
(1871) 12 CAL CK 0006

Calcutta High Court

Case No: Criminal Appeal No. 522 of 1871

Queen

APPELLANT

Vs

Amir Khan and Others

RESPONDENT

Date of Decision: Dec. 21, 1871

Judgement

Richard Couch, Kt., C. J.

1. In this case the appellant, Amir Khan, has been convicted by the Sessions Judge of Patna of the offence of abetment at Calcutta of waging war against the Queen in the years 1801, and 1862; the first charge being laid as an offence under Act XI of 1887, and the second as an offence under s. 121 of the Penal Code. The learned Counsel for the appellant, Amir Khan, took three preliminary objections on his behalf. The third objection, namely, that the proceedings before the Magistrate who committed the case for trial were irregular, in that none of the depositions were taken before the accused persons were brought before him (as I understand the objection), was disposed of in the course of the argument. It is clear, upon the decisions of this Court, as well as upon the decision of the High Court of Bombay, that such an objection as that ought not to prevail and I do not think it necessary to say anything more with regard to it ¹.

2. The first of the remaining two objections was that the Sessions Court at Patna had no jurisdiction to try the accused for offences which were committed at Calcutta.

3. Now, by s. 4, Act XVII of 1862, it is provided that, "in the investigation and trial of offences committed before the 1st day of January 1862, the Criminal Courts of the several grades, and the Officers of Police, shall, after the passing of this Act, be guided by the provisions of the Code of Criminal Procedure so far as the same can be applied, wherever the said Code shall be in operation at the time of such investigation or trial; and for the trial and punishment of such offences, such Court, shall exercise the jurisdiction and powers vested in them under the said Code of Criminal Procedure: provided that no person convicted of any such offence shall be liable to any other punishment than that to which he would have been liable had he been convicted of such offence before the said

1st day of January 1862, and that no such person, who shall claim the same, shall be deprived of any right of appeal or reference to a Sudder Court which he would have enjoyed had the trial been held under any of the Regulations or Acts hereby repealed." These words, which are very extensive, "shall exercise the jurisdiction and powers vested in them under the Code of Criminal Procedure," would give to the Sessions Court at Patna jurisdiction to try the accused, Amir Khan, not only for the offence which was charged to have been, committed contrary to the provisions of the Penal Code, but also for the offence under Act XI of 1857. In order to see whether there was jurisdiction, we must look to the provisions of the Code of Criminal Procedure. S. 26 of that Code provides that, "except where otherwise expressly provided by this Act, every offence shall be enquired into and determined in the district in which the offence was committed: provided that nothing in this section shall exempt European British subjects from being tried and convicted before the Supreme Courts of Judicature for offences committed beyond the local limits of such Courts." Then comes s. 27, which does not apply here; and the next section, which is applicable to the present case, is s. 28, which provides that "the abetment of an offence, wherever such abetment shall have taken place, may be enquired into or determined in any district, or division of a district, in which the offence abetted may be enquired into or determined by any Court which has jurisdiction to try such offence, as if the abetment had been committed at the same place at which the offence abetted was wholly or partly committed; or the abetment may be enquired into or determined in any district, or division of a district, within which the abettor has done anything for abetting the commission of such offence." The offence of which the accused Amir Khan has been convicted is the abetment of waging war against the Queen, the act abetted having been committed, and the abettor, therefore, being liable to the punishment for the offence of waging war against the Queen, as provided by s. 100 of the Penal Code. Now the waging of war did not take place in the district of Patna; and the part of this section (28), which is applicable to the present case, is the latter, which provides that the "abetment may be enquired into, or determined in any district within which the abettor has done anything for abetting the commission of the offence." The abetment charged against Amir Khan was that he had engaged in a conspiracy to wage war against the Queen, which was an offence under s. 107 of the Penal Code. That section provides that "a person abets the doing of a thing who instigates any person to do that thing, or engages with one or more other person or persons in a conspiracy for the doing of that thing, if any act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing." That was the abetment charged, and of which Amir Khan has been found guilty by the Sessions Court. Now, the rule of law is that, where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of law, the act of the whole. Each party is an agent of the others in carrying out the objects of the conspiracy and doing anything in furtherance of the common design. This was determined in England in the case of *Rex v. Bowes* (4 East., 171), cited by Grose, J., in *The King v. Brisco* (4 Bust., 164), and cited to us by the learned Advocate-General, and the law has, from the period when that case

was decided, been the settled law in England. It rests upon a principle which is equally applicable in this country. There is not any peculiarity of English law in this matter, but it rests upon the general law which has been stated that, where parties concert together, and have a common object, the act of one of the parties done in furtherance of the common object and in pursuance of the concerted plan, is the act of the whole of them. To apply that principle to the present case. If it were proved that Amir Khan engaged in a conspiracy to wage war against Her Majesty, acts done within the district of Patna by any one of the persons with whom he so engaged in pursuance of the original concerted plan, and with reference to the common object, would be, in point of law, the acts of the accused Amir Khan; and it would be the same as if he himself had done the acts within the district of Patna, although at the time he might not be there, and might be remaining at Calcutta. Thus, the case is, in my opinion, brought within the provisions of a. 28 of the Code of Criminal Procedure, the abettor having done something for abetting the commission of the offence within the district of Patna, and that appears to me to be one and a conclusive answer to the objection taken to the want of jurisdiction in the Patna Courts to try Amir Khan for the abetment of waging war against the Queen, of which he has been convicted. I do not think that the offence committed can be regarded as the abetment of an abetment. It was not that Amir Khan abetted other persons to abet the waging of war; he engaged with other persons in a conspiracy to wage war, and did acts in furtherance of that conspiracy.

4. There is another way in which the matter may be regarded, which equally affords an answer to the objection of want of jurisdiction. In this case the acts of abetment of which the Sessions Court has found the prisoner guilty are the sending of money on several occasions from Calcutta to Patna, in furtherance of the common design that that money should be made use of in waging war against Her Majesty. Now, the money was received at Patna, and sent by Amir Khan there through hundis, as proved by the evidence; and until that money reached its destination, the sending, in point of law, continued on the part of Amir Khan; the money was in the process of being sent to the persons by whom it was" intended to be received until they received it at Patna, and there was, in that view of the case, a sending of the money by Amir Khan within the district of Patna, where he has been tried and convicted: It is on this principle that it has been held, and it is considered settled law, that an indictment for sending a threatening letter may be tried either in the county in which the offender sent the letter, or in the county in which the prosecutor received the letter; and, in like manner, in the case of a libel or letter containing a challenge, if the letter be sent from one county to another, the trial may take place in either county. That is applicable to this case of sending the money, and would, if there was not an answer to the objection of want of jurisdiction on the ground I have previously stated, afford in itself a sufficient answer be that objection. In my opinion, therefore, the Court at Patna had jurisdiction to try the accused Amir Khan for this offence, of which he has been convicted.

5. There is, no doubt, an apparent want of jurisdiction on the face of the proceedings, because both the charges upon which the conviction has taken place allege that the abetment was "at Calcutta," and there is this apparent inconsistency, that the Sessions Court at Patna has found the accused guilty of an offence committed at Calcutta. But that is an error or defect in the charge, which is cured by s. 426 of the Code of Criminal Procedure². The charge might and ought properly to have been a charge of the offence of abetment at Patna; and then evidence might have been given, not merely of what he did at Calcutta, but of what the other conspirators did at Patna. It cannot be said that the defect is not one to which s. 426 would apply, or that the accused has been in any way prejudiced in his defence by the erroneous statement of the abetment having taken place at Calcutta, when the evidence was sufficient to show an abetment at Patna. In truth, the proper mode of framing the charge would have been that all the conspirators should have been jointly charged with the conspiracy, it being alleged to have been an abetment at Patna, and then the acts of the various conspirators in Calcutta and in Patna might have been given in evidence, and there would have been jurisdiction to try the accused at Patna if any acts were done in Patna. Had the accused been so charged in this case, there would have been no plausible ground even for the objection that the trial should not have been held at Patna. It cannot be contended that it is not proper or right where persons are engaged in a conspiracy that they should be tried at the chief place of conspiracy; and that is really what has been done in the present case. This disposes of the first of the two preliminary objections.

6. Then the second objection which was taken by the learned Counsel for Amir Khan, was that Amir Khan had already been tried, convicted, and punished.

7. I am now speaking of these two objections as applying to the case of Amir Khan only but, in fact, they apply to the other accused persons as well, and it will not be necessary to repeat the remarks which I have to make with regard to Amir Khan's case when I come to deal with the case of the others.

8. With respect to this objection, the learned Counsel relied upon the judgment of Phear, J., in the matter of Amir Khan (6 B.L.R., 468). The matter was then before Phear, J., on the appeal from the decision of Norman, J., on an application for a writ of habeas corpus. The first passage on which the learned Counsel relied, and to which he called our attention, is to be found at page 468 of the Report, where Phear, J., speaking of the warrant which had been issued under Regulation III of 1818, says:-- "It is a warrant of commitment reciting that which is, by virtue of the Regulation, equivalent to a conviction." In a subsequent passage, to be found at p. 476, the learned Judge says, after noticing the Acts of Parliament and the Regulations with regard to the power of the Governor-General in Council, to commit persons and keep them in custody:-- "The real effect of these Acts is that they create and make lawful a new cause of imprisonment, and constitute the Governor-General in Council a Court endowed with the fullest discretion to adjudicate such a cause, and with power to imprison therefore during pleasure. It may indeed be taken, in effect that on the present occasion the High Court has enquired into

the legality of Amir Khan's imprisonment, and has ascertained that he is imprisoned under a conviction and commitment of a competent tribunal, the warrant of which conviction and commitment is good on the face of it." It appears that in the present case the commitment actually took place on the 10th July 1869; and it is to be observed that what Phear, J., said was with reference to a warrant dated the 10th August 1870, to the case of in the matter of Amir Khan (6 B.L.R. 434), which is in the form given in the Regulation. But we may assume that there was some warrant in a similar form previously; and, if not, still the objection which the learned Counsel took would arise, namely, that there had been a commitment amounting to a conviction by the Governor-General in Council under the Regulation, and a subsequent discharge of the persons who had been so committed. Now Mr. Anstey and also Mr. Ingram, who followed on the same side, contended--and it was necessary for them to contend--that Amir Khan, having been committed under Regulation III of 1813, and afterwards discharged, could not be punished for any political offence committed previously to that commitment. That, as I understand, was the objection. They urged that that gave him immunity from all political offences (it cannot be supposed that the argument went beyond that) committed before that period; and it was necessary for them to go to that extent; because the warrant of commitment being in the general form given in the Regulation, no offences were specified in it, and there would be no means of ascertaining for what particular offence (if their view is correct), the commitment had been made. The opinion expressed by Phear, J., in the passages I have referred to appears to be very distinct; and it has become necessary for us to consider whether we can concur in it. With every respect for the learned Judge by whom that opinion was pronounced, I am unable to concur in it, and it appears to me to be opposed both to the preamble and to the enactment in the Regulation III of 1818. The preamble of that Regulation says:--"Whereas reasons of state, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in the territories of native princes entitled to its protection, and the security of the British dominions from foreign hostility and from internal commotion, occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding or when such proceeding may not be adapted to the nature of the, or may, for other reasons be unadvisable or improper; and whereas it fits that, in every case of the nature hereto referred to, the determination to be taken should proceed immediately from the authority of the Governor-General in Council; and whereas the ends of justice require that, when it may be determined that any person shall be placed under personal restraint, otherwise than in pursuance of some judicial proceeding, the grounds of such determination should from time to time come under revision." The language of the preamble points to cases where a commitment may be made when there are not sufficient grounds for a judicial proceeding, or when a judicial proceeding may not be adapted to the nature of the case, or when it may be determined that the person shall be placed under personal restraint otherwise than in pursuance of a judicial proceeding. Looking to that language, I am unable to see that the Legislature intended that the Governor-General, in issuing a warrant of commitment under this Regulation, was in any way to act as a Court of Justice,

or to act judicially, or to be considered as having adjudicated that the person placed under personal restraint had been guilty of some specific offence; I am unable to see that this proceeding was at all intended to be treated as in the nature of a conviction of the person so placed under personal restraint. That is the language of the preamble. Then the other parts of the enactment are consistent with the preamble, and show again what was the intention of the legislative authority by which this Regulation was passed. S. 3 says:--" When the reasons stated in the preamble of this Regulation may seem to the Governor-General in Council to require that an individual should be placed under personal restraint, without any immediate view to ulterior proceedings of a judicial nature, a warrant of commitment under the authority of the Governor-General in Council, and under the hand of the Chief Secretary, or of one of the Secretaries to Government, shall be issued to the officer in whose custody such person is to be placed." The form of the warrant is next given, and it states "that, whereas the Governor-General in Council, for good and sufficient reasons, has seen fit to determine that (the prisoner's name) shall be placed under personal restraint at (the name of the place), you are hereby required and commanded, in permanence of that determination, to receive the person above named into your custody," and so on. There is nothing to my mind, in the language here used, which points to the proceeding being in the nature of a judicial proceeding, or of a conviction of the person placed under restraint. The whole of the Regulation indicates that what was intended was what is expressed by my lamented colleague, Norman, J., in his judgment, when he refused the writ of habeas corpus, namely, that the Regulation does no more than give to the Governor-General in Council a power analogous to that which the Parliament of the United Kingdom exercises when by legislative enactment it suspends the Habeas Corpus Act. That is more like what the proceeding is than what the learned Council for Amir Khan compared it to; and Markby, J., who sat with Phear, J., on the occasion when the opinion I am now considering was expressed by Phear, J., does not appear to have considered in the view which that learned Judge took of this question. Markby, J., concurred in refusing the writ of habeas corpus but he gave his own reasons for doing so; and I do not find that he assented to the proposition which had been laid down by Phear, J., and certainly Norman, J., did not take that view of the matter, because he expressed himself quite in the opposite way. After carefully considering the language of this Regulation, I must come to the conclusion that there is not in this case any real ground for the objection taken by the learned Counsel that the accused had, already been tried and convicted and punished for the offence with which he was charged before the Sessions Court at Patna. It was said that this proceeding, under Regulation III of 1818, was like a proceeding by a Bill of Pains and Penalties, and we were referred to Bishop Atterbury's Case (16 How. St. Tr., 223) in the State trials, But there is no similarity in the proceedings. The Bill of Pains and Penalties was a conviction by Act of Parliament of a person for an offence, or an attaching to the offence of which the person was found guilty certain pains and penalties which went beyond the common law, and was a bar to a subsequent prosecution in respect of the same matter, on the principle that a person once convicted cannot be tried again. As I have said when we look to the language of Regulation III of 1818, it does not attach such consequences to a commitment by the

Governor-General in Council for good and sufficient reasons. This disposes of the second of the preliminary objections which were taken on behalf of Amir Khan.

9. It now becomes necessary for us to consider the evidence in the case, and see whether that was sufficient to support the conviction. The offence charged being the abetment of waging war against the Queen, and the punishment being, as I have stated, the punishment which is to be awarded where the offence abetted has been committed, it was necessary in the first instance to prove the actual waging of war. Although probably little doubt could be entertained that war was waged, yet on the trial it was necessary that evidence should be given on that point.

10. (His Lordship then read the evidence of Mahomed Israil and proceeded):--There then is evidence that during the period to which the charge against Amir Khan is applicable, there was a waging of war against the English Government, against Her Majesty the Queen.

11. (After reading the evidence of Jan Mahomed, His Lordship proceeded):--These two witnesses show beyond doubt that there was a waging of war.

12. Then what is the evidence as to the abetment, of waging of war? Now I do not think it necessary to go through the evidence either of Abdulla Kowidi or Abdul Gaffur. The Judge says, as to both of these witnesses, that it would not be safe to rely upon their uncorroborated statements; and for that reason it was that the accused Hashmadad Khan was acquitted entirely and Amir Khan was acquitted of certain of the charges against him. The Judge says that Abdulla Kowidi gave his evidence in a manner which impressed him favorably: that there was a (sic) and self-possessed demeanor in the witness in giving his evidence. It is possible that the Judge may have attributed too much to that demeanor: it might be the demeanor of a liar who was an adept in giving false evidence, as well as of a man telling the truth. I am not inclined to place reliance on the testimony of either of these witnesses.

13. (After reading the evidence of Abdul Karim, His Lordship proceeded):--The witness is here speaking of some matters which occurred before 1859, and therefore before the time at which this abetment is charged to have been committed; but this is evidence against Amir Khan, and is so far of importance as tending to show that he had then engaged in the conspiracy; and it is to be taken with other evidence, showing that the conspiracy in which he was so engaged continued, and that he continued to be engaged in it.

14. (After reading the evidence of Hosseini and Moazim Sirdar, His Lordship proceeded):--In reading the depositions of these witnesses, I do not forget that they are accomplices, and require corroboration.

15. (His Lordship then read the evidence of Kazi Murad, Daimula, and Amir Khan of Pubna, and speaking of the last witness, proceeded):--This witness, if corroborated,

appears to me to show, conclusively, that Amir Khan was engaged in this conspiracy. The question then arises what corroboration there is of the statements of Amir Khan of Pubna. I must say how, ever that perhaps it is scarcely right to treat this witness as an actual accomplice, though he does show by his evidence that he knew what the money was intended for which he took part in remitting.

16. Now the corroborative evidence relied upon consists is the three letters, L1, M1A, and N1A, which were found in Kazi Mian Jan's house. It was objected as to these letters by the learned Counsel for Amir Khan that Kassi Mian Jan had been previously arrested, and that letters found in his house, subsequent to his arrest and whilst he was in custody, could not be used in evidence. But that rule of evidence is subject to this exception that, if the previous existence of the letters found is established, either by direct proof, or by strong presumptive evidence, the objection that they were found after the arrest of the party in whose house they were found cannot prevail. The reason for not allowing them to be received in evidence would not apply in such a case; that reason being that it is necessary to guard against the possibility of persons, after a man has been arrested and is in custody, placing in his house papers which might be used to criminate him. But if the evidence shows that the papers were in existence before the arrest then the papers may be used in evidence. And the evidence, which I am now about to notice, shows, I think, conclusively, that these letters were in existence previous to the arrest of Kazi Mian Jan. I do not know that it does not appear that he had been arrested before the search of his house; but I do not think that is material, seeing what the evidence is with regard to these letters.

17. (After reading the evidence of Mosahib Ali, His Lordship proceeded):--This witness, if believed, shows that these three letters were written by him by direction of the accused Amir Khan, His position, no doubt, is the position of a witness who requires some corroboration, and upon whose unsupported testimony it would not be safe to rely. But we have roost material evidence in support of what this man says, and that is the evidence of Major Parsons. Major Parsons says that he is District Superintendent of Police, Rajshahye. Then he speaks of having searched the house of Mahomed Jaffer at Thanesar, and found certain letters there; he then says:--"I proceeded to Calcutta, where I searched the house of Amir Khan (the prisoner) in company with Mr. Reily, Nabakrishna Ghose, and some Calcutta Police. I asked Amir Khan for an explanation of statements made in some letters found in Kazi Mian Jan's house at Comarcolly, supposed to have been written by him, in which allusion was made to money having been forwarded to Patna. He pointed to a munshi sitting there, whose name I afterwards ascertained to be Mosahib Ali, and said that munshi had written the letters."

18. (After reading the rest of Major Parsons' evidence and commenting upon it. His Lordship proceeded):--A doubt has occurred to us in the course of the consideration that we have given to this case, although the point was not taken by the Counsel for the accused. The doubt to which I allude is as to whether the evidence of Major Parsons as to what Amir Khan said and did when he searched the house, can be said to be an

admission by confession of guilt made to a Police Officer (for Major Parsons was a Police Officer), and as snob inadmissible in evidence according to s. 143 of the Code of Criminal Procedure. But it does not appear to me that in what passed there was any admission or confession of guilt such as is contemplated by s. 148. Supposing, however, it to be doubtful whether what Amir Khan actually said could be used in evidence, I entertain no doubt that his conduct at that interview, when he was distinctly informed of what these letters were, and when his servant Mosahib Ali said that he had got orders to write them, in not denying that statement, and not attempting to offer any explanation of it, is admissible in evidence against him. I think s. 148 of the Code of Criminal Procedure cannot be carried to the extent of excluding such evidence as that.

19. The case then stands thus. There is against the prisoner Amir Khan, not putting aside, but not placing entire reliance upon the evidence of persons who may be regarded as accomplices, the evidence of Daimulla about the money being sent, the evidence of Amir Khan of Pubna, and the important evidence of these letters, as to the contents of which, and as to their referring to money which was to be sent for purposes of the jihad, I think there can be no doubt.

20. (After reading the letters L1, M1A, and N1A, His Lordship proceeded):--Now it was argued by the learned Counsel for Amir Khan that a meaning such as was put forward in the case for the prosecution ought not to be attached to the expression "sale of books" used in these letters. If we take these letters in connection with the evidence of the witnesses, especially that of Amir Khan of Pubna, it is clear that these remittances were not made on account of the sale of books, but for some other purpose; and then it comes to this, that the expressions contained in these letters were evidently used for the purpose of concealment; and the letters themselves very strongly corroborate the evidence which the witnesses on the part of the prosecution give. I have not alluded to the other letters which were found in Mian Jan's house. The reason why I have not done so is, that the hand-writing of those letters appears to be proved only by accomplices, such as Abdul Gaffur and Eiahi Bax; and their evidence not having been corroborated in this respect, I have not thought it safe to rely upon those letters. In regard to the three letters L1, M1A, and N1A, the evidence is of a very different nature; and upon that evidence I can come to no other conclusion than that the prisoner Amir Khan was a party to this conspiracy, and did act in furtherance of the objects of the conspiracy; and therefore I think that he has been properly found guilty by the Sessions Judge of Patna upon these two charges, and that his conviction ought to be affirmed.

21. Having disposed of the case against Amir Khan, his Lordship proceeded to consider the case as against the other appellants.

22. The plea of autrefois convict was taken on behalf of these prisoners. The evidence against all was objected to, as being that of accomplices, without any trustworthy corroboration.

23. The preliminary objections taken in the case of Amir Khan, in so far as they apply to the case of these prisoners may be considered as already disposed of, and the judgment in Amir Khan's case on those objection applies equally to their cases.

24. I proceed to consider, first, the case of Tobaruk Ali, who has been convicted of waging war against the Queen at Umbeyla in 1868. (His Lordship, after reading the evidence of Nur Shah Ali and of Sanata, proceeded):--It is difficult to see in what other way evidence of this character, as to persons engaged in the fight could be obtained, except by the Government instituting as to which Jaya Narayan speaks, we cannot, I think, rely upon the evidence of this witness sufficiently to sustain the conviction of Aminuddin. I think his conviction must be reversed. This disposes of all these appeals. The result will be that the convictions and sentences with regard to Amir Khan and Tobaruk Ali will be affirmed/and the convictions and sentences in the cases of Mobarak Ali, Haji Din Mahomed, and Aminuddin will be reversed, and the said prisoners Mobarak Ali, Haji Din Mahomed, and Aminuddin will be released.

¹See The Queen v. Narayan Naik, 5 B.L.R. 680.

²S. 426.--"No finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal or region an account of any error or defect either in the charge or in the proceedings on trial, unless the accused person shall have been sentenced to a larger amount of punishment than could be awarded for the offence of which, in the judgment of the Appellate Court, the accused person ought, upon the evidence to have been found guilty, or unless, in the judgment of the Appellate Court, the accused person shall have been prejudiced by such error or defect; and in case the accused person shall have been sentenced to a larger amount of punishment than could have been awarded for the offence which, in the judgment of the Appellate Court, at proved by the evidence, the Appellate Court may reduce the punishment within the limits prescribed by the Indian Penal Code or any law for the time being in force for such offence."