

APPELLATE CRIMINAL.

Before Bartley and Lodge J.J.

YAWAR BAKHT CHAUDHURI

v.

EMPEROR*.

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Feb. 1, 2, 5.

Jury—*Decision about an objection to a juror, when final—Sanction—Discovery of want of sanction relating to a charge of conspiracy, Effect of—Code of Criminal Procedure (Act V of 1898), ss. 196A, 278, 279—Indian Penal Code (Act XLV of 1860), ss. 109, 120B.*

By virtue of the provision of s. 279 (1) of the Code of Criminal Procedure, the decision of the trial Court that no presumed or actual partiality in a juror has been made out is absolutely final and cannot be challenged in appeal. If, however, a Court were to find that some presumed or actual partiality in the juror had been made out, but in spite of this finding were to overrule the objection, the decision of the Court overruling the objection might perhaps be challenged in appeal.

When in a trial for an offence under s. 120B of the Indian Penal Code, it was discovered at the time of the argument that the necessary sanction of the Local Government had not been obtained, the accused could neither be acquitted nor convicted of that offence nor could the Public Prosecutor withdraw the charge under s. 494 of the Code of Criminal Procedure. The Court, in those circumstances, should direct the jury to ignore the charge for the reason that they were not entitled to return a verdict on it.

In those circumstances, if there be a separate charge of abetment under s. 109 of the Indian Penal Code, it is neither unfair nor illegal for the Judge to direct the jury to consider the charge of abetment by conspiracy.

CRIMINAL APPEAL.

These three appeals were on behalf of three appellants who were tried and convicted on charges under ss. 467 and 467 read with s. 109 of the Indian Penal Code and under s. 81 of the Indian Registration Act. The material facts leading to the prosecution of the accused and others and to the present trial are set out fully in the judgment.

*Criminal Appeals, Nos. 339, 343 and 346 of 1939 against the order of Dwarka Nath De, Additional Sessions Judge of Sylhet, dated June 6, 1939.

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Narendra Kumar Basu and Hamidul Huq for the appellant *Syed Yawar Bakht Chaudhuri* in Appeal No. 339. The trial is vitiated by illegal empaneling of the jury. Of the eleven persons in attendance objection was taken and allowed with regard to seven of them, with the result that only four were available. The Court thereafter selected a gentleman who was present in Court to act as a juror in spite of the objection of the defence. An application was filed by the appellant stating that the said person was interested in a gentleman with whom the appellant had several litigations in which the person selected had taken side with the former. In overruling the objection the learned Judge never stated that the allegations were false. He merely noted that he overruled the objection after due consideration of the grounds urged. The use of the word final in s. 279 (1) does not preclude the appellant from raising the question in appeal because the learned Judge did not apply his mind properly to the consideration of the objection urged. The next error of the learned Judge was that, after having permitted the withdrawal of the charge of conspiracy, he directed the jury in several passages of his charge to them to consider the question of abetment by conspiracy. This he was not entitled to do. He might have directed the jury to consider abetment by instigation or active participation by intentional aid but not by conspiracy the charge under which was withdrawn. This seriously prejudiced the appellant inasmuch as there was really no evidence of abetment except on the basis of an alleged conspiracy. [Other misdirections on fact were then discussed.]

S. K. Sen, Rashidul Hasan and Abdul Alim for *A. A. M. Abdul Ali* in appeal No. 343. So far as the Sub-Registrar was concerned the evidence against him did not complete all the necessary links and, in a case of circumstantial evidence like the present, the learned Judge should have directed the jury to return a verdict of not

guilty so far as this appellant was concerned. The document in question passed through many hands when it was nominally in the custody of the Sub-Registrar and the forgery might have been committed by an interested party during any of these stages. It was also not impossible to have got this document altered when it was taken for some time out of the registration office to a boat for the signature of the lady executants.

Sudhangshu Sekhar Mukherjee and *Obaidul Huq* for *Trailokya Nath Datta* in appeal No. 346.

The Advocate-General, Sir Asoka Roy, and *Anil Chandra Ray Chaudhuri* for the Crown were called upon to reply only to the point relating to the withdrawal of the charge of conspiracy. The charge was really not withdrawn as it could not be done legally, but an application was made by the Public Prosecutor for the cancellation of the charge, because through mistake the necessary sanction had not been obtained. Sanction being necessary to vest the Court with jurisdiction to try that charge, the legal position was that that portion of the trial had to be completely ignored. After the discovery of the mistake the jury would not be entitled to return any verdict on that charge nor would the learned Judge be entitled to pass any order of acquittal or conviction. Section 494 of the Code of Criminal Procedure would also not apply because it presupposes a valid charge which can be taken into consideration by the Court. The proper procedure, as pointed out in some cases, was to direct the jury to ignore the charge altogether and then consider if any prejudice has been caused to the accused. *Hari Charan Misra v. King-Emperor* (1) and *In re Muthu Moopan* (2). In this case there is no question of any prejudice, inasmuch as from the very outset there was a separate charge of abetment and the entire evidence relating to the conspiracy charge was relevant to the charge of abetment.

Cur. adv. vult.

(1) (1933) I.L.R. 12 Pat. 353.

(2) I.L.R. [1937] Mad. 664.

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LODGE J. These are appeals against convictions and sentences under ss. 467 and 467/109 of the Indian Penal Code and under s. 81 of the Indian Registration Act.

The facts are rather complicated and need to be set out in some detail, in order that the arguments advanced before us may be properly appreciated.

Syed Yawar Bakht Chaudhuri was in debt to Debendra Kumar Ray to the extent of Rs. 5,001-3-3; Musammat Kaniz Ahammed Chaudhurani, wife of Syed Yawar Bakht Chaudhuri was in debt to the same creditor to the extent of Rs. 336; two minor sons of the late Afroz Bakht Chaudhuri, brother of Syed Yawar Bakht Chaudhuri were in debt to the same creditor to the extent of Rs. 13,162-12-9; the total debt of these members of the family to this creditor thus amounting to Rs. 18,500. The creditor had obtained decrees in respect of these debts.

In order to satisfy this creditor's claims, it was settled that certain properties belonging to (1) Syed Yawar Bakht Chaudhuri, (2) Musammat Kanij Ahammed Chaudhurani, (3) Najamannessa Bibi another wife of Syed Yawar Bakht Chaudhuri, (4) the two minor sons of the late Afroz Bakht Chaudhuri, (5) Abdul Matin Chaudhuri, (6) Mahammad Motasin Chaudhuri and (7) Jamilunnessa Bibi, sister of Syed Yawar Bakht Chaudhuri, should be transferred to the creditor. The value of these properties was estimated at Rs. 20,000, and it was decided that the creditor vendee should pay in cash to Jamilunnessa Bibi the sum of Rs. 1,500 and that the remainder of the consideration money should be retained by him in full satisfaction of the debts specified above.

Accordingly a deed of sale was drawn up on February 10, 1936. As the vendors were numerous and lived at different places, the execution of the document by all the adult vendors was not completed until the end of April, 1936. The two minor sons of the late Afroz Bakht Chaudhuri were wards of a

guardian appointed by the District Judge of Sylhet under the provisions of the Guardians and Wards Act. The sanction of the District Judge was therefore necessary before the certificated guardian could consent to execute the document on behalf of the minors. The document was presented to the District Judge on April 30, 1936, and his sanction was sought for. The document was returned by the District Judge's office on May 29, 1936, after sanction had been granted.

On June 9, 1936, the document was presented at the Balaganj Registry Office by Syed Yawar Bakht Chaudhuri. The latter admitted execution of the document on his own behalf and on behalf of his two wives and his two minor nephews. The Sub-Registrar granted the usual receipt to Syed Yawar Bakht Chaudhuri who made over the same to the vendee Debendra Kumar Ray. The document was then sent by registered post from the Sub-Registrar, Balaganj, to the Sub-Registrar, Habiganj, in order that the admission of Abdul Matin Chaudhuri might be obtained. The latter admitted execution, and the document was returned to the Sub-Registrar, Balaganj, again by registered post.

On three occasions the Sub-Registrar of Balaganj was taken to the house of Syed Yawar Bakht Chaudhuri in order that the admission of execution by Jamilunnessa Bibi might be obtained. On the first two occasions, the Sub-Registrar was unable to meet the lady. On the third occasion, *i.e.*, on August 16, 1936, Jamilunnessa Bibi denied execution of the document. In the meantime, on July 25, 1936, execution had been admitted by Mahammad Motasin Chaudhuri.

On September 7, 1936, the Sub-Registrar refused registration in so far as Jamilunnessa Bibi was concerned.

On September 18, 1936, the vendee Debendra Kumar Ray appealed to the District Registrar against the order refusing registration, and prayed

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that the document be called for from the Sub-Registrar. The document reached the District Registrar's office on October 2, 1936. The vendor on examining the document came to the conclusion that certain alterations had been made therein. He accordingly applied for certified copy of the document, and after obtaining that copy he filed a petition of complaint before the Magistrate on October 17, 1936, accusing some of the executants of the documents and others of forgery and conspiracy to forge. He alleged that the original document provided for the sale to him of all the remaining interest of the executants in Sch. 1, of all their interest in Sch. 2, and of the entire 5 as. $2\frac{1}{2}$ *gandās*' interest in Sch. 3 which belonged to Syed Yawar Bakht Chaudhuri and his two wives Mussammam Kanij Ahammed Chaudhurani and Najamannessa Bibi: whereas the document in the condition in which it reached the District Registrar's office provided merely for the transfer of $2\frac{1}{2}$ *gandās* share in these properties to the vendee. He alleged further that pages 4 and 52 of the original document had been removed and other pages substituted in their place, and that minor verbal alterations had been made in other parts of the document. While the magisterial enquiry was proceeding, there was a talk of compromise between the parties. Two more documents were executed in favour of the vendee; the sum of Rs. 1,500 was paid to Jamilunnessa Bibi, and the latter admitted execution of the original document; the registration appeal was allowed; and the vendor Debendra Kumar Ray applied to the Magistrate for permission to withdraw from the prosecution.

The task of prosecution was then undertaken by the Government; but on March 31, 1938, the Public Prosecutor, under orders of the Local Government, applied under s. 494 of the Code of Criminal Procedure to withdraw from the prosecution. Permission was granted, and the accused were discharged.

The order of discharge was subsequently set aside by this Court, and a further enquiry ordered.

As a result, five of the accused were committed to the Court of Sessions to stand their trial, the remaining accused persons being discharged.

The accused Trailokya Nath Datta was charged under s. 467 of the Indian Penal Code with forging the document; Abul Abbas Mahammad Abdul Ali, Sub-Registrar of Balaganj, was charged under s. 81 of the Indian Registration Act, Syed Yawar Bakht Chaudhuri, Abul Abbas Mahammad Abdul Ali, Trailokya Nath Datta, Mahammad Aftar and Mahammad Jamshed Ahammad Chaudhuri were charged under s. 120B/467 of the Indian Penal Code with the offence of conspiring to forge a valuable security. Before the trial was commenced in the Sessions Court, the learned Additional Sessions Judge of Sylhet framed an additional charge of abetment under s. 467/109 of the Indian Penal Code against Syed Yawar Bakht Chaudhuri, Abul Abbas Mahammad Abdul Ali, Mahammad Aftar and Mahammad Jamshed Ahammad Chaudhuri.

The accused were tried by the Additional Sessions Judge of Sylhet with the aid of a common jury.

Eighteen persons were summoned to attend as jurors. Of these eleven were in attendance when the case was taken up. Four of the eleven were selected, but objection was taken either by the Crown or by the defence against each of the remaining gentlemen summoned. Thereupon, acting under s. 279 (2) of the Code of Criminal Procedure, the learned Additional Sessions Judge chose a gentleman who was present in Court and whose name was on the list of jurors for the district. The defence objected to this gentleman sitting as a juror, but the learned Additional Sessions Judge after due consideration of the grounds urged, overruled the objection, and the trial proceeded.

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After all the evidence had been recorded and the arguments of the learned Public Prosecutor were being heard, the Court enquired whether sanction of the Local Government to the prosecution under s. 120B/467 of the Indian Penal Code had been obtained, as required by s. 196A of the Code of Criminal Procedure. The learned Public Prosecutor then realised for the first time that no such sanction had been obtained, and prayed that the charge under s. 120B/467 of the Indian Penal Code be cancelled; and the court ordered that that charge be cancelled.

The jury returned an unanimous verdict of not guilty in so far as accused Mahammad Aftar and Mahammad Jamshed Ahammad Chaudhuri were concerned. The learned Additional Sessions Judge accepted this verdict and acquitted these two accused.

The jury were divided with regard to the remaining three accused. The majority of the jury—three against two—found Trailokya Nath Datta guilty of forgery and Syed Yawar Bakht Chaudhuri and Abul Abbas Mahammad Abdul Ali guilty of abetment of forgery, and Abul Abbas Mahammad Abdul Ali guilty of an offence punishable under s. 81 of the Indian Registration Act.

The learned Additional Sessions Judge accepted the majority verdict and sentenced Trailokya Nath Datta under s. 467 of the Indian Penal Code to four years' rigorous imprisonment, Syed Yawar Bakht Chaudhuri and Abul Abbas Mahammad Abdul Ali under s. 467/109 of the Indian Penal Code, to four years' rigorous imprisonment. No separate sentence was passed under s. 81 of the Indian Registration Act. The three accused convicted and sentenced by the learned Additional Sessions Judge have appealed to this Court. Their appeals were heard together and will be disposed of by this one judgment.

It has been contended on behalf of the appellants, that the defence objection to the jurymen selected under s. 279 (2) of the Code of Criminal Procedure should have been upheld, and that as this objection was not upheld, the jury was not properly constituted and the trial was consequently illegal.

Section 278(a) of the Code of Criminal Procedure provides that an objection taken to a juror on the ground of some presumed or actual partiality in the juror shall, if made out, be allowed.

The defence filed a petition of objection to this particular jurymen alleging partiality in the juror. The learned Additional Sessions Judge thereupon passed the following order, namely:—

I overrule the defence objection against him after due consideration of the grounds urged in support of this objection and on being satisfied that there is no good ground or reason for accepting the objection.

Section 279 (1) of the Code of Criminal Procedure provides that—

Every objection taken to a juror shall be decided by the Court and such decision shall be recorded and shall be final.

In view of this provision the learned Advocate-General has contended that this Court is not entitled to consider whether the decision of the learned Additional Sessions Judge in overruling the objection was right or wrong. The learned advocate for the appellants on the other hand has contended that the decision of the learned Additional Sessions Judge is final only in a limited sense—that is to say, it cannot be challenged during the trial but it may be challenged during appeal.

In our opinion, if the Court decides that no presumed or actual partiality in the juror has been made out, that decision is absolutely final and cannot be challenged in appeal. If, however, a Court were to find that some presumed or actual partiality in the juror had been made out, but in spite of this finding were to overrule the objection, the decision of the Court overruling the objection might perhaps be challenged in appeal.

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In view of the clear finding in the present case, that the objection on the ground of presumed or actual partiality had not been made out to the satisfaction of the Court, that decision cannot in our opinion be challenged.

The next argument addressed to us on behalf of the appellants was to the effect that it was unfair, unjust and improper to convict the appellants under s. 109 of abetment by conspiracy after cancelling the charge under s. 120B/467 of the Indian Penal Code. The learned advocate argued that inasmuch as there was a specific charge of conspiracy under s. 120B, the abetment contemplated in the charge under s. 467/109 must have been abetment as defined in the first and third clauses of s. 107 and not abetment as defined in the second clause of that section: Consequently the learned Additional Sessions Judge was not justified in asking the jury to find the accused guilty of abetment on the ground that they had engaged in a conspiracy to forge the document.

In our opinion there is no force in this argument. In the charge under s. 109 of the Indian Penal Code, no particular form of abetment was set out. If sanction of the Local Government under s. 196A of the Code of Criminal Procedure had been granted, there was no legal bar to the jury finding the accused guilty both under s. 120B/467 and under s. 467/109 of the Indian Penal Code, if they were satisfied that there had been the conspiracy and abetment by conspiracy. Whether separate sentences could have been imposed is a different question with which we are not concerned. The trial proceeded almost to a conclusion on the assumption that the charge under s. 120B/467 of the Indian Penal Code had been validly framed. Evidence as to conspiracy had been led by the prosecution and been considered by the defence. When it was discovered that no sanction under s. 196A of the Code of Criminal Procedure had been granted, the legal consequence was merely as if the charge under s. 120B/467 of the Indian Penal Code had never been framed.

The accused could not be acquitted or convicted of the offence punishable under s. 120B of the Indian Penal Code. The Public Prosecutor could not withdraw under s. 494 of the Code of Criminal Procedure from the prosecution under s. 120B, because there was no valid prosecution. If the Court, instead of passing an order that the charge be cancelled, had directed the jury to ignore the charge for the reason that they were not entitled to return a verdict on that charge, there could not have been even a suggestion that the jury were not entitled to consider whether the offence of abetment by conspiracy had been made out.

In the circumstances we are unable to find that it was either illegal or unjust or unfair to the accused to consider whether the offence of abetment by conspiracy had been proved.

The learned advocate appearing for the appellant Syed Yawar Bakht Chaudhuri contended that in his charge to the jury the learned Additional Sessions Judge had failed to draw the attention of the jury to evidence which was in favour of the accused. The learned advocate placed before us evidence to show that the value of the properties in Schs. 1 and 2 was such that it was improbable that the vendors should have agreed to transfer their entire interest in the lands of Sch. 3. He also drew our attention to the oral evidence regarding the draft document and the memoranda produced by the prosecution witnesses in support of their evidence as to the original contents of the document, and argued that this oral evidence was not placed before the jury, and that the jury were consequently induced to attach too much importance to these documents.

In our opinion the learned Additional Sessions Judge dealt fairly with all this evidence in his charge to the jury and placed the material facts fairly before the jury for their consideration. We are unable to find that there was any misdirection in the charge in the manner in which this evidence was dealt with.

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The learned advocate further argued that the learned Additional Sessions Judge committed a serious mistake in telling the jury that the Sub-Registrar (accused) had married the daughter of a sister of accused Syed Yawar Bakht Chaudhuri and that that mistake had seriously prejudiced the accused. In the first place it is not by any means clear from the record that there was any mistake. In the second place, the mistake, if any, was only in respect of the exact relationship between the parties. We are unable to hold that the accused were in any way prejudiced if the statement was incorrect.

On behalf of Abul Abbas Mahammad Abdul Ali, it was pointed out that the document passed through many hands, and it was argued that there was no evidence whatever to prove that he had any hand in the forgery.

In his charge to the jury the learned Additional Sessions Judge pointed out in detail the people into whose hands the document passed, and the evidence regarding the manner in which it passed from one to the other. The learned Additional Sessions Judge warned the jury that they must acquit this accused if they were not absolutely convinced from the evidence and circumstances that the forgery could not have been committed without the connivance and concurrence of this accused. In our opinion, the matter was properly explained to the jury, and it was for the latter to decide on the evidence whether or not this accused was guilty.

On behalf of the appellant Trailokya Nath Datta, it has been argued that he was a mere servant of the accused Syed Yawar Bakht Chaudhuri and might have written up the substituted pages in all innocence under his master's orders. In other words it is argued that though he may have altered the document in the manner alleged, it may be that he did so without any criminal intention.

The learned Additional Sessions Judge discussed this aspect of the case in his charge and made it clear

that the accused could not be found guilty unless he had the necessary criminal intention. We are unable to find any misdirection in the charge on this point.

The last argument placed before us referred to the sentences imposed on the appellants. All three have received the same sentence, namely, four years' rigorous imprisonment.

We are of opinion that a servant acting under the direct orders of his master should not be punished as severely as the latter, and further that a Government servant, who abuses the trust placed in him in the manner in which appellant Abul Abbas Mahammad Abdul Ali did, should be punished more severely than the other appellants.

We therefore alter the sentences as follows:—

Abul Abbas Mahammad Abdul Ali is sentenced under s. 467/109 of the Indian Penal Code to undergo four years' rigorous imprisonment; Syed Yawar Bakht Chaudhuri is sentenced under s. 467/109 of the Indian Penal Code to undergo three years' rigorous imprisonment; and Trailokya Nath Datta is sentenced under s. 467 of the Indian Penal Code to undergo two years' rigorous imprisonment.

With this modification the appeals are dismissed.

The appellants must surrender and serve out their sentences.

BARTLEY J. I agree.

Appeals dismissed.

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