CRIMINAL REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Mitter, and Mr. Justice Maclean.

THE EMPRESS *v.* M. J. VYAPOORY MOODELIAR.*

1881
Jan. 22, *and*
Feb. 9.

Evidence, Admissibility of—Receiving Illegal Gratification—Penal Code (Act XLV of 1860), *ss.* 161, 165—*Evidence of Subsequent, but Unconnected Receipt, showing footing on which Parties stood—Evidence Act (I of* 1872), *ss.* 5—13 & 14.

The accused was charged with having received illegal gratification from *C. and Co.*, on three specific occasions in 1876. In 1876, 1877, and 1878, *C. and Co.* were doing business as commissariat contractors, and the accused was the manager of the Commissariat office. *Held*, that evidence of similar but unconnected instances of receiving illegal gratifications from *C. and Co.* in 1877 and 1878, was not admissible against him under ss. 5 to 13 of the Evidence Act.

Held, per GARTH, C. J. (MACLEAN, J. concurring), the evidence was not admissible under s. 14.

Per GARTH, C. J.—Section 14 applies to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it; not to cases where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling.

Per MITTER, J.—If the receipt of the illegal gratifications mentioned in the charge be considered proved by other evidence, and if it were necessary to ascertain whether the accused received them as a motive for showing favor in the exercise of his official functions, the alleged transactions of 1877 and 1878 would be relevant under s. 14, but they would not be relevant to establish the fact of payments in 1876.

THIS was a reference to the High Court, on a difference of opinion between two Judges sitting as the Special Court of British Burma.

The case referred was as follows:

"The accused was charged under s. 161 of the Penal Code with receiving illegal gratifications, on three distinct occasions,

* Criminal Reference, No. 1 of 1880, and Letter No. 8-1, from R. J. Crosthwaite, Esq., and C. F. Egerton Allen, Esq., Judges of the Special Court of British Burma, dated 12th November 1880.

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at Tonghoo, in the year 1876, from the firm of Cohen and Co.; and there were also three counts charging him under s. 165 of the Penal Code with reference to the same sums. He was tried before the Additional Recorder and a jury, and acquitted by a majority of the jury on all the charges; and the Additional Recorder, dissenting from the opinion of the majority, referred the case to the Special Court under s. 263 of the Criminal Procedure Code.

"At the trial evidence was admitted of similar, but unconnected, receipts of illegal gratifications by the accused from the same firm of Cohen and Co. during the years 1877 and 1878 at Thayetmyo. At both places, and in the three years, 1876, 1877, and 1878, the firm of Cohen and Co. were doing business as commissariat contractors, and the accused was the manager of the Commissariat office, first at Tonghoo, then at Thayetmyo.

"The Officiating Judicial Commissioner, at the hearing before the Special Court, was of opinion, that the evidence as to the similar but unconnected receipts of illegal gratifications at Thayetmyo, during the years 1877 and 1878, was not admissible to prove the specific charges relating to the year 1876, and therefore thought, that the verdict of the majority of the jury acquitting the accused should not be interfered with. The Additional Recorder was of opinion, that that evidence was admissible, and that the verdict of the majority of the jury should be reversed.

"The Officiating Judges, therefore, being unable to agree in a judgment, referred the case under s. 80 of the Burma Courts Act (XVII of 1875) to the High Court of Judicature at Fort William.

"The point as to which the Officiating Judges differ is as follows:

"Whether, in trying the three specific charges of receiving illegal gratifications from the firm of Cohen and Co. at Tonghoo in 1876, evidence of similar, but unconnected, instances of receiving illegal gratifications from the same firm at Thayetmyo in the years 1877 and 1878, is admissible."

The *Standing Counsel* (Mr. *Phillips*) for the Crown, contended that the evidence was admissible. The footing on which these

sums were received may have remained unchanged during the years 1876, 1877, and 1878. It now appears that, in 1878, the footing on which the money was received from the firm of Cohen and Co. by the prisoner was such, that the receipt of the sums was with a corrupt motive; if they were on the same footing in 1876, it would go to show the prisoner's guilt; then it is submitted that the evidence is admissible. [GARTH, C. J.—Could you give evidence to show what happened even at a longer interval, say ten years ?] Yes, I submit so. The subsequent conduct of the parties can be looked at to show on what footing Cohen and Co. and the prisoner were. The longer the interval the less would be the probability of the footing having remained the same, and therefore of the evidence being conclusive, but it would be admissible. [GARTH C. J.—Does it not depend on intention ? Is there any question of intention here ?] Yes, it is submitted there is; see s. 161, Penal Code. [GARTH, C. J.—Suppose a man charged with theft in 1876 : the fact of his having stolen something in 1877, a year afterwards, would be no evidence of the former crime.] In that case there would be no constant element : here we have the parties possibly in the same relation to one another, and on the same footing, subject to alteration of place and detail, which would be immaterial. The evidence cannot be said to be absolutely irrelevant. Proof of subsequent utterance of coin or notes is admissible; see Taylor on Evidence, 7th Ed., § 345, though possibly not if the notes or coin were of a different description.—*Id.*, note 1. Thus in *Rex* v. *Smith* (1) and *Rex* v. *Taverner* (2), the evidence was held inadmissible on that account. So in *Rex* v. *Harris* (3). Here the footing was probably the same, therefore, evidence of subsequent illegal receipt of money is admissible. Suppose the footing an innocent one. Might not a prisoner give evidence of the footing on which he stood with another person to show he was innocent ? Why can evidence not be admitted of the subsequent footing to prove his guilt ? The basis would be the same,—*viz.*, that the footing remained identical. The question here is, not whether the evidence is sufficient to convict, but whether it is absolutely

(1) 4 C. & P., 411. (2) *Id.*, 413 note. (3) 7 C. & P., 429.

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inadmissible? In the case of *Boddy* v. *Boddy and Grover* (1), evidence of acts of adultery subsequent to the date of the last act charged was held to be admissible for the purpose of showing the character and quality of previous acts of improper familiarity. In the present case what we want to show is the quality and character of these acts of receiving money. We have not a series of isolated acts, but acts which must have been done on some footing, which may have remained the same throughout. [GARTH, C. J.—The evidence shows that the arrangement was changed in 1877.] There is evidence here to show that there was a previous agreement for a monthly sum, but the purpose is not stated. Now in 1877, the purpose appears,—may evidence not be given to connect them? They are probably parts of a continuous transaction. Under the Evidence Act, s. 6, this evidence would be admissible. It would be for a jury to say if the acts were done on the same footing, and if this evidence is excluded, the jury would be prevented entirely from finding out what the footing was on which the parties were in 1876, so as to see if the footing was the same. Sections 8, 9, 14, and 15 of the Evidence Act were also referred to, and it was contended the evidence was relevant also under those sections.

Cur. adv. vult.

The following judgments were delivered:—

GARTH, C. J. (MACLEAN, J., concurring).—The prisoner in this case was tried before the Special Court at Rangoon upon three charges for receiving money illegally as a public servant, contrary to the provisions of ss. 161 and 165 of the Indian Penal Code.

The transactions upon which the charges were based are all said to have occurred in the year 1876, and the nature of them was, that the prisoner, being then the managing clerk in the Commissariat office of Tonghoo, where Messrs. Cohen Brothers carried on business as Commissariat contractors, accepted certain remuneration from Messrs. Cohen for services, which he is said to have rendered them in his official capacity.

(1) 30 L. J., P. & M., 23.

The case for the prosecution was, that these services were rendered, and the remuneration received, by the prisoner under some arrangement, which existed between the parties in the year 1876, but which came to an end in January 1877.

In the year 1877, the prisoner was transferred to the Commissariat office at Thayetmyo; and it was alleged by the prosecution, that in that year Messrs. Cohen, who also carried on business as Commissariat contractors at the latter place, made a similar arrangement there with the prisoner, and that certain sums were given to him as remuneration in that year for similar services.

Upon the trial evidence was adduced on the part of the prosecution, to show the receipt of these sums and the existence of this arrangement in 1877. But the learned Judges in the Special Court differed in opinion as to whether the evidence was admissible, and therefore, under s. 80 of the Burma Courts Act, they have referred the question to us in the following terms (*reads the point referred*).

It has been contended by Mr. Phillips for the Crown, that the evidence was admissible under some one or more of the sections from 5 to 14 of the Evidence Act, as showing the illegal nature of the transactions between Messrs. Cohen and the prisoner in 1877, and the probability that, if sums were received by the prisoner from them for an illegal consideration in that year, the sums which were received from them by the prisoner in the previous year, were also for an illegal consideration.

I believe that we are all agreed that this evidence was not admissible under any of the sections from 5 to 13 of the Evidence Act; but my brother Mitter is of opinion, that it might be admissible, under s. 14 upon the grounds stated in his judgment.

After carefully considering this point, and the authorities to which our attention was called by Mr. Phillips, I have come to the conclusion that the evidence was not admissible.

Section 14 seems to me to apply to that class of cases which is discussed in Taylor on Evidence, 6th edition, ss. 318 to 322,—that is to say, cases where a particular act is more or less criminal or culpable, according to the state of mind or feeling of the person who does it; as for instance in actions of slander or

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false imprisonment, or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff; or again, on a charge of uttering counterfeit coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coin in his possession, or had passed such coin before or after the particular occasion which formed the subject of the charge. The illustrations to s. 14, as well as the authorities cited in Taylor, show with sufficient clearness the sort of cases in which this evidence is receivable.

But I think we must be very careful not to extend the operation of the section to other cases, where the question of guilt or innocence depends upon *actual facts*, and *not upon the state of a man's mind or feeling*. We have no right to prove that a man committed theft or any other crime on one occasion, by shewing that he committed similar crimes on other occasions.

Suppose for example, that usury was a crime by the law of this country, and that a prisoner was charged with having taken usurious interest from A B in a transaction which occurred in 1870. It seems quite clear to me, that, for the purpose of proving the nature of this transaction in 1870, evidence could not be given of some other usurious transaction having taken place between the same parties in 1871. The question in such a case would be, not whether the prisoner had a mind prone to the commission of usury, or whether he was in the habit of making usurious contracts, but whether, in the particular instance, the prisoner had, *in point of fact, been guilty of usury*.

Now, as I understand, the argument for the Crown in the present case amounts to this. In the year 1876, Messrs. Cohen were commissariat contractors at Tonghoo, and the prisoner was the managing clerk in the Commissariat. In the year 1877, these parties were employed respectively in the same way at Thayetmyo. In the year 1876, the prisoner is charged with receiving certain sums of money as bribes from Messrs. Cohen, for showing them some favour in his official capacity, and he is proved to have actually received those sums. Under these circumstances, Mr. Phillips argues, that evidence is admissible that

in the year 1877 he received other sums from Messrs. Cohen as bribes, in order to prove that the sums which he received in 1876 he also received as bribes. But it seems to me, that the question, whether he took the sums in 1876 as bribes for doing a favor to Messrs. Cohen, is in each case purely a question of fact. It is not, as it seems to me, a matter of intention, or feeling, or knowledge; and I think that, in such a case evidence is no more admissible to show that he took bribes from Messrs. Cohen in 1877, than it would be to show that he stole some of the Government money in 1876, because he afterwards stole some in 1877.

I would, therefore, answer the question referred to us by saying that, in my opinion, the evidence is not admissible.

MITTER, J.—The facts of the case in which this reference has been made are briefly these:—

The accused was committed for trial on twelve separate charges of receiving illegal gratification, as a public servant, under ss. 161 and 165, the receipt of these several sums of money extending over a space of three years, 1876, 1877, and 1878.

At the trial the prosecution elected to proceed on three charges. The transactions out of which they are alleged to have arisen all happened in the year 1876. The accused was the managing clerk in the Commissariat office at Tonghoo in the year 1876, where Cohens transacted business as commissariat contractors. The evidence for the prosecution is, that there was an understanding between Cohens and the accused, under which he had agreed for certain remuneration to show to them certain favour in the exercise of his official functions; that this agreement came to an end in January 1877, when the accused was transferred to the Commissariat office at Thayetmyo; that in the month of June of that year the Cohens, who also transacted business as commissariat contractors at the latter place, entered into a similar agreement with the accused, and the evidence of payments of money to him in 1877 and 1878 at Thayetmyo, under the last mentioned agreement, was adduced in the course of the trial. The question of law that has been referred to us is as follows (*reads the point referred*).

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I am of opinion that receipt of illegal gratification in the years 1877 and 1878 at Thayetmyo cannot be proved, in order to establish that the accused *received* the three sums of money mentioned in the charges for which he was tried. The two sets of transactions are not so connected as would make them relevant to one another within ss. 5 to 13 of the Evidence Act. Section 6 cannot apply, because the payments of 1877 and 1878 are not so connected with the facts in issue in this case as to form part of the same transaction. The alleged agreement of 1876, according to the case for the prosecution, came to an end in January 1877, and the alleged payments in 1877 and 1878 were said to have been made under a different understanding.

The next section, under which it was contended, in the lower Court, that the transactions in 1877 and 1878 were relevant, was s. 8. But it seems to me that it cannot be said that they show or constitute a motive or preparation for the facts in issue. Neither can the conduct of the accused, as shewn in the alleged transactions of 1877 and 1878, be said to have been influenced by the facts in issue in the sense in which these words are used in the section. No doubt, a person who commits a crime with impunity, may ordinarily be found more ready to commit another crime of a similar nature, and in that sense the second crime may be considered to have been influenced to a certain extent by the commission of the first crime. But it seems to me that that kind of connection is not contemplated by this section. If it did, then where a person is charged with an offence, the whole of the previous history of his life would be relevant, because, every event of his life that preceded the commission of the crime, may be considered to have influenced it in some way. But that is not the meaning of the section. The influence referred to here must be direct and obvious; and in this sense I cannot say that the transactions of 1877 and 1878 were in any way influenced by the facts in issue. The same observation will apply to the contention based upon s. 11. There also the words "*highly* probable" point out that the connection between the facts in issue and the collateral facts sought to be proved must be so mediate as to render the coexistence of the too *highly* probable.

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The only other section which it is necessary to notice is s. 14. Under that section collateral facts specified therein can be proved if the question be as to the existence of any state of mind. In this case if the receipt of the several sums of money mentioned in the charges be considered to have been proved to the satisfaction of the Court by *other* evidence, and if it be necessary to ascertain whether the accused *received* them as a *motive* for showing favor in the exercise of his official functions, the alleged transactions of 1877 and 1887 may, in that case, be relevant under this section. But they are not relevant for the purpose of establishing the *fact* of payment in the year 1876.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

SOOBHUL CHUNDER PAUL *v.* NITYE CHURN BYSACK.

1880
Aug. 21.

Attaching Creditor—Right to Redeem Mortgage—Civil Procedure Code (Act X of 1877), ss. 276, 282, 295.

An attaching-creditor has not, as such, any right to redeem a mortgage subsisting prior to his attachment.

THE facts of this case sufficiently appear from the judgment.

Mr. *Jackson* and Mr. *Trevelyan* for the plaintiff.

Mr. *Kennedy* and Mr. *Phillips* for the defendant.

WILSON, J.—The plaintiff obtained a decree against one Kristo Chunder Chowdry; and, in execution of that decree, he attached a house of his judgment-debtor. The defendant held a mortgage of the house. The plaintiff in this suit claims to redeem that mortgage.

The case came on for settlement of issues. The first question that arises is, whether an attaching-creditor is entitled, as such, to redeem a mortgage subsisting prior to his attachment.