

**Manni Vs. State**

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**SooperKanoon Citation :** [sooperkanoon.com/470367](http://sooperkanoon.com/470367)

**Court :** Allahabad

**Decided On :** Mar-06-1974

**Reported in :** 1975CriLJ161

**Judge :** Yashoda Nandan, J.

**Appellant :** Manni

**Respondent :** State

**Judgement :**

ORDER

**Yashoda Nandan, J.**

1. This is a reference made by the learned II Temporary Sessions Judge. Fatehpur recommending that the learned trial Magistrate be directed to allow the accused in the case to examine any witness as defence witness irrespective of the fact whether he had already been examined as prosecution witness or, not.

2. The material facts giving rise to this reference are that Manni is on trial in the court of the learned Additional District Magistrate (J), Fatehpur for an offence punishable under Section 379. Indian Penal Code on the basis of a police report. He is consequently being tried in accordance with the procedure prescribed by Section 251-A of Chapter: XXI of the Criminal Procedure Code hereinafter referred as the Code. After the charge was framed by the learned Magistrate the

prosecution examined in support of its case B. W. 1 Shiv Darshan, P.W. 2 NankaU.P. W. 3, Pittan and; P.W. 4 Udaya Narain Singh. The first three witnesses were examined as witnesses of fact and deposed about the occurrence in respect of which Manni is on trial. After examination in chief of each of the witnesses mentioned above he was tendered for cross-examination by the accused. There is a note below the statement of each witness to the effect that 'the counsel for the accused states that he does not want to cross-examine the witnesses'. These witnesses were examined by the prosecution evidently as required by Sub-section (7) of Section 251-A of the Code. Manni thereafter entered upon his defence. On the 4th of December. 1971, an application was made on behalf of Manni stating that the 'Cross-examination of prosecution witnesses Shiv Darshan. Nankau and pittan could not be done which was prejudicial to the accused.' It was prayed that the three witnesses mentioned above be recalled at the expense of the accused for their cross-examination in the interest of justice. The learned Magistrate rejected the application by an order of the same date on the ground that sufficient opportunity had already been given to the accused to cross-examine the prosecution witnesses and he consequently found no ground to summon them again. Thereafter a second application was presented by the accused before the learned Magistrate in which it was stated that it was necessary to examine P. Ws. Shiv Darshan, Nankau and Pittan in defence. It was prayed that the above-mentioned three witnesses be summoned at the cost of the accused to give evidence in the interest of justice. The learned Magistrate directed the application to be put for orders on 7th December, 1972, on which date he ordered as follows:

The accused has summoned these prosecution witnesses as defence witnesses. These witnesses were examined as prosecution witnesses and the accused's Counsel who was also present was given full opportunity to cross-examine these P. Ws. after which their statements were closed. But it is not clear to me as to how these prosecution witnesses who have been examined as P. Ws. can again be examined as D. Ws. I would have granted the prayer had full opportunity not been given. Hence this application appears simply to delay the proceedings without any reasonable cause. It is now defence stage and the accused may examine any witness as D. W. who has already not been examined as D, Ws. File. However further time for D. Ws, is given.

Against this order Manni went up in revision before the learned Sessions Judge. Relying on a decision of Kotwal, J. in State v. Masa Singh Chanda Singh : AIR1959 Bom368 the learned Sessions Judge took the view that

It was open to the accused to examine or to cross-examine even the aforesaid three prosecution witnesses as defence witnesses and the learned Magistrate could refuse their examination or cross-examination only on the ground that the application had been moved for the purpose of vexation or delay or for defeating the interest of justice.

In this view of the matter the learned Sessions Judge has made this reference.

3. I have gone through the record since Manni himself is unrepresented. In my judgment the reference made by the learned Judge has no merits and must be rejected. The validity or otherwise of the order passed by learned Magistrate must be judged with reference to Section 251-A (9) of the Code which runs as follows:

If the accused, after he has entered upon his defence applies to the Magistrate to issue any process for compelling the attendance of any witness for the purposes of examination or cross-examination or the production of any document or other thing the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such grounds shall be recorded by him in writing:

Provided that when the accused has cross-examined or had the opportunity of cross-examining any witness after the charge has been framed, the attendance of such witnesses shall not be compelled under this section unless the Magistrate is satisfied that it is necessary for the purpose of justice.

The learned Sessions Judge has apparently based his order of reference on the consideration that the main part of Sub-section (9) as quoted above gives the right to an accused to apply for process being issued for compelling the attendance of any witness. The view taken however disregards the proviso to subsection (9) which carves out an exception to the main provision.

4. The result of reading Sub-section (9) along with the proviso is that the accused has a right to apply for the issue of process for compelling the attendance of witnesses other than those whom he has either cross-examined or had the opportunity of cross-examining after the charge had been framed. The proviso does not completely debar the trial Magistrate from issuing process even for such witnesses as are mentioned therein. He has the power to issue process for compelling the attendance of even such witnesses in case he is satisfied that it is necessary for the purposes of justice. Apparently the learned Magistrate in the instant case did not consider it necessary to compel the attendance of prosecution witnesses who had been tendered for cross-examination and whom the accused had refrained from cross-examining. If in the guise of examining the prosecution witnesses mentioned above as defence witnesses the accused desired merely to cross-examine them with regard to facts deposed to by them as prosecution witnesses the proviso to Sub-section (9) quoted above applied on all fours.

\* Moreover the learned Magistrate has recorded a finding that the application dated 4th December, 1971 with which we are concerned had been made simply to delay the proceedings without any reasonable cause. On this finding even under the main part of Sub-section (9) irrespective of the proviso the learned Magistrate had power to refuse to issue process for the attendance of the three prosecution witnesses. The learned Magistrate's finding that the application had been made to delay the proceedings is not unjustified on the facts of the case. An earlier application as already mentioned by which Manni desired summons to issue to prosecution witnesses for their cross-examination has been dismissed by the learned Magistrate on 4th December, 1971. By means of the second application the accused it appears merely wanted to achieve what he had failed to by the earlier application. The application does not disclose as to for what purpose the accused wanted to examine in defence the prosecution witnesses who had already deposed against him.

5. I have carefully considered and gone through the judgment of Kotwal, J., in : AIR1959 Bom368 (supra) on which the learned Sessions Judge has relied in support of his order of reference but find myself in respectful disagreement therewith. The facts giving rise to the criminal reference before the Bombay High

Court were that Masg Singh who figured as the non-applicant in the reference was being prosecuted under Section 506, Indian Penal Code and after certain witnesses were examined for the prosecution a charge was framed under that section against him. After the charge prosecution witnesses were called for cross-examination including three witnesses Harnam Singh, Trilok Singh and Balvant Singh. The accused did not avail of the opportunity of cross-examining them which was offered to him. Subsequently on the 26th February, 1957, the accused entered upon his defence and put in a list of defence witnesses. A month later on the 26th March, 1957, he put in an application praying that the three prosecution witnesses mentioned above should be called and he should be permitted to cross-examine them but the trial Magistrate rejected this application. Thereafter the accused applied for their being summoned for examination as defence witnesses and the Magistrate allowed that application and summoned the three persons named above as defence witnesses. When those witnesses appeared before the court the Counsel on behalf of the accused commenced cross-examination of those witnesses and the learned Magistrate intervened and ordered that he could examine them on behalf of the accused.

6. The learned Sessions Judge on a revision being filed before him by the accused appeared to have been of the view that the accused had a right to cross examine the prosecution witnesses by reason of Section 251-A (9) of the Code. Kotwal, J. accepted the reference holding as follows:

The section refers without distinction to 'any witness' and permits the accused even after he has entered upon his defence, to apply to the Magistrate to compel attendance for the purpose of examination or cross-examination. The only ground upon which the right to cross-examine 'any witness' could be negatived is the ground stated in Sub-section itself, namely, that the Magistrate 'considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.' The trying Magistrate in the instant case did not give a finding or come to any conclusion that the accused made the application for the purpose of vexation or delay or for defeating the ends of justice, and therefore the right of the accused to cross-examine the witnesses even though he had entered upon the defence was clear in the terms of Sub-

section (9) of Section 251-A of the Code of Criminal Procedure. The proviso to Sub-section it was conceded was not attracted to the facts of the present case.

7. With due deference to the learned Judge who decided : AIR1959 Bom368 (Supra) I do not find it possible to agree with the view taken. Under the main part of Sub-section (9) of Section 251-A an accused has a right to ask the court to compel the attendance of witnesses either for examination as a defence witness or for cross-examination provided he does not in the guise of examining a prosecution witness as a defence witness intend to or actually cross-examine such prosecution witness as was offered for cross-examination to him and whom he had failed to cross-examine. The court cannot refuse to summon any person as a defence witness unless it records a finding that the application for summoning the witness had been made merely for the purpose of vexation or delay or for defeating the ends of justice. If however the accused wants to make use of the main part of Sub-section (9) for the purpose of achieving that which is prohibited by the proviso, the proviso will apply and the court will be justified in refusing to accede to the request of the accused to summon such witness. A prosecution witness who; had been tendered for cross-examination by the accused and whom he had either cross-examined or had failed to cross-examine may still be summoned by the court if it is satisfied that it is necessary for the purpose of justice but not otherwise. In the case before the Bombay High Court prosecution witnesses who had been offered for cross-examination by the accused but whom he has failed to cross-examine were sought to be cross-examined by the accused. The accused before the Bombay High Court thus desired to do what the proviso to Sub-section (9) of Section 251-A prohibits and consequently the learned Magistrate acted within his powers to refuse their cross-examination by the accused. It was a case to which the proviso clearly applied. I fail to understand how it was conceded before the learned Judge that the proviso to the Sub-section was not attracted to the case before the Court. The decision by Kotwal, J., is based on a misconceived concession with regard to the non-applicability of the proviso to Section 251-A (9) of the Code. Consequently I decline to follow it.

8. For the reasons given the reference made by the learned Sessions Judge is rejected. The case will go back to the learned Magistrate for being proceeded with

in accordance with law.

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