

Judge for decision in accordance with law. It will be open to the judgment-debtor, if so advised, to support the ultimate decision of the executing Court on any of the points which had been raised by him before that Court but had been decided against him. Having regard to all the circumstances of the case and the fact that the question was not free from difficulty I would leave the parties to bear their own costs in all Courts.

ABDUL RASHID J.—I agree.

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MOTT RAM-  
DIWAN CHAND

v.

DHANNA  
SINGH-  
HAVELI RAM.

TEK CHAND J.

ABDUL  
RASHID J.

*Appeal accepted.*

### APPELLATE CRIMINAL.

*Before Hilton J.*

MUHAMMAD QASIM KHAN—Appellant

*versus*

THE CROWN—Respondent.

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*April 19.*

**Criminal Appeal No. 1438 of 1933.**

*Criminal Procedure Code, Act V of 1898, Sections 188, 537: Trial for offences committed at Kabul, beyond the limits of British India—Sanction of Local Government signed, and placed on record before the trial ended—Accused not raising any objection till the very close of the proceedings—Defect—whether fatal.*

Where an accused in a criminal case relating to offences committed at Kabul, beyond the limits of British India, does not raise any objection as to the jurisdiction of the trial Court till the very end of the proceedings, and the sanction of the Local Government required by Section 188, Criminal Procedure Code, is signed while the trial was proceeding, and is placed on the record of the case before the trial ends—

*Held*, that the absence of the required certificate during the earlier stages of the trial was not a fatal defect, but a mere irregularity curable under section 537 of the Code.

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*Shahmir Khan v. The Empress* (1), *Roda v. The Empress* (2), and *Fateh Din v. Emperor* (3), followed.

Other Cases discussed.

*Appeal from the order of K. S. Mian Hakim Din, Magistrate, 1st Class, exercising enhanced powers under Section 30, Criminal Procedure Code, Attock, at Campbellpur, dated 30th October, 1933, convicting the appellant.*

BARKAT ALI, for Appellant.

D. C. RALLI, for the Government Advocate, for Respondent.

HILTON J.

HILTON J.—This is an appeal by *Khan Sahib* Mohammad Kasim who has been convicted by the Additional District Magistrate of Attock and sentenced to rigorous imprisonment for five years and a fine of Rs. 1,500 under section 409, Indian Penal Code, and to rigorous imprisonment for three years and a fine of Rs. 1,000 under section 466, Indian Penal Code, the sentences of imprisonment running concurrently.

The appellant was employed as an Accountant in the British Legation at Kabul until he went on leave on 4th February, 1933. The charge relates to the forging of account books which it was his duty to keep and the embezzlement of money by him at Kabul in respect of the Legation accounts for August and September, 1932.

The appellant being a native Indian subject of His Majesty and the charge having related to an offence said to have been committed at a place without and beyond the limits of British India, he could be dealt with under section 188, Criminal Procedure

(1) 35 P. R. (Cr.) 1888.

(2) 30 P. R. (Cr.) 1889.

(3) 4 P. R. (Cr.) 1902.

Code, at Campbellpur, if the Political Agent certified that the charge ought to be enquired into in British India or if there is no Political Agent for the territory in question if the sanction of the Local Government was forthcoming.

The appellant was arrested on 27th March, 1933, in the Attock District and brought before the Additional District Magistrate on 28th March, 1933. On 26th April, 1933, the Additional District Magistrate began to record evidence in the presence of the accused. On that day a certificate containing the required declaration was produced in the Court which certificate had been signed on 13th April, 1933, by His Britannic Majesty's Minister at Kabul. The Additional District Magistrate has held, and his finding on this point has not been disputed before me on behalf of the Crown, that His Britannic Majesty's Minister at Kabul is not a Political Agent within the definition to be found in the General Clauses Act, X of 1897.

After recording some of the prosecution evidence and examining the accused, the Additional District Magistrate framed a charge against the appellant on 1st May, 1933.

On 15th May, 1933, the sanction of the Local Government required by section 188, Criminal Procedure Code, was signed. It was in due course forwarded to the Additional District Magistrate of Attock and placed on the record of the trial before the trial ended, but on what exact date is not recorded.

The prosecution evidence was closed on 8th June, 1933, and the defence evidence on 27th June, 1933, on which date a written statement of the appellant was also placed on the record. On 11th July, 1932, the

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Public Prosecutor asked for an amendment of the wording of the charge and this was done on that date. The appellant did not require that any prosecution witness should be recalled or that any further opportunity for calling defence evidence should be given to him in consequence of the amendment of the charge. The Additional District Magistrate, therefore, adjourned the case for arguments to 28th July, 1933. On 24th July, 1933, however, the appellant made an objection that the proceedings taken against him in the Court of the Additional District Magistrate were without jurisdiction for want of sanction of the Local Government. In due course the Additional District Magistrate heard arguments and gave judgment. In the course of his judgment he overruled the aforesaid objection of the appellant. This objection has again been raised in the appeal before me.

In *Shahmir Khan v. The Empress* (1), it was held that the absence of a certificate under section 188, Criminal Procedure Code, was not a fatal defect but was curable under section 537, Criminal Procedure Code, as a mere irregularity analogous to a defect of venue and that it was not a defect of jurisdiction. In that case the objection to the absence of the certificate was taken after conviction in the trial Court and it was remarked by the learned Judges that "the case would be different in its circumstances if the objection had been taken before the enquiry commenced or even before the trial of the case upon the accused pleading not guilty to the charge."

This authority was followed in *Roda v. The Empress* (2) and *Fateh Din v. The Emperor* (3). It

(1) 35 P. R. (Cr.) 1888.

(2) 30 P. R. (Cr.) 1889.

(3) 4 P. R. (Cr.) 1902.

was distinguished in *Queen-Empress v. Mastana* (1), *Ram Charan v. Crown* (2) and *Buta Singh v. Crown* (3), which were cases where committal proceedings had taken place without a certificate, but where an objection was raised at the beginning of the trial in the Sessions Court. These cases, therefore, fell within the exception contemplated by the above quoted words of *Shahmir Khan v. The Empress* (4). "if the objection had been taken before the trial commenced." In these cases the objection having been taken before the Sessions trial commenced the absence of a certificate was held to be fatal.

None of these cases is exactly on all fours with the present case where the objection has been taken towards the close of the trial and more than two months after the Local Government had signed the requisite sanction.

The authorities *Queen-Empress v. Kathaperumal* (5), *Queen-Empress v. Ram Sundar* (6) and *Emperor v. Narain* (7), which have been cited before me are equivalent in all material respects to *Queen-Empress v. Mastana* (1), and take the question no further.

In *Emperor v. Kali Charan* (8), there was this difference that a certificate had been produced two days before the order of committal was made, the objection being taken at the trial before the Sessions Judge. It was held that a certificate is a preliminary requisite to the holding of an enquiry. This dictum of a Single Judge appears to me to be in conflict with the authority of *Shahmir Khan v. The*

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(1) 11 P. R. (Cr.) 1899.

(5) (1890) I. L. R. 13 Mad. 423.

(2) (1924) I. L. R. 5 Lah. 416.

(6) (1897) I. L. R. 19 All. 109.

(3) (1926) I. L. R. 7 Lah. 396.

(7) (1919) I. L. R. 41 All. 452.

(4) 35 P. R. (Cr.) 1888.

(8) (1902) I. L. R. 24 All. 256.

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*Empress* (1), which I must follow, to the effect that the defect is a defect curable under section 537, Criminal Procedure Code. Moreover, the objection having in this Allahabad case been taken before the trial in the Sessions Court may be considered to have been taken in time which also differentiates it from the circumstances of *Shahmir Khan v. The Empress* (1).

The Bombay and Sind authorities have held for the most part that if the certificate is obtained after the enquiry has begun but before the framing of the charge and before the commencement of the trial after the charge, the defect can be cured under section 537, Criminal Procedure Code [see *Emperor v. Muhamad Buksh* (2), *Emperor v. Sakharan* (3), *In re Ram-bharthi Hirabarthi* (4) and *Alibhoy Jivraj v. Emperor* (5)]. These authorities, however, disagree with the authority of *Shahmir Khan v. The Empress* (1), which lays down that even when no certificate is produced up to the close of the trial the defect is curable under section 537, Criminal Procedure Code, and that the matter to which regard must be had in seeing whether the defect is actually cured or not is at what stage the objection was taken.

This last mentioned principle is certainly that which accords with the wording of section 537, Criminal Procedure Code. Accepting the view laid down in *Shahmir Khan v. The Empress* (1), that the absence of a certificate is curable under section 537, Criminal Procedure Code, the next point to be determined under that section is whether or not this absence has in fact occasioned a failure of justice,

(1) 35 P. R. (Cr.) 1888.

(3) (1910) 12 Bom. L. R. 667.

(2) (1906) 8 Bom. L. R. 507.

(4) (1923) I. L. R. 47 Bom. 907.

(5) 1925 A. I. R. (Sind) 88.

and in determining this point "the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage of the proceedings."

Now, in the present case the appellant did not raise an objection until the very end of the proceedings, but if, in fact, he was prejudiced by the absence of a certificate he could and should have raised his objection at the time when the absence of a certificate was in fact prejudicing him. It cannot reasonably be said that the absence of a certificate was prejudicing him after 15th May, 1933, because by that date a certificate of the Local Government was in existence. If, therefore, he was prejudiced at all, he was prejudiced before 15th May, 1933, but he raised no objection before 15th May, 1933, and no reason has been adduced why he could not and should not have done so, if in fact he was being prejudiced by the absence of a certificate before 15th May, 1933.

For these reasons I am constrained to hold that the absence of a certificate between 27th March, 1933 (the date of the appellant's arrest) and 15th May, 1933, was a defect curable under section 537, Criminal Procedure Code, and that having regard to the omission to raise any objection to its absence before 15th May, 1933, no failure of justice was occasioned by the absence of the certificate between the above-mentioned dates and that the defect is thus cured by section 537, Criminal Procedure Code. I, therefore, reject this ground of appeal.

[*His Lordship then dealt with the facts of the case and dismissed the appeal, Ed.*]

P. S.

*Appeal dismissed.*

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