

MISCELLANEOUS CRIMINAL.

Before Mr. Justice Tek Chand.

CHIRANJI LAL—Petitioner,

versus

THE CROWN—Respondent.

Criminal Miscellaneous No. 158 of 1927.

1927

Oct. 22.

Criminal Procedure Code, Act V of 1898, section 526—Transfer of case—ground for—Duty of Magistrate—to exercise his own judgment—Sub-section (8) —Postponement—necessity for—where Court is informed of intention to apply to High Court for transfer.

Where a Magistrate on hearing a bail application announced that personally he was inclined to grant bail but before passing orders he would like to consult the District Magistrate, and then actually consulted the latter on the telephone and according to his advice rejected the application.

Held that the action of the Magistrate was highly improper and contrary to the elementary principles of the administration of justice according to which a judicial officer, dealing with a matter pending before him, must exercise his own independent judgment after hearing the parties and not give decisions according to the opinion of his superior officers.

In this case the trial Magistrate showed anxiety to commence the trial on an incomplete *challan* within a few hours of the service of the summons on the accused ; rejected his applications under sections 341 and 526 for adjournment ; ordered the prosecution of the first witness the moment he retracted his former statement implicating the accused ; and then of his own accord adjourned the case without examining the remaining witnesses as soon as it was discovered that the second witness did not give direct evidence as to the guilt of the petitioner.

Held that these incidents necessitated the transfer of the case to another Court.

Sergeant v. Dale per Lush J. (1) and *Amar Singh v. Sadhu Singh* (2), followed.

(1) (1877) 2 Q. B. D. 558.

(2) (1925) I. L. R. 6 Lah. 396.

1927

CHIRANJI LAL
v.
THE CROWN.

In re McCarthy (1), per Lord Hewart C. J., and *Sardari Lal v. Crown* (2), referred to.

Held also, that under the amended section 526 (8) of the Criminal Procedure Code, as soon as the Public Prosecutor complainant or the accused person notifies to the Court his intention to make an application to the High Court for transfer, the Magistrate is bound to adjourn the case, and it is not competent to him after such an application has been made to record any evidence at all.

Sartaj Singh v. Emperor (3), followed.

Application for transfer of the case Crown v. Chiranji Lal, from the Court of Mr. Taj-ud-Din, Magistrate, 1st class, Ambala, to a Court of competent jurisdiction at Lahore or elsewhere.

RAM LAL, ANAND, for Petitioner.

GOVERNMENT ADVOCATE, for Respondent.

ORDER.

TEK CHAND J. TEK CHAND, J.—This is a petition under section 526, Criminal Procedure Code, for transfer to another district of a criminal case pending against the petitioner, Charanji Lal, in the Court of Mr. Taj-ud-Din, Magistrate, 1st class, Ambala. The petitioner, who is the *ex-Principal* of the Benarsi Das High School and Vice-President of the Cantonment Board at Ambala, has been challaned under section 377, Indian Penal Code, for having committed unnatural offence with one of his pupils, Raj Kumar, Sharma (P. W. 1), a youth 15 or 16 years old.

The petition is an unnecessarily lengthy document and contains a large number of allegations, several of which are either irrelevant to the point before me or have not been proved. I do not, therefore, think it necessary to deal at length with all

(1) (1924) 1 K. B. 256. (2) (1922) I. L. R. 3 Lah. 443.

(3) (1924) 83 I. C. 699.

the contentions raised, but propose to confine myself only to incidents which occurred before the Magistrates in their judicial capacity, and to base my decision on matters, which are either admitted by both parties or with regard to which there was no controversy at the Bar. There is, however, one matter on which the affidavit filed by the petitioner and the explanation furnished by the District Magistrate do not agree and to which reference seems to be necessary at the very outset. It is alleged by the petitioner that he, in his capacity as a member of the Cantonment Board and as an officeholder of various political and other associations, had on several occasions advocated and pressed views on public matters which were opposed to those of the Deputy Commissioner (Mr. Fyson); that by so doing he had incurred the displeasure of the latter; and that for this reason Mr. Fyson was using his position and powers as District Magistrate to harm him. After considering the arguments of the learned counsel for the petitioner and reading the explanation of the District Magistrate, I have no hesitation in rejecting the petitioner's contentions in this behalf and hold that there is no foundation for the suggestion that because of his activities as a member of the Cantonment Board and other public bodies the petitioner will not have a fair and impartial trial in the Ambala District.

1927

CHIRANJI LAL

v.
THE CROWN.

TEK CHAND J.

The facts leading to the institution of criminal proceedings against the petitioner, so far as they can be gathered from the record and the affidavits placed before me, are as follows:—

On the 8th June, 1927, an application (Ex. P. A.), purporting to be written by Raj Kumar Sharma

1927

CHIRANJI LAL

v.
THE CROWN.

DEK CHAND J.

and containing serious allegations of misconduct against the petitioner, was received by the Inspector of Schools, Ambala Division. On the 13th of June Raj Kumar is said to have made a lengthy statement (Ex. P. B.), to the Inspector of Schools, in which he stated that the petitioner had committed unnatural offence with him on certain specified occasions.

The Inspector of Schools discussed the matter with *Rai Bahadur* Benarsi Das, the proprietor of the School, as well as with Mr. Fyson, District Magistrate, Ambala, who was then at Kasauli. Shortly afterwards the petitioner was dismissed from the School, and on the 27th June he was arrested by the Superintendent of Police. On the same day an application for his release on bail was presented before Mr. Said Zaman Khan, Cantonment Magistrate. The Magistrate heard arguments in support of the application, but instead of making up his mind as to whether he should grant or refuse the application, he put himself in communication on the telephone with the District Magistrate, who was then at Kasauli. The petitioner in his affidavit alleges that the Magistrate did so with a view to take instructions from the District Magistrate as to what order he should pass on the bail application. Another affidavit has been filed by one Captain G. D. Ram, Medical Practitioner, Ambala, in which the deponent states that on the 27th of June, 1927, he had gone "to the Court of *Sardar* Said Zaman Khan, Cantonment Magistrate, along with many other leading residents of Ambala, to watch the proceedings of the bail application that had been presented on behalf of Charanji Lal", but the Cantonment Magistrate stated in open Court "that he was personally inclin-

ed to grant the bail", but for certain reasons "he would like to consult the District Magistrate on the phone at Kasauli, where he was on that day", and that on the 28th the bail application was refused by the Magistrate, "who stated that he had done so in compliance with the instructions received on the phone from the District Magistrate."

In the explanation that he has sent up to this Court, the District Magistrate states that "the Cantonment Magistrate consulted me by telephone and was advised of the reasons of refusing bail, namely, to protect the school boys, to prevent an escape and tutoring of witnesses."

From the above it would appear that the Cantonment Magistrate, Mr. Said Zaman Khan, did not dispose of the application according to his own view of the matter but acted in accordance with the instructions received by him from the District Magistrate. Now it is quite clear—and indeed it has not been denied on behalf of the Crown—that in dealing with the bail application Mr. Said Zaman Khan was acting judicially and in deciding what orders he should pass on the application he ought not to have taken instructions from the District Magistrate or any other superior authority. If the learned Magistrate felt that all the necessary facts had not been placed before him, the proper course to follow was to ask the Public Prosecutor to take further and fuller instructions from the Police or the Inspector of Schools and to present in open Court the case for the Crown against the petition for bail, and then after hearing the petitioner's counsel to pass such orders as he deemed fit. The learned Government Advocate has frankly admitted that he is unable to support the

1927

CHIRANJI LAL
v.
THE CROWN.
TEK CHAND J.

1927
 CHIRANJI LAL
 v.
 THE CROWN.
 TEK CHAND J.

action of the Magistrate on legal grounds and says that all that he can urge in justification is that subordinate Magistrates sometimes consult District Magistrates in such matters. Now this is a position, which I can, under no circumstances, accept. It is one of the elementary principles of administration of justice that a judicial officer, who is called upon to decide a matter in controversy, must exercise his *own* independent judgment, after hearing the parties concerned. It is the privilege as well as the duty of the presiding officer of a Court of justice to form his own opinion on the point before him and to act accordingly. He ought not, as if it were, to mortgage his mind to another officer and to seek instructions from the latter, whenever he is called upon to decide a difficult or important matter. A Magistrate, who does so, abdicates his proper functions and discloses a lamentable lack of sense of responsibility.

I have no doubt whatever that in this particular case both the Cantonment Magistrate in consulting the District Magistrate and the latter in advising him in connection with the orders to be passed on the bail application acted with the best of intentions, but it cannot be denied that such action on their part was highly improper and was certainly calculated to raise a reasonable apprehension in the mind of the petitioner such as to bring the case within the rule laid down by Lush J. in the well-known case of *Serjeant versus Dale* (1), which is regarded by the Courts in England and India as the leading authority on the subject of transfer of cases.

(1) (1877) 2 Q. B. D. 558.

Turning back to the proceedings in the case we find that on the rejection of the bail application by Mr. Said Zaman Khan, the petitioner moved the Sessions Judge, who accepted his petition and ordered his release on bail.

1927
 CHIRANJI LAL
 v.
 THE CROWN.
 TEK CHAND J.

In the meantime the boy, Raj Kumar, was produced by the police before Mr. Said Zaman Khan, Cantonment Magistrate, to make a statement on oath in the absence of the petitioner. That statement is not among the papers that are before me, but it is admitted by both parties that before Mr. Said Zaman Khan, the deponent retracted the allegations, which he had made before the Inspector of Schools imputing misconduct to the petitioner.

On the 30th of June 1927, which was a public holiday, the police took Raj Kumar to the Savoy Hotel and once again produced him before another Magistrate, Mr. Keelan, who recorded his statement under section 164, Criminal Procedure Code (Ex. P. C.). In this statement Raj Kumar practically reiterated what he had stated before the Inspector of Schools on the 13th of June and specifically stated that on several occasions the petitioner had committed unnatural offence with him.

On the 5th July, 1927, the police sent up an incomplete challan against the petitioner under section 377, Indian Penal Code, and this was made over by the District Magistrate to Mr. Taj-ud-Din, Treasury Officer and Magistrate, 1st class, for trial. In the challan eight witnesses were named. On the 5th the Magistrate, Mr. Taj-ud-Din, issued summons to the petitioner to appear in his Court to take his trial on the next day (6th of July). The petitioner was served on the morning of the 6th and appeared in Court at

1927
CHIRANJI LAL
 v.
THE CROWN.
 TEK CHAND J.

10 A.M. As soon as the case was called, an application, under section 344, Criminal Procedure Code, for adjournment was presented on his behalf, it being urged that he had been served only 3 hours before; that he wanted time to get copies of the statements made by witnesses to the police or before Magistrates under section 164; and that his leading counsel, *Sardar* Jhanda Singh, was out of station on account of the Muharram holidays. This application was rejected by the Court on the ground that another Advocate, *Lala* Sri Ram, was present in Court on behalf of the petitioner.

The petitioner then presented another application under section 526 (8) stating that he intended to apply for the transfer of the case from the Magistrate's Court and praying that the case be adjourned to enable him to do so. In this application it was not stated in so many words that the applicant wanted to move the High Court for transfer, but the application was made under section 526 (8) and if the learned Magistrate had taken the trouble of reading that section, he would have discovered that it applies only when a party asks for an adjournment on the ground that he intends to move the High Court. The Magistrate, however, passed the following order :—

“The applicant does not disclose where to an application for transfer is to be made. Section 528 relates to such applications to be made to the District Magistrate and further on it is not imperative to stop the proceedings when the witnesses were present in Court. I will record the evidence in Court and allow the accused time to make application as desired and I remember such is the practice in

cases like this where unnecessary adjournments are sought. Under the circumstances I disallow the application and proceed with the case ”.

1927
 CHIRANJI LAL
 v.
 THE CROWN.
 TEK CHAND J.

As already pointed out the application purported to be under section 526, and it is surprising how the learned Magistrate assumed that the petitioner intended to move the District Magistrate under section 528, Criminal Procedure Code, for transfer. It is hardly necessary to point out that under the amended section 526 (8) as soon as the Public Prosecutor, complainant or the accused person notifies to the Court his intention to make an application to the High Court for transfer, the Magistrate is bound to adjourn the case and it is not competent to him after such an application has been made to record any evidence at all, see *inter alia*, *Sartaj Singh versus Emperor* (1).

The application having been rejected, the trial of the petitioner commenced and the first witness examined was the boy, Raj Kumar. In his examination-in-chief, Raj Kumar went back on the statements which he made before the Inspector of Schools as well as before Mr. Keelan. On this the Public Prosecutor applied and was granted permission to cross-examine him as a hostile witness. In cross-examination he stuck to what he had stated before and alleged that he had written the petition to the Inspector of Schools at the dictation of one Shugan Chand (who in the affidavit is described as a bitter enemy of the petitioner); he alleged that what he had stated before Mr. Said Zaman Khan was true, and that on the 30th June, as soon as he returned from

1927

CHIRANJI LAL

v.

THE CROWN.

TER CHAND J.

Muradabad, he was arrested by the police and brought in handcuffs before Mr. Keelan at the Savoy Hotel, and that his statement before that officer had been made under pressure. As soon as the examination of Raj Kumar was over, the Public Prosecutor presented an application to the Court, stating that the evidence given by Raj Kumar in Court was false, and that he having gone back on the statement which he made on solemn affirmation before Mr. Keelan on the 30th of June, proceedings under section 476, Indian Penal Code, should be taken against him with a view to prosecute him for perjury. The learned Magistrate stopped further proceedings in the case, and then and there called upon Raj Kumar to show cause why he should not be prosecuted under section 193, Indian Penal Code. In reply Raj Kumar said that what he had stated in Court was true and that his statement before Mr. Keelan was not voluntary, but had been made under pressure. On this the Magistrate passed an order making a complaint against Raj Kumar for having committed an offence under section 193, Indian Penal Code, and sent it to the District Magistrate for trial either in his own court or in that of any other Magistrate; Raj Kumar being directed to furnish security for Rs. 1,000, or in default to be kept in the judicial lock-up. This complaint was in due course made over by the District Magistrate to *Sardar* Budh Singh, Magistrate, for trial.

The learned Magistrate then resumed the trial and examined the second witness, Anant Ram, Head Master, H. M. High School, Ambala, but this witness did not give any direct evidence against the petitioner. Though at least one other witness for the

prosecution was present in court, the Magistrate did not examine him, but passed an order adjourning the case to the 16th of July on the ground that he had "a lot of treasury work to do."

1927
 CHIRANJI LAL
 v.
 THE CROWN.
 TEK CHAND J.

On the 13th July, the petitioner moved this court for transfer of the case and an *ad interim* order was passed staying further proceedings.

It is quite clear from what has been stated above that the proceedings before the learned Magistrate on the 6th of July were conducted in such a way as to give rise to a reasonable apprehension in the mind of the petitioner that he will not have a fair and impartial trial in his court. The manner in which the applications under sections 341 and 526 were rejected; the anxiety to commence the trial on an incomplete challan within 3 hours of the service of the summonses on the petitioner; the haste with which proceedings under section 476 against Raj Kumar (P. W. 1) were started the moment he retracted his former statements implicating the petitioner; and the adjournment of the case without examination of the remaining witnesses as soon as it was discovered that the second witness did not give any direct evidence as to the guilt of the petitioner, are incidents which necessitate the transfer of the case to another court. These incidents do not necessarily prove the existence of any real bias in the mind of the Magistrate against the petitioner but, as pointed out by the learned Chief Justice in *Amar Singh versus Sadhu Singh* (1), "in dealing with an application for transfer the court has to consider not merely whether there has been any real bias in the mind of the presiding Judge against the applicant, but

1927

CHIRANJI LAL

v.

THE CROWN.

BEK CHAND J.

whether incidents may not have happened which, though they may be susceptible of explanation, are nevertheless such as are calculated to create in the mind of the accused person a justifiable apprehension that he will not have an impartial trial." See also the observation of Lord Hewart L.C.J. in the recent English case *In re McCarthy* (1), and of Broadway J. in *Sardari Lal v. Crown* (2), where the case-law on the subject is discussed at length. For the foregoing reasons I am constrained to allow the application for transfer and to withdraw the case from the court of Mr. Taj-ud-Din. Both counsel were agreed that in the event of this court deciding to transfer the case from the court of Mr. Taj-ud-Din there was no other Magistrate at the head-quarters of the Ambala District competent to try it as the District Magistrate and the other Magistrates have in some form or another taken part in the investigation and the case cannot be sent to any of them for trial. A transfer to another district is, therefore, necessary. The learned counsel for the petitioner suggested that the case should be tried in the neighbouring district of Ludhiana or Karnal, but the learned Government-Advocate pointed out that, having regard to the fact that the case has roused considerable local feeling at Ambala and in the neighbourhood, and that the petitioner appears to have influential friends and enemies there, it would be proper to send it to a convenient place outside the Ambala Division, where there is no likelihood of the witnesses being harassed by either side. After fully considering the matter, and more especially having regard to all that has already

(1) (1924) 1 K. B. 256.

(2) (1922) I. L. R. 3 Lah. 443.

happened, I find myself in agreement with the suggestions of the learned Government Advocate and direct that this case be tried at Hoshiarpur.

Accordingly I allow the petition, withdraw the case from the court of Mr. Taj-ud-Din, Magistrate, 1st Class, Ambala, and refer it for trial to Mr. E. M. Jenkins, District Magistrate, Hoshiarpur, who will proceed to hear it with all convenient speed fixing dates on which it may be possible for him to examine all the witnesses who come from Ambala, or as many of them as may be possible.

Before concluding, I wish to point out that nothing contained in this order should, in any way, be construed as giving the slightest indication of the views of this court on the merits of the allegations against the petitioner or as to the truth or otherwise of the assertions made in his affidavit that he is a victim of intrigue. These are matters for enquiry and determination by the trial Magistrate hereafter.

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Application accepted.

1927

CHIRANJI LAL

v.

THE CROWN.

TEK CHAND J