

(1927) 12 CAL CK 0031
In the Calcutta High Court

Satya Narain Mohata

APPELLANT

Vs

Emperor

RESPONDENT

Date of Decision : 02-12-1927

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 449

Citation : AIR 1928 Cal 675

Hon'ble Judges : Rankin, C.J.;Chotzner, J

Bench : Full Bench

Judgement

Rankin, C.J.—In this case the appellant Satya Narain Mohata was put upon his trial jointly with one Nanda Lal Banerjee at the High Court Sessions before Costello, J., and a jury. The facts out of which the case arose were alleged to be that Messrs. Bird and Company had a contract to supply labour to Messrs Kilburn and Company in connexion with the managing agency of the latter firm for the India General Steam Navigation Company Limited. It appears that there was an office at a certain ghat. It appears that Messrs. Bird and Company gave a sub-contract for the supply of this labour to the appellant. The appellant was to be paid at a flat rate based upon the number of maunds actually handled or transhipped by the coolies whom he supplied. The rate was not quite the same for all articles but it was a system of payment which depended upon the number of maunds that had been handled. The first accused, Nandalal Banerjee was a clerk or servant of Messrs. Bird and Company and the system as regards payment was alleged to have been that certain vouchers were prepared by accused 1 and that accused 1 to a large extent looked after the business of the present appellant and assisted him in various matters connected with the supply of labour and obtained payment from Messrs. Bird and Company. In these circumstances it was said that after certain records giving the weights of the different goods handled had been checked and passed on behalf of Messrs. Kilburn and Company these records were falsified and bills were presented on behalf of the present appellant to Messrs. Bird and Company for a larger sum than was justly due. To give a particular illustration which is referred to in one of

the counts at the trial it is said that figure "36" maunds was changed into "4036"

2. In these circumstances the accused were put upon their trial jointly and the charges against them were as follows : The first charge alleged that between February and August 1926 they were parties to a criminal conspiracy to cheat Messrs. Bird and Company. The second count was against the present appellant alone and accused him of cheating Messrs. Bird and Company in respect of a certain certified report being the daily report of work done on the 7th July 1926. The third count was against Naiadalal Banerjee alone and accused him of abetting the offence of cheating described in the second count. The fourth count was also against Nandalal Banerjee alone and accused him of committing forgery in respect of the same document as is mentioned in the second count, namely a certified daily report of work done on the 7th July 1926, and the fifth count was against the present appellant charging him with having dishonestly used as genuine the document referred to in the previous Court.

3. Now, the jury found the two accused not guilty on the first count of conspiracy but they found the present appellant guilty on the second count of the crime of cheating and they found Nandalal Banerjee guilty of abetting that. They also found Banerjee guilty of the charge of forgery and the present appellant guilty of dishonestly using as genuine the forged document.

4. In these circumstances Mr. Sircar on behalf of the present appellant calls attention to the fact that in the second and the fifth counts on which this man has been convicted and sentenced the charge is that "he" in pursuance of the conspiracy in the first charge mentioned "cheated Messrs. Bird and Company and that in pursuance of the conspiracy in the first charge mentioned" he dishonestly used a forged document as genuine and the first question which arises is this : If the jury have negatived the conspiracy can a conviction on these two counts stand?

5. Now it appears to me, to deal with that question first, that the conviction on those two counts is quite in order, the reason being that the words "in pursuance of the conspiracy in the first charge mentioned" find their place in these charges not because they are any element of the offence alleged in the second or the fifth count but because they are proper words to show as the truth and substance of the matter was, that the accused were being (rightly or wrongly) charged with offences all having reference to the same subject-matter or series of transactions and properly brought together in one indictment.

6. In this connexion it may be desirable to point out that there has always been, an important branch of the law as regards indictments which is referred to sometimes as the doctrine of surplusage. A very elaborate treatment of this may be found in Russel on Crimes, Book 6, Ch. 2, Section 3, and from this I will take the following statement of the law:

In order to convict a man of an offence; all the material facts which constitute the offence, and which are necessary to enable the parties to avail themselves

of the verdict and judgment, should the same charge be again I brought forward must be stated upon the indictment, and all these requisite allegations must be satisfied in evidence and proved as laid. But allegations not essential to such purpose which might be entirely omitted without affecting the⁵ charge against the prisoner and without detriment to the indictment are considered as mere surplusage and may be disregarded in evidence.

7. In illustration and in support of that statement I will refer to two cases only. The first is the case of *Rex v. Hunt* (1811) 2 Camp 583 where Lord Ellenborough said:

If an indictment charges that the defendant did and caused to be done a particular Act it is enough to prove either. The distinction runs through the whole criminal law, and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified.

8. The Court of King's Bench in the well known case of *The King v. Hollingberry* (1825) 4 B. & C. 329, had before them a charge of conspiring falsely to indict one A.B. for keeping a gaming house for the purpose of extorting money from the said A.B. The jury found the defendants guilty of conspiring to indict A.B. for the purpose of extorting money but not to indict him falsely and upon that the conviction was upheld with these observations:

In criminal cases it is sufficient for the prosecutor to prove so much of the charge as constitutes an offence punishable by law. This was an indictment for conspiring falsely to indict a person for the purpose of extorting money. The jury found the defendants guilty of conspiring to prefer an indictment for the purpose of extorting money and that is a misdemeanour whether the charge be or be not false.

9. It is said, however, that the words in the second and the fifth counts "in pursuance of the conspiracy in the first charge mentioned" cannot be omitted without detriment to this indictment because it is said that if they are omitted there will be nothing to show that the specific offences alleged in those counts arise out of the same subject-matter as the alleged offence under the first count. Upon that question it appears to me that the appellant's appeal cannot succeed. The indictment may be good or bad but lit cannot depend upon the facts which will ultimately be found by the jury and it must be good or bad at the beginning of the trial. If the only function of those words is to make it plain that the second and the fifth counts have no reference to independent offences; or to a different subject-matter than the first count then it seems to me that there is no objection at all to the jury convicting under the second and the fifth counts although they acquitted upon the first. This matter was considered by a Division Bench consisting of Newbould and Suhrawardy, JJ, in the case of *Abdul Salim and Others Vs. Emperor*, . The particular passage which deals with this matter is at p. 596. In my judgment there is no validity in the objection that has been taken. It would have been quite possible to rearrange these counts differently, to have

begun with what was in fact the second count and to have added the charge of conspiracy last, provided only that suitable words were used in each count to show that they related to the same series of transactions. So far as the counts other than the first count are concerned they all have reference to cheating accomplished by means of forgery of the daily report of the 7th July 1926 and it is quite clear, therefore, that they merely specify the various sections of the Indian Penal Code which the course of conduct of the accused offends against.

10. It remains, therefore, only to consider the question whether the direction of the learned Judge was correct and sufficient. In our opinion, the learned Judge's summing up is unexceptionable. It is very elaborate upon each point that arose for decision. It was quite open to the jury to find Nandalal Banerjee guilty of abetment although they did not find a conspiracy, because conspiracy is only one of the possible ways of abetment by the definition given in the Indian Penal Code.

11. It was suggested by Mr. Sircar that the learned Judge in certain passages put too strongly to the jury the view that the appellant was the only person interested in getting over payments; but if the charge be taken as a whole that matter was very fully dealt with. It would appear that as between these two accused their defences were at variance upon that very point.

12. Mr. Sircar complains that after the appellant had given an explanation upon this matter the Judge ought not to have taken another statement from his co-accused u/s 342, Criminal P.C. In my judgment that was entirely in the discretion of the learned Judge and he has not used his discretion unfairly.

13. The view taken by the jury as they were careful to explain was this : that the appellant was the principal and that Nandalal Banerjee who seems to have been a clerk on a small pay and an old man was a mere tool of the appellant. That may very well explain why the jury took a merciful view and acquitted both on the charge of conspiracy. We are not concerned with the question whether the jury's verdict was completely logical upon such a matter. It is sufficient that the jury have convicted this appellant upon the charge of cheating and the charge of using dishonestly a forged document knowing it to be forged.

14. In my opinion this appeal must be dismissed. The appellant must surrender to his bail and serve out the remainder of his sentence.

15. I pass now to a question of practice which was argued in connexion with this case. This appeal is brought under a new provision - Section 449, Criminal P.C., as amended in 1923. It is an appeal from a trial held on the original side before a Judge and a jury at the High Court Sessions. It was represented to us that this appellant desired that a vakil of this Court should act for him in the matter of this appeal. In order that his case might not fail to be presented he also employed an attorney so as to put himself in order if the Court should think that the vakil was not entitled to act in a criminal appeal from the original side under the new section. I mention that because a point which is not raised in this case is the question whether it could possibly be right to appear by both a vakil and an

attorney. I confine myself to the question whether in such a case as this it is open to a vakil to act for an appellant. Now, we were referred to the rules of this Court and to certain sections of the Criminal Procedure Code by Mr. N.K. Basu who was good enough to argue this matter on behalf of the vakils and by the learned Advocate-General who argued it in the interest of the attorneys. In my judgment the question depends upon the rules of this Court and is not concluded by anything in the Criminal Procedure Code Mr. Basu did not contend that it was outside the powers of the Court by rules to regulate this matter, but he drew our attention to the terms of Section 419 and to the definition of "pleader" in Section 4 of the Code. Now for the present purpose it matters nothing whether the true view be that the joint effect of these sections is to give the right to the vakils subject to any restrictions which the High Court by rules may have imposed or whether the true view be that the effect of these sections is to give the right in question to those practitioners who by the rules of the High Court are authorized to exercise it. It might be said that the definition of "pleader" in Section 4 of the Code means that unless there is a rule to the contrary any advocate any attorney or any vakil can file a memorandum of appeal under, Section 419. If so, that might be inconvenient from the point of view of the vakils as much as of the attorneys, because it is quite clear that if that be the true view then a rule would have to be shown preventing an advocate from filing a memorandum of appeal in such a case as this or preventing an attorney from filing a memorandum of appeal in an ordinary criminal appeal from a mofussil Court. The point, however, when the actual rules of the High Court are considered does not fall to be decided by a mere choice between the two views I have mentioned.

16. I come now to set out the rules of this Court which bear upon the matter and their history in so far as this is necessary to explain them. The rules upon which the question depends are Rules 1 and 4, Ch. 2 of the original side rules. Rule 1 is:

Advocate of this Court may appear and plead for parties on either side of the Court, but on the original side or in appeals from the original side, not unless instructed by an attorney.

17. Rule 4 as it stands now is as follows:

Vakils shall not appear, plead, or act for any suitor in this Court in any matter on the original side or in any matter of appeal from any case from the original side unless in such appeal a question of Hindu or Mahomedan law or usage shall arise, and the Court or a Judge thereof shall think fit to admit a vakil or vakils to plead for any suitor or suitors in that case. In such case the vakil or vakils, so admitted may plead accordingly.

18. On that rule it is necessary to ascertain whether this reference to a "suitor" or "suitors" points to the provision being intended for civil appeals only so as to cut down the generality of the expression "in any matter of appeal, from any case from the original side." If not, then there is an express prohibition because on that view by the term of the rule vakils shall not appear, plead or act in any

matter of appeal from any case from the original side. It is for this reason that I thought it necessary to observe that it did not matter which interpretation was put upon the definition of "pleader" in S4, Criminal P.C.

19. I come now to see whether in the, history of this rule there is any light to be obtained upon its real intention. The word "sutors" comes in this connexion from Clause 11 of the originals Charter of 1774. It is repeated in Clauses 7, 8 and 9 of the Letters Patent, 1862 which deal with the same subject-matter, and it is repeated again in Clause 9 of the Letters Patent 1865. In Clause 11 from which subsequent clauses all derive their language we find this:

And we do hereby further authorize and empower the said Supreme Court of Judicature at Fort William in Bengal, to approve, admit, and enrol such and so many advocates and attorneys-at-law, as to the said Supreme Court of Judicature at Fort William in Bengal shall seem meet who shall be attorneys of record, and shall be and are hereby authorized to appear plead and act for the suitors of the said Supreme Court of Judicature at Fort William in Bengal.

20. Whether the idea underlying the word "suitor" is that of a person who owes suit and service or that of a person who is seeking or demanding something from a Court there can be no doubt that in Clause 11 of 1774, the term is used in the very broadest sense for any client, i.e., for any person who may happen to require to employ a member of the legal profession to do his business for him.

21. In the Letters Patent of 1862 the clause reads as follows : Clause 7:

We do hereby authorize and empower the said High Court of Judicature at Fort William to approve, admit and enrol such and so many advocates as to the said High Court shall seem meet who shall be and are hereby authorized to appear and plead for the suitors of the said High Court subject to the rules and directions of such Court.

22. It seems to be quite clear that the ordinary case of an advocate defending a prisoner in a criminal trial is governed by that clause. The same phrase is used in Clause 8 with reference to vakils:

We do hereby authorize and empower the said High Court of Judicature at Fort William to approve, admit and enrol such and so many vakils as to the said High Court shall seem meet who shall be and are hereby authorized to appear plead and act for the suitors of the said High Court subject to the rules and directions of such Court.

23. It seems quite clear that that language is intended to be read in the same wide general way as in Clause 11 of 1774. When the Letters Patent of 1862 was amended in 1865, Clauses 7, 8 and 9 were rolled into one and a certain change was made because no longer were the advocates or vakils or attorneys authorized to do something by the Letters Patent subject to a power in the High Court to restrict the authority, but the terms of the Letters Patent of 1865 gave to the High Court a power to give such authority to each branch of the profession

as it would think fit to do; and Clause 9, Letters Patent of 1865 went on to say not merely the High Court had power to approve, admit and enrol so many advocates, attorneys and vakils as to the High Court should seem meet, but that

such advocates, vakils and attorneys shall be and are hereby authorized to appear for the suitors of the said High Court and to plead or act or to plead and act, for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

24. The position, therefore, after 1865 was that the rights of each branch of the profession were to be the rights given to them by the rules.

25. I come now on this question to the rules that were made under the Letters Patent of 1862 and 1865. As it is not easy now owing to the lapse of time to obtain the exact words of those rules I propose to set them out in this judgment. The rules of the High Court under the first Letters Patent of 1862 were as follows : Rule 6:

Advocates of this Court may appear and plead for suitors in any branch of the Court civil or criminal.

26. Rule 7:

Vakils shall not appear, plead or act for any suitor in this Court in any matter of ordinary original jurisdiction civil or criminal or in any matter of appeal from any case of ordinary original civil jurisdiction unless upon appeal from judgment in a case of such civil jurisdiction a question of Hindu or Mahomedan law or a question of usage shall arise and the Court or Judge thereof shall think fit to admit a vakil or vakils to plead for any suitor or suitors in that case.

27. Now, so far as appeals are concerned it will be noticed that Rule 7 of 1862 confines the prohibition of vakils from appearing to cases of appeals from ordinary original civil jurisdiction. The reason for that is manifest because if one goes to the clause which corresponds to Clause 15 of the present Letters Patent one finds that that is Clause 14 of 1862 and Clause 14 of 1865 was in these terms:

And we do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment in all cases of original civil jurisdiction of one or more Judges of the said High Court

and so on : so that there was no Letters Patent right of appeal in 1862 except in a civil case That, however, was altered by the terms used Clause 15 of 1865 and the terms used by that clause were these that,

an appeal shall lie to the said High Court of Judicature at Fort William in Bengal from the judgment not being a sentence or order passed or made in any criminal trial,

so that if it was possible to have an appeal in a criminal case which was an

appeal from a judgment, but not from a judgment which was a sentence or order passed or made in a criminal trial, then for the first time it became theoretically possible to have an appeal in a criminal case from the original side. At first it does not appear that the consequences of that change were appreciated. When the High Court came in 1865 to revise its rules because of the new Letters Patent it left the rule about advocates (as I have set it out - Rule 6) without amendment. The only amendment it made in the rule about vakils was this : that instead of saying that

vakils shall not appear, plead or act for any suitor in this Court in any matter of ordinary original jurisdiction civil or criminal

and so forth it says that

vakils may appear, act or plead for suitors in this Court, provided that they shall not appear, plead or act for any suitor in any matter of ordinary original jurisdiction civil or criminal or in any matter of appeal from any case of ordinary original civil jurisdiction, so that in effect the rule which confined the execution in case of appeals to cases of civil jurisdiction was repeated after 1865.

28. It does not appear that the change effected by 01. 15 of 1865 Letters Patent claimed the attention of this Court until the very well-known case of Ameer Khan, In the matter of (1870) 6 B.L.R. 659 in 1870, where it will be remembered, Norman, J., refused an application for a writ of habeas corpus. That decision was taken on appeal and the question was debated whether or not you could have in a criminal matter an appeal from the original side under the Letters Patent of 1865. The point discussed chiefly was whether a refusal of a writ of habeas corpus was a "judgment" within the meaning of Clause 15. The point, however, was not decided because both the learned Judges who heard the appeal were clearly of opinion that the writ had been rightly refused on the merits and that case, although it brought the question up for the first time, resulted in no decision. In 1889 a case arose in Bombay. In the matter of Narrondas Dhanji (1890) 14 Bom. 555, where an order in the nature of habeas corpus applied for u/s 491, Criminal P.C., was refused by a Judge on the original side and the question was argued whether or not any appeal lay from that refusal. The point which was argued there again was whether a mere refusal to make such an order was a judgment - was really a determination" of the rights of the parties - and it was held that an appeal did lie on the ground that the refusal of the order was a judgment and therefore the case came within Clause 15, Letters Patent. But it was not until 1902, in the case of In the matter of Horace Lyall (1902) 29 Cal. 286, that the question was authoritatively determined in this Court and there it was held that an appeal did lie from a refusal to grant an order u/s 491, Criminal P.C., on the ground that although it was a criminal matter, it was not a sentence or order passed or made in a criminal trial and from that date - and so far as I can judge, not before - it has been settled law in this Court that there can be an appeal from the original side in a criminal matter.

29. Now, the rules of this Court were subjected after 1910 to an extensive and general revision. The process of revision apparently took a long time, but ultimately the revised rules were passed by the full Court on 19th August 1913 to come into force on 15th April 1914 and in those revised rules we find that the old rules as to vakils and as to advocates and their authority have been altered. The alterations are very significant. At the same time we find incorporated in our rules a series of rules beginning with Section 14, Ch. 38, dealing with appeals u/s 491, Criminal P.c. We have therefore, to look back to Rules 1 and 4, Ch, 2 to our present rules, with a view to see what is the alteration as compared with the rules of 1865 and what is the meaning of it.

30. Now, as the first rule stands, instead of the words:

Advocates of this Court may appear and plead for suitors in any branch of the Court civil or criminal,

we get the present Rule 1.

Advocates of this Court may appear and plead for parties on either side of the Court, but on the original side or in appeals from the original side, not unless instructed by an attorney.

31. I cannot doubt that the intention of that rule was to cover criminal as well as civil appeals. Nobody supposes that an advocate of this Court is to be restricted to take his instructions from an attorney in civil cases only from the original side.

31. When we come to Rule 4 we find there that, instead of the prohibition against vakils appearing in appeals from the original side being expressly confined to civil cases only as had been the practice ever since the Letters Patent of 1862, the following words are employed:

Vakils shall not appear, plead or act for any suitor in this Court in any matter on the original side or in any matter of appeal from any case from the original side unless in such appeal a question of Hindu or Mahomedan law or usage ,shall arise,

and so on. In my judgment it is reasonably clear that the revision of the rule which came into effect in 1914 took a broad line of division according as the case was on, or was an appeal from, the original side of this Court; and whatever might have been the position had these rules not been revised the rules themselves are capable of but one interpretation. In my judgment the proper and the only permissible course in cases under the new Section 449, where a new right of appeal is given by the Code to the subject is for this right to be exercised so long as the present rules remain unchanged in the way laid down by these rules, namely tan the footing that it is part of the business of the Court from which, as the rules stand, vakils are excluded. This disposes of the question of practice and I have only to thank Mr. Advocate-General and Mr. Basu for their assistance in enabling the Court to come to a decision in this matter. It may be noticed that so far as appeals from applications u/s 491 of the Code are

concerned the Letters Patent of 1865 was amended in 1919 so as to prohibit any Letters Patent appeal in a case of criminal jurisdiction, and since 1923 Section 491 itself has been elastically altered. It may well be that these legislative changes make it necessary for the Court to bring these rules up to date. I desire to make it quite clear that nothing that I have said touches in any way upon any question as to what rules should be made. I am concerned only with the correct interpretation of the rules as they are.

Chotzner, J.

32. I agree.