FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Ainslie, and Mr. Justice Birch.

THE EMPRESS v. NOBIN CHUNDER DUTT.*

1879
March 24

Evidence—Proceedings on Forfeiture of Recognizance—Criminal Procedure Code (Act X of 1872), s. 502.

A Magistrate is not justified in forfeiting a recognizance under s. 502 of Act X of 1872, unless the party charged with a breach of the peace has had an opportunity of cross-examining the witnesses, upon whose evidence the rule to show cause why the recognizance should not be forfeited has been issued.

On the 27th September 1877, the Deputy Magistrate of Moonsheegunge passed an order binding over Nobin Chunder Dutt and Krishna Coomar Dutt to keep the peace for one year, under two separate recognizance bonds to the amount of Rs. 500 each.

Before the expiration of the year, certain persons were charged with, and convicted of, an assault before the Deputy Magistrate, who, upon the evidence before him, decided that Nobin, though he had not been personally concerned in the offence, had caused the breach of the peace to be committed. He therefore issued a notice to Nobin, calling on him to show cause why his recognizances should not be forfeited. Nobin appeared to show cause; but the Magistrate, without taking further evidence against Nobin than that which was recorded in the case above mentioned, used that evidence against him, and without hearing any evidence on Nobin's side, ordered that his recognizances should be forfeited under s. 502 of the Criminal Procedure Code.

The Sessions Judge was of opinion, on the case coming up before him, that the Magistrate had proceeded improperly,—

* Reference No. 1486 of 1878 to the High Court by C. B. Garrett, Esq., Sessions Judge of Dacca, with a view to the reversal of the order of Baboo Trailokya Nath Sen, Deputy Magistrate of Moonsheegunge.

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firstly, because no breach of the conditions of the recognizance bond had been proved by any evidence against Nobin; and, *secondly*, because, although notice was issued on him to show cause, the Deputy Magistrate forfeited the recognizances without summoning the witnesses whom Nobin wished to call in his defence, and he, therefore, sent up the case for orders to the High Court.

On the case coming up before the High Court, Mr. Justice Ainslie and Mr. Justice Broughton referred the case to a Full Bench with the following remarks:—

The evidence, by which it is sought to charge Nobin Chunder Dutt with having done an act whereby he was liable to a forfeiture of the recognizance to keep the peace entered into by him, was not taken in his presence, and he, therefore, had no opportunity of cross-examining any of the persons whose testimony constituted the proof on which the Magistrate relies. In the case of *Kalikant Roy Chowdhry* (1) the Court held—under s. 293 of the former Criminal Procedure Code, the words of which are substantially the same as those of s. 502 of the Code of 1872,—that before a Magistrate can declare that recognizances to keep the peace have been forfeited, there must be a regular judicial trial and legal enquiry before the punishment can be inflicted.

The circumstances of that case appear to be the same as those of the present.

Looking to the words of the law, we think it doubtful whether this view is strictly correct, though the course prescribed is one, the principle of which we approve.

The section says—'Whenever it is proved before the Magistrate that any recognizance has been forfeited, he shall record the grounds of such proof, and call upon the person bound by such recognizance to pay the penalty thereof, or show cause why it should not be paid;' and the following clause provides for the Magistrate proceeding by warrant to levy the amount, if sufficient cause be not shown, and the penalty be not paid; so that if the person called upon should not appear at all to show

(1) 3 B. L. R., App., 155.

cause, the Magistrate may act upon the proof recorded before he ever had any chance of hearing any proceedings against him being on foot.

The procedure prescribed in this section is an exception to the general rule,—'That a man charged with an offence can only be convicted on evidence taken in his presence.'

It may be, that the person charged with an act involving forfeiture of his recognizances, is entitled to have any witnesses, on whom the Magistrate relies, recalled for cross-examination, but it would appear that under the words of the law the Magistrate is not otherwise legally bound to examine such witnesses in the presence of the person charged, as in ordinary trials.

We think this point of such importance, that it should be determined by a Full Bench, and we, therefore, refer the question,—Whether a Magistrate is bound in law to record the proof, on which he proposes to forfeit a recognizance to keep the peace in the presence of the person bound by such recognizance?

We agree with the Sessions Judge on the second point, that Nobin Chunder was entitled to have his witnesses examined when he appeared to show cause. We defer making any final order until the reference to the Full Bench shall be disposed of.

No one appeared for either party.

The judgment of the Full Bench was delivered by

GARTH, C.J.—We find that, in the case referred to us, Nobin Chunder Dutt was bound to keep the peace for the term of one year in his personal recognizance for the sum of Rs. 500. Within this term, certain other persons were charged with a breach of the peace before the Deputy Magistrate, who thereupon convicted Krishna Tappadar and others of an assault; and, although Nobin was not personally concerned in the offence, and was not made a defendant at the trial, the Magistrate decided upon the evidence that he (Nobin) had by the agency of the convicted persons caused that breach of the peace to be committed, and he thereupon called upon him to show cause why his recognizances should not be forfeited; and on his appearance in Court, he upon no further evidence

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than that which was recorded on the prosecution of Krishna Tappadar and others, declared the recognizances forfeited.

The course prescribed by s. 502 of the Criminal Procedure Code (and by s. 293 of the former Code), takes the place of the cumbrous proceeding by *scire facias*, which is in most cases necessary in England before estreating recognizances to keep the peace.

In this proceeding the defendant, who has entered into the recognizance, has an opportunity of pleading to the *scire facias*, and of thus raising the question,—Whether he had been guilty of the assault or no: and upon the issue raised by that plea, a trial takes place, at which evidence is gone into precisely as in a civil suit.

We think that, according to the fair construction of s. 502, a Magistrate is not justified in forfeiting a recognizance under that section, unless the party charged with a breach of the peace has had an opportunity of cross-examining the witnesses upon whose evidence the rule to show cause had been issued.

That opportunity may arise either upon the prosecution of the accused person before the Magistrate for a breach of the peace, or any other offence: in which case the accused being the defendant would of course have the right to cross-examine the witnesses for the prosecution; or it may arise upon a substantive application made to the Magistrate to forfeit the recognizance; in which case the witnesses upon whose evidence the rule is granted ought to be present and subject to be cross-examined by the accused, upon the occasion when cause is shown against the rule.

If no cause is shown, or if the accused declines to cross-examine the witnesses, the Magistrate may of course proceed to dispose of the case upon the evidence as it stands. It is obviously sufficient for the purposes of justice that the accused has had the opportunity of cross-examination.

Order reversed.