complaint. The accused is entitled to a decision both in the trial Court and on appeal from a Judge who approaches his case with an absolutely open mind.

There is a further objection that the real trouble in this case is that the charge was not in the alternative, and the reason why the charge was not in the alternative was that the complaint was not in the alternative for it definitely stated that the last statement of the accused was false and asked for a decision on this point and on this point alone. Naturally enough the Magistrate, even, if he noticed the defect in the complaint presented by his superior officer, did not draw any attention to it, and proceeded to try that complaint as lodged and to hear the witnesses, whom he had been directed to hear. The Sessions Judge now realises apparently that the form in which he drew up the complaint was wrong. He does not order a fresh charge in the alternative, which would require no further evidence at all, but perseveres in the matter, asking for a conviction on a finding that the last statement is untrue, and directs the Magistrate to rehear the whole of the material evidence in the section 304 case and to come to a decision on the point, which has been decided both by the Sessions Judge and by the High Court, and not to allow himself to be influenced in any way by those previous decisions.

To say the least of it, this would necessitate an enormous amount of unnecessary labour, a terrible

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waste of time. The District Magistrate has complained of the expense already incurred in this case and that expense would be very much increased if the order of the Sessions Judge were carried out. This, however, is no sufficient ground for interference. The reasons why I think the proceedings must be quashed and not re-opened are: (1) that the complainant and the appellate Court are one and the same; and (2) that I do not think it right that the accused should have to submit to a fresh trial because the initial mistake was made of not framing the charge in the alternative. It would not be illegal but I think most inadvisable to allow such a fresh trial and the principle of *nemo debet bis vexari* applies in the spirit if not in the letter. The accused has undergone one month's imprisonment and a great deal of trouble and anxiety and also considerable expense, and I think he has been punished enough for any offence he may have committed.

I accept the application and quash the proceedings.

N. F. E.

Application accepted.