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Court : Kolkata

Decided On : Nov-14-1921

Reported in : AIR1922Cal107,69Ind.Cas.145

Judge : Newbould and ;Suhrawardy, JJ.

Appellant : Abdul Salim and ors.

Respondent : Emperor

Judgement :

1. The eight appellants and two others were tried before the Additional Sessions Judge of Chittagong and a Special Jury on a charge of criminal conspiracy of other offences under the Indian Penal Code against each of them individually. One of these ten accused, Makbul Ahmed, was acquitted of all the charges framed against him. Eight of the remainder were convicted on the general charge of conspiracy under Section 120B/420, Indian Penal Code, including one Ahmed Kabir who has since died. The second appellant, Ahmed Mia, was acquitted on this charge. All accused except Maqbul Ahmed were convicted on one or more of the charges framed against them individually. In some cases the verdict was nnanimous and in others by a majority of three to two. The appellant, Abdul Salim, has been sentenced to five years rigorous imprisonment under sections 120B/420, Indian Penal Code. The appellant, Ahmed Salim, has been sentenced to two years' rigorous imprisonment under sections 420/109, Indian Penal Code. The appellants Mohamad Ismail alias Ismial Dovash, Osi Mian and Mohamed Ismail

alios Kala Ismail have each been sentenced to four years' rigorous imprisonment under Section 120B/420, Indian Penal Code, and the appellants Mohamed Nassim, Matiar Rahaman and Yasin have each been sentenced to three years' rigorous imprisonment under Section 120B/420, Indian Penal Code. No separate sentences have been passed on any of the appellants for the other offences of which they have been convicted

2. The facts of the case are somewhat complicated but it is not necessary to set them out in full, since in this appeal we cannot set aside the findings of the Jury on the facts whether the verdict be unanimous or that of a majority. The main facts according to the case for the prosecution are as follows: During the War a large number of men were required for marine work as serangs, tindals, sukanis, laskars, etc., in Mesopotamia. At first men were recruited in India for this purpose by the Koyal Indian Marine (R.I.M.) Department at various centres throughout India. The demand for these men, who were technically known as ' Marine Ratings ' steadily increased and about the middle of August 1916 a new department, sailed the Inland Water Transport (I. W. T) Department, was created to carry on this work of recruitment. The new department commenced work in October 1916. In February, 1917, Chittagong was made one of the recruiting centres of ' Marine Ratings ' for service in Mesopotamia. The Recruiting Office in the Chittagong Port Office worked as a branch office of the Calcutta Recruiting Office but was financially independent, Mr. Chudleigh, (P. W. No. 2), Senior Harbour Master, was the Recruiting Officer for the Chittagong centre and as such selected men for Marine service in Mesopotamia. Men getting over Rs. 20 per month were technically termed ' Higher Ratings ' and the others ' Lower Ratings.' In selecting recruits for the 'Higher Ratings,' Mr. Chudleigh made it a rule that all candidates, except those known to him, should produce certificates or testimonials as to their fitness before they were finally selected. The men after their final selection were paid one month's pay in advance and diet allowance. They were then sent to Calcutta with a ' watchman ' to be made over to the Technical Recruiting. Officer who despatched them to Mesopotamia through the I. W. T. officers in Bombay. This "watchman ' was a servant of one Abdul Rahaman Dohasi who had entered into an agreement with the Secretary of State for India on the 7th February 1917, for the supply of the recruits to serve as 'Marine Ratings' in

Mesopotamia. Abdul Rahaman was in the position of a sole agent and was entitled to get a commission on the number of men recruited through the Chittagong office whether he himself brought them in or not. But until the men recruited at Chittagong were made over to the Head Office at Calcutta, Abdul Rahaman was responsible for the money advanced to them. At first Ismail Dovash (appellant No. 3) was Abdul Rahaman's ' watchman ' and, besides performing his duties as watchman, used to bring in men for recruitment. For some reason the Port Office authorities, about the middle of the year 1917, refused to allow Ismail Dovash to enter that office and he then began to bring in recruits through Matiar Rahman and Ahmed Mia (appellants Nos. 7 and 2) and others. As a result of advertisement by Abdul Rahaman other persons also began to bring in recruits. These middlemen or dalals got no commission or, remuneration from Government.

3. Mr. Chudleigh took good care to bring to the notice of the candidates for recruitment and of these dalals that certificates of competency and general fitness were absolutely necessary for recruitment in the 'Higher Ratings.' The certificates which were accepted were of two kinds known as Shipping Office Certificates and Basrah Certificates. In the present case we are only concerned with the Basrah certificates. These were certificates granted to men who had already served in Mesopotamia.

4. Among the dalals who brought in recruits were nine of the accused excluding Abdul Salim (appellant No. (sic)). Until July or August 1918 these dalals worked separately, Dovash and those who worked on his behalf. This rivalry of interest gave rise to friction with the result that the business of each suffered more or less and in August 1918 the dalals made up their mutual differences and formed a combination based on a system of rateable distribution of profits at some fixed periods. At about the same time information was received from the Military Authorities at Basrah by the Government of India which led to an enquiry by the Criminal Investigation Department of Bengal being ordered. This inquiry revealed the existence of a wide-spread conspiracy to secure appointments in the Higher Ratings by deceiving the Recruiting Officer and his staff with forged certificates. The association of dalals at Chittagong hired one house and a room in another house there to carry on their business. In that room the dalals used to assemble

and receive candidates for Marine service. The appellant, Abdul Salim, with one Penheiro, since deceased, used to meet the dalals there and receive orders for the certificates to be forged. The forged certificates were prepared at the house of Abdul Salim by him or by Penheiro or others. Abdul Salim was paid for preparing or procuring these forged certificates with a portion of the money received by the results as advance pay and diet allowance at the time of their final selection. The dalals also got a share of this money which was divided amongst them at certain intervals by the appellant Ismail Dovash.

5. The above are the more salient features of the case which are necessary to be stated before considering the points of law urged on behalf of the appellants.

6. The first point argued on behalf of the appellants is that the trial is void because an application to the Sessions judge under Section 526, Criminal Procedure Code to allow time to move the High Court was refused. This contention fails because no application under this section of the Code the file of the Sessions Judge, Mr. Seaton, an application was made to him to keep the case on his own file. He refused this application as frivolous and rightly held that Section 526, Criminal Procedure Code, did not apply to such a case, He then transferred the case to the Additional Sessions Judge for trial. If the appellants had good grounds to object to the trial of the case by this officer they could have/applied to him to adjourn the case to enable them to move this Court but this they did not do.

7. The second ground on which the legality of the trial has been attacked is, that the allegations of the prosecution support a case of conspiracy to forge documents and that a prosecution for such an offence requires sanction under Section 196 A of the Code of Criminal Procedure, We can see no reason why, because the appellants might have been charged with an offence for the prosecution of which the sanction of the Government is required, they should not be charged with and tried for offences in respect of which no sanction is required, A similar objection taken in the case of *Amritlal Hazra v. Emperor* 29 Ind Cas. 513 : 42 C. 957 at p. 988 : 19 C.W N. 676 : 21 C.L.J. 331 : 16 Cr. L.J. 497 was overruled as untenable.

8. The third ground on which objection has been taken to the legality of the trial is that there has been misjoinder of charges. The charges framed, counting each

head of charge as a separate charge, total thirty-seven. There is first a charge with one head charging all; the ten appellants 'that you between the 1st September 1918 and the 27th November 1918 at Chittagong and other places in British India did agree with one another and with seven other named persons and with other persons unknown, to do and to cause to be, done an illegal act, to wit, the commission of the offence of cheating by deceiving the Recruiting Officer for Marine Bating at Chittagong and his staff with forged certificates of ability, and by statements and conduct at or about the time of recruitment, and thereby | fraudulently and dishonestly inducing them, to deliver to the recruits concerned their respective advance pay for one month and diet allowance at the rate of 8 annas each and you were thus parties to criminal conspiracy, and that in pursuance of the said conspiracy, the said Recruiting Officer and his staff were deceived by 22 Exhibits marked in the case (the numbers of which are stated) and by statements and conduct during the production of the said exhibits, and were thereby fraudulently and dishonestly induced to deliver to the recruits mentioned in the schedule given on the reverse the sums quoted therein respectively against their names: and you thereby committed an offence punishable under Section 120 B read with Section 420 of the Indian Penal Code.' The schedule on the reverse of this charge contains the names of 22 recruits with the amounts of one month's advance pay and diet allowance paid to each of them.

9. Before considering the remaining charges we will first consider the objection that has been raised to this main charge. It is contended that this charge is bad since it is not a charge of a single offence but really of 22 different offences; that each separate act of deceit in respect of each of the 22 recruits named in the schedule is a separate offence. In support of this contention reliance is placed on the well known decision of the Judicial Committee of the Privy Council *Subrahmanya Ayyar v. King-Emperor* 25 M. 61 : 28 I.A. 257 : 11 M.L.J. 233 : 3 Bom. L.R. 540 : 5 C.W.N. 866 : 2 Weir 271 : 8 Sar. P.C.J. 160 (P.C.), It is contended that this charge is open to the same objection as the first count of the charge in that case and that the reasons given in the judgments of three of the learned Judges of the Madras High Court, whose decision was accepted by the Judicial Committee, are applicable to this case. There would be great force in this contention if the law were the same now as it was when that case was decided.

Then conspiracy to commit an offence (except a conspiracy to wage war) was punishable only as the abetment of an offence. Consequently, a person joining in a conspiracy in pursuance of which several offences were committed could only be charged with the abetment of those offences and the abetment of each offence had to be charged separately, But now that Section 120B has been added to the Indian Penal Code, conspiracy has become a substantive offence. This has the effect of bringing the law as to conspiracy in India into line with the English Law. The main arguments in the judgments of the three learned Judges of the Madras High Court, who held the first count in Subrahmanya Ayyar's case 25 M. 61 : 28 I.A. 257 : 11 M.L.J. 233 : 3 Bom. L.R. 540 : 5 C.W.N. 866 : 2 Weir 271 : 8 Sar. P.C.J. 160 (P.C.) to be bad, were based on the difference between the English and Indian Law and the fact that conspiracy could only be charged as a form of abetment. Now that the law has been altered these arguments lose their force. In the present case the accused were charged with the offence of conspiracy, and the acts of cheating referred to in the charge and the schedule are not charged as offences but were set out as acts done in pursuance of the conspiracy. It was open to the prosecution to prove such act in order that from them the existence of the conspiracy might be inferred. It may not have been necessary to set out these details in the charge but their addition did not make the charge bad for misjoinder.

10. It was also contended that the trial was bad for the misjoinder of this charge of conspiracy with the other charges framed against the accused individually. Separate charge sheets with two, three or four heads have been drawn up against each of the accused. Except in the case of Osi Mia (accused No. 4) heads of charges of abetment of offences punishable under sections 417, 420 and 466, Indian Penal Code, have been framed against each accused six; of these nine accused have also been charged with abetment of an offence punishable under Section 471, Indian Penal Code. Each of these sets of charges relate to the fraudulent recruitment of one of the persons named in the main conspiracy charge. The charges against Ahmed Mia (accused No. 2) may be taken as an example. He is charged first with having between 1st September 1913 and 25th day of November in pursuance of the criminal conspiracy already charged abetted Aminul Huq in the commission of the offence of cheating, the said offence having been committed by the said Aminul Huq by deceiving the Recruiting Officer for Marine

Ratings, Chittagong, and his staff with forged certificate of Sukain (Exhibit 839) and by statements and conduct at or about the time of recruitment and thereby intentionally inducing him or them, so deceived, to appoint him (Aminul Huq) as Sukain which he could not have done if not so deceived, and which act was likely to cause damage or harm, in mind, reputation and property and the said offence of cheating having been committed in consequence of his abetment he committed an offence punishable under Section 417 read with Section 109, Indian Penal Code. He is charged, secondly, in similar terms with having abetted Aminul Huq in the commission of the offence of cheating under Section 425, Indian Penal Code, with the same forged certificate and thereby dishonestly and fraudulently inducing the Recruiting Officer and his staff, so deceived, to pay Rs. 45 (one month's advance pay as Sukain) plus 8 annas (Khoraki or diet allowance) the said money being the property of Government.

11. He is charged, thirdly, with having between the 1st September and 5th November, 1918, in pursuance of the criminal conspiracy already charged abetted some unknown person or persons in the commission of the offence of forgery of the certificate of Aminul Huq. as Sukain (Exhibit 839) purporting to have been made by a public servant in his official capacity.

12. Fourthly, he is charged with having on the 5th November 1918, abetted Aminul Huq in the commission of the offence of using as genuine a forged document punishable under sections 466 and 431 and 471, Indian Penal Code, the said offence having been committed by the said Aminul Huq, by fraudulently and dishonestly using as genuine the forged certificate of himself as Sukain (Exhibit 839) before the Recruiting Officer and his staff and which he (Aminul Huq) knew to be a forged document. The charges under sections 417, 420, 466 and 471, read with Section 109, Indian Penal Code that have been framed against the other eight accused are in similar terms, In the case of the first two accused Abdul Salim and Ahmed Mia the charges relate to the same recruit Aminul Huq. In the others seven different recruits are named in each set of charges. Osi Mia (accused No. 4) is charged, firstly, that he between the 1st September and the 27th November 1913, in pursuance of the criminal conspiracy stated in the main charge, abetted some unknown person or persons in the commission of the offence of forgery of a

document, to wit, the certificate of Ali Mia as Sukain (Exhibit 959) purporting to have been made by a public servant in his official capacity and punishable under Section 496, Indian Penal Code, and the said offence having been committed by the said unknown person or persons in consequence of his abetment he thereby committed an offence punishable under Section 466 read with Section 109 Indian Penal Code He is, secondly, charged that he on or about the 27th November 1918 at Halisahar Police Station Double Moorings in pursuance of the criminal conspiracy had in his possession five documents described in the schedule given on the reverse (Exhibits 965, 966, 975, 969 and 990) knowing them to be forged and intending that they should fraudulently and dishonestly be used as genuine, the said documents being of one of the descriptions mentioned in Section 456, Indian Penal Code, viz., purporting to have been made by public servants in their official capacity and he thereby committed an offence punishable under Section 474 Indian Penal Code. None of these five documents are the subject of any of the other charges against individual accused nor do the names of the persons which appear on these documents appear in the schedule to the general conspiracy charge. One more head of charge remains to be mentioned. Abdul Salim, the first accused, in addition to the charges under sections 417, 420 and 46G read with Section 109, Indian Penal Code, is, fourthly, charged with the substantive offence of having been in possession of 10 forged documents, this charge being in similar terms to that framed against Osi Mia. None of these ten documents save out in the Schedule are the subject of any other charge and only one name, Abdul Aziz appears both in this schedule and in the schedule to the conspiracy charge.

13. It is urged on behalf of the appellants that each of these ten sets of charges relate to entirely separate transactions for which the appellants could not be tried jointly. It is also urged that the charges of abetment of cheating and abetment of forgery under one head of charge are also separate transactions since in the cheating charges the person abetted is named while in the forgery charges he is described as a person unknown. There can be no doubt that these ten accused could not have been tried at one trial or the charges framed against them individually if there had not been also the charge against them all of conspiracy punishable under Section 120B read with Section 420, Indian Penal Code. It is contended on behalf of the prosecution that once a charge of conspiracy is framed

anything done in pursuance of the conspiracy can be tried at the trial for conspiracy. This contention is supported by authority of decisions of this Court. In the case of Superintendent and Remembrancer of legal Affairs Bengal v. Manmohan Roy 26 Ind. Cas. 307 : 21 C.L.J. 195 : 19 C.W.N 672 : 16 Cr. L.J. 3, it was held that the offence of conspiracy and offences committed in pursuance of that conspiracy formed one and the same transaction and could be jointly tried. It was also so held in Harsha Nath Chatterjee v. Emperor 26 Ind. Cas. 313 : 42 C. 1153 : 21 C.L.J. 201 : 16 Cr.L.J. 9 : 19 C.W.N. 706, and both these cases were cited and approved in Amrita Lal Hazra v. Emperor 29 Ind Cas. 513 : 42 C. 957 at p. 988 : 19 C.W N. 676 : 21 C.L.J. 331 : 16 Cr. L.J. 497. These decisions fully support the contention raised on behalf of the Crown and we hold that there was no misjoinder of charges in the present case that would render the trial illegal.

14. It is also urged that even if this misjoinder did not render the trial illegal the Court had discretion under Section 239 Criminal Procedure Code to try the accused separately and this discretion was improperly exercised. But even if this be regarded as an irregularity it cannot be held to have occasioned a failure of justice.

15. There is not the same objection to the joinder of a number of charges in a conspiracy trial that there might be in other cases since even if they had not been charged the offences alleged to have been committed in pursuance of the conspiracy could have been proved to support the charge of conspiracy. This being so, we do not think that there was even an irregularity or an improper exercise of discretion in putting in the form of charges the specific acts specially relied on as against each individual accused to show that they joined in the conspiracy.

16. Objection was also taken to the individual charges of abetment to commit non-cognizable offences on the ground that the abetment sought to be proved was abetment by conspiracy and, therefore, sanction of the Local Government to the initiation of proceedings was necessary under Section 196A., Criminal Procedure Code. On behalf of the Crown it is not contended that those charges of abetment rest on conspiracy and it is pointed out that there is evidence to prove abetment by

instigation. But even if the abetment were by conspiracy, Section 196A, Criminal Procedure Code, only renders sanction necessary when the prosecution is for criminal conspiracy punishable under Section 120B, Indian Penal Code. It does not alter the former law that a prosecution for abetment by way of conspiracy punishable under section 10, Indian Penal Code, requires no sanction.

17. Another objection on the ground of mis-joinder was based on the acquittal of the appellant, Ahmad Mia, on the conspiracy charge. It is urged that this shows that the other offences with which he was charged were not part of the same transaction with the other offences charged at the trial. The answer to this objection is to be found in the wording of Section 239, Criminal Procedure Code. It begins: 'When more persons than one are accused.' That is to say, the legality of the joint trial depends on the accusation and not on the result of the trial. The charge of conspiracy against this appellant was a real accusation and not a mere excuse for trying him with the others. The learned Sessions Judge has recorded that he cannot account for the verdict of not guilty against this accused under Section 120B/420, Indian Penal Code.

18. In addition to the above mentioned objection to the legality of the trial objections were also taken on the ground of wrongful admission of evidence. The first of these relates to a portion of Mr. Chudleigh's evidence. In deposing as to the names of the brokers who produced certain certificates alleged to be forged Mr. Chudleigh refreshed his memory, by referring to entries made not by himself but by his clerk. The evidence as to the circumstances under which these entries were made is to the following effect. Mr. Chudleigh and his clerk sat in the same office room and the dalals used to come there with recruits. In the case of Higher Ratings Mr. Chudleigh would ask for the recruits certificate and question him about his capacity. The recruit and the broker. would then go to the clerk who would record the name of the recruit and the broker, and other detail'. After the day's selection and after the clerk recorded the names in the register Mr. Chudleigh counted them and signed his name, We hold that these facts were sufficient to make the provisions of sections 159 and 160 of the Evidence Act applicable and that Mr. Chudleigh was rightly allowed to refresh his memory by referring to these entries. In the leading text-book on this Act three classes of cases covered by

these two sections are described and the present case is of the third class: 'When it (the writing) brings to the mind of the witness neither any recollection of the facts mentioned in it nor any recollection of the writing itself but which nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing a writing which he knows to be genuine.' Mr. Chudleigh admitted in cross-examination that he did not himself keep any note of the names of the brokers and that he did not care to know their names., The writing, therefore, could not bring to his recollection the fact that a particular broker identified a particular recruit. But on a reference to the register he could swear to such a fact. We, therefore, hold that the learned Sessions Judge was right in rejecting as he did the petition of objection to the admission of this evidence.

19. It was contended that the retraced confession of the appellant Abdul Salim should have been held to have been inadmissible. In support of this contention reliance is placed on the case of Emperor v. Pramatha Nath, Bagchi 55 Ind. Cas. 282 : 30 C.L.J. 503 : 21 Cr. L.J. 266. The only point of resemblance between the facts of that case and the present case is that Abdul Salim's confession was recorded late at night. That alone is not sufficient ground for holding that a confession was not voluntarily made. It is not necessary to discuss the point at length. We think the learned Sessions Judge was right in letting in this confession and should have left it to the Jury to decide what value could be attached to it as against the maker. He was, however, unnecessarily favourable to this appellant since he told the Jury the value of a retracted confession was almost nil even against the maker of it,

20. We find no substance in the contention that evidence of the result of the Police enquiry was wrongly admitted because evidence was given that the accused were arrested in consequence of the Police enquiry. The C.I. D. Inspector, Sarendra Nath Lahiri, (P. W. No. 33) was examined to explain the delay and had to give some account of the investigation between October 1918 and the submission of the charge-sheet in September 1919. We do not find that he deposed to any fact that was not admissible against the accused.

21. In summing up the voluminous evidence to the Jury the learned Sessions Judge has put the case to them with perfect fairness. Our attention has been drawn to some points favourable to the accused or adverse to the prosecution that have not been referred to in the charge and to other points which might have been put differently. It is not to be expected that a Judge should comment on every point that could be possibly argued in favour of the accused. It is sufficient if, as in this case, the Judge deals with the more important points and does not unduly press on the Jury his own views on questions of fact. We have considered carefully the evidence as to points of fact said to have been improperly dealt with in the charge and we are satisfied that there has been no mis-direction as regards them. For instance it is pointed out that the Jury were not told that the enlistment registers were not found till the fourth search of the office. But the point is of no real importance. The so-called search was not a search in the ordinary sense of the words. These registers were not concealed but could have been taken at an earlier stage of the investigation but apparently their importance was not recognised at first.

22. Then as regards the evidence of the head clerk. The Jury were plainly told that he was an accomplice and were properly directed as to the necessity of corroboration of his evidence. It was not necessary to repeat this direction every time any reference was made to his evidence. It would serve no useful purpose to refer to every point in the evidence to which our attention has been drawn. In deciding whether there has been misdirection on the facts, the charge to the Jury must be considered as a whole and we are satisfied that there has been no misdirection in this respect.

23. We hold, therefore, that no ground has been established which would justify our interference with the verdict of the Jury. The sentences passed are appropriate to the offences of which the appellants have been convicted.

24. We accordingly dismiss this appeal.