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Court : Kolkata

Decided On : Mar-29-1881

Reported in : (1881)ILR7Cal28

Judge : Pontifex and ;Field, JJ.

Appellant : Faiz Ali and ors.

Respondent : Koromdi

Judgement :

Pontifex, J.

1. This rule was moved for and granted by us on the ground that the Deputy Magistrate had improperly refused to allow the petitioners to recall and cross-examine the witnesses of the complainant after the charge had been framed under Section 217. The same objection was taken in appeal before the Magistrate, and the Magistrate, in his decision, has held that the petitioners did not exercise their right under Section 218, of recalling the witnesses for the prosecution for cross-examination within proper time, and that therefore they were not now entitled to take any objection on account of the refusal by the Deputy Magistrate to recall such witnesses.

2. Now, in the petition before us, it is stated that the charge was drawn up on the 17th of December 1880, and that on the same day an application was made to the

Deputy Magistrate, asking that the witnesses should be recalled for further cross-examination. It appears, however, that the petition before the [30] Deputy Magistrate asking that the witnesses should be recalled, although dated on the 17th December 1880, could not have been filed before the 18th December 1880, the date on which the stamp was punched and the date on which the endorsed order was made. It appears that, early in December, the witnesses, both for the complainant and for the accused persons, had been examined and cross-examined, and on the 17th December the charge was drawn up, and the Deputy Magistrate made this order,---' To-day having heard the pleaders and mukhtears, the case will stand over until to-morrow.' The ordinary inference would be, that the pleaders and mukhtears having been heard, the case had closed, and only awaited the decision of the Deputy Magistrate. But, however that may be, the only rights that the accused person has, are under Section 218 of the Criminal Procedure Code. Now, under Section 217, the charge is to be read and explained to the accused person, who is to be asked whether he has any defence to make. That was done on the 17th December. Under Section 218, if the accused has any defence to make, he is to be called upon to enter upon the same, and to produce his witnesses, and is to be allowed to recall and cross-examine the witnesses for the prosecution. These two sections coming together, it seems to us that it was intended, that if the accused person desired to recall and cross-examine the witnesses for the prosecution, the time at which he should express such desire was, when the charge was read over to him and he was called upon to make his defence. That was done on the 17th December. The petition to recall these witnesses was not put in until the 18th. Therefore we think, that it was no longer in the power of the accused persons to insist upon their right of recalling these witnesses, although it remained in the discretion of the Deputy Magistrate to recall them if he thought fit. Now, on the 18th December, he made another order directing that the case should come on again on the 20th; and on the 20th, an order was drawn up, but not signed, directing that the witnesses should be produced for re-examination on the 28th. The Deputy Magistrate never signed that order, for, before he was prepared to sign it, one of these witnesses for the prosecution, a policeman, who happened to be in Court, was produced, and it was asked on behalf of the prosecution that, if the accused persons wanted to cross-

examine this witness-they should do so at once. The accused refused to cross-examine him then, alleging that it would prejudice their case unless all the witnesses were cross-examined together. The Deputy Magistrate then considered that the application for cross-examination was made only with the object of delaying the proceedings, and that it was not a bond fide application; and it being, under the circumstances, in his discretion to recall the witnesses or not, and the accused having lost their rights under Section 218, the Deputy Magistrate decided that he would not sign the order drawn up, and he proceeded to dispose of the case. The Magistrate, on the appeal before him, considered that the Deputy Magistrate had acted with propriety, and we are disposed to agree with the Magistrate in that opinion. We think that there is not sufficient ground for this application, and that the rule must be discharged.

Field, J.

3. I only desire to add, that the vernacular record shows that 'the vakeels and mukhtears,' that is, as I understand, the vakeels and mukhtears of both sides were examined on the 17th. Now, though the Code of Criminal Procedure contains no express provisions similar to those to be found in the Civil Procedure Code as to the time at which, or the order in which the pleaders and mukhtears for the prosecution, or for the defence, shall address the Court, still, according to mofussil practice, the usual practice on this point is followed. I therefore understand from the vernacular record, that the pleader or mukhtear of the accused had addressed the Court, and that the pleader or mukhtear of the prosecution had been heard in reply. This being so, I take it that the case was closed on the 17th, and the accused not having exercised the right given them by Section 218 at the time at which they ought, if they intended to exercise it, to have expressed their intention of doing so, I think they could not afterwards claim to exercise that right.

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