

APPEAL FROM ORIGINAL CRIMINAL.

Before Sunderason C. J., and Pantou J.

GALLAGHER

v.

EMPEROR.*

1926

June 25.

Appeal—Leave to appeal—Affidavit as to nationality—Limitation—Criminal Law Amendment Act (XII of 1923)—Criminal Procedure Code (Act V of 1898), ss. 443 (1) (a) and 440 (1) (c)—Indian Oaths Act (X of 1873) s. 5.

In an application by a European British subject for leave to appeal from a sentence by the High Court Criminal Sessions, the accused put in an affidavit by himself as to his nationality

Held, that the affidavit was admissible.

Akhoy Kumar Mookerjee v. Emperor (1) referred to.

APPLICATION.

These were two applications for leave to appeal by G. Mandelli and O. C. P. Gallagher, who were prisoners in Alipore Jail.

Mandelli was charged with forgery and other charges and Gallagher was charged with abetment of the same. They were convicted by Mr. Justice Chotzner and a jury at the High Court Criminal Sessions. From that they wanted to appeal under the special provisions in Chapter XXXIII of the Code of Criminal Procedure, and made these applications for leave to appeal. In support of their applications they filed affidavits by themselves, stating their parentage and nationality. The applications were heard together.

Mr. A. N. Sen, for Gallagher.

* Applications for leave to appeal from Original Criminal Jurisdiction.

(1) (1917) I. L. R. 45 Calc. 720.

Mr. R. K. Chatterjee, for Mandelli.

Mr. R. C. Bonnerjee, for the Crown.

1926

GALLAGHER
v.
EMPEROR.

SANDERSON C. J. These are two applications by Mandelli and Gallagher, who are prisoners in the Alipore Central Jail, for leave to appeal.

The two convicted men were tried at the High Court Criminal Sessions by my learned brother Mr. Justice Chotzner and a jury.

Mandelli was charged with dishonestly using as genuine a forged document, knowing the same to be forged, forgery for the purpose of cheating, and other charges which I need not enumerate; and Gallagher was charged with abetment of the same.

They were both convicted and sentenced to a term of imprisonment on the 3rd of December 1925.

I propose to deal with the application of Gallagher in the first instance.

The learned advocate, who appeared at the request of the Court for him and to whom we are much obliged for the assistance which he has given, relied upon section 449 (1) (c) of the Code of Criminal Procedure. This section was enacted by Act XII of 1923 and under that section it is necessary for the Court to be satisfied that if this case had been tried outside the Presidency town it would have been triable under the provisions of Chapter XXXIII.

In order to see whether it would be triable under the provisions of that chapter, it is necessary to refer to section 443 (1) (a), and the provision, which applies to this case, is that the complainant and the accused persons, or any of them, are respectively European and Indian British subjects or Indian and European British subjects.

There is no doubt that the complainant in this case was an Indian British subject; and, in order to

1926
 GALLAGHER
 v.
 EMPEROR.
 SANDERSON
 C. J.

bring himself within that provision, Gallagher has to show that he is a European British subject within the meaning of the Criminal Procedure Code.

“European British subject” is defined in section 4 (1) (i) as follows: “European British subject” means any subject of His Majesty of European descent in the male line born, naturalised or domiciled in the British Islands or any Colony, or any subject of His Majesty who is the child or grand-child of any such person by legitimate descent.”

Gallagher has filed an affidavit, in which he states that he was born on the 3rd of September 1899 in Bombay, and that he is the legitimate son of Michael Patrick Gallagher and Ruth Constancia Gallagher. To that affidavit is attached a certified copy of the certificate of marriage, which shows that Michael Patrick Gallagher and Ruth Constancia Jones were duly married at St. Thomas Church, Middleton Row, Calcutta, on the 4th July 1897, that the parents of M. Patrick Gallagher were Martin and Ann Gallagher and the parents of Ruth Constancia Jones were John and Constancia Jones.

In my opinion, there is sufficient proof before the Court that Gallagher is a European British subject within the meaning of the Code of Criminal Procedure; and consequently if this case were tried outside a Presidency town it would have been triable under the provisions of Chapter XXXIII of the Code.

That being so, in my judgment, this Court ought to grant leave to Gallagher to appeal on the ground mentioned in section 449 (1) (c).

Mandelli filed an affidavit, which, in my opinion, is not sufficient to show that he is a European British subject within the meaning of the Code of Criminal Procedure. But the learned advocate, who appeared

for the Crown in this case, drew our attention to section 415 (A) of the Code of Criminal Procedure, which was passed by Act XVIII of 1923 and which is to the following effect: "Notwithstanding anything contained in this chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any such persons, all or any of the persons convicted at such trial shall have a right of appeal."

1926
 GALLAGHER
 v
 EMPEROR.
 SANDERSON
 C. J.

By reason of the provisions of that section I am of opinion that leave to appeal should be granted to Mandelli in view of the fact that I have come to the conclusion that the judgment or order in respect of Gallagher is appealable.

During the course of the argument a question was raised whether this Court ought to admit the affidavits of Gallagher and Mandelli. Our attention was drawn to certain cases which went to show that, to say the least, it was doubtful whether it was competent to the applicants to swear affidavits in support of their applications. No decision of this Court, which is in point, has been brought to our attention.

The two relevant provisions are section 342 of the Code of Criminal Procedure and section 5 of the Indian Oaths Act which is Act X of 1873,

Section 342 is the well-known section which deals with the examination of an accused at his trial and sub-section (4) is as follows: "No oath shall be administered to the accused."

Section 5 of the Oaths Act provides "that oaths or affirmations shall be made by the following persons". The "persons" are enumerated in clauses (a), (b) and (c); and then the following provision is to be found: "Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person"

1926
 GALLAGHER
 v.
 EMPEROR.
 SANDERSON
 C. J.

I am not prepared to hold that those provisions prevent the applicants from filing affidavits in support of their petitions in this matter.

It is to be noticed that the abovenamed provisions refer to "the accused" and "the accused person". I am not prepared to go so far as to hold that, because the applicants were accused and were tried and have been convicted, they are still within the provisions of those two sections.

In my opinion sub-section (4) of section 342 of the Code was intended to relate to the proceedings which are specified in section 342, and that section 5 of the Oaths Act was intended to apply to an accused person while he is under trial.

I am confirmed in that opinion by the observations, which were made by two learned Judges of this Court. I refer to Mr. Justice Teannon and Mr. Justice Richardson who were considering these two sections in the case of *Akhoy Kumar Mookerjee v. Emperor*(1), the following passage is to be found: "It is undisputed, therefore, that an accused person actually under trial cannot be sworn as a witness, and that if two or more persons are being jointly tried, none of them is a competent witness for or against the others. But in our opinion this exception to the general rule goes no further, and has no application to an accused person who is not at the time under trial."

For these reasons, in my opinion, the affidavits of the applicants upon the applications for leave to appeal under section 449 (1) (c) are admissible. I confine my judgment to the facts of this case and to the particular applications with which the Court is dealing.

There is one other matter, which it is necessary to mention. The learned advocate for the Crown referred to a decision of my learned brothers Mr. Justice C. C. Ghose and Mr. Justice Duval to the effect that an application of this kind was within Article 155 of the Limitation Act. I see no reason to differ from that decision and it seems to me that these applications ought to have been made within sixty days from the date of the sentence appealed from.

1926
 GALLAGHER
 v
 EMPEROR.
 SANDERSON.
 C. J.

It appears, however, that the Superintendent of the Alipore Central Jail had before him a document, which was signed by the Chief Presidency Magistrate which is headed "Form to be attached to all warrants of commitment." In that form there is a column which is headed as follows: "Whether sentence appealable or not" and in that column the word "no" is to be found. I am looking at a copy of the form which relates to the case of Gallagher. I assume that the same entry was made with regard to Mandelli.

The Superintendent of the jail relying upon that statement did not forward Gallagher's petition in the usual manner. The Superintendent pointed out that Gallagher's petition was not handed to him for despatch until the 20th of February 1926 which would be more than sixty days from the date of the sentence.

But judging from the history-ticket of Gallagher, of which a copy is before the Court, it is clear that Gallagher took steps within a short time of his conviction to get the necessary documents from the Court in order that he might present a petition of appeal under section 449 (1) (c) of the Code and he did not get the necessary documents until the 21st of January 1926, so that having regard to the provisions of section 12 of the Limitation Act I think that this application should be entertained.

1926

GALLAGHER
v.
EMPEROR.SANDERSON
C. J.

If it is necessary for the Court to exercise its discretion under section 5 of the Limitation Act I am of opinion that Gallagher has shown sufficient cause for not making the application within the specified time.

With regard to Mandelli, it is stated that he wanted to appeal, but he was informed by the Superintendent of the jail that it was a non-appealable sentence and consequently it was no good to appeal.

I desire to make it plain that no blame attaches to the Superintendent of the jail. Apparently it had not been recognised that under the somewhat new provisions of section 449 of the Criminal Procedure Code this sentence might be an appealable sentence. That explains the delay which has taken place.

Leave to appeal in both the cases is granted.

Panton, J. I agree.

Attorney for the Crown: *Government Solicitor.*

N. G.