

MISCELLANEOUS CRIMINAL.*Before Broadway and Abdul Qadir J.J.*

THE CROWN (COMPLAINANT) Petitioner

versus

PARMA NAND (ACCUSED) Respondent.

1933

*March 15.***Criminal Miscellaneous No. 194 of 1932.**

Criminal Procedure Code, Act V of 1898, Section 164 (2): Statement of approver under—whether can be recorded or, oath or solemn affirmation—Perjury—whether charge competent—Indian Oaths Act, X of 1873, Section 5.

Held, that on a person being offered a pardon under section 337 of the Criminal Procedure Code, and on his acceptance of that pardon, there is no objection to his being placed before a Magistrate in order that his statement may be recorded under section 164 (2), and the Magistrate is empowered to administer to the deponent an oath or solemn affirmation and the statement so recorded can form the subject of an alternative charge under the perjury sections of the Indian Penal Code.

Queen-Empress v. Alagu Kone (1), Suppa Tevan v. Emperor (2), Queen-Empress v. Khem (3), followed.

Abdul Aziz v. The Crown (4), Emperor v. Moti Lal-Hira Lal (5), Emperor v. Vishwanath Krishna Sathe (6), referred to.

Lalu v. Queen Empress (7), distinguished and explained.

Petition under section 339, Criminal Procedure Code, for the prosecution of the accused under sections 193, 194, Indian Penal Code, on the complaint framed by the Sessions Judge, Shahpur, at Sargodha.

CARDEN-NOAD, Government Advocate, for Petitioner.

M. L. BATRA and K. AHMAD, for Respondent.

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- (1) (1893) I. L. R. 16 Mad. 421. (4) 34 P. R. (Cr.) 1916.
 (2) (1906) I. L. R. 29 Mad. 89. (5) (1922) I. L. R. 46 Bom. 61.
 (3) (1900) I. L. R. 22 All. 115. (6) (1906) 8 Bom. L. R. 589.
 (7) 2 P. R. (Cr.) 1893.

1933

*Order, dated 25th January, 1933, referring case to
a Division Bench.*

THE CROWN

v.

PARMA NAND.

TEK CHAND J.

TEK CHAND J.—One Sarab Dayal was murdered in November 1931 at Bhera in the Shahpur district. In the course of the investigation the respondent Parma Nand was tendered a pardon under section 337 of the Code of Criminal Procedure, on the conditions specified in that section. Parma Nand accepted these conditions and was produced before *Sheikh* Alla-ud-Din Arshad, Magistrate, 1st Class, who recorded his statement on *solemn affirmation* under section 164 of the Code. In this statement he implicated Ram Narain and Narsingh Das as the persons who had committed the murder in company with himself. When Parma Nand was produced as a witness for the prosecution before the Committing Magistrate, he went back on the statement which he had made before *Sheikh* Alla-ud-Din Arshad, and stated in cross-examination that the statement made by him under section 164 was false, that he made it because he had been tortured by the police and that as a matter of fact Narsingh Das and Ram Narain were not concerned in the crime. In the course of the trial before the Sessions Judge, Parma Nand stuck to this position and repeated that he had falsely implicated Narsingh Das and Ram Narain in his statement before Mr. Arshad under pressure of the police.

As there was no other evidence against Narsingh Das and Ram Narain the learned Sessions Judge acquitted them. But being of opinion that there were reasons to believe that Parma Nand had given false evidence, he drew up a complaint against him under sections 193/194 of the Indian Penal Code, and the learned Government Advocate has moved this Court

under section 339 (3) of the Code of Criminal Procedure, for sanction to prosecute Parma Nand for offences under these sections. It appears from the complaint as drafted by the Sessions Judge and the application made by the learned Government Advocate that it is intended to make the statement made by the respondent before Mr. Arshad under section 164 and the statements made by him before the Committing Magistrate and the Sessions Judge as the basis of alternative charges for perjury against the respondent.

Mr. Batra for the respondent objects that the statement made under section 164 before Mr. Arshad cannot be the basis of a charge for perjury under sections 163-164 of the Indian Penal Code. His contention is that that statement is not "evidence," and that there is no provision in the law empowering the magistrate to administer an oath to the person whose statement he is going to record under section 164. He concedes that the practice generally followed in this province is to record such statements on oath, but he urges that this procedure is unwarranted and that in the eye of the law statements made under section 164 cannot be regarded as having been made on oath. In support of his contention counsel relies on a dictum of Plowden S. J. in *Lalu v. Queen-Empress* (1), where the learned Judge observed (at p. 28), that "as at present advised, it seems to me that the Magistrate (acting under section 164) has no power to administer an oath or affirmation under the Oaths Act of 1873, to any person whose statement he records. His function is to prepare a record in the manner and subject to the conditions prescribed in section 164,

1933

THE CROWN
v.
PARMA NAND.
TEK CHAND J.

1933
 THE CROWN
 v.
 PARMA NAND.
 TEK CHAND J.

Criminal Procedure Code." Counsel also refers to *Emperor v. Motilal-Hiralal* (1), as containing some observations which indirectly lend support to his contention. On the contrary, it was held in *Queen-Empress v. Alagu Kone* (2), that a Magistrate, acting under section 164, has power to administer an oath, and a charge of perjury can be framed with regard to statements made before him on oath when he is so acting. This ruling was followed in *Suppa Tevan & others v. Emperor* (3), and was cited with approval in *Emperor v. Vishwanath Krishna Sathe* (4), and *Queen-Empress v. Khem* (5). As stated already, the practice in the Punjab is in accord with the Madras rulings and in numerous cases prosecutions for perjury in the alternative have been successfully based on statements recorded on oath under section 164. In view of this divergence of judicial opinion and the conflict between the practice prevailing in the province and the dictum of a Division Bench of the Chief Court referred to above, and having regard to the general importance of the question, I am of opinion that the point should be authoritatively settled by a larger Bench.

I accordingly refer the case to a Division Bench. A very early (actual) date shall be fixed for the hearing.

Judgment of the Division Bench.

BROADWAY J.

BROADWAY J.—This matter has come before us in the following circumstances :—

In the course of an investigation in connection with the murder of one Sarab Dayal a pardon was

(1) (1922) I. L. R. 46 Bom. 61. (3) (1906) I. L. R. 29 Mad. 89.

(2) (1893) I. L. R. 16 Mad. 421. (4) (1906) 8 Bom. L. R. 589.

(5) (1900) I. L. R. 22 All. 115, 117.

1933

THE CROWN
v.
PARMA NAND.
BROADWAY J.

tendered to Parma Nand under section 337, Criminal Procedure Code, and was accepted by him on the conditions therein prescribed. After he had accepted this pardon he was placed before a Magistrate of the 1st Class, *Sheikh* Ala-ud-Din Arshad, who recorded his statement on solemn affirmation obviously acting under section 164, Criminal Procedure Code. In the statement then made Parma Nand implicated two persons named Ram Narain and Narsingh Das as being concerned in the murder.

In the course of the magisterial enquiry Parma Nand was, as required by law, produced as a witness and in his examination-in-chief adhered to the statement made by him before *Sheikh* Ala-ud-Din Arshad. Three days later when he was cross-examined he resiled from his statement and stated that the statements made by him implicating Narsingh Das and Ram Narain were false and had been made as a result of torture inflicted on him by the police.

At the trial of Narsingh Das and Ram Narain before the Sessions Court Parma Nand was again, as required by law, produced as a witness and in examination-in-chief adhered to the first statement made by him implicating the two persons under-trial. In his cross-examination, however, he again resiled from his statements alleging that he had been tortured into making the statements implicating Narsingh Das and Ram Narain.

Steps were then taken on behalf of the Crown to take proceedings against Parma Nand under sections 193 and 194, Indian Penal Code. The Public Prosecutor furnished the necessary certificate and an application was made to the learned Sessions Judge

1933
THE CROWN
v.
PARMA NAND.
BROADWAY J.

praying that a complaint be lodged as required by law. Notice was served on Parma Nand calling upon him to show cause, and a complaint was finally lodged on the 23rd of April, 1932, by the learned Sessions Judge. In this complaint the matters which it was intended to prove against Parma Nand were set out at length and the complaint concluded as follows:—

“ The accused stated in his statements before *Sheikh* Ala-ud-Din Arshad, Magistrate, 1st Class, Sargodha, and Mr. B. L. Bhandari, Committing Magistrate, and in the Sessions Court deposed on solemn affirmation that Ram Narain and Narsingh Das took part in the commission of the murder of Sarab Dayal. The accused has himself admitted before the Sessions Court that he made false statements. Hence he committed an offence under sections 193 and 194, Indian Penal Code. Hence the complaint, etc., etc.”

As required by the provisions of the Code a petition was filed in this Court under section 339, Criminal Procedure Code, for the necessary sanction for the prosecution of Parma Nand on the complaint framed by the learned Sessions Judge. This was on the 3rd of October, 1932, and on the 10th of October, 1932, a petition was filed on behalf of Parma Nand under section 439, Criminal Procedure Code, practically praying that the proceedings be quashed. These two petitions came up before Mr. Justice Tek Chand before whom an objection was taken by Mr. M. L. Barra for Parma Nand to the effect that the statement made under section 164, Criminal Procedure Code, before *Sheikh* Ala-ud-Din Arshad could not form the basis of a charge for perjury on the ground that it

was not evidence and that the Magistrate was not empowered to administer any oath to him acting, as he was, under section 164, Criminal Procedure Code. Although the learned counsel admitted that according to the general practice in this province statements under section 164, were, as a matter of fact, recorded on oath or solemn affirmation, he contended that this practice was illegal, and in support of his contention he cited a dictum of Plowden, S. J. in *Lalu v. Queen-Empress* (1). Reliance was also placed on certain observations in *Emperor v. Motilal-Harilal* (2).

1933
 THE CROWN
 v.
 PARMA NAND.
 BROADWAY J.

Mr. Justice Tek Chand pointed out that the dictum referred to was in conflict with the general practice in this province in such matters and also with the view taken by the Madras High Court in *Queen-Empress v. Alagu Kone* (3), which was followed in *Suppa Tevan v. Emperor* (4), and cited with approval in *Emperor v. Vishwanath Krishna Sathe* (5) and *Queen-Empress v. Khem* (6). Considering the matter to be of importance Mr. Justice Tek Chand referred both petitions to a Division Bench.

On the case coming before us the attention of Mr. M. L. Batra was drawn by the learned Government Advocate to the concluding paragraph of the complaint, whereupon Mr. Batra, very frankly, said that he had failed to notice the exact wording of that paragraph and that had he noticed it he would not have raised the point on which the reference was really based, at this stage of the proceedings. As,

(1) 2 P. R. (Cr.) 1893.

(2) (1922) I. L. R. 46 Bom. 61.

(3) (1893) I. L. R. 16 Mad. 421.

(4) (1906) I. L. R. 29 Mad. 89.

(5) (1906) 8 Bom. L. R. 589.

(6) (1900) I. L. R. 22 All. 115.

1933

THE CROWN
v.
PARMA NAND.
BROADWAY J.

however, the cases have been referred to us we have thought it incumbent on us to deal with the question involved. Broadly stated, this question is whether on a person being offered a pardon under section 337, and, on his acceptance of that pardon, being placed before a Magistrate in order that his statement may be recorded, that Magistrate has the power to administer an oath or solemn affirmation to him. After a discussion of the various authorities Mr. Batra admitted that there was nothing in the Code which precluded a Magistrate from administering an oath or solemn affirmation to such a person, but, he contended, there was no obligation on the part of the deponent to speak the truth and that whatever he stated at the time could not be regarded as evidence. A reference to section 337, Criminal Procedure Code, shows that the whole object of that section is to tender a pardon to a person with a view to obtaining the evidence of that person because he is supposed to have been directly or indirectly concerned in or privy to the offence, and the same section lays down that every person accepting a tender under it shall be examined as a witness in the later proceedings in connection with that offence. Mr. Batra urged that having regard to that mandatory provision the intention of the Legislature was that as soon as a pardon was accepted the person accepting it could only be examined as a witness in the presence of the person or persons accused of the original offence. This contention is, to my mind, opposed to common sense, and Mr. Batra was unable to cite any authority in support of it. It seems to me obvious that it might be very necessary to obtain a detailed statement of what the person accepting the pardon has to say in order to complete the investigation and enquiry and to ascer-

tain what corroboration of his statement might be forthcoming, and it might very well be extremely difficult to wait for that information till the magisterial enquiry commenced.

Turning now to section 164 of the Criminal Procedure Code it will be seen that provision is made by that section for the recording of two kinds of statements :—

- (1) a statement pure and simple; and
- (2) a confession.

With the recording of confessions we are not here concerned. Sub-section (2) of section 164 lays down that such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his (the Magistrate's) opinion, best fitted for the circumstances of the case. A reference to section 5 of the Indian Oaths Act, X of 1873, shows that oaths or affirmations shall be made by "all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having, by law, authority to examine such persons, or to receive evidence."

Mr. Batra has very rightly admitted that in this case *Sheikh* Ala-ud-Din Arshad had by law authority to examine Parma Nand and, therefore, I consider that *Sheikh* Ala-ud-Din Arshad had authority to administer the solemn affirmation which he did administer to Parma Nand. Again, it seems to me that Parma Nand was, by virtue of the conditions laid down in section 337, Criminal Procedure Code, and his acceptance thereof, bound to speak the truth and the whole truth. In these circumstances I consider that the procedure adopted by *Sheikh* Ala-ud-Din

1933

THE CROWN
v.
PARMA NAND.

BROADWAY J.

1933

THE CROWN
v.
PARMA NAND.

BROADWAY J.

Arshad was in accordance with law and that the statement recorded by him of Parma Nand under section 164, Criminal Procedure Code, was recorded in accordance with law.

A reference to *Lalu* versus *Queen-Empress* (1), in which the dictum referred to by Plowden S. J. was made, shows that the question then before the Court was somewhat different to the one which is now before us and the learned Judges in that case appear to me to have carefully refrained from laying down any definite rule. It is significant that *Lalu* versus *Queen-Empress* (1) has never been followed in any of the cases subsequent to that date, and the practice in this province is opposed to that dictum and is, in my opinion, in accordance with law. The question involved in *Emperor* versus *Motilal-Harilal* (2), was also different, it being held there that where a pardon has been tendered during an investigation and not during an inquiry under the Criminal Procedure Code, and the approver makes a statement accordingly, such statement cannot form the basis of an alternative charge of an offence punishable under section 193, Indian Penal Code. It is to be noted that the Judges in that case differentiated between a pardon tendered during an investigation into the offence and a pardon tendered during an enquiry under the Criminal Procedure Code. This authority, however, need not detain us as the law has been amended subsequent to the delivery of that judgment and section 337, as it now stands, expressly places a pardon tendered during the course of an investigation on the same footing as a pardon tendered during a magisterial enquiry. I do not think it necessary to discuss the Madras and

(1) 2 P. R. (Cr.) 1893.

(2) (1922) I. L. R. 46 Bom. 61.

Allahabad authorities which have been already referred to and which are noted in the order of reference as, in my judgment, they correctly lay down the law on the subject. I would merely add that in *Abdul Aziz versus The Crown* (1), Chevis J. and myself had occasion to consider *Queen-Empress versus Alagu Kone* (2) and *Lalu versus Queen-Empress* (3) and that we expressed our approval of the view taken by the Madras High Court in that case, and in referring to *Lalu versus Queen-Empress* (3), pointed out that though the learned Judges seemed to doubt whether a Magistrate, when recording the statement of a person under section 164, could administer an oath, nothing was definitely decided and that the decisions of the Madras and Bombay High Courts were entitled to considerable weight. The reference to the Bombay authority in this connection was to *Emperor versus Vishwanath Krishna Sathe* (4). In my judgment, therefore, it must be held that in recording a statement under section 164, Criminal Procedure Code, a Magistrate is empowered to administer to the deponent an oath or solemn affirmation and that the statement so recorded can form the subject of an alternative charge under the perjury sections of the Indian Penal Code.

In these circumstances I consider that sanction should be accorded to the prosecution of Parma Nand in this case and I would therefore grant the sanction prayed for. The revision petition is dismissed.

ABDUL QADIR J.—I concur.

N. F. E.

ABDUL QADIR J.

Revision dismissed.

(1) 34 P. R. (Cr.) 1916.

(3) 2 P. R. (Cr.) 1893.

(2) (1893) I. L. R. 16 Mad. 421.

(4) (1906) 8 Bom. L. R. 589.