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to point out the principles of law which he should bear in mind in dealing with the question of fact which he will have to determine in this case. Costs to abide the result. As the question of title acquired by Government by adverse possession was not raised distinctly in the Courts below, the parties are to be at liberty to adduce fresh evidence.

Decree reversed. Case remanded.

CRIMINAL REVISION.

Before Mr. Justice Candy and Mr. Justice Fulton.

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January 6.

EMPEROR *v.* PURSHOTTAM KARA AND FOUR OTHERS; EMPEROR *v.* DHARAMSHI GHELA AND THREE OTHERS.*

Criminal Procedure Code (Act V of 1898), sections 257, 177, 110—Security for good behaviour—Witness—Magistrate—Summons—Refusal to summon—Procedure.

Section 257 of the Criminal Procedure Code (V of 1898) is imperative in its terms. It leaves to a Magistrate no discretion to refuse to issue process to compel the attendance of any witness, unless he considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice; such ground, however, must be recorded by him in writing. The discretionary power of refusing to summon any particular witness is vested in the Magistrate, but the order of refusal must be such as to show in writing the ground of refusal as applied to each individual.

APPLICATION for revision under section 435 of the Criminal Procedure Code (Act V of 1898).

In December, 1900, information was lodged by the police against the accused twenty-four persons in the Court of the First Class Magistrate at Bhiwndi, praying that action be taken against them under section 110, clauses (*d*) and (*e*), of the Criminal Procedure Code (Act V of 1898). The allegations against them were that they formed a gang under the leadership of one Kara Devraj

* Criminal Applications for Revision, Nos. 183 and 184 of 1901.

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(accused No. 1); that accused Nos. 1 to 7, being the *sávkár* (merchant) members of the gang were in the habit of cheating their customers and getting valuable property from them, using the rest of the gang to terrorise such persons as endeavoured to resist them.

The Magistrate issued warrants for the arrest of the twenty-four persons, and proceedings were instituted before the District Magistrate of Thána under section 110 of the Criminal Procedure Code (Act V of 1898).

Accused Nos. 13, 16, 17, 18, 19, 20, 23 and 24 were discharged on the 29th June, 1901, as "it was found that the evidence for the prosecution showed no cause for holding them to belong to the alleged gang, or to have done anything to call for action against them under Criminal Procedure Code, Chapter VIII."

Kara Devraj, accused No. 1, died during the proceedings.

The remaining accused presented an application praying that thirty-three persons be summoned as witnesses to prove their respectability. On this application the Magistrate made the following order:

A list of thirty-three witnesses. On inquiry as to the kind of evidence these witnesses are to give, it is found that twenty-eight are to be called simply to depose to the respectability of the accused. Many of them are officials with important duties, and many now reside at distant places. The Court declines to call more than five witnesses on this point, and accused No. 2 selects Nos. 1, 2, 3, 4 and 9, who are to be summoned with Nos. 11, 12, 26, 28 and 32.

On the 11th July, 1901, the District Magistrate discharged six of the accused. Finally, on the 5th August, 1901, he required the remaining accused to execute bonds for keeping peace and for maintaining good behaviour for a period of one year in varying amounts and sureties.

Against this order the accused applied to the High Court under its Criminal Revisional Jurisdiction.

Branson (with him *H. C. Cayaji*) for the accused in application No. 183.

M. B. Chaubal for the accused in application No. 184.

Ráo Bahádur *Vasudev J. Kirtikar*, Government Pleader, for the Crown, in applications Nos. 183 and 184.

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Per Curiam :—In this case proceedings commencing in December, 1900, were taken against one Kara Shet and twenty-three others under section 110, Criminal Procedure Code, on the information that they habitually committed cheating or attempted so to do, and that they habitually abetted the commission of breaches of the peace. In other words, it was said that these men formed a gang of which the *sávkár* members were in the habit of cheating, and kept a retinue of bullies to beat and assault people who opposed them.

After some action by another Magistrate, the case was begun before the District Magistrate at Kalyán on the 19th January, 1901. On the 29th January eight of the persons whose conduct was being inquired into were discharged. On the 11th July six more were discharged, Kara Shet having died in June. Finally, on the 5th August, the Magistrate directed nine persons to give security for good behaviour. These nine persons have now applied to this Court to exercise in their favour its powers of revision and have based their applications on two principal grounds, namely, that their witnesses were not examined and that the evidence for the prosecution was insufficient to justify the order.

After the examination of the persons, whom for brevity's sake we may call the accused, a list of thirty-three witnesses, signed by accused No. 2 on behalf of himself and others, was put in. The Magistrate disposed of this application in the following order :

A list of thirty-three witnesses. On inquiry as to the kind of evidence these witnesses are to give, it is found that twenty-eight are to be called simply to depose to the respectability of the accused. Many of them are officials with important duties and many now reside at distant places. The Court declines to call more than five witnesses on this point, and accused No. 2 selects Nos. 1, 2, 3, 4 and 9, who are to be summoned with Nos. 11, 12, 26, 28 and 32.

The law on the subject is contained in section 257 which, under clause 2 of section 117, is applicable to this case. The section is as follows :

If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process, unless he considers such application should be refused on the ground that it is made for

the purpose of vexation or delay or for defeating the ends of justice. Such grounds shall be recorded by him in writing.

Now it will be observed that this section is imperative. The Magistrate has no discretion to refuse to issue process to compel the attendance of any witness, unless he considers that the application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing. The Magistrate, therefore, must issue the summons for each witness named in the list, unless he takes the responsibility of recording his ground for believing that any particular name is entered for the purpose of vexation or delay or for defeating the ends of justice. The case of each witness must be dealt with individually. Here no reason at all is assigned for refusal to summon any particular witness, and it is clear that in regard to any individual the Magistrate was not prepared to say that his name had been entered for purposes of vexation or delay or of defeating the ends of justice, as he allowed the accused to select five out of the twenty-eight expected to testify as to respectability. It is impossible now for us to treat such an order as a compliance with the provisions of the section, for the limitation of the number of witnesses on a particular point was purely arbitrary and cannot be upheld. The discretionary power of refusing to summon any particular witness is doubtless vested in the Magistrate, but the order, we think, must be such as to show in writing the ground of refusal as applied to such individual.

The Magistrate treated this as a test case, and it is, therefore, unfortunate that an error of this sort should have occurred. At present all we need do is to set aside the order on the ground that the applicants have not had a trial in the manner prescribed by law. We do not think it expedient to direct the Magistrate to re-open the case and proceed to hear the rest of the witnesses for the defence. Already the applicants have been severely harassed. We think that proceedings of this kind against such a large body of men should not have been undertaken unless the police had evidence ready to prove that all the persons named were members of a gang in the habit of acting together for one of the purposes mentioned in section 110. Gangs, no doubt, do exist sometimes,

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and proceedings for their suppression may be desirable. But where a large number of persons are to be proceeded against, great care must be taken not to mingle together persons against whom there is evidence with persons against whom there is hardly any. Exhibit 29, being the order of discharge of eight persons on the 29th January, shows that against these persons at least the proceedings were instituted without sufficient preparation. Moreover, it is obvious that in a case of this kind, involving a large number of accused persons, besides pleaders and witnesses, the trial should have been conducted at some central place as near as possible to the place where the accused and the witnesses lived. The diary shows that the trial began at Kalyán and was carried on at Ghorbandar, Bassein, Thána, Andheri, Thána, Andheri, Bordi, Umbargaon, Gunjawli, Bándra, Thána, Bándra, and Thána. At most of these places all the accused who had not been discharged were present, and the inconvenience on some occasions must have been great. The District Magistrate has, of course, many duties to perform which require his presence in many different places; but we feel that this fact was a great disqualification for the trial by him of a case like the present. It is always much to be regretted, when necessity compels the parties and witnesses in a criminal case to follow Magistrates from camp to camp; but in a case like the present case, which was somewhat novel in the attempt to apply section 110 towards the prevention of malpractices such as were here alleged, it was specially desirable that the proceedings should be conducted by a stationary Magistrate. We do not say that the section might not be used against persons combining together for purposes of cheating and bullying, but we think that in the peculiar circumstances of the present case, every effort should have been made to prevent any unnecessary hardship from the method of its application, for until it was judicially proved that the accused parties were addicted to cheating or abetment of breaches of the peace, they were entitled to consideration.

We set aside the orders of the District Magistrate and direct hat the security bonds be cancelled.

Order accordingly.