FULL BENCH.

Before Young, C. J. and Addison and Monroe JJ.

1936

Jan. 14.

MUSSAMMAT NIAMAT—Appellant

versus

THE CROWN—Respondent.

Criminal Appeal No. 964 of 1935.

Criminal Trial — Evidence not produced before Committing Magistrate — whether can be produced by prosecution in the Sessions Court — Criminal Procedure Code, Act V of 1898, Chapter XVIII, sections 208 (1) (3) to 219.

Held, that the prosecution is not debarred from producing in the Sessions Court evidence which has not been produced in the Committing Magistrate's Court, but that only those witnesses who were examined in the Magistrate's Court can be bound down to attend in the Sessions Court.

Khan Mohammad v. *The Empress* (1), *Emperor* v. *Jhabwala* (2), *Emperor* v. *Soopi* (3), and *Bhat* v. *Emperor* (4), relied upon.

Sher Bahadur v. *The Crown* (5), dissented from.

Appeal from the order of Sardar *Teja Singh, Sessions Judge, Shahpur at Jhang, dated 25th July, 1935, convicting the appellant.*

B. R. PURI and ZAHUR-UD-DIN NAQSHBANDI, for Appellant.

DEWAN RAM LAL, Government Advocate, for Respondent.

The judgment of the Court was delivered by—

YOUNG C. J.—*Mussammat* Niamat and Mohammad were charged with the murder of one Allah Ditta in the Court of the learned Sessions Judge of Sargodha. The learned Sessions Judge found both

(1) 1 P. R. (Cr.) 1889.
(2) (1933) I. L. R. 55 All. 1040.
(3) (1929) 120 I. C. 539.
(4) (1931) 134 I. C. 1230.
(5) (1934) I. L. R. 15 Lah. 331.

the accused guilty, sentenced *Mussammat* Niamat to death and Mohammad to transportation for life. Both the convicts appeal and we have also to consider the question of confirmation of the death sentence on the female appellant.

The prosecution alleges that *Mussammat* Niamat and Mohammad were lovers and that they conspired together and murdered the husband of the female appellant, Allah Ditta, by administering arsenic to him.

At the hearing of the appeal before a Bench of this Court counsel for the accused raised an important preliminary point, namely, that the expert evidence relating to a thumb-mark of the appellant Mohammad on the register of a vendor of arsenic was inadmissible in evidence, in that this evidence had not been produced in the Committing Magistrate's Court. The Bench of this Court in view of conflicting decisions in this and in other High Courts referred the whole case to a Full Bench.

We will consider first the point of law raised. This question has been considered by a Bench of this Court in *Sher Bahadur* v. *The Crown* (1). That Bench decided that evidence in order to be admissible in the Sessions Court must be produced in the Committing Magistrate's Court. On the other hand, a Division Bench of this Court in *Khan Mohammad* v. *The Empress* (2), one of the Judges being Sir Meredyth Plowden, held that it was not necessary to produce all the evidence in the Committing Magistrate's Court and that evidence not so produced was admissible at the hearing in the Sessions Court. *Emperor* v. *Jhabwala* (3), the well-known Meerut

(1) (1934) I. L. R. 15 Lah. 331. (2) 1 P. R. (Cr.) 1889.
(3) (1933) I. L. R. 55 All. 1040.

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Conspiracy case, was heard by a Bench of the Allahabad High Court of which one of us was a member. That Bench held, in agreement with the decision in *Khan Mohammad* v. *Empress* (1), that evidence not produced in the Committing Magistrate's Court was admissible in the Sessions Court. The following authorities also decided this point of law in the same way as in *Emperor* v. *Jhabwala* (2) and *Khan Mohammad* v. *Empress* (1) :—

Emperor v. *Soopi* (3) and *Bhat* v. *Emperor* (4).

We have not been referred to any authority agreeing with the decision in *Sher Bahadur* v. *The Crown* (5). The balance of authority, therefore, appears to be in favour of the proposition that the evidence in the Sessions Court is not confined to evidence produced in the Committing Magistrate's Court.

The question of the relevancy of evidence is dealt with in section 5 of the Indian Evidence Act which is as follows :—

" Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others."

It would appear, therefore, to be clear that an objection to relevant evidence being admissible in any trial must depend upon the existence of some special law prohibiting such evidence to be used. It will, therefore, be upon counsel for the appellants in this case to show conclusively that the evidence objected to is prohibited by law from being produced in the Sessions Court.

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(1) 1 P. R. (Cr.) 1889.
(2) (1933) I. L. R. 55 All. 1040.
(3) (1929) 120 I. C. 539.
(4) (1931) 134 I. C. 1230.
(5) (1934) I. L. R. 15 Lah. 331.

Counsel for the appellants has referred us to Chapter XVIII of the Code of Criminal Procedure. The relevant sections are 208 (1) and (3), 209, 210, 211, 216, 217 and 219. Sections 540, 291 and 286 have also to be examined. Chapter XVIII deals with the procedure in committal proceedings before the Committing Magistrate.

Section 208 (1) and (3) provides:—

"(1) The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate.

(3) If the complainant or officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process, unless, for reasons to be recorded, he deems it unnecessary to do so."

The important words in section 208 (1) are "the Magistrate shall, * * *, take in manner hereinafter provided all such evidence as *may* be produced in support of the prosecution or in behalf of the accused, or as *may* be called for by the Magistrate." The plain wording of this sub-section clearly cannot be taken in support of the proposition argued by counsel. It is in the discretion of the prosecution to call such evidence as it wishes. There is nothing here to indicate that all the evidence on which the prosecution proposes to rely in the Sessions Court *must* be called. Sub-section (3) provides the method for compelling the attendance of witnesses in the Committing Magistrate's Court; that is, sub-section (1)

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provides for evidence from willing witnesses and sub-section (3) from unwilling witnesses. A consideration of sub-section (3) appears to show clearly that it is unnecessary to produce all the evidence in the Court of the Committing Magistrate. The Magistrate may be asked to issue process to compel the attendance of a witness in his Court, but only if he deems it necessary to do so, *e.g.*, the Magistrate may consider that the prosecution has established a *prima facie* case and it is unnecessary to call further evidence. It is clear that some of the evidence which a Magistrate thinks to be unnecessary in his Court may be necessary and relevant evidence. If the contention of counsel for the appellants is correct the mere fact that the Magistrate thought such evidence unnecessary for his Court would bar the production of this evidence in the Sessions Court. Sub-section (3) clearly contemplates no such result. There is nothing in section 208 (1) or (3) which, at any rate, makes the production of all evidence necessary in the Magistrate's Court.

Section 209 is as follows :—

" (1) When the evidence referred to in section 208, sub-sections (1) and (3), has been taken and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

" (2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be

recorded by such Magistrate, he considers the charge to be groundless."

This section is only important as showing that the evidence recorded is the evidence alluded to in section 208 (1) and (3).

Section 210 gives power to the Magistrate "upon such evidence being taken" and on his being satisfied that there are sufficient grounds for committing the accused for trial, to frame a charge. "Such evidence" refers back to the evidence indicated in section 208 (1) and (3). So far then there is nothing in any of these sections indicating a positive rule of law that all evidence must be produced in the Committing Magistrate's Court.

Section 211, which is as follows, is relied upon by the learned counsel as indicating that the accused is bound by the list of witnesses which he is required to give after the charge is framed and that therefore the prosecution should be similarly bound :—

"(1) The accused shall be required at once to give in, orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial.

"(2) The Magistrate may, in his discretion allow the accused to give in any further list of witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial."

This contention in our opinion is wholly untenable. The purpose of section 211 is merely that the executive authorities should be able to compel the

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attendance of such witnesses as the accused wishes to be summoned in order that when the trial of the case comes on in the Sessions Court the case may be heard from day to day and no time should be wasted. That the section does not bear the construction contended for by learned counsel is clear from sub-section (2) which gives the Magistrate authority to take any further list of witnesses subsequently at any time.

That the accused is not confined to witnesses indicated in any list is clear from consideration of section 291 which enacts that the accused shall be allowed to examine any witness in the Sessions Court not previously named by him if such witness is in attendance. Sections 211 and 291 read together clearly show that if the accused has willing witnesses at the Sessions Court he can be allowed to produce them, but if he requires the Court to issue process for compelling attendance he is confined to those witnesses whose names he has previously included in his list of witnesses.

Section 213 provides for committal of the accused for trial. There is nothing in this section dealing with the point under consideration.

Section 216 clearly shows that it is unnecessary for the accused at any rate to produce all his witnesses before the Magistrate, but it has no real bearing upon the point before us. The section is :—

" When the accused has given in any list of witnesses under section 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included in the list, as have not appeared before himself, to appear before the Court to which the accused has been committed."

Section 217 (1) deals with the procedure for binding down witnesses who appear before the Committing

Magistrate in order that they should appear in the Court of Session. The words "whose attendance before the Court of Session or High Court is necessary and who appear before the Magistrate" are important. These words indicate that only those witnesses who appear before the Magistrate can be bound down to appear before the Sessions Court. It also, in our opinion, clearly shows that witnesses who do not appear before the Magistrate can appear before the Court of Session, the only disadvantage to the prosecution being that they cannot be bound down so to appear.

Section 219 deals with the power of the Committing Magistrate to examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over to give evidence in the Sessions Court. It is:—

"(1) The Committing Magistrate or, in the absence of such Magistrate, any other Magistrate empowered by or under section 206 may, if he thinks fit, summon and examine supplementary witnesses after the commitment and before the commencement of the trial, and bind them over in manner hereinbefore provided to appear and give evidence.

(2) Such examination shall, if possible, be taken in the presence of the accused and, where the Magistrate is not a Presidency Magistrate, a copy of the evidence of such witnesses shall be given to the accused free of cost."

Sub-section (2) is important as it indicates that such examination shall, *if possible*, be taken in the presence of the accused. The examination can, therefore, it is clear be taken when the accused is not present. The words in section 219 (1) "may, if he thinks fit, summon and examine supplementary wit-

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nesses" show that if the contention of counsel for the appellants is correct the Magistrate would have complete power to bar evidence being called in the Sessions Court as he might not think fit to summon and examine such supplementary witnesses.

These are all the relevant sections of Chapter XVIII. We have invited counsel to refer us to anything in any of these sections which establishes the point for which he contends. He is unable to point to any provision of law in any of these sections which expressly prohibits the calling of evidence in the Sessions Court which has not been produced in the Court of the Committing Magistrate. On the other hand, we are of opinion that a general consideration of all these sections clearly indicates that the law contemplates the calling of evidence in the Sessions Court which has not been produced before the Committing Magistrate.

The trial in the Court of Session is dealt with in Chapter XXIII. Section 286 is as follows:—

"(1) When the jurors or assessors have been chosen, the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

"(2) The prosecutor shall then examine his witnesses."

This section in no way restricts the power of the prosecution with regard to witnesses to be called. Indeed in section 286 (1) the prosecutor has to state by what evidence he expects to prove the guilt of the accused. If the evidence before the Court was confined to the evidence called before the Magistrate, it

would be wholly unnecessary for the prosecutor to make any opening in the case as to the evidence he proposed to call. If there was a restriction intended by law to be placed upon the prosecution, such as is contended for, this is the place where we would expect it to appear. Section 286 (2) also clearly places no restriction upon counsel for the prosecution. The words are " shall examine his witnesses " *not* " shall examine such witnesses as were called in the Court of the Committing Magistrate."

Section 289 (1) does not either in any way indicate a limitation as to the witnesses to be called.

Section 291 is wholly irrelevant.

Section 540 of the Code gives the Court power to and examine any witness in attendance. This does not limit the right of the Court to call only such evidence as has been called in the Court of the Committing Magistrate. This clause indicates, therefore, that the Court, at any rate, has a right to call a witness in favour of the prosecution although he has not been examined in the Court of the Committing Magistrate. The theory of counsel for the defence is that the intention of Chapter XVIII is that no witness can be called in the Sessions Court who has not been examined in the Court of the Committing Magistrate. This section, at any rate, clearly shows that this is not so.

The general effect, in our opinion, of a consideration of these sections of the Code of Criminal Procedure is that the prosecution is at liberty to examine witnesses in the Sessions Court which it has not produced in the Court of the Committing Magistrate, but that only those witnesses so examined in the Committing Magistrate's Court can be bound down to attend

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in the Sessions Court. The prosecution in the Sessions Court if the witnesses are not examined in the Court of the Committing Magistrate has to depend upon such witnesses, being willing to give evidence without being bound down to appear, or upon being able to persuade the Court to act under section 540, and summon such a witness.

It has been argued by counsel for the appellants that it would be unfair to the accused not to examine all witnesses in the Committing Magistrate's Court. This argument has really nothing to do with the point of law which we are discussing, but we point out that the *chalan* gives a list of witnesses relied upon by the Crown and also indicates the effect of the evidence on be called.

Counsel further referred us to section 347 of the Code as this section was alluded to in *Emperor* v. *Jhabwala* (1). We agree with counsel's view that this section has no relevance to the point under discussion. It merely refers the Magistrate to the sections we have already considered in Chapter XVIII. We think that, in accordance with the practice of the English Courts, a summary of the evidence proposed to be called should be given to the Sessions Court and the accused, before the trial; if a witness has not been called in the Committing Magistrate's Court. There is no provision in the Criminal Procedure Code making this course compulsory, but we think that, in fairness to the accused, it should be followed. We answer the point of law referred to us as follows :—

That the prosecution is not debarred from producing in the Sessions Court evidence which has not been produced in the Committing Magistrate's Court.

(1) (1933) I. L. R. 55 All. 1040.

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[Their Lorships then went into the merits of the case and dismissed both appeals except for the alteration of the death sentence passed on *Mst.* Niamat which was changed into transportation for life—*Ed.*]

A. N. C.

Reference answered in the negative. Appeals dismissed, except alteration of sentence of Mst. *Niamat.*

LETTERS PATENT APPEAL

Before Addison and Din Mohammad JJ.

GANESH DAS (JUDGMENT-DEBTOR), Appellant

versus

HARI CHAND (DECREE-HOLDER), SHAM NARAIN AND ANOTHER (JUDGMENT-DEBTORS) } Respondents.

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March 26.

Letters Patent Appeal No. 110 of 1934

Execution of Decree — against one of several judgment-debtors — whether Executing Court can go behind the Decree.

Held, that where a decree, as it stands, is against all the defendants, it can be executed against each of them personally and against his property, whatever the nature of it, and an Executing Court cannot go behind the decree

Shankar Narayan Pande v. *Rikhavdas Chandanmal* (1), followed.

Sukhdeo Prasad Narayan Singh v. *Madhusudan Prasad Narayan Singh* (2), dissented from.

Jagatjit Singh v. *Sarabjit Singh* (3), distinguished.

Letters Patent Appeal from the order of Dalip Singh J. in C. A. 1706 of 1933, affirming that of Mr. G. S. Mongia, Senior Subordinate Judge, Lahore, dated 7th November, 1933, ordering the execution to proceed.

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(1) 1932 A. I. R. (Bom.) 483. (2) (1931) I. L. R. 10 Pat. 305.
(3) (1892) I. L. R. 19 Cal. 159 (P. C.).