Before Sir William Comer Petheram, Knight, Chief Justice, and Mr. Justice Rampini.

1894
May 29.

HARI KISHORE MITRA AND OTHERS (PETITIONERS) *v.* ABDUL BAKI MIAH (OPPOSITE PARTY.)*

Transfer of Criminal Case—Ground for Transfer—Probability of unfair trial—Complexity of case—Transfer from one Magistrate to another—Local enquiry—Magistrate collecting evidence on local enquiry—Magistrate trying case, Competency of, to be witness—Competent witness—Examination of Magistrate trying case as a witness.

Where an Assistant Magistrate with second class powers was directed by the District Magistrate to take up a case of some complexity arising out of disputed boundaries to land in which the accused were charged with rioting, trespass, mischief and theft, and where, in the course of such investigation, he held a local enquiry extending over five days, during which he made a number of notes and appeared to have made a very careful and conscientious investigation of the locality, such as would properly be made by a person whose duty it was to get at the facts with a view to lay the same before some tribunal, and during such investigation it appeared that he acquired a large amount of information with reference to the occurrence on which he had to arrive at a judicial determination, but which, by reason of the way it was acquired, he could not properly or legally consider in arriving at an ultimate decision of the case, (such information not being guarded by the safeguards by which statements on which a Judge or a Magistrate exercising judicial functions can act must be guarded), and where it was suggested that the notes so made should be put on the record, and the Assistant Magistrate tender himself while trying the case as a witness to be cross-examined by either the prosecution or the defence :

Held, that such a course could not be allowed, and that the Assistant Magistrate ought not to try the case, but that it must be transferred to some other Magistrate exercising first class powers for disposal.

Powers of Magistrates to hold local investigations and the nature of such investigations discussed.

Whenever it is desirable for a Magistrate to view the place at which an occurrence, the subject-matter of a judicial investigation before him, has taken place, he should be careful to confine himself to such a view of the place as to enable him to understand the evidence placed before him, and should take care that no information reaches him with reference to the occurrence which he has to investigate beyond what he acquires by that view, and if the place of the occurrence be in dispute he would be wise in postponing his visit till all the evidence has been recorded, if under such circumstances he feels disposed to visit it at all.

* Criminal Rule No. 13 of 1894, against the order passed by C. A. Radice, Esq., Assistant Magistrate of Mymensingh, dated the 5th April 1894.

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But where a local enquiry by a Magistrate takes the form of an investigation into the occurrence on the site of the occurrence instead of in his own court, and he takes evidence on the spot, such evidence should not be recorded unless it is protected by all the safeguards by which evidence, on which a Judge may act, is protected by law.

THIS was a rule to show cause why a case pending before the Assistant Magistrate of Mymensingh, who exercised second class powers, should not be transferred to the file of some other Magistrate exercising first class powers on the ground of the complexity of the case. The facts which gave rise to the application being made to the High Court were as follows: It appeared that for a considerable period there had been a dispute existing between Rani Hemanta Kumari Devi and the Maharajah of Nattore and their respective predecessors in title regarding the boundaries of their lands and of certain forests in the subdivision of Tangail adjoining each other, and that these disputes had from time to time led to the institution of criminal proceedings.

In February and March 1893 timber in both forests appeared to have been cut, and thereafter various complaints were made. On the 27th November 1893 the complaint which gave rise to the present proceedings was made by Abdul Baki Miah, a servant of the Maharajah, before Babu Shib Chunder Nag, Sub-Divisional Magistrate of Tangail, charging Hari Kishore Mitra, and a large number of others in the service of the Rani, with offences under sections 147, 379, 426 and 447 of the Penal Code, *viz.*, rioting, theft, mischief and criminal trespass. On the complaint being made, the complainant was examined on oath, and the Magistrate passed the following order: "There have been disputes going on for some time and cases are pending regarding similar matters and are under enquiry. There are questions of right of of all sorts connected with the disputes. Complainant to prove his case first on the 9th December 1893."

On the 11th December 1893, Abdul Baki Miah presented a petition to Mr. Earle, the District Magistrate of Mymensingh, stating, amongst other things, that Babu Shib Chunder Nag was inclined to view all cases instituted by the Maharajah's men in the light of merely contested civil cases, and that it was desirable

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and necessary for the ends of justice that the cases should be tried by some other magistrate, and asking for a local enquiry and for the seizure of the timber that might be found on the enquiry, and for the transfer of the case to the file of some other magistrate.

Thereupon Mr. Earle recommended a local enquiry to be held by the Sub-Divisional Magistrate of Tangail himself, and suggested that, pending his arrival at the place of occurrence, the timber might be inspected by the Police Inspector. The Sub-Divisional Magistrate then forwarded the order to the Police Inspector for the necessary steps to be taken, and the latter having made an enquiry on the spot submitted his report on the 29th December 1893.

Previous to the submission of that report, *viz.*, on the 20th December, Babu Shib Chunder Nag made over the case to Munshi Sujab Ali, Sub-Deputy Magistrate of Tangail, for trial, and on the 6th January 1894, the latter official ordered warrants to issue without bail for the arrest of some 21 persons referred to in the petition of complaint on charges under sections 379 and 411 of the Penal Code, and on the same day passed an order directing the Police to seize the timber and stack it in the compound at the Police outpost.

On the 9th January 1894 the Rani's people communicated by telegram with Mr. Earle complaining of the orders of the 6th, and the latter replied that he was enquiring into the matter, and called on Babu Shib Chunder Nag to explain why he could not take up the case himself and to give the reason for the orders framed by the Sub-Deputy Magistrate. Further correspondence then appears to have passed, and on the 17th January Mr. Earle directed the issue of the warrants to be stopped and made over the case to Mr. Radice, an Assistant Magistrate with second class powers.

That order was in the following terms :—

"The issue of warrants in the case in question is hereby prohibited, as also the seizure of timbers. The case, as also another case which I understand is pending as regards the forest timber, is made over to Mr. Radice, Assistant Magistrate, who will take them up *de novo* on the spot. He will have perfect liberty to issue such process and pass such orders as he considers legal after

perusal of all the papers, and also, if he likes, local investigation. The cases are between big zemindars and the value of the property concerned is not small. Further the cases may involve difficult questions which I do not consider the Sub-Deputy Magistrate is the proper person to deal with. If any orders have been passed by the Sub-Deputy Magistrate in the other case, the name of which is not specified, they are to be considered as cancelled. Mr. Radice having a full hand to deal with the case * * * I should have put a first class Magistrate in charge of these cases if it had been possible but I find it is impossible."

On the 21st January Mr. Radice reached the locality, and on the 22nd, 23rd, 24th, 25th and 26th he proceeded to hold a local enquiry at which the accused persons were alleged not to have been present. During that enquiry it appeared that Mr. Radice made a number of notes, the nature of which appears from the judgment of the High Court, and it was alleged on the part of the accused that at the time of holding the enquiry he had shown that he had even then formed an opinion adverse to them.

On the 25th January Mr. Radice passed an order directing the accused to appear before him on the 12th February.

On the 8th February an application was made to Mr. Earle on behalf of the accused, asking that the case should be made over to some Magistrate with first class powers on account of its importance and of the difficult questions that were likely to arise in it, but this application was refused.

On the 13th March the accused were brought up before Mr. Radice, and on that day and the following, and again on the 3rd April, some witnesses were examined on behalf of the prosecution in chief only and two of the accused was examined. On the latter date the further hearing was adjourned till the 18th April, and Mr. Radice intimated that he would again visit the locality on the 15th April.

It further appeared that on the 8th February 1894 an application had been made by the accused for copies of the proceedings, order sheet, notes, memos, and depositions which had been made and recorded by Mr. Radice while holding the local enquiry, and that on the 9th February Mr. Radice had passed the following order: "Grant copies of every thing on the record of the

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case," and the accused thereafter obtained copies of everything that *had been made* part of the record.

On the 3rd April 1894 a further petition was put in on behalf of the accused, stating that they had obtained copies of the daily proceedings in connection with the local enquiry, which had been made part of the record, and praying that if Mr. Radice had made any separate notes or memoranda which had not been made part of the record, he would be pleased to make such a memoranda part of the record, so that the accused might have an opportunity of seeing them. This petition was presented in Court by Mr. W. C. Ghose on behalf of the accused, and, as stated in the petition of the accused to the High Court, the following is what then transpired :—

"Mr. Ghose said that he did not know whether there was any other note besides the one that formed part of the record, and that if there was any such note he prayed that he might be allowed an inspection of it.

"Mr. Radice said that he thought he had made all notes part of the record, and that he would presently make an enquiry.

[At this stage the Peshkar, on being asked, handed over to Mr. Radice some notes saying that they had not been made part of the record.]

"Mr. Radice then went through the notes himself, and after considering for a few minutes told Mr. Ghose that the part of the notes which contained facts found by him would be made part of the record, but that the remaining portion which contained his opinions he would keep away. Mr. Ghose thereupon said that he was entitled to see the whole of the notes and he prayed that he might be allowed to do so.

"Mr. Radice then said that he had recorded his opinions in preparation for writing his judgment. Mr. Ghose answered, saying, that surely at that stage the Court ought not to have formed any opinion, and he prayed that he might be allowed to see the whole of the notes.

"Mr. Radice thereupon said that he might change his opinion. Mr. Ghose then again prayed that he might be allowed to see the whole of the notes. That thereupon the said Mr. Radice, without allowing the said Mr. Ghose to see the notes, recorded the

following order on the said petition presented by Mr. Ghose, *viz.*, 'I may put in as much of the notes as is observation of fact and not opinion or inference drawn by me; but must in any case consider what I will put in and what not.'"

On the 4th April 1894, another petition was filed on behalf of the accused for certified copies of the notes and memoranda made by Mr. Radice, in addition to those on the record, and also a copy of the petition filed by the defence the day before together with the order passed thereon; and on the 5th April 1894 Mr. Radice passed the following order: "Ask Mr. Ghose to see me about this." Mr. Ghose appeared to have seen Mr. Radice on the same day in Chambers and verbally prayed that copies of the whole of his notes might be granted, but did not succeed in his prayer; and the following further order was then passed on the petition the same day: "Grant copy of petition. As to copies of my notes I will pass orders on the 16th. Put up them."

On the 13th April 1894 this application was made to the High Court. It was alleged that under the circumstances it would be necessary to call Mr. Radice as a witness for the defence, and affidavits were put in to show that he had not only formed an opinion adverse to the accused, but had recorded such adverse opinion in the notes referred to with a view to base his judgment thereon, and that consequently a fair and impartial trial could not be expected from him. It was further urged as a ground for a transfer that what Mr. Radice had done was in fact to take part in collecting evidence for the prosecution during the local enquiry, and therefore he ought not to try the case, and also that the case was one of such complexity that it should be tried by a Magistrate exercising first class powers.

A rule was issued on the latter ground, and Mr. Radice submitted an explanation and sent up the notes referred to. The purport of that explanation and the nature of the contents of the notes appear sufficiently from the judgment of the High Court.

Mr. *Jackson* and Babu *Promotho Nath Sein* appeared in support of the rule.

Mr. *W. C. Bonnerjee*, Babu *Srish Chunder Chowdhry*, and Mr. *K. N. Chowdhry* showed cause.

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The following judgments were delivered by the High Court (PETHERAM, C.J., and RAMPINI, J.) :—

PETHERAM, C.J.—The Maharajah of Nattore and Rani Hemanta Kumari Devi are the owners of forests in the Sub-Division of Tangail, which adjoin each other, and there have been for a long time disputes between them, and the persons who claim under them, as to the boundary line between their properties, which have from time to time led to the institution of criminal proceedings. On the 27th November 1893, Abdul Baki Miah, a servant of the Maharajah, laid a complaint before Babu Shib Chunder Nag, Sub-Divisional Magistrate of Tangail, charging the petitioners, who are tenants and servants of the Rani, with having, on the 25th and 26th of the same month, been guilty of the offences of rioting, criminal trespass, mischief and theft. The complainant was examined on oath before the Sub-Divisional Magistrate, who on the same day made an order that there were questions of right of all sorts connected with the disputes, and that the complainant should prove his case first on the 9th of December. On the 11th of December the complainant petitioned the District Magistrate to remove the case from the file of Babu Shib Chunder Nag to that of some other Magistrate, on the ground that that officer was inclined to view all cases instituted by the Maharajah's men in the light of contested civil cases; and on the 17th of January 1894 the District Magistrate, after a good deal of correspondence and consideration, made over the case to Mr. Radice, an Assistant Magistrate, with orders that he should commence the trial *de novo* and on the spot. Mr. Radice reached the place on the 21st of January, and was engaged on the 22nd, 23rd, 24th, 25th and 26th on a local enquiry, in the course of which he made a good many notes. He has sent these notes to this Court under cover, and they indicate that he made on those days a very careful and conscientious investigation of the locality, such as would properly be made by a person whose duty it was to get at the facts with a view to lay them before some tribunal, but the information which he sought and obtained was not guarded by the safeguards by which statements on which a Judge or Magistrate exercising judicial functions can act must be guarded. On the 13th of March the accused persons were brought

up before Mr. Radice, and on that and the next day, and again on the 3rd of April, to which day the trial seems to have been adjourned, witnesses were examined for the prosecution, and two of the accused were examined by the Magistrate. The enquiry was then adjourned to the 18th, and Mr. Radice intimated that he would again visit the place on the 15th. On the 3rd an application was made to Mr. Radice on behalf of the accused, that all notes and memoranda which he had made in the course of the investigation might be made part of the record, and that the parties might have copies of them. A good deal of discussion took place on the subject, and on the 5th Mr. Radice made this order: "Grant copy of petition. As to copies of my notes I will pass orders on the 16th. Put up them." On the 13th this rule was obtained from this Court, at the instance of the accused, to transfer the case from the file of the Assistant Magistrate to that of a Magistrate exercising first class powers, on the ground of the complexity of the case.

Mr. Radice has submitted an explanation to this Court, in which he tells us, amongst other things, that a transfer of the case from his file would cause great waste of time, and submits that a transfer is not necessary. With reference to the local enquiry he says: "Mr. Earle, the Magistrate, refused to transfer this case from my file (I was then Assistant Magistrate with second class powers) to that of a Magistrate with first class powers. I had consulted Mr. Earle on the advisability of transferring this case from my file, on the ground of my having conducted the local enquiry, and that either side might desire to call me as a witness. It was decided that as I had prepared full and careful notes of everything done at the local enquiry it would be sufficient if I were to put in these notes as evidence, and invite both parties to cross-examine me thereon." I have looked at some of the evidence which has been taken in the case, and I must say that if such an amount of evidence and such an elaborate local enquiry was necessary to determine whether the timber was grown on the land of the Maharajah or on that of the Rani, it seems unfortunate that the District Magistrate should have removed the case from the file of Babu Shib Chunder Nag for the reason assigned, as if it is the case that the question between the zemindars is one of such complication and difficulty,

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it could hardly be possible to convict the servants of either of them of crime, for taking, by the orders of his master, timber which his master claimed as his own; and at first I was disposed to discharge this rule, on the ground that the local enquiry was not necessary at all, and that it would be enough for us to send the case back to Mr. Radice, with a direction to try the question whether crime had been committed, and not to endeavour in such a case to decide questions of title or boundary. On further consideration, however, I have come to the conclusion that we cannot allow Mr. Radice to proceed further with the trial of this case, and I have been forced to that conclusion mainly by what he has himself said in his explanation to this Court. Mr. Radice evidently considers the local investigation to have been of the greatest importance, and he feels, and no doubt properly, that he is not in a position to act judicially upon the information which he obtained in the course of it; but he thinks, after consultation with the District Magistrate, that the difficulty caused by the mode in which the local enquiry was conducted may be avoided by his putting in his notes as evidence, and by his allowing either the prosecution or the defence to cross-examine him upon them. It is in my opinion absolutely impossible for us to countenance anything of the kind. Such a proceeding is not contemplated by any provision to be found in the written law of this country, and is one which I think must have a tendency to shake the confidence of the people in the administration of justice. It may be that there are cases in which it is desirable that a judicial officer should see the place in which an occurrence which is the subject of a judicial investigation before him has taken place, in order to enable him to understand the evidence which is laid before him, but when an officer visits a place for this purpose he should take care that no information reaches him with reference to the occurrence which he is to investigate beyond what he acquires from the view of the place, and when there is a dispute as to the exact spot in which the occurrence is said to have taken place, he will be wise to defer his visit to the spot until he has heard the whole of the evidence, if under such circumstances he feels disposed to visit it at all. There may also be another kind of local enquiry which an officer may sometimes be called upon to hold.

I mean an enquiry which, for the sake of convenience, he holds at the place where the occurrence took place, and not in his own Court; but such an enquiry, wherever it is held, is the trial of the case, and no evidence can be received at it, unless it is protected by all the safeguards by which evidence on which a Judge may act is protected by law. It is evident that the local enquiry held by Mr. Radice in this case was something very different from either of these, and was one in which he acquired a large amount of information with reference to the occurrence on which he had to arrive at a judicial determination, which, by reason of the mode in which he had acquired it, he cannot properly and legally consider in arriving at his ultimate decision. I do not believe it would be possible for any man in coming to a conclusion of fact under such circumstances, to separate the evidence which was properly before him from the information he had acquired on the spot, so that he could say that his mind was not influenced by such information, and when the officer tells us, as he does here, that he has acquired such information, I think it is impossible for us to allow him to proceed with the trial. I wish to add that though Mr. Radice has fallen into this error with reference to the nature of a local inquiry when held by a judicial officer in the course of a judicial enquiry, his notes of the local enquiry and of the evidence taken before him indicate to my mind a conscientious desire on his part to spare himself no trouble, but to make the investigation entrusted to him as complete and at the same time as fair as possible.

The rule will be made absolute to remove the case from his file to that of some Magistrate of the first class, but the selection of the particular officer must rest with the District Magistrate.

RAMPINI, J.—I agree with the learned Chief Justice that this rule must, for the reasons assigned by him, be made absolute. I further agree with him in considering that the Assistant Magistrate who entered on the local enquiry made by him only under the orders of his superior officer, the District Magistrate, has throughout acted conscientiously and exhibited an anxious desire to deal fairly with both parties to this litigation. But the fact of his having made the local enquiry he did make, in which

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he collected information with regard to the boundary between the Maharajah's and the Rani's properties and the cutting of the logs, and in which he actually searched for and found some of the logs claimed as stolen property, renders it impossible for him to try this case judicially. The suggestion which he makes after consultation with the District Magistrate that he should enter the witness-box and be examined and cross-examined by the pleaders of the parties is one which it is impossible, and which it would be illegal, for him to carry out. It has been frequently ruled by this Court that when a Judge is the sole judge, both of law and fact, he cannot give evidence before himself [see *Empress* v. *Donnelly* (1).] Further I may point out that there is no section of the Criminal Procedure Code which authorises a Magistrate to make such a local investigation into a case tried by himself as was made by the Assistant Magistrate in this case. Section 148 provides that the District Magistrate or Sub-Divisional Magistrate may direct some other Magistrate, subordinate to him, to make a local enquiry in a case of a dispute likely to cause a breach of the peace regarding tangible immoveable property, and that the report of such Magistrate may be read as evidence in the case. Section 202 authorises a Magistrate when, after examining a complainant, he sees reason to distrust the truth of the complaint to postpone issuing process against the accused, and either to enquire into the case himself, or direct a previous local investigation to be made by any officer subordinate to him, or by a police officer, or by such other person, not being a Magistrate or police officer, as he sees fit. Section 293 directs that in the course of a sessions trial, when it is considered desirable that the jury or assessors should view the place where the offence is alleged to have been committed, they may be conducted to the place under the care of an officer of the Court, and when the view is finished they must immediately be conducted back into Court, without being allowed to speak to anyone. These are the only sections of the Criminal Procedure Code which allow of local investigations and local inspections, and it is clear that the sort of local enquiry made by the Assistant Magistrate in this case was not one contemplated or

(1) I. L. R., 2 Calc., 405.

authorised by any of them. It is very desirable, I think, that Magistrates should bear these sections in mind when pressed, as they constantly are, to make local investigations into cases coming judicially before them.

H. T. H. *Rule made absolute.*

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RAM BRAHMA SIRCAR AND OTHERS (PETITIONERS) *v.* CHANDRA KANTA SHAH (OPPOSITE-PARTY.)*

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Revision—Criminal Cases—Power of High Court in Revisional Cases—Power to go into case on facts—Criminal Procedure Code (Act X of 1882), section 439.

Under section 439 of the Code of Criminal Procedure, 1882, the High Court has power to consider the facts of a case in revision.

THE petitioners in this case were charged before the Sub-Divisional Magistrate of Meherpore with offences under sections 147, 379, and 109 of the Penal Code, and were all convicted, Ram Brahma Sircar being sentenced to six months and the others to five months rigorous imprisonment. Against this conviction there was an appeal to the District Magistrate who altered the conviction to one under sections 143 and 379 but upheld the sentence.

The petitioners then moved the High Court under the revisional section to send for the record and quash the convictions on the following grounds :—

(1) That under the circumstances of the case the petitioners were not members of an unlawful assembly, and therefore not guilty under section 143 ;

(2) That there was nothing in the case to show any common object ;

(3) That there was nothing in the facts proved to show that theft had been committed ; and

(4) That upon the facts proved, and under the circumstances of the case, the sentences passed were unduly severe.

* Criminal Revision No. 273 of 1894, against the order passed by J. H. E. Garrett, Esq., District Magistrate of Nuddia, dated the 14th May 1894, modifying the order passed by W. N. Delevinge, Esq., Sub-Divisional Magistrate of Meherpore, dated the 21st of April 1894.