

Rayan Khan and ors. Vs. Emperor

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Court : Kolkata

Decided On : May-24-1916

Reported in : 38Ind.Cas.968

Judge : Asutosh Mookerjee and ;Sheepshanks, JJ.

Appellant : Rayan Khan and ors.

Respondent : Emperor

Judgement :

ORDER

1. In a proceeding under Section 110, Criminal Procedure Code, the petitioners were directed on the 1st December 1915 to execute bonds for Rs. 200 with two sureties each, to be of good behaviour for one year in some cases, and for three years in other cases--in default to undergo rigorous imprisonment for the respective periods. This order was made by Mr. H.K. Mallik, Sub-Divisional Magistrate, Bankura. On the 24th and 26th January 1916, the petitioners produced two sureties each, who offered to stand as sureties and filed documents of title relating to their properties. On the 28th January the Magistrate recorded the following order: 'To Police for enquiry, if the surety is fit; forward documents also.' As the Police did not submit the report on the day fixed the case was adjourned. The Sub-Inspector of Police subsequently reported in the following terms: 'The proposed sureties are not fit. They have no sufficient central over the accused and they have no sufficient property to pay the amount in case of default; so under the

circumstances I cannot recommend this.' The Inspector of Police forwarded this report to the Magistrate with the note 'not recommended.' The Magistrate thereupon recorded the following order on the 11th February 1916: 'Rejected. Let them furnish other good surety.' The result was that the petitioners were all lodged in jail. The Sessions Judge has now forwarded the records to this Court with the recommendation that the order of the Magistrate be set aside, on the ground that the sureties were rejected without judicial enquiry by the Magistrate himself.

2. It is well settled that the question whether a particular person who is offered as a surety is or is not fit, within the meaning of Section 122, Criminal Procedure Code, must be decided by the Magistrate himself, and his decision must be based upon evidence taken for the purpose; sureties offered should not be refused except after judicial enquiry. This view is supported by a long line of cases in this Court which are binding upon us and our subordinate Courts. *Suresh Chandra Basu v. Emperor* 3 C.L.J. 575 : 3 Cr. L.J. 468, *Abdul Khan In re* 10 C.W.N. 1027 : 4 Cr. L.J. 169, *Hirn v. Emperor* 28 Ind. Cas. 663 : 42 C. 706 : 19 C.W.N. 220 : 16 Cr. L.J. 327, *Kalu Mirza v. Emperor* 5 Ind. Cas. 29 : 37 C. 91 : 14 C.W.N. 49 : 11 Cr. L.J. 23. In the case last mentioned, *Coxe, J.*, doubted whether the enquiry might not be delegated to a Subordinate Magistrate. *Ryves, J.*, however, followed what has undoubtedly been the consensus of opinion in all the superior Courts in this country, namely, that the Magistrate should himself hold the enquiry into the fitness of the proposed sureties and cannot call upon other persons to exercise the functions which are entrusted by law to him alone. Amongst the cases in Allahabad, reference may be made to the decisions in *Queen-Empress v. Pirthi Pal Singh* A.W.N. (1898) 154, *Emperor v. Tota Ram* 25 A. 272, *Emperor v. Ghulam Mustafa* 26 A. 371 : A.W.N. (1904) 52 : 1 Cr. L.J. 190, *Emperor v. Balwant* 27 A. 293 : A.W.N. (1804) 231 : 1 Cr. L.J. 912 : 1 A.L.J. 601, *Bhawani Singh v. Emperor* 26 Ind. Cas. 646 : 12 A.L.J. 1004 : 16 Cr. L.J. 54. The same view has been adopted in the Court of the Judicial Commissioner of Oudh [*Emperor v. Parmeshur* 7 O.C. 113 : 1 Cr. L.J. 459, *Ramanand Singh v. Emperor* 11 O.C. 267 : 8 Cr. L.J. 344, *Jai Govind v. Emperor* 17 Ind. Cas. 72 : 15 O.C. 263 : 13 Cr. L.J. 760]. A similar view has been adopted by the Chief Court of the Punjab [*Emperor v. Kaim Khan* 18 P.R. 1906 Cr. : 3 Pan. Cr. B. 2910 : 14 P.L.B. 1907 : 5 Cr. L.J. 148], and also by the Court of the Judicial Commissioner of Sind [*Imperator v.*

Mahro 2 S.L.R. 11 : 10 Cr. L.J. 225, Emperor v. Kamal 2 S.L.R. 15 : 10 Cr. L.J. 230, Imperator v. Allahdino 11 Ind. Cas. 594 : 5 S.L.R. 87 : 12 Cr. L.J. 410, Emperor v. Haji Usman 7 Ind. Cas. 592 : 4 S.L.R. 18 : 11 Cr. L.J. 497, Piru Abdulla v. Emperor 23 Ind. Cas. 746 : 7 S.L.R. 94 : 16 Cr. L.J. 378, Muhammad Ibrahim v. Emperor 27 Ind. Cas. 148 : 8 S.L.R. 173 : 16 Cr. L.J. 100]. We accordingly accept the recommendation of the Sessions Judge, set aside the order of the Magistrate, dated the 11th February 1916, and remand the case to him in order that he may enquire into the fitness of the sureties offered upon such evidence as may be adduced before him on behalf of the accused. It may be added that as there are several accused persons each of whom has offered two sureties, the fitness of each person must be separately determined; a general order without investigation of the circumstances of each of the sureties is obviously not contemplated by the law.

3. As the question of fitness of each surety will be determined by the Magistrate after enquiry, it is not necessary for us to specify the elements to be taken into consideration by him; but with reference to the observation in the Police report that sureties should be rejected if they do not show that they have sufficient control over the accused, we may draw the attention of the Magistrate to the fact that according to the decisions of this Court this is not a valid ground for rejection of a surety [Kalu Mirza v. Emperor 5 Ind. Cas. 29 : 37 C. 91 : 14 C.W.N. 49 : 11 Cr. L.J. 23]. The same view has been adopted by the Bombay High Court in a recent case, Jivanatha v. Emperor 23 Ind. Cas. 476 : 16 Bom. L.R. 138 : 15 Cr. L.J. 268, though a somewhat different view is possibly indicated in Queen-Empress v. Rahim Bahhsh 20 A. 206 : A.W.N. (1898) 21 : 9 Ind. Dec. (N.S.) 494 and Zikri v. Emperor 11 Ind. Cas. 1008 : 8 A.L.J. 785 : 12 Cr. L.J. 472.

4. Let the records be returned.