APPELLATE CRIMINAL.

1931

Jan. 8, 9, 19.

Before Lort-Williams and S. K. Ghose JJ.

MAHAMMAD YUSUF

v.

EMPEROR.*

Co-accused—Co-accused, if can depose against other accused after pleading guilty —Plea of guilty, if ends trial—Refusal to accept a plea of guilty, effect of—"Accused," meaning of—Code of Criminal Procedure (Act V of 1898), ss. 271, 272, 342 (4).

An accused person, who has pleaded guilty to the charge and has been convicted thereon but has not been sentenced, becomes competent as a witness against his co-accused.

Section 342, clause (*4*), is restricted to an accused who is on trial in the proceeding to which the section is being applied. When a prisoner has pleaded guilty, he ceases *ipso facto* to be an accused person, still more so, when he has been convicted. Section 342 has no application to him. Also it has no application to a person who may be an accused in some other proceeding.

Akhoy Kumar Mookerjee v. *Emperor* (1), *Winsor* v. *Queen* (2) and *Empress* v. *Durant* (3) referred to.

The trial before a court of session commences after the empanelling of the jury, when the prisoner is charged, and not at the time of arraignment when the charge is explained to him and his plea is taken.

Section 271 of the Code of Criminal Procedure seems to give the judge discretion to accept a plea of guilty or not. But if it be not accepted, there is no sense in recording it and in such a case there is no provision in the code for proceeding with the trial.

Khudiram Bose v. *Emperor* (4) referred to.

The practice, sometimes adopted in India, where there is a joint trial, of refusing to accept the plea of guilty, and proceeding to try the accused, in order that his confession may be taken into consideration against his co-accused under section 30 of the Evidence Act, is illegal and an abuse of the process of the court. The trial of the accused ends with his plea of guilty.

CRIMINAL APPEAL.

The material facts appear from the judgment.

Khodabux (with him *Sateendranath Mukherji*) for the appellants. The trial is vitiated by the admission of inadmissible evidence and an illegal procedure adopted

*Criminal Appeal, No. 586 of 1930, against the order of K. G. Morshed, Additional Sessions Judge, 24-Parganas, dated 24th June, 1930.

(1) (1917) L L. R. 45 Calc. 720.
(2) (1866) L. R. 1 Q. B. 390.
(3) (1898) I. L. R. 23 Bom. 213.
(4) (1908) 9 C. L. J. 55.

1931

Mahammad Yusuf v. *Emperor.*

by the learned judge. The accused, Pannalal, was being jointly tried with the appellants on the same charges arising out of the same transaction. He pleaded guilty and was convicted thereon, but no sentence was passed on him. On the same date, he was given oath and examined as a witness against the other accused persons. His confession was also put in and exhibited. He was sentenced some days later, as the order sheet of the Judge shows. This was absolutely illegal. He was being tried jointly and his trial had not yet ended. He was, therefore, still an accused person and no oath would have been administered to him: section 342 (*4*), Code of Criminal Procedure. *Akhoy Kumar Mookerjee* v. *Emperor* (1). As a co-accused in the same trial, his testimony was not available against the other co-accused.

Assuming, for the sake of argument, that he was not then an accused, his confession could not be admitted in evidence, inasmuch as he was not being tried jointly and section 30 of the Evidence Act has no application.

Anilchandra Ray Chaudhuri for the Crown. The real question is, at what stage does a co-accused, who pleads guilty, regain his competency as a witness under the general law? That stage is reached when he is removed from the dock or withdrawn from the jury. The joint trial at once becomes severed and, under the general law, he once more regains his competency as a witness. That happens when the accused pleads guilty or in any case when the court has decided to accept the plea. In this case, the trial of the prisoner, in the technical sense in which it has been used in section 271 and the following sections, including section 364, never began because he was never given in charge to the jury. The wordings of sections 271 and 272 make it perfectly clear. Under section 271, when the charge is explained, his plea is taken. If he pleads guilty, the court has an option either to accept it or not. The trial has not yet

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

1931

Mahammad Yusuf v. *Emperor.*

commenced. It is only at the next stage, in circumstances contemplated by section 272, which does not include a case where the prisoner pleads guilty, that the jury are empanelled and the actual trial commences. The use of the word "trial" in section 272 makes this clear. It is in this trial that the provision for the examination of the accused laid down in section 364 is attracted. That section has no application to an accused who has been convicted and can no longer be examined. Some support is obtained from the observations of Chief Justice Sir Arnold White in the case of *Subrahmania Ayyar* v. *King-Emperor* (1) when it was being heard by Full Bench of the Madras High Court. The English law is clear on the point: *Winsor* v. *Queen* (2).

The question next arises, whether he is still an accused for the purposes of section 364 of the Code of Criminal Procedure. It has always been felt that a limited meaning must be attached to it. It does not include an accused who is being tried separately, although he and others are indicted for offences arising out of the same transaction. *Akhoy Kumar Mookerjee* v. *Emperor* (3).

The separate trial may be solely for the purpose of obtaining his evidence against the other accused persons. The proper limitation should be to confine it to persons who are being actually tried before the jury and liable to be examined in the same trial. There are various modes of obtaining the testimony of a co-accused against others. The best way is to convict him on his plea and pass sentence, but that is not the exclusive mode. Four such modes are indicated in *Winsor* v. *Queen* (2) and *Subrahmania Ayyar* v. *King-Emperor* (1). With regard to the cases where the judge ignores the plea of guilty and proceeds with the trial in order to make the confession of that accused available against others under section 30 of the Evidence Act, there is a conflict of decisions. Those cases are, however, not applicable here, because the plea was not ignored but accepted.

(1) (1901) I. L. R. 25 Mad. 61; L. R. 28 I. A. 257.
(2) (1866) L. R. 1 Q. B. 390.
(3) (1917) I. L. R. 45 Calc. 720.

1931

Mahammad Yusuf v. *Emperor.*

On the facts in this case, the judge not only convicted the accused but indicated what would be the nature of the sentence. Merely the quantum, for which a medical report was necessary, was left undecided.

Cur. adv. vult.

LORT-WILLIAMS J. For the purpose of deciding this appeal the general facts of the case are not material.

Four persons, the two appellants and two others, named respectively, Mahammad Siddiq and Pannalal, were committed to the Sessions at Alipore, on joint charges. The first three pleaded not guilty. Pannalal pleaded guilty. The learned judge accepted his plea, convicted him thereon and ordered that, in view of his age and antecedents, he should be detained in a Borstal institution. Further, he ordered that he should be examined medically forthwith and after that had been done he would fix the period of detention.

The case then proceeded against the other three, and, among other witnesses, Pannalal was called by the prosecution, and gave evidence on oath against them. All this took place on the same day. The trial proceeded and three days later the medical report on Pannalal was received, and the learned judge fixed the period of his detention at three years. The trial was resumed, and eventually the jury found a verdict of not guilty in favour of Mahammad Siddiq, and of guilty against the other two. The learned judge accepted these verdicts, acquitted Mahammad Siddiq and sentenced each of the appellants to be detained in a Borstal institution for 3 years.

The only point of substance raised by the learned advocate for the appellants was that Pannalal's evidence was inadmissible because when he gave it, he was an accused person and therefore was incompetent as a witness.

In our opinion, this contention is unsound. Section 5 of the Indian Oaths Act provides that it is

1931

Mahammad Yusuf v. *Emperor.*

Lort-Williams J.

unlawful in a criminal proceeding to administer an oath to the accused person. Section 342 of the Code of Criminal Procedure gives power to the court to examine the accused upon his trial for the purpose of enabling him to explain any circumstances appearing in the evidence against him. Sub-section (4) provides that no oath shall be administered to the accused.

Obviously this means that, for the purposes of section 342, no oath shall be administered, and, equally obviously, it is restricted to an accused who is on trial in the proceeding to which the section is being applied. The very terms of the section show that it has no application to a person who may be accused in some other proceeding. See *Akhoy Kumar Mookerjee* v. *Emperor* (1), *Winsor* v. *Queen* (2) and *Empress* v. *Durant* (3).

The question, therefore, which we have to decide is, whether, at the time when Pannalal gave his evidence, he was an accused person within the meaning of section 342.

The first point to note is that he was no longer a person who was accused only, but one who had been convicted also. Chapter XXIII, Criminal Procedure Code, deals with trials before courts of session. Section 268 provides that all such trials shall be either by jury or with the aid of assessors. Section 271 provides that when the court is ready to commence the trial, the charge shall be read out and explained to the accused, and he shall be asked whether he is guilty or claims to be tried. (In England this is called the time of arraignment, and was always quite distinct from the next stage in the proceedings which is called exclusively the time of trial.) If he pleads guilty, the plea shall be recorded, and he may be convicted thereon.

Section 272 provides that if the accused refuses to, or does not plead, or if he claims to be tried, the court shall proceed to choose jurors, and to try the

(1) (1917) I. L. R. 45 Calc. 720. (2) (1866) L. R. 1 Q. B. 390.
(3) (1898) I. L. R. 23 Bom. 213.

case. (The claim to be tried is called in English law "putting himself upon the country," that is, he claims to be tried by a jury.) Therefore, the trial before a court of session commences immediately after the empanelling of the jury, when the prisoner is given in charge. When the charge is read out to him, the accused has three courses offered to him. He may plead guilty, or he may remain silent, or he may claim to be tried. The plea of "not guilty" is not recognised by the Code. It is only when he remains silent, or when he claims to be tried, that the court can proceed to empanel a jury and try the case. The issue between him and the Crown has then and not till then been joined, and it is that issue which the jury have to try. It is true that section 271 seems to give the judge a discretion, when the accused pleads guilty, to accept the plea or not. But if the plea be not accepted there seems to be no sense in recording it [see *Khudiram Bose* v. *Emperor* (1) per Brett J.], and if it be not accepted, there is no provision in the Code for proceeding with the trial, because section 272 does not apply where the accused has pleaded guilty.

Section 271 seems to mean that where the accused pleads guilty, the court need not necessarily record a conviction against him—his plea shall be recorded and, in a suitable case, the court may leave the matter there and discharge him. In our opinion, he cannot be tried.

In England, where the court does not think it expedient, in the interest of the accused, to convict him upon his own confession, for example, where the charge is one of murder, the usual procedure is to advise him to withdraw his plea of guilty and to plead not guilty. 2 Hale's Pleas of the Crown 225. But where he refuses to do this he cannot be tried. The practice sometimes adopted in India, where there is a joint trial, of refusing to accept the plea of guilty, and proceeding to try the accused, in order that his confession may be taken into consideration

(1) (1908) 9 C. L. J. 55, 72.

1931

Mahammad Yusuf v. *Emperor.*

Lort-Williams J.

against his co-accused under section 30 of the Evidence Act, is, in our opinion, illegal and an abuse of the process of the Court.

It follows, therefore, that we are in disagreement with the decisions in *Queen-Empress* v. *Chinna Pavuchi* (1), *Sukdev Tewari* v. *King-Emperor* (2) and *Kesho Singh* v. *Emperor* (3), in which it was decided that the trial of an accused person does not necessarily end with his plea of guilty and in agreement with those in *Queen-Empress* v. *Lakshmayya Pandaram* (4), *Queen-Empress* v. *Pirbhu* (5), *Queen-Empress* v. *Paltua* (6), *Emperor* v. *Kheoraj* (7), *Queen-Empress* v. *Pahuji* (8) and the judgment of Sir Arnold White C. J. in *Subrahmania Ayyar* v. *King-Emperor* (9) in which it was decided that where an accused person pleads guilty he is not on trial and cannot be tried.

After a plea of guilty there is nothing in issue to be tried between the Crown and the prisoner at the bar, *a fortiori*, after his plea of guilty has been accepted; *Khudiram Bose* v. *Emperor* (10). And the reason is stronger still if he has been convicted upon his own confession, that is to say, upon his plea of guilty.

When a prisoner has pleaded guilty, he ceases *ipso facto* to be an accused person. There would be no sense in continuing to accuse him of, or charge him with committing an offence, after he had pleaded guilty to having done it. Still more certain is it that he ceases to be an accused person when he has been convicted. The very terms of section 342 show that it cannot be applied to a convicted person.

All the cases, to which we have referred are distinguishable from the present case, because the accused Pannalal had been convicted, and had been sentenced to be detained in a Borstal institution

(1) (1899) I. L. R. 23 Mad. 151.
(2) (1909) 13 C. W. N. 552.
(3) (1917) 18 Cr. L. J. 742.
(4) (1899) I. L. R. 22 Mad. 491.
(5) (1895) I. L. R. 17 All. 524.
(6) (1900) I. L. R. 23 All. 53.
(7) (1908) I. L. R. 30 All. 540.
(8) (1894) I. L. R. 19 Bom. 195.
(9) (1901) I. L. R. 25 Mad. 61 (69); L. R. 28 I. A. 257.
(10) (1908) 9 C. L. J. 55, 72.

1931

Mahammad Yusuf v. *Emperor.*

Lort-Williams J.

before he was called to give evidence for the prosecution, although the actual term of his detention had not been fixed by the learned judge. It is clear, therefore, that he was a competent witness. It is, however, always desirable to pass sentence completely before calling one accused in a joint trial to give evidence against his co-accused so that the witness may give his evidence with a mind free of all corrupt influence which the fear of impending punishment, and the desire to obtain immunity to himself at the expense of the prisoner might otherwise produce, *Winsor* v. *Queen* (1) per Cockburn C. J. But this course is not essential, *Queen* v. *Payne* (2).

For these reasons, this appeal is dismissed.

S. K. GHOSE J. I agree.

Appeal dismissed.

A. C. R. C.

(1) (1866) L. R. 1 Q. B. 289, 311-312. (2) (1872) L. R. 1 Cr. Cas. 349.