Fateh Chand Agarwalla Vs Emperor

Court: Calcutta High Court

Date of Decision: Aug. 29, 1916

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€" Section 537
Penal Code, 1860 (IPC) â€" Section 243, 27

Citation: 38 Ind. Cas. 945

Hon'ble Judges: Lancelot Sanderson, C.J; Teunon, J; Fletcher, J; Chaudhuri, J; Asutosh Mookerjee, J

Bench: Full Bench

Judgement

Lancelot Sanderson, C.J.
In this case the charge against the accused was as follows:--That he the said Fateh Chand Agarwalla on or

about the 26th day of November in the year of our Lord 1915 in Calcutta aforesaid, fraudulently or with intent that fraud might be committed, had

in his possession certain counterfeit coins, that is to say, 160 counterfeit rupees, being counterfeit of the King"s coin, having known at the time

when be became possessed of them that they were counterfeit, and thereby he the said Fateh Chand Agarwalla committed an offence punishable

u/s 243 of the Indian Penal Code.

2. Secondly, that he the said Fateh Chand Agarwalla at or about the time and in the place aforesaid, fraudulently or with intent that fraud might be

committed, had in his possession certain counterfeit coins, that is to say, 3 counterfeit rupees, being counterfeit of the King"s coin, having known at

the time when he became possessed of them that they were counterfeit, and thereby he the said Fateh Chand Agarwalla committed an offence

punishable u/s 243 of the Indian Penal Code.

3. He was tried at the Criminal Sessions of this Court; the Jury by an unanimous verdict convicted him of both charges and he was sentenced to a

term of imprisonment. A representation was made to the Advocate-General, who gave a certificate under Clause 26 of the Letters Patent to the

effect that the question whether the direction to the Jury was right in law and whether certain alleged omissions to direct the Jury do not amount to

a misdirection, should be further considered by the High Court, and consequently the petition to this Court was presented.

4. The accused had a place of business at 24 Armenian Street, Calcutta, and the case for the prosecution was that the Police in consequence of

certain information went, on the 26th November 1915, to the shop of one Soniram in Machua Bazar and searched it. They found in Soniram''s

shop 31 counterfeit rupees, dated 1898. In consequence of information received from Soniram the Police proceeded to the shop of the accused;

24 Armenian Street, and arrived there between 10-30 P.M. and 11 P.M. on the same evening. The accused, one Gungasahai, who. was alleged

to be the cashier of the accused, and another man named Choteylal, who was alleged to be connected with the business, were present on the

premises.

5. The evidence of the Police officer was that in response to a request by him, the accused opened the safe which was locked, and the key of

which was produced by the accused. In the safe were found

15 G. C. Notes of Rs. 10 each.

1 "" "" "" "" 5

4 Ã¯Â¿Â½ Ã¯Â¿Â½ Ã¯Â¿Â½ Ã¯Â¿Â½ 100 Ã¯Â¿Â½

1 Ã¯Â¿Â½ Ã¯Â¿Â½ Ã¯Â¿Â½ "" 1000 Ã¯Â¿Â½

and 497 rupees; these rupees were in a bag

inside the safe.

6. The officer sorted them and found that 160 were counterfeit coins, dated 1898. In a wooden box which was also inside the safe, there were 40

rupees, 3 of which were counterfeit coins dated 1901. These three counterfeit coins were not mixed up with the other coins in the box.

7. The coins were produced; the 160 counterfeit coins of 1898 appeared to be new and were obviously made from the same die, and on

comparison with the false coins taken from Soniram''s shop, were found to be similar to them.

8. The accused was arrested. Before the arrest, according to the Police officer''s evidence, he was asked for an explanation; he gave one;

thereupon the Police officers proceeded to Strand Road, and searched the house of a Muhammadan, who was afterwards arrested at Dacca;

nothing was found at the house of the Muhammadan: the accused also referred the Police officers to Soniram.

9. The case of the accused, to support which Gungasahai and Choteylal were called as witnesses, was that Gungasahai was the cashier, who used

to receive the money in the ordinary course of business, and that the daily receipts varied from Rs. 2,000 to Rs. 5,000 a day. That when the Police

came to the shop on the 26th November 1915, Gungasahai had the key of the safe, and that he was asked by the accused for the key, and that he

gave it to the accused.

10. The case for the defence further was, that Gungasahai must have received the 160 counterfeit rupees, that he did not know they were

counterfeit, and it was suggested that the counterfeit money had been received that very day and that it might have been included in a payment of

cash, Rs. 222, which Soniram had made that day. Although there were only two payments of cash, of larger amount than Rs. 160, received on that

day, viz., one of Rs. 240 from other business premises of the accused, and one of Rs. 222 from Soniram. and although the counterfeit coins were

all obviously new and bright coins and, therefore, likely to attract attention, Gungasahai said, he could not make any suggestion from which party

the coins came.

11. The first and main ground of the alleged misdirection was the direction given by the learned Judge to the Jury as to the construction of Section

243, Indian Penal Code, under which the charge was brought: secondly, it was contended in argument that the learned Judge should have directed

the Jury that there was no evidence (a) to show when, if ever, the counterfeit coins came into the actual possession of the accused, (6) to show that

the accused had knowledge of the spurious character of the coins either when they were received by his servant, or at any time before the Police

raid.

12. With regard to the construction of the section, the passage of the summing up which was laid before the Advocate-General, and upon which

the certificate was based, was taken from learned Counsel''s notes; but admittedly it did not represent a full or complete statement of the learned

Judge''s charge on this point. It was as follows:-- ''Counsel for the defence put too narrow a construction on Section 243, Indian Penal Code,

when he said that the accused must have knowledge at the time when he became possessed of the coins. Knowledge that the coins were

counterfeit at the time when he became possessed of the coins was not necessary. It is enough if the accused subsequently became aware of the

spurious nature of the coins.

13. The learned Judge has supplied the Court and the parties with a memorandum of his summing up made for the purpose of this appeal from his

recollection and the notes which he used for his summing up, and it is upon the summing up as shown in the memorandum that the case was argued

by both sides.

14. The learned Judge first dealt with the question of fraudulent intent, then with possession, in which connection he drew the attention of the Jury

to Section 27 of the Indian Penal Code and pointed out ""that the law made possession of the servant on account of his master the possession of

the master. The question of possession, therefore, was free from difficulty.

15. He then dealt with the question of knowledge, and after pointing out that it must be the personal knowledge of the accused, and that the

knowledge of the servant would not be sufficient, he directed the Jury that they had to decide two matters in this connection:--(1) Had the accused

knowledge that he was possessed of counterfeit coin? (2) If he had knowledge, did he intend fraudulent use and, if so, at what time did he so

intend?

16. After dealing with the first point and telling the Jury that they had to find on the evidence whether the accused had actual knowledge or not, he

then proceeded to direct the Jury as to the time of knowledge in connection with intention as follows:--

The next point was about the time of knowledge in connection with intention. The section says ''having known at the time when he became

possessed of it.'' I thought that Counsel for the defence had put. too narrow a construction upon it. I was of opinion that it referred to thetime of

conscious possession so far as the accused was concerned, that it need not be the time when the servant received the money. I thought that it

referred to the time when the master came to know that the coin had been received. The point to consider was, had the accused fraudulent

intention at that point of time when he became aware of the possession, became conscious of the possession or had knowledge of it. Such

knowledge need not be contemporaneous with the receipt of the coin if the accused did not receive the money, but some one else had received it

on his behalf. So to construe would be to restrict the scope of the section. The essential point was, was the accused fraudulently, or with fraudulent

intention, in possession, having known, at the time he became aware of the possession, that coin was counterfeit. That was, I thought, the meaning

of the section. The man may not have been present when his servant received it. There was no evidence in this case that he was. I cautioned them

more than once that the servant''s knowledge, if any, could not be attributed to the master. I also told them that possession involved the idea of

retention. They had also to consider whether the money was kept in possession with a fraudulent intention, and was such intention formed at the

time when the fact of possession became known to the accused, if he came to know it at all. I explained why I thought the section difficult to apply.

17. I agree with the learned Judge that this section is one which it is difficult to apply, but with great deference to him, I do not think that the

construction which he placed upon the section, as indicated in his summing up, is correct.

18. To constitute an offence under this Section,

(1) it must be proved that the accused was in possession of the coin.

(2) that the coin was counterfeit of the King''s coin.

(3) that the accused was in such possession fraudulently or with intent to defraud.

(4) that at the time he became possessed of such counterfeit coin, he knew it to be counterfeit.

19. Section 27 of the Indian Penal Code provides that when property is in the possession of a person''s wife, clerk, or servant on account of that

person, it is in that person''s possession within the meaning of this Code, and by Section 7 of the Indian Penal Code, it is enacted that every

expression, which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation.

20. Consequently Section 243 must be read in view of these two sections, and therefore, two kinds of possession may have to be considered in

connection with a case under this section, viz., the possession of the accused person himself and the possession of an accused person''s wife, clerk

or servant on account of that person.

21. In the case now before us it was alleged by the defence that the counterfeit coins must have been received in the first instance by the servant of

the accused, viz., Gungasahai, and that they remained in his possession; on the other hand it was urged for the prosecution that the counterfeit coin

was found in the locked safe of the accused; that the accused kept the key and the number of counterfeit coins was large and thatfrom such facts it

was only reasonable to suppose that the accused was in possession of the coins and that he must have known when he became possessed of them

that they were counterfeit. Having regard to the facts and the contentions on this part of the case, in my judgment a direction should have been

given to the Jury to the effect that they should come to a decision (1) whether the counterfeit coins were in the possession of the accused, or in the

possession of his clerk or servant on behalf of the accused: and second, if they came to the conclusion that the coin? were in the possession of the

accused, they would then have to decide whether he knew, at the time when he became so possessed of them, that the coins were counterfeit:

third, if they came to the conclusion that the coins were in the possession of the clerk or servant on behalf of the accused, they would then hare to

decide whether at the time the clerk or servant on behalf of the accused became possessed of the counterfeit coins, the accused himself knew that

they were counterfeit. I do not find that these questions were put either directly or indirectly to the Jury; on the contrary the Jury''s attention was

directed to a question which was said to be the essential question, viz, whether ""the accused was fraudulently, or with fraudulent intention, in

possession, having known at the time he became aware of the possession that the coin was counterfeit."" This was in my judgment not a correct

direction, and for the reasons given above: and while agreeing with the learned Judge that the section is a difficult one to apply, I must with

deference differ from him on the point of construction. In view of the above conclusion it is not necessary to give auy opinion as to the second

contention as to the alleged omission of the learned Judge to direct the Jury. It was also urged during the course of the argument that the learned

Judge ought not to have left the case to the Jury at all, as there was no evidence on which the charge could be supported.

22. I do not think this really was open to the learned Counsel for the accused in view of the terms of the certificate of the Advocate-General; but

even if it was open for argument, in my judgment there was evidence which the learned Judge was bound to leave to the Jury in support of the

charge.

23. In view, however, of the fact that I think there was a misdirection, as already indicated, in a part of the summing up, which related to a material

and essential element of the charge, I think the conviction should be set aside. I do not think the facts are so clear that we should be justified in

saying that the misdirection has not in fact occasioned a failure of justice.

24. In my judgment, therefore, the conviction should be set aside.

Mokerjee, J.

25. This is an application for review of a criminal case on the certificate of the Advocate-General under Clause 26 of the Letters Patent. The

petitioner Fateh Chand Agarwalla was tried at the third Criminal Sessions of this year on a charge of offences punishable u/s 243 of the Indian

Penal Code, and, on the unanimous verdict of the Jury, was convicted and sentenced to undergo rigorous imprisonment. The accused then applied

to the Advocate-General and obtained a certificate that ""in his judgment, whether the direction to the Jury (hereinbefore specified) was right in law

and whether the alleged omissions to direct the Jury do not in law amount to a misdirection should be further considered by the High Court."" To

determine the points of law certified by the Advocate-General, it is necessary to give a brief outline of the history of the trial.

26. The accused is the owner of two flour mills, one in Armenian Street, the other in Hanspukur Road, and carries on considerable business. On

the 26th November 1915, Purnachandra Lahiri, Assistant Commissioner of Police, received information that there were counterfeit coins in the

shop of one Soniram Agarwalla in Machua Bazar Street. Lahiri searched the shop that very day, and found 31 spurious coins which bore the year

1898. Soniram gave him certain information, and he raided the shop of the accused in Armenian Street late in the evening between 10-30 and 11

P.M. The case for the prosecution is that they found in an iron safe (the key of which was produced by the accused) 160 counterfeit coins (1898)

similar to the 31 coins found in the shop of Soniram. The Police further found 3 counterfeit coins, which bore the year 1901, in a wooden box

inside the safe. The 160 coins were found in a bag mixed up with 337 genuine rupees. Inside the safe, there were also 37 genuine rupees and

currency notes to the extent of Rs. 1,555. The Police took charge of the currency notes (Rs. 1,555), the genuine coins (Rs. 374), and the

counterfeit coins (Rs. 163). At the time of the search, there were present in the shop, besides the accused, one Gungasahai, alleged to be his

cashier, and another man namad Choteylal, said to be his partner in the Electric Flour Mill. The case for the defence was that his cashier receives,

as a rule, all moneys paid into the shop, that on the day of the incident Gungasahai was the cashier, that he himself did not receive the counterfeit

coins, that it was quite likely ''that the coins were included in a payment of Rs, 222 made on that date ,by Soniram for goods supplied oh the 23rd

November, and that, as payments had been made by other persons also on the same date, it was impossible to state with certainty how or from

whom the spurious rupees were received. In support of the defence, both Gungasahai and Choteylal were examined, and what purported to be the

account books of the firm were also produced. In these circumstances, the question arises, whether there was an error of law in the charge to the

Jury.

27. Section 243 of the Indian Penal Code is in these terms: ""Whoever fraudulently or with intent that fraud may be Committed is in possession of

counterfeit coin which is a counterfeit of the Queen''s coin having known at the time when he became possessed of it that it was counterfeit, shall

be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

28. To establish that the accused has committed an offence under this section it must be proved,

(1) that the coin in question is a counterfeit of the Queen''s coin;

(2) that the accused was in possession of it;

(3) that he was in possession thereof fraudulently (that is, with intent to defraud, or with intent that fraud might be committed);

(4) that at the time that he became so possessed thereof, he knew it to be counterfeit. The term ""possession"" has to be interpreted in the light of

Section 27, which by virtue of Section 7 is applicable wherever the term is used in the Code. Section 27, which abolishes the distinction

recognised in English Law between possession and custody, provides as follows:

When property is in the possession of a person"s wife, clerk or servant, on account of that person, it is in that person"s possession within the

meaning of this Code.

29. Consequently, an accused charged u/s 243 may be proved to be in possession within the meaning of that section, if he is in possession in either

of two modes, namely, (a) he may be in possession of the coin himself, or (6) he may be in possession, because his wife, clerk or servant is in

possession of the coin on his account. It is plain that whichever mode of possession is established, it is essential to prove that at the time the

accused became possessed of the coin, he knew it to be counterfeit. The vital point of the matter, then, is to determine the precise moment when

the accused becomes possessed of the coin in either of the two modes whereby possession may be acquired. If the coin is delivered directly into

the hands of the accused, there is no room for controversy that he does, at that moment, become possessed of it, and, in such a case, it is

necessary to establish that the accused knows that the coin is" counterfeit when it is so delivered to him. When, however, the coin is delivered to

the wife, clerk or servant of the accused, a different question arises, a question which may be by no means easy of solution in the circumstances of

a particular case. Possession of property by the wife, clerk or servant of a person is, u/s 27, his possession, only if the possession is on his

account. Consequently, when a spurious coin is delivered to the wife, clerk or servant of a person, it does not necessarily follow that he is in

possession from that moment; it must further be shown that tie person to whom it has been delivered possesses it on his account. Questions of

extreme nicety may, in this connection, arise on the facts of some cases, as may be seen from the decisions in Reg. v. Boober (1850) 4 Cox. C.C.

272 and Anglo-American Oil Co. v. Manning (1908) 1 K.B. 536 : 77 L.J.K.B. 205 : 98 L.T. 570 : 6 L.G.R. 299 : 72 J.P. 35 : 24 T.L.R. 215.

There may, on the other hand, arise obviously simple cases, as in Reg. v. Weeks (1861) 8 Cox. C.C. 455 : L. & C. 18: 30 L.J.M.C. 141 : 7 Jur.

(N.S.) 472 : 4 L.T. 373 : 9 W.R. 553. For example, A asks a coiner, B, to supply him with 100 spurious coins and instructs him to leave them

with his servant if he is not at home; as soon as the parcel is delivered to the servant, A is in possession of the coins. On the other hand, suppose

B, a coiner, delivers to the servant of A, without the knowledge of A, a packet of spurious coins; it cannot be said that A is necessarily in

possession of the coins from the moment of their delivery to his servant. Consequently, when property is in the possession of a servant, it is

essential to determine, whether, upon the special facts of the case, it can be said that he is in possession on account of his master. This may be

answered in the affirmative, either because, from the very moment when the property comes into the possession of the servant, he was in

possession on behalf of his master, or because, though not in possession on his behalf at that time, he becomes so possessed later on by reason of

events subsequent. When this moment of time has been determined, there must be proof that at that moment the accused had knowledge that the

coins are counterfeit. In my opinion, the charge in this case should have specified that the first point for the Jury to determine was, whether the

coins had been delivered to the accused himself or to his cashier. The charge should further have specified that the second point for determination

by the Jury would depend upon their view of the first question. If they found that the coins had been delivered to the accused himself, they would

have to determine whether, when he received the coins, he knew that they were counterfeit; if, on the other hand, they came to the conclusion that

the coins were delivered to the cashier, they would have to decide, whether from the moment of such delivery or only from a later period, the

possession of the cashier was on account of the accused. They would finally have to decide, whether at the time when the cashier could be said to

be in possession on account of his master, the master had knowledge that the coins were counterfeit. After a careful perusal of the notes of the

charge as drawn up by the learned Judge, I regret I cannot see any escape from the conclusion that the charge involved an error of law, inasmuch

as it was based on an erroneous view of the requirements of Section 243, specially with reference to the element of time when the accused must be

proved to have known that the coins were counterfeit. I may add that I have based my conclusion, not upon the notes supplied by Counsel, but

upon the notes of the learned Judge himself, for, as pointed out in a long series of decisions mentioned in the case of Emperor v. Upendra Nath

Das 30 Ind. Cas. 113 : 21 C.L.J. 377 : 19 C.W.N. 658 :16 Cri. L.J. 561, the statement of the Judge who presides at the trial as to what actually

took place before him is conclusive. But though the version of the charge, whereupon the certificate of the Advocate-General was granted, differs

in certain respects from, the substance of the charge as given by the learned Judge, the certificate does, in my opinion, substantially bring out the

question in controversy, and it has consequently not been necessary to require an amended certificate, as was done in the case of Emperor v.

Upendra Nath Dae 30 Ind. Cas. 113 : 21 C.L.J. 377 : 19 C.W.N. 658 :16 Cr. L.J. 561; there the Court found that the questions sought to be

raised on review were fundamentally different from the points of law specified in the certificate of the Advocate-General. I desire to add further, as

the application for review is based on allegations of not only erroneous direction but also non-direction, that, in my opinion, mere non-direction is

not necessarily misdirection. The true rule on the subject was enunciated by Lord Alverstone, C.J., in Rex v. Stoddart (1909) 2 Cr. App. Rep.

217 246 : 73 J.P. 848 : 53 S.J. 578 : 25 T.L.R. 612: ""it is no misdirection not to tell the Jury everything which might have been told them. Again,

there is no misdirection unless the Judge has told them something wrong, or unless what he has told them would make wrong that which he has left

them to understand. Non-direction merely is not misdirection, and those who allege misdirection must show that something wrong was said or that

something was said which would make wrong that which was left to be understood.""

30. In the view that there was misdirection in the charge to the Jury, the question arises, what course should be pursued. Reference was made on

behalf of the Crown to Section 537 of the Criminal Procedure Code, 1898, which provides that no sentence passed by a Court of competent

jurisdiction shall be reversed or altered under Chapter XXVII (confirmation of sentences of death), or on appeal, or revision, on account of any

misdirection in any charge to a Jury, unless such misdirection has in fact occasioned a failure of justice. But Section 537 is clearly of no avail. In the

first place, the section has no application to a case reviewed under Clause 26 of the Letters Patent. The proceeding is not by way of appeal, which

is expressly excluded by Clause 25; nor is it in the exercise of revisional jurisdiction, which is created by Clause 28; and it is needless to observe

that it does not fall within the scope of the chapter which deals with the confirmation of sentences of death. In the second place, even if Section

537 had applied, I would not hesitate to hold on the facts of this case that the misdirection had in fact occasioned failure of justice. We must,

consequently, consider the scope of the authority of the Court under Clause 26 of the Letters Patent.

31. Mr. Norton contended, on behalf of the accused, that if the Court comes to the conclusion that the Jury were misdireoted, there is no option

left to the Court but to set aside the conviction and acquit the accused. In support of this argument, he relied upon the decision of the Judicial

Committee in Subrahmania v. King-Emperor 25 M. 61 : 11 M.L.J. 233 : 3 Bom. L.R. 540 : 28 I.A. 257 : 5 C.W.N. 866 : 2 Weir 271. Mr.

Mitter, on behalf of the Crown, contested the validity of this contention as opposed to the settled practice of this Court. The question raised, if it

were res integra, must be deemed not free from difficulty. Clauses 25 and 26 make it plain that, when a point or points of law have been reserved

or have been certified by the Advocate-General as erroneously decided or as worthy of further consideration, the Court has full power and

authority ""to review the case or such part of it as may be necessary, and finally determine upon such point or points of law, and thereupon to alter

the sentence passed by the Court of Original Jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right."" It is

obvious that the intention is that the case should be finally decided on review and not remitted for re-trial. It has also been ruled that when the

Court on review holds on the point of law in favour of the accused, it is competent to the Court to consider the whole case on the evidence and to

pass such sentence as shall seem right. The Bombay High Court followed this procedure in the cases of Reg. v. Navroji Dadabhai 9 B.H.C.R. 358

and Imperatrix v. Pitamber Jina 2 B. 61 : 1 Ind. Dec. (N.S.) 469; in each instance although the Court decided the question of law in favour of the

accused, yet, upon a review of the whole case and an examination of the merits, affirmed the conviction. In this Court, the same procedure was

adopted in the cases of Queen v. Hurribole Chunder Ghose 1 C. 207 : 25 W.R. 36 Cr. 1 Ind. Doc. (N.s.) 132 and Queen-Empress v. O''Hara

17 C. 642 : 8 Ind. Dec. (N.S.) 967; in each instance, the point of law was decided in favour of the accused; but on a review of the whole

evidence, while the conviction was affirmed in the former case, it was set aside in the latter instance. The cases of Queen-Empress v. Shib Chunder

Mitter 10 C. 1079 : 5 Ind. Dec. (N.S.) 721 and Emperor v. Upendra Nath Das 30 Ind. Cas. 113 : 21 C.L.J. 377 : 19 C.W.N. 658 :16 Cr. L.J.

561 do not directly touch the present question, inasmuch as the alleged error of law was not established in either instance. The only question thus

is, whether the decision of the Judicial Committee in Subrahmania v. King-Emperor 25 M. 61 : 11 M.L.J. 233 : 3 Bom. L.R. 540 : 28 I.A. 257 : 5

C.W.N. 866 : 2 Weir 271 overrules in effect the decisions in Queen v. Hurribole Chunder Ghose 1 C. 207 : 25 W.R. 36 Cr. : 1 Ind. Doc. (N.s.)

132 and Queen-Empress v. O''Hara 17 C. 642 : 8 Ind. Dec. (N.S.) 967. The point is not free from difficulty and deserves much fuller examination

than is possible on the arguments addressed to us. The accused, in the case of Subrahmania v. King-Emperor 25 M. 61 : 11 M.L.J. 233 : 3 Bom.

L.R. 540 : 28 I.A. 257 : 5 C.W.N. 866 : 2 Weir 271, was charged upon an indictment which contained seven counts and was jointly tried with an

abettor who was charged with abetment of the offences set out in three of the counts. The accused was convicted and sentenced to undergo

imprisonment and to pay a heavy fine. He then obtained a certificate from the Advocate-General under Clause 26 of the Letters Patent, and the

points of law were heard by a Full Bench of six Judges. The Judges were equally divided in opinion upon the question whether the first count was

bad; but the majority were agreed that whether good or bad, its union with the remaining counts made the whole indictment bad for misjoinder;

they held, however, that it was open to them to strike out the first count and to deal with the evidence applicable to the remaining counts. The

accused contended that the Court was not competent to deal with the case in this manner, to usurp the functions of the Jury and to substitute in

essence the judgment of the Court for the verdict of the Jury. The Court overruled the objection raised as to its jurisdiction to review, the case

upon the evidence, and the six Judges sat a second time to hear the case on the facts. They examined the evidence, came to the conclusion that the

conviction could be sustained on the counts other than the first which they had expunged, and passed sentences on the remaining counts in

modification of the original sentence. The accused obtained special leave to appeal to His Majesty in Council. Before the Judicial Committee, the

point was pressed that the trial was bad for misjoinder of charges and that the Court had no power, under Clause 26 of the Letters Patent, to

decide the case on the residue of the evidence. The Judicial Committee came to the conclusion that the trial had been held in contravention of

Section 234 of the Criminal Procedure Code, inasmuch as the accused was charged in the indictment with no less than 41 acts extending over a

period of two years, whereas, under the law, he could be tried only for three such offences of the same kind if committed within a period of twelve

months. Lord Halsbury, L.C, then proceeded to observe as follows: ""Their Lordships think that the course pursued and which was plainly illegal,

cannot be amended by arranging afterwards what might or might not have been properly submitted to the Jury. Upon the assumption that the trial

was illegally conducted, it is idle to suggest that there is enough left upon the indictment upon which a conviction might have been supported, if the

accused had been properly tried. The mischief sought to be avoided by the Statute has been done. The effect of the multitude of charges before the

Jury has not been averted by dissecting the verdict afterwards and appropriating the finding of guilty, only to such parts of the written accusation as

ought to have been submitted to the Jury. It would in the first place leave to the Court the functions of the Jury and the accused would never have

really been tried at all upon the charge arranged afterwards by the Court. Their Lordships cannot regard this as cured by Section 537."" In this

view, their Lordships did not consider whether the conviction on any of the counts could be supported on the evidence adduced at the trial, and

allowed the appeal. On this judgment, Mr. Norton based the contention that in no circumstances is the High Court competent, under Clause 26, to

review the case on the evidence. This raises the question, whether the Judicial Committee intended their observations to be limited to cases of the

ype then before them, namely, cases where the trial has been conducted in a mode prohibited by law or, in the words of Lord Russell quoted by

them, where the proceedings have been constituted in a way not authorised by law and the rules applicable to procedure; or did the Judicial

Committee intend to go further and to include in their observations cases of the type of Reg. v. Navroji Dadabhai 9 B.H.C.R. 358, Queen v.

Hurribole Chunder Ghose 1 C. 207 : 25 W.R. 36 Cr. : 1 Ind. Doc. (N.s.) 132 and Queen-Empress v. O''Haru 17 C. 642 : 8 Ind. Dec. (N.S.)

967, where evidence had been erroneously received, or cases of the type of Imperatrix v. Pitamber Jina 2 B. 61 : 1 Ind. Dec. (N.S.) 469, where

evidence was improperly rejected, or, again, cases of the type of the one now before us, where the error assigned consists in the erroneous

exposition of a principle of law or the constituent elements of the offence charged; or, did the Judicial Committee intend, in substance, to adopt the

rule enunciated by themselves in the earlier case of Makin v. Attorney-General for New South Wales (1894) App. Cas. 57 : 63 L.J.P.C. 41 : 6 R.

373 : 69 L.T. 778 : 17 Cox. C.C. 704 : 58 J.P. 148, where they bad emphatically condemned the transference from the Jury to the Court the

determination of the question whether the evidence, that is, what the law regards as evidence, established the guilt of the accused? These are

questions not wholly free from difficulty, and in the absence of full arguments thereon at the Bar, I must reserve my opinion on them. This is

rendered possible, because, in my judgment, an examination of the evidence, assuming it to be permissible, shows that the conviction cannot be

sustained. There are lacunas in the evidence which make it impossible for me to hold that the elements essential for conviction u/s 243 have been

established. I do not propose to review the evidence in detail; but I desire to state that upon one fundamental point, namely, who had the key of

the iron safe, there is really no contradiction. Lahiri stated that the key was produced by the accused; he does not appear to have been cross-

examined upon this point. Gungasahai stated that the keys were with him, then when the Police came, his master asked for the keys, that he gave

them up and the safe was opened. This witness also does not appear to have been cross-examined on this point. The two statements may

obviously be reconciled. If, then, the coins were received by Gungasahai as he would seem to assert, and if the keys were with him when the

Police came, how does the prosecution establish the requisite elements u/s 243? The evidence clearly does not prove that the case falls within that

section. Much stress was laid on the large number of coins and their appearance, and reference was made to Reg. v. Jarvis (1865) 7 Cox. C.C.

53, (sic). C.C. 552 : 25 L.J.M.C. 30 : 1 Jur. (N.S.) 1114 : 4 W.R. 85, where Rex. v. Fuller (1816) Russell & Ryan. 308 was followed. These

cases are of no assistance to the Crown, in the absence of evidence, direct or circumstantial, to show that the accused had seen the coins or had

even been aware of their existence in the safe before the Police raided his shop. I also find from the notes of evidence that on behalf of the Crown

the suggestion was made to two of the defence witnesses, Gungasahai and Choteylal, that there was an agreement between the accused and

Soniram to pass counterfeit coins at a profit. In my opinion, this was calculated to prejudice the accused and was obviously unfair to him, if there

was no basis for the suggestion; if, on the other hand, the suggestion was well founded in fact, the Crown should have adduced the evidence at

their disposal. It has been repeatedly ruled that the duty of the prosecution is, not to secure a conviction, but to assist the Court in arriving at the

truth, and for that purpose to place before the Court all the material evidence at its disposal; Ram Ranjan Roy v. Emperor 27 Ind. Cas. 654 : 19

C.W.N. 28 : 16 Cri. L.J. 170; Amritalal Hazra v. Emperor 29 Ind. Cas. 513 : 21 C.L.J. 331 Emperor v. Nogendra Nath Sen Gupta 30 Ind. Cas.

128 : 21 C.L.J. 396 : 16 Cri. L.J. 576. On an examination of the whole evidence, my conclusion is that the conviction cannot be sustained.

32. In my judgment, this application must be granted and the conviction and sentence set aside.

Fletcher, J.

33. The only matters that have been certified by the Advocate-General in this case are, first, whether the direction set out in paragraph No. 7 of

the petition for review was right in law, secondly, whether the matter set out in paragraph No. 9 of the same petition vitiated the trial, and thirdly,

whether the alleged omissions to direct the Jury on the matters referred to in paragraph No. 8 of such petition, amounted to misdirection. The

second and third heads may be shortly disposed of. The second head does not represent what in fact took place at the trial. The third head has not

been argued before us.

34. We are, therefore, left to deal with the first head, namely, the alleged misdirection set out in paragraph No. 7 of the petition for review.

35. The two charges on which the accused was tried were framed u/s 243 of the Indian Penal Code, namely, of being in possession of certain

counterfeit coins with intent to utter the same, the accused having known at the time he became possessed of the same that they were counterfeit.

The case set up by the prosecution was as follows:--On the 26th of November last on a search by the Police at a shop at Machua Bazar Street,

Calcutta, belonging to one Soniram Agarwalla, thirty-one counterfeit (1898) rupees and other base coins were found. Soniram was arrested.

Acting on certain information received from Soniram the Police at about 10-30 or 11 P.M. the same night raided the premises of the accused and

found in an iron safe, the key of which was produced by the accused and opened by him, 160 counterfeit (1S98) rupees similar to the 31

counterfeit rupees found in the shop of Soniram. The Police also found 3 counterfeit (1901) rupees in a wooden box inside the safe--the key of

which box was also produced by the accused.

36. The 160 counterfeit (1898) rupees were found in the safe inside a bag mixed up wtih 237 genuine rupees. Thirty-seven other genuine rupees

and currency notes for Rs. 1,555 were also found in the safe.

37. Now if the case had stopped there, the Jury could obviously have found that the accused had committed the offences with which he was

charged. The possession of so large a number as 160 counterfeit rupees all bearing the same date and appearing as if they had recently been issued

from the mint, are facts from which the Jury might well have inferred, in the absence of any explanation by the accused, that the accused must have

known at the time he became possessed of the same, that they were counterfeit and that the accused could not be in possession of such a large

number of counterfeit rupees except fraudulently, or with intent that fraud might be committed. The accused, however, called evidence in support

of his defence.

38. The principal witness was one Gungasahai, said to be the cashier of the accused''s firm and so acting in November last. His evidence was to

the effect that he received moneys and made payments on account of the accused''s firm and that he never received any counterfeit rupees to his

knowledge. He also produced certain books of account alleged to be the books of the accused''s, firm, showing the payment on the 26th of

November last of the sum of Rs. 222 by Soniram to the accused''s firm on account of certain goods sold and delivered.

39. Now it seems to me obvious that Counsel for the defence in his address to the Jury had argued that even if the Jury came to the conclusion on

the evidence that at the time the accused obtained physical possession of the counterfeit rupees he knew that they were counterfeit, no offence had

been committed u/s 243 of the Indian Penal Code, because the evidence called by the defence proved or strongly suggested that moneys paid to

the firm were received by the cashier Gungasahai. It seems to have been argued that under the provisions of Section 27 of the Indian Penal Code

the possession of Gungasahai was the possession of the accused, and as the accused would not at the very instant become aware of any payments

made to his cashier, he would not in the ordinary course know, at the time he became possessed of the counterfeit rupees, that they were

counterfeit. In dealing with this argument the learned Judge gave the direction to the Jury that is complained of.

40. If the direction had been in the terms set out in paragraph No. 7 of the petition for review, it would clearly have been a misdirection. The

learned Judge has, however, furnished us with a note of his charge to the Jury, and the portion dealing with the argument before mentioned is as

follows:--""The section says ''having known at the time when he became possessed of it'', I thought that Counsel for the defence had put too narrow

a construction upon it. I was of opinion that it referred to the time of conscious possession so far as the accused was concerned, that it need not be

the time when the servant received the money. I thought that it referred to the time when the master knew that the coin had been received. The

point to consider was, had the accused the fraudulent intention at the point of time when he became aware of the possession, became conscious of

the possession, or had knowledge of it. Such knowledge need not be contemporaneous with the receipt of the coin if the accused did not receive

the money, but some one else had received it on his behalf."" I venture to think that that was a proper direction of the learned Judge to give to the

Jury in the circumstances of the case. The cashier Gungasahai was put forward presumably as a witness of truth, and it must be taken in

accordance with his evidence that he had no knowledge of the receipt of the counterfeit rupees. If the cashier Gungasahai had no authority to

receive counterfeit coins on behalf of the accused and did not in fact know that he had received them, would the fact that the counterfeit coins had

passed through the hands of Gungasahai to the accused prevent the accused, if the other elements necessary to prove the offence were present,

from being convicted of an offence u/s 243 of the Indian Penal Code? In my opinion it would not. No doubt, under the provisions of Section 27 of

the Indian Penal Code when property is in possession of a penson''s wife, clerk or servant on account of that person, it is in the person''s

possession within the meaning of the Code, But not every possession of a person''s wife, clerk or servant is his possession--it must be possession

on account of that person. For instance, possession by a housemaid of stolen property is not the possession of her master unless the housemaid

has been authorised to receive it, or her possession has been ratified, as the receipt of stolen property is not within the scope of a housemaid''s

authority.

41. In the present case it is not suggested that Gungasahai had authority to receive counterfeit rupees on behalf of the accused. His possession was

not, therefore, I think, on account of the accused, and the learned Judge, I think, correctly directed the Jury that the point of time they had to look

at, in the circumstances of the case, was the time when the accused had actual or, as the Judge calls it, conscious possession of the counterfeit

coins for determining whether he had knowledge at that time that the coins were spurious. In my opinion, therefore, the direction of the learned

Judge, to which the Advocate-General"s certificate relates, was correct. The application for review ought, I think, to be refused.

42. The majority of the Bench, however, are, I understand, of a contrary opinion, and in that view of the case it becomes necessary to consider

whether in a review we should affirm the conviction and sentence. The verdict of the Jury, in accordance with the opinion of the majority of the

Bench, notbeing a verdict arrived at after proper directions as to the law, we have to review the evidence without having the benefit of an opinion,

which we can act on, of the Court which saw the witnesses give their evidence, and observed their demeanour. In that view I think with evidence

both on the side of the prosecution and the defence, we cannot say that the defence evidence is so palpably false that a conviction ought to take

place.

43. In view of the fact that the majority of the Bench are of opinion that there was a misdirection by the learned Judge, I agree that the conviction

and sentence ought to be set aside.

Teunon, J.

44. In this case the petitioner before us one Fateh Chand Agarwalla has been convicted on two charges u/s 243 of the Indian Penal Code. The

conviction was had on the 7th July 1916 at the Criminal Sessions holden in this Court, and the matter comes before us on a certificate granted by

the learned Advocate-General under the provisions of Section 26 of the Letters Patent.

45. The case for the prosecution was that at about 11 P.M. on the 26th November 1915 the business premises of the accused were searched by

an Assistant Commissioner of Police, who, in a safe, the key of which was produced by the accused, found 160 counterfeit rupees bearing date

1898 and three counterfeit rupees bearing date 1901. The 160 were in a bag mixed up with 337 good rupees and the 3 bearing date 1901 were in

a wooden box in which it appears there were also 37 good rupees, though in this case the good and the bad were not mixed together.

46. The first count or charge on which the accused has been convicted referred to the 160 rupees bearing date 1898, and the second charge or

count to the 3 bearing date 1901.

47. In the safe were also found currency notes aggregating Rs. 1,555 in value and small coins to the value of some Rs. 200. It was the further case

for the prosecution that at a search of the shop or business premises of another trader named Soniram Agarwalla, made by the same Assistant

Commissioner of Police If hours earlier, 31 counterfeit rupees were found, and that it was on information received from Soniram that the search

officer proceeded to the premises of this petitioner. In fact the 31 counterfeit found at Soniram''s were similar to the 160 found in the petitioner''s

safe and all appear to be from the same die.

48. The prosecution rested its case on the possession by the accused of this large number of counterfeit coins and left it to the accused to rebut the

presumption thereby created.

49. The accused did not deny that the coins were found in his safe, but pointed out that as the owner of two flour mills he had a considerable

business and that for the receipt and payment of moneys he employed a cashier by whom moneys received were placed in the safe. He also

alleged that in the course of the 26th November a payment of Rs. 222 had been made by the very Soniram in whose possession similar counterfeit

coins had been found. In short he denied all personal knowledge of the existence of base coins in his safe and alleged the possibility of a fraud

practised upon his cashier by Soniram.

50. In support of his defence the accused examined his cashier Gungasahai and a second witness Choteylal said to be his partner. These witnesses

speak of the duties of the cashier, of the extent of the business, of the firm''s dealings with Soniram and of the transaction with the latter on the

26th. The cashier also explained how he tested the coins offered to him.

51. From the learned Judge''s charge to the Jury it would seem that he was satisfied that the accused did in fact carry on an honest business on a

considerable scale, and that in this business money came in and went out daily. He appears also to have been satisfied that in the ordinary course

of business the money now in question would have been taken in by the cashier and he pointed out to the Jury that it did not appear that the

accused was present when the coin was received.

52. It is impossible for us to say what view was taken by the Jury of any particular portion of the evidence, but from their verdict it is clear that they

were satisfied that the accused had knowledge of the spurious character of the coins, and intended to make a fraudulent use of them.

53. But in order to a conviction u/s 243 of the Code, the law requires that the accused should have this knowledge that the coin in question is

counterfeit ""at the time when he became possessed of it.

54. If we could take it that the Jury had found that the accused had himself received the money from his customer or customers, the case would

present no difficulty. The difficulty is caused by the interposition or possible interposition of the cashier. By virtue of Section 27 of the Code the

possession of the cashier on account of his master is the master''s possession. Now, on this aspect of the case, the learned Judge directed the Jury

to the effect that if the money had in fact been received by the cashier, the requirements of the section would be satisfied if the Jury found that the

accused had knowledge of the spurious character of the coin when he ""became aware"" that the coin had been received or became conscious"" of

his possession: that is to say, the Jury were directed that if the receipt by the cashier on the account and for the use of the accused and the

accused''s knowledge of the receipt were not contemporaneous, the Jury should have regard not to the time of receipt but to the later point of time

when the accused''s unwitting possession became conscious possession.

55. With all respect I am unable to agree in this interpretation of the section.

56. In the case of an employer doing a large business, such knowledge or consciousness might be deferred for days. During those days, for all

other purposes, for instance, for the purposes of the sections relating to theft, the coins are to be treated as in the employer''s possession; for the

purposes of the section under consideration, they are in this view not to be so regarded; for this purpose, the employer''s possession is to Be

deferred until he has seen them or been otherwise informed of their true character. But this appears to be contrary to the provisions of Section 7,

which requires us to give to the expression ""possession"" the same sense or value in all parts of the Code.

57. It has been contended that ""conscious retention"" is implied or is a necessary element in all possession. In so far as that may be so, it would

seem that in cases where possession is held or obtained through a servant, the law makes the conscious retention of the servant on the master''s

account supply the place of the conscious retention of the employer. It is, of course, otherwise with the knowledge of the base character of the

coin. Such knowledge must be personal.

58. It has also been urged that to place upon the section the interpretation which I do is unduly to restrict its scope and to make it extremely

difficult of application in the case of shopkeepers, traders or business men. I am not pressed by that argument. I can see no reason on principle

why the employer, whose cashier has received bad coin otherwise than in conspiracy with him, should be placed in a worse position than the

unwary person upon whom bad coin has been passed. In any case, if there is a defect in the law, the remedy is with the Legislature.

59. In the view I take, reading the verdict with the charge, it cannot, I think, be held that the Jury have found that the accused knew of the spurious

character of the coin in question when he first came into possession of or originally obtained it.

60. That being so, we have to consider the case on the merits.

61. The takings in the accused''s business appear to average Rs. 1,000 a day, and it appears to be fairly clear that, in ordinary course, the coins in

question would have been received by the cashier. It was apparently not seriously suggested in the Trial Court that the accused and his cashier

were engaged in a conspiracy for the object of uttering base coins. If the 160 coins bearing the date 1898 were in fact received from Soniram on

the 26th, it is not clear that the accused must have seen them, as it would seem that the practice is that the accounts are made up in the morning.

The coins are fresh and this taken with their number should possibly have excited suspicion. Apart from this, these coins are remarkably good

imitations. There is no difference in size, the difference in sound and weight is not noticeable, and it is only when the coins come to be examined

that the differences in the heading, lettering and effigy, are observed.

62. On the whole, though the case is one of grave suspicion, the accused is, I think, entitled to the benefit of the doubt.

63. I should, therefore, acquit him and direct that his bail-bond be discharged.

Chaudhuri, J.

64. I am of opinion that I correctly interpreted the meaning of Section 243, Indian Penal Code, to the Jury. My note deals with the points raised in

the certificate of the Advocate-General, but it may be taken as practically containing the whole of my charge. It sets out my view of the law, but I

shall add a few comments on the points discussed before us.

65. Section 27, Indian Penal Code, lays down that when property is in the possession of a servant, on account of his master, it is in the master''s

possession. Section 7 says that every expression, which is explained in any part of the Code, is used in every part of the Code in conformity with

the explanation. Therefore, ""in possession"" throughout the Code includes the servant''s possession on account of the master, as the master''s

possession. There is, however, a clear distinction in law between ""custody"" and ""possession."" Custody means possession on account of another. A

person in possession of his property is not in custody of it, but a servant is, when he holds the property on behalf of his master. Although such

possession of the servant is the master''s possession, the possession of the master cannot always be said to be that of the servant, though he may

be in charge. Let us take Section 266, Indian Penal Code. It seems to me that the words ""in possession"" there do not apply to a servant in charge

of his master''s shop, in the master''s absence. Learned Counsel for the defence agreed with that view. In England it has been held not to apply to

that case. See Smith v. Webb (1896) 12 T.L.R. 450.

66. In the Penal Code different expressions have been used in different places, which indicate that a distinction between being in possession"" and

becoming possessed"" was intended. Sections 239 and 241 may be referred to in this connection. Section 239 deals with the case of a person

having"" any counterfeit coin, which at the time he became possessed of it, he knew to be counterfeit, delivering the same to any person

fraudulently."" This section has been held not to apply to a coiner, who manufactures counterfeit coin. He has it, or in other words he is in

possession of it, and although he may have intended fraudulent use with it, he is not liable, having regard to the words used in the section, which at

the time he became possessed of."" See Queen v. Sheo Bux 3 N.W.P.H.C.R. 150. Section, 241 deals with the time when the person charged

took it into his possession.

67. The Penal Code has not used the expression ""custody"" in dealing with the servant''s possession on behalf of the master, but it is quite another

thing to say that the distinction in law between ""custody"" and ""possession"" has been wiped out by the Penal Code. Confusion has resulted from the

two ideas being thus mixed up in Section 27. It is interesting to note that Mr. Norton, senior, objected to Clauses 17 and 18 (the original sections

corresponding to Section 27) when the Code was under discussion, as it did not contain the words ""with the consent and knowledge of the

husband or master."" The Law Commissioners, although they made some alterations which do not affect this point, thought the objections would

have weight, if such constructive possession could be charged against the party possessing, as a criminal possession, in order to bring him within

the definition of any offence, and to render him liable to a penal prosecution, but said that they were not aware that the clauses in question were

capable of being so perverted under the provisions of the Code (see Section 83, The First Report of the Law Commissioners).

68. We are bound to interpret the expression ""in possession"" according to Section 27, but there is nothing in the Code which lays down that

Section 27 must be used to interpret the expression become possessed."" It is clear to me that Section 27 does not express the complete thought of

the Legislature on the question of possession and it is competent to us to interpret the words ""to become possessed"" in accordance with the

meaning that the general law has given to them. [See the observations of Holloway, J., in Proceedings, 22nd December 1866 3 M.H.C.R.

Appendix xi.] When a servant takes possession on behalf of the master, it does not necessarily follow that it is the master who takes possession.

Suppose the servant takes wrongful possession, purporting to do so on behalf of his master, does the master become liable? The master is not

liable in civil law, for acts wholly outside the servant''s authority. He is not answerable if the servant takes upon himself, though in good faith, and

meaning to further the master''s interest, that which the master has no right to do, even if the facts were, as the servant thinks them to be: [Poulton

v. London and South Western Railway Company (1967) 2 Q.B. 534 : 8 B. & S. 616 : 36 L.J.Q.B. 294 : 17 L.T. 11 : 16 W.R. 309]. Much less

can the master be held to be criminally liable in those circumstances. It would be to pervert the meaning of the expression, to use the phrase of the

Law Commissioners, to put such a construction on a Penal Statute. Possession in law is that of the master. The servant does not become

possessed, although he may be in custody, or ""in possession."" Dishonest removal of money from the master''s safe in which it has been kept by the

servant, is removal from the master''s possession. It is theft of the master''s property, not of the servant. If the servant dishonestly removes the

money from the safe, after having kept the money there, he may be guilty of theft, or of criminal breach of trust, according to circumstances.

Possession involves the idea of proprietorship, the right to exercise power or control over the object possessed--animus sibi pabendi. ""Becoming

possessed"" of property involves the intention to possess (animus possidendi). A person picks up a coin in his shop dropped by a customer and

puts it into his till with the intention of restoring it to the customer, but he does not thereby become possessed, although he is ""in possession."" The

master becomes possessed, when he personally takes possession on his own account, or when he authorises the servant to take a thing for him, for

his benefit, or on his account, or when he consents to or sanctions the retention of the thing received by the servant, or knowingly allows the

servant to retain in custody for him. If there be prior authority to the servant, or arrangement with him to receive, the time when the servant

receives, is the time when the master becomes possessed. In other cases, the time when the master comes to know or consents or allows the thing

to remain with the servant, is the time when he becomes possessed. The master, for purposes of Section 243, may be in possession in two ways,

personally or constructively through a servant, but the time when he becomes possessed, is, I have endeavoured to explain, as above, in other

words, when it can be held that he was ""conscious"" of his possession. I hold, therefore, that the law was correctly put before the Jury. Since there

was no evidence in this case of any prior authority given to the servant, or of any arrangement with him to receive the counterfeit coin, it was

unnecessary to deal with the time of the servant''s receipt. The accused produced the key of the safe and it was opened by him. It was all-

important to find, if he had at all come to know that the counterfeit coin was there. The attention of the Jury was prominently called to the point. If

they so found, they were asked to consider whether he knew it at the time he became conscious of such possession. This became necessary haying

regard to the reading of the section by the defence.

69. It follows that I hold, we cannot interfere with their verdict. I think it right to add, as the facts of the case have been discussed before us, I

would not have convicted him if I had tried the case independently of a Jury.