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RAGHU N. DAS v. ASHRAF H SAIN KHA

Mir *Akbar Husain*, for the respondents.

The judgment of the Court, so far as it related to the above contention, was as follows :

JUDGMENT.—We are of opinion that the plaintiff's objection to the set-off allowed by the Courts below is valid. Under s. 111, Act X of 1877, it is only an ascertained sum of money legally recoverable that can be the subject of set-off, and it is necessary that in such claim both parties fill the same character as they fill in the plaintiff's suit, the claim must be certain and determinate and actually due and in the same right and of the same kind. The claim by the defendants in this suit, for estimated damages to property mortgaged as security for money lent, does not meet the requirements of the law, so as to be capable of being set-off against the plaintiff's claim for the money lent.

It has been held that mesne profits is in the nature of damages and is not a debt so as to form a subject of set-off (1 ; and it was held in a suit by a carrier for the price of the carriage of goods that the defendant cannot set off the amount of damages claimed against the plaintiff for injury to the goods, but must sue to recover the damage in a separate suit (2). We must therefore allow the plaintiff's appeal.

APPELLATE CRIMINAL.

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April

Before Mr. Justice Pearson and Mr. Justice Spankie.

EMPRESS OF INDIA *v.* BALDEO SAHAI.

Attempt to obtain an Illegal Gratification—Act XLV of 1860 (Penal Code), s 161—Act X of 1872 (Criminal Procedure Code), ss. 2 8, 351 - Warrant case—Defence—Right of accused person to cross-examine the witnesses for the prosecution—Power of the Court to summon material witness.

To ask for a bribe is an attempt to obtain one and a bribe may be asked for as effectually in implicit as in explicit terms.

Where, therefore, *B*, who was employed as a clerk in the Pension Department, in an interview with *A*, who was an applicant for a pension, after referring to his own influence in that department and instancing two cases in which by that influence increased pensions had been obtained, proceeded to intimate that any thing might be effected by "*kar-sawai*," and on the overture being rejected,

(1) *Ruteerummon Opadhya* v. *Grijanund Opadhya*, 7 Wym. Rep., 218.

(2) *Scanlan* v. *Herrold*, 10 W. R., 295.

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concluded by declaring that *A* would rue and repent the rejection of it, *held* that the offence of attempting to obtain a bribe was consummated.

The charge having been read to the accused person he stated his defence to the same, upon which the Magistrate, the witnesses for the prosecution being in attendance, called upon the accused to cross-examine them. The accused refused to do so until he had examined the witnesses for the defence who were not in attendance. The Magistrate then discharged the witnesses for the prosecution and adjourned the trial for the production of the witnesses for the defence.

Held, per SPANKIE, J., that the accused was not entitled to have the witnesses for the prosecution summoned, in order that they might be cross-examined by the accused, on the date fixed for the examination of the witnesses for the defence.

Held also *per* SPANKIE, J., that the Magistrate was empowered to record both oral and documentary evidence after the witnesses for the defence had been examined.

THIS was an appeal to the High Court by the local Government against a judgment of acquittal by Mr. H. Lushington, Sessions Judge of Allahabad, dated the 22nd November, 1878. One Baldeo Sahai was convicted by Mr. J. B. Thomson, Magistrate of the first class, on the 16th September, 1878, under s. 161 of the Indian Penal Code, *of attempting to obtain an illegal gratification. On* appeal Baldao Sahai was acquitted by the Sessions Judge, the Judge holding that the acts of the accused were not acts committed towards the commission of the offence of attempting to obtain an illegal gratification, but acts preparatory towards the commission of such offence, and that consequently the accused could not be convicted of such offence. The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*), for the Crown.

Mr. *Colvin* and Mr. *L. Dillon*, for Baldeo Sahai.

The following judgments were delivered by the Court :

SPANKIE, J.—The accused was charged that he on or about the 30th July, 1878, being a public servant, attempted to obtain from Abbas Ali, for himself, a gratification other than legal remuneration, as a motive or reward for showing favour in the exercise of his official functions, and thereby with having committed an offence punishable under s. 161 of the Indian Penal Code.

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If we accept the evidence of Abbas Ali, it is clear that he at least quite understood that Baldeo Sahai had expressed every readiness to use his influence in his (Abbas Ali's) favour provided that he was paid for doing so. I felt some difficulty at first when I considered the case whether "an attempt to obtain" an illegal gratification had been made out. But I am satisfied that not only was the intent to commit the offence defined in s. 161 of the Penal Code present in the mind of Baldeo Sahai, and for some time too, but that he made preparations to do so, and when these preparations and his plans were ripe, he attempted to carry out his intention. It is shown in evidence that the grant of a pension to Abbas Ali was received in the Accountant-General's Office on the 15th June. But an anonymous letter had reached the office, suggesting that there had been breaks in Abbas Ali's service, and great care should be taken in passing his pension; that the Assistant Accountant-General in charge of the Pension Department directed that the "permanent payable order" should be issued, that he took no notice of the letter because it was anonymous; and that he made over the file to Baldeo Sahai, who is a clerk in the pension pay department, to carry out his orders.

It is also shown that the Government of the North-Western Provinces had sanctioned the pension on the 12th June, 1878. It is also shown that the file was made over, as stated above, on the 14th August or thereabouts by Mr. Carnac after the objections of the Deputy Accountant-General to the pension had been considered by the Local Government and over-ruled, so that Baldeo Sahai must have been fully aware that no further objections to its payment would be entertained. When Abbas Ali first saw Baldeo Sahai, which I agree with Mr. Thomson must have been about the middle of August, he was told by Baldeo Sahai that an anonymous petition had been received objecting to the pension; that from what was written he was afraid that there would be a fuss about it; that Biss Sahib had raised several objections, and a report had been prepared that Rs. 25 a month in excess of the proper pension had been sanctioned, and Baldeo Sahai promised next day to show Abbas Ali the petition. The next day Abbas Ali met Baldeo Sahai near the Accountant-General's Office with the file in his hand and drove him home. It was evening, and Baldeo Sahai said that

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it was too late, he had better come the next morning, and "I will show you the letter."

So far Baldeo Sahai had made his preparations for carrying out his previously conceived plans and intention. He had also stimulated the curiosity of Abbas Ali and excited his fears by the false assertion that there were still difficulties in the way of his getting the full pension already sanctioned. The next day at 8 A. M. Baldeo Sahai showed the anonymous petition and told Abbas Ali of two pension cases which had been carried through by him. In one instance he had obtained half pay instead of one-third as pension for Mirza Ali, and in the other he had increased the pension of Ali Bakhsh Khan to Rs. 400 a month. There can be no doubt that, if this evidence be true, this statement of his successful efforts to secure better pensions for persons was meant to act upon Abbas Ali and induce him to follow the lead which Baldeo Sahai was now bent upon giving to him. He now begins what may be called business and what I think constitutes an attempt on his part to obtain a gratuity from Abbas Ali (1). The intention had been conceived, the plans had been matured, and all preparations made, and though no specific sum had been asked for, the transaction had so far advanced, that Abbas Ali had thoroughly understood what was being done, and put a stop to what might have been successful, if he had not refused to enter into any arrangement and intimated to him, that he "would not give him anything." That Baldeo Sahai understood that his attempt had failed is clear from his declaration, "You will rue and repent it." If Baldeo Sahai had found a willing listener, there can be no reasonable doubt that his offer to arrange the business, if Abbas Ali wished it, in the manner suggested by "*kar-rawai*," which he understood to be the giving and taking of money, would have been accepted. Not only would Baldeo Sahai have succeeded in his attempt to obtain a gratuity, but he would have caused Abbas Ali to commit an offence punish-

(1) "He (Baldeo Sahai) said that the office was a large one, much authority was vested in him, and by such *kar-rawai* (*i.e.*, I supposed giving and taking money) such things were effected: I gave him to understand that nothing of that need be expected from me; that as the report had been written which he had shown me, he could have no power in the matter: he then said that the office was a large one, if I wished it, every thing might be accomplished: I said I did not wish to do anything of the nature of the "*kar-rawai*" he wished, that is, I intimated to him I would not give him anything: as I left he said you will rue and repent it."

able under s. 116 of the Penal Code. I think therefore that there can be no doubt that, if the evidence be true, the offence charged under s. 161 of the Code against the accused has been made out.

On the merits I entertain no doubt of the accused's guilt. I fully accept Mr. Thomson's judgment in this respect. It is full and exhaustive, and deals with all the apparent difficulties, such as contradictory statements and discrepancies. The accused in no way made out his defence that he was the victim of a conspiracy on the part of the office hands organized by the head of his office, and so far from Abbas Ali being eager to secure the punishment of Baldeo Sahai, there is proof on the record that he did not wish that there should be any criminal charge. He from the first stated to the Deputy Commissioner at Lucknow that he wished no notice to be taken of his complaint. If he could have got his pension order made out, he would have been quite content.

An objection was taken by Baldeo Sahai's counsel that the Magistrate had contravened a ruling of this Court and had refused to summon the complainant in order that he might be cross-examined on the day fixed for hearing the defence. The law as laid down in s. 218 of the Criminal Procedure Code is: "If the accused person have any defence to make to the charge, he shall be called upon to enter upon the same and to produce his witnesses if in attendance, and shall be allowed to recall and cross-examine the witnesses for the prosecution." It appears from an order by the Magistrate dated the 4th September, after hearing the defence, that accused's pleader was offered an opportunity under s. 218 of cross-examining the witnesses. The pleader refused to cross-examine them and said that he would apply to the Court after he had examined his witnesses. The Magistrate held that he could not do this. The accused at this time had no witnesses in attendance. The case was adjourned and the witnesses were summoned. The ruling (1) cited by the respondent's counsel did not determine the point whether, if the Magistrate before granting an adjournment called upon the accused to exercise his right of recalling the witnesses for the prosecution, and the accused refused to do so at that time, the Magistrate would there-

(1) *Queen* v. *Lal Mahomed*, H. C. R., N.-W. P., 1874, p. 284.

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upon be at liberty to discharge the witnesses for the prosecution. This point the learned Judge expressly said "need not now be determined" in the case before him. In the same volume with the ruling referred to is another (1) by Mr. Justice Pearson in which it is laid down that the section does not say that accused shall only be allowed to recall and cross-examine the witnesses for the prosecution, provided that he expresses his wish to do so at the time when he is called upon to make his defence, and provided that these witnesses be still in attendance in the Court and do not require to be re-summoned. The plain meaning and intention of the section was to allow him the right in question at any time while he is engaged in his defence and before his trial is concluded. The object of the section is clearly to secure the accused the opportunity of cross-examining the witnesses for the prosecution after he has been informed as to the nature of the specific charge which he is required to answer. Until he knows this he is not in a position to decide on what points the evidence for the prosecution is material. If this opportunity be secured, I do not apprehend that he has any further right of re-calling the witnesses. If the witnesses for the defence are in attendance, they are to be examined, and after that the accused shall be allowed to recall and cross-examine the witnesses for the prosecution. But if the witnesses for the defence were not in attendance, the accused would still be at liberty to recall the witnesses for the prosecution. If he refuses to exercise this right *after he has entered on his defence*, he cannot, I think, demand as a right the recall of the witnesses for the prosecution, if the case be adjourned because he has not produced his witnesses. He has had the opportunity intended by the section. What his own witnesses may say can have little or no bearing on the cross-examination of the witnesses for the prosecution who are called to support the charge, but not to refute the evidence for the defence. There is also a second objection that the Magistrate acted illegally and against the practice of the Criminal Courts, inasmuch as he recorded evidence for the prosecution, both oral and documentary, after the case for the defence had been closed. S. 351 of the Criminal Procedure Code, however, gives the Magistrate power to summon any witness at any stage of any proceeding, inquiry or trial, if the

(1) *Queen* v. *Lal Singh*, H. C. R., N.-W. P., 1874, p, 270.

evidence of such person appears essential to the just decision of the case. "Trial includes the punishment of the offender" (s. 4), so I see no valid objection to the course adopted by the Magistrate. The trial had not closed until he had sentenced the accused, if convicted.

In conclusion I may state that the sentence passed was, in my judgment, too lenient for the offence committed. I now find that my honorable colleague proposes to increase the amount of punishment by a fine, in which proposal I quite agree with him.

PEARSON, J.—I concur with my honorable colleague in the opinion that, for the reasons set forth in the Joint Magistrate's able and well-considered judgment, the evidence of Abbas Ali is substantially trustworthy, and that it convicts the accused of an offence punishable under s. 161, Indian Penal Code. Nor does it appear to me that the Joint Magistrate's procedure is obnoxious to material objections. The view of the Sessions Judge, that "the accused has not committed any act towards the commission of the offence," and that "all that he has done is only preparatory to the commission of the offence," is erroneous. It may be that the accused in sending for Abbas Ali and showing him the anonymous petition and exhibit B and making him aware of their contents was only paving the way for the commission of the offence in question. But when, after referring to his own influence in the office and instancing two cases in which by that influence increased pensions had been obtained, he proceeded to intimate that anything might be effected by *kar-rawai*, and on the overture being rejected, concluded by declaring that Abbas Ali would rue and repent the rejection of it, the accused was actually offering inducements for the purpose of obtaining a bribe. To ask for a bribe is an attempt to obtain one; and a bribe may be asked for as effectually in implicit as explicit terms. As soon as he had caused Abbas Ali to understand that he was willing to render him a service for a bribe, the offence of attempting to obtain a bribe was consummated, and the Sessions Judge is wrong in holding that it was not consummated, but that the accused might have foregone his intention of committing it. The punishment awarded by the Joint Magistrate's sentence is, however, scarcely adequate to the offence.

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I would, therefore, set aside the order passed by the Sessions Court in appeal, and restore the finding and sentence of the Court of the Joint Magistrate with this modification, that, in addition to the punishment awarded by the sentence, the criminal Baldeo Sahai pay a fine of Rs. 200, or in default of payment undergo a further imprisonment for six months.

Appeal allowed.

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April 10.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

EMPRESS OF INDIA *v.* ASGHAR ALI AND OTHERS.

Evidence of Accomplice—Confession by Accused person—Act X of 1872 *(Criminal Procedure Code), ss.* 344, 345, 347—*Act I of* 1872 *(Evidence Act), s.* 24—*Pardon.*

Where a pardon was tendered by the Magistrate to a person supposed to have been concerned with other persons in offences none of which were exclusively triable by the Court of Session, and such person was examined as a witness in the case, *held* that, the tender of pardon to such person not being warranted by s. 347 of Act X of 1872, he could not legally be examined on oath, and his evidence was inadmissible.

Held also, that the statement made by such person was irrelevant and inadmissible as a confession, with reference to s. 344 of Act X of 1872 and s. 24 of Act I of 1872.

THIS was an appeal to the High Court by Asghar Ali, Hamid-ud-din, and Achal Behari, from convictions by Mr. W. Duthoit, Sessions Judge of Shâhjahânpur, dated the 16th November, 1878. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court. On behalf of all the appellants it was contended that the statement made on the trial of the appellants by the witness Irtiza Ali was not admissible as evidence against the appellants, and that, such statement being rejected, there was no evidence remaining which would justify the convictions of the appellants.

Mr. *Colvin* for Asghar Ali and Hamid-ud-din, and Mr. *Leach* and Babu *Dwarka Nath Mukarji* for Achal Behari.

The *Junior Government Pleader* (Babu *Dwarka Nath Banarji*) for the Crown.

The Court (PEARSON, J., and OLDFIELD, J) delivered the following