Before Mr. Justice Loch, and Mr. Justice Glover.

MAGHAN MIRSA *v.* CHAMMAN TELI.*

1868
Sept. 14.

Security to keep Peace—Section 282 of the Criminal Procedure Code (Act XXV of 1861.)

Before making an absolute order directing a person to enter into a bond to keep the peace, the Magistrate must take the evidence on which he bases the order in the presence of the accused or his agent.—*Per Loch, J. Glover, J.*, dissenting.

The following reference was made by the Sessions Judge of Gya :

" Under the provisions of section 434 of the Code of Criminal Procedure, I have the honor to submit the record of the case noted in the margin, and to recommend that the order of the Officiating Joint Magistrate requiring security to keep the peace from Maghan Misra be quashed as illegal and not having been duly made.

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2. " In the case of *Narsing Narrayan* (1) it was held that the order directing the defendant to enter into a bond to keep the

* Reference under section 434 of the Code of Criminal Procedure.

(1) This was a reference, under section 434 of the Criminal Procedure Code, from the Sessions Judge of Tirhoot. It came before *Phear* and *Hobhouse, JJ.*, on the 2nd of June 1868, and the following opinion was delivered by

PHEAR, J.—This is a reference made to this Court by the Sessions Judge of Tirhoot, under section 434 of the Criminal Procedure Code, in which he says that he transmits to this Court the record of the case of Government against Baboo Narsing Narayan, with the recommendation that the final order upon the defendant in that case to give recognizance to the extent of 5,000 rupees should be quashed. The Judge thus states the case.—"Upon a memorial of the Assistant Magistrate of Tajpore, dated the 18th of October 1867, stating that though the charge of illegal assembly brought against Baboo Narsing Narayan possibly had broken down, and he had had to acquit the defendant, he was of opinion that Baboo Narsing Narayan ought to be bound down to keep the peace. Accordingly, a summons was issued on the Baboo, under section 282 of the Criminal Procedure Code, and he was eventually bound down to keep the peace." The Judge further says :— "I find that the summons served upon Baboo Narsing, under section 282 of the Criminal Procedure Code, sets forth as the credible information received by the Magistrate, etc., etc., the record of a case of complaint of one Mul Chand Pande in the Court of the Assistant Magistrate o Tajpore against Baboo Narsing Narayan, and also the Assistant Magistrate's

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peace, could not be made until the Magistrate had taken fresh evidence properly given on the appearance of the accused, or opinion that the Baboo should be bound down. But upon this, I observe that Mul Chand's case has been dismissed as not proved. Therefore, this would be no ground for calling upon the Baboo to enter into a recognizance either under section 280 or 282, and obviously the Assistant Magistrate's opinion cannot be called credible information. I consider, therefore, that the Baboo ought to be released from his recognizance."

We think that the Judge is in error in thinking that the record in the case of Mul Chand Pande *v.* Baboo Narsing Narayan, does not afford credible information, within the meaning of the Legislature, quite sufficient to justify the Magistrate in issuing a summons under section 283. That record contains the depositions on oath of several witnesses in the case who appear to state, as facts, matters which would certainly, if credible, lead to a conclusion that a breach of the peace might be likely, and we think that, information so conveyed to the Magistrate is credible information. Consequently, we are of opinion that the recognizances are not void for the reasons which the Judge suggests in his reference. However, it has been brought to our notice by the Advocate who has argued the case before us on behalf of the accused, that after the issuing of the summons, and on the appearance of Narsing Narayan in answer to the summons, there was no further evidence taken bearing upon the subject of the summons. Now, although section 282 of the Criminal Procedure Act authorizes the Magistrate to issue a summons, that is to call the party before him upon the foundation of any information that can be called credible information, still he cannot make the order that the defendand should enter into a bond to keep the peace, until he has adjudicated judicially that he is satisfied that it is necessary for the preservation of the peace to take such a bond from the defendant. This is provided by section 288, and taking that section in connection with the one immediately preceding 287, it is perfectly clear that this adjudication must be come to, upon evidence properly given on the appearance before the Magistrate of the person who has been summoned, or of his agent in the case, where he is permitted to appear by agent. Two or three decisions upon the analagous enactment, section 318, namely *Dewan Elahi Newaz* v. *Savarannisa* (1) and *Amrit Nath Jha* v. *Ahmed Reza* (2) and others, have laid down that an adjudication by a Magistrate of his being satisfied that a breach of the peace is likely to occur, must be based upon legal evidence and be duly recorded. I may say that it is obvious, and unless this be so, the result of the provisions of section 282 and section 288, would be that the Magistrate might really inflict a very heavy fine, and commit to prison for default of payment thereof without the observance of the ordinary procedure, and the taking of evidence, in the manner which is considered by the Legislature to be necessary; and is therefore strictly provided for all other cases, where an accused person is made liable to a penalty and without there being even the security afforded by the opportunity of appeal.

On the whole, I think, there cannot be any doubt, even though the words of this section, with those of the one I have last referred to, do not expressly so provide, that the adjudication of a breach of the peace being likely to occur, which must be made by the Magistrate under section 288 of the Criminal Procedure Act, before he can take a bond from the person accused, must be based upon legal evidence, and must be distinctly stated as a judicial finding of the Magistrate as in all other criminal cases. I have already said that the learned Advocate has pointed out to us that there does not appear in the papers before us any trace of evidence having been

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

(2) 6 W. R., Crim., 61.

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of his agent, before him; and before he had adjudicated judicially on such evidence that it was necessary for the preservation of the peace that a bond should be taken. In the case now under consideration, it appears from the record that a petition was presented by certain parties complaining of threatened violence on the part of certain persons therein mentioned. Thereupon some of those persons were summoned, but the defendant, Maghan Misra, does not appear to have been then called upon; subsequently the evidence of some witnesses was taken, and after it had been recorded, the defendant, Maghan Misra, was directed to show cause why security should not be demanded from him. This order was passed on 20th June. On the 23rd *idem*, the defendant appeared, and gave in a written statement showing cause as required. Upon this statement being filed, an order was passed directing Maghan Misra to give two sureties in 100 rupees each, and to enter into his own recognizances to the amount of 200 rupees to keep the peace for the space of one year.

3. "The proceedings in this case were not in accordance with the ruling above cited; no evidence appears to have been taken on the appearance of the accused; that which is with the record was taken before he was required to appear; and therefore under the ruling referred to, cannot be considered to have been properly given. For these reasons, I consider the Joint Magistrate's order is illegal, and recommend that it be quashed."

GLOVER, J.—I can find nothing in the Criminal Procedure Code which makes it necessary to take evidence as to the likelihood of a breach of the peace, after the accused has been summoned and is persent either in person or by agent. Section

given when the accused appeared before the Magistrate in obedience to the summons. Nor is there evidence in the *quasi* record sent up to us, which can be properly said to be the taking place of an adjudication by the Magistrate that he was satisfied upon the evidence that a breach of the peace was likely to occur. This being so, I think that the order directing the accused, Baboo Narsing Narayan, to enter into a bond to keep the peace, was illegal, as not having been duly made; and, therefore, that it ought to be quashed, and the accused released from his recognizances, if he has entered into them, or discharged from custody, if he has been put into prison.

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282 gives a Magistrate power, on receiving "credible information," that such and such a person is likely to commit a breach of the peace, to call upon that person to show cause why he should not be required to enter into a bond to keep the peace. An order of this description cannot be issued until the Magistrate has satisfied himself in the way laid down in the Procedure Code of the necessity for issuing it, but being issued, and the accused appearing to show cause against it, there would be no necessity, it seems to me, for recording, *de novo*, the evidence of any witnesses, merely because their depositions had not been taken in the presence of the accused. The law supposes that the Magistrate has acted prudently, and with due consideration, and has received information upon which he believes that it is necessary to prevent a breach of the peace by calling for a security bond. The words of section 282 appear to me to suppose that a good *primâ facie* case has already been established against the party accused, which case he is called upon to rebut, if he would escape the necessity of having to give security, and I cannot find either in sections 282, 287, or 288 anything which makes it incumbent on a Magistrate to adjudicate judicially as to the necessity for taking security in evidence given before him, on the appearance of the person summoned. It appears to me that if a Magistrate is once satisfied, on what he considers to be credible information, that it is necessary to take security for the preservation of the peace, he has full authority to call upon the party charged, and to take such security from him, without recording in his presence the evidence or information on which he himself acted.

This case has been referred to the High Court by the Judge of Gya, under section 434, Code of Criminal Procedure, with an opinion that as a certain party against whom proceedings had been taken under section 282 had not had the opportunity of hearing the evidence, on which the Magistrate acted, in calling upon him to show cause, the order for security was illegal, in accordance with the ruling of a Divisional Bench of this Court, in the case of *Narsing Narayan* (1). With

(1) *Ante*, p. 7, note.

great deference to the learned Judges who passed that decision, I think, for the reasons above given, that the Magistrate's order in this case was not illegal, and that there was no necessity for taking the evidence of witnesses in the accused's presence.

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The point is an important one, and I should wish it referred to a Full Bench.

LOCH, J.—I think that the course laid down in the ruling of the Court referred to should be followed, though the law does not distinctly prescribe what is to be done after the accused appears. He is, however, in the position of a person charged with an offence, against whom evidence has been taken, and he has been summoned to answer to the charge. Now in ordinary cases, though witnesses in support of the charge have been examined before the accused appear, yet when he appears, they are required to attend to be again examined before the accused, and to give him an opportunity of cross examining them. This appears to me the course which should be taken in cases of the kind which has been referred to. A criminal charge is preferred, and the accused should have the opportunity, as in other cases, of showing, by the cross-examination of the witnesses for the prosecution, that no charge is made out against him. I would, therefore, set aside the order of the Magistrate, as recommended by the Sessions Judge.

Before Mr. Justice Loch and Mr. Justice Glover.

THE QUEEN *v* SHAM SUNDAR CHOWDHRY.*

1868
Dec. 11.

Recognizance to keep the Peace—Jurisdiction—Criminal Procedure Code (Act XXV. of 1861), s. 293.

A executes in District T, a recognizance to keep the peace towards B. A. was afterwards convicted in District S of having assaulted B in that district. *Held*, A had forfeited his recognizance, and the Magistrate in District T could proceed against him under section 293 of the Criminal Procedure Code.

DEFENDANT executed, at the order of the Magistrate of Tipperah, a recognizance, that he would keep the peace towards one Radhagobind Shaha. Subsequently he was convicted by the Magistrate of Sylhet of having assaulted Radhagobind within the

* Reference from Sessions Judge of Tipperah, dated 31st August 1868