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favour upon the three points, which the plaintiff had to make out, and that being so, I do not see how we can interfere, and the appeal must be dismissed with costs.

BANERJEE, J.—I concur.

Appeal dismissed.

28 C. 594.

[594] CRIMINAL REVISION.*

Before Mr. Justice Ameer Ali and Mr. Justice Pratt.

SHEOPRAKASH SINGH AND OTHERS (*Petitioners*) *v.* W. D. RAWLINS (*Opposite Party*). [12th March, 1901.]

Cross-examination—Witness—Accused—Defence—Evidence Act (1 *of* 1872) *s.* 154—*Code of Criminal Procedure* (*Act V of* 1898), *s.* 257—*Prosecution.*

Certain witnesses for the prosecution were examined. The accused applied to the Court for an adjournment to enable them to cross-examine the witnesses by Council. The application was refused, and the accused being called upon to cross-examine, were not in a position to do so. The accused then applied that the witnesses should be summoned as witnesses for the defence. The witnesses were summoned, and, when the Counsel for the accused proceeded to cross-examine them, he was not allowed to do so.

***Held*, the mere fact that the accused had been compelled to treat the witnesses for the prosecution as their own witnesses did not change their character. That, although the accused were compelled to obtain their attendance as witnesses for the defence, they were really summoned under s. 257 of the Code of Criminal Procedure for "the purpose of cross-examination," and the Magistrate was wrong in refusing to allow their cross-examination.**

THE accused were tried by the Sub-Divisional Officer of Beguserai, under s. 147 of the Penal Code. During the trial, after the witnesses for the prosecution had been examined, the accused made an application for an adjournment so as to enable them to cross-examine, by Counsel, who could not appear on the particular day fixed. The application was refused, and the accused were called upon to cross-examine the witnesses themselves, which they were not in a position to do. Subsequently, the 20th of December 1900 was fixed for taking the evidence for the defence, and the accused applied that the prosecution witnesses should be summoned, and they be allowed to examine them. The witnesses were summoned, and, when the Counsel for the accused proceeded to cross-examine them, he was not allowed to do so. The accused were convicted and sentenced, and their appeal **[595]** was dismissed by the Sessions Judge of Bhagalpur on the 29th January 1901.

The accused thereupon applied to the High Court and obtained a rule calling upon the Magistrate of the District to show cause why the conviction and sentence should not be set aside, on the ground that the accused were not allowed by the Sub-Divisional Officer of Beguserai to cross-examine the witnesses for the prosecution, who were summoned on the 20th of December and who were present on that date.

Mr. *Jackson* and Babu *Atulya Charan Bose* and Babu *Kulwant Sahay*, for the petitioners.

The Advocate-General (Mr. *J. T. Woodroffe*,) and *The Deputy Legal Remembrancer* (Mr. *Gordon Leith*) and Mr. *C. Gregory*, for the Crown.

The judgment of the Court (AMEER ALI and PRATT, JJ.) is as follows :—

*** Criminal Revision No. 103 of 1901, made against the order passed by W. H. Vincent, Esq., Sessions Judge of Bhagalpur, dated the 29th of January 1901.**

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This rule was issued calling upon the Magistrate of the District to show cause why the conviction of, and sentence passed on, the petitioners should not be set aside, on the ground that the accused were not allowed by the Sub-Divisional Officer of Beguserai to cross-examine the witnesses for the prosecution, who were summoned for the 20th December, and who were present on that date, or why such other order should not be made, as to this Court may appear fit and proper.

As we pointed out to the learned Advocate-General in the course of his arguments, in granting the rule we had in view the provisions of s. 257. We may observe at the very outset that, in our opinion, the work of this Court would be appreciably lightened, if the Subordinate Magistrates, in dealing with the law relating to the rights of accused persons, would construe it in a less technical spirit than they are sometimes accustomed to do. In the inferior Courts the right principle is occasionally reversed, and a person is presumed to be guilty the moment he is accused, and every attempt on his part to prove his innocence is regarded as vexatious. When the law vests in a Court a certain discretion, that discretion, in our opinion, should be [596] exercised, so as not to give rise to any reasonable complaint of prejudice or bias.

What appears to have happened in this case is as follows: The witnesses for the prosecution were examined, and an application was made on behalf of the accused for an adjournment, so as to enable them to cross-examine by Council, who could not appear on the particular day fixed. The application was refused, and the accused were called upon to cross-examine the witnesses themselves, which they were not in a position to do. Subsequently, a day was fixed for taking the evidence for the defence, and the accused asked that the prosecution witnesses, who had been already examined, but whom they had no opportunity to cross-examine, except as already mentioned, should be summoned and they be allowed to examine them. Those witnesses were summoned, by the Sub-Divisional Officer, and, when the Counsel for the accused proceeded to cross-examine them, as naturally he would, considering that they had deposed for the prosecution, in other words to put to them questions which ordinarily would not be put to the witnesses for the defence, he was admittedly not allowed to do so. The reason given in the explanation, as well as in the note of the Magistrate attached to the judgment, is that the witnesses had been cited as defence witnesses, and, as no sufficient reason was made out under s. 154 of the Evidence Act, it was within the Magistrate's discretion to disallow cross-examination.

In our opinion the mere fact that the accused had, under the circumstances already stated, been compelled to treat the witnesses for the prosecution as their own witnesses, does not change their character. The accused sought for an opportunity to cross-examine them; that was not allowed. They considered that, in cross-examination, they would be in a position to elicit facts, which would materially help their case. Under the circumstances we think that, although the accused were compelled to obtain their attendance as witnesses for the defence, they were really summoned under s. 257 "for the purpose of cross-examination," and we, therefore, think the Magistrate was wrong in refusing to allow their cross-examination. To regard it other [597] wise would be to make the procedure of the Courts a mere travesty of justice.

Under these circumstances, we are of opinion that the rule ought to

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be made absolute, and we accordingly make it absolute and set aside the conviction and sentences.

We are informed that the Magistrate, who tried this case, will not be in the district. The case must, therefore, go back to the District Magistrate, either to try it himself or to refer it for trial to any other Magistrate competent to try the same. The provisions of s. 350 of the Code of Criminal Procedure debar us from directing that the case should be proceeded with from the stage at which it was left on the 20th December. The trying Magistrate must proceed in accordance with that section.

Rule made absolute.

28 C. 597.

ORIGINAL CIVIL.

Before Mr. Justice Harington.

NEEL COMUL MOOKERJEE AND OTHERS *v.* BIPRO DASS MOOKERJEE AND ANOTHER.* [31st May and 3rd June, 1901.]

Contract Act (IX of 1872), s. 260—Guarantee, revocation of—Surety—Liability of surety to a firm which has undergone change in its constitution—Cause of action—Surety bond.

The defendants *B* and *R* on December 6, 1895, executed a security bond, the condition of which was that *B* should duly and faithfully discharge his duties, while employed as cash-keeper to the firm of "N. C. Mookerjee," *R* standing as *B's* surety to the firm. In July 1896 there being a change in the constitution of the firm, it came to be styled and designated as "N. Mookerjee and Son." Defalcations on the part of *B* were discovered between January 1897 and May 1900; *i.e.*, while *B* was in the service of "N. Mookerjee and Son," a firm, which came into existence in the year following that in which the bond was executed. The members of the present firm of "N. Mookerjee and Son" sued the defendants on the bond. An objection by way of demurer to the plaintiffs' claim—that no cause of action was shown to exist against the defendants—having been taken.

[598] *Held*, that there being a change in the constitution of the firm before the alleged defalcations took place, the guarantee given by *R* would be taken as revoked by virtue of s. 260 of the Contract Act; and the alleged embezzlements having been committed by *B* while in the service of the new firm of "N. Mookerjee and Son," and not that of N. C. Mookerjee, there was no breach of the conditions of the bond; the objection taken by the defendants must, therefore, prevail, and the suit be dismissed.

THIS was an action brought by Neel Comul Mookerjee, Naro Nath Mookerjee, and Golab Roy Poddar, carrying on business in co-partnership as merchants and banians in the Town of Calcutta under the name, style, and firm of "N. Mookerjee and Son," for recovery of Rs. 5,000, on a bond executed by the defendants, Bipro Dass Mookerjee and Rakhal Dass Mookerjee (son and father, respectively) on December 6, 1895.

It appears from the plaint that previous to July 1895, the defendant Bipro Dass was employed by the plaintiff Neel Comul in his then firm of "Neel Comul Mookerjee," as a *sircar*; and that, in July 1895, Bipro Dass was appointed as its cash-keeper by the said firm of "Neel Comul Mookerjee;" and that some time after that Neel Comul called upon the defendant Bipro Dass to furnish security for the due and faithful discharge of his duties as cash-keeper, and to make good any loss which the said Neel Comul Mookerjee might sustain by or through the said Bipro Dass. Thereupon Bipro Dass proposed that his father Rakhal Dass Mookerjee,

* Original Civil Suit No. 683 of 1900.