

Mahtab Singh Vs. Emperor

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SooperKanoon Citation : sooperkanoon.com/451656

Court : Allahabad

Decided On : Sep-22-1938

Reported in : AIR1939All101

Appellant : Mahtab Singh

Respondent : Emperor

Judgement :

Bennet, Ag. C.J.

1. This is a criminal reference by Mr. K.N. Joshi, the Sessions Judge of Mainpuri, recommending that the order passed by a Magistrate be set aside and he be directed to give all reasonable facilities to the accused in establishing his defence the case before the Magistrate of Shikohabad was one under Section 110, Criminal P.C., and the accused Mahtab Singh resides in a village Amora in Shikohabad sub-division. The first order of the Magistrate was on 17th December 1937 and he stated that that date had been fixed for the defence witnesses at the request of counsel for the accused because it provided facility for the defence witnesses residing in the village of the accused which was close to the place where the Magistrate was holding his Court. the witnesses were not produced and the Magistrate adjourned the case until the next day and said that the accused should state the next day if he did not, wish to examine local witnesses, and he should prepare a list of his witnesses and file it in Court. The next day, on 18th December 1937, no witnesses for the defence were produced in spite of the order

for production. The excuse given was that the list, was not complete. The Magistrate gave a further adjournment to 7th January 1938, and directed that list of defence witnesses should be filed by 23rd December 1937. No such list was filed on 23rd December 1937. On the date fixed, 7th January 1938, the accused handed in a list of witnesses which contained so many names that the counsel for defence has not been able to count them. The list consists of 13 pages of which six pages are typed and the remaining pages are in handwriting, some in English and some in Hindi. The list is arranged by departments. First of all there are 16 railway witnesses; then come seven postal witnesses; then come seven canal department witnesses; then come eight witnesses of a newspaper called Bekar Sakha; then come ten college examiners; then come six outside officers, retired District Magistrate, etc.; then come 42 witnesses from Shikohabad Town, including school masters and medical practitioners and persons of position; then come ten candidates and diploma holders, some of whom come from places from which it is not possible to summon witnesses, such as Nepal; then come 13 witnesses from Mainpuri; six witnesses from Etawah; six witnesses from Muttra; nine witnesses from Agra; four witnesses from Cawnpore; three witnesses from Lucknow; three witnesses from Allahabad ; four witnesses from Lahore; four witnesses from Delhi; five witnesses from Aligarh; four witnesses from Bombay; five witnesses from Calcutta; one witness from Chandausi; three witnesses from Benares and one witness from Dacca in Bengal. These names are type-written. Then follows a large number of witnesses in handwriting from different parts of the province. The total of these in handwriting is 114. The total in the typed lists is 174, and the grand total is 288. Now, the order of the Magistrate which is under reference stated:

He has now given a very long list of witnesses which he intends to call and examine and has given no reasons for such a large number of witnesses. However, I am not inclined to interfere with his choice as far as the number of witnesses and the nature of evidence he intends to produce, but he shall be responsible for the cost. He is not in custody and there is no reason why he should not stand the cost of witnesses when he is intending to summon such a large number of them. He shall therefore deposit their approximate cost within four days from this day otherwise no summonses can be issued to the witnesses. If he is unable to make a correct estimate of the cost at present, he should deposit at least

Rs. 500 to begin with and then adjust the amount later on.

2. It is clear that there was no refusal by the Magistrate to summon any of these witnesses under Section 257(1), Criminal P.C. but his order is passed under Section 257(2) which provides as follows:

The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court.

3. An application was made to the Sessions Judge, stating in para. 2 that the applicant being on bail was no legal ground for saddling the applicant with the costs of summoning the witnesses, and in para. 3 that the order of depositing Rs. 500 as a condition precedent to the summoning of witnesses is practically to hamper the accused in his defence. The order of the Sessions Judge extends over three typed pages and in this order, although he refers in two places to Section 257(2), Criminal P.C., he deals with the matter as if it was a case of refusal to summon witnesses under Section 257(1), Criminal P.C. The learned Sessions Judge assumes that the provision of law which is in question is Section 257(1) and he has apparently got this idea from three rulings which he quoted. It is most regrettable that the learned Sessions Judge did not read Section 257(2) and apply his mind to it and apparently he has been misled by this neglect. The first ruling to which he referred was *Parbhu v. Emperor* : AIR1929 All914 . This was a case where p. 915, col. 2 states that the Magistrate did not adjourn the case for the evidence of a defence witness, Ram Narain. He ordered that the deposition of this witness should be dispensed with. The ruling referred to Section 257(1) and pointed out that the Magistrate under that sub-section had only power to refuse if the conditions of that sub-section existed. There was no question in that ruling of Section 257(2). It is true that the head-note by error refers to Sub-section (2), but the Court is not responsible for the errors of persons who compose law reports.

4. This next ruling to which the learned Sessions Judge referred was *Debi Singh v. Emperor* (1924) 11 A.I.R. Pat. 142 Page 142, col. 2 shows that there was ii, list of 20 witnesses filed by the defence; and the Magistrate ordered costs to be deposited and that accused should explain for what evidence he has summoned

the Raja Saheb, and that the list should be curtailed. On the following day, the accused filed a petition containing a list of 11 witnesses and stating that he could not afford to pay the costs of the witnesses which had been assessed at Rs. 80. The order of the Court was Nos. 2 to 10 may be summoned for the present but not the Deputy Magistrate and the Raja'. Now it is clear therefore that the Court had summoned 9 of the 11 witnesses and refused to summon 2 under Section 257(1). On page 143, col. 1, the Court pointed out that the Magistrate must record his remark for refusal in writing which he had not done and added : But the inability or even refusal to pay the costs of the witnesses would not be adequate ground in a warrant case and no inference can be drawn either that the accused failed to state orally to the Magistrate the reason why they desired process in respect of the Raja or that the Magistrate considered that there was ground such as is set out in Section 257 for refusing process.

5. Now so far as this ruling may be taken to indicate that the Magistrate is not entitled to pass an order for the deposit of costs prior to issuing summons under the provisions of Section 257(2), we cannot agree with the learned single Judge, Macpherson, J. Macpherson, J. failed to refer to the provisions of Section 544 which provides as follows:

Subject to any rules made by the Local Government, any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any enquiry, trial or other proceeding before such Court under this Code.

6. We do not know what are the rules passed by the Local Government in Patna in regard to this matter. But whatever those rules are, they have no bearing on the rules in this province. The Criminal Procedure Code gives a Magistrate a discretion to pass an order under Section 257(2) and his discretion is subject to Section 544 and the rules passed by the Local Government under that Section, that is a Magistrate cannot pay from Government the expenses of witnesses attending if he is not authorized to do so by the rules of the Local Government. Macpherson, J. was apparently under the impression that these rules would not apply in a warrant case. He is mistaken because Section 257(2) is in Chap. 21,

Criminal P.C. which deals solely with warrant cases. There is no doubt a similar provision in Chap. 20 which deals with summons cases, namely Section 244, Sub-section (3). Each of these chapters therefore; has a similar provision and it is obvious therefore that the provision applies not only in summons cases but also in warrant cases. The third ruling was *Sayed Habib v. Emperor* (1929) 16 A.I.R. Lah. 23 Sir Shadi Lal had before him a case where a Magistrate was trying a charge under Section 353, Penal Code, of assault on a public servant in the discharge of his duty which was a warrant case. The Magistrate passed an order that the accused were to deposit the expenses before summons for their witnesses would issue. Sir Shadi Lal stated:

But the ordinary procedure in warrant cases - and I am here dealing with a warrant case - is that the cost of causing the attendance of accused's necessary witnesses is usually borne by Government : vide Rules and Orders of the High Court, Vol. 2, Chap. 6, para. 67. The Magistrate has no doubt authority to depart from this usual practice, but there should be strong and cogent reasons for making the departure.

7. It may be here pointed out that Sir Shadi Lal was giving a decision in regard to the particular rules of the Local Government in force in the Punjab and embodied in the rules of the Punjab High Court. It has not been shown by learned Counsel that there has been a similar provision in this Province of Agra that the ordinary procedure in a warrant case is for the Government to bear the costs of the accused's necessary witnesses. The rule for this province is embodied, so far as we have been able to find it, in the Manual of Government Orders, Judicial (Criminal) Department VI, para. 900, which is as follows:

The Criminal Courts are authorized to pay at the rates specified below the expenses of all complainants and witnesses who are legally bound to attend in such Courts : Provided that no such payment shall be made from public funds to any witness in cases where under the provisions of any law in force the reasonable expenses of such witnesses have by order been deposited in Court as a condition precedent to the issue of process to compel attendance.

8. This rule of the Manual of Government Orders does not, like the Punjab High Court rule, prescribe that usual expenses should be paid to witnesses for the

accused in a warrant case. The matter is left entirely to the discretion of the Magistrate. Therefore the Magistrate has a right to exercise this discretion in accordance with Section 544, Criminal P.C. that is, if he thinks fit, he may order payment of the costs of witnesses for the accused in any case, summons case or warrant case. The Section shows that the expenses should be reasonable. In the present case, we are of opinion that it cannot be said that the expenses of the witnesses of the accused would be reasonable. In view of the large number and of the fact that they come from many parts of the country, we do not consider that it has been shown that these expenses would be fit all a reasonable charge on Government. Therefore in our opinion the Magistrate was perfectly entitled to hold that these were expenses which could not reasonably, be incurred by Government under Section 544, Criminal P.C., and he was therefore correct in requiring that the expenses should be deposited prior to the issue of summons in accordance with Section 257(2), Criminal P.C. The ruling of Sir Shadi Lal then proceeded to point out that the list before the Magistrate was of 121 witnesses, most of whom belonged to different districts in the province and eight outside the province and it was stated that more witnesses of the same number would be produced. The Magistrate stated these facts in his explanation and added that he did not consider that Government should be burdened with the expenses when the accused was well-to-do and was being defended by leading lawyers. Sir Shadi Lal stated in regard to this explanation that the Magistrate could decline under Section 257(1) to compel the attendance of all the witnesses if he considered that the application to summon them was made for the purpose of vexation or delay or for defeating the ends of justice, but that the Magistrate had not passed that order. In view therefore of the rules of the Punjab High Court and the Local Government the order of the Magistrate as it stood was set aside and the Magistrate was directed to proceed in the manner indicated above, that is that he was not bound to summon witnesses if he was of opinion that the application was not bona fide and was made for no other purpose than for vexation, delay or for defeating the ends of justice. Now, that particular ruling was passed in view of the particular order in the Punjab in regard to the payment of witnesses. The ruling will not apply to this province because there is no such order of the Local Government or of the High Court. On the contrary we may point out that there is a rule of the High Court

which has not been complied with by the accused in the present case. In the General Rules (Criminal) for Courts subordinate to the High Court of this Province- it is provided on page 7, Chap. 3, Rule 8, as follows:

Every application for the issue of process for the attendance of witnesses shall, if the party presenting the application is represented by a legal practitioner, contain a certificate signed by such legal practitioner that he has satisfied himself that the evidence of each of the witnesses is material in the case.

9. We have examined the record and find that although the accused was defended by a legal practitioner, as is also stated by the Magistrate in the first order quoted, no certificate has been filed by such legal practitioner that he has satisfied himself that the evidence of each of the witnesses is material in the case. For this reason alone, the Magistrate should have refused to issue process and we invite his attention to this provision and also the attention of the learned Sessions Judge. We have been shown a number of other rulings by learned Counsel for the accused, but we consider it unnecessary to refer to them because all of them deal with orders passed under Section 257(1), Criminal P.C., and the present order is passed under Section 257(2), Criminal P.C. and therefore the rulings have no bearing. We refer to one ruling mentioned by learned Counsel for the Crown, Mr. Shanker Saran : Ganpat Rai v. Emperor (1923) 10 A.I.R. Lah. 420. This ruling stated:

Section 257(2), Criminal P.C., fully empowers a Magistrate trying a case to order that reasonable expenses of a witness shall be deposited by the applicant in Court before he is summoned, and it has not been shown why the District Magistrate should not have exercised this power in this particular case.

10. The learned Judge further points out on p. 687, col. 2, that if a contrary rule were followed then Section 257(2), Criminal P.C. would become an entirely dead letter, that is, it is not necessary that an order should only be passed under Section 257(2) if the conditions of Section 257(1) exist. These two sub-sections deal with different cases. Under Sub-section (1) the order which is passed is an absolute refusal to issue process for certain reasons which are recorded. Under Sub-section (2) the order is a conditional one that process will be issued on a

certain condition. No doubt if the accused refuses to fulfil the condition, then the process is not issued and the result is the same as if there had been an order, under Sub-section (1), and again the same result would ensue if the accused does not apply for the issue of process at all. There is an unreported ruling of Allahabad High Court in Balkrishna Sharma v. Emperor Cri. Revn. No. 655 of 1931 by King, J., on 26th October 1931, where it was laid down as follows:

The most practical check upon summoning an excessive) number of witnesses is the requirement that the defence should deposit in Court the reasonable expenses of summoning the witnesses.

I therefore allow this application and set aside the Magistrate's order refusing to summon more than 10 out of the 78 witnesses. The accused will be entitled to summon any of the witnesses on his revised list if he deposits such sums for their attendance as the District Magistrate may order under Section 257(2).

11. This ruling shows that the order of the Magistrate in the present case was in accordance with the authority of this High Court, as the principle laid down in the ruling exactly covers the order of the Magistrate in the present 'case. Learned Counsel for the accused has not attempted to argue that the list of witnesses handed in by the accused and his counsel in the Court below was a reasonable list. It is obvious that the witnesses called from all over the country and witnesses who are mostly officials of different departments and persons of position have been called for no other reason than to cause public inconvenience and expense and annoyance to Government. In addition to the orders of Government in the Manual of Government Orders, Para. 900, we may refer to G.O. No. 1224 (A)/VI-1369-1931, dated 29th July 1932, addressed to all District Magistrates where it is directed:

2. I am also to draw your attention to G.O. No. 1867/VI-1369-1931 dated 16th December 1931, and to say that it should again be impressed on all Subordinate Magistrates that they should not summon witnesses for the defence blindly without first satisfying themselves that the witnesses really are required.

12. Again in G.O. No. 678/VI-1369-1931, dated 1st May 1933, addressed to all District Magistrates it is directed:

3. I am also to draw your attention to the provisions of Section 257, Criminal P.C., and to request that Magistrates should be enjoined to exercise their discretion under this Section in the case of witnesses of accused persons.

13. These orders make the position of Government clear, and we see no reason why the Criminal Courts should lend themselves to such an abuse of the processes of the Court or such a waste of public money and time, both of the Court and of the persons summoned, as the accused desire in the present case. In our view the action taken by the accused is one which should be checked, and we are greatly surprised that Mr. K.N. Joshi who was officiating as Sessions Judge could for a moment have contemplated that the order of the Magistrate was not a proper order. As it is, Mr. Joshi has delayed the trial of this case from January till September, and he has taken up the time of this Court and his own time with a matter which should not have been brought before this Court. We trust that Mr. Joshi will in future read the Section under which any order has been passed before he proceeds to deal with that Section in exercise of his powers of appeal or revision. With these remarks we reject this reference and we direct that the Magistrate should proceed with the trial of the case.