1904
APRIL 26, 27.

CRIMINAL REVISION.

31 C. 710 =1 Cr. L. J. 797.

As regards allegations of wrongful confinement at places distant from the Krishnaproshad outpost, where the petitioner remained on duty, it is apparent that the petitoners' criminal responsibility for such acts is too remote to form the basis of any charge. The case is that the Head constable sent away Krupa Sahu in charge of two chowkidars to procure money. If in effecting this object the chowkidars subsequently confined Krupa Sahu, ducked him in a pond or even beat him, it would be impossible to hold the Head constable guilty of abetting such specific acts in the absence of proof (which of course cannot be given) that he gave definite orders to that end.

As regards the examination of three further witnesses the Sessions Judge, if he thought their evidence necessary, should have proceeded under cl. (1) of section 428 of the Criminal Procedure Code.

**[714]** As the matter stands we find no reason for thinking they could give important evidence. The prosecution was conducted by a pleader and it has not been shown that he exercised an improper discretion in not calling the witnesses.

The Deputy Legal Remembrancer has contended that there was a misjoinder as the charge against the petitioner under section 202 did not concern the chowkidars, who were tried jointly with him. On this ground he asks us to set aside the whole trial as illegal, and to direct a new trial. No such objection was taken before, and we do not think we ought to give effect to it, when dealing with the case on the application of the petitioner and not of the Crown.

We make the Rule absolute and set aside the order for retrial.

*Rule made absolute.*

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31. C. 715 (=8. C. W. N. 910=1. Cr. L. J. 408.)

**[715]** APPELLATE CRIMINAL.

*Before Mr. Justice Pratt and Mr. Justice Handley.*

JOHARUDDIN SARKAR *v.* EMPEROR*

[26th April and 5th and 10th May 1904.]

*Transfer—Adjournment of case—Supplementary case, disqualification of Sessions Judge to try—Criminal Procedure Code (Act V of 1898) s. 526, cl. (8).*

The accused were committed for trial on the 12th December, 1903. The trial was fixed for the 3rd February 1904 before the Sessions Judge.

On the 3rd February the accused asked the Judge to refer the case to the High Court for transfer on the ground that the Judge had previously convicted other accused persons on the same facts. This was refused.

The accused thereupon applied under s. 526, cl. (8) of the Criminal Procedure Code for an adjournment of the case, on the ground that the High Court would be moved for a transfer. This was refused.

The case proceeded and after the case for the prosecution was concluded two witnesses were examined on behalf of one of the accused and the case was adjourned till the 16th February. Between the 3rd and 16th February no application was made to the High Court for a transfer.

The case was concluded on the 16th February and the accused were convicted.

*Held*, that the Sessions Judge was not disqualified from trying the case. That the accused had a reasonable time for applying to the High Court before

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Criminal Appeal No. 269 of 1904, made against the order passed by C. Fisher, Sessions Judge of Dinajpur, dated 16th February 1904.

1904
APRIL 26.
MAY 5, 10.

APPELLATE CRIMINAL.

31 C. 715=8 C. W. N. 910=1 Cr. L. J. 408.

they were required to enter upon their defence on the 16th February and, as they abstained from doing so, the proceedings of the Sessions Judge were not void.

[Foll. 33 Cal. 1183=10 C. W. N. 793=3 C. L. J. 477. Ref. 17 Ind. Cas. 58=13 Cr. L. J. 746=1 P. R. 1913 Cr.=254 P. L. R. 1912=42 P. W. R. 1912 Cr.]

ONE Gulu Mahmad and several other persons were accused of forging a mortgage deed and being parties to its registration. Two of the accused Gulu Mahmad and Basarat Ali were tried and convicted by Mr. Fisher, the Sessions Judge of Dinajpur. They appealed, and their conviction was upheld by the High Court. Subsequently the same Sessions Judge directed a further inquiry regarding others, who had been complained against. The inquiry was held and the accused Joharuddin and six others were committed for trial on the 12th December 1903 **[716]** for abetment of forgery and for an offence under the Indian Registration Act. The trial was fixed for the 3rd February 1904 before the same Sessions Judge.

On that day when the case came on for hearing and after the assessors were chosen the accused through their pleader applied to the Sessions Judge to refer the case to the High Court for transfer on the ground that he had already convicted two other accused on the same facts. This application was refused. Thereupon the accused put in a petition intimating that they would move the High Court for a transfer of the case and asked the Sessions Judge for an adjournment. This application was also refused and the case was proceeded with. After the case for the prosecution was closed, two witnesses were examined on behalf of one of the accused and the case was then adjourned till the 16th February, warrants being issued for a number of defence witnesses who had not appeared. Between the 3rd and the 16th February no application was made to the High Court for a transfer of the case. On 16th February the trial was concluded and the accused were all convicted.

Babu *Jeygopal Ghose* for the accused. The Sessions Judge should not have tried this case. This trial was supplementary to the trial previously held by him, in which he convicted two other accused persons upon the same facts. In that case he made up his mind as to the truth of the story put forward by the prosecution. It would be impossible to make him come to any other finding. By his trying this case the accused have been greatly prejudiced. The accused applied to the Judge under s. 526, cl. (8) of the Criminal Procedure Code at the commencement of the hearing for an adjournment of the case on the ground that they intended to apply to the High Court for a transfer. Clause (8) provides that the Court shall exercise the powers of postponement of adjournment. The Judge therefore had no power to refuse this application, but was bound under that clause to adjourn the case. The fact that the accused had time before the case came on for hearing to apply to the High Court does not affect the case. The Judge having failed to follow the provisions of the law his subsequent proceedings are void. *Queen-Empress* v. *Gayitri* **[717]** *Prosunno Ghosal* (1), *Surat Lall Chowdhry* v. *Emperor* (2), *Kishori Gir* v. *Ram Narayan Gir* (3), *Queen-Empress* v. *Virasami* (4).

(1) (1888) I. L. R. 15 Cal. 455.
(2) (1902) I. L. R. 29 Cal. 211; 6 C. W. N. 251.
(3) (1903) 8 C. W. N. 77.
(4) (1896) I. L. R. 19 Mad. 375.

1904
APRIL 26.
MAY 5, 10.

APPELLATE CRIMINAL.

31 C. 715=8 C. W. N. 910=1 Cr. L. J. 408.

The *Deputy Legal Remembrancer* (Mr. *Douglas White*) for the Crown. This is what is commonly called a supplementary trial. It would, I submit, be highly inconvenient, if a Judge were debarred from trying one set of prisoners, because he had on a previous occasion tried other persons who were implicated with regard to the same offence. Your Lordships have frequently on appeal heard and disposed of cases of this description, and it has never been suggested that your Lordships were disqualified from doing so. The Sessions Judge was perfectly justified in refusing the adjournment. The words in s. 536, cl. (8) " before the commencement of the hearing " should be read in a reasonable manner. That section was never intended by the Legislature to be used as a means of oppression for the purpose of hindering the working of the Court. When the case was committed on the 12th December the accused knew that it would be tried by Mr. Fisher. From that day till the 3rd February they never attempted to move the High Court. Even apart from that they had plenty of time between the 3rd and the 16th February to move, but again failed to take the opportunity. It is quite clear that their application to the Sessions Judge was not a *bona fide* one, but merely for the purpose of delay. It would seriously interfere with the administration of justice, if in a Sessions case an accused person, who had ample opportunity before the case came on for hearing, could wait until the last moment when the case was called on and then apply for an adjournment, and stop the case, irrespective of the inconvenience he might cause to the Court, the assessors or jurors and the witnesses. The Judge has power to refuse to postpone the case if he is of opinion that the application is not *bona fide*.

PRATT AND HANDLEY, JJ. One Gulu Mahmad, son of Toki, accused another man of the same name as well as several other [718] persons with forging a mortgage deed for his land and being parties to the registration thereof. Gulu Mahmad and Basarat Ali were tried and convicted at the Sessions and their conviction was upheld by the High Court. Thereafter the Sessions Judge directed a further inquiry regarding others, who had been complained against. In the result the present appellants, seven in number, were committed for trial on the 12th December last, all of them except Joharuddin Sarkar for abetment of forgery, and Joharuddin Sarkar for an offence under section 82 (*d*) of the Indian Registration Act, a like charge being also added against Kutub Ali Sarkar. The trial was fixed for the 3rd February and on that day, after the assessors had been chosen, the accused through their pleader asked the Sessions Judge to refer the case to the High Court for transfer on the ground that the Judge had previously convicted Gulu Mahmad and Basarat Ali. The Sessions Judge refused the application remarking that the pleader was unable to show that he had in any way prejudged the case. Another petition was then put in intimating that the High Court would be moved to transfer the case and asking for an adjournment.

This was refused and the trial was proceeded with. After the case for the prosecution was closed two witnesses cited by the accused Joharuddin were called. They were unable to testify to any relevant fact and the case was then postponed to the 16th February, warrants being issued for ten witnesses cited by all the accused and who had failed to appear.

On the 16th February the defence was gone into and the trial concluded in the conviction of all the accused. During the interval between

1904
APRIL 26.
MAY 5, 10.

APPELLATE CRIMINAL.

31 C. 715=8 C. W. N. 910=1 Cr. L. J. 408.

the 3rd and 16th February no application was made to the High Court for a transfer of the case.

The first plea taken before us is one of law. It is urged that under the circumstances the trial of the appellants by the Sessions Judge was illegal and void.

The following cases were relied upon: *Queen-Empress* v. *Gayitri Prosunno Ghosal* (1), *Surat Lall Chowdhry* v. *Emperor* (2), [719] and *Kishori Gir* v. *Ram Narayan Gir* (3). Now in the present case it is clear that the fact of two persons having been previously tried and convicted by the same Sessions Judge would not disqualify him from trying the case or be a sufficient ground for transferring it. What are usually known as supplementary trials are very common and it would cause much public inconvenience, if Magistrates and Judges, who had tried one batch of persons, should be thereby debarred from trying a subsequent batch on the same facts. In the present instance, if the accused had moved the High Court for a transfer, we have no doubt that their application would have been refused and we may reasonably infer that the legal advisers of the accused abstained from moving this Court either during the 53 days' interval between commitment and trial or after a postponement was granted from the 3rd to the 16th February, because they were conscious that they had no chance of success.

Under the circumstances we hold that the application of the 3rd February was not a *bona fide* one under section 526 of the Criminal Procedure Code, but merely a pretence. There was no real " intention to make an application under this section " to quote the terms of clause (8). If we were to hold that the accused could legally insist on a retrial, the result would be a grave anomaly, which the Legislature could never have intended. For *ex hypothesi* there being no ground for a transfer the same Judge would retry the case precisely as before, although there was no defect in the previous trial or any possible advantage to be gained by duplicating the whole process.

In the cases relied upon for the appellant the applications were regarded as reasonable and proper and in two of them this Court ordered a transfer. The question of *bona fides* did not arise in those cases. If in laying down that owing to a refusal to grant an application for postponement purporting to be made under section 526 all the subsequent proceedings are necessarily illegal, it was intended by Stevens and Harington, JJ. that such a dictum should be of general application, then we must respectfully beg to differ from them. It seems to us that such an interpretation of the law might have disastrous effects on the [720] administration of justice as it would lie in the power of every accused person to delay and thereby possibly defeat justice by intimating to the Court that he intended to move the High Court for a transfer, no matter how frivolous, groundless or illusory the application might be. In the cases of *Kishori Gir* v. *Ram Narayan Gir* (3) and *Queen-Empress* v. *Virasami* (4) it seems to have been held that an application for transfer should be made with due diligence or at the earliest possible time. We think that unreasonable delay or total abstention from moving the High Court might well be taken into account in considering the *bona fides* of the accused in notifying his intention to the trying Court.

(1) (1888) I. L. R. 15 Cal. 455.
(2) (1902) I. L. R. 29 Cal. 211; 6 C. W. N. 251.
(3) (1903) 8 C. W. N. 77.
(4) (1896) I. L. R. 19 Mad. 315.

1904
APRIL 26.
MAY 5, 10.

APPELLATE CRIMINAL.

31 C. 715=8 C. W. N. 910=1 Cr. L. J. 408.

We are relieved of the necessity of referring the case to a Full Bench, because in our opinion the contention of the appellants must fail upon another ground.

The accused had a reasonable time for applying to this Court, before they were required to enter upon their defence, that is, before the 16th February. And as they abstained from doing so the proceedings of the Sessions Judge were not void. This was also the view taken by Stevens and Harington, JJ. in the case of *Dhone Kristo Samanta* v. *King-Emperor* (1). In that case it was further held that it was competent to the Magistrate before granting an adjournment to proceed with the case up to the point at which the accused would be called on for their defence. It would seem to follow that the trial is good and valid in every case at least up to the close of the case for the prosecution. And no doubt the terms of clause (8), section 526 admit of this construction, though it is perhaps not quite in accord with what was laid down by the same learned Judges in the two other cases, to which reference has been made. Having disposed of the question of law we now turn to a consideration of the merits.

That the mortgage deed is a forgery has been sufficiently proved in this case. The accused Elamudin, Meher, Kaltu and Jarip, whose names appear as attesting witnesses, gave evidence for the defence in the former trial and there admitted the part they took. Their depositions have been admitted in evidence and [721] rightly so on the authority of the case of *Moher Sheikh* v. *Queen-Empress* (2). Against Kutub Ali there is the evidence of the cartman, Who was relied on in the former case and against Joharuddin there is the same evidence, as also his thumb impression.

As regards the accused Phatu there is nothing but his statement to the Magistrate, and that is ambiguous and inconclusive. We therefore direct that Phatu be acquitted. The conviction and sentences of the other appellants are affirmed, and they must at once surrender to their bail.

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31 C. 722 (=8 C. W. N. 572.)

[722] FULL BENCH.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Harington and Mr. Justice Brett.*

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BALKISHEN SAHU *v.* KHUGNU.*

[21st March, 1904.]

*Appeal—Civil Procedure Code (Act XIV of 1882), s. 215A and s. 545—Preliminary order—Appellate Court, power of, to stay proceedings.*

When an appeal is pending in the High Court against a preliminary order made by a Subordinate Court under s. 215A of the Civil Procedure Code, the High Court having seizin of the appeal can, apart from the question whether the case falls within s. 545 of the Code, make an order staying the carrying out of such order pending the hearing of the appeal.

[Foll. 38 Cal. 927=3 C. L. J. 67. Ref. 3 C. L. J. 29 ; 34 C. 1037 F.B.=11 C. W. N. 1030=6 C. L. J. 298 ; 31 Cal. 1031 : 43 All. 198 ; 60 I. C. 131 ; 48 All. 203 ; Dist. 34 Cal. 1081=9 C. W. N. 123.]

REFERENCE to a Full Bench by Harington and Brett, JJ.

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*Reference to Full Bench in Civil Rule No. 1355 of 1903, in Regular Appeal No. 132 of 1903.

(1) (1902) 6 C. W. N. 717. (2) (1893) I. L. R. 21 Cal. 392.