1938 *Present :* **de Kretser J.**

SABAPATHY *v.* THARMALINGAM *et al.*

310—P. C. Jaffna, 220.

Costs—Adjournment of case—Power of Police Magistrate to order payment of costs—Criminal Procedure Code, s. 289.

A Police Magistrate has power in granting an adjournment of a case to order costs to be paid by a party on whose application the adjournment is made.

Paul v. Sinniah Kangany (*5 C. W. R. 143*) not followed.

APPEAL from an order of the Police Magistrate of Jaffna.

F. A. Tisseverasinghe, for appellant.

Cur. adv. vult.

September 30, 1938. DE KRETSER J.—

In this case on April 19 the complainant applied for a postponement and this was objected to by the opposite side. The acting Magistrate postponed the case and ordered the complainant to pay Rs. 10 to the accused to be divided equally between them for the day's expenses. On April 22 he ordered a distress warrant to be issued for the recovery of the money and postponed the trial for May 10. On May 10, the complainant sent a medical certificate and the Magistrate not being satisfied with the excuse given for his absence discharged the accused. Meanwhile, according to the journal, a petition of appeal has been filed on April 30 and the defendants had been given notice for May 9. The petition of appeal is itself undated and is signed by the petitioner but was drawn by his Proctor. I think it is unsatisfactory that a petition addressed to this Court should bear no date, but the question that arises is whether the Magistrate had any power to make the order he has made. Crown Counsel refers me to section 289 of the Criminal Procedure Code which empowers the Court to order a postponement or an adjournment on such terms as it thinks fit. The terms of this section seem to be wide enough to cover the present order, and Sohoni in his work on the Criminal Procedure Code of India, in dealing with the corresponding section, cites a number of cases in which similar order has been made. ***Paul v. Sinniah Kangany***[1] is a decision by de Sampayo J. in which he

[1] *5 C. W. R. 143.*

says, " that section 289 does not authorise an order for costs and there is no authority for a criminal court ordering costs to be paid by one side or the other excepting such costs as Crown costs and compensation ". The authority is directly in point, but on the other hand there was no appearance for the respondent and the attention of de Sampayo J. does not seem to have been directed to any authority. In the present case the appellant is absent. The order in my opinion is justified and I see no reason to interfere with it.

Mr. Tisseverasinghe argued the matter further on Friday, September 30, 1938, and the points made by him were :—

(1) That section 289 does not use the word " Costs " and that costs should not be considered to be included in the expression " Terms ";

(2) He quoted *Sangaralingam Mudaliyar v. Narayana Mudaliyar and others*[1], as supporting the decision in this way, viz., that the Criminal Procedure Code had provided for the Appellate Court ordering costs and the Police Court ordering Crown costs, and that therefore, on the principle of the maxim *expressio unius est exclusio alterius,* section 289 should not be considered to empower the imposition of costs ;

(3) That it had not been the practice to award costs in criminal cases and it would be a dangerous thing to put such power in the hands of the minor judiciary ;

(4) He asked whether the Court would deal in the same way with Police Officers and other Government servants ;

(5) Whether there was to be no limit on the amount of costs which a Magistrate might impose. He said that, for example, Counsel goes from Colombo to Galle and then, if the case is postponed, Counsel may mention his fee and ask that the fee be included in the award of costs.

Further, costs may be awarded repeatedly and the result may be that a man who comes to Court with a grievance may find himself in jail because of his inability to pay costs. He supported the decision in *Paul v. Sinniah Kangany* (*supra*) as coming from a Judge of great eminence and experience and suggested that the Indian authorities are not of much value, more especially as most of the reports themselves were not available and we had to depend on notes made by a Commentator on the Code.

With regard to the first objection, I see no reason why section 289 should be limited in the way he suggests. It does not seem to have been so limited in the Indian Courts and I can conceive of other occasions on which a similar expression would be sufficient to cover an order for costs. In section 82 of the Civil Procedure Code the language is that the Court may allow a postponement " on such terms as to costs and otherwise ". One cannot argue from this that the Legislature felt the necessity for using the word "costs " and the argument is really the other way about. It indicates—that the word " terms " would include costs—costs being probably specified merely as an indication of what might be done.

[1] *45 Madras 913.*

With regard to the second objection it fails when once his argument on the first point is not sustained. In the Indian Code there was no provision, such as we have in section 352 of our Code, justifying the Appellate Court ordering costs and all that the case quoted decided was that the Appellate Court had no jurisdiction to award costs.

With regard to the third point made by him, I agree that it has not been usual to award costs in criminal cases and in fact when this appeal was taken up I myself was rather surprised by the order and no Counsel at that time could refer me to any authority justifying the order, but Crown Counsel was able, in a little while with the assistance of his note book, to refer me to the section. The power which the Court has should undoubtedly be exercised with moderation, but it is a salutary power and I think that it might well be used more often than it has been in the past. I cannot accede to the argument that it is a dangerous thing to put such power in the hands of the minor judiciary both for the reason that I have more confidence than Counsel in the minor judiciary and also because the Legislature has chosen to impose such confidence in that body of Judges.

The answer to the fourth point raised by him is in the affirmative. The section does not discriminate between Police Officers and Government servants and others and they will stand on the same footing. Section 352 did not discriminate, and in *P. C. Balapitiya, Case No. 44,852, S. C. M. of April 26, 1918,* Bertram C.J. put a Fiscal's officer on " terms ", the terms being that he should pay such costs with regard to the attendance of witnesses and legal assistance as the Magistrate thought reasonable. As a result of that decision section 352 was amended and it was provided that no order for costs should be made against the Attorney-General or the Solicitor-General. In that case the Solicitor-General was the appellant. Dias in his *Commentary on the Criminal Procedure Code, p. 746,* quotes this case as an authority for an order for costs under section 289. There is nothing in the Supreme Court Minutes to indicate that the Magistrate himself had made an order for costs and the record itself is not available here.

With regard to the next point the Magistrate must always exercise his discretion in a reasonable way and in exercising that discretion he will no doubt bear in mind that it has not been usual to award costs in criminal cases, the condition of the parties, the circumstances in which the postponement is asked for, and will not pay undue attention to the request of Counsel. If the Magistrate does not exercise his discretion reasonably, this Court can always interfere by way of revision. But there should be no occasion for the award of costs repeatedly if litigation is conducted on proper lines. Counsel was here thinking of the state of things which unfortunately has obtained, and obtains to-day, in most, if not in all, Police Courts. A very large number of cases is fixed for each day—a number much larger than the Magistrate can hope to deal with—and the result is that postponements are granted too readily and there may be the temptation for a Magistrate to get rid of a case by means of a threat to impose heavy costs on the party who is not ready. The state of things now prevailing is, I believe, being given attention to. It is due to anxiety on the part of the Magistrates to keep a short roll. It used to be common

to hear Magistrates take pride in the shortness of their rolls. This is legitimate pride if the roll does indicate the true state of work in the Court, but the effort to keep a short roll is often due to other causes. I can only hope that Magistrates will be intelligent enough to realize that their work will be judged not by the shortness of the roll but by the quality of the work they perform.

As far back as 1896 the Judges of the High Court of Bombay expressed themselves as follows :—

> " The Honourable the Chief Justice and Judges regret to observe that the trial of cases is at times unnecessarily and unduly protracted. Their Lordships, therefore, desire to point out for the guidance of all Magistrates that it is their duty to despatch their criminal work with the least possible delay, it being essential for the proper administration of justice that it should be promptly dealt with. As far as possible, criminal work should be given precedence over other work, cases in which accused are in custody being taken up for disposal in preference to those in which the accused are on bail. Magistrates should so arrange for the despatch of their criminal work that the hearing of one case should, as much as possible, not be allowed to interfere with the hearing of another, each one being fixed for hearing for distinct days, due regard being had to their probable duration. Every effort should be made to minimize delay and hardship to the parties and witnesses. When a case is once commenced, it should be heard *de die diem* and completed with every possible despatch, the whole, or as much of the working day as could be spared, being devoted to its hearing. Witnesses remaining over from one day should be examined at the first sitting of the Court on the following day. The practice of taking up a case for an hour or so and then dropping it again should be avoided, and cases should be disposed of, as far as possible, in continuous sittings. Adjournments should, as a rule, be avoided, especially when the accused are likely to be prejudiced thereby, and if from any unavoidable cause an adjournment is deemed indispensable; it should be for as short a time as possible. In any case, a trial once commenced should be continued from day to day, except on Sundays and other days when the public Treasuries are closed, and days when native usage absolutely requires the intermission of all business ".

The reference in the case quoted above is to trials, but it applies with almost greater force to inquiry in non-summary cases, and the length of time that often elapses between the beginning and the completion of an inquiry, for example, in a case of murder is much to be regretted. The fault is really due to the work not being properly arranged. In my opinion it is much better to have a roll of three months than to have a case taken up and postponed from time to time during the three months. Magistrates will find, however, from experience that a three-month roll will not be necessary and spreading out their cases at the start for about six weeks will probably suffice.

With regard to the Indian Reports, I have not been able myself to get most of them, but I have no reason to doubt that they have been accurately summarized by *Sohoni at p. 775 of his Commentary*. I have traced one of the cases, *i.e.*, the case of *Mathura Prasad v. Basant Lal*[1]. In that case the Magistrate ordered the complainant to pay Rs. 100 being not satisfied with the reason given for the complainant's absence, namely, that he was ill. Richards J. said :—" Section 344 of the Code of Criminal Procedure dealing with proceedings in prosecutions expressly empowers the Court to postpone or adjourn an inquiry upon such terms as he thinks fit. It seems to me that this clearly entitles a Court to award costs to a party who has been put to unnecessary expenses by the conduct of the other side. I, furthermore, think that it would be greatly deplored if the Court had no such power. I think the Court has power to award costs, and in proper cases it is a power that the Court should exercise ; and I think a judicious exercise of the power would have the effect of preventing many useless adjournments ". He then goes on to explain the decision in *King Emperor v. Chhabraj Singh*[2]. He says that the attention of the Judge in that case does not appear to have been called to the terms of section 344 of the Indian Code ; the case does not seem to have been argued and, further, the award of the costs was against the Government ; it also appears that the adjournment was not the adjournment of a trial but of an appeal. He goes on to say that in the case of *Sew Prasad v. Corporation of Calcutta*, a Bench of the Calcutta High Court in a considered judgment held that the Magistrate in granting an adjournment was entitled under section 344 to order costs to be paid by the party in whose favour an order to adjourn was made. The Calcutta case is reported in 1904, *9 C. W. N. 18* which is not available, but it is described as a considered judgment of a Bench of the Calcutta High Court.

I see no reason to vary my previous order and the appeal will therefore be dismissed.

Affirmed.