APPELLATE CRIMINAL.

Before Mr. Justice Macpherson and Mr. Justice Morris.

THE QUEEN *v.* BHOLANATH SEN.*

1876
June 15.

Criminal Proceedings—Irregularities—Effect of Waiver by Prisoner—Disqualifying Interest of Judge—Judge giving Evidence.

The jailor of a district jail being accused by one of the jail clerks of falsifying his accounts and defrauding the Government, the matter was enquired into by the District Magistrate, and the jailor was, by the Magistrate's order, placed on trial before a Bench of Magistrates, consisting of the District Magistrate himself, *L*, the Officiating Superintendent of the Jail, and three other Honorary Magistrates. The prisoner and his pleaders were alleged to have stated before the commencement of the trial on being questioned that they had no objection to the composition of the Bench, but after the charges had been framed, the prisoner's Counsel objected to the Bench as formed. The District Magistrate directed the Government pleader to prosecute, and both the District Magistrate and *L* gave evidence for the prosecution. After the case for the prosecution was closed, two formal charges were drawn up, namely, that the prisoner had debited Government with the price of more oil-seed than he actually purchased, and that he had received payment for certain oil at a higher rate than he credited to Government. The moneys, the receipt of which were the subject of the first charge, were obtained by the prisoner on the strength of certain vouchers which he had induced *L* to sign as correct, and *L* had sanctioned the sale at the rates credited to Government. Upon the prisoner's giving the names of the witnesses he intended to call in his defence, *L* was deputed by his brother Magistrates to examine some of them who were connected with the jail, in order "to guard against deviation," and the depositions so taken were placed on the record, "to be used by either party, though not themselves as evidence." The prisoner was convicted. On a motion to quash the conviction,—

Held, that *L* had a distinct and substantial interest which disqualified him from acting as Judge.

Held further, that although a Magistrate is not disqualified from dealing with a case judicially merely because in his character of Magistrate it may have been his duty to initiate the proceedings, yet a Magistrate ought not to act judicially in a case where there is no necessity for his doing so, and where

* Criminal Motion, No. 800 of 1876, against the order of the Sessions Judge of Midnapore, dated the 11th February 1876.

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he himself discovered the offence and initiated the prosecution, and where he is one of the principal witnesses for the prosecution.

Held further, that the recording the statements of the prisoner's witnesses was irregular.

Criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner.

THE prisoner Bholanath Sen, while occupying the post of jailor of the District Jail at Midnapore, was accused by one of the jail clerks of falsifying his books and defrauding the Government. The matter was enquired into by the District Magistrate, Mr. Harrison, by whose order the prisoner was placed on trial for criminal breach of trust as a public servant before a Bench of Magistrates consisting of Mr. Harrison himself and four Honorary Magistrates. One of the latter was a Mr. Larymore, who, at the time of the commission of the alleged offences, and at the time of the trial, was the Officiating Superintendent of the jail and the prisoner's immediate superior. In his judgment in the case Mr. Harrison stated that the prisoner and his pleaders were asked before the commencement of the trial whether they had any objection to the composition of the Bench, and that they distinctly said they had none whatever. The prisoner's consent however was not formally recorded, and after the charges were drawn up the prisoner's Counsel objected to the Bench as formed. Under instructions from Mr. Harrison, the Government pleader appeared to prosecute, and both Mr. Harrison and Mr. Larymore gave evidence for the prosecution. After the case for the prosecution was closed, two distinct charges against the accused were framed, the first of debiting Government with the price of more oil-seed than he actually purchased, and the second of receiving payment for certain oil at a higher rate than he credited to Government. As regards the first charge the prisoner was alleged to have received money for the oil-seed on the strength of certain vouchers which he had induced Mr. Larymore to countersign as correct, and with respect to the second charge the prisoner's defence was that Mr. Larymore had himself sanctioned the sale at the rate credited to Government. Upon the accused giving the names of the witnesses he intended to

call in his defence, Mr. Larymore was deputed by his brother Magistrates to examine some of them who were connected with the jail and to take down their statements at once in the presence of the agents of both parties in order to prevent any suggestion that the witnesses had been tampered with and "to guard against subsequent deviation." The depositions so taken were placed on the record "for the use of either party, though not themselves as evidence." Separate judgments were written by the various members of the Bench, but all five joined in signing the finding and sentence of the Court convicting the accused on the two charges of criminal breach of trust under s. 409 of the Penal Code, and sentencing him to two periods of rigorous imprisonment amounting in all to two years, and to a fine of Rs. 1,000, and in default of payment of the fine to six months' additional imprisonment.

An appeal by the prisoner to the Sessions Court was dismissed and he now moved the High Court to quash the conviction.

Mr. *M. Ghose* (Baboo *Boidonath Sen* with him) for the prisoner.—The conviction is bad not merely on the ground of the serious irregularities which marked the whole course of the proceedings, but because the Bench of Magistrates, as constituted, was incompetent to try the case. The District Magistrate who presided at the trial was virtually the prosecutor, and Mr. Larymore was materially, in fact pecuniarily, interested in the result of the trial, and therefore disqualified from acting as Judge: *Queen* v. *Meyer* (1), *Queen* v. *Hiralal Das* (2); and the presumed consent of the prisoner would not cure the disqualification—*Queen* v. *Bertrand* (3). Further it was illegal, or at least highly improper, for these gentlemen to be both witnesses for the prosecution and Judges of the prisoner's guilt or innocence. Taylor on Evidence, 5th ed., 1197. The Bench of Magistrates, in deputing Mr. Larymore to take the depositions of the witnesses for the defence, committed a grave irregularity, and one which has materially prejudiced the prisoner in his defence.

(1) 1 Q. B. D., 173. (2) 8 B. L. R., 422.
(3) L. R. 1 P. C., 520.

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The judgment of the Court was delivered by

MACPHERSON, J.—This is an application to the High Court under s. 297 of the Criminal Procedure Code.

The petitioner, Bhola Nath Sen, has been convicted by a Bench of Magistrates at Midnapore on two charges of breach of trust, under s. 409 of the Indian Penal Code. He was sentenced to two periods of imprisonment, amounting, in all, to two years' rigorous imprisonment, with a fine of Rs. 1,000, and in default of payment of the fine six months' additional imprisonment.

We are asked to quash the conviction on the ground of various substantial illegalities and irregularities, most of which are set forth in the petition presented to this Court.

The seventh of the grounds stated in the petition is, that it was illegal and improper that a certain Mr. Larymore should have been one of the Bench of Magistrates who tried this case. It appears to us that this is a good ground of objection, and that, under the circumstances, the presence of Mr. Larymore, who had a substantial interest in the prosecution, vitiated the proceedings, and makes it necessary that the conviction should be quashed.

The prisoner Bholanath Sen was the jailor of the District Jail at Midnapore, of which Mr. Larymore was the Superintendent at the time of the trial and at the time of the commission of the offences for which Bholanath Sen was tried. Bholanath Sen was Mr. Larymore's immediate subordinate in the management of this Jail, and the moneys, the receipt of which was the subject of the first charge, were drawn by him from Government on the strength of certain bills or vouchers which (although in fact incorrect) Mr. Larymore had been induced by the accused to countersign as correct; while as regards the second charge, which was for receiving payment for certain oil at a higher rate than he credited to Government, the defence was (and Mr. Larymore proved it to be true) that Mr. Larymore had himself sanctioned the sale at the rate with which the prisoner credited the Government.

The whole case was, that the prisoner, by deceiving and

imposing upon Mr. Larymore, had fraudulently got the sums of money, the receipt and appropriation of which was charged against him as criminal breach of trust. Mr. Larymore being the Superintendent in charge of this Jail, and being connected in this manner with the sums which the prisoner was alleged to have misappropriated, it is evident that he was most substantially interested in the matter, and that he was by no means free from the possibility of pecuniary responsibility in respect of it. That being so, it was most unfortunate that the District Magistrate should have thought fit to select Mr. Larymore to sit as one of the Judges in the case.

The Magistrate says, that Mr. Larymore was friendly to the prisoner, and that it was with a desire to assist the prisoner that he put Mr. Larymore on the Bench. But the Magistrate really erred if he selected Mr. Larymore because he was supposed to be specially friendly to the prisoner, almost as much as he would have erred had he selected him for the opposite reason. A criminal prosecution is not in the nature of a friendly arbitration. It is a penal proceeding of a very grave and serious kind, in which it is impossible to proceed too strictly according to the rules prescribed by law. Connected as Mr. Larymore was with the prisoner in the very matters which were the subject of the trial, it is impossible that his sitting as one of the Judges could be right. It is one of the oldest and plainest rules of justice and of common sense that no man shall sit as judge in a case in which he has a substantial interest. That is the law of this country as much as it is the law of England. [See the decision of a Full Bench of this Court in the case of *The Queen* v. *Hiralal Das* (1) and the cases there referred to. See also a very recent case in England—*The Queen* v. *Meyer* (2).]

The District Magistrate says, that Mr. Larymore's interest in the matter was very indirect. In this we cannot agree with him: for it is quite clear, even from the evidence given by Mr. Larymore himself, that he had a most distinct and substantial interest. Under certain circumstances it might have proved a direct pecuniary interest. The District Magistrate

(1) 8 B. L. R., 422. (2) 1 Q. B. D., 173.

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himself says as to the second head of charge,—"there is this to be said in palliation of it, that Mr. Larymore's consent was obtained to the price, while the quantity sold was probably fixed in the accounts with a view to square the monthly statements."

We think that, were it on this ground alone, the conviction ought to be quashed.

But, in addition to this, there are several other very serious irregularities to which our attention has been called.

The Bench of Magistrates consisted of the District Magistrate, Mr. Harrison, Mr. Larymore, the Officiating Superintendent of the Jail, Dr. Bachelor and two native gentlemen, being a Bench of five. In the course of the trial, both Mr. Harrison and Mr. Larymore were examined as witnesses for the prosecution. Without saying that it is illegal for a Magistrate to give evidence in the witness-box in a case with which he is dealing judicially, it clearly is, on general principles, most undesirable that a Judge should be examined as a witness in a case which he himself is trying, if such a contingency can possibly be avoided. (See the Full Bench case—The *Queen* v. *Hiralal Das* (1)—already referred to.) The mere fact that Mr. Harrison and Mr. Larymore were necessary witnesses for the prosecution was a most cogent reason why neither of them should have been members of the Bench by which the prisoner was to be tried. Mr. Harrison was almost as much out of place on the Bench as was Mr. Larymore. For the whole alleged fraud was discovered by Mr. Harrison himself: the prosecution was initiated, and the Government pleader was instructed by him: and he was one of the most important witnesses for the prosecution. That being the District Magistrate's position, we cannot conceive why he did not place the case (which is really a very important one) before some Magistrate in no way connected with it, who might have disposed of it himself, or might have committed the accused for trial to the Sessions, instead of going out of his way to have the case tried by a Special Bench composed of Magistrates, of whom two were manifestly objectionable.

(1) 8 B. L. R., 422.

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In making these remarks, we do not say that a Magistrate is incapacitated from dealing with a case judicially, merely because in his character of Magistrate it may have been his duty to initiate the proceedings. We only say that it was wrong that the District Magistrate should deal with a case judicially when there was no sort of necessity for his doing so, when he had himself discovered the alleged fraud and initiated the prosecution, and when he was one of the principal witnesses against the prisoner.

Then, again, we find that after the case for the prosecution was closed and formal charges were drawn up, and the accused had given the names of the witnesses whom he intended to call, Mr. Larymore was deputed by his brother Magistrates to go and take the depositions of some of these witnesses, Mr. Harrison in his judgment says:—"When the witnesses for the defence were named, most of them were connected with the jail. As it would certainly be said by whatever party they gave evidence against, that they had been tampered with, the Court suggested, and both sides agreed, that these statements had better be taken down at once in the presence of the agents of both parties and of one of the Honorary Magistrates, to guard against "subsequent deviation. Accordingly, they were questioned, and their answers recorded in this way on the 12th and 13th November, and the statements are placed with the record for the use of either party, though not themselves as evidence." We are unable to understand what such a proceeding is supposed to mean. Here is a man being tried on a very serious charge, who names the witnesses whom he means to call. Thereupon "the Court" suggests that "to guard against subsequent deviation," the statements of these witnesses should be taken down at once in the presence of one of the Honorary Magistrates and of the prisoner's agent. Accordingly, the statements are taken down by Mr. Larymore, and the depositions so recorded "are placed with the record for the use of either party, though not themselves as evidence." This was a most irregular and unfair proceeding. The Court had no possible right to receive from Mr. Larymore or from any body else statements recorded after such a fashion; or to place

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on the prisoner's consent, that consent ought to have been formally and accurately recorded at the time it was given.

On these grounds, and without entering into the other objections which the prisoner's Counsel take to the conviction, we think it clear that there have been most serious and material errors in the proceeding in this case, which have been greatly to the prejudice of the prisoner. We, therefore, set aside the conviction and sentence, and order that the prisoner be discharged and that the fines, if paid, be refunded to him.

The Magistrate of the District, no doubt, had authority to direct that this case should be tried by a Bench of Magistrates. But a complicated and somewhat difficult case like this is by no means one which it is desirable to place before such a Court. And the result shows that this is so. The case is one in which the strictest accuracy is necessary:—whereas the proceedings have been diffuse and loose in the highest degree. Moreover, there is not one "judgment" by the Court, but a series of judgments, which to say the least of it is most inconvenient. Mr. Harrison writes the judgment (a most voluminous one) on the first charge, and says that he concurs with Mr. Larymore's judgment on the second charge. Mr. Larymore writes a judgment on the second charge, and says he concurs in Mr. Harrison's judgment on the first charge. Dr. Bachelor writes that he concurs in the judgments of Mr. Harrison and Mr. Larymore. And the two native Magistrates write a long judgment of their own. All the five Magistrates however so join in signing in a regular way the final "finding and sentence" of the Court. The case comes before us under somewhat peculiar circumstances; for the prisoner availed himself (as to a portion of his case at least) of his right of appeal to the Sessions Judge. The appeal was unsuccessful, although he, in his petition, repeated his objections to the constitution of the Court which tried him. Notwithstanding that the appeal was dismissed, it appears to us that the irregularities on which we have dwelt are so serious and so important as to render it imperative on us even now to quash the whole proceedings.

Conviction quashed.