

That is a position which, as stated above, cannot, in our opinion, be maintained. For the above reasons we allow the appeal with costs, and, setting aside the order of the lower Court, we direct the execution to proceed. We must, in conclusion, express a hope that the Judge of the lower Court will devote his personal and particular attention to the execution of this decree, and will see that trustworthy men are sent to carry into effect the order for arrest.

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 JIT MAL
 v.
 JWALA
 PRASAD.

Appeal decreed.

REVISIONAL CRIMINAL.

1898
 December 21.

Before Mr. Justice Banerji.

QUEEN-EMPRESS v. ZAKIR HUSAIN.*

Act No. XLV of 1860 (Indian Penal Code), sections 192 and 123—Fabricating false evidence—False entry made by a Police officer in a special diary.

Held that a Police officer who made a false entry in the special diary relating to a case which was being investigated by him could not be convicted therefor of the offence of fabricating false evidence as defined in section 192 of the Indian Penal Code, inasmuch as the document in which the alleged false entry was made was not one which was admissible in evidence. *Empress v. Gauri Shankar* (1) and *Keilasum Putter* (2) referred to.

THE facts of this case sufficiently appear from the order of the Court.

Alston, for the applicant.

The Officiating Government Advocate (*Ryves*) for the Crown.

BANERJI, J.—The applicant, Zakir Husain, has been convicted, under section 193 of the Indian Penal Code, upon the two following charges:—

First, that on or about the 30th July 1898, he fabricated the special diary of July 29th, in the case of *Queen-Empress v. Balla and others*, so as to make it appear that the list of stolen property was furnished on that date; and, secondly, that

* Criminal Revision, No. 600 of 1898.

(1) (1883) I. L. R., 6 All., 42.

(2) (1870) 5 Mad., H. C. Rep., 373.

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on or about the 4th of August, in the Court of the District Magistrate, in the same case, he stated that the list of stolen property was furnished before the search and arrest of the accused.

The conviction and sentence have been affirmed by the learned Sessions Judge on appeal. It is urged that the conviction on each of the two charges is bad in law. In my opinion the contention is valid.

The facts found are these:—The house of one Ranjit was broken into by burglars, who carried away some of his property. He made a report of the burglary at the Etah Police Station. The applicant, who was the second officer at that station, suspected Balla and others, and searched their houses. He discovered certain property, and after having done so, caused Ranjit to give him a list of the property stolen from his house, so as to make it correspond with the articles found in the houses of Balla and others. This was on the morning of the 30th July 1898; but in his special diary of the previous day, the 29th, he entered a list of stolen property as given to him on that date before the search. It is in respect of this entry in the special diary that the applicant has been held guilty of having fabricated false evidence as defined in section 192 of the Indian Penal Code.

In my opinion the conviction for that offence cannot be maintained. In order to constitute the offence of fabricating false evidence, three things must exist:—First, that the entry or document in question is false; second, that the false entry or document was made with the intention that it may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator; and, third, that so appearing in evidence it may cause any person who in such proceeding is to form an opinion upon the evidence to entertain an erroneous opinion upon a material point. Where any of these elements is wanting, the offence is not that of fabricating false evidence. As two of the elements of the offence are that

the false document is intended to appear in evidence, and that when it so appears in evidence it should cause a judicial officer, or other public servant, or an arbitrator, to form an erroneous opinion upon a material point, it is clear that the document must be capable of being used in evidence. The offence of fabricating false evidence cannot therefore be committed in respect of a document which is not admissible in evidence. This view is supported by the ruling of this Court in *Empress v. Gauri Shankar* (1) and that of the Madras High Court in *Keilasum Putter* (2) to which the learned counsel for the applicant has drawn my attention. The document which the applicant, Zakir Husain, is said to have fabricated is a Police special diary, which under section 172 of the Code of Criminal Procedure, is not evidence. It was held by a Full Bench of this Court in *Queen-Empress v. Mannu* (3) that "entries in the special diary cannot by themselves be taken as evidence of any date, fact or statement therein contained." The diary may, it is true, be used by a Police officer for the purpose of refreshing his memory, or it may be used for the purpose of contradicting the Police officer who made the entries which it contains ; but the entries by themselves are not evidence, and therefore a special diary is not a document which is capable of being used in evidence. The learned Sessions Judge is wrong in holding that the entry in the diary could be referred to in support of the allegation that the list of the stolen property was produced before the discovery of the property. The entry could not be used as corroborative evidence, and this is conceded by the learned Government Advocate. He contends that it is the intention of the accused which is the *gravamen* of the charge, but he loses sight of the fact that not only must the accused intend that the document may appear in evidence, but the document must be such as may appear in evidence before the officer who is to form an opinion upon the evidence.

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(1) (1883) I. L. R., 6 All., 42.

(2) (1870) 5 Mad. H. C. Rep., 373.

(3) (1897) I. L. R., 19 All., 390.

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A document which is inadmissible in evidence can never be produced for the purpose of enabling an officer to arrive at any conclusion, erroneous or otherwise, upon a relevant point. A special diary, which can never be used as evidence, cannot be produced for the purpose mentioned above, and therefore the offence of fabricating false evidence cannot be committed in respect of it. Whether the accused in this case committed the offence punishable under section 218 of the Indian Penal Code, or any other offence, it is unnecessary at present to decide. But I am of opinion that his conviction for the offence of fabricating false evidence cannot be sustained.

The conviction of the accused upon the second charge, namely, that of giving false evidence, is equally unsustainable. The charge itself as drawn is very defective. It does not set out the particular statement in respect of which the accused is charged with perjury. It only states the substance of what the accused is said to have stated in his deposition. As the accused pleaded not guilty to the charge, it was the duty of the prosecution to prove the particular statement which the accused was charged with having made falsely. For this purpose the deposition itself ought to have been put in evidence and formally proved. This was not done in this case, and there is absolutely no evidence on the record to prove that the accused made any statement on the 4th of August, and, if he made any, what that statement was. I am unable to follow the observation of the learned Sessions Judge that the "Court could take judicial notice" of the deposition, and that the accused "did not, and could not, deny having made it." When the accused pleaded not guilty he did deny everything. If by the judicial notice to which the learned Judge referred he meant the provisions of section 80 of the Indian Evidence Act, he was clearly in error. Even if the alleged deposition of the 4th of August 1898 had been produced in evidence, it would not have been admissible against the accused unless it was proved that it was he who gave the deposition and made the statement

which was the subject of the charge. The mere production of the deposition would not, under section 80, have made it admissible. As the deposition was not produced and the identity of the accused with the person who gave the deposition was not proved, the charge of giving false evidence was not established. I may observe that the learned Government Advocate very properly abandoned this part of the case against the applicant.

The result is, that the application is allowed, the conviction and sentence are set aside, and the applicant is acquitted of the offences with which he was charged. I direct that he be at once released.

The learned Government Advocate has asked me to order the trial of the applicant for the offence punishable under section 218 of the Indian Penal Code. I do not deem it desirable to make any such order at present; but I may observe that this decision will not preclude the Magistrate of the District from taking any proceedings justified by law against the accused for any other offence with which the accused may be lawfully charged.

Before Mr. Justice Blair and Mr. Justice Burkhitt.

KALIAN MAL (PLAINTIFF) v. RAM KISHEN AND OTHERS (DEFENDANTS)*
Regulation No. 1 of 1877 (Ajmere Courts), sections 18 et seq.—Reference by Commissioner of Ajmere—Powers of High Court—Jurisdiction.

Held that where a point of law or a question as to the construction of a document is referred to the High Court by an order purporting to be made under s. 18 of the Ajmere Courts Regulation, the High Court cannot consider whether the point referred arises in the case in which the reference before it has been made or not; but its functions are limited to pronouncing an opinion on any point which may be so referred to it.

The facts of this case sufficiently appear from the order of the Court.

Pandit *Sundar Lal* for the appellant.

Mr. *W. K. Porter* and Babu *Devendro Nath Ohdedar* for the opposite party.

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December 22.
