CRIMINAL REVISION.

1901
Mar. 12.

Before Mr. Justice Ameer Ali and Mr. Justice Pratt.

SHEOPRAKASH SINGH AND OTHERS . . PETITIONERS.

v.

W. D. RAWLINS . . . . . OPPOSITE PARTY.

Cross-examination—Witness—Accused—Defence—Evidence Act (I of 1872), s. 154—Code of Criminal Procedure (Act V of 1898), s. 257—Prosecution.

Certain witnesses for the prosecution were examined. The accused applied to the Court for an adjournment to enable them to cross-examine the witnesses by Counsel. The application was refused, and the accused being called upon to cross-examine were not in a position to do so. The accused then applied that the witnesses should be summoned as witnesses for the defence. The witnesses were summoned, and, when the Counsel for the accused proceeded to cross-examine them, he was not allowed to do so.

Held, the mere fact that the accused had been compelled to treat the witnesses for the prosecution as their own witnesses did not change their character. That, although the accused were compelled to obtain their attendance as witnesses for the defence, they were really summoned under s. 257 of the Code of Criminal Procedure "for the purpose of cross-examination," and the Magistrate was wrong in refusing to allow their cross-examination.

THE accused were tried by the Sub-Divisional Officer of Begusarai under s. 147 of the Penal Code. During the trial, after the witnesses for the prosecution had been examined, the accused made an application for an adjournment so as to enable then to cross-examine by Counsel, who could not appear on the particular day fixed. The application was refused, and the accused were called upon to cross-examine the witnesses themselves, which they were not in a position to do. Subsequently, the 20th of December 1900 was fixed for taking the evidence for the defence, and the accused applied that the prosecution witnesses should be summoned, and they be allowed to examine them. The witnesses were summoned, and, when the Counsel for the accused proceeded to cross-examine them, he was not allowed to do so. The accused were convicted and sentenced, and their appeal

° Criminal Revision No. 103 of 1901, made against the order passed by W. H. Vincent, Esq., Sessions Judge of Bhagalpur, dated the 29th of January, 1901.

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was dismissed by the Sessions Judge of Bhagalpur on the 29th January 1901.

The accused thereupon applied to the High Court and obtained a Rule calling upon the Magistrate of the District to show cause, why the conviction and sentence should not be set aside on the ground that the accused were not allowed by the Sub-Divisional Officer of Beguserai to cross-examine the witnesses for the prosecution, who were summoned on the 20th of December and who were present on that date.

Mr. *Jackson* and Babu *Atulya Charan Bose* and Babu *Kulwant Sahay* for the petitioners.

The Advocate General (Mr. *J. T. Woodroffe*), and *The Deputy Legal Remembrancer* (Mr. *Gordon Leith*) and Mr. *C. Gregory* for the Crown.

The judgment of the Court (AMEER ALI and PRATT, JJ.) is as follows :—

This rule was issued calling upon the Magistrate of the District to show cause why the conviction of, and sentence passed on, the petitioners should not be set aside on the ground that the accused were not allowed by the Sub-Divisional Officer of Beguserai to cross-examine the witnesses for the prosecution, who were summoned for the 20th December, and who were present on that date, or why such other order should not be made, as to this Court may appear fit and proper.

As we pointed out to the learned Advocate General in the course of his arguments, in granting the rule we had in view the provisions of s. 257. We may observe at the very outset that, in our opinion, the work of this Court would be appreciably lightened, if the Subordinate Magistrates in dealing with the law relating to the rights of accused persons, would construe it in a less technical spirit than they are sometimes accustomed to do. In the inferior Courts the right principle is occasionally reversed, and a person is presumed to be guilty the moment he is accused, and every attempt on his part to prove his innocence is regarded as vexatious. When the law vests in a Court a certain discretion, that discretion, in our opinion, should be

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exercised, so as not to give rise to any reasonable complaint of prejudice or bias.

What appears to have happened in this case is as follows: The witnesses for the prosecution were examined, and an application was made on behalf of the accused for an adjournment, so as to enable them to cross-examine by Counsel, who could not appear on the particular day fixed. That application was refused, and the accused were called upon to cross-examine the witnesses themselves, which they were not in a position to do. Subsequently a day was fixed for taking the evidence for the defence, and the accused asked that the prosecution witnesses, who had been already examined, but whom they had had no opportunity to cross-examine, except as already mentioned, should be summoned, and they be allowed to examine them. Those witnesses were summoned by the Sub-Divisional Officer, and, when the Counsel for the accused proceeded to cross-examine them, as naturally he would, considering that they had deposed for the prosecution, in other words to put to them questions, which ordinarily would not be put to the witnesses for the defence, he was admittedly not allowed to do so. The reason given in the explanation as well as in the note of the Magistrate attached to the judgment is, that the witnesses had been cited as defence witnesses, and, as no sufficient reason was made out under s. 154 of the Evidence Act, it was within the Magistrate's discretion to disallow cross-examination.

In our opinion the mere fact that the accused had, under the circumstances already stated, been compelled to treat the witnesses for the prosecution as their own witnesses, does not change their character. The accused sought for an opportunity to cross-examine them; that was not allowed. They considered that, in cross-examination, they would be in a position to elicit facts, which would materially help their case. Under the circumstances we think that, although the accused were compelled to obtain their attendance as witnesses for the defence, they were really summoned under s. 257 "for the purpose of cross-examination," and we, therefore, think the Magistrate was wrong in refusing to allow their cross-examination. To regard it other-

wise would be to make the procedure of the Courts a mere travesty of justice.

Under these circumstances we are of opinion that the Rule ought to be made absolute, and we accordingly make it absolute and set aside the conviction and sentences.

We are informed that the Magistrate, who tried this case, will not be in the district. The case must therefore go back to the District Magistrate, either to try it himself or to refer it for trial to any other Magistrate competent to try the same. The provisions of s. 350 of the Code of Criminal Procedure debar us from directing that the case should be proceeded with from the stage at which it was left on the 20th December. The trying Magistrate must proceed in accordance with that section.

D. S. *Rule made absolute.*

ORIGINAL CIVIL.

Before Mr. Justice Harington.

NEEL COMUL MOOKERJEE AND OTHERS.

v.

BIPRO DASS MOOKERJEE AND ANOTHER.*

1901 *May* 31 *& June* 3.

Contract Act (IX of 1872), s. 260—Guarantee, revocation of—Surety—Liability of surety to a firm, which has undergone change in its constitution—Cause of action—Surety bond.

The defendants *B* and *R* on December 6, 1895, executed a security bond, the condition of which was that *B* should duly and faithfully discharge his duties, while employed as cash-keeper to the firm of "N. C. Mookerjee," *R* standing as *B*'s surety to the firm. In July 1896 there being a change in the constitution of the firm, it came to be styled and designated as "N. Mookerjee and Son." Defalcations on the part of *B* were discovered between January 1897 and May 1900, *i. e*, while *B* was in the service of "N. Mookerjee and Son," a firm, which came into existence in the year following that in which the bond was executed. The members of the present firm of "N. Mookerjee and Son" sued the defendants on the bond. An objection by way of demurrer to the plaintiffs' claim—that no cause of action was shown to exist against the defendants—having been taken :

* Original Civil Suit No. 683 of 1900.