

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

MOHESH CHANDRA SAHA

v.

EMPEROR.*

1908

Feb. 4.

Transfer—Magistrates—Succession of Magistrates—Transfer of case from one Magistrate to another—De novo trial—Criminal Procedure Code (Act V of 1898) ss. 350 and 528—Practice.

Section 350 of the Criminal Procedure Code is not limited to cases in which Magistrates succeed each other in their offices, but applies also to all cases transferred from the file of one Magistrate to that of another under section 528 of the Code.

Deputy Legal Remembrancer v. Upendra Kumar Ghose (1) commented on. *Purmessur Singh v. Suroop Audhikaree* (2), *Kopil Nath Sahi v. Koneeram* (3) referred to. *In re Raghoo Parirah* (4), *Damri Thakur v. Blowan's Sahoo* (5), *Queen-Empress v. Bashir Khan* (6) distinguished.

Queen v. Hurnath Guho Thakurta (7), *Queen-Empress v. Angnu* (8) not followed.

THE petitioners were put on trial before Mr. G. S. Oddie, Assistant Magistrate of Dacca, who recorded the examination and cross-examination of the prosecution witnesses and framed a charge against the accused on the 25th September 1907. He was then transferred, and the District Magistrate of Dacca thereupon withdrew the case to his own file and referred it for trial, on the 8th October, under section 528 of the Criminal Procedure Code, to Batu Jogobundhu Ghose, a local Deputy Magistrate.

The petitioners did not claim a new trial, and the Magistrate accordingly proceeded with the case from the stage it had reached, when it came to his file, heard the defence witnesses and convicted the petitioners under section 147 of the Penal Code. They appealed to the Joint-Magistrate who, on 7th December, directed the trying Magistrate to take the evidence of two fresh witnesses.

* Criminal Revision No. 27 of 1908 against the order passed by A. Bentinck, Joint Magistrate of Dacca, dated Decr. 23rd, 1907, affirming the order passed by Jogabundho Ghose, Sub-Deputy Magistrate of Dacca, dated Novr. 25th, 1907.

(1) (1906) 12 C. W. N. 140.

(5) (1895) I. L. R. 23 Calc. 194.

(2) (1870) 13 W. R. Cr. 40.

(6) (1832) I. L. R. 14 All. 246.

(3) (1870) 14 W. R. Cr. 8.

(7) (1875) 24 W. R. Cr. 52.

(4) (1873) 19 W. R. Cr. 28.

(8) (1889) All. W. N. 130.

1908
 MOHESH
 CHANDRA
 SAHA
 v.
 EMPEROR.

On receipt of such evidence he dismissed the appeal by his judgment, dated the 23rd December. The day after the arguments in his Court had concluded, the pleader for the petitioners drew his attention to the case of *Deputy Legal Remembrancer v. Upenara Kumar Ghose*(1), and contended that Babu Jogobundhu Ghose had no jurisdiction to hold the trial except *de novo*, but his contention was not given effect to.

Mr. Norton (Babu Dasharathi Sanial and Babu Sarat Chander Basak with him) for the petitioners. The Magistrate, to whom the case was transferred by the District Magistrate, was bound to have tried the case *de novo*, although the accused did not ask him to do so. Section 350 of the Criminal Procedure Code only applies, where one Magistrate is transferred and another succeeds him in his office. The present case was, on the transfer of Mr. Oddie to another district, withdrawn by the District Magistrate under section 528 of the Code, and referred for trial to Jogobundhu Ghose. Mr. Oddie was an Assistant Magistrate and Babu Jogobundhu a Deputy Magistrate, and so one cannot be said to have succeeded the other in office. Section 350 does not apply to the case of a transfer under section 528, because in such a case there is no succession in office between the Magistrates. My contention is supported by *Deputy Legal Remembrancer v. Upenara Kumar Ghose*(1). See also *Purmessur Singh v. Soroop Audhikares*(2), *Kopil Nath Saha v. Koneeram* (3), *In re Raghoo Parivah* (4), *Damri Thakur v. Bhowani Sahoo* (5), *Queen-Empress v. Bashir Khan* (6), *Queen v. Hurnath Guho Thakurta* (7), *Queen-Empress v. Angnu* (8).

The Advocate-General (Hon'ble Mr. P. O'Kinealy) for the Crown. Section 350 applies not only where a Magistrate having heard a case in part is transferred and another succeeds him, but also where a case is transferred by the District Magistrate under section 528 from one Subordinate Magistrate to another. When a case is so transferred the former Magistrate ceases to

(1) (1906) 12 C. W. N. 140.

(2) (1870) 13 W. R. Cr. 40.

(3) (1870) 14 W. R. Cr. 3.

(4) (1873) 19 W. R. Cr. 28.

(5) (1895) I. L. R. 123 Calc. 194.

(6) (1892) I. L. R. 14 All. 346.

(7) (1875) 24 W. R. Cr. 52.

(8) (1889) All. W. N. 130.

1908
 MOHESH
 CHANDRA
 SAHA
 v.
 EMPEROR.

exercise jurisdiction in the case and is succeeded in the exercise of jurisdiction by the other, just as in the case of one Magistrate being transferred and another succeeding him in his office. If the construction put by the other side was correct the operation of the section would be limited to a small number of cases only, as Magistrates subordinate to the District Magistrate rarely succeed each other in their offices, and Deputy Magistrates never.

RAMPINI AND SHARFUDDIN, JJ. This is a Rule to show cause why the convictions and sentences in this case should not be set aside on the ground that after the case was transferred to the file of Babu Jogobandhu Ghose that officer did not hold a *de novo* trial.

The petitioners have been convicted under section 147 of the Penal Code. Kechu Paramanik has been sentenced to one month's rigorous imprisonment, and Mohesh Chandra Saha to pay a fine of Rs. 100.

The case was originally on the file of Mr. G. S. Oddie, who recorded the evidence of the witnesses for the prosecution. They were cross-examined before him and a charge was drawn up by him. He was then transferred. The District Magistrate took the case on his own file, under section 528 of the Criminal Procedure Code, and transferred it to the file of Babu Jogobundhu Ghose, Deputy Magistrate. The accused did not claim a new trial. So Babu Jogobundhu Ghose completed the trial and convicted the accused. They appealed to the Joint-Magistrate who, on the 7th December, ordered the Deputy Magistrate to examine two more witnesses. On the case coming before the Joint-Magistrate for the second time, the appeal of the accused was dismissed. The day after the arguments in the case had been heard, the appellants' pleader cited the case of *Deputy Legal Remembrancer v. Upendra Kumar Ghose* (1), to the Joint-Magistrate, and contended that the proceedings of Babu Jogobundhu Ghose in not holding a *de novo* trial were illegal. Before us Mr. Norton has supported the Rule. The Advocate-General for the Crown has shown cause against it.

1908
 MOHESH
 CHANDRA
 SAHA
 &
 EMPEROR.

The contention of the Advocate-General is that the provisions of section 350 of the Criminal Procedure Code apply both to cases of transfer of a case under section 528 of the Criminal Procedure Code and to cases which, after being begun by one Magistrate, have to be completed by another owing to the former Magistrate having left the District, when only, it is argued by Mr. Norton, he can be said to be succeeded by another Magistrate. The Advocate-General, however, replies that when a case is transferred under section 528 from the file of a Magistrate to that of another, the former ceases to have jurisdiction in the case and is succeeded in the exercise of jurisdiction in the case by the other, just as if the former had been removed from the District and been succeeded in his office by the other.

In this case, Mr. Oddie was transferred from the district. The District Magistrate, however, passed an order under section 528 of the Criminal Procedure Code transferring the case, no doubt because Mr. Oddie was an Assistant Magistrate and Babu Jogobundhu Ghose, Deputy Magistrate, could not be said, strictly speaking, to succeed him in the office of Assistant Magistrate.

We consider the contention of the Advocate-General must prevail. We do not think that the provisions of section 350 of the Criminal Procedure Code apply only to cases in which Magistrates succeed each other in their offices. Magistrates subordinate to the District Magistrate rarely do so. Deputy Magistrates never succeed each other in their offices. But the terms of the section appear to us to apply to all cases in which cases are transferred for whatever reason from the file of one Magistrate to that of another. This is admitted in the case of *Deputy Legal Remembrancer v. Upendra Kumar Ghose* (1), in which Mitra and Holmwood, JJ., say:—"The section, it seems to us, is capable of the interpretation that it covers all cases of change of trying Magistrates, whether on account of the first trying Magistrate being transferred to another district or on account of a transfer of a case under Chapter XLIV of the Code."

Further on, they observe: "The words of section 350 of the present Code are slightly different from the words of similar

(1) (1906) 12 C. W. N. 140, 144.

sections of the Codes of 1872 and 1882. The alteration might have been made with a view to include cases of transfer." They then conclude with this order. "Having regard to the general principles of interpretation that provisions and sub-clauses should be governed by the operative portion of the section, and to the fact that the general rules laid down in the earlier rulings have been recognised and approved of on more than one occasion, since the amendment was made, we hold that Moulvi Abdus Samad acted irregularly in convicting the accused on evidence partly recorded by Mr. Oddie."

1908
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But the reasons for this order appear to us to be inconsistent, for the operative portion of section 350 expressly permits the conviction of an accused on evidence recorded, or partly recorded, by one Magistrate, who is succeeded by another, while the earlier rulings referred to are no doubt in favour of the opposite view.

We observe further that the conclusion of the learned Judges, who decided the case of *Deputy Legal Remembrancer v. Upendra Kumar Ghose*(1), is only that Moulvi Abdus Samad acted irregularly, and for this reason they set aside the conviction. We presume they were of opinion that the irregularity was one that had prejudiced the accused.

The earlier rulings referred to by Mitra and Holmwood, JJ., have been laid before us. They are *Purmessur Singh v. Sorroop Audhikar*(2), *Kopilnath Sahi v. Koneeram*(3). *In re Raghoo Parirah*(4) and *Queen v. Hurnath Guho Thakurta*(5). But the first two of these rulings appear to us to be in favour of the view advocated by the learned Advocate-General. The case of *In re Raghoo Parirah*(4) is not in point. The only case in favour of the view contended for by Mr. Norton is that of *Queen v. Hurnath Guho Thakurta*(5), alluded to in the judgment in the case of *Deputy Legal Remembrancer v. Upendra Kumar Ghose*(1).

Then, as for the rulings in which the general rule laid down in this case has been recognised and approved of since the alteration in the wording of the corresponding section of the Code of 1872, the only case exactly in point, which Mr. Norton cites, is

(1) (1906) 12 C. W. N. 140.

(3) (1870) 14 W. R. Cr. 3.

(2) (1870) 13 W. R. Cr. 40.

(4) (1873) 19 W. R. Cr. 22.

(5) (1875) 24 W. R. Cr. 52.

1908
 MOHESH
 CHANDRA
 SAHA
 v.
 EMPRESS.

that of *Queen-Empress v. Annu*(1), which is the decision of a single Judge of the Allahabad High Court, and accordingly is not binding on us.

He also calls attention to *Queen-Empress v. Bashir Khan* (2), and *Damri Thakur v. Bhowani Sahoo* (3). In the former of these the accused expressly prayed for a *de novo* trial and, as the Magistrate did not accede to their request, the conviction of the accused was rightly set aside. The latter case is not in point and need not be considered.

We are, therefore, of opinion that we are free to follow the interpretation which in our opinion should be put on the terms of section 350 of the Criminal Procedure Code and which Mitra and Holmwood, JJ., admit the section is capable of having put on it, *viz.*, that it applies to all instances of transfer of a case, for whatever reasons the transfer may be made.

We have been pressed, if we take this view, to refer the question for the decision of a Full Bench. But looking at the terms of the order in the case of *Deputy Legal Remembrancer v. Upendra Kumar Ghose* (4), *viz.*, that Moulvi Abdus Samad acted irregularly in convicting the accused on evidence partly recorded by Mr. Oddie, which lays down no general rule and which must have proceeded on the principle that the irregularity had prejudiced the accused, which is not shown to have been the case in the present instance, we do not think we need or could do so.

We accordingly discharge the Rule. The petitioner, who has been sentenced to imprisonment, must be relegated to jail to undergo the remainder of his term.

Rule discharged.

E. H. M.

(1) (1859) All. W. N. 130.

(2) (1892) I. L. R. 14 All. 346.

(3) (1895) I. L. R. 23 Calc. 194.

(4) (1906) 12 C. W. N. 140.