APPELLATE CRIMINAL.

Before Skemp J.

1935

May 10.

KHUDA BAKHSH (CONVICT) Appellant,

versus

THE CROWN, Respondent.

Criminal Appeal No. 385 of 1935.

Criminal Procedure Code, Act V of 1898, section 257, proviso : *Accused refusing to cross-examine witnesses and to answer questions both before and after charge was framed — whether entitled to have the witnesses re-called for cross-examination.*

The appellant at the trial refused to cross-examine any of the prosecution witnesses and to answer any questions both before and after the charge was framed. On the date fixed for arguments, appellant engaged counsel who requested the Magistrate to re-call all the witnesses for cross-examination. This the Magistrate refused to do.

Held, that the Magistrate was justified in doing so. The accused was " mute of malice " and the *proviso* to section 257, Criminal Procedure Code, was enacted to deal with cases like this.

Chint Ram v. *Emperor* (1), distinguished.

Appeal from the order of Dewan *Vidya Sagar, Magistrate, 1st Class, with enhanced powers under Section 30, Criminal Procedure Code, Lahore, dated 2nd February, 1935, convicting the appellant.*

S. D. KITCHLEW, for Appellant.

M. TUFAIL, for GOVERNMENT ADVOCATE, for Respondent.

SKEMP J.

SKEMP J.—The appellant Khuda Bakhsh has been convicted under section 307 of the Indian Penal Code of an attempt to murder one Mohammad Bashir and sentenced to five years' rigorous imprisonment. He has further been ordered to furnish security under

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section 106, Criminal Procedure Code to keep the peace for three years after the expiry of sentence and himself execute a bond in the sum of Rs.3,000 with two sureties for that amount. He has appealed through Dr. Kitchlew.

The first point taken in appeal is that the Magistrate did not comply with the provisions of section 257 of the Code of Criminal Procedure. At an early stage of the case, the accused applied and was granted an adjournment to make an *oral* application for transfer of the case, but his application for transfer was refused by the Additional District Magistrate. The case was then returned to the trying Magistrate. This was before the conclusion of the first witness for the prosecution, the medical witness. Thereafter, the accused refused to cross-examine any of the witnesses, although asked when each prosecution witness was examined. After the seventh prosecution witness, the accused was examined under section 342 of the Code of Criminal Procedure, but refused to answer questions. After the charge was framed, he again refused to answer questions; the Magistrate called up one by one all the prosecution witnesses, excepting the medical witness, and the accused asked them no questions. The Magistrate then took some more prosecution witnesses who were also not cross-examined, though the accused was given an opportunity to do so, and then, at the request of the prosecuting Sub-Inspector, adjourned the case for arguments. On the date fixed for arguments, the accused engaged counsel who requested the Magistrate to recall all the prosecution witnesses for cross-examination. The Magistrate refused. In my opinion, he was entirely justified in so doing. The accused was " mute of malice " and the *proviso* to section 257, Criminal

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Procedure Code, was enacted to deal with cases like this. It runs: "provided that, when the accused has cross-examined or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the purposes of justice." The accused had been given ample opportunity for cross-examination and it would not have been reasonable to put the Crown to the expense or the witnesses to the trouble of appearing again.

Dr. Kitchlew referred to *Chint Ram* v. *Emperor* (1). That was a political case in which the accused declined to cross-examine the prosecution witnesses and made a statement. After the charge had been framed, however, "he apparently changed his mind and claimed that all the prosecution witnesses should be re-called for cross-examination. They were re-called six days later and when all the prosecution witnesses were present, the accused professed his inability to cross-examine them on the ground that he had not been furnished with a copy of their statements. He further stated that, if the Court considered that the witnesses could not be re-called again for cross-examination, he would summon them as his defence witnesses. The Magistrate declined to allow the accused an opportunity to cross-examine the witnesses or to summon them as defence witnesses." A learned Judge of this Court said that as the accused did not know the names of the prosecution witnesses when they attended for cross-examination by him he could not cross-examine them properly without obtaining copies of their depositions, and the refusal

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of the Magistrate to re-summon these witnesses was unreasonable and had prejudiced the trial. This opinion, however, is *obiter*, because the learned Judge accepted the appeal on the merits and finished by saying: "If I had held that there was a *prima facie* case against the appellant, I would have considered the necessity of allowing the applicant an opportunity to further cross-examine the prosecution witnesses, but, in view of my opinion on the merits of the case, it is not necessary to do so." It is, moreover, clear that the opinion was expressed on the particular facts of that case, which were more favourable to the accused than the present facts.

[*The remainder of the judgment is not required for the purpose of this report.*—Ed.]

A. N. C.

APPELLATE CIVIL.

Before Young C. J. and Abdul Rashid J.

1935

May 13.

PUNJAB CO-OPERATIVE BANK, LAHORE (PLAINTIFF) Appellant

versus

PARMA NAND AND ANOTHER (DEFENDANTS) Respondents.

Civil Appeal No. 53 of 1935.

Negotiable Instruments Act, XXVI of 1881, section 76 (c) : Letter confirming the loan (made on a promissory note)— whether implies a promise to pay — and renders presentation of the note for payment unnecessary.

Held, that the word ' promise ' as used in section 76 of the Negotiable Instruments Act may be either an express or implied promise and, therefore, the letter by the defendant ' confirming ' the loan made to him on a promissory note, payable on demand, amounted to ' a promise to pay ' within the meaning of clause (*c*) of the section, and rendered presentation of the promissory note for payment unnecessary.