APPELLATE CRIMINAL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

1916
December, 15.

EMPEROR *v.* YAKUB ALI AND OTHERS *

Act No. I of 1872 (Indian Evidence Act), sections 11, 14 and 15—Evidence—Admissibility of evidence of similar but unconnected transactions in which the accused were concerned— Act No. XLV of 1860 (Indian Penal Code), section 420—Cheating.

S, Y and W were charged with having cheated B and P and thereby obtained from them various sums of money. The mode adopted by the accused was as follows: S, representing himself to be a broker, introduced B and P, who wanted to borrow money, to Y and W, as being the agents of a wealthy lady of the name of Akbari Begam, and a story was told them that Akbari Begam had a large amount of ready money which she was willing to lend on very favourable terms. Negotiations were commenced, and extended over a considerable period, in the course of which B and P were induced to part with various small sums of money for preliminary expenses. Ultimately the negotiations fell through, and it was discovered that they had been fraudulent from beginning to end.

The accused's defence was, broadly, that, while admitting that B and P had paid them the sums of money in questions, the payments were made in circumstances totally different from those alleged by the prosecution. They denied that they had ever said that there was such a person as Akbari Begam, and, *a fortiori*, that they had ever represented themselves as her servants or agents.

Held that on the case for the prosecution evidence was admissible that the same three persons had on other occasions made proposals of much the same kind to other persons to whom they told a story similar in all essential particulars down to the name of the proposed lender of the money.

King Emperor v. *Abdul Wahid Khan* (1) and *Emperor* v. *Debendra Prosad* (2) referred to.

SHORTLY put the case for the prosecution was that the two complainants who were in need of a loan came into touch with the accused Sheo Sahai, who was a broker, and who introduced them to the accused, Yakub Ali and Wazir Ahmad, as being the agents of a wealthy lady named Akbari Begam who was willing to lend money on very favourable terms. Several interviews and journeys took place, ostensibly for the purpose of settling the preliminaries of a loan to the complainants, and the three accused from time to time obtained several sums of money from the complainants for "expenses." Ultimately the complainants

*Criminal Appeal No. 669 of 1916, by the Local Government, from an order of I. B. Mundle, Sessions Judge of Jaunpur, dated the 6th of March, 1916.

(1) (1916) I. L. R., 34 All., 93. (2) (1908) I. L. R., 36 Calc., 573.

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realized that it was all a hoax and broke off negotiations; the matter was investigated by the police, and a case of cheating was instituted against the accused in respect of three specific sums of money. At the trial before the magistrate the prosecution examined the complainants and witnesses to corroborate their statements. Then five other witnesses were produced who stated that they, too, had been cheated by the same accused in exactly the same way as the complainants. Cross-examination of the prosecution witnesses was reserved. The magistrate framed the following charge: "That you, between 16th June, 1914, and 7th December, 1914, cheated and thereby dishonestly induced Brij Kishore and Pitambar Nath," the two complainants, "to deliver the property as detailed below, . . . and thereby committed an offence punishable under section 420, Indian Peual Code, and within my cognizance." The defence set up was to the effect that there had been certain negotiations with the complainants, but that those negotiations were with a view to the latter advancing and getting others to advance money for financing a litigation on behalf of an impecunious lady, named Humai Tajdar Begum, whose agent was Yakub Ali, one of the accused. The accused admitted the receipt of the three sums of money which formed the subject matter of the charge, but said that the money was part of what the complainants promised to advance for the purpose mentioned above. They denied having cheated the complainants with the story of obtaining loans for them from Akbari Begam or any one else. The prosecution witnesses were, with a few exceptions, re-called and cross-examined by the accused. The trying magistrate found the accused guilty and sentenced them under section 420, Indian Penal Code. On appeal the Sessions Judge held that the evidence of the five witnesses who deposed to the accused having cheated them also with a similar story was irrelevant and inadmissible, and that the remainder of the prosecution evidence did not establish the guilt of the accused. He, therefore, acquitted them. The Local Government appealed against the acquittal.

The Government Advocate, (Mr. *A. E. Ryves*,) with whom Babu *SitalPrasad Ghosh*, for the crown:—

So much of the evidence of the five witnesses whose statements have been ruled out as inadmissible by the Sessions Judge

as directly corroborates the statments of the complainants is clearly admissible. The rest of that evidence which went to show that other persons had been cheated by the accused at about the same time and in the same way as the complainants is relevent and admissible under sections 11, 14 and 15 of the Evidence Act. The complainants had to prove not only that a particular representation was made to them by the accused in consequence of which the money had been paid, but also that the representation was fraudulent. To prove the latter they led evidence of the same representation having been made by the accused at or about the same time to other persons who had been similarly cheated. It was not the object of this evidence to establish the commission of other offences by the accused or the *fact* that a particular representation had been made to the complainants, but to explain the *character* of that representation, to establish the intent to defraud and to forestall the possibility of the defence, which had not been foreshadowed in any way, taking the shape that there was no fraudulent intention ; *Emperor* v. *Debendra Prosad* (1) and the authorities cited and followed therein ; *Emperor* v. *Barma Shankar* (2), *The King* v. *William Henry Ball* (3)and *The King* v. *Shellaker* (4). In any case it was not open to the Sessions Judge in appeal to entertain any objection on the score of inadmissibility of evidence which was allowed to be brought upon the record without any challenge by the accused in the trial court. If the accused had challenged the admissibility of the evidence in question it would have been open to the trying magistrate to add a charge of criminal conspiracy in which case the evidence would have been unquestionably admissible under section 10 of the Evidence Act.

Mr. *C. Dillon*, (with him Dr. *S. M. Sulaiman*), for the accused :—

It is a general principle of criminal law that evidence of previous criminal acts which may have been committed by the accused is irrelevant in a subsequent trial. An accused person

(1) (1909) I. L. R., 36 Calc., 573.

(2) (1916) Unreported; Cr. Rev. No. 181 of 1916, decided on the 8th of April, 1916.

(3) [1911] A. C., 47.

(4) [1914] 1 K. B., 414.

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must not be prejudiced at his trial for the commission of a particular offence by the leading of evidence tending to show that he committed or attempted to commit a similar offence on some other occasion. The prosecution is not entitled to produce such evidence unless the accused has given evidence of his good character. It is true that there are certain exceptions to the rule above stated, but the present case does not come within those exceptions. Neither section 14 nor section 15 of the Evidence Act is applicable to this case. Section 14 applies to those cases in which the act which is proved to have been committed by the accused is criminal or otherwise according to the state of mind of the accused at the time when it was committed; it does not apply to a case where the guilt or innocence depends upon actual facts and not upon the state of a man's mind. Where the actual facts or the acts alleged by the prosecution are either admitted or proved, but the case turns upon something further, namely, the state of mind of the person committing those acts, and no direct evidence of the state of mind is available, section 14 comes into play. In the present case the sole question was whether the representations actually made by the accused to the complainants were true or false—a matter of direct evidence. It was no part of the defence that the acts alleged by the complainants were accidental rather than intentional. There is no question whether the acts were intentional or accidental or done with a particular knowledge or intention. Section 15 of the Evidence Act has no application to the present case. *King-Emperor* v. *Abdul Wahid Khan* (1) and *Emperor* v. *Chota Lal* (2). The evidence in question might have been relevant if a distinct charge of criminal conspiracy had been framed against the accused. The accused could not properly have challenged this evidence at the time when it was produced; because at that time the charge had not been framed and they did not know whether a charge of criminal conspiracy was going to be framed or not. But when the charge was drawn up as one of cheating alone, they challenged the admissibility of the said evidence in the appellate court. The trying magistrate found that the accused had entered into a

(1) (1911) I. L. R., 34 All., 93. (2) (1916) Unreported Cr. Rev. No. 1116 of 1915, decided on the 10th of March, 1916.

criminal conspiracy, although there was no such charge against them. They have been condemned without such a charge being framed against them, and upon evidence which would be relevant only if such a charge had been framed.

PIGGOTT, J.—In this case four persons, Sheo Sahai, Yakub Ali, Wazir Ahmad and Thomas Fanthome, were tried before a magistrate of the first class at Jaunpur on a charge framed under section 420, Indian Penal Code. The magistrate, after a prolonged trial, found all the four accused guilty, convicted them and sentenced them to substantial terms of imprisonment and also to fine. All the four accused appealed to the Additional Sessions Judge of Jaunpur, and the Additional Sessions Judge, in a judgement, dated the 6th of March, 1916, that is to say, some eight months after the hearing in the magistrate's court had commenced, has reversed the conviction and acquitted all the four accused. The appeal before us is one by the Local Government against the acquittal of Yakub Ali, Wazir Ahmad and Sheo Sahai. The learned Government Advocate, in opening the case in support of the appeal, called our attention to the fact that there was no appeal against the acquittal of Thomas Fanthome ; but urged that this action on the part of the Local Government should not be construed as prejudicing their case against the other accused persons, or as implying an admission on the part of the Local Government that any portion of the prosecution evidence was false or unreliable. We can only deal with this matter by leaving the case of Thomas Fanthome out of our consideration, and hereafter I propose to speak of the three men, Yakub Ali, Wazir Ahmad and Sheo Sahai, whose cases are before us, as "the accused." The case against these men is that they deceived two persons of the names of Brij Kishore and Pitambar Nath and, by deceiving them induced them to part with various sums of money. The charge is framed in respect of three separate items, a sum of Rs. 60 sent by money-order in June, 1914, another of Rs. 70 sent by money-order in October, 1914, and another of Rs. 100 sent by money-order in December, 1914. The story told by Brij Kishore and Pitambar Nath is substantially as follows: They were previously acquainted with the accused Sheo Sahai, a resident of Lucknow, who describes himself as a broker. Having occasion to require a loan of money, they both of them

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discussed the question with Sheo Sahai. The story which he then told them was subsequently confirmed by the other two accused. It was to the effect that a wealthy lady of Rampur, named Akbari Begam, had a large sum of money which she was anxious to lend out and which she was prepared to lend at an extremely low rate of interest. Yakub Ali and Wazir Ahmad were servants of this lady and were entrusted to act on her behalf in the arrangement for loans to be made out of the money above referred to. The lady was so anxious to dispose of the whole of the available money in this manner that she was prepared to make, through her agents, a further offer to Brij Kishore and Pitambar Nath, namely, that if they would bring forward other persons desirous of borrowing large sums of money, the loan which they themselves required, say about Rs. 40,000 apiece, would be made to them, without any interest at all, on very easy terms as regards instalments. Pitambar Nath and Brij Kishore have gone into the witness-box and have given evidence in support of this story. They describe a number of journeys to and from Jaunpur, Lucknow and Moradabad, and a number of interviews with the accused. They mention that there was an attempt on their part to bring forward others persons prepared to borrow money on easy terms, and they give details connected with the case of one Dasrath Bharthi. They say that Wazir Ahmad and Yakub Ali visited the Gonda district in connection with this affair, in order to inquire into the details of the aforesaid Dasrath's landed property. They say similar inquiries were made at Machlishahar in respect of their own landed property. The transactions to which they depose are alleged to have extended over a prolonged period, from about the month of November, 1914, to about the month of January, 1915. Finally, according to these two witnesses, they came to the conclusion that they were being played with, and that the money which had been obtained from them on one pretext or another by the accused in connection with this affair was as good as lost. They then broke off further negotiations and returned to their home. It was only in consequence of inquiries which the police were beginning to make into the proceedings of these accused persons, that Brij Kishore and Pitambar Nath were induced to come forward and make a complaint. In corroboration

of this story a very great deal of evidence was produced. Some of this evidence it is unnecesssary to refer to in detail, because the facts are, up to a certain point, admitted by the accused themselves. It might, for instance, have been of great importance for the prosecution to bring forward evidence to corroborate Brij Kishore and Pitambar Nath on such questions as that the three accused were acting together and were jointly negotiating with those two complainants upon some matter or other. They might have required direct corroboration of their statements that money passed from them to the accused, and so on. It is unnecessary to discuss the reliability of the evidence of these two witnesses in so far as the correctness of their statement is admitted by the accused themselves. The accused put forward a carefully considered and an elaborate defence. They reserved their cross-examination during the hearing of the prosecution witnesses in the magistrate's court, and they finally produced written statements of considerable length, divided methodically into paragraphs, putting forward in the clearest possible manner the case they desired the court to consider as their defence. They admit that all three of them were in negotiation with Brij Kishore and Pitambar Nath about some matter or other during the period covered by the evidence of the two complainants. They admit that they did receive money from the complainants, and in particular the three sums of money specified in the charge. They deny, however, having deceived the complainants in any way. The deny having told the complainants anything about a lady called Akbari Begam, or having represented themselves as servants or agents of any such lady. They say that the negotiations which did in fact take place between the parties were about an entirely different matter. They bring forward a story which has a certain basis of truth, as can be shown from the records of this Court itself. There was in fact a lady of Rampur named Humai Tajdar Begam, and it seems to be true that the accused Yakub Khan had been at one time in this lady's service. She appeared as plaintiff in a suit in which she claimed an enormous sum of money as the dower-debt of her late husband, and the case attracted considerable attention at the time when it was litigated. The subsequent history of this litigation need be

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mentioned in so far only as it is necessary to make clear the defence set up by these accused. It seems that Humai Tajdar Begam's suit was financed by a gentleman of the Bijnor district, and that after the plaintiff had obtained a decree from this Court this gentleman in some way or other contrived to appropriate to himself the entire benefits of this decree. The transaction was not recent. In fact, according to the accused themselves, the final transfer by means of which the gentleman of Bijnor secured for himself all the benefits that were to be obtained under the decree for the dower-debt took place in the month of November, 1903, so that from any possible point of view the period of limitation based on this cause of action was running out during the latter part of the year 1915. So far the accused are telling us a story which can be shown to have a basis in fact, and it is a story with which they must have been acquainted owing to Yakub Ali 's connection with Humai Tajdar Begam. Now, say the accused, it is not true that they ever offered to obtain a loan of any sort or kind for Brij Kishore or Pitambar Nath. On the contrary, they were themselves trying to borrow money from any one who might be prepared to lend it, as a speculation, for the purpose of financing a suit against the gentleman of Bijnor who had appropriated to himself the benefits of Humai Tajdar Begam's decree. They say that, through Sheo Sahai, they succeeded in interesting Brij Kishore and Pitambar Nath in this affair, and that these two complainants promised to put them in communication with other persons as well, and to endeavour to raise the sum of Rs. 25,000, which was estimated as necessary to the financing of the suit. Eventually, according to the accused, it became clear that Brij Kishore and Pitambar Nath were either unable or unwilling to find the necessary money. There was a quarrel between the parties, and the accused threatened that they were going to bring a suit against these complainants for the breach, presumably, of a verbal contract entered into that they would supply the money. The suggestion is that, as a defence against a suit of this nature, Brij Kishore and Pitambar Nath managed to bring to the notice of the police the false story on the strength of which the accused have been prosecuted. What we have to consider most particularly is what corroboration is forthcoming upon

this record to show that the story told by the two complainants is substantially true, where it differs from that put foward on behalf of the accused. It follows that one of the principal points on which the prosecution has to satisfy the Court is that the three accused were offering a loan, and not trying to raise one, and that they were putting themselves forward as the servants or agents of a wealthy lady prepared to lend money, and not as persons interesting themselves from philanthrophic motives in the affairs of a ruined and necessitous old lady in desperate need of some one who would lend money to finance her suit. The learned Additional Sessions Judge has dealt with the entire evidence in a most unsatisfactory manner. No one reading his judgement would suppose how much of the prosecution story was admitted by the accused, or how various and manifold was the corroboration tendered in support of the truth of the story told by Brij Kishore and Pitambar Nath. There are two witnesses, Kanhaiya Lal, son of Mohan Lal, and Hanuwant Singh, who gave direct evidence to the effect that these accused persons were offering a loan of money to Brij Kishore and Pitambar Nath, that the visits paid by these two complainants to Moradabad were in connection with an attempt to borrow money, and that the accused Yakub Ali and Wazir Ahmad represented themselves to be the agents of a lady who was prepared to lend money. Some corroboration is also forthcoming in the evidence of the witness Guppu, as against the accused Sheo Sahai. Over and above this we have, as the trying magistrate rightly remarks, a mass of documentary evidence on the record of a very striking character.

Now I desire to pass on to another point in the case about which there has been considerable argument. The learned Sessions Judge names five witnesses, Rudra Nath, Ram Asarey, Hanuwant Singh, Kanhaiya Lal and Bir Bhaddar Singh, in respect of whom he says that they were put forward by the prosecution simply to prove that the accused had also cheated them with the same false tale which they told Brij Kishore and Pitambar Nath. Looking at their evidence solely from this point of view, the learned Sessions Judge rejects it as inadmissible, on the ground that it was not covered by the provisions of sections 14 and 15 of the Indian

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Evidence Act. I have had occasion incidentally to mention the evidence of the witness Hanuwant Singh, and from any point of view some part of the evidence of this witness is admissible as direct corroboration of Brij Kishore and Pitambar Nath. I may note also that the Kanhaiya Lal here referred to must be the second Kanhaiya Lal, son of Kamta Prasad, of Lucknow, and not the other witness of the same name to whom I have already referred. Now as regards two of these witnesses, Rudra Nath and Ram Asarey, it so happened that unfortunately they were not cross-examined in the magistrate's court. In the view which we have agreed to take of the case as a whole, it is not necessary for me to go into this question in any detail. The learned Government Advocate informed us that he did not wish to press for the consideration of the evidence given by Ram Asarey, but he did ask us to take into consideration the evidence given by Rudra Nath. We went in considerable detail into the circumstances under which Rudra Nath was examined in the magistrate's court and under which the accused finally abandoned, under protest, their claim to cross-examine him. For myself I am content to say this much. I should not be prepared to hold that the evidence of Rudra Nath, as it stands on the record, is not legally capable of being taken into consideration; but I think that, under all the circumstances, the evidence of this witness, untested by cross-examination, becomes of practially negligible value. I propose, therefore, to exclude it altogether from consideration, and I attach no weight whatsoever to this evidence in coming to a decision in the case. There remains, however, the evidence of Bir Bhaddar Singh and of Kanhaiya Lal, son of Kamta Prasad, and those portions of Hanuwant Singh's evidence which are not admissible as direct corroboration of the prosecution story. On the general question as to the admissibility in a case of this sort of evidence that the persons accused had, successfully or unsuccessfully, played off the very same fraud in respect of which the charge has been framed upon persons other than those who are named as complainants in the charge, we listened to a good deal of argument and a number of cases have been cited. There is not much case-law on the subject in this Court. The only reported case to which we were referred is

that of *King Emperor* v. *Abdul Wahid Khan* (1). Reference was also made to two unreported cases, namely, Criminal Revision No. 1116 of 1915, the case of *Chote Lal*, decided by the Honourable the CHIEF JUSTICE on the 10th of March, 1916, and Criminal Revision No. 181 of 1916, the case of *Barma Shankar*, decided by myself on the 8th of April, 1916. In no one of these three cases was the general question fully argued out as it has been before us. In the reported case Mr. Justice CHAMIER considered that evidence of similar but distinct acts of fraud committed by the accused upon other persons had been wrongly admitted. The learned CHIEF JUSTICE also held that evidence of a similar nature had been wrongly admitted in the case before him, though it would seem that he might have taken a different view if there had been a definite charge of conspiracy framed in connection with the facts which he was dealing. In the case decided by myself I admitted evidence substantially similar to that tendered by the prosecution in the present case. I did so without discussing the general question, but fortifying myself by a recent decision of the Calcutta High Court in *Emperor* v. *Debendra Prosad* (2). I think I had better make the precise question in issue clear by setting forth in detail the evidence of the witness Bir Bhaddar Singh. Now this witness is a gentleman of position and respectability. The trying magistrate considered him to be a quite unexceptionable witness. The learned Sessions Judge does not question this, but has simply ruled out his evidence as inadmissible. Bir Bhaddar Singh deposes that he got into touch with Sheo Sahai, somewhere in the month of December, 1913, and received a letter from Sheo Sahai which he produces and which is Exhibit A 53 in the case. At a personal interview which followed, Sheo Sahai informed him that he would be able to obtain a loan of a large sum of money at a very low rate of interest from Akbari Begam of Rampur, through her servants, Yakub Ali and Wazir Ahmad. He subsequently met these two accused and they told him the very same story. He produces a letter, Exhibit A. 54, written to him by Wazir Ahmad. In my opinion the whole of the evidence of this witess, so far as it has been set forth above, including the

(1) (1911) I. L. R., 34 All., 93. (2) (1909) I. L. R., 36 Calc., 573.

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exhibits proved by him, is admissible in evidence and is of great importance in the decision of the present case. The only point in Bir Bhaddar Singh's evidence as to which I entertain any doubt is the passage towards the close of his examination-in-chief, in which he was permitted to depose that he had actually paid Rs. 320 to the accused at their request, on the pretext that it was wanted on account of expenses. The prosecution had put foward this witness before the charge was framed and while the defence was being reserved. They were entitled to adduce evidence relevant upon any charge the magistrate could lawfully be asked to frame hereafter, and they were entitled to meet in anticipation any defence which the accused might reasonably be expected to put forward. It seems to be beyond question, and has in substance been conceded in argument, that if the trying magistrate had seen fit to frame a charge of criminal conspiracy under section 120 B, Indian Penal Code, the whole of Bir Bhaddar Singh's evidence as above set forth would have been legally admissible. Personally, I would go further and say that, if the charge which has been actually framed had been drawn up a little more carefully, the question of the admissibility of this evidence would hardly have arisen. The real charge against each of the accused was that each of them had conspired with the other two to defraud the two complainants and had, by cheating the complainants, either obtained for himself, or abetted the others in obtaining, the sums of money specified in the charge. Abetment by conspiracy is one of the forms of abetment as defined in the Indian Penal Code, and was the suitable form of abetment to have alleged in the present case. As a matter of fact, the learned magistrate, although he drew up the charge in a plain and unelaborate form, has convicted the accused upon a finding that they entered into a conspiracy to do the acts alleged in the charge. This is clear from the concluding portion of his judgement. Putting aside, however, the question of conspiracy, we have to consider precisely the manner in which the prosecution desired to rely upon such evidence as that given by Bir Bhaddar Singh. The case for the accused was that they had never said that there was such a person as Akbari Begam, and that *a fortiori* they had never represented themselves as servants or agents of any

such lady. To prove that, at or about the very same time when the accused were alleged to have made such a representation to Brij Kishore and Pitambar Nath, they had been making precisely the same representation to a gentleman like Bir Bhaddar Singh, was at once to corroborate the prosecution evidence in support of the particular offence charged and to disprove the case set up for the defence. It seems therefore that the evidence to this extent was clearly admissible under section 11 of the Indian Evidence Act. Further, the prosecution were bound to prove the intention of these accused in the course of their dealings with Brij Kishore and Pitambar Nath, and in this connection it seems to me that the evidence to which I have referred was admissible under section 14 of the Indian Evidence Act. It is quite true that an accused person should not be prejudiced at his trial by proof of the fact that he has committed similar offences to that with which he has been charged. At least, such evidence is not admissible unless the accused has challenged its production by producing evidence of his previous unblemished character. The law, however, does not say that evidence otherwise admissible must be excluded if incidentally it involves showing that other offences similar in nature to the one under investigation had been committed by the accused. Personally, I should have endeavoured, as far as possible, in recording the evidence of the witness Bir Bhaddar Singh, to steer clear of this difficulty. I should have allowed his evidence to go in in examination-in-chief to the extent already indicated ; but I should have stopped him when he began to depose that he was defrauded by the accused. If the accused had chosen to take up the position that it was impossible for the court properly to appreciate the evidence of this witness without having the whole of his story before it, and had for this reason gone on to cross-examine Bir Bhaddar and to elicit from him in cross-examination the fact that money had actually passed from him to the accused, it seems to me that there could have been no reasonable objection to this being done. There is just one more point I wish to make with regard to this question of law. The whole of the evidence which was challenged before the learned Sessions Judge went in without any objection on the part of the accused in the court of the trying magistrate.

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In view of the remarks which I have already made, it would seem that the position was really this:—The evidence was not challenged by the accused at the time when it was tendered, and could not have been successfully challenged by them, because the only result of so doing might have been to lead the magistrate to pay more attention to the framing of the charge and to draw up a charge of conspiracy in connection with which the admissibility of the evidence could scarcely have been questioned. No objection was therefore raised; but when it was found that the magistrate and drawn up the charge as one simply alleging three acts of cheating against the accused, then the point was taken in the court of the Sessions Judge that on this particular charge the evidence adduced was not admissible. I think the learned Sessions Judge was mistaken in allowing the objection at all. Even assuming that he was right on the question of law as it was put to him, I think it was his clear duty to have considered the provisions of section 423 of the Code of Criminal Procedure, and to have seen whether the difficulty raised was not one which he could have met, either by "altering the finding" within the meaning of that section, or by ordering a new trial, or ordering the accused persons to be committed for trial before himself upon a properly framed charge. The manner in which he has excluded this evidence altogether, and made its exclusion the basis for a finding of not guilty in respect of all the accused persons, seems to me seriously objectionable.

With regard to the importance of Bir Bhaddar Singh's evidence, I have a word to add. The two letters Ex. A. 53 and A. 54, produced by him prove beyond question that the transaction between himself and the accused was one of a loan offered by the accused and not of a loan to be advanced by himself. I think those documents are clearly admissible as they throw light upon the use of the vague word *muamala*, and other ambiguous expressions in the documents relied upon by Brij Kishore and Pitambar Nath.

Having said this much, I do not propose to go into the rest of the case at any length. In my opinion the evidence given by Hanuwant Singh and Kanhaiya Lal is reliable and does corroborate the story told by Brij Kishore and Pitambar Nath. On the

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review of the case as a whole I am quite satisfied that these men were rightly convicted by the Magistrate. The reversal of that conviction by the learned Additional Sessions Judge proceeds in the main upon a mistaken view of the law, and even as regards that portion of the evidence with which the learned Sessions Judge considered himself competent to deal, he seems to have dealt with it in an unsatisfactory manner and without real appreciation of its weight and cogency. I think this appeal must be accepted, the order of acquittal made by the Sessions Judge set aside and the conviction as recorded by the magistrate restored, along with the sentences of imprisonment and fine passed by him against each of these three men, Yakub Ali, Wazir Ahmad and Sheo Sahai.

WALSH, J.—I entirely agree, except that I think the result is somewhat lenient to the accused. On the question of the admissibility of the evidence, this seems to me a perfectly plain case. In a case of this kind one question, which it is necessary for the prosecution to prove, is whether the untruth is honest or dishonest. In other words whether it is accidental or intentional. Because if a man makes an honest mis-statement the untruth is, so far as he is concerned, accidental. I therefore think that section 15 of the Evidence Act applies to all these cases, the question being whether an untruthful statement is "accidental or done with particular knowledge or intention." I adopt in its entirety the Calcutta ruling with a slight addition. I think the test to be applied must include every possible defence and not be confined merely to the actual defence raised by the accused.

As we are differing from the Sessions Judge, I will merely add this on the merits. I am absolutely convinced beyond any reasonable doubt that the story of Brij Kishore and Pitambar Nath is substantially true.

I agree with the observations of the magistrate at the conclusion of his judgement. I think the investigation of this case is creditable in the extreme to those who conducted it. The police actually disclosed, which they were not under any obligation to do, to the defendants the original information, which bears the signature of Brij Kishore, but which came from most of the complainants and preceded the first information report. It seems to me

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that the defence had every latitude permitted to them. It is, however, to be observed that the final determination of this clear case has taken eighteen months from its commencement.

BY THE COURT:—The appeal is allowed, the order of acquittal passed by the learned Additional Session Judge is set aside and the conviction recorded by the magistrate is restored, along with the sentences of imprisonment and fine passed by him against Yakub Ali, Wazir Ahmad and Sheo Sahai.

Appeal allowed.

APPELLATE CIVIL.

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December, 19.

Before Mr. Justice Piggott and Mr. Justice Walsh.

EJAZ AHMAD AND ANOTHER (APPLICANTS) *v.* KHATUN BEGAM (OPPOSITE PARTY.) *

Muhammadan law—Waqf—Minor mutawalli—Jurisdiction of court to appoint guardian in respect of waqf property—Act No. VIII of 1890 *(Guardians and Wards Act.)*

A Muhammadan died, leaving two sons and a daughter, all minors, and having also constituted a waqf of a partly public and partly private character, under which, upon the death of the waqif, one or other of his sons was to be *mutawalli*.

Held that it was competent to the District Judge to appoint a person to perform the duties of the *mutawalli*, pending either the coming of age of the minors or the institution of a regular suit by some persons interested in the endowment to contest the arrangement made by him.

THE facts of this case were as follows :—

One Huzur Ahmad died, leaving three minor children, two boys and a girl. Under the provisions of the Guardians and Wards Act, 1890, the District Judge of Budaun appointed Huzur Ahmad's own brother Ejaz Ahmad to be guardian of the property of the minors. Huzur Ahmad also constituted a waqf partly of a public and partly of a private nature, under which it was provided that he himself should be the first *mutawalli* and after him one or other of his sons. With regard to this the District Judge made a further order appointing Ejaz Ahmad to be the "*mutawalli* of the waqf property during the minority of the sons of Huzur Ahmad." Against both the orders mentioned above

* First Appeal No. 131 of 1916, from an order of F. D. Simpson, District Judge of Budaun, dated the 29th of March, 1916.