section 423 or section 439, Criminal Procedure Code, or both read together. The reference is answered accordingly.

Jangir Singh and others *v.* The State

Sharma, J.

The case should now go back to the learned Single Judge for disposal on merits.

R. P. KHOSLA, J.—I agree.

R. P. Khosla, J.

K. S. K.

REVISIONAL CRIMINAL

Before Gurdev Singh, J.

JIT SINGH *alias* RANJIT SINGH,—*Petitioner.*

versus

THE STATE,—*Respondent.*

Criminal Revision No. 725 of 1961.

Criminal Miscellaneous No. 387 of 1961.

1961

Nov., 17th

Code of Criminal Procedure (V of 1898)—Section 257—Rules and Orders of Punjab High Court Volume III—Chapter 9A, Rule 1—Defence witnesses—Whether to be summoned at State expense—Capacity of the accused to pay the expenses of summoning his defence witnesses—Whether a valid ground to refuse to summon such witnesses unless the accused deposits process fee and diet money, etc.

Held, that under section 257 of the Code of Criminal Procedure the Magistrate has the power to call upon the accused to deposit reasonable expenses for summoning witnesses on his behalf but this power has to be exercised on judicial principles and after recording reasons. Rule 1 of Chapter 9A of the Punjab High Court Rules and Orders, Volume III, prescribes the cases in which the witnesses are to be summoned at the State Expense and no distinction is made between witnesses summoned by the prosecution or the accused in the payment of their expenses. Where a Court summons a witness under section 540 of the Code of Criminal Procedure his expenses have to be met by the State irrespective of the fact whether the case has been

instituted by the police or one of the public officers of the Government or whether it is cognisable or non-cognisable and bailable or non-bailable. A magistrate can refuse to summon a witness cited by an accused in his defence if he is satisfied that the prayer for summoning the witness concerned is made for the purpose of vexation or delay or for defeating the ends of justice. That power can be exercised by the Magistrate by absolutely refusing to summon the witness concerned, or he may still show some indulgence to an accused person by affording him an opportunity to procure the evidence of the witness at his own expense. This may be necessary where the Court is not satisfied about the *bona fides* of an accused in summoning a witness. But while making such an order for summoning a witness and calling upon an accused person to deposit his expenses, the Magistrate must record his reasons for departing from the usual practice.

Held, that the capacity of the accused to pay the expenses of his witnesses is not a valid ground for refusing to summon such witnesses except on the deposit of the diet money and process fee by the accused person. Neither section 257 of the Code of Criminal Procedure, nor the Rules framed by the High Court or the State under section 544 of the Code of Criminal Procedure warrant any such distinction between an accused who is in a position to meet the expenses of summoning defence witnesses and one who is unable to pay them.

Petition under Section 439/561 of the Criminal Procedure Code for revision of the order of Shri Jagwant Singh, Magistrate 1st Class, Faridkot (A), dated the 18th May, 1961, ordering that the witnesses cannot be summoned at State expense as the accused has the capacity to pay the diet money of the witnesses.

M. R. SHARMA, ADVOCATE, for the Petitioner.

K. S. KWATRA, ASSISTANT ADVOCATE-GENERAL, for the Respondent.

JUDGMENT

Gurdev Singh, J.

GURDEV SINGH, J.—The petitioner, Jit Singh alias Ranjit Singh, along with another is being

tried on a charge under section 420, Indian Penal Code, in the Court of the Magistrate Ist Class at Faridkot. After he had been asked to enter on his defence, he submitted a list of his witnesses and prayed for summoning them. The learned trial Magistrate thereupon passed the following order :—

> "The witnesses cannot be summoned at State expense as the accused have capacity to pay the diet money of the witnesses. The witnesses be summoned if the accused deposit their process fee and diet money."

Feeling aggrieved by this order, Jit Singh has come up in revision.

The order of the Magistrate refusing to summon the witnesses except on the payment of their process fee and diet money by the petitioner is assailed on the ground that in cases which are cognisable by the police the expenses of summoning all witnesses, including the defence witnesses are to be borne by the State. Reliance in this connection has been placed upon Rule 14 of Chapter 1-D of the High Court Rules and Orders, Volume III, which runs as follows:—

> "The magistrate is bound to cause the production of and hear all witnesses whom the accused desires to call, and to consider any documentary evidence relied on by him. The only exception to this rule is, where the magistrate considers that in naming any witnesses the object of the accused is to cause vexation or delay or to defeat the ends of justice. In case the magistrate refuses to receive any evidence required by the accused, he should record his reasons for such refusal in writing. The magistrate may, before summoning any witness applied for by the accused, require the accused to deposit reasonable expenses

Jit Singh alias Ranjit Singh
v.
The State

Gurdev Singh, J.

for his attendance. In ordinary warrant-cases, however, the cost of causing the attendance of accused's necessary witnesses is usually borne by Government."

The learned Assistant Advocate-General points out that the concluding portion of this rule vests a discretion in the trial Magistrate to call upon an accused person to deposit expenses for the attendance of his witnesses and if the discretion is properly exercised it should not be interfered with by a superior Court. He further contends that the last sentence of this rule laying down that "in ordinary warrant-cases, however, the cost of causing the attendance of accused's necessary witnesses is usually borne by Government" is just a statement of practice that has been prevailing and has no binding force. He further urges that the rule in question has no statutory force but is just in the nature of advice to the subordinate Courts for their guidance in order to ensure uniformity and smooth working. In this connection he relies upon observations of Blacker, J., while referring a similar question for consideration to a larger Bench. That reference became infructuous, but the reference order is reported in *Nanak Chand* v. *Suraj Parkash* (1). The learned Judge took note of the earliest decision of the Lahore High Court on the point reported as *Sayad Habib* v. *Emperor* (2), which was subsequently followed in *Habib* v. *Medhi Hussain* (3), *Ram Narain* v. *Emperor* (4), *Parshotam Das* v. *Emperor* (5), and *Khushi Mohammad* v. *Abdulla Khan* (6).

In *Sayad Habib* v. *Emperor* (2), which is the basic authority, Shadi Lal, C.J., held that in ordinary warrant-cases the cost of causing the attendance of accused's necessary witnesses is usually

(1) A.I.R. 1938 Lah. 693
(2) A.I.R. 1929 Lah. 23(2)
(3) 108 I.C. 907
(4) A.I.R. 1932 Lah. 481
(5) A.I.R. 1936 Lah. 919
(6) A.I.R. 1937 Lah. 458

borne by the Government. The learned Judge, however, observd:—

> "The Magistrate has no doubt authority to depart from this usual practice, but there should be strong and cogent reasons for making the departure. Where the Magistrate finds that the accused has given a long list of witnesses to defeat or delay the ends of justice, he may decline to compel their attendance, under sub-section (1) of section 257 of the Code of Criminal Procedure, but at the same time he must be careful not to do any act which might hamper the accused in his defence. The Court should, in a case of this kind, adopt a reasonable course which would, while avoiding any hardship on either side, promote the ends of justice."

This decision was based upon para 67 of Chapter 6 of the then prevailing Rules and Orders of the High Court, Volume II which corresponds to rule 14, Chapter 1-D of the Rules and Orders of this Court, Volume III.

The learned Chief Justice in that case, however, recognised that under section 257, Code of Criminal Procedure, this ordinary practice can be departed from for strong and cogent reasons, such as the conduct of the accused in giving a long list of witnesses to defeat or delay the ends of justice. Blacker, J., in his order of reference in *Nanak Chand* v. *Suraj Parkash* (1), expressed an opinion that the Rules of the High Court on which reliance had been placed in support of the practice of summoning defence witnesses in warrant cases at the State expense had no statutory force and appeared to be *ultra vires*. It is, however, not necessary to go into that matter because the provisions contained in the Code of Criminal Procedure and the rules framed thereunder are clear.

(1) A.I.R. 1938 Lah. 693

Jit Singh alias Ranjit Singh
v.
The State

Gurdev Singh, J.

The power and procedure for summoning defence witnesses in a warrant-case is contained in section 257 of the Code of Criminal Procedure. Sub-section (1) enjoins upon the trial Magistrate to issue process for compelling the attendance of any witnesses named by an accused for examination, or cross-examination, or the production of any document or other thing, 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. It further lays down that the ground for refusal to summon a witness named by the accused shall be recorded in writing. The proviso to sub-section (1) further gives a discretion to a Magistrate not to summon a defence witness where the witness concerned has already been cross-examined or the accused had the opportunity to cross-examine him after the framing of the charge, except where it is necessary in the ends of justice. Sub-section (2) of section 257, Code of Criminal Procedure, is the one which is material for the purposes of this case. It runs 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."

If there was no further provision with regard to payment of expenses for summoning a defence witness certainly acting under this provision of law the Magistrate has the power to call upon the accused to deposit reasonable expenses for summoning a particular witness, but again that discretion has to be exercised judiciously and not in an arbitrary manner. There must be cogent reasons for making the deposit of process fee and diet money as a condition precedent for summoning a defence witness. Sub-section (1) of section 257 gives an indication of the circumstances in which such a power should be exercised by a trial Magistrate. Even in *Sayad Habib's case* (1), Shadi Lal,

(1) A.I.R. 1929 Lah. 23(2)

C.J., observed that where the object of the accused in summoning the defence witnesses is to defeat or delay the ends of justice the Court may decline to compel their attendance under sub-section (1) of section 257 of the Code of Criminal Procedure. The learned Chief Justice, however, held out a warning to the subordinate Courts by observing:—

> "But at the same time he (the Magistrate) must be careful not to do any act which might hamper the accused in his defence. The Court should, in a case of this kind, adopt a reasonable course which would, while avoiding any hardship on either side, promote the ends of justice."

We, however, find that the matter does not rest here as the State Government in pursuance of the powers vesting in it under section 544 of the Code of Criminal Procedure has made rules regarding the payment of expenses to the complainant and witnesses for their attendance in the course of an inquiry, trial or other proceedings. These rules have been reproduced in Chapter 9-A of the Rules and Orders of this Court, Volume III, and it is not disputed that they have a binding force and are to be followed by all the criminal Courts in the State. Rule 1 lays down:—

> "The Criminal Courts are authorised to pay at the rates specified below, the expenses of complainants or witnesses— (1) in cases in which the prosecution is instituted or carried on by or under the orders or with the sanction of the Government, or of any Judge, Magistrate, or any other public officer, or in which it shall appear to the presiding officer to be directly in furtherance of the interests of the public service; (2) in all cases entered in column 5 of Schedule II appended to the Code of Criminal Procedure, as not bailable; (3) in all cases

Jit Singh alias Ranjit Singh
v.
The State

Gurdev Singh, J.

which are cognizable by the police; and (4) of witnesses in all cases in which they are compelled by the Magistrate, of his own motion, to attend under section 540 of the Code of Criminal Procedure."

The position that emerges on perusal of this rule is that in the summoning of witnesses in cases instituted or carried on by or under the orders or with the sanction of the Government or of any Judge, Magistrate, or any other public servant, or in those which are cognizable by the police, no distinction is made between witnesses summoned by the prosecution or the accused in the payment of their expenses. Where a Court summons a witness under section 540 of the Code of Criminal Procedure his expenses have to be met by the State irrespective of the fact whether the case has been instituted by the police or one of the public officers of the Government or whether it is cognisable or non-cognisable and bailable or non-bailable.

The case with which we are dealing falls both within the first and the third categories stated in this Rule. The petitioner is being tried on a police challan and the charge against him is for an offence under section 420, Indian Penal Code, which is cognisable by the police. It is, thus, evident that under rule 1 of Chapter 9-A of the High Court Rules and Orders, Volume III, the expenses of summoning a defence witness have to be met by the State and the Court is not justified in refusing to summon the witnesses of the accused merely because he has capacity to pay.

Of course, as has been pointed out by Shadi Lal, C.J., in *Sayad Habib's case* (1), the trial Magistrate has still the power under sub-section (2) of section 257 of the Code of Criminal Procedure to refuse to summon a witness cited by an accused in his defence if he is satisfied that the prayer for summoning the witness concerned is made for the

(1) A.I.R. 1929 Lah. 23 (2)

purpose of vexation or delay or for defeating the ends of justice. That power can be exercised by the Magistrate by absolutely refusing to summon the witness concerned, or he may still show some indulgence to an accused person by affording him an opportunity to procure the evidence of the witness at his own expense. This may be necessary where the Court is not satisfied about the *bona fides* of an accused in summoning a witness. But while making such an order for summoning a witness and calling upon an accused person to deposit his expenses, the Magistrate must record his reasons for departing from the usual practice.

In the instant case the only reason given by the Magistrate in refusing to summon any of the witnesses cited in defence is that the accused has the capacity to pay. This is not a valid ground for refusing to summon a witness except on the deposit of the diet money and process fee by an accused person. Neither section 257 of the Code of Criminal Procedure, nor the Rules framed by this Court or the State under section 544 of the Code of Criminal Procedure warrant any such distinction between an accused who is in a position to meet the expenses of summoning defence witnesses and one who is unable to pay them.

In these circumstances, I am of the opinion that the order of the Magistrate cannot be sustained and accepting the petition I set aside the same. The defence witnesses named in the list shall be summoned at the State expense. The petitioner is directed to appear in the trial Court on the 8th of December, 1961.

K. S. K.

16952 HC—1000—9-7-62—C. P. & S., Pb., Chandigarh