

INDIAN LAW REPORTS. [VOL. XXXVII.]
CRIMINAL REVISION.

Before Mr. Justice Chatterjee and Mr. Justice Ryves.

1909
 Oct. 1.

INDER RAI
v.
 C. R. BROWN.*

Cross-examination—Prosecution witnesses, cross-examination of, after charge—Failure to name, on date of the charge, the witnesses required for cross-examination—Subsequent application before close of the case—Right of cross-examination, continuance of—Waiver—Criminal Procedure Code (Act V of 1898), s. 256.

Section 256 of the Criminal Procedure Code merely lays down that after the plea of the accused is taken he shall be required to state whether he wishes to cross-examine any, and if so which, of the prosecution witnesses whose evidence has been taken, but it does not state at what particular time he is to be asked this question, nor up to what time he has this right.

Where, therefore, the accused were asked, on the day the charges were framed, whether they would call any of the prosecution witnesses for cross-examination and did not name any, but made an application to re-call some of them for that purpose on the next Court day and before the case had closed—

Held, that they were entitled to have the prosecution witnesses re-called for the purpose of cross-examination, and that there was no waiver of their right under the section.

THE petitioners, Inder Rai and others, were put on their trial before Mr. J. S. Mackay, Sub-divisional Officer of Hajipur, for rioting armed with deadly weapons and voluntarily causing hurt by dangerous weapons, in pursuance of the common object, to certain factory labourers who had gone to the petitioner, Inder Rai, in order to demand their wages due from him. The prosecution witnesses were examined and cross-examined by the mukhtears for the accused, and thereafter, on the 8th April 1909, the Sub-divisional Officer framed charges against the petitioners under sections 148 and $\frac{3}{1} \frac{2}{4} \frac{4}{9}$ of the Penal Code. Immediately after the charges had been read and explained to the accused,

* Criminal Revision No. 1079 of 1909, against the order of J. W. Ward, Sessions Judge of Mozufferpore, dated June 29, 1909, modifying the order of J. S. Mackay, Sub-divisional Magistrate of Hajipur, dated May 25, 1909.

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who pleaded not guilty, they were asked by the Magistrate to name the prosecution witnesses whom they wished to cross-examine, but they failed to do so. The case was then postponed to the 28th instant. From the 9th to the 13th April the Court was closed for the holidays. When the Court re-opened on the 14th, the accused applied to the Magistrate to re-call five of the prosecution witnesses for cross-examination, but their application was rejected on the next day. The application was renewed on the 28th, but disallowed. The Magistrate passed the following order thereon :—

The accused were asked, immediately after the charge was framed, to state whether they wished to cross-examine any, and if so which, of the prosecution witnesses who had been examined. They did not exercise that right at once as they ought to have done, but put in a petition on the 14th April, *i.e.*, 7 days after the charge, to have certain witnesses recalled and cross-examined which I rejected. Under the law, I think, the accused are required to state, immediately after the charge is framed, whether they wish to exercise their right, and if they do not, I don't think they are at liberty to come forward some days after to claim the right. The accused have had ample opportunity of cross-examination before the charge was framed, and their present application has simply been put in for the purpose of vexation to the prosecution witnesses and delay in the proceedings; so I reject the application.

The accused were convicted on the 25th May, under the above-named sections of the Penal Code, and sentenced to nine months' rigorous imprisonment. The Sessions Judge of Mozufferpore on appeal, by his order dated the 29th June, altered the conviction and reduced the sentences of some of the petitioners. They then moved the High Court and obtained the present Rule.

Babu Harihar Prosad Singh, for the petitioners.

No one for the opposite party.

CHATTERJEE AND RYVES JJ. We think that this Rule ought to be made absolute. The Magistrate says that the petitioners were asked at the time of framing the charge whether they would call any of the prosecution witnesses for cross-examination, but they could not at that instant make any answer to his question. They did, however, subsequently

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apply for re-calling some of the witnesses for the prosecution for the purpose of cross-examination, and the Magistrate thought that, since the defence was conducted by two mukhtears who had cross-examined the prosecution witnesses before the charge, it was not necessary to give them a further chance of cross-examination, and that the petitioners had waived their right by not answering when called upon. This is, however, against both the wording and the spirit of the law. Section 256 of the Criminal Procedure Code only says that the accused shall be required to state whether he wishes to cross-examine any, and if so which, of the witnesses whose evidence has been taken. It does not say at what particular time he is to be asked this question and up to what time he has this right. In this case an application had been made before the case had closed, and we think that the petitioners were entitled to have their prayer granted. The conviction, therefore, must be set aside. Under the circumstances, as all the petitioners, except one, have served out their sentences, and the other almost the whole sentence, there need not be any re-trial. The order under section 106 is also set aside.

Rule absolute.

E. H. M.