Privy Council Appeal No. 58 of 1926.

V. M. Abdul Rahman - - - - - - - - *Appellant*

v.

The King-Emperor - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT RANGOON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 14TH DECEMBER, 1926.

Present at the Hearing:

LORD PHILLIMORE.
LORD SINHA.
LORD BLANESBURGH.
LORD SALVESEN.
SIR JOHN WALLIS.

[*Delivered by* LORD PHILLIMORE.]

This appeal which is presented by special leave, arises in the following circumstances. One, Mani Iyer, presented an insolvency petition in the High Court of Rangoon against the firm of D. K. Cassim & Sons, alleging that the firm had allowed the attachment of certain immoveable properties to remain undischarged for over three weeks and had thereby committed an act of insolvency.

On hearing of the petition it appeared that the orders for the attachment had been made on the 19th and 21st November, 1923, but that the date of execution was the 27th, and that within three weeks of the 27th, though not within three weeks of the 19th, the attachment had been discharged, and, therefore, there was no act of insolvency.

It appeared, however, that in order to support the petition, the dates of execution of the warrants had been altered from the 27th to the 20th and 21st, respectively.

This being so, the Judge dismissed the petition and reported the case with a view to criminal proceedings, and proceedings were taken against Mani Iyer and against the present appellant Abdul Rahman, who was alleged to have abetted the forgery in order to injure or ruin trade rivals.

After some mistaken steps, the matter finally came before the District Magistrate at Rangoon. He, after taking evidence, formulated two charges against each of the accused. The first was to the effect that each of them acting jointly with the other, instigated some person unknown to forge false dates and serial numbers on the warrants ; and the second was that they attempted to procure the head process server to alter the dates on the register so as to make them correspond with the forged dates on the warrant.

Upon these two charges the District Magistrate convicted both the accused ; and upon the first charge he passed sentence on each of two years rigorous imprisonment. In respect of the second charge he passed no sentence.

Both the accused appealed from these convictions and sentences to the High Court which affirmed the convictions, but reduced the sentences to rigorous imprisonment for 9 months. From this conviction and sentence Abdul Rahman has now obtained special leave to appeal to His Majesty in Council.

One objection which is taken on behalf of the appellant can be disposed of shortly. It takes the form of an attack upon the conviction on the second charge, it being urged by counsel that though no sentence was passed in respect of this conviction, the Judges may have taken it into account in estimating the quantum of sentence to be passed on the first conviction.

Inasmuch as the sentence passed in respect of the first conviction was one which the conviction by itself would warrant, their Lordships desire themselves to be understood as not expressing any opinion as to the propriety of such a point being taken on an appeal to this Board. It is now well established that this Board only recommends His Majesty to exercise his jurisdiction in appeals in criminal cases upon certain very restricted grounds. But with this reservation their Lordships will deal with the point as it has been raised, and they are of opinion that it is not a good one.

It arises upon sections 190 and 191 of the Code of Criminal Procedure, which provide as follows :—

> " 190.—(1) Except as hereinafter provided, any Presidency Magistrate, District Magistrate or Sub-divisional Magistrate, and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—
>
> (*a*) upon receiving a complaint of facts which constitute such offence ;
>
> (*b*) upon a report in writing of such facts made by any police officer ;
>
> (*c*) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed. . . .

"191. When a Magistrate takes cognizance of an offence under sub-section (1), clause (*c*), of the preceding section, the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court, and if the accused, or any of the accused, if there be more than one, objects to being tried by such Magistrate, the case shall, instead of being tried by such Magistrate, be committed to the Court of Session or transferred to another Magistrate."

The complaint is that the Magistrate did not inform the accused that he was entitled to have the case tried by another Court, and for this purpose reliance is placed upon the case of *Chedi* (I.L.R. 28 Allahabad, p. 212), where a magistrate when trying the owners of certain licensed premises on a charge of refusing to admit the police, acquitted the employers and forthwith proceeded to try and convict the servant without giving him an opportunity of electing to be tried by another magistrate.

But in that case the Magistrate was proceeding under Clause C whereas in this case he was proceeding under Clause A. It was not a case in which while trying one person, the magistrate finds occasion to formulate a charge against someone else, but a case in which he was taking cognizance of an offence after receiving a complaint of the facts which constituted the offence. He formulated this second charge as he formulated the first in consequence of the one complaint.

In this connection *Begu's* case (L.R. 52 I.A. p. 191) is not without importance.

The second point and the one mainly relied upon on behalf of the accused can be best stated in his favour by setting out the material parts of an affidavit sworn on his behalf by his clerk Narayan which was produced to the Court of Appeal. He deposes that he was present on all the dates on which witnesses were examined before the District Magistrate, Rangoon,

"that the procedure adopted by the Magistrate in the said trial in relation to the reading over of the depositions to the witnesses, who did not know English, was to hand over the depositions to the Interpreter, who read over and interpreted the same to the witnesses, and that while such reading over and interpretation was going on, the learned District Magistrate went on recording the depositions of other witnesses";

"that in the case of English-speaking witnesses who gave their depositions in English, their depositions were handed over to them to read and the said witnesses read the depositions to themselves silently";

"that in the case of some witnesses, who were examined in Burmese and could read English, namely, Po Shin, Head Clerk, Ba Kyaw, the Copyist, and Shwe Htun, the Process-server, the depositions were handed to them and they read their depositions to themselves silently";

"that in none of those instances where the witnesses read over their depositions to themselves silently, the depositions as recorded were read over and explained to the accused";

"that even in the case of Burmese depositions, the statements of witnesses were in no time read over and explained to the accused": and

"that his master does not know Burmese."

The procedure is regulated by the following sections of the Code of Criminal Procedure.

"Section 360.—(1) As the evidence of each witness taken under Section 356 or Section 357 is completed it shall be read over to him in the presence of the accused if in attendance, or of his pleader if he appears by pleader, and shall, if necessary, be corrected.

"(2) If the witness denies the correctness of any part of the evidence when the same is read over to him the Magistrate or Sessions Judge may instead of correcting the evidence make a memorandum thereon of the objection made to it by the witness and shall add such remarks as he thinks necessary.

"(3) If the evidence is taken down in a language different from that in which it has been given, and the witness does not understand the language in which it has been taken down, the evidence so taken down shall be interpreted in the language in which it was given or in a language which he understands.

"Section 361.—(1) Whenever any evidence is given in a language not understood by the accused and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

"(2) If he appears by pleader and the evidence is given in a language other than the language of the Court and not understood by the pleader it shall be interpreted to such pleader in that language."

The point having been raised by this affidavit and the additional grounds of appeal on behalf of the accused, the High Court required a report from the District Magistrate, and it appeared that the course taken was adopted in order to save time and to meet the wishes of the Counsel for the accused.

Their Lordships have thought it right that this should be stated in exoneration of the District Magistrate, and because in applying Section 537 of the existing Code of Criminal Procedure, the Court is directed to have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings, but they wish it to be understood that no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused.

Now with regard to the objections taken in this affidavit, they are two : the first being that the depositions were read over while other stages of the case were proceeding, so that the accused and his advocate could not attend to the reading over, being occupied with listening to the further evidence that was being given, and indeed, that they were not so loudly read that the accused or his advocate could hear them, and the second objection being that in some cases the depositions were not read out to the witnesses at all, they being left to read them to themselves.

What is more remarkable about this affidavit than its averments are its omissions.

It does not aver, and as has been shown it could not aver, that any objection was taken by the accused or his advocate to the course pursued. It does not aver that the accused suffered any prejudice or that there was any correction of the evidence which any witness would have made, or which the accused or his advocate might with propriety have suggested, if all the depositions had

been read out loud to the witnesses and to the accused and where necessary, translated.

It does not suggest that there was any actual or possible failure of justice by reason of the course pursued, and this being the case, it would be contrary to the rule according to which this Board proceeds, if their Lordships were to entertain this appeal.

It has, indeed, been submitted by Counsel that inasmuch as special leave to appeal has been granted, the ordinary rules limiting the exercise of this jurisdiction ceased to apply. But this is not so.

The case of *Arnold* v. *the King Emperor* (41 I.A. p. 149) was a case where special leave had been given and where notwithstanding such leave, their Lordships adopted and repeated the language of Lord Watson in *Dillet's* case (12 A.C. 459) which was as follows :—

> "The rule has been repeatedly laid down, and has been invariably followed, that Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."

These considerations really dispose of the appeal. Inasmuch, however, as questions have been raised as to the propriety of the course pursued at the trial, the duty of Indian Courts of Appeal in criminal matters and the effect of Sections 535 and 537 of the Code of Criminal Procedure upon which there has been some difference of opinion in India, their Lordships think it desirable for the guidance of the Courts that they should pronounce their opinion upon these points.

With regard to one objection made on behalf of the accused, a careful study of the sections will show that the object of reading over the deposition is to obtain an accurate record from the witness of what he really means to say, and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down. It is not to enable the accused or his advocate to suggest corrections.

The distinction between Section 360 and Section 361 is very marked. Under the latter section, if evidence is given in a language not understood by the accused or his pleader, it is to be interpreted into their language, while under the former section when it is read over, it is to be interpreted to the witness in his own language, but there is no provision for its being interpreted to the accused. Thus if the depositions are taken down in English, and the language of the accused is Hindée, and the language of a witness is Burmese (as in the present case) the depositions will have to be taken by getting the witness' answers in Burmese, having them interpreted to the court so that they may be taken down in English, and further interpreted to the accused so that he may understand them in Hindée. When, however, the deposition comes to be read over, as it will be in English, it will be interpreted to the witness in Burmese, but not to the accused in Hindée ; and

if the accused knew neither English nor Burmese, he will be none the wiser.

No doubt the evidence has to be read over in the presence of the accused or of his pleader. He is entitled to be sure that it has been read over, and that the witness has had an opportunity of correcting the written word. But he is not necessarily entitled to the opportunity of suggesting corrections. Their Lordships are of opinion that upon the strict construction of the sections of the code there was no violation of their provisions in the course taken with respect to those witnesses whose depositions were read over to them as already described.

At the same time, their Lordships cannot but see that it would be a better course if depositions other than mere formal ones were read over so that the accused or his pleader could hear them and give their undivided attention to them. Care would, of course, have to be taken that no suggestion should be conveyed to a witness in the form of a correction which would make him alter his evidence, but there might be obvious slips to which, under proper safeguard, attention might be called by the accused or his pleader. Still it should be remembered that the primary object is to fix the witness and to enable him to protect himself against any inaccuracy in the words taken down from his lips.

The second objection is more serious. Section 360 says that the deposition is to be read over to the witness. This provision is not complied with in terms by giving the witness an opportunity of reading it over to himself. He may do so in a slovenly and imperfect manner. He may not easily decipher the handwriting. He may not feel the responsibility in the same way that he would if it were read over to him. No doubt there are cases in which it would be more likely that accuracy would be obtained if the witness read over the deposition to himself, as for instance, if the pronunciation of the magistrate or of the interpreter in a language not his own, was difficult to follow, or if a witness was partially deaf. But it is dangerous in cases of criminal law to accept equivalents, and except in cases where reading over to the witness would be absurd, as, for example, with a stone deaf person, the provision should be complied with. The course adopted in this case seems to be that which was condemned in the case of *Jyotish Chandra Mukerjee* (I.L.R. 36 Calc., p. 955).

Then arises the further question whether non-compliance in this respect should vitiate a trial, and in this connection their lordships have to consider the provisions of Sections 535 and 537 of the Code of Criminal Procedure, which are as follows :—

> " 535.—(1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of Appeal or revision, a failure of justice has in fact been occasioned thereby.
>
> " (2) If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a

charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge.

"537. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

(*a*) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial, or in any inquiry or other proceedings under this Code ; or

* * * * *

(*c*) of the omission to revise any list of jurors or assessors in accordance with Section 324 ; or

(*d*) of any misdirection in any charge to a jury

unless such error, omission, irregularity, or misdirection has, in fact, occasioned a failure of justice.

"*Explanation*.—In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

The passage beginning " unless such error " does not qualify (*d*) only but also the other letters of the alphabet.

The legislation on this matter is of long standing. Their Lordships have referred to Sections 426 and 439 of the Code of 1861 ; Sections 283 and 297 of the Code of 1872 ; and Sections 535 and 537 in the Codes of 1882 and 1898.

The variations are not important, the chief thing to note being that a rather trivial illustration which appeared in the Code of 1908 has disappeared from the present Code.

There have been a number of decisions in India upon these enabling or curing sections, but the only important one which came before this Board is the case of *Sabramania Iyer* (reported in 28 I.A. p. 257). There the trial of a man on charges of extortion in which 41 criminal acts extending over a period of two years were brought against him in contravention of a section of the Code which provides that a man can only be tried for three offences and those committed within a period of 12 months, was held bad, and the conviction was quashed because the provisions of Section 537 of the then Criminal Procedure Code, did not cure it.

The distinction between that case and the present is fairly obvious. The procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused.

The other authorities which have been brought to their Lordships' notice, are decisions of the High Courts in India. There is *Chedi's* case (28 Allah p. 212) already quoted, on which their Lordships offer no comment, and several decisions in Calcutta. One of the earliest is the case of *Sheikh Bazu* in 1867 where it was held by a Full Bench of the High Court of Calcutta that there had been an error in the action of the Magistrate in sending up joint

charges against persons who took part in the riot on opposite sides, but that inasmuch as the accused had had a fair trial notwithstanding, the conviction should not be set aside.

A more apposite case is that of *Jyotish Chandra Mukerjee* decided in 1909 already cited. The error in that case seems to have been the same as the error in the present case; but Jenkins C.J., delivering the judgment of the Court, said that they were able to hold that in the special circumstances, the omission was not fatal.

On behalf of the appellant, reliance was placed upon two later decisions of the High Court of Calcutta, both in the year 1924, and both reported in Volume 52 of the I.L.R. (Calcutta).

In the first case, that of *Hira Lal Ghose* (p. 159), with regard to five depositions, it did not appear positively that they had been read over to the witnesses, and the matter was left as one of inference; two others had not signed their depositions, and the Court held that these irregularities could not be cured. It will be observed that the irregularity or omission in that case was graver than the irregularity in the case now under appeal, because in the present case, all the witnesses signed their depositions as having either had them read over, or having read them over themselves. But even so, their Lordships cannot accept the reasoning in that case, and they are of opinion that though it is regrettable that such an irregularity should creep in, and though it might be taken into account with other elements (if such there were) of objection to the satisfactory character of a trial—it would not by itself be ground sufficient for quashing a conviction.

If, indeed, it were shown that the omission did lead or even with probability might have led to some material error in the depositions not being checked, the case would be otherwise.

The second case before the same judges (that of *Dargahi*, p. 499) follows on the same lines, and the only further comment to be made upon it, is that it was somewhat doubtful whether any error in fact had been committed, and that the learned judges would rather seem to have neglected to use all the means which they might have used to enquire into the correctness of the facts alleged in objection to the conviction.

To sum up, in the view which their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which in their Lordships' view, may be supported by the curative provisions of Sections 535 and 537. Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

In the Privy Council.

V. M. ABDUL RAHMAN

v.

THE KING-EMPEROR.

DELIVERED BY LORD PHILLIMORE.

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