ORIGINAL CRIMINAL.

Before Mr. Justice Tyabji and a special Jury.

EMPEROR *v.* ABDUL RAHIMAN AKRAMDIN AND OTHERS.* 1935 *October* 18

Criminal Procedure Code (Act V of 1898), sections 236, 237, 238 and 369—Letters Patent of the High Court of Bombay, Clauses 25 and 26—Judge presiding at Criminal Sessions of High Court—Sentence—Review of sentence before warrant of commitment to jail signed—Practice—Charges of conspiracy and cheating—Conviction of cheating alone—Indian Penal Code (Act XLV of 1860), sections 120B, 34 and 417.

The practice followed has been that a Judge presiding over the Criminal Sessions of the High Court has power in proper cases to review the sentence already pronounced by him in Court, so long as the warrant has not been drawn up and signed, and to correct an error whether clerical or otherwise in the sentence, which has been pronounced. Section 369 of the Criminal Procedure Code does not preclude the correction of errors other than clerical so long as the warrant has not been signed. Resort may also be had in appropriate cases to clauses 25 and 26 of the Letters Patent of the High Court of Bombay.

Where the accused are charged with cheating in pursuance of a conspiracy, and it is not proved that there was any conspiracy, but the evidence warrants a finding of cheating without any conspiracy, it is competent to the Court to convict the accused of the offence of cheating.

CRIMINAL SESSIONS.

In this case the facts were that an officer of the Port Haj Committee of Bombay saw certain Haj pilgrims after their return from the Haj, and went to the Victoria Terminus Railway Station in Bombay to see them on their way to their respective destinations. He discovered that the railway tickets supplied by some persons to the Hajis were counterfeit tickets. On inquiries he found that accused Nos. 1 and 2 had sold such tickets to seven Hajis. Accused Nos. 1 and 2 were arrested on the Railway station and on statements made by them accused Nos. 3 and 4 were arrested. On subsequent investigations the police believed that accused Nos. 3 and 4 had employed accused Nos. 1 and 2 to pass off such counterfeited railway tickets as genuine ones. For these offences all were committed to the

*Fourth Criminal Sessions, 1935, case No. 16.

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Criminal Sessions of the Bombay High Court. The following charges were framed against the accused :—

First.—That you between December 1933 and 20th April 1935 at Bombay agreed to do or caused to be done certain illegal acts to wit: to print and forge Railway tickets purporting to be issued by certain Railways from and to different Railway stations on different Railways and to use such forged tickets as genuine and to give such forged tickets to passengers intending to travel on such Railways and to cheat them and the Railway Companies and thereby committed an offence punishable under Section 120-B of the Indian Penal Code and within the cognizance of the High Court.

Secondly.—That you, between December 1933 and 20th April 1935, in pursuance of the said conspiracy and in furtherance of the common intention to do the aforesaid illegal acts set out in the First Charge did forge certain documents purporting to be valuable securities viz. certain Railway tickets with intent to cause intending Railway passengers to part with money and/or with intent to commit fraud or that fraud may be committed and thereby committed an offence punishable under Section 467 read with Section 34 of the Indian Penal Code and within the cognizance of the High Court.

Thirdly.—That you, between December 1933 and 20th April 1935, in pursuance of the said conspiracy and in furtherance of the common intention to do the aforesaid illegal acts set out in the First Charge did forge certain documents, viz., certain Railway tickets intending that such documents shall be used for the purpose of cheating and thereby committed an offence punishable under Section 468 read with Section 34 of the Indian Penal Code and within the cognizance of the High Court.

Fourthly.—That you on or about the 19th day of April 1935 at Bombay in pursuance of the said conspiracy and in furtherance of the common intention to do the aforesaid illegal acts set out in the First Charge fraudulently and/or dishonestly used as genuine certain documents purporting to be valuable securities, viz., certain Railway tickets which you knew or had reason to believe at the time you used them to be forged documents and that you thereby committed an offence punishable under Sections 467 and 471 read with Section 34 of the Indian Penal Code and within the cognizance of the High Court.

Fifthly.—That you on or about the 19th day of April 1935 at Bombay in pursuance of the said conspiracy and in furtherance of the common intention to do the aforesaid illegal acts set out in the First Charge did fraudulently and dishonestly represent to five Haj Pilgrims to wit: (1) Hassanali Bandeali, (2) Aiyudin Haji Samuzdi, (3) Abdul Rehman Badrudin Gazi, (4) Amjatali Karamatali, and (5) Nizamatali Ashkarali, that you had purchased Railway tickets (part of Exhibit A) for them for Howrah and that they should pay the price thereof to you thereby inducing the said five pilgrims to refrain from purchasing from the Railway Administration any Railway tickets for themselves which said act of yours caused and/or was likely to cause damage or harm to the said five Pilgrims in body, mind, reputation and property and thereby committed cheating an offence punishable under Section 417

read with Section 34 of the Indian Penal Code and within the cognizance of the High Court.

The accused were tried before the Honourable Mr. Justice Tyabji and a special Jury.

At the close of the trial the jury brought in a unanimous verdict of not guilty as regards all the charges so far as accused Nos. 3 and 4 were concerned, and a similar verdict also as regards accused Nos. 1 and 2 so far as charges 1 to 4 were concerned. As regards charge No. 5 the jury by a majority of six to three brought in a verdict of guilty only of cheating against accused Nos. 1 and 2. The trial Judge discharged accused Nos. 3 and 4 as a result of the verdict ; but as regards accused Nos. 1 and 2 he accepted the majority verdict of the jury and sentenced these accused to rigorous imprisonment for six months and three months respectively and he also sentenced them to pay fine of Rs. 200 and 100 respectively.

When the warrants of sentence came to be prepared, the Clerk of the Crown raised a doubt as to the legality of the verdict and of the sentence.

The point was therefore argued before Tyabji J.

G. C. O'Gorman, with *R. J. Kolah*, for the Crown.

N. H. Jhabvala, with *P. N. Patel*, for accused No. 1.

M. J. Sethna, for accused No. 2.

Jhabvala. I submit the conviction of accused Nos. 1 and 2 cannot stand. Shortly, the fifth charge under which the accused are convicted specifically mentions section 34 of the Indian Penal Code. It says " that you . . . in pursuance of the said conspiracy and in furtherance of the common intention to do the aforesaid illegal acts, etc. . . . did fraudulently and dishonestly etc. cheat five Haj pilgrims ". Now the accused are acquitted and that too unanimously, on the charges of conspiracy and you cannot convict the accused of cheating and acquit them of conspiracy in furtherance of which the accused are said to have cheated

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the railway company. Moreover, the Court has not, as yet, signed the warrant. I therefore submit that the Court has still power under section 369 of the Criminal Procedure Code to alter the sentence and pass any other order accordingly. Cites *Abdul Rahman* v. *Emperor*.[1]

Sethna. It is apparent from the language and statements of the charges 1, 2, 3, 4 and 5 in the charge sheet that all the acts alleged to be committed by the accused are acts done in pursuance of their alleged common conspiracy and in furtherance of their alleged common intention. Hence all the charges are made out to be interdependent, and charge 5 is a necessary corollary of charge 4. Therefore the fifth and fourth charges stand or fall together. The jury has unanimously found the accused No. 2 and accused No. 1 not guilty on the charges of conspiracy, forgery, and above all on the charge of using as genuine a forged document. Consequently the accused cannot be guilty in law on the fifth charge. And since the verdict of the jury on the fourth charge is unanimous it applies to the fifth charge also where the verdict was not unanimous but was a verdict of 6 to 3. Hence the accused is in law *ipso facto* not guilty. I therefore submit that the jury's verdict on the 5th charge is bad and unsustainable in law.

I further submit that the unanimous verdict of Not Guilty on charge 4 (using as genuine a forged document) proves that in doing the act or acts mentioned in charge 5 there was no fraudulent or dishonest intention on the part of the accused. Consequently the acts mentioned in charge 5 being done, if at all, without any fraudulent or dishonest intention are not illegal and therefore do not amount at all to the offence of cheating. I therefore submit that the majority verdict of guilty on the fifth charge is necessarily bad in law and therefore unsustainable in law.

Another important point to be considered is " Whether the judgment having been once signed, it can now be

[1] (1926) 94 I. C. 717.

reviewed". On this point counsel drew His Lordship's attention to section 369 of the Criminal Procedure Code which provides that a High Court established by Royal Charter under its Letters Patent can review its own judgment. This power to revise its own judgment is given only to High Courts established by Royal Charter under their Letters Patent. In virtue of the provisions of section 369 of the Criminal Procedure Code the Court is fully entitled to review its own judgment since the warrant is not yet signed.

The verdict of the jury being only a majority verdict it is yet open to the Court to revise its order, and even to disagree with the verdict of the jury and acting under section 305 of the Criminal Procedure Code read in conjunction with section 308 of the Criminal Procedure Code to make an entry to the effect that the accused should not be retried and that entry will operate as an acquittal of the accused.

O'Gorman. The verdict of the jury having been accepted and sentence passed the Court is *functus officio.* A criminal judgment or order, after it is once pronounced, can only be altered to correct a clerical error under section 369 of the Criminal Procedure Code or as provided by clause 25 or 26 of the Letters Patent. The fact that the warrant has not been signed is immaterial.

Jhabvala, in reply. The case of *Emperor* v. *Dastarali*[1] has no application to the present case.

TYABJI J. It has been submitted by the Clerk of the Crown for consideration whether the sentences passed by me on accused Nos. 1 and 2 were in accordance with law.

Accused Nos. 1 and 2, with two other persons, were tried before me and a jury, under five charges: (1) the first charge was of a criminal conspiracy to print and forge railway tickets, to use them as genuine and to cheat intending passengers and the railway company (section 120B of the

[1] (1930) 58 Cal. 822.

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Indian Penal Code). The other four charges were charges of having committed offences in pursuance of the said conspiracy, viz., (2) of forging railway tickets (sections 467, 34), (3) of forging the tickets knowing that they would be used for the purpose of cheating (sections 468, 34), (4) of dishonestly using the tickets as genuine (sections 467, 471, 34), and (5) of cheating by fraudulent and dishonest representations of having purchased the tickets, and inducements, requests for payment, etc., connected with or following such representations (sections 417, 34).

The jury brought in unanimous verdicts of "not guilty" against all the accused in respect of the first four charges. As to the fifth charge the jury unanimously acquitted accused Nos. 3 and 4; but a majority held accused Nos. 1 and 2 guilty. I accepted the verdict of the majority, finding accused Nos. 1 and 2 guilty under the 5th charge, viz., of cheating in pursuance of the conspiracy. I deferred passing sentence for a day, and then after hearing counsel, sentenced accused Nos. 1 and 2 to terms of imprisonment and fines.

The question now raised is whether the verdict of the majority as to the fifth charge was legal,—whether accused Nos. 1 and 2 can be found guilty under the fifth charge, having been found not guilty under the first four charges, (the first of which was of conspiracy), and whether consequently my sentences on accused Nos. 1 and 2 were legal and ought to be allowed to stand.

The Clerk of the Crown submitted this question when the warrants were placed before me for signature. Out of deference to that Officer's doubts, I had the matter argued before me.

It was contended for the Crown, mainly on the strength of the Criminal Procedure Code, section 369, that at the present stage this Court has no authority to consider the question raised; that the sentences having been pronounced, they cannot be altered, except under the Letters Patent, clause 25 or 26.

Section 369 of the Criminal Procedure Code runs as follows :

"Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court when it has signed its judgment, shall alter or review the same, except to correct a clerical error."

So that clerical errors may be corrected ; but otherwise no Court may, after it has signed its judgment alter or review it, except by virtue of a power derived from the Code or other law or the Letters Patent. The effect of section 369 may—speaking broadly and without attempting strict accuracy,—be put under three heads : (1) it saves powers to correct clerical errors ; (2) it provides that as a general rule no Court shall alter or review its judgment after it has signed it, except to correct clerical errors ; and (3) in cases where the judgment has been signed and it is sought (in contravention of the general rule) to alter or review the judgment for the purpose of correcting errors other than clerical, power to correct such errors is reserved only if it can be derived from any provisions in (*a*) the Criminal Procedure Code, or (*b*) in any other law for the time being in force, or (*c*) (in the case of a High Court established by Royal Charter), by the Letters Patent of such High Court.

The alleged error in the present case is certainly not clerical. It is argued therefore that section 369 prevents the correction of the alleged error at the present stage unless jurisdiction to do so is derived from some provision of the Code or any other law for the time being in force, or the Letters Patent.

I shall refer to the Letters Patent a little later ; but I must first observe that what I have stated as the general rule under section 369, comes into operation only when the Court has signed its judgment. In the case of the High Court exercising its Ordinary Original Criminal Jurisdiction, no judgment nor any other pronouncement of its decision is

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signed until the warrant is signed by the presiding Judge. The warrant is drawn up some little time after the sentence has been orally pronounced. The practice has been for the Judges in proper cases to review their sentences, though already pronounced in Court,—so long as the warrant has not been drawn up and signed. That practice does not seem to me to conflict with section 369, but to conform with the implications in what is left unexpressed in section 369. I therefore come to the conclusion that, not having yet signed the warrant, the power to alter or review my sentences does not fall under what I have stated as the general rule contained in section 369. Nor does the case fall under the third head of section 369 as stated by me. I may, therefore, act in accordance with the practice, without seeking the support of any specific provision in the Code or other law or the Letters Patent.

If I am right in this view, then the question is, whether the verdict of the majority of the jury, holding accused Nos. 1 and 2 to be guilty under the fifth charge, was legal and could have been accepted, and whether thereupon sentences could legally be passed upon the 1st and the 2nd accused. The legality of the verdict of the majority is questioned because the fifth charge is of cheating in pursuance of the conspiracy, and the jury have unanimously found all the accused not guilty of the offence of conspiracy. The jury, it is rightly contended, cannot, therefore, find under the fifth charge that in pursuance of a conspiracy—which the jury held did not exist—accused Nos. 1 and 2 cheated or did any fraudulent or dishonest acts.

But the verdict of the jury on the fifth charge in reality expresses the view that though it is not proved that there was any such conspiracy as the fifth charge alleges, yet accused Nos. 1 and 2 did fraudulently and dishonestly represent that they had purchased railway tickets (though it is not proved that they had conspired or agreed amongst themselves or with the 3rd and the 4th accused to make

such representation), that they induced passengers to refrain from purchasing tickets from the railway, and that they committed the offence of cheating, punishable under section 417. The verdict was at the time taken, and in my opinion rightly taken, to be a verdict only that the offence of cheating under section 417 had been committed by the two accused.

As I deferred passing sentences till the day following the verdict and the accused were defended by counsel, there was sufficient time to consider the practical bearing of the question. It was not then, nor has it to-day, been suggested that except from the aspect of its technical legality there is any reason why the verdict may not be accepted.

The question then turns into the question whether on the jury finding all the accused unanimously not guilty on the first four charges, it was legally permissible to find the accused guilty of cheating on the fifth charge under section 417—in other words, whether on a charge of cheating in pursuance of a conspiracy, the accused may be found guilty of cheating without a conspiracy.

The answer to that question must be found, it seems to me, in sections 236, 237 and 238 of the Criminal Procedure Code. It is desirable to consider these sections together. The first deals with a case where the facts proved are of such a nature that it is doubtful which of several offences the facts that are proved constitute. In such a case the accused may, under section 236, be charged with having committed all or any of such offences; and under section 237 he may be convicted of an offence although he was not charged with that particular offence: where the accused is charged with one offence and it is proved that he has committed a different offence for which he might have been charged under section 236, he may be convicted of the offence which is shown to have been committed, although he was not charged with it.

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These two sections, therefore, deal with cases where all the facts constituting the offence of which the accused is sought to be convicted have been alleged in the charge, and have been proved, but where it is doubtful what offence those facts constitute. It may accordingly happen that the accused is convicted of an offence with which he was not charged.

Under section 238 again a person may be convicted of an offence with which he is not charged, provided that the facts constituting the offence of which he is sought to be convicted have been alleged and proved, although other facts are also alleged, and those other facts are not proved. The section deals in terms with a case where a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and where such combination is proved, but the remaining particulars are not proved. In such a case the accused may be convicted of that offence which the combination of the particulars that are proved constitutes, although the remaining particulars are not proved : and this notwithstanding the fact that the specific offence with which he was charged would have been proved only if the rest of the particulars which had been alleged had also been proved—so that he cannot be convicted of the specific offence with which he has been charged.

It was argued that section 238 is not applicable to the present case, though several particulars were alleged in the charge, and some of the particulars are proved while other particulars have not been proved and though a combination of those particulars that have been proved constitutes an offence. The contention is that the offence which the particulars that have been proved constitutes, is not a minor offence within the terms of section 238. It is

admitted that there is no definition of the expression "minor offence". (The expression "major offence" is not used in the section, but it is convenient to adopt it in the present context.) It is argued that the expression "minor offence" can apply only to a case where, for instance, a person is charged with murder, and it is proved that he has committed not the major offence of murder but the minor offence of grievous hurt or the still more minor offence of simple hurt. I do not think the argument relied upon is sound. It seems to me to proceed on the unwarranted assumption that the test by which an offence is deemed in section 238 (*1*) to be major or minor is the gravity of the punishment incurred. The sub-section does not refer to the gravity of punishment at all: it merely refers to the number of particulars constituting the offence: if a number of particulars is needed to constitute the offence, then for the purposes of section 238 (*1*) it may be called the major offence: if a combination of some only of such particulars constitutes a complete offence, then that offence is referred to in section 238 (*1*) as the minor offence. I do not overlook that section 238, sub-section (*2*), speaks of the proof of additional facts reducing an offence to a minor offence, and this does not accord with the view that the minor offence must always consist of fewer particulars than the major offence. But this is only a new form that the situation takes. In any case, I do not think it is necessary to pursue the question, because it is admitted that in the present instance the charge alleged several particulars, all of which were not proved: but a combination of those that were proved constitutes a complete offence, viz., the offence of cheating. As it happens, if all the particulars that were alleged had been proved, liability to a higher punishment would have been incurred. Presumably this would happen in most cases: the additional

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particulars would not be alleged in the charge unless they had the effect of enhancing the punishment or some similar effect; the charge would presumably not allege more facts than are necessary for proving liability to the highest punishment. But, confining myself to the present case, I do not see in what sense that offence, which the facts that have been proved constitute, is not to be considered a minor offence. It is a minor offence in the sense that it consists of a combination of fewer particulars than were alleged; it is also a minor offence in the sense that punishment to which the accused became liable is less grievous than that to which they would have been liable if all the particulars alleged in the charge had been proved.

The view taken by me of the verdict seems to me, therefore, to have been in accordance with law, that though all the particulars alleged in the fifth charge had not been proved, some of them had been proved; that a combination of the particulars that have been proved constitutes a complete offence,—the offence of cheating—which must under section 238 (*1*) be considered, for the purpose of this charge, to be a minor offence. The accused may consequently be found guilty under the fifth charge of the offence of cheating not committed in pursuance of any conspiracy.

It was pressed upon me by counsel that there was a degree of doubt in the question; and it was suggested that I should in some form express the desirability of a certificate under clause 26 being granted by the Advocate General. I think these arguments were based on some misapprehension. My own view is that, as I have not yet signed any judgment, the Criminal Procedure Code, section 369, does not preclude the correction of any error that may be discovered in the sentences that I have pronounced,—that I may at the present stage correct the error (if there was any) without

deriving authority to correct the error from any provision in the Code, or any other law for the time being in force or in the Letters Patent of this High Court. In other words, I think, I have not finally and irrevocably pronounced any sentences : if I find that the sentences verbally pronounced by me were illegal, I can consider them as not pronounced, and proceed in accordance with law. If then I had agreed with the view presented by the counsel for the defence, the proper course for me would have been to give effect to that view by my own revised sentences or if I had felt doubtful on the point, to exercise my discretion under clause 25 of reserving the point of law for the opinion of the High Court. I have not considered it necessary to follow either course.

What, however, was referred to by counsel was clause 26, not clause 25, of the Letters Patent. Clause 26, so far as relevant, gives the High Court power and authority to review the case and alter the sentence of the Court of Original Criminal Jurisdiction, on its being certificated by the Advocate General that in his judgment there is an error in the decision of a point or points of law decided by the original Court, or that a point or points of law decided by the said Court should be further considered. This provision is to be brought into operation after the Court of Original Criminal Jurisdiction has decided the case. It would be obviously improper for me, in the view that I have taken, to say anything with reference to the certificate referred to in clause 26, which is for the purpose of my errors being reviewed and set right.

In my opinion, therefore, I need not give any other orders ; the warrants will be drawn up in accordance with the sentences already pronounced by me.

B. K. D.