# APPELLATE CRIMINAL.

*Before Mr. Justice Benson (on reference from Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore).*

## IN THE MATTER OF PALANI PALAGAN.*

1902. August 26, 29. September 9, 17.

*Indian Penal Code—Act XLV of* 1860, *s.* 193—*Charge of giving false evidence—Contradictory statements by witness before same Magistrate in the course of one and the same trial, on two different days—Conviction—Legality.*

On 18th January 1900, the accused deposed before a Magistrate that he had seen P and others gambling in a certain place. The deposition was read over to the accused, and acknowledged by him to be correct. On 1st February, he was cross-examined, in the same case, before the same Magistrate, and he then deposed that he did not know P and had never seen him gambling. He was charged and convicted under section 193 of the Penal Code of having intentionally given false evidence, in that he made two contradictory statements, one of which he either knew or believed to be false or did not believe to be true. On the question being raised, on revision, whether the conviction was legal, or whether it was illegal, by reason of the fact that the contradictory statements were made before the same Magistrate and in the course of one and the same trial:

*Held, Per* BENSON, J. (to whom the case was referred).—That the conviction was legal.

*Per* MOORE, J.—As no rule can be laid down to the effect that the contradictory statements must have been made at different inquiries or trials, (to render a person liable to conviction) the conviction could not be held to be illegal and should, consequently, not be interfered with in revision.

*Per* BHASHYAM AYYANGAR, J.—The conviction was bad in law. No statement made by a witness in a deposition can be regarded as a completed statement until the deposition is finished, and corrected if necessary; for till then, every statement is liable to be retracted, corrected, varied or qualified, and until his *viva voce* examination is finished, neither the whole nor any portion of his deposition becomes evidence. The whole deposition must be read and construed as one, and if a later statement in it is contradictory to or at variance with a prior statement, the statement made by the witness must be taken to be the earlier statement as subsequently modified, or the subsequent statement itself, if it intentionally contradicts and thus retracts the earlier.

*Habibullah* v. *Queen-Empress*, (I.L.R., 10 Calc., 937), considered.

CHARGE of having intentionally given false evidence. V. Ponnusami and others were charged before the third-class Magistrate at Sendamangalam, with gambling. The second witness for the

* Criminal Revision Case No. 177 of 1902. Taken up Case No. 20 of 1902. Records called for by the High Court in the matter of the conviction of Palani Palagan, by the Deputy Magistrate of Namakkal, in Calendar Case No. 85 of 1900, which conviction was upheld by the Sessions Judge at Salem in Criminal Appeal No. 14 of 1902.

PALANI PALAGAN.

prosecution was the present accused Palani Palagan. On 18th January 1900, after he had been solemnly affirmed, he made the following statement in the course of his examination-in-chief :—"At about 9 A.M. on 16th January 1900, Vania Ponnusami, Palli Ramaswamy, Kavarai Rangan and Andi Bodi were gambling, keeping with them money and stones under the ichi tree, by the side of Yettikulam road. . . . As soon as the gamblers saw [the constable] they left the stones and money and ran away. . . ." At the end of the deposition, which bore the witness' mark, the usual statement was made and signed by the Magistrate that the evidence had been taken down by him and read over to the witness and acknowledged by him to be correct. On 1st February 1900 the same witness was cross-examined, after having again been solemnly affirmed. In the course of his cross-examination he said :—"I do not know this Ponnusami. I have not seen him. I know the Police Constable . . . . I have never seen Ponnusami gambling . . . ." Palani Palagan was charged under section 193 of the Indian Penal Code with having given false evidence in a judicial proceeding. The Magistrate who recorded the statements deposed that accused had stated what was recorded, and that both depositions had been read to him, and that he had admitted the correctness of them both and had touched the pen when the mark was added. The Deputy Magistrate, who tried the present case considered that the record of evidence showed that accused had been tampered with in the interval between examination-in-chief and cross-examination. Accused admitted that he had made the later statement, but he denied having made the earlier one. The Deputy Magistrate found accused guilty and sentenced him to a short term of imprisonment in consideration of the time that had elapsed. The accused appealed, without success, to the Sessions Judge.

The records were called for by the High Court.

The case first came on for hearing before Bhashyam Ayyangar and Moore, JJ.

The Acting Public Prosecutor appeared in support of the conviction.

Their Lordships delivered the following judgments :—

BHASHYAM AYYANGAR, J.—In my opinion a witness who has intentionally made contradictory statements in one and the same deposition cannot be charged in the alternative and convicted

under section 193, Indian Penal Code, by reason of his having made such statements one or other of which must, if the two are construed as independent and separate statements, be false. No statement made by a witness in a deposition can be regarded as a completed statement until the deposition is finished and corrected if necessary; for, till then, every statement is liable to be retracted, corrected, varied or qualified and until his examination *viva voce* is finished, neither the whole nor any portion of his deposition becomes evidence. If a later statement in the deposition be contradictory to or at variance with a prior statement, the whole deposition must be read and construed as one, and the statement made by the witness must be taken to be the earlier statement as subsequently modified or the subsequent statement itself if it intentionally contradicts and thus retracts the earlier, and the statement so modified or the later statement intentionally retracting the earlier is the statement or evidence made or given by him, and if that be proved to be false he can of course be convicted of perjury or giving false evidence on that count. Suppose the deponent instead of giving evidence *viva voce* was allowed to give evidence by swearing to an affidavit which is given in evidence, can he be indicted and convicted of giving false evidence by reason merely of the affidavit containing two contradictory statements one or the other of which must be false to the knowledge of the deponent? They cannot be regarded as two independent separate statements which are contradictory to each other and the witness cannot be convicted on the footing that he intentionally made two contradictory statements one or other of which must be false to his knowledge, any more than a plaintiff or defendant can be indicted and convicted in the alternative for verifying a plaint or written statement containing contradictory or inconsistent statements, one or other of which must be false. The fact that in the present case there was an interval of about a week between the close of the examination-in-chief—in which the earlier statement was made—and the commencement of the cross-examination—in which the later statement was made contradicting the earlier—cannot affect the question, and if, as appears to be the case, the two instalments of the deposition have been separately signed, even that can make no difference any more than the construction of a document will depend upon whether the document is signed once for all at the end or each sheet thereof is signed separately.

PALANI PALAGAN.

The question arising in this case was considered and decided under Act X of 1882, in *Habibullah* v. *Queen-Empress*(1). In that case Tottenham, J., and Wilson, J., to the latter of whom the case was referred as third Judge under section 429, Criminal Procedure Code, held that the conviction was legal; Norris, J., having dissented from the view of Tottenham, J., holding that a witness cannot be convicted by reason of having intentionally made contradictory statements in one and the same deposition. I concur with the dissenting Judge, Norris, J., in his opinion. I am also inclined to think that the Legislature in enacting illustration (*b*) to section 236 of Act V of 1898—which illustration did not exist in Act X of 1882—was aware of the above decision of the Calcutta High Court and adopted the view of Norris, J. This seems to be also the view on which the decisions of this Court in Criminal Miscellaneous Petitions Nos. 25 and 23 of 1902 proceed, the sanction in the former case having been upheld on the ground that the contradictory statements were made not in one and the same deposition, but in different depositions made on different occasions and in different proceedings though in one and the same case. In my opinion, therefore, the conviction of the accused in the present case in the alternative ought to be set aside on the ground that it is bad in law and the accused acquitted and set at liberty.

I am glad to be able to come to this conclusion as a pure question of law, for I feel convinced that as a matter of policy the contrary doctrine, that a witness can be indicted and convicted of giving false evidence by reason merely that one or other of two contradictory statements intentionally made in one and the same deposition must be false, will have a most unwholesome and deterrent effect upon witnesses, by compelling them to adhere to statements which they have originally made in the course of their examination—however incautiously or inaccurately they might have been made—and unwary and comparatively ignorant witnesses may be made, in the hands of cross-examining counsel who are allowed full latitude in 'leading' a witness in cross-examination, to commit themselves to hopeless contradictions of what they have stated in the examination-in-chief. During the course of examination, a witness often discovers that previous statements made by him are incorrect, either owing to forgetfulness

(1) I.L.R., 10 Calc., 937.

or confusion or because the question was misunderstood, and he should be at perfect freedom to retract or qualify such statements until the deposition is finished and read out. No doubt it will be said that in such cases he will not be prosecuted for having made contradictory statements and I dare say it will be so when the matter rests in the discretion of experienced Magistrates and Judges. But, as a general rule, it is but natural that a witness would rather adhere to his original statement than expose himself to the risk of the party against whom he gives evidence obtaining sanction to prosecute him for having made contradictory statements though in one and the same deposition.

The doctrine that a witness can be convicted of perjury simply on the ground that one or other of two contradictory statements intentionally made by him must be false, without proving which of them is false, is one that has long been exploded in English law (*R.* v. *Harris*(1), *Reg.* v. *Wheatland*(2), *Reg.* v. *Jackson*(3), *Queen-Empress* v. *Ghulet*(4), *Palany Chetty*(5)), and in India it rests upon the decision of the majority in two Full Bench cases (*Queen* v. *Musst. Zamiran*(6) and *Queen* v. *Mahomed Hoomayoon Shaw*(7)), which has been dissented from by eminent Judges who took part in those cases and by others in *Queen-Empress* v. *Mugapa Bin Ningappan*(8), and the Legislature itself has given sanction to such doctrine, not directly by any substantive enactment, but only indirectly, by illustration (*b*) to section 236 of the Criminal Procedure Code of 1898. In *Habibullah* v. *Queen-Empress*(9) already referred to, Wilson, J. (who concurred with Tottenham, J.) in adverting to the above two Full Bench decisions of the Calcutta High Court, stated as follows :— "I think I am bound to accept this view of the law though if it were not framed (sic 'concluded') by authority, it is not a view that I should myself have taken."

Apart from the reasons already given by me for holding that the doctrine cannot logically or on legal principles apply to a case in which the so-called contradictory statements are contained in and form parts of one and the same deposition, I am not prepared to extend the doctrine beyond the authority of the Full Bench decisions and illustration (*b*) to section 236 of Act V of 1898 and

(1) 5 B. and Ald., 926.
(2) 8 C. and P., 238.
(3) 1 Lewis C.C., 270.
(4) I.L.R., 7 All., 44.
(5) 4 M.H.C.R., 51 at p. 52.
(6) B.L.R.F.B., 521.
(7) 13 B.L.R., 324.
(8) I.L.R., 18 Bom., 377.
(9) I.L.R., 10 Calc., 937.

PALANI PALAGAN.

the forms of alternative charges appended to that Act and the former Codes of Criminal Procedure, in all of which the contradictory statements referred to are in different depositions—each of which became complete in itself—and was made by the witness on different occasions and in different proceedings.

MOORE, J.—Palani Palagan when examined before a Magistrate on the 18th January 1900 deposed that he saw one Ponnuswami and others gambling in a certain place. After he had given his deposition it was read over to him and acknowledged by him to be correct. On the 1st February he was cross-examined in the same case before the same Magistrate and he then deposed that he did not know Ponnuswami and had never seen him gambling. Palani Palagan has been convicted on an alternative charge of giving false evidence under section 193, Indian Penal Code. There is no finding by the Deputy Magistrate as to which of the contradictory statements is false. A question has been raised as to whether the conviction can be upheld inasmuch as the two statements were made in the same trial although on different days and not in two separate and distinct enquiries. The only reported decision that I can find in which this question, as to whether it is absolutely necessary that the contradictory statements should have been made in different inquiries or trials, has been discussed is that of *Habibullah* v. *Queen-Empress*(1), and as I agree with the view taken by the majority of the Judges (Wilson and Tottenham, JJ.) who heard that case to the effect that no such rule can be laid down I am not prepared to hold that the conviction of Palani Palagan is illegal and I would therefore decline to interfere in revision.

---

In consequence of the difference of opinion the case was referred to and again came on for hearing before Benson, J., under sections 429 and 439 (1) of the Code of Criminal Procedure who delivered the following :—

JUDGMENT.—The facts of the case are not in dispute. They are briefly as follows :—The accused when examined on solemn affirmation before the Magistrate on the 18th January 1900 deposed that he saw one Ponnusami and others gambling in a certain place. The deposition was read over to the witness and acknowledged by him to be correct. A fortnight afterwards he was cross-examined in the same case, before the same Magistrate, and he then deposed that he did not know Ponnuswami, and had never

---

(1) I.L.R., 10 Calc., 937.

seen him gambling. He was convicted of having intentionally given false evidence, an offence punishable under section 193, Indian Penal Code, in that he made two contradictory statements one of which he either knew or believed to be false or did not believe to be true. The question for decision is whether the conviction is legal, or whether it is illegal by reason of the fact that the contradictory statements were made before the same Magistrate and in the course of one and the same trial.

In my judgment the conviction is legal. It is unnecessary to consider what would be the law of England in such a case, inasmuch as the Indian Legislature has deliberately departed from the English law of perjury in more than one particular, and has defined the offence and laid down the procedure to be followed by the Indian Courts in dealing with it. It is admitted on all hands that under section 236, Code of Criminal Procedure, a witness who intentionally makes two contradictory statements in two separate trials, or in an inquiry before a Magistrate and in the trial of the same offence before a Sessions Judge, may be tried on a charge which alleges that one or other of the statements was known by the witness to be false, though without alleging which was, in fact, false. The only question for decision is whether a witness may be similarly charged when the contradictory statements have been made, as in this case, before the same Court and in the same trial. I can find nothing in the law, or in the history of the law, or in the principles on which it is founded to justify the distinction suggested. The law which sanctions the framing of an alternative charge in such a case is section 236, Code of Criminal Procedure, and its terms are perfectly general. They are: "If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences." There are two illustrations added to the section as examples of how its terms may be applied. The second of these illustrations is as follows:—"*A* states on oath before the Magistrate that he saw *B* hit *C* with a club. Before the Sessions Court *A* states on oath that *B* never hit *C*. *A* may be charged in the alternative and convicted of intentionally giving false evidence although it cannot be proved

PALANI PALAGAN.

which of these contradictory statements was false." This illustration, no doubt, deals only with a case of a witness making contradictory statements before the Committing Magistrate and the Sessions Judge, but it is obvious that the general scope of the provisions of a section cannot be cut down by the terms of an illustration, and the same is true of the forms in the schedule attached to the Code. As observed by Scotland, C.J., and Collett, J., in reference to this same question "the statements of particular offences given in the forms are obviously given only as examples (*Ramanuja Chariyar* v. *Venkatavaradhaiyangar*(1))." There is no suggestion that a charge in the alternative would not be warranted by the section if the two contradictory statements were made in two separate trials, though the illustration does not cover such a case. So far as the terms of the law are concerned, I find nothing to indicate that a conviction such as we are dealing with is illegal: nor do I find anything to that effect in the history of the law, or in the principles on which the law is based. The history of this part of the criminal law has been set forth with admirable fulness by Duthoit, J., in *Queen-Empress* v. *Ghulet*(2). The learned Judge there showed that the *ratio decidendi* of the leading English case, *R.* v. *Harris*(3) was inapplicable in India and that the rule of English law there laid down was never adopted in India. In fact it was almost at once dissented from by express Legislation. Madras Regulation 3 of 1826, which was enacted soon after *R.* v. *Harris*(3) was decided settled the law in Madras and provided that "if a witness shall wilfully and deliberately give two contradictory depositions on oath . . . . such witness shall be liable to be committed for trial before the Court of Circuit for wilful and corrupt perjury; provided that the contradiction between the two depositions be direct and positive, and that upon the whole circumstances of the case, there be strong grounds to presume the corrupt intention of the witness." In Bengal and the North-Western Provinces the law was laid down in 1831 "where there exists a contradiction in the evidence of a witness before one or more Courts, and the difference be such that the two statements can in no way be reconciled with each other; for instance, if a witness depose that he saw *A* kill *B* mentioning the time and place in which the murder was committed and

(1) 4 M.H.C.R., 51 at p. 54. (2) I.L.R., 7 All., 44.
(3) 5 B. and Ald., 926.

afterwards in the same Court or some other, shall state that he did not witness the transaction, this is a direct retractation of his evidence," and he is liable to be convicted (Constructions S.D.A. and N.A., ed. 1839, Vol. II, p. 19).

In 1847 the Indian Law Commissioners, in dealing with this question, stated: "We are strongly of opinion that whoever in any stage of a judicial proceeding, been bound by an oath or by a sanction tantamount to an oath, to state the truth, gives a statement touching any point material to the result of such proceeding which directly and positively contradicts a statement touching the same point, given by him on oath, or under a sanction tantamount to an oath, in any stage of a judicial proceeding, at another time "should (failing any satisfactory explanation of the contradiction to negative the inference of a corrupt intention) be liable to punishment. Under such circumstances, it is morally certain that the party has given a false statement on one or other of the two occasions, though it may be impossible to show positively which of the contradictory statements is false. Both statements may perhaps be false, but one only can be true. It is possible, indeed, that the first statement may have been false, through an error or mistake, which has been corrected by subsequent information, and that the second contradicts the first because it contains the truth which had come to the knowledge of the party in the meantime. But when there is no such allegation nor any explanation of the contradiction to negative the inference that the party at one time or the other has been guilty of stating on oath (or as it may be) as true what he knew to be false in order to deceive a Court of justice, on a point material to the question to be decided by the Court, we think the law should be so framed that he should not be able to escape from the punishment he would well deserve." Now, the reasoning of the Law Commissioners, which, I take it, correctly explains the policy and principles on which the law is founded, is equally applicable whether the two statements are made as in the case before us, at different times in one and the same trial, or at different stages (the inquiry and trial) of one judicial proceeding. The Indian Penal and Criminal Procedure Codes came into force on the 1st January 1862 and laid down the law applicable thenceforward throughout India. The Criminal Procedure Code was re-enacted in 1872 and again in 1882 and 1898, but in each enactment the

PALANI PALAGAN.

law on this matter was substantially the same as it now is. The validity of a conviction on an alternative charge has been affirmed in reported cases under each of the Codes (referred to in detail in *Queen-Empress* v. *Ghulet*, already cited), but in only one of these has the exact question now before us been decided. That is the case of *Habibullah* v. *Queen-Empress*(1). In it the witness was under cross-examination on one day and under re-examination on the next day, and made two statements which were directly contradictory. His conviction on a charge in the alternative was upheld by a majority of the Judges,—Norris, J., dissenting. The learned Judge who dissented did not quote any authority for making a distinction in favour of the witness who makes contradictory statements at different stages of his examination by the same Court. He based his dissent on the supposed inexpediency of allowing a prosecution in such a case "as it would render it unsafe for a witness to correct the deposition." I do not think that much weight can be given to this argument, for precisely the same argument can be used, and I think with no less force, when the contradictory statements are made at the enquiry and at the trial respectively. Yet this latter is the case expressly given in illustration (*b*) to section 236 as within the scope of the section. It is just as desirable that a witness who has honestly made an incorrect statement at the enquiry before the Magistrate should be free to correct it at the trial before the Judge, as it is that a witness, who has honestly made an incorrect statement at one stage of his examination by the Magistrate should be free to correct it at a later stage of his examination by the same Magistrate, and in my judgment it is no less desirable that a witness who has dishonestly and intentionally made a false statement should not be allowed to escape with impunity in the one case more than in the other. If a witness is honest he has nothing to fear. He cannot be prosecuted without the sanction of the Court before which he deposed (or some Court to which it is subordinate) after such enquiry as the nature of the case demands, and no Court would give sanction unless satisfied that the witness had deliberately and intentionally made the contradictory statements not merely to correct a *bonâ fide* error, but intending in one or the other instance to mislead the Court by stating what he knew to be false or did not believe to be

(1) I.L.R., 10 Calc., 937.

true. The essence of the offence lies in the intention to give false evidence, and that intention may, I think, just as well exist where the contradiction is in various stages of the same deposition as where it is in different stages of the same proceedings. In both cases every possible presumption should be made in favour of a reconciliation of the two statements and every means should be taken to ascertain the true intention of the witness, but when that intention is shown to be deliberately dishonest, I can see no principle on which the witness should be protected from punishment in the one case more than in the other. To consider whether the false statement was made in the course of one deposition or in the course of two separate depositions seems to be irrelevant, and calculated to obscure the real question. The offence is defined in the Indian Penal Code, and consists in intentionally making a false statement. The Criminal Procedure Code does not create or define the offence. It rather relates to the mode in which it may legitimately be proved that the offence has been committed. It says, in effect, you may prove that a false statement has been made by showing that two contradictory statements have been made one or other of which must necessarily be false, and it is not necessary for you to show which of the two is, in fact, the false one. This mode of proof is just as applicable in the case of contradictory statements made at different stages of a witness' examination by a Magistrate, as in the case of contradictory statements made by the same witness at the enquiry by a Magistrate and at the trial by the Judge. It often happens that a witness is not cross-examined at all at the enquiry by the Magistrate, the cross-examination being reserved until the witness has been examined in the Sessions Court. In what essential does such a case differ from that now before us? In both cases it is merely a question of words as to whether the statement in cross-examination is to be regarded as a separate deposition or as a continuation of the original deposition. The evil to be guarded against seems to be precisely the same in both cases, and ought to be equally liable to the sanction of punishment.

In the case before us the witness deposed in examination-in-chief that he saw Ponnuswami committing an offence and stated the exact time and place and other particulars. The deposition, after it was recorded, was read over to the witness and acknowledged to be correct. When cross-examined a fortnight afterwards the

PALANI PALAGAN.

witness denied that he knew Ponnuswami or had ever seen him commit the offence. He did not plead that his former statement was made under any misapprehension. He made no attempt to reconcile the two statements or to explain them in any way consistent with an honest intention on his own part. He simply denied having made the former statement attributed to him. It would, I think, be difficult to find a more flagrant case of intentional giving of false evidence, and it would, in my judgment, have a most unfortunate effect on the morality of witnesses and the administration of justice if a witness, however corrupt, who behaves in this way, cannot be punished. In the words of Sir Barnes Peacock, used with reference to two contradictory statements made before the Magistrate and the Sessions Judge in one and the same case: "It is clear that unless the law is very defective, or we are to trifle with the administration of justice, the witness ought to be punished. It appears to me that the law is not deficient, and that the case is provided for by the Code of Criminal Procedure whether it be read according to the strict letter or according to its spirit" (*R.* v. *Zumeerun*(1)).

I must hold that the conviction in the present case was legal and that there is no ground for our interference as a Court of Revision.

---

## APPELLATE CIVIL.

*Before Mr. Justice Bhashyam Ayyangar and Mr. Justice Moore.*

1902. March 5.

K. CHIDAMBARA RAO AND ANOTHER (PLAINTIFF), APPELLANTS,

*v.*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), RESPONDENT.*

*Indian Easements Act—V of* 1882, *s.* 13 (*c*)—*Grant of village as inam—Right to water for irrigation—Area under wet cultivation at time of grant subsequently increased—Claim by inamdar for proportionate increase of water for irrigation.*

In 1859 a village with land comprising 339 acres was granted by Government, as inam, to plaintiff. At the time of the grant, 106·09 acres were under

(1) 6 Suth. W.R., (Cr.), 65.

* Second Appeal No. 963 of 1900, against the decree of W. C. Holmes, District Judge of Kistna, at Masulipatam, in Appeal Suit No. 575 of 1899 against the decree of S. A. Swaminadha Sastri, District Munsif of Gudivada, in Original Suit No. 153 of 1897.