(1866) 08 CAL CK 0006

Calcutta High Court

Case No: None

The Queen		APPELLANT
	Vs	
Musst. Zamiran		RESPONDENT

Date of Decision: Aug. 31, 1866

Judgement

Sir Barnes Peacock, Kt., C.J.

I have no doubt that there may be an alternative finding as well in a case in which the evidence proves the commission of one of two offences filling within the same sections of the Penal Code, and it is doubtful which of such offences has been proved, as in one in which the evidence proves the commission of an offence falling within one of two sections of the Penal Code, and it is doubtful which of such sections is applicable. This appears to me to be quite clear when s. 381 of the Code of Criminal Procedure is read together with s. 242 and cl. 5, s. 382 of that Code. A swears before a Magistrate that he saw the prisoner kill B. The prisoner is committed to the Sessions for trial for murder. A, on the trial, swears that he did not see the prisoner kill B, and the" prisoner is acquitted. A, in consequence, is committed for trial for giving false evidence, and two charges are framed against him under s. 242, Code of Criminal Procedure:-- First,--That he intentionally gave false evidence before the Magistrate, by swearing that he saw the prisoner kill B. Second,--That he intentionally gave false evidence before the Sessions Judge, by swearing that he did not see the prisoner kill B. The Sessions Judge finds that the prisoner intentionally gave false evidence, but that it is doubtful whether the statement made before the Magistrate, or that made before the Sessions Judge, was the false one. If the prisoner was innocent, and the statement before the Magistrate was false, the prisoner has in consequence been improperly committed for trial on a charge of murder, and has suffered all the degradation, annoyance, and anxiety of being committed on a false charge. If the prisoner was guilty, and the witness, in consequence of bribery or other cause, has sworn falsely before the Sessions Judge, the administration of justice has been defeated and a murderer has been acquitted. It is clear that, unless the law is very defective, or we are to trifle with, the

administration of justice, A ought to be punished. It appears to me that the law is not deficient, and that the case is provided for by the Code of Criminal Procedure, whether it be read according to the strict letter or according to its spirit. In such a case it would seem clear that the Magistrate was right in framing a charge containing two heads under s. 242. The Sessions Judge would also be strictly within the letter as well as the spirit of ss. 381 and 382, cl. 5, in finding that A is guilty of the offence of intentionally giving false evidence, and that he is guilty either of the offence specified in the first head, or of the offence specified in the second head of the charge, and is convicted of an offence punishable under s. 193 of the Penal Code. The words in cl. 5, s. 382, which follow the word "namely," are clearly given only as an example, and it is clear that without an example of a case falling within the latter branch of s. 242, such, a case falls within the strict letter of cl. 5, s. 382. The other point upon which Campbell, J., is stated in the reference to entertain a strong opinion is, as I understand him, that the statement made by the prisoner before the Sessions Judge was in consequence of s. 32, Act II of 1855 See Act I of 1872, s. 132., inadmissible against the prisoner in a criminal proceeding, except for the purpose of punishing her for willfully giving false evidence upon such examination, i.e., examination before the Judge.

2. Witness was not compelled to give evidence before the Judge, and, therefore, the question does not arise whether she would be protected from a charge of giving false evidence in her examination before the Judge had she been compelled to give evidence. Whatever opinion may be entertained upon that point, there can be no doubt that the evidence given before the Magistrate was admissible to prove that the evidence given before the Judge was false. The prisoner could not have been excused from giving evidence before the Magistrate upon the ground that her answer might criminate her, in respect of the evidence which she might afterwards give before the Judge. The prisoner is charged with giving false evidence upon her examination before the Judge, and upon that head of the charge, the statement made before the Sessions Judge, as well as that mode before the Magistrate, is evidence, the former to prove that the prisoner made the statement, the latter to prove that the statement was false, within the knowledge of the prisoner. But the statement of the prisoner made before the Judge, when used as evidence against her, is also admissible in her favor if the Judge believes it. The Judge, taking the two statements together, and the prisoner''s plea of not guilty, which in substance denies that she intentionally gave false evidence before the Judge, says-- "I cannot determine which of the statements is false. I cannot, upon the strength of the first statement alone, finding that it is contradicted by the second, say that the second is false. But giving the prisoner the benefit of the doubt which has been created in my mind by the fact of the contradiction of the first statement by the second, I cannot say that the second is false; I can say that one or the other of the two statements was false, within the prisoner''s knowledge. Looking, therefore, at the evidence which has been given in support of the charge, that the second statement was false,

I am doubtful under which of the two heads of the charge the offence falls. I can only say that the prisoner has been guilty of intentionally giving false evidence; I cannot say that she is not guilty of intentionally giving false evidence before the Judge, or that she is guilty of it; and therefore I can only find that she is guilty either of the offence charged in the first head of the charge, or of the offence specified in the second head of the charge, namely, that she intentionally gave false evidence before the Judge, or that she intentionally gave false evidence before the Magistrate." The effect of that finding is that the prisoner is liable to be punished for the offence for which the lowest punishment is provided, if the same punishment is not provided for both; see Penal Code, s. 72. In the particular case referred to us, giving false evidence, intending to cause a person to be convicted of culpable homicide not amounting to murder, such as the evidence given before the Magistrate, would be punishable more severely than giving false evidence to procure his acquittal. The former would fall, u/s 194 of the Penal Code, and the latter under s. 193; the maximum punishment being for the former offence transportation for life, or imprisonment for ten years, with fine, and for the latter offence imprisonment for seven years, with fine. The argument of Campbell, J., would lead to the conclusion that no indictment ought to lie for giving false evidence before a Judge, if it contradicts evidence previously given in the case before a Magistrate, inasmuch as the liability to be indicted, if the evidence given before the Judge differs from that given before the Magistrate, would be an inducement to the witness to stick to the first statement.

Norman, J.

3. I do not think that the first point in this reference is by any means clear. For myself, I still feel the doubts which are expressed in the order referring the case. S. 381 says, that the Court "shall distinctly specify the offence of which, and the section of the Indian Penal Code under which, the prisoner is convicted, or if it be doubtful under which of two sections the offence falls shall distinctly express the same and pass judgment in the alternative, according to s. 72 of the said Code." I should still doubt whether a finding "that a prisoner either gave false evidence before the Magistrate on the 1st February, or else, if that evidence be true, gave false evidence before the Judge on the 1st of May," can be properly said to specify the offence of which the prisoner is guilty. It is very important that there should be a definite and well-understood rule on the subject, and I am quite satisfied to abide by the judgment of the majority of the Court.

4. On the other point raised by Campbell, J., it appears to me perfectly obvious that one who makes a criminal charge against another cannot protect himself from a cross-examination on the direct question whether the charge was true or false, on any pretext whatever. Even assuming for the purpose of argument, that such a person could protect himself, still, if he answered voluntarily and without claiming protection, his answer would be admissible against him, and would not be excluded

by the 32nd section of Act II of 1855, because it would not be "an answer which the witness had been compelled to give," within the meaning of that section. Indeed, if the witness claimed protection in such a case, and said, in substance, "I refuse to answer because the answer, if I speak the truth, will convict me of perjury before the Magistrate," the, objection would be almost as strong evidence against him as if the witness had admitted by a direct answer that his former statement was false. If the evidence given in a subsequent case in answer to cross-examination, and under pressure, would be receivable as against the witness to show that his former statement was false, much more must it be admissible when the subsequent deposition of the witness is given voluntarily, and without pressure of any sort, as in the present case. A subsequent deposition has always been received, both in England and in this country as evidence, upon a charge of perjury, to show the falsehood of the former contrary deposition by the same witness. There are numerous cases on the point; and the propriety of admitting such evidence has never, as far as I am aware, been questioned by any one except Campbell, J., in this case.

Kemp, J.

5. I entirely concur in the judgment of the learned Chief Justice.

Seton-Karr, J.

6. I entirely concur with the learned Chief Justice. Indeed, I had always understood that our Court and the subordinate Courts acted on the principle laid down in the judgment with which I concur; and, until this reference was made, I was not aware that there existed any very serious doubts on the points. Indeed, unless Courts did and could return an alternative finding in such cases of false evidence, the most disastrous consequences to the administration of justice would ensue. Violent crime and crimes of all kinds would go unpunished, and the witnesses who had been bought off to deny their statements implicating the perpetrators of such violent or other crimes, would go unpunished also. I can conceive nothing more detrimental to society.

7. On the second point referred to us, I regret that I cannot concur with Campbell, J. If I understand him aright, I think that the examination of the prisoner before the Judge and the statements of the prisoner before the Magistrate are admissible for the reason given by the Chief Justice, and are admissible to test the prisoner''s guilt or innocence.

Campbell, J.

8. In the view of the Judge, the deposition before the Magistrate was evidence to show that the deposition before the Judge was false, and the deposition before the Judge was evidence to show that the deposition before the Magistrate was false. On this Mussamat Zamiran appeals to this Court.

9. The case came before a Division Bench consisting of Norman, J., and myself; and having doubts regarding the case, we referred it to a Full Bench.

10. We had, in the first place, some doubts whether, under s. 381 of the Code of Criminal Procedure, it was not necessary for the Judge, in passing judgment, to specify the offence of which the accused person is convicted, and whether it is not only when the same facts constitute or form a part of an offence under one or other of two sections, or under one section, and the Court, from imperfect information, is unable to say under which head the offence falls, that it can pass judgment in the alternative. We doubted whether the law enables a Judge in such a case as the present to convict of either of two charges of false evidence in the alternative, when the facts constituting one of the alternative offences are wholly different from, and opposed to, those constituting the other alternative offence.

11. Another doubt was whether, with reference to the provisions of s. 32, Act II of 1855, the evidence given by Mussamat Zamiran before the Magistrate and before the Judge respectively could be used as evidence against her in support of a criminal charge of false evidence given upon another occasion than that on which the evidence so used was given, Mussamat Zamiran not having put herself forward as a witness of her own accord, but having been summoned, and in a manner compelled, to give evidence, first, before the Magistrate, and then before the Judge.

12. With reference to the first point of doubt noticed by the Division Bench, I in some degree concur in the doubts which were suggested by Norman, J. I am not by any means clear upon the point. I will only express some doubts.

13. But with regard to the second point--the construction of s. 32, Act II of 1855--I have a strong opinion, which I will now proceed to express. S. 32 is as follows:-- "A witness shall not be excused from answering any question relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate such witness; or that it will expose or tend, directly or indirectly, to expose such witness to a penalty or forfeiture of any kind, provided that no such answer, which a witness shall be compelled to give, shall, except for the purpose of punishing such person for willfully giving false evidence upon such examination, subject him to any arrest or prosecution, or be used as evidence against such witness in any criminal proceeding." In cases of false evidence formerly tried by me, I have expressed the opinion, with reference to the above provision, that, although the evidence of a witness taken before a Magistrate may be used to prove his subsequent perjury before the Judge, the evidence taken before the Judge cannot be used to prove a prior perjury before the Magistrate; that, consequently, when there is no other evidence on the record, a charge of false evidence before the Magistrate, only supported by the subsequent evidence of the same witness before the Judge, must fall to the ground. If so, an alternative conviction that the accused has committed one of two offences, of which the not-to-be-supported charge of

false evidence before the Magistrate is one, cannot be sustained, Whether the conviction be on a single charge, or a double charge, no charge can be supported without evidence of some sort. As respects the charge of giving false evidence before the Judge, although the wording of s. 32 of the Act might leave some room for doubt, I do not think it could have been intended to protect a witness against subsequent perjury; and, understanding that the other Judges of this Bench fully agree with me on the point, I may now hold with confidence that the evidence of a witness taken before the Magistrate may be used as pro tanto evidence on a charge of subsequent false evidence before the Judge. As respects the other charge of false evidence before the Magistrate, and the question of the admissibility as evidence against the prisoner of his subsequent evidence before the Judge, it seems to me that the policy of the law on this latter point is clear. The old English rule was that no one was compelled to criminate himself, and no man was obliged to answer a question if his answer would expose him to the risk of criminal proceedings. This system was attended with many inconveniences, and the Indian Legislature, by Act II of 1855, adopted another rule. S. 32 enacts that no witness shall be excused from answering any relevant question, on the ground that the answer will, directly or indirectly, criminate such witness or expose him to a penalty of any kind; but then it goes on to provide that "no such answer which a witness shall be compelled to give, shall, except for the purpose of punishing such person for willfully giving false evidence upon such examination, subject him to any arrest or prosecution, or be used as evidence against such witness in any criminal proceeding." Witnesses are bound over and compelled to give evidence at a Court of Sessions; and, as I understand the present law, if a witness were to object, "I cannot state the truth, for that would disclose that I committed a murder, or that would disclose that I gave false evidence on a former occasion," the Judge would explain, "you need be under no apprehension; you must answer; but nothing that you say can be used against you in order to convict you of the murder, or the false evidence on the prior occasion you may therefore speak out without fear." If that be not the meaning of the law, I am quite unable to understand what is the meaning. It seems to me that a witness compelled to appear in a Session case is protected from any use against him of the evidence which he gives; and that such evidence cannot be used against him in a criminal prosecution to prove that he committed perjury on a former occasion. If it were otherwise, witnesses, who had committed themselves to certain statements when first carried by the Police before the Magistrate, would be no longer free agents; they would go into the witness-box with halters round their necks. If they venture to speak freely, they may immediately be committed on an alternative charge of this kind without further evidence. The absence of any other evidence implies that if they stick to their original story they are safe, but if they say that which may be the truth, they are forthwith liable to be indicted for perjury. If they give false evidence at the Sessions, by all means prove the charge and punish them. But to punish them on an alternative finding, which necessarily implies that the evidence before the Sessions Court may be true, without any other evidence to

the prior perjury than the privileged evidence which they are compelled to give, seems to me contrary to the letter and the policy of the law. If that be lawful Sessions trials must become a farce. Witnesses have no option but to repeat the story once told to the Police and the Magistrate. I do not think that it makes any difference that the witness did not go through the form of refusing to answer, and being told by the Judge that she must answer. She was, I think, in every sense compelled to give evidence. She was compelled to appear before the Sessions Court, and being there, the law by penal enactments compelled her to give evidence. Therefore, in my opinion, in this case the evidence taken before the Judge was improperly and wrongfully used in support of the charge of false evidence given before the Magistrate, and a conviction founded upon that evidence only cannot be sustained.

14. The present case is somewhat complicated by this, that the prisoner has, in some sort, supplied what may possibly be considered evidence upon this head of the charge; that is to say, the charge of false evidence before the Magistrate, inasmuch as two of her witnesses have stated before the Court, "I know that Mussamat Zamiran gave false evidence before the Magistrate." But it seems to me that a statement of this kind, without any particulars as to which the witness pledges himself to his means of knowledge, is no evidence, and certainly is totally insufficient evidence on which to convict a prisoner of giving false evidence. In my opinion, the conviction ought to be quashed and a new trial ordered.

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[1] Circular No. 10A, dated Calcutta, 18th April 1863. Field''s General Rules and Circular Orders, pp. 22 & 23.