

Saghir UddIn Vs. Mt. Munni and ors.

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Court : Allahabad

Decided On : Dec-23-1948

Reported in : AIR1949All428; 1949CriLJ674

Judge : Wanchoo and; Desai, JJ.

Appellant : Saghir Uddin

Respondent : Mt. Munni and ors.

Judgement :

Desai, J.

1. The facts in this application in revision are very simple. The applicant instituted a complaint under s. 494 and 498, Penal Code, against the opposite party. The trial Court, after recording his evidence, framed a charge against the opposite party and fixed 17th October 1947 for cross-examination of the prosecution witnesses. When the case was called out on 17th October 1947, the complainant and his witnesses were absent and at the request of his counsel the case was adjourned to 5th November 1947. On that date also, the applicant was absent and his counsel again applied for adjournment on the ground of his illness. The trial Court was not satisfied with the plea of illness and did not understand why, even if the applicant was ill, his witnesses could not be present to be cross-examined. It rejected the application, refused to consider the evidence of the prosecution witnesses examined before the charge on the ground that they were not subjected

to cross-examination, concluded that there was left no evidence against the opposite party and acquitted them. The complainant challenged this order before the Sessions Judge, who refused to interfere. His order 'Heard the parties. Ejected' did not touch the grounds on which the application was based and is of absolutely no help to us in deciding the question that has been raised by the learned Counsel for the applicant. He has urged that under Section 256, Criminal P. O., it was not the applicant's duty to produce his witnesses for cross-examination, that it was really the Court's duty to summon them and that it could not penalise the applicant when the witnesses were not present. He also alleged that though the applicant was absent, his witnesses were present in the Court on 5th November 1947. He further urged that even if the trial Court did not see its way to adjourn the case, it should have decided it on 5th November 1947 on the basis of the evidence already recorded and should not have refused to consider it at all.

2. The Criminal Procedure Code casts upon the Magistrate trying a warrant case, the duty of ascertaining from the complainant the names of his witnesses and of summoning them: see Section 252. If, after considering the evidence of the witnesses summoned by him and the statement of the accused, he 'is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter' he is to frame a charge. He must then ask the accused to plead to it. After recording his plea, he must ask him if he wishes to cross-examine any of the prosecution witnesses whose evidence has been taken. If he answers in the affirmative, 8. 256, Criminal P. C, requires that

the witnesses named by him shall be re-called, and, after cross-examination and re-examination (if any), they shall be discharged.

3. Now the principal question is whose duty it is to re-call the prosecution witnesses for cross-examination as required under Section 256. The section itself does not expressly lay the duty on either the complainant or the Magistrate, but the general scheme of trial of warrant cases suggests that the duty is on the Magistrate. It is he who is required by 8. 252 to ascertain the names of the prosecution witnesses and to summon them. It is for him to ascertain from the accused if he wishes to cross-examine any of the prosecution witnesses under

Section 256, and when this duty is considered together with the requirement that on the accused's answering in the affirmative 'the witnesses named by him shall be re-called,' it follows that it is for the Magistrate to re-call them and not for the complainant. The witnesses, after cross-examination and re-examination, have to be discharged. This duty of discharging can be performed only by the Magistrate. If one bears regard to the context in which the words 'shall be recalled' and 'shall be discharged' are used, when the duty of discharging is upon the Magistrate, it follows that the duty of re-calling also is upon him. The other acts to be done under Section 256 are also to be done by him.

4. The use of the word 're-called' in S. 256 does not necessarily indicate that witnesses should have been present in the Court precincts. They may be present in the Court precincts, if they were bound down on the previous hearing, or were summoned, for attendance in the Court on that date, or they may not be. If they are present, all that is required to be done is for the orderly of the Court to shout out their names. But if they were not bound down on the previous date, or were not summoned, for attendance on that date, they must be summoned. We are supported by the following observation of Bennet J. in *liar Kishan Das v. Emperor* A. I. R (24) 1997 ALL. 127 : 188 Or. L. J. 361 .by the use of the word 'recalled' I understand that Section 256 (1) means that if the witnesses are not present then the Magistrate should issue process to ensure their attendance.

5. Our attention was drawn to an older case, *Baqrideev*, Emperor A. I.B, (17) 1930 ALL. 495 : 31 or. L. j. 764 decided by Dalai J. In that case, the Magistrate, after framing charge against the accused, for reasons recorded in writing, forthwith asked him to state which prosecution witnesses he wanted to cross-examine, and insisted that they would be cross-examined there and then. The accused took up the matter to the High Court through an application for transfer. Dalai J., while upholding the Magistrate's insistence upon the accused's mentioning there and then the names of the witnesses he wanted to cross-examine, quoted, with approval, the sentence 'the word 'recall' is very significant and does not mean re-summon' from *Mula v. Sheoraj Singh* 8 A. L. J. 707 : li i. o. 1007 decided before the amendment of Section 25G. This interpretation of the word 're-call' in the cases of *Mula* 8 A. L. J. 707 : 11 I, O. 1007 and *Baqridee* A.I.R. (17) 1980 ALL.

495 : 31 Cr. L. J. 764 was not placed before Bennet J., in the case of *Ear Kishan Das A. I. B. (24) 1987 all. 127 : 88 Or. L. J 361*. We prefer to accept the interpretation of Bennet J.

6. The Legislature could have used the word 're-summoned' in place of the word 'recalled', in Section 268, but seems to have preferred the latter word in order to cover the case in which the witnesses are present. If a Magistrate works methodically and punctually he should on the date on which he examines the complainant's witnesses, be able to anticipate the date on which they would be cross-examined after the charge, if so desired by the accused, and to take their bonds for attendance in the Court on that date. It is also possible for him to issue summonses against them for attendance on the date on which he proposes to ask the accused to cross-examine them. Consequently, it is possible for the witnesses to be in attendance in the Court for cross examination and when the accused expresses desire to cross-examine any of them, all that has to be done is to call them inside the court room. This seems to explain why the word 'recall' has been retained in the section after the amendment. But if they are not in attendance, summonses will have to be issued. A complainant has no authority to require his witnesses to be in attendance in the Court; he has no means to compel them, A witness can be compelled to attend the Court only if a summons is issued and served upon him. Therefore, the duty of procuring the attendance of the witnesses cannot be laid upon the complainant's shoulders. In *Emperor v. Nazir Husain A.I.B. (17) 1980 ALL. 795 : 32 Or. L. J. 866* by J., dealing with a warrant case in which the complainant and his witnesses failed to attend the Court on the date fixed for their cross-examination under 8. 266, observed: if he felt that there were no good grounds for adjourning the case he should have found the accused 'not guilty' and acquitted him, acting under Section 258(1).

Boys J. only discussed the proper order to be passed in such a case; he did not consider the question of responsibility for the absence of the prosecution witnesses. Since the effect of the order suggested by the learned Judge is to penalise the complainant, it can be said that he impliedly held the complainant responsible. The complainant had not explained his and his witnesses' failure to attend the Court and by J. assumed 'in the particular circumstances of the

case', that the complainant was responsible for his and his witnesses' failure. If a complainant undertakes to produce his witnesses himself in the Court and thereby prevents the Magistrate from issuing summonses against them, it would be right to hold him responsible for their absence. But if he does not, we do not see how he can be held responsible when he has no authority to compel their attendance. What the particular circumstances were in the case of Nazir Husain, A. I. H. (17) 1980 ALL. 795 : 32 Cr. L. J. 866), on account of which the Bench held the complainant responsible for the absence of his witnesses is not known. Therefore, the decision of the Bench does not affect the precise question under discussion.

7. In *Chiranjilal v. Ram Swarup* A.I.R. (80) 1943 all 9 : 44 Or. L. J. 196 a Magistrate trying a case under Section 408, Penal Code, acquitted the accused because the complainant and his witnesses did not appear for cross-examination. Allsope J. set aside his order observing:

The Magistrate should realise that the burden is upon him in the trial of warrants to discover from the complainant or otherwise what evidence is available and to see that that evidence is produced.

8. We are, therefore, of the opinion that it is the Magistrate's duty to re-call the prosecution's witnesses for cross-examination under Section 256 of .. the Code.

9. In the present case, the trial Court failed to perform its duty of re-calling the applicant's witnesses for cross-examination. It is stated in the application for revision that the witnesses were present on 5th November 1947 though the applicant himself was not, that one of them actually made an application for adjournment on the ground of the applicant's illness and that the other witnesses have given affidavits to prove their attendance. From the order of the trial Court, however, one finds that the witnesses were absent. They were not summoned by it for appearance on 5th November 1947 or 17th October 1947. They were not bound down for appearance on these dates. The applicant could not be penalised for their absence when he was not at fault. The fault was of the trial Court itself.

10. There can be no doubt that if the trial Court was not going to adjourn the case and was going to dismiss it, it had to acquit the opposite party under Section 258

(1), and not to discharge them under Section 259 of the Code.

11. As, however, we find that the absence of the applicant's witnesses was due to no steps being taken by the trial Court to secure their attendance on 5th November 1947, it ought to have adjourned the case when they were absent. Its acquittal of the opposite party is illegal and must be set aside. It has been alleged by the opposite party that they are being harassed by the applicant by filing complaints which he does not pursue diligently. We have no definite material to come to a finding on this and the applicant must be given full opportunity of proving his case.

12. We allow this application, set aside the order of acquittal of 5th November 1947 and re. mand the case for re-trial from the stage of the charge. The first act to be done by the trial Court will be to question the accused as to which of the prosecution witnesses they wish to cross-examine and to summon them.

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