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He referred, upon the first point, to the cases of *Dewan Elahee Newoz Khan* v. *Suburunnissa* (1), *The Queen* v. *Abbas Ali Chowdhry* (2), and *The Queen* v. *Ballabh Kant Bhuttacharjee* (3),

(1) 5 W. R., Cr., 14,

(2) 6 B. L. R., 74.

(3) *Before Mr. Justice L. S. Jackson and Mr. Justice Markby.*

*April 6th* 1869.

THE QUEEN *v.* BALLABH KANT RHUTTACHARJEE AND OTHERS.*

Baboos *Sreenath Das* and *Kissen Dayal Roy* for the prisoners.

JACKSON, J.—This is an order under section 318 of the Code of Criminal Procedure by the Magistrate of Runpore, which has been laid before us by the Sessions Judge for revision, and against which we have also heard an argument on the part of one of the zemindars interested, the effect of the Magistrate's order being to keep the opposite party, the zemindar of Nekbukht, in possession of a quantity of chur land, excepting a certain part which the Magistrate described as being unculturable and sandy soil, and therefore not capable of being possessed in the usual way, and which, oddly enough, he goes on to say, must be considered as not forming part of the disputed land, but as being in the undisputed possession of the second party. The question before us, however, does not relate to this small portion of sandy chur, but to the larger area which has been found to be in possession of the opposite party.

The objections urged before us are, first, that the Magistrate's proceedings were not commenced in the way required by section 318, and that consequently the orders were altogether bad on that account. Now it seems to me that the Magistrate has recorded an amply sufficient proceeding as to the grounds upon which he was satisfied that such a dispute existed regarding these lands as was likely to occasion a breach of the peace, and therefore demanded his interference. It has been argued before us that, in order to his being satisfied on this subject he ought to have summoned witnesses. This is not prescribed by the Code, nor has it been so held in any case before this Court so far as I know. The Magistrate was satisfied by certain investigations conducted by the district police, and the report made by the police was clearly sufficient ground upon which to proceed.

The next objection is that the Magistrate has decided, not with reference to possession, but with reference to the title of the parties respectively; and also that the Magistrate has come to a decision entirely upon documentary evidence, and has not examined the witnesses whom the parties were ready to produce. Now I think it very clear on the face of these proceedings that the Magistrate has quite misconceived the nature of the jurisdiction which he has to exercise under the 22nd Chapter of the Code of Criminal Procedure. What the Magistrate has to do under that chapter, when he finds that occasion exists, is to make a speedy and summary enquiry into the fact of possession of the disputed land, and to pass with as little delay as possible an order declaring the party whom he finds to be in such possession entitled to retain

* Reference to the High Court, under section 434 of the Code of Criminal Procedure, by the Sessions Judge of Rungpore.

Upon the second point, he referred to the cases of *The Queen* v. *Sonaoollah* (1) and *Maharajah Gobind Nauth Roy* v. *Rajah Anund Nath Rai* (2).

Baboo *Krishna Dayal Roy* appeared on behalf of the Kakina zemindar.

it until ousted by due course of law. I observe that the Magistrate commenced these proceedings in the month of August 1868, and after receiving papers and holding investigations of various kinds, and adjourning the enquiry from time to time, he finally passed an order in January 1869. It is also clear that in passing his order, he has taken into his consideration various circumstances which were really beyond the scope of the proper enquiry, and has not confined himself to the simple issue before him. But it is also, I think, quite clear that what he has done, has been done on the invitation of the parties themselves. It is the parties themselves who have placed before him the materials on which he has based his judgment, and any miscarriage of his, therefore is chiefly their own fault.

I do not find that the Magistrate refused to examine witnesses when produced before him. The only thing shown to us is, that on one occasion when witnesses were apparently in attendance, he directs that they may be discharged for that day, but that the case will be taken up the following Monday. It is not shown to us that the witnesses were again produced on that day and that he refused to examine them; and although he certainly does say that he thought it unnecessary to go into oral evidence, thus leading the parties to produce oath against oath, and perhaps leading to a great deal of false swearing upon both sides, it does not appear that the course which he took was taken otherwise than with their consent. I am therefore not of opinion that there is any such miscarriage in these proceedings as obliges us to interfere; but my objection to interfering in this case is also based upon the impossibility of our substituting for the order of the Magistrate any order which would place the parties in a better position, or would be more to the advantage of the public than the order which now stands. These proceedings commenced some eight months ago. The dispute if it then existed, is now probably at an end; and I am altogether unable to see what enquiries we could order, or what directions we could now give, which would improve the state of affairs. It is quite clear that if either of the parties has been injuriously affected by these proceedings, he has had ample time to resort to the Civil Court to have the matter set right. We are not told that any thing of the sort has been done. I think, therefore, that the objections preferred before us are rather in the nature of technical and formal objections to the order than really well-founded camplaints of wrong done, and I consider that we ought not to interfere with the order of the Magistrate.

MARKBY, J.—I also think we ought not to interfere with this order.

(1) 2 W. R., Cr., 44.

(2) 5 W. R., Cr., 79.

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Baboo *Kashi Kant Sen* on behalf of the ijardar under the zemindar of Purbhobhog.

Baboo *Krishna Dayal Roy* referred to the cases quoted by the Magistrate, and pointed out how they applied to the facts of this case. He urged hat the first order of the Officiating Joint Magistrate, calling on the parties to give evidence of actual possession, was based on a mere police report which was not evidence; and that there was nothing on the record to show that the final order of the Magistrate on the question of possession was based on any evidence whatever; and although the Officiating Joint Magistrate recorded having personally visited the spot, yet he said nothing as to whether he had taken any evidence of parties on oath. On both these grounds, he urged, the order of the Officiating Joint Magistrate ought to be quashed.

Baboo *Kashi Kant Sen* drew the attention of the Court to the statement on solemn affirmation of one Sheikh Burra Mahomed, which was taken down by the Officiating Joint Magistrate before proceeding under section 318, and contended that it disclosed, if believed, grounds upon which a Court deciding a question of fact would be competent to base a finding as to the probability of a breach of the peace happening. This, he urged, disposed of the first point of reference. On the second, he observed that the Officiating Joint Magistrate went personally to the spot, and from enquries made by him from the residents there he was satisfied as to which party was in possession; and it could not be said that the Officiating Joint Magistrate had come to his conclusion on the matter of possession at a mere guess; the mere omission to record the statements of the parties, whom he must have questioned, could not lead to the inference that the Officiating Joint Magistrate had not examined witnesses. Upon the authority of *The Queen* v. *Ballabh Kant Bhuttacharjee* (1), he contended that it was not absolutely necessary for the Officiating Joint Magistrate to have examined any witnesses at all on the fact of possession.

(1) See *Ante*, p. 324.

PAUL, J.—In this reference two questions have been submitted for our consideration: 1st, Before a case can be brought under section 318 of the Criminal Procedure Code, is it necessary to adjudicate upon legal evidence? and, secondly, having been so brought, are the statements of the parties, and mere local enquiry, not on oath, sufficient data on which to decide who is in possession of the disputed lands?

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With reference to the first question, the Magistrate has considered the decisions under section 318 of the Criminal Procedure Code to be apparently conflicting. We think the circumstances of this case do not admit of any reference to those decisions which are said to be conflicting, because we find that in this case a petition was presented by Sheikh Burra Mahomed on the 10th January 1870, that his evidence was then and there taken on solemn affirmation, and that he substantiated the principal matters contained in his statement.

This evidence plainly shows that a dispute existed concerning lands, &c., which was likely to create a breach of the peace; and the order that was made on that occasion was to the effect that, in order to prevent the breach of the peace, two inspectors should be deputed to the spot to keep the peace. All the subsequent proceedings are based upon this preliminary proceeding. The subsequent proceedings consist of petitions and other matters put in by the disputing parties, and they clearly confirm the view originally taken by the Magistrate, upon the evidence of Sheikh Burra Mahomed, as to the existence of a dispute concerning lands, &c., which was likely to create a breach of the peace. Under these circumstances, it appears that the Magistrate was reasonably and rightly satisfied, and that he acted fully within the provisions of section 318. In this view of the case, a consideration of what is said to be a conflict between the various decisions is not, I think, called for, and I would suggest that in making references to this Court, the Magistrates should be careful to glean the facts first and see if any of the admitted facts, on being carefully weighed and considered, give rise to any questions which are mooted in the decisions said to be conflicting. In this case we consider that if the Magistrate had applied his mind to the particular facts of the

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case, he would have had no difficulty whatever in putting the correct interpretation upon section 318. It often happens that a confusion arises in the mind upon reading a number of decisions, without at the same time assiduously considering the particular facts upon which those decisions are come to.

With reference to the second question, it is quite clear that mere local enquiry and statements of parties not on oath are not sufficient data on which to decide what party is in possession of land. We do not find on the records of this case any evidence of witnesses examined on oath by the Magistrate; and we consider that any statements that they have made not upon oath cannot be regarded as evidence, and ought not to be relied upon as such. It is admitted on both sides, that there is no evidence of parties on the record, that the statements were not taken on oath, and that the local enquiry was not conducted on oath. Under such circumstances, the question involved in this reference is too elementary to require discussion, and it has taken me by surprise, that an enquiry made on the spot, either in the presence or absence of the parties, and some statements elicited from persons not under the sanction of an oath, should be considered as any legal evidence on which to direct a party to be kept in possession to the exclusion of another. When we consider that an award under section 318 gives a man a strong hold upon land, from which he cannot be dispossessed until the opposite party can prove a superior title, it cannot but be maintained that the proper proceeding must be that the local enquiry or investigation, of whatever nature it may consist, should be upon evidence in the legal sense of the word. I do not myself much approve of the term "legal evidence," for all that courts of justice are concerned with is evidence in the legal sense of the term,—that is, that which is taken on oath. Oral evidence is the statement of a witness on oath, and unless it be upon oath it cannot be any evidence at all. Therefore the expression "legal evidence" seems to create some confusion, in that it supposes that there may be evidence which is not legal. The adjudication in any case must be upon evidence property so called. The adjudication by the Magistrate on the second question having been made upon matter which was not properly

in evidence is manifestly wrong, and his proceedings must therefore be quashed.

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BAYLEY, J.—On the first of the two questions referred by the Magistrate, I think there is no doubt that Sheikh Burra Mahomed's statement on solemn affirmation recorded by the Joint Magistrate afer the presentation of his petition on its back, and followed by an order endorsed under the affirmation upon the police to act, and for two constables to keep the peace, fully satisfied the Joint Magistrate as to the likelihood of a breach of the peace, and this in such a manner as to make his proceedings in accordance with the provisions of section 318. It follows, therefore, that a discussion of the several decisions referred to by the Magistrate is now unnecessary in this case and under the above circumstances.

As to the second question, the pleader is unable to show us any statement on oath or solemn affirmation of any witness whatever. In fact, it seems clear that the Joint Magistrate went to the village in company with his mohurrir, and asked the inhabitants their views of the rights and interests of the contending parties, but did not put their statements under the sanction of an oath or solemn affirmation. So these statements, under the law, are no evidence at all. The Joint Magistrate no doubt makes some reference as to "oral evidence" in his judgment, but, as stated above, there is no such evidence in a legal sense on the record. I concur, therefore, in the order that the Joint Magistrate's proceedings should be quashed as illegal on the second point referred.

*Magistrate's proceedings quashed.*

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*Before Mr. Justice Bayley and Mr. Justice Mitter.*

IN THE MATTER OF THE PETITION OF BHADRESWARI CHOWDHRANI.*

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*Criminal Procedure Code (Act XXV of 1861), s. 318—Evidence—Police Report—Breach of Peace.*

A Magistrate, before proceeding under section 318 of the Criminal Procedure Code, must be satisfied by evidence that a dispute likely to induce a breach of the peace exists. A police report is not evidence.

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IN this case there was originally a report made by the police, and sent to the Extra Assistant Commissioner of Gowalpara (vested with the powers of a Magistrate), that there was a likelihood of a breach of the peace being caused by the ryots of Charla and Parbat Juwar, who were disputing as to the right of fishery in a certain bhil called Bhoispori, on the ground that it was the property of their respective zemindars. Simultaneously with this report, one Nilchand Manji, on behalf of the zemindar of Parbat Jowar, presented a petition setting out his claim, but not praying for an adjudication, under section 318 of the Criminal Procedure Code. Upon this report the Extra Assistant Commissioner called upon Nilchand Manji on behalf of the Parbat Jowar zemindar, and Gobardhan Manji on behalf of the Gharla zemindar, to file written statements as to the actual possession of the fishery. The parties filed their statements, and the Magistrate thereupon personally went to the spot and took the depositions of witnesses on both sides on the fact of possession, and found in favor of the Gharla zemindar, and passed an order retaining him in possession.

The zemindar of Parbat Jowar applied to the Judicial Commissioner of Assam (vested with powers of a Sessions Judge), to send up the proceeding of the Extra Assistant Commissioner of Gowalpara to the High Court for revision under section 434 of the Criminal Procedure Code, on the ground that the Court below had passed no decision on the point as to whether he was satisfied that there was a likelihood of a breach of the peace, which is requisite before steps can be taken under section 318 of the Code, and that there was no evidence on the record on which a finding could be arrived at on this point. The Judicial Commissioner called for an explanation from the Extra Assistant Commissioner, at the same time directing him to take evidence (if there had been an omission to do so) and to record a proceeding as to whether he was satisfied or not of the likelihood of a breach of the peace. The extra Assistant Commissioner took the evidence of eight witnesses, and recorded his opinion that he was satisfied that there was a likelihood of a breach of the peace happening; and the Judicial Commissioner after this thought the necessity for a reference to the High Court no

longer existed, and rejected the prayer of the Parbat Jowar zemindar.

Baboo *Mohini Mohan Roy*, on behalf of the Parbat Jowar zemindar, moved the High Court (Bayley and Mitter, JJ.) to call for the records of this case and quash the order of the Magistrate, as there was no finding, nor evidence, that a breach of the peace was likely to take place.

A rule was granted, calling upon the other side to show cause why the order of the Extra Assistant Commissioner should not be set aside.

Mr. *Allan* (with him Baboo *Tarini Kant Bhuttacharjee*), for the Gharla zemindar, now showed cause. He contended that the report of the police was sufficient, if believed by the Magistrate, to warrant proceedings being taken under section 318 of the Criminal Procedure Code. In support of this view, he quoted the case of *The Queen* v. *Ballabh Kant Bhuttacharjee* (1).

He further urged that, in this case, the Extra Assistant Commissioner did not act simply on the police report, for there was a petition on the record, put in about the same time with the police report, by the petitioner, complaining to the Magistrate of the conduct of the opposite party, and asking for an adjudication, which would be sufficient to move a Magistrate to take proceedings under section 318. The Magistrate, he urged, is simply to be satisfied of the probability of a breach of the peace taking place, and that it was nowhere laid down that he could not be satisfied otherwise than on the sworn statement of parties.

BAYLEY, J.—We think this rule should be made absolute, and the order of the Extra Assistant Commissioner be set aside.

The contention between the parties was as to the right of fishery; and the legal question raised before us in this reference is, whether the Extra Assistant Commissioner had legal evidence to proceed upon under section 318.

It is admitted that no depositions on oath were taken, and it

(1) See *ante*, p. 324.

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is not alleged that the Magistrate personally and with his own eyes saw any probability of a breach of the peace. All that was acted upon was the report of the police.

In a recent case, decided by Mr. Justice Paul and myself, on the 17th of this month, *The Queen* v. *Kali Chandra Shaw* (1), we stated on a similar question, that "mere local enquiry and "statements of parties not on oath are not sufficient data on which "to decide what party is in possession of land;" and further on, that "any statements made not on oath cannot be regarded as "evidence, and ought not to be relied upon as such." The only exception to this rule—if exception it can properly be called—is when a Magistrate on the spot, and with his own eyes, sees parties armed for a conflict, or otherwise in such a position as would create a breach of the peace.

A decision of Mr. Justice L. S. Jackson and Mr. Justice Markby, in *The Queen* v. *Ballabh Kant Bhuttacharjee* (2), has been quoted to us as holding that, in some cases, the mere information of the police may be accepted. There might have been peculiar facts in that case which are not in this. The majority of decisions are the other way, so we follow them and the ordinary rule of law,—*viz.*, that statements not upon oath are not ordinarily legal evidence.

It has, however, been pressed on us that the complainant himself, Nilchand Manji, had requested by a petition that the Magistrate should proceed under section 318; but on referring to the petition and the endorsement upon it, it is quite clear that all that the complainant has requested was with a view to the satisfaction of his own particular claim, and did not specifically ask for an enquiry and trial under section 318.

In this view, we think that the orders of the Extra Assistant Commissioner, dated the 26th May 1870, and 24th November 1870, must be set aside, and this rule made absolute.

MITTER, J.—I am of the same opinion. The report of the police is no evidence whatever, and the Extra Assistant Commissioner ought not therefore to have accepted that report as sufficient to institute proceedings under section 318.

*Rule absolute.*

(1) See *ante*, p. 322 (2) See *ante*, p. 324.