

CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

1911
 Feb. 17.

ISHAN CHANDRA BHUTT

v.

EMPEROR.*

Mukhtear—Authority to practise in the Courts of Magistrates and Sessions Judges—Limitation of authority—Necessity of permission of the Court in each particular case—Grounds of permission—Criminal Procedure Code (Act V of 1898) ss. 4 (r.), 340.—Practice.

Under ss. 4 (r) and 340 of the Criminal Procedure Code, a mukhtear is, subject to the permission of the Court in each particular case, authorised to practise both before Magistrates and Sessions Judges.

There is no general rule that mukhtears should be allowed to appear in every case in the Courts of Magistrates, and that they should not be permitted to appear in any case in the Courts of Session. The Magistrate and the Judge must decide in each case whether he will permit a mukhtear to appear.

Though it is not desirable that mukhtears should be permitted to appear in Sessions Courts where their appearance is unnecessary, or where there is no reason for their appearance, the question is one which must be decided independently in each case, and no general rule can be laid down. It depends largely on whether the accused is in a position to employ a vakil or pleader and whether he elects to do so. But the defence of an accused should not be shut out merely by the fact that he is represented by a mukhtear.

THE petitioner was tried before Moulvi Abu Nasir Mahomed Ali, Deputy Magistrate of Mymensingh, under s. 325 of the Penal Code, and convicted and sentenced, on the 11th October 1910, to one day's simple imprisonment and a fine. An appeal, which was almost time-barred, was thereupon verbally presented to the Sessions Judge of Mymensingh, against the Magistrate's order by Brojo Gopal Bose, a duly certificated mukhtear who was, under the terms of his certificate, authorised to practise in all the Civil and Criminal

* Criminal Revision, No. 13 of 1911, against the order of H. Walmsley, Sessions Judge of Mymensingh, dated Nov. 26, 1910.

Courts subordinate to the High Court except the Calcutta Small Cause Court. The learned Judge passed an order that, as it was not the practice for mukhtears to present appeals or to plead in his Court, he would, before admitting the appeal, hear the representatives of the pleaders and mukhtears. Accordingly, on the 24th November, he heard Brojo Gopal Bose for the mukhtears and the Government Pleader on behalf of the pleaders, and dismissed the appeal summarily, on the 26th, in the following terms:—

On the 24th instant I heard a senior mukhtear on behalf of the mukhtears, and the Government Pleader on behalf of the pleaders. The question for decision is whether mukhtears should be allowed to present criminal appeals, and practise generally in the Court of the Sessions Judge. My attention has been drawn to some of the earlier enactments about legal practitioners, but it is not necessary to discuss them. The law as to the appearance of mukhtears in Courts of all descriptions is contained in section 4 (*r*) of the Criminal Procedure Code. Mukhtears may appear with the permission of the Court.

Now in this district, and in all districts of which I have had experience, mukhtears habitually practise in the Courts of Magistrates without let or hindrance, but they do not attempt to practise in the Judge's Court. Before Magistrates the possession of a certificate, renewed annually, seems to be regarded as entitling mukhtears to practise without further permission, and I think the custom is a very good one. But it is quite another matter when the mukhtears want to practise, as of right, in Courts of a superior grade. The law does not give them this right. The ruling of the Allahabad High Court in *L. L. R. 30 All. 66* does not help them. A later case, not yet reported, except in certain newspapers, seems to go further, but it may turn largely upon special features which have not been fully set out. I hold, therefore, that mukhtears cannot practise in this Court, as of right. With regard to the matter of permitting them to appear, I must bear in mind that there are here in Mymensingh very many pleaders who have qualified themselves by passing a more severe examination than the mukhtears.

These pleaders are, as they should be, better able than the mukhtears to assist the Court in the administration of justice, and it is most undesirable that a lower grade of practitioners should be admitted indiscriminately to compete with them. The number of pleaders is so great that their fees can rarely be prohibitive.

My attitude, therefore, is that mukhtears are not welcome in this Court.

I cannot assent to their proposition that all mukhtears are entitled to permission to appear in this Court until I know something against them. What I shall have regard to is the circumstances of the case in which a mukhtear wishes to appear; if he can satisfy me that for financial reasons, or for any other special cause, it is necessary to his client's

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interest that a mukhtear should appear, and not a pleader, I shall grant permission, but not otherwise.

In the present instance it is not pretended that there was any reason why a mukhtear should appear: the appeal was merely a peg for the question I have discussed. The appeal is dismissed summarily.

The petitioner, thereupon, obtained the present Rule on the ground set forth in the judgment of the High Court.

Mr. Sinha, Babu Harendra Nath Mitter and Babu Bhudeb Chunder Roy, for the petitioners.

Mr. Chakravarti, The Deputy Legal Remembrancer (Mr. Orr), Babu Dwarka Nath Chackerbutty and Babu Akhil Bandhu Guha, for the Crown.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate to show cause why the appeal should not be reheard on the ground that a mukhtear has a right to appear for the defence of an accused person in any mofussil Court.

The issue of this Rule appears to have raised a general question between vakils and pleaders and mukhteers as to the right of the latter to appear in criminal cases. It was never intended that such a question should be raised, and the question is obviously one which has been disposed of by the terms of the law and by the High Court Rules. The law is contained in section 340 of the Criminal Procedure Code read with section 4, clause (r) of the same Code. Every person accused before any Criminal Court may of right be defended by a pleader, and "pleader" in this connection includes any mukhtear or other person appointed with the permission of the Court to act in such proceeding.

This particular practitioner has a 15-rupee license entitling him to practise as a mukhtear in all Civil and Criminal Courts subordinate to the High Court, except the Calcutta Small Cause Court. It is, therefore, clear that, subject to the permission of the Criminal Courts in each case, (and this applies equally to the Sessions Judge and the Magistrate) he is authorised to practise.

What we intended in issuing the Rule was to emphasize the position that an accused person having the right to be defended by the class of persons enumerated in section 4 clause (r), it could rarely be a wise discretion on the part of the Sessions Judge or the Magistrate to refuse permission to a mukhtear appearing for the defence. That appears to be the tenor of the rules which have been laid down by this Court for the guidance of Magistrates; and, as the certificate is the same for both the Sessions Judge's Court and the Magistrate's, we presume that the rules laid down for Magistrates are equally applicable to Sessions Judges. "The terms of section 340 do not warrant any general rule for the exclusion of mukhteers in all cases, but only allow the exercise by Magistrates of a discretion in each case as it arises. The Magistrates are expected not to deprive parties of legal aid which they could frequently obtain at a moderate cost by indiscriminate exclusion of persons who are invested by law with a distinct professional status in criminal trials. Every Magistrate is bound, in each case that comes before him, to use the discretion vested in him by law before giving audience to an uncertified pleader, and in deciding whether permission should be given or not, the character of the person appointed to plead is one of the matters to be taken into consideration."

It has been urged before us by the learned counsel in showing cause against the Rule that, if this latter rule is applied in practice, the result would be that no mukhtear can be excluded on either side except on personal grounds, and this will result in their being admitted to universal practice.

In the first place we have to point out that this rule does not apply to mukhteers but to uncertified pleaders. Under section 4, clause (r), a mukhtear is a certified pleader when he obtains the permission of the Court to appear in any particular case.

We quite agree with the learned Judge that mukhteers should not be permitted to appear in the Sessions Court where their appearance is unnecessary, or where there is no reason for their appearance. But that is a matter which must be

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decided independently in every case, and no general rule can be issued. The learned Judge seems to have discussed the matter from the point of view of general practice. He has laid down that, as a general practice, mukhtears should be allowed to appear in every case in Magistrates' Courts as they do now, and that, as a general practice, they should not be allowed in any case to appear in the Sessions Court. Those general rules are both of them equally erroneous. The Magistrate has to decide in every case whether he will permit a mukhtear to appear; and the Sessions Judge has to decide in every case whether he will permit a mukhtear to appear, and we think that it is very difficult to exclude a qualified practitioner when he appears for the defence of an accused person, and that is all that we desired to put forward when we issued this Rule.

It is not competent to the Court below to say that this matter was merely put forward to test the right of mukhtears inasmuch as the appeal was almost out of time. The fact that the appeal was almost out of time, may have been the very reason for employing the very first practitioner that came to hand, namely, a mukhtear, there being nothing against the appearance of the mukhtear in this particular case. We think that the Rule should be made absolute, and that the appeal should be re-heard. Of course, the learned Sessions Judge may still exercise his discretion at the hearing of the appeal, and may permit a mukhtear to argue it, but that will largely depend upon the question whether the accused person is in a position to employ a vakil or pleader and whether he elects to do so. All we are anxious to avoid is that the defence of an accused person may not be shut out merely by the fact that he is represented by a mukhtear. The Rule is, therefore, made absolute and there will be a re-hearing of the appeal.

Rule absolute.

E. H. M.