1884

QUEEN EMPRESS v. SADHEE KASAL.

knowing it to be stolen. It appeared, that in the Sessions Court Chowri Kasal had been granted a pardon under s. 338 of the Criminal Procedure Code and released, and Sadhee Kasal was found by both assessors to be guilty under s. 411 of the Penal Code, and was sentenced to rigorous imprisonment for two years by the Sessions Judge. After perusing the record, the Court (PRINSEP and MACPHERSON, JJ.) passed the following order:—

As the case is now presented to us on review of the Sessions Judge's statement, and on perusal of the record we think it sufficient to point out to the Sessions Judge that the offences under trial not being exclusively within the jurisdiction of the Court of Sessions, the Sessions Judge was not competent to tender pardon under s. 338 of the Criminal Procedure Code to Chowri Kasal.

Before Mr. Justice Wilson, Mr. Justice Tottenham and Mr. Justice Norris.

HABIBULLAH (ACCUSED) *v.* QUEEN EMPRESS (COMPLAINANT).*

1884 *April* 28, *July* 7.

Alternative charge and conviction—False evidence—Penal Code (Act XLV of 1860), s. 193—Criminal Procedure Code (Act X of 1882), ss. 233, 554 and Sch. 5, XXVIII, II, (4.)

A prisoner was convicted on an alternative charge in the form provided by Sch. 5, XXVIII, II, (4) of the Criminal Procedure Code (Act X of 1882) of having given false evidence, such evidence consisting of contradictory statements contained in *one* deposition which he was under cross-examination and re-examination as a witness in a judicial proceeding. There was no finding as to which of the contradictory statements was false.

Held, (NORRIS, J., dissenting) that s. 233 of the Criminal Procedure Code did not affect the matter and that the conviction was good.

Semble per WILSON, J.—The decision in *The Queen* v. *Bedoo Noshyo* (1), though a guide to the discretion of Courts in framing and dealing with charges, was not intended to, and does not, affect the law applicable to the matter.

THIS was a rule to show cause why the conviction of the petitioner under s. 193 of the Indian Penal Code before the Joint

* Rule No. 66 of 1884 against the order of E. Staley, Esq., Officiating Joint Magistrate of Dacca, dated the 10th day of December 1883, affirmed by T. Smith, Esq., the Sessions Judge of Dacca, dated the 14th January 1884.

(1) 12 W. R., Cr. 11.

1884

HABIB-ULLAH v. QUEEN EMPRESS.

Magistrate of Dacca, affirmed on appeal by the Sessions Judge, should not be set aside as bad in law.

The facts of the case were as follows :—

The petitioner was charged in the alternative with having committed perjury in a deposition given by him during the hearing of certain suits in the Court of the Second Subordinate Judge of Dacca. He was examined as a witness on behalf of the defendants in those suits, and during his cross-examination, which commenced on the 12th September, he admitted that certain entries in account books and certain letters were in his handwriting. On the 13th September he was re-examined, (his cross-examination having terminated late on the evening of the 12th,) and on his re-examination he contradicted his statements as to the entries and the letters, and swore positively that they were not in his handwriting. It was in respect of these contradictory statements that sanction to prosecute was given and that the charge was brought. The Joint Magistrate, finding that he had a strong motive for contradicting his first statement, and that it was not a mistake made through inadvertence, without deciding as to which of the statements was false, convicted the accused upon two similar charges, one in respect of the statement as to the entries in the account books and the other in respect of the statement as to the letters, and sentenced him to a year's rigorous imprisonment on each charge.

This decision was upheld on appeal by the Sessions Judge

The petitioner then applied to the High Court in the exercise of its revisional powers, to send for the record with a view of quashing the Magistrate's order, on the ground, that an alternative charge of giving false evidence under s. 193 of the Indian Penal Code would not lie, when the charge was based upon contradictory statements contained in one and the same deposition.

On the hearing of the application, Mr. *Pugh* and Mr. *M. P. Gasper* appeared on behalf of the petitioner, and the Court issued the present rule.

The rule came on to be heard before a Division Bench of the High Court consisting of TOTTENHAM and NORRIS, JJ.

Mr. *Pugh*, Mr. *M. P. Gasper*, Baboo *Durga Mohun Dass* and Baboo *Umbica Churn Bose* for the petitioner.

The Advocate-General (Mr. *G. C. Paul*) and Baboo *Chunder Madhub Ghose* for the opposite party.

The Advocate-General in showing cause against the rule cited *The Queen* v. *Mussamut Zumeerun* (1) and *The Queen* v. *Mahomed Humayoon Shah* (2).

Mr *Pugh* in support of the rule referred to *Empress of India* v. *Niaz Ali* (3), the judgment of Jackson, J., in *The Queen* v. *Mahomed Humayoon Shah* (2), and upon the question of the effect of illustrations to an Act, to *Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (4). He also referred to *Taylor on Evidence, 7th edition*, 708; *Roscoe on Evidence*, 825; and *Peake's Nisi Prius*, 52.

The nature of the arguments appears sufficiently from the judgments of the Division Bench, which were as follows.—

TOTTENHAM, J.—This is a rule to show cause why the conviction of the petitioner under s. 193 of the Indian Penal Code before the Joint Magistrate of Dacca, affirmed by the Sessions Judge on appeal, should not be set aside as bad in law

The charge upon which the petitioner was convicted was in the alternative form, of which an example is given in the 5th schedule of the Code of Criminal Procedure, and in respect of two contradictory statements made by the petitioner in the course of one and the same deposition: the one being made one day in cross-examination, and the other the following day in re-examination.

The ground on which we have been asked to interfere, and set aside the conviction, is, that a charge, in the alternative form, of intentionally giving false evidence by making contradictory statements, cannot legally be framed where the statements in question are contained in one single deposition; but is allowable only in case the statements are contained in distinct separate depositions.

The particular form given in the schedule to the Code clearly refers to separate depositions made on distinct occasions, *viz.*, in an enquiry before a Magistrate, and at the subsequent trial in the Sessions Court. It is contended that there is no warrant

(1) 6 W. R., Cr. 65; B. L. R., F. B., 521.
(2) 21 W. R., Cr. 72; 13 B. L. R., 324.
(3) I. L. R., 5 All., 17, p. 22.
(4) I. L. R., 7 Calc., 132, p. 135.

1884

HABIB-ULLAH v. QUEEN EMPRESS.

in law, except in this form and in s. 554 which authorises its use, for a single alternative charge of giving false evidence, and it is submitted, that the law should not be stretched in this direction so as to have a charge in the alternative made in respect of contradictory statements made in the course of one deposition. And it is argued that, if such a charge is good in law, no witness could safely correct an erroneous statement once made: for by so doing, he would render himself liable to prosecution, and if prosecuted, his conviction would inevitably follow should there be no obligation on the prosecution to prove which of the two statements was false.

After giving the matter the most careful consideration in my power, I am of opinion that there is nothing illegal in the charge before us; and that the conviction had upon it is good in law. In this country it has more than once been held, that a conviction for intentionally giving false evidence may be had upon a charge in an alternative form, and without any finding as to which statement is false. The Full Bench cases, *Queen* v. *Mussamut Zumeerun* (1) and *Queen* v. *Mahomed Humayoon Shah* (2) establish this proposition, and the present Code of Criminal Procedure, by providing a form for such a charge, has continued the state of the law previously existing. And there seems to be no authority for holding the contrary view or for confining that view to cases in which two distinct proceedings are in question. And little reason except supposed expediency. The argument that, because the form given as an example in the schedule to the Code deals with a case in which the two statements were made in distinct proceedings, therefore, no similar form may be used in respect of statements made in one and the same proceeding, appears to me not entitled to any weight.

For s. 554 which prescribes the use of the forms in the schedule, expressly provides for such modifications in the forms as the circumstances of cases may require. A witness may, and sometimes does, make as flagrantly contradictory statements in the same proceeding as he may make in two distinct proceedings,

(1) 6 W. R., Cr, 65; B. L. R., F. B., 521.

(2) 21 W. R. Cr., 72; 13 B. L. R., 324.

and it may be as difficult in one case as the other to determine which is false. I see no reason to suppose that the Legislature intended to give immunity in the one case, but to allow a prosecution in the other. It seems to me only reasonable to suppose that it was intended that the same peril should attend the witness in either case.

And as to the argument, that this view of the law renders it unsafe for a witness even to correct or alter a statement which he has once made, I do not think that an honest witness has any reasonable ground for apprehension. He cannot be prosecuted unless the Court before which he has deposed, or a superior Court, sanctions a prosecution after such enquiry as may be necessary; and no Court would sanction the prosecution of a witness, unless satisfied that he had deliberately and intentionally made the two contradictory statements, not merely by way of *bonâ fide* correction of a mistake, but intending in one or other instance to state what he knew to be untrue or did not know to be true. And further even when prosecuted, the witness cannot be convicted on an alternative charge for correcting an error; but can be convicted only upon the Court being satisfied that in one or other of the instances charged the accused did *intentionally* give false evidence. The essence of the offence is the *intention*, and that may exist where the contradiction is in various stages of a single deposition, as well as where it is manifested in two distinct proceedings. I come therefore to the conclusion that the law permits the charge upon which the petitioner has been convicted, and I see no particular hardship in that state of the law to a person who wilfully gives false evidence.

I would discharge this rule, and would order the petitioner to undergo the sentence passed upon him.

NORRIS, J.—The petitioner in this case was examined as a witness on behalf of the defendants at the hearing of the suits, which were tried together, by the Second Subordinate Judge of Dacca. The petitioner's examination-in-chief and cross-examination took place on the 12th September 1883; the cross-examination was not concluded until a late hour and the re-examination was postponed until the following day. In his cross-examination the petitioner admitted that certain entries in certain account books, which were shown

1884

HABIB-ULLAH v. QUEEN EMPRESS.

to him, were in his handwriting; and that a letter, in which he admitted that he had been guilty of embezzlement, was also in his handwriting; in his re-examination he contradicted his previous statements with regard to the entries and the letter, and positively denied that any or either of them were in his handwriting. Sanction having been obtained from the Judge for the institution of a prosecution against the petitioner, he was brought before the Officiating Joint Magistrate of Dacca who, after taking evidence, framed the following charge: "I hereby charge you, Khajieh Habibullah, as follows: That you on or about the 12th day of September 1883, at Dacca, in a stage of a judicial proceeding, *viz.*, in the trial of suits Nos. 88 and 93 of 1882 in the Court of the Second Subordinate Judge being a witness cited by the defendants in those, the jointly tried, suits, on solemn affirmation stated "Exhibit IX is in my handwriting and the signature is mine," and on the 13th day of September, in the same judicial proceeding, stated "Exhibit IX is not in my handwriting," and whereas one of those statements you either knew or believed to be false or did not believe to be true, you thereby committed an offence punishable under s. 193 of the Indian Penal Code, and within the cognizance of this Court, and thereby direct that you be tried by this Court on this said charge." The Magistrate also framed a second charge with reference to the petitioner's statements regarding the entries in the account books. The Joint Magistrate convicted the petitioner, and sentenced him to two years rigorous imprisonment, one year on each charge. The petitioner appealed to the Sessions Judge, who confirmed the conviction; he then applied to us, in the exercise of our revisional powers, to send for the record with a view of quashing the Magistrate's order, on the ground that an alternative charge of committing an offence under s. 193 of the Indian Penal Code was bad where such charge was based upon alleged contradictory statements made in the same deposition.

We granted a rule to show cause why the conviction should not be set aside. On the argument of the rule, the Advocate-General appeared to show cause; Mr. *Pugh* and Mr. *Gasper* supported the rule. I regret that after the best consideration I have been able to bestow upon the case, I find myself unable to agree with my brother Tottenham in the conclusion at which he has arrived.

1884

HABIB-ULLAH v. QUEEN EMPRESS.

I am of opinion that the rule should be made absolute. The Advocate-General urged that the point was concluded by authority, and he referred us to two cases, *Reg.* v. *Mussamut Zumeerun* and *Reg.* v. *Mahomed Humayoon Shah.* These were both Full Bench decisions; the first was a decision upon the provisions of the Code of Criminal Procedure of 1861 with regard to alternative charges, the second was a decision upon the provisions of the Code of 1872 with reference to such charges.

I am undoubtedly bound by these decisions, unless I can distinguish the facts upon which those decisions were based from the facts of this case. I trust, however, that I shall not be considered presumptuous, if I respectfully say that I share in the doubts expressed by Norman and Campbell, JJ., in the first case, and that the judgment of Jackson, J., in the second case, and the reasoning by which he arrived at his conclusion, commend themselves to my judgment. There appears to me, however, to be an essential distinction between the cases above cited and this case. In both the cited cases the alleged contradictory statements were made in two separate depositions taken on two distinct occasions. In *Reg.* v. *Mussamut Zumeerun* the first statement was made before a Magistrate on the 14th October 1865, and the second statement before a Sessions Judge on the 18th December 1865.

In the case of *Reg.* v. *Humayoon Shah*, the charge against the prisoner was "that he did on or about the 23rd January 1873, at Alipore, in the course of the trial of Tulsi Dass Dutt and Mahomed Latif on a charge of cheating, state in evidence before Moulvi Abdul Latif, Deputy Magistrate of Alipore, that, &c., &c., and that he did on or about the 13th February 1873, in the course of the trial of I. R. Belilias, Tulsi Dass Dutt and Mahomed Latif *in the same case of cheating* state in evidence before Moulvi Abdul Latif, Deputy Magistrate of Alipore, that, &c., &c."

Now, it is plain that though it is called "the same case of cheating" it could not have been strictly speaking "the same case." The case on the 23rd January was a case against two persons only, Tulsi Dass Dutt and Mahomed Latif; the case on the 13th February was one against three persons, I. R. Belilias, Tulsi Dass Dutt and Mahomed Latif. I. R. Belilias had clearly been added as a defendant between 23rd January and 13th February; the pri-

1884

HABIB-ULLAH v. QUEEN EMPRESS.

soner's evidence against the two defendants on 23rd January could not have been used against the added defendant on 13th February without his having been re-sworn. There would thus be two depositions on two distinct occasions on two different charges.

In this case, though a night elapsed between the cross-examination and the re-examination of the petitioner, the alleged contradictory statements were made in one and the same deposition, on the hearing of one case.

I think it would be a very dangerous thing to extend the principle of the Full Bench cases to such a case as this; it would render it unsafe for a witness to correct the deposition. I am of opinion, upon the ground of the distinction I have pointed out, that the Full Bench cases are not in point, and that the rule should be made absolute.

The Judges having disagreed, the case was referred to Mr. Justice Wilson and re-argued before him.

The same counsel appeared as at the previous hearing, with the exception of Mr. *Pugh*—Mr. *M. P. Gasper* arguing the case in support of the rule.

The following judgment was delivered by

WILSON, J.—This case has been referred to me in consequence of a difference of opinion between Tottenham and Norris, JJ.

The accused has been charged with, and convicted of, offences under s. 193 of the Penal Code. Each charge followed the form given in schedule V, XXVIII, II (4) to the Code of Criminal Procedure and charged him with having, in the course of a judicial proceeding, made, as a witness, two contradictory statements, one or other of which he knew to be false or did not believe to be true. The conviction is in accordance with the charge without any express finding which of two contradictory statements was false.

Mr. *Gasper*, who appeared for the accused, raised these points. First he argued that, under the present law, a charge and conviction of this nature is in no case good. The validity of such charges has twice come before Full Benches of this Court.

In the *Queen* v. *Mussamut Zumeerun* such a charge seems

to have been regarded as an alternative charge of perjury committed either on the one occasion or on the other, and to have been held good on that ground under the Procedure Code then in force. If the matter be viewed in that light, it would be very difficult to reconcile such a charge with s. 452 of the Code of 1872 or with s. 233 of present Code, which requires that each offence shall be the subject of a separate charge, except in the particular cases (of which this is not one) in which alternative charges are expressly allowed.

But in the subsequent Full Bench case of *The Queen* v. *Mahomed Humayoon Shah*, Couch, C.J., with whom Kemp, J., concurred, expressly lays down that such a charge is not a charge of two offences in the alternative, but of one offence. And I think the judgments of Morris, J., with whom Birch, J., concurred, and of Ainslie, J., embody the same view. The other two Judges who made up the majority of the Court did not give their reasons. I think I am bound to accept this view of the law, though, if it were not framed by authority, it is not a view that I should myself have taken.

If this be so, s. 233 does not affect the matter. And the form of charge given in the schedule, which is sanctioned by s. 554 and has been followed in this case, is legitimate and may be followed by a corresponding conviction. I think, therefore, that Mr. *Gasper's* first contention fails.

Secondly, he argued that a charge and conviction in the present form can only properly be used in a case in which it is impossible to find, upon the evidence obtainable, which of the two inconsistent statements is true; and for this he cited *The Queen* v. *Bedoo Noshyo*. As a guide to the discretion of Courts in framing charges and in dealing with them, I think what is there said is of great importance. But it cannot affect, and was not, I think, intended to affect, the law *applicable* to the matter.

Thirdly, Mr. *Gasper* argued that the rule which has been laid down does not apply in a case where, as here, the two inconsistent statements have been made in the course of the same deposition. It is no doubt very important that a witness honestly desiring to correct an error in his evidence should not be deterred from doing so by the risk of a criminal charge. And charges arising out of

1884

HABIB-ULLAH v. QUEEN EMPRESS.

alleged inconsistent statements in a deposition may well require, and I think they so require, to be watched with special care. But I can see no sufficient distinction in principle between such contradiction in one deposition and in two. If it is an offence under s. 193 to make two contradictory statements, one or other of which must be false, and to do so with a guilty intention, on two distinct occasions, I think it must be equally an offence to make them on one occasion.

I therefore agree with the view of Tottenham, J., upon the matter referred to me.

WILSON, J. (TOTTENHAM, J., concurring).—The rule must be discharged, but the period during which the rigorous portion of the sentence was suspended will count as part of the original sentence.

Rule discharged and conviction affirmed.

REFERENCE UNDER THE BURMAH COURTS ACT.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Beverley.

1884
July 7.

MAHOMED HOSSEIN (PLAINTIFF) *v.* INODEEN (DEFENDANT).*

Limitation for second appeals under Burmah Courts Act—Act XVII of 1875, s. 27.

A second appeal under s. 27 of the Burmah Courts Act is not subject to the limitation of time prescribed for an appeal to a High Court under the Limitation Act of 1877.

IN this case, which was one for the specific performance of a contract, the plaintiff obtained a decree in the Court of the Extra Assistant Commissioner of Toungo.

The defendant appealed to the Deputy Commissioner who, on the 6th December 1883, reversed the decision of the lower Court.

On the 14th March 1884 (at which date more than 90 days had passed from the date of the decree of the lower Appellate Court), the plaintiff presented his appeal to the Judicial Commissioner.

* Reference under the Burmah Courts Act of 1875, made by T. Jardine, Esq., Judicial Commissioner of British Burmah.