SPECIAL BENCH.

Before Mr. Justice Holmwood, Mr. Justice Sharfuddin and Mr. Justice Chatterjee.

EMPEROR

v.

ABANI BHUSHAN CHUCKERBUTTY.*

1910
June 6.

Pardon—Forfeiture of pardon—Proper Court to determine the question of forfeiture—Withdrawal of pardon by the Court granting it—Power of the Special Bench to re-open the question on a plea of pardon taken at the trial for the original offence in respect of which it was granted—Criminal Procedure Code (Act V of 1898) ss. 337, 339.

Where an approver, to whom a pardon was granted under section 337 of the Criminal Procedure Code by the committing Magistrate, resiles, at the hearing of the case before the Special Bench, from his deposition given before such Magistrate, the Special Bench can only discharge him, but cannot take any action against him for the offence in respect of which he was accorded the pardon.

If he is proceeded against for the original offence, the committing Magistrate who granted the pardon must determine whether he has complied with its terms or not, and thereby forfeited the same; and the question cannot be re-opened at his trial before the Special Bench for such offence.

Queen-Empress v. *Manick Chandra Sarkar* (1) approved of.

Emperor v. *Kothia* (2) and *Kullan* v. *Emperor* (3) referred to.

King-Emperor v. *Bala* (4) distinguished.

THE accused was tried at a session of the Special Bench, constituted under section 11 of Act XIV of 1908, on the 6th June, on a charge of dacoity under section 395 of the Penal Code.

The facts of the case appear to be as follows. On the 16th August 1909, at about 1 A.M., a dacoity was committed at Nangla, in the district of Khulna, in the house of one Mathura Nath Poddar. On his information a police investigation was started and several arrests were made. On the 2nd September the accused, Abani Bhushan Chuckerbutty, was arrested in connection with a dacoity which had occurred some time before

* Trial by the Special Bench constituted under Act XIV of 1908.

(1) (1897) I. L. R. 24 Calc. 492.
(2) (1906) I. L. R. 30 Bom. 611.
(3) (1908) I. L. R. 32 Mad. 173.
(4) (1901) I. L. R. 25 Bom. 675.

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at Bighati, and was sent to the Hooghly Jail. It appeared that on the 12th, Superintendent Shamsul Alum, who was in charge of the Bighati case, visited the prisoner in jail. On the next day Mr. Denham, an Officer of the Criminal Investigation Department, went there, and in consequence of a communication from him, the District Magistrate of Hooghly deputed Babu Kumud Nath Mookerjee to go to the jail where the accused made a confession regarding a number of attempted dacoities, including the one at Nangla, admitting general association with others for the purpose of committing dacoities in order to collect money for the purchase of arms and ammunition to be used against the Government. On the 30th October Mr. R. C. Hamilton, District Magistrate of Khulna, tendered him a pardon, under section 337 of the Criminal Procedure Code, during the preliminary inquiry against Bidhu Bhusan Dey and eight others for complicity in the Nangla dacoity which was then being held in his Court. Abani was examined on the 30th and 31st October as a witness, and repeated the statements made in his confession. On the 3rd December the Magistrate committed the accused to the High Court, charging eight of them under section 395 of the Penal Code, and one under sections $\frac{395}{109}$. The case came on for hearing before a Special Bench of the High Court, constituted under section 11 of Act XIV of 1908, and consisting of Woodroffe, Caspersz and Chatterjee JJ., on the 14th March 1910. Abani was examined as a witness on the 15th, when he retracted his confession and his previous deposition, alleging that the whole story as formerly told by him was false, and that he had been tutored while in jail by Shamsul Alum and afterwards by others. He was then allowed by the Court to be treated as a hostile witness and was cross-examined. On the next day the Advocate-General withdrew the case against the accused under trial, and they were acquitted. He then applied to the Special Bench for an expression of opinion that Abani had spoken untruthfully either before the District Magistrate or the High Court in order to enable the former to decide whether the witness had deviated from the conditions of his

pardon. The Court, while refraining from expressing an opinion as to whether or not he had failed to comply with the terms of his pardon, passed the following order :—

Having regard to the evidence that was given by the approver, Abani Bhushan Chuckerbutty, here, as also to the evidence given by him before the Magistrate, we are of opinion that he has given false evidence either in the inquiry before the District Magistrate or before this Court.

The Advocate-General then applied to the Special Bench for sanction, under sections 195 and 339 of the Code, to prosecute Abani for giving false evidence. The Court directed him to renew the application the next day. On the following day, the 17th March, Woodroffe J. informed the Advocate-General that he with Caspersz and Chatterjee JJ. had been appointed a Criminal Bench for the purpose of hearing the application. The Advocate-General then presented his petition containing the assignments of perjury, and the Court granted sanction under sections 195 and 339 of the Code.

On the 2nd April an application was made on behalf of the Crown to the District Magistrate of Khulna, Mr. R. C. Hamilton, to proceed against the accused under section 395 of the Penal Code. He was produced in Court, and the Magistrate asked him whether he relied on the pardon as a plea in bar to his trial for dacoity, whereupon he replied—"I cannot say anything." The Magistrate took some evidence to show that the accused, when examined before the Special Bench, had resiled from his previous deposition. The sanction granted by the High Court was put in, and also its judgment. The accused called no witnesses. The Magistrate thereupon declared his pardon to be forfeited. A preliminary inquiry was then held in respect of the original dacoity, and the accused was committed to the High Court, on the 14th April, charged under section 395 of the Penal Code. The case then came on before the Special Bench constituted under Act XIV of 1908, as stated above. Before the accused was called on to plead, an objection was taken to the trial by the defence.

Mr. J. N. Roy, for the accused. The question under the present Code is not one of withdrawal but of forfeiture. The

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Magistrate may withdraw the pardon, but he must first determine whether it has been forfeited. He cannot go into the question of forfeiture, as he has not the materials necessary for the decision thereon. There should have been an inquiry on the point: *King-Emperor* v. *Bala* (1), *Emperor* v. *Kothia* (2). In this case the Special Bench that tried the original case should have determined the point on the evidence before it. The present Special Bench cannot decide the matter, not having before it the proper materials for its judgment. There having been no declaration of forfeiture by proper authority the commitment is illegal, and the pardon is still subsisting.

The Advocate-General (*Mr. Kenrick, K.C.*), for the Crown. A Magistrate who has granted pardon under section 337 may withdraw it under section 339: *Queen-Empress* v. *Manick Chandra Sarkar* (3), *Queen-Empress* v. *Ramasami* (4). The procedure adopted in this case by the Magistrate was approved of in *Kullan* v. *Emperor* (5). The cases cited on the other side do not apply. The commitment was, therefore, legal and proper.

Mr. Roy, in reply, referred to *In re Alagirisawmy* (6).

HOLMWOOD J. The plea has been raised before us that there is no proper finding that the forfeiture of pardon under section 339 of the Criminal Procedure Code was incurred in this case, and that, therefore, this Court has no jurisdiction to try the case. Whether we look at the section as it stands, or at the law as laid down by the Bombay and Madras Courts under the present Act, or by this Court under the Act of 1898, there seems to be no doubt that the procedure followed in this case has been the correct procedure.

The defence has principally relied upon *Emperor* v. *Kothia* (2), where Beaman J. lays down precisely the procedure which has been adopted in this case as the procedure to be followed. At the termination of the trial in which the pardon is given, the

(1) (1901) I. L. R. 25 Bom. 675.
(2) (1906) I. L. R. 30 Bom. 611.
(3) (1897) I. L. R. 24 Calc. 492.
(4) (1900) I. L. R. 24 Mad. 321.
(5) (1908) I. L. R. 32 Mad 173.
(6) (1908) 5 Ind. Cas. 831; 7 Mad. L. T. 121.

accomplice must be discharged by the Court which tries the case. In this case it was the Special Tribunal. "Then, if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put upon his trial for that offence, he may plead to a competent Court his pardon, in bar. And that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence": *Emperor* v. *Kothia* (1). It is clear, therefore, that the Special Tribunal could not in any way proceed against him for the offence in respect of which he was given a conditional pardon. It may also be inferred, from the wording of clause (*l*), section 339 of the present Code of Criminal Procedure, that the forfeiture is incurred *ipso facto* by the acts of the approver, that is to say, if he either wilfully conceals anything essential or gives false evidence, he does not comply with the conditions upon which the tender was made, and the pardon is forfeited.

In dealing with the matter, the Court will have to consider whether the approver has or has not complied with the conditions upon which the pardon was tendered, and whether he has made a full and true statement and disclosed the true facts. The only difficulty that can arise is whether the inquiry should be made by the committing Court, or be made before us.

It seems clear that the committing Court must be intended to be the Court where the inquiry is to be made, and for this reason. As soon as a charge is drawn up, the accused is *ipso facto* put upon his defence. It does not, therefore, appear to us that the inquiry should be re-opened here, and in the case of *Queen-Empress* v. *Manick Chandra Sarkar* (2), which is the only authority in this Court, and which appears to apply with equal force to the present law as to the former law, it was laid down that the withdrawal of the conditions of pardon should be under section 339 by the authority that granted it and not by the High Court. The word *withdrawal* has been left out of the present Code, and, as I have just said, the *forfeiture* appears now to operate *ipso facto*.

(1) (1906) I. L. R. 30 Bom. 611, 621. (2) (1897) I L. R. 24 Calc. 492.

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In the case of *Kullan* v. *Emperor* (1), which followed the case of *Queen-Empress* v. *Ramasami* (2), the procedure which has been adopted here appears to have been approved. In the Bombay case, *King-Emperor* v. *Bala* (3), the facts were quite different. There the withdrawal appears to have taken place behind the accused's back, either in the committing Court, before the first case was tried, or in the Sessions Court immediately the judgment was delivered in the main case.

Now, let us see what happened in this case. The accused, Abani Bhushan Chuckerbutty, was asked, on being produced before the Magistrate when put upon trial in the present case, whether he relied upon the pardon under section 337 of the Criminal Procedure Code as part of his defence. This is his reply—"I cannot say anything." Evidence was accordingly produced for the purpose of proving that he gave false evidence either in the lower Court, the Magistrate's Court, or in the High Court. The sanction of the High Court was put in, also the High Court's judgment, and one witness was examined. The accused did not wish to call witnesses, and the Magistrate held that it had been proved that Abani Bhushan Chuckerbutty, after accepting pardon, had given false evidence, and that he had thereby forfeited that pardon and would have to be tried for the offence under section 395 of the Indian Penal Code.

Were we to hold that we had jurisdiction to re-open this matter, we should be prejudicing the accused and pre-judging the very question that has to be tried. It is open to the accused here to show that the statement he made on oath was not a false statement, or was a false statement induced by improper influence. It is obviously improper for us to enter upon that which is the main issue in the case, as a preliminary enquiry. The objection is, therefore, overruled.

SHARFUDDIN J. I agree with my learned brother in the conclusion he has arrived at on the law as contained in section 339 of the Criminal Procedure Code. The law is silent regarding

(1) (1908) I. L. R. 32 Mad. 173. (2) (1900) I. L. R. 24 Mad. 321.
(3) (1901) I. L. R. 25 Bom. 675.

the Court by whose order a pardon to a person who has not complied with the conditions under which it was tendered may be withdrawn. The law is also silent as to the Court by which this question may be determined. The corresponding section of the former Act has declared that such an order could be passed by the Magistrate before trial, or the Court of Session before judgment has been passed; and the High Court is the Court of Session here.

From the wording of the section, it seems to me to be clear that the mere fact that the approver has wilfully concealed anything essential, or has given false evidence, is sufficient to show that he has not complied with the conditions upon which the tender was made, and in that case he may be tried in respect of the offence for which a pardon was tendered, or for any other offence of which he may appear to be guilty in connection with the same matter.

The second clause of this section lays down that a statement made by a person who has accepted a tender of pardon may be used as evidence against him when the pardon has been forfeited.

It is to be observed that the word "forfeited" is not used in the first clause, but in the second, and if both the clauses are taken together, it is clear that the intention of the Legislature was that by the mere fact of concealment or incomplete disclosure or false evidence forfeiture would follow. With these words I agree with my learned brother Mr. Justice Holmwood.

CHATTERJEE J. The contention of learned counsel for the defence that the question as to whether the accused has, by giving false evidence, forfeited his pardon, ought to have been tried by the previous Special Tribunal, does not seem to be sound. The accused was in that case a mere witness. He was not on his defence for any offence charged against him; he had no opportunity to cross-examine any of the witnesses examined in the case. To hold, therefore, that the Tribunal before which he was deposing as a witness was to decide that he was giving false evidence, would be to hold that an accused person may be made liable for an offence without his having

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had an opportunity to cross-examine the witnesses who are examined against him. It cannot, therefore, be said that the Tribunal before which he gave his evidence was the only Tribunal that could decide whether he gave false evidence.

If that was not the proper Tribunal, then the next authorities to be considered are the Magistrate before whom the Crown initiated fresh proceedings against him under section 339 of the Criminal Procedure Code, and this Court.

It must be remembered that this Court is a Special Tribunal acting only after commitment under the provisions of the Criminal Law Amendment Act. Therefore, this Court would not have any jurisdiction to try that question, so that the Magistrate who committed the case was the proper authority to decide that question, but for the purpose of the commitment alone. Upon the evidence adduced by the Crown the pardon was, therefore, forfeited.

The result, therefore, is that I agree with my learned colleagues in holding that it was for the committing Magistrate to decide this question, and he has decided it in this case.

I say this with this qualification, that this is only for the purpose of the commitment, and it is perfectly open to the accused to show before us in this Court that the statements which are alleged to be false are true in fact, or were induced by improper influences.

E. H. M.