

used for Parsee ceremonials and functions whose nature and character were familiar to the plaintiff. In two of her letters the plaintiff approved of the building and added that it would add to the amenities of the adjacent sites. His Lordship held that the plaintiff had full knowledge of the facts, and by her acquiescence was not entitled to an injunction.

His Lordship discussed the evidence as to damages. The plaintiff alleged that she had difficulty in getting purchasers for sites near the hall and on account of it. His Lordship held that there was no evidence to support the allegation and that the defendants had successfully established that the hall had enhanced the value of the locality. His Lordship dismissed the suit with costs.]

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SERENE  
COWASJEE  
v.  
N. M.  
COWASJEE.  
SEN, J.

## CRIMINAL REVISION.

*Before Mr. Justice Mya Eu.*

D. K. NATH v. P. K. NATH.\*

1936  
Sept. 25.

*Complaint—Compensation for frivolous complaint—Duty to examine all the witnesses produced by complainant—Refusal to issue commission to examine a witness—Legality of discharge—Criminal Procedure Code (Act V of 1898), ss. 250, 252.*

A magistrate examined all the witnesses produced by the complainant who had charged the accused with an offence punishable under s. 380 of the Penal Code. The magistrate refused to issue a commission to examine a witness for the complainant residing in India on the ground that his evidence was not material. On the evidence before him the magistrate held that the complaint was frivolous, discharged the accused and awarded him compensation under s. 250 of the Criminal Procedure Code. The complainant applied to the High Court for revision on the ground that all the evidence he wanted to adduce had not been taken by the Court.

*Held*, that the magistrate had taken all the evidence that was produced by the complainant, and had rightly refused to issue a commission and therefore his order of discharge was legal and the order for compensation valid.

*Shwe Zin v. Maung Tun Hla*, 1 L.B.R. 44, referred to.

*Parthasarathi v. Ayyar*, I.L.R. 51 Mad. 337, distinguished.

\* Criminal Revision No. 564B of 1936 from the order of the Second Additional Magistrate of Rangoon in Criminal Regular Trial No. 87 of 1936.

1936  
NATH  
v.  
NATH.

MYA BU, J.—This matter comes to this Court on a reference by the Sessions Judge of Hanthawaddy under section 438 of the Criminal Procedure Code. The reference was made upon the application of the petitioner, D. K. Nath, against whom an order under section 250 (1) of the Criminal Procedure Code had been made by the Second Additional Magistrate of Rangoon in the prosecution launched by the petitioner against the respondent, P. K. Nath, upon a complaint for an offence punishable under section 380 of the Indian Penal Code. The Magistrate having taken the evidence of all the witnesses who were produced by the petitioner made an order of discharge of the respondent and ordered the petitioner to pay compensation of Rs. 50 upon the ground that his complaint was false and vexatious.

It is not contended that upon the facts of the case this Court should, in revision, interfere with the findings arrived at by the Magistrate upon the evidence: but the petitioner's application has been prosecuted on the ground that it is only after the examination of all the witnesses that the complainant wanted to examine the Magistrate could, in law, come to the conclusion that the case was false and vexatious.

What happened in this case is that in the first list of witnesses filed by the petitioner on the 9th April, 1936, he mentioned the names of six witnesses, but in a later list filed by him on the 7th May, 1936, he mentioned the names of four additional witnesses: on the 12th May four witnesses of the first list and three of the second list—seven witnesses in all—were examined, two witnesses of the first list and one of the second list being absent. One of the witnesses mentioned in the second list was a man named T. M. Nath, and he was one of the absentees on the 12th May. The Court directed issue of fresh summons to

the three absent witnesses. On the 30th May, 1936, a third list containing only one witness named Abdul Rasid was filed and summons was issued for his attendance. On the 5th June, when the case was called on for hearing, Abdul Rasid was the only one present, while two of the witnesses of the first list and T. M. Nath of the second list, who were absent on the 12th May, were unserved. The evidence of Abdul Rasid was duly taken and the learned advocate for the petitioner waived the examination of the three witnesses but asked that T. M. Nath might be examined on commission in Chittagong. In support of his request he stated certain grounds which, the learned Magistrate rightly held, did not show that T. M. Nath's evidence would be material to the fate of the prosecution. These are the circumstances under which it is complained on behalf of the petitioner that all the evidence the complainant wanted to adduce had not been taken by the Court, and it is upon this ground that the order for payment of compensation has been challenged relying on the authority of *Parthasarathi Naicker v. T. Krishna-swami Ayyar* (1), in which a single Judge of the Madras High Court, in a case where a Magistrate after hearing only five of the prosecution witnesses and without taking the rest of the evidence, as he thought that the remaining witnesses would not materially help the case, discharged the accused and awarded compensation to him, held that it was only after the examination of all the evidence that the complainant wanted to adduce that the Magistrate could come to the conclusion that the case was false and vexatious and award compensation under section 250 of the Criminal Procedure Code. Upon the facts of that particular case I have no reason to doubt the correctness

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(1) (1927) I.L.R. 51 Mad. 337.

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of that decision : but the clause : "it was only after the examination of all the evidence that the complainant wanted to adduce", in my opinion, with all respect, puts the matter too broadly.

In *Shwe Zin and Queen-Empress v. Maung Tun Hla and three others* (1), which arose out of a summons case in which after examining the complainant and one witness and without examining the other witnesses offered by the complainant, which the Magistrate was bound to do under section 244 of the Criminal Procedure Code, the Magistrate discharged the accused person and ordered the complainant to pay compensation under section 250 of the Criminal Procedure Code, it was held that the provisions of section 250 could only be applied when the discharge or acquittal was legal. This, I have no doubt, is correct.

The sole criterion, therefore, is whether the order of discharge in this case was legal, and it turns upon whether the Magistrate before making his order of discharge examined the witnesses tendered on behalf of the prosecution, which he was bound to do under section 252 of the Criminal Procedure Code, under which the Magistrate shall take all such evidence as may be produced in support of the prosecution. In the present case it is perfectly clear that the Magistrate took all the evidence that was produced by or on behalf of the complainant. It cannot be said that the omission to issue a commission for the examination of T. M. Nath, or, to be more accurate, the omission on the part of the Second Additional Magistrate to move the District Magistrate for issue of a commission for the examination of T. M. Nath at Chittagong, was a refusal to take the evidence which was produced in support of the prosecution. Evidence taken on commission is

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(1) 1 L.B.R. 44.

not evidence until it is received in the case and, in my opinion, it is not correct to say that when a Magistrate, for sufficient reasons, refuses to issue a commission, or to move the District Magistrate for issue of a commission for the examination of a witness in a criminal trial, he has refused, or omitted, to take the evidence produced in support of the prosecution. If it be otherwise, a cunning complainant will always be able to safeguard himself not only against the risk of an order under section 250 of the Criminal Procedure Code being made against him but also even against the likelihood of an order of discharge of the accused by including in his list of witnesses the name of an unimportant or fictitious witness living at a great distance from the Court whose evidence cannot but be taken on commission at great expense and inconvenience to the Court and to the accused person.

In my opinion, the order of discharge is perfectly legal in the present case, and accordingly there is no legitimate ground of invalidity of the order under section 250 of the Criminal Procedure Code.

In the result I direct that the petitioner's application for revision be dismissed, and the order for compensation under section 250 of the Criminal Procedure Code maintained.

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NATH  
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NATH.

MYA BU J