

Martindale Vs. Emperor

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Court : Kolkata

Decided On : Aug-06-1924

Reported in : (1925)ILR52Cal347

Judge : Walmsley and ;Mukerji, JJ.

Appellant : Martindale

Respondent : Emperor

Judgement :

Walmsley, J.

1. The appellant, T. C. S. Martindale, was committed for trial by a Presidency Magistrate and tried at the High Court Sessions before Mr. Justice Pearson, on three charges relating to forgery, and one charge of cheating. We are told that the majority of the jurors consisted of Europeans, but that result was achieved by process of challenging, and not as a consequence of the provisions contained in Section 275 of the Criminal Procedure Code. He was found guilty on all the charges; by a verdict of seven to two on the forgery charges, and unanimously on the charge of cheating. He was sentenced to four years rigorous imprisonment on each charge; the sentences to ran concurrently.

2. Some time later, the Chief Justice was moved to appoint a Bench to hear his application for leave to appeal. The matter was referred to the Criminal Bench

(then consisting of Newbould and B. B. Ghose JJ.) and leave was granted, under Section 449 (1) (c), one of the new clauses added by last year's Amending Act.

3. The learned Standing Counsel has appeared before-us and urged that no appeal lies, and that the application for leave should have been made with notice to the Crown, and that it should have been made to Mr. Justice Pearson, the Judge who tried the case.

4. It is convenient to deal with these points in the reverse of the order in which I have stated, them.

5. It appears to me that the third point is merely a matter of convenience and expediency. There can be no, doubt that the Bench which granted leave to appeal had jurisdiction to entertain and dispose of the application. At the same time I think it is desirable that such applications should be made to the trying; Judge. The right of appeal, if there is one, depends upon extraneous circumstances which have nothing to do with the guilt of the accused, and the trying Judge-is better qualified than any one else to decide whether those circumstances exist or not.

6. On the second point, I think the learned Standing Counsel is right in urging that notice of the application should have been given to the Crown. The right of appeal, if there is one, is at best a qualified right, and very different from the right conferred by Section 410 of the Criminal Procedure. Code. In other proceedings in this Court, where special circumstances creating a right have to be shown, it is the practice to insist on notice being given to the opposite party, that he may have an opportunity of urging that those circumstances do not exist. The same rule, I think, ought to be followed in applications of this nature. In the present instance, however, we are confronted by the fact that leave has been given, and that there is no counter affidavit to rebut the statements in the affidavit upon which the leave was granted. We cannot revoke the leave, and I think we can do no more than express our opinion as I have already done. In view of the fact that leave has been granted, it is hardly necessary to deal with the first argument that there is no right of appeal. Such right of appeal as is created by the Amending Act is contained in a Chapter---No. XXXIII---which, except for the one Section 419, has no application to Presidency towns and the trials held in this Court under normal procedure.

Chapter XLIVA contains provisions for European and Indian British subjects in cases to which Chapter XXXIII does not apply. Under this Chapter the accused might have claimed the status of a European British subject with a view to a limited sentence or with a view to the right, conferred by Section 275, of claiming a European majority on the Jury. He made no such claim, however, and though in fact he obtained a European majority, it was by the luck of the ballot and not as of right under Section 275. So far as Chapter XLIVA is concerned, the appellant can no longer claim the status of a European British subject. I do not think, however, that that fact debars him from urging that the conditions mentioned in Clause (a) or Clause (b) of Section 443 (I) exist. Those clauses do not refer only to the status of the accused person, but to the status of two persons: one of them cannot be the accused person, and in the second clause neither need be. It seems unreasonable, therefore, that the omission of the accused person to avail himself of the right to claim the benefit of Section 528A should conclude the matter. The right of appeal given to the Local Government, by Sub-section (2) of Section 449, supports this view. I am of opinion, therefore, that proof of the conditions mentioned in, Section 443 is what is required, and not evidence that any person concerned in the case has preferred and substantiated a claim to a particular status. On the facts set out in the affidavit, therefore I think that the conditions were such as to admit of leave to appeal being granted.

7. Now I turn to the merits of the appeal. The case for the prosecution is that on August 8, a Wednesday, the accused went to a shop in the New Market, and after making some purchases tendered a cheque for Rs. 800: a poddar cashed it in consideration of a small commission; he presented it on Monday, the 13th, and it was dishonoured. On enquiry it was found that the cheque form had been abstracted from a cheque book belonging to a Mr. Maitra, on whom the accused had called that very day. The brother of the accused, G. R. Martindale, has an account with the Bank (the Imperial), but the signature is not his; in fact it bears no resemblance to his. It is an obscure signature, but 'artindale' perhaps 'Martindale' can be made out of it, and as G. R. Martindale is the only constituent of the Bank with such a name, the Bank officials naturally rejected the cheque as not being signed by G. R. Martindale. The evidence of the shopkeeper and the poddar, however, is clear on the point that the accused made no representation about G.

R. Martindale. He initialled an alteration in the date as though he were the drawer. It is not necessary to go into the question whether the flourishes at the beginning of the signature are T. C. S. (appellant's initials) assembled in the form of monogram. So far as the charges of forgery are concerned, it is enough to say that the appellant did not pass off the cheque to the shopkeeper and the poddar as being signed by G. R. Martindale. In the trial Court the idea seems to have been that the appellant attempted through the poddar to pass off the cheque on the Bank as signed by G. R. Martindale. The evidence of the Bank officials tends to support that view, but I think that they are really under the influence of the suggestion to which I have referred. I do not think that anyone who had never heard of G. R. Martindale would have read the initials as G. B. It is perhaps in consequence of the evidence from the Bank officials that the learned Judge in charging the Jury about the meaning of the expression 'false document' seems to have dwelt only on the fraudulent or dishonest intention, and to have ignored the other element, the passing off of the imitation as the real. That is an essential ingredient in a false document, and it is not necessary to refer to *Queen v. Martin* (1879) L. R. 5 Q. B. D. 34. or *Ring v. Dunn* (1765) 1 Leach 68., for the principle of those cases is embodied in Section 464, the section which defines a false document. The question is whether the appellant put the signature on the cheque with the intention of causing it to be believed that it had been signed by G. R. Martindale. It is clear that he had no intention of inducing that belief in the minds of the shopkeeper and of the poddar, and I am not satisfied that he had the intention in regard to the Bank. In my judgment, therefore, the cheque was not a false document, and consequently on the first and second and third charges there should have been an acquittal.

8. The charge of cheating under Section 420 of the Indian Penal Code names the poddar as the person who was cheated; this is natural because it is he who parted with the money. The point made in connection with this charge is that, whatever false representation there may have been, such false representation was made to the shopkeeper and not to the poddar; that when the poddar came there was a conversation between him and the shopkeeper in Bengali, a language which the appellant is not proved to understand, that the appellant said nothing to the poddar, and his silence cannot be treated as concealment of facts which he ought

to have disclosed.

9. Before this argument is reached, however, it is urged that the appellant's version of what occurred is the true one. It is in short that there was a loan of Rs. 400, and that the cheque was delivered not as a. cheque but as a document embodying the terms of the loan. The story is fantastic: there is nothing in the evidence to support it, and the fact that the cheque form had been obtained surreptitiously a few hours earlier, and the fact that the date first written--- August 12---was changed by appellant at the instance of the poddar to August 9, militate against it.

10. To go back to the argument on the prosecution case, some support is no doubt given to it by the conflicting evidence of the shopkeeper and the poddar. They are quarrelling about who is to bear the loss, and the result is that each makes statements which help the appellant in a slight degree. It is also a point in favour of the appellant that the poddar understood that there would be no balance at appellant's credit from which the cheque could be cashed on the 9th, and that he inferred that appellant had not been able to add to the balance from the request made to him to keep the cheque back a few days.

11. None of these considerations, however, really touch the main features of the case. The cheque was offered as a genuine cheque, although in fact it was written by appellant on a form that did not belong to him, and drawn on a Bank where he had no account; the poddar paid good money for it, and the appellant knew that the poddar accepted it as a genuine cheque which would be honoured if he had patience for a day or two. 'Whether appellant understood the conversation between the shopkeeper and the poddar or not, he knew perfectly well what was being done, and that he was getting Rs. 800 in return for a worthless piece of paper: by his own acts of altering the date and endorsing the cheque he fostered in the poddar's mind the belief that the cheque was genuine; he must have understood the inference that would be drawn from the mere fact that he tendered a form taken from an Imperial Bank cheque book. In such circumstances the silence of the appellant must be regarded as amounting to dishonest concealment. In my opinion, therefore, all the elements of an offence of cheating are

established, and the appeal, as against the conviction under Section 420 of the Indian Penal Code, must fail.

12. As to sentence, the sentences passed under Sections 467, 468, 471 of the Indian Penal Code, are set aside with the convictions under those sections.

13. It was our intention to maintain the sentence' of rigorous imprisonment passed under Section 420 of the Indian Penal Code, but for a reduced period. It is represented to us, however, that friends of the accused are ready to make good the loss sustained by the poddar, and that the poddar is prepared in return j to compound the offence, and we are asked under Section 345(2) of the Criminal Procedure Code to permit the composition.

14. An application has also been put in to-day to that effect by the appellant, and at the foot of it there has been a note made by one Tarini Mohan Shaw, the proprietor of the poddar's shop, and the employer of Rai Mohan Shaw, who has been duly identified, acknowledging receipt of the sum of lis. 800 and consenting to have the case compounded.

15. I think that we should give our assent. The appellant had grave domestic trouble about the time of the incident; he was arrested a year ago, and he has served over two months of the sentence. In these circumstances I assent to the composition. In doing so, I wish to express the hope that the appellant will strive to make a proper response to the loyalty of his friends. Let the accused be acquitted.

Mukerji, J.

16. The appellant, Theodore Cecil Swinhoe Martindale, was tried by Mr. Justice Pearson at the First Criminal Sessions for the year 1924 on charges under Sections 467, 488, 471 and 420 of the Indian Penal Code. The jury returned a verdict of guilty; on the first three charges by a majority of 7 to 2, and on the last one unanimously. The learned Judge accepting the verdict convicted the appellant on all the charges, and sentenced him to undergo rigorous imprisonment for four years on each of the charges, the said sentences to run concurrently.

17. The appellant thereupon applied for leave to appeal under the provision of Section 449 (2) (c), of the Criminal Procedure Code. The application was presented before his Lordship the Chief Justice, and on his so directing, it was heard by Newbould and B. B. Ghose JJ. The learned Judges granted the leave applied for and admitted the appeal, and it then came on for hearing before us.

18. The learned Standing Counsel appearing on behalf of the Crown raised a preliminary objection as to the maintainability of the appeal. The objection is based mainly upon three grounds:---Firstly, that the appellant was bound to put forward his claim to be dealt with as a European British subject before the Magistrate before whom he was produced, in accordance with the provisions of Section 528A of the Criminal Procedure Code; and inasmuch as he did not do so, he must, under Section 528B of the Code, be held to have relinquished his right to be dealt with as a European British subject, and that, therefore he is incompetent to assert the same in any subsequent Stage of the case; and consequently he cannot, now be permitted to rely on that right for the-purpose of his appeal; secondly, that the appellant: never asserted, either before the committing Magistrate or before Mr. Justice Pearson, his right to be dealt with under the provisions of Chapter XXXIII, which he should have done in order to have a proper investigation into the question of status of the parties to the case, and that he cannot be permitted to raise the said question for the first time in his application for leave to appeal; and thirdly, that the-leave to appeal was not properly given, the same having been granted ex parte and without any inquiry, and merely upon an affidavit which is not sufficient for establishing either that the appellant is a European British subject or that his prosecutors-are Indian British subjects.

19. With regard to the first of these grounds, I may say at once that I adhere to the opinion which I expressed in the order I passed in the case of Emperor v. Harendra Chandra Chakravarti (1924) I. L. R. 41 Calc. 980., which was tried in the second Criminal Sessions of the High Court for the year 1924, in connection with a claim made in that case under the provisions of Section 275 of the Criminal Procedure Code. In that case I had occasion to deal with the amendments introduced by Act XII of 1923, and I held that a claim to be tried under the provisions of Chapter XXXIII of the Code is wholly different from a claim to be tried

as a European British subject or an Indian British subject, or a European not being a European British subject or an American, that it is the latter claim only which is dealt with in Chapter XLIVA of the Code in which Sections 528A and 528B occur, and that, so far as the former claim is concerned, the question of status of the claimant does not always arise, as is evident from the provisions of Section 448(7)(&) of the Code. Whereas in a claim to be dealt with as a European British subject or an Indian British subject, or a European not being a European British subject or an American, the claimant has to prove his own status, in a claim to be tried under the provisions of Chapter XXXIII the claimant may or may not have to do so. If the latter claim is based upon Clause (a) of Section 443, Sub-section (1) of the Code, the claimant will have to prove that the complainant, and the accused persons, or any of them, are, respectively, European and Indian British subjects or Indian and European British subjects. If it is based upon Clause (b) of Section 443 Sub-section (1) of the Code, the claimant will have to prove that, in view of the connection with the case of both a European British subject and an Indian British subject, it is expedient for the ends of justice that the case should be tried under the provisions of Chapter XXXIII; this may or may not involve a question of the claimant's own status. It will also be seen that Section 528A is expressly limited in its operation to a case to which the provisions of Chapter XXXIII do not apply, and Section 528B relates only to such cases as are contemplated by Section 528A, and Section 449 under which the right of appeal is claimed is in Chapter XXXIII; consequently Sections 528A and 528B can have no application to Section 449. This ground of objection, therefore, in my opinion, fails.

20. So far as the second ground is concerned, it is sufficient to say that there is no provision in the Code enabling a person to put forward a claim of this character, either before a Magistrate holding an enquiry or trial in a Presidency town, or before the High Court during the trial of the case. It is unreasonable to suppose that the Legislature ever intended that, when there was no knowing whether there would be conviction or an acquittal (and both are open to appeal under Section 449 of the Criminal Procedure Code), an enquiry might be asked for and the Court required to decide on the question as to whether, if tried outside a Presidency town, the case would have been triable under the provisions of Chapter XXXIII, the only object of such an enquiry being that the result of it may be availed of for the

purposes of an appeal by the accused in the case of a conviction and by the Crown in the case of an acquittal. In my opinion the proper time to raise the question is when leave to appeal is applied for, and that is when the appellant has raised it. I, therefore, think that the second ground has no substance.

21. As for the third ground it seems to me that the Crown has a just cause for complaint. The appellant applied for leave on the ground that the case, if tried outside the Presidency town of Calcutta, would have been triable under Chapter XXXIII as it came within Section 443 (1)(a). He alleged that he is a European British subject, and the two persons on whose information he was prosecuted are Indian British subjects. The Court had to be satisfied on these points before it could grant the leave asked for; and the Crown undoubtedly was entitled to an opportunity to show, if possible, that the allegations were not true, or that the case, if tried outside the Presidency town of Calcutta, would not have been triable under Chapter XXXIII. It would, therefore, have been better if the leave was asked for on notice to the Crown, or at any rate if the same was granted with such notice. The matter, however, is of very little practical importance, for if it could be shown to us even now that the case was not so triable, or that the appeal did not lie, we would have been bound to dismiss it. Nothing, however, has been placed before us to rebut the statements contained in the petition of appeal, and the affidavit in support of it, and I can find nothing which may lead me to hold that the accused is not a European British subject or that the prosecutors, who are people living in Calcutta and carrying on business in Calcutta, are not Indian British subjects. I am, therefore, of opinion that the third ground of objection also fails.

22. The appeal, therefore, is competent and must be dealt with on the merits.

23. Now the case for the prosecution, shortly stated, is this. On the 8th August 1923, the appellant went to the hosiery shop of A. S. Mullick at No. 32, Municipal Market, and purchased goods worth Rs. 22-4. He tendered a cheque for Rs. 800 drawn in his favour to Abdul Razak, the salesman of the shop, and asked for the balance. Abdul Razak replied that he had not enough money to pay the balance. On that the appellant requested Abdul Razak to send for a poddar and get the cheque cashed. A poddar, Rai Mohan Saba, was sent for; he came and inspected

the cheque and asked for a commission of Rs. 1-8 which the appellant agreed to pay, and he asked the appellant to alter the date from the 12th to the 9th. The appellant made the alteration and initialled it. Rai Mohan Saha insisting, Abdul Razak put down the name of the firm A. S. Mullick and the address 32, New Market, Calcutta, and also wrote 'By the pen of Abdul Razak' on the back of the cheque. Rai Mohan went away with the cheque, brought the money Rs. 798-8 and the appellant took it and paid Rs. 22-4 out of the amount to Abdul Razak. The appellant subsequently requested Abdul Razak to ask Rai Mohan Saha not to present the cheque at the Bank on the 9th, and promised to pay up the amount of the cheque and take it back. Rai Mohan Saha accordingly kept the cheque back till the 13th. On that day Rai Mohan Saha presented the cheque at the Bank, and then it was found that the cheque belonged to a book of cheque counterfoils supplied to one H. P. Maitra. The officials of the Bank found that the signature of the drawer of the cheque was that of a Martindale; they took it to be that of G. R. Martindale, the appellant's brother, who was the only constituent of the name of Martindale in the Bank, and that the signature did not tally with the specimen signature of G. R. Martindale which was in the Bank. Thereupon no payment was made on the cheque.

24. The above is the main story of the prosecution, and the version of the transaction as narrated above is what has been deposed to by Abdul Razak. The poddar, Rai Mohan Saha, however, makes some variations, mainly to the effect that the cheque was sent to him in the first instance by Abdul Razak through a boy named Jamaluddin, that he on examining the cheque found that it did not contain the endorsement of the firm of A. S. Mullick, and also that the date was the 12th, and upon that he came to Abdul Razak and all the conversation that he had with regard to the cheque was with Abdul Razak and none with the appellant. He, however, states that he would not have agreed to cash the cheque if he knew that it was worthless, and that he paid the amount of the cheque entirely relying on Abdul Razak. He says he does not know English, and that Abdul Razak assured him that the appellant was a known customer of his. The boy Jamaluddin supports in substance the version given by Abdul Razak. One Sheikh Attar Ali who works in the shop of A. S. Mullick also gives practically the same story, and endeavours to make out that the transaction was directly between Rai Mohan Saha on the one

hand and the appellant on the other. Mahabut Ali, a shopkeeper, who has got his shop opposite to that of A. S. Mallick, also supports the version of Abdul Razak.

25. The appellant's version of the transaction in short was that he had been dealing with the firm of A. S. Mullick for 11 or 12 years, that he was badly in need of money for the medical expenses for his wife's illness, that he expected money from his brother Mr. G. R. Martindale in a few days, and in order to meet his urgent demands he approached Abdul Razak and asked for a temporary loan of Rs. 400 and that Abdul Razak agreed to lend him the amount at 12 per cent, interest if he was prepared to give some security. The appellant's case is that he obtained the blank cheque form from one Mr. Smith who belongs to the firm of H. P. Maitra & Co., that thereafter he saw Abdul Razak who said that he would have to sign a cheque for Rs. 800 and that it would be understood that if he returned the money by the 13th, he would have to pay only Rs. 400 plus interest, a but otherwise he would have to pay Rs. 800. The appellant says that on that condition he made out the cheque, and that Abdul Razak thereafter sent for Rai Mohan Saha, and had some conversation with him which the appellant neither heard nor understood. He says that he was thereafter requested to alter the date from the 12th to the 9th which he did, and was paid only Rs. 400. He then gives a story as to the subsequent events which is unnecessary to narrate here.

26. The appellant's version of the transaction is not supported by any evidence. It may be said that on the assumption that it was true it would not be possible for him to get witnesses to support it. That may be so; but the story is so inherently improbable that one should feel great hesitation in accepting it. Why Abdul Razak, who is the salesman of a shop carrying on hosiery, should suddenly convert himself into an extortionate money lender, lending out money on condition that it would be doubled if it was not re-paid within five days, it is difficult to conceive; it is still more difficult to imagine that the appellant, who is a man of the world and a business man, and not altogether helpless, would agree to such an extortionate stipulation. Then again if Abdul Razak wanted to have some security for the loan, would he have agreed to accept as security a cheque written by the accused in that way, unless he believed that the accused had an account in the Bank upon which the cheque could be drawn? The story that the cheque was meant merely to

be evidence of the transaction and not as security, it is impossible to believe. On a careful consideration of the whole of the facts and circumstances it appears to me impossible that the transaction that took place was anything like the one suggested on behalf of the defence. I have carefully scrutinized the evidence of the witnesses who have supported the prosecution version of the transaction, but I have not been able to discover anything in that evidence which may lead me to suspect that the prosecution version of the transaction does not represent the truth. The conflict between the evidence of Rai Mohan Saha on the one hand and that of Abdul Razak, Jamaluddin, Attar Ali and Mahabutali on the other, noticed above, is easily explicable on the hypothesis that while Rai Mohan Saha endeavours to make out that the firm of A. S. Mallick and Abdul Razak are responsible for the money, the latter and the other witnesses attempt to repudiate any suggestion of that responsibility.

27. I, therefore, find that the appellant gave the cheque to Abdul Razak for encashment, which act carried with it the representation that it was a good cheque on which payment would be obtained from the Bank; that he did not disclose that he had no account or money in the Bank; that when Abdul Razak expressed his inability to pay the amount, the appellant suggested that the cheque might be cashed with some poddar; that Abdul Razak honestly believing that it was a good cheque requested Rai Mohan Saha to make the payment allowing him a commission of Re. 1-8; that Rai Mohan Saha wanted to be safe and so got Abdul Razak to sign for the firm on the back of the cheque; that Rai Mohan Saha was not willing to wait till the 12th, which was the date that the cheque bore, and intended to get the cheque cashed in the Bank on the 9th, and so got the appellant to alter the date which the appellant readily did, and that the appellant subsequently requested, Abdul Razak to see that the cheque was not presented promising to pay the amount in cash and so redeem the cheque.

28. On these findings it is necessary to consider what offence or offences was committed by the accused.

29. The cheque purports to bear a signature which is said by the prosecution to represent that of G. E. Martindale, and by the defence to be that of T. C. S.

Martindale, the appellant himself. A good deal of evidence has been adduced on behalf of the prosecution to establish that the appellant's brother, G. R. Martindale, has an account in the Imperial Bank of India, that the signature cannot be read as that of T. C. S. Martindale but only as of G. R. Martindale, and that as a matter of fact it was so read by officials of the Bank. On the other hand the defence has endeavoured to show that the signature may be read as that of T. C. S. Martindale, that it does not resemble the specimen signature of G. R. Martindale which is in the Bank, and that a loop below the curve of 'C' and a line which are to be found there now were not there when the cheque was in the Court of the Committing Magistrate. In my opinion it has not been made out sufficiently clearly that the signature really represented that of G. R. Martindale rather than that of T. C. S. Martindale; but I do not consider the matter to be of any real importance. The controversy that has centred round this question, in my judgment, is entirely unprofitable and is likely to cloud the real issues. I do not think there is anything on the record which may go to show that the appellant ever contemplated that the cheque would get to a stage when it would happen to be presented at the bank and payment would be made upon it on the impression that it was a cheque issued by G. R. Martindale; for, in that case some endeavour would have been made by the appellant to make the signature resemble that of G. R. Martindale. It is admitted on all hands that the signature of the 3 drawer of the cheque does not bear the faintest resemblance to the specimen signature of G. R. Martindale, and is in fact wholly dissimilar to it.

30. The real question is what was the intention of the accused in making out the cheque. With regard to this matter there are two views that may possibly be taken. It may have been the intention of the accused to make it appear that the cheque had been drawn by somebody else in his favour. In that view it is immaterial whether the signature was T. C. S. Martindale or G. R. Martindale or was of any body else, either real or fictitious. If it was intended to represent that the cheque had been drawn by somebody else in favour of the appellant, and it was made out with that intention and with the object of tendering it for payment or for being used as security it would be a false document. The principle was laid down in the case of *King v. Dunn* (1765) 1 Leach 68. in these words: 'First, that if a person give a note or other security as his own note or security, and the credit thereupon be

personal to himself without any relation to another, his signing such a fictitious name may indeed be a cheat, but will not amount to forgery; for in that case it is really the instrument of the party whose act it purports to be, and the creditor had no other security in view. But secondly, that if a note be given in the name of another person either really existing or represented so to be, and in that light it obtain a superior credit, or induce a trust which will not be given to the party himself, it is then a false instrument, and punishable as forgery.' We have to judge of the intention at the time when the document was made, and it is upon that intention that the criminality of the act has to be judged. Now the fact that the drawer's signature was obviously made to look as altogether different from the name of the drawer and; the fact that the signature of the appellant on the back of the cheque as endorser is Like the writing of the payee's name on the face of the cheque and is wholly dissimilar to his signature on the cheque as drawer thereof, lend some support to the theory that the intention was to make it appear that it was a cheque issued in favour of the appellant by somebody else---it does not matter whether it was Gr. R. Martindale or a fictitious person; and it is just possible that such was his intention when the appellant made out the cheque. If the appellant had this intention, then the document he made was a false document and he was guilty of forgery. This, however, is a mere possibility, and I am not inclined to press it too much against the accused in the face of the evidence relating to the use that the appellant actually made of the cheque, and from which his intention may as well and perhaps with greater certainty be gathered. There is no evidence to show that he made any other representation than that it was a cheque which he was drawing upon the Bank. Neither Abdul Razak nor Rai Mohan Saha ever thought of looking to the drawer's signature as a guarantee for the payment of the cheque; on the other hand the fact that they asked the appellant to alter the date of the cheque, and thought that he was competent to do so, that the appellant did so in their presence, shows unmistakeably that they took it as a cheque drawn by the appellant himself, and lends support to the theory that in making out the cheque the appellant intended to pass it off as a genuine cheque drawn by himself in his own favour. If that was the appellant's intention, there was no preparation of a false document, and so no forgery. In that view of the appellant's intention the case would clearly be on all fours with that of Queen v. Martin (1879) L. R. 5 Q. B.

D. 34. In that case a prisoner gave a cheque drawn in the name of a fictitious person upon a Bank in which there was no account answering to that signature, but the prosecutor took the cheque believing that it was drawn in the prisoner's name, and the Court following the ruling in *King v. Dunn* (1765) 1 Leach 68. cited above, held that there was no forgery. The law in Section 464 of the Indian Penal Code is exactly the same. The intention in such a case must be to cause it to be believed that such document was made or signed or executed by or by the authority of a person by whom or by whose authority it was not made signed or executed. I, accordingly, think that there was no false document made, and, therefore, there was no forgery. In that view the charges under Section 467, 468 and 471 of the Indian Penal Code must fail and the convictions and sentences passed on these charges cannot stand.

31. As to the charge under Section 420 of the Indian Penal Code the appellant's contention is that he did not make any representation to Rai Mohan Saha whom he is alleged to have cheated, that whatever conversation there was was between Abdul Razak and Rai Mohan Saha, and though the appellant was sitting in the same room he was at some distance, and he could neither hear nor follow the conversation as it was in Bengali. In view of the findings at which I have arrived with regard to the nature of the transaction, I hold that the appellant used Abdul Razak merely as an agency for communicating the representations to Rai Mohan Saha. He knew perfectly well that he had not disclosed to Abdul Razak the fact that the cheque was absolutely worthless, and that he had no account in the Bank, far less any money, against which the cheque could be drawn. He knew perfectly well that as a security the cheque was worth nothing. It was his plain duty to disclose the real state of affairs to Abdul Razak, for he must have understood that when Rai Mohan was paying Rs. 798-8 on the cheque he was acting on the representation which the cheque carried with it that it would be honoured on presentation. This representation the appellant intended to convey through Abdul Razak to Rai Mohan Saha; and this representation Abdul Razak did in fact convey to Rai Mohan Saha in the presence of the appellant by making over the cheque to Rai Mohan Saha and getting the money from him. A dishonest concealment of facts is deception within the meaning of Section 415 of the Indian Penal Code. I hold that the appellant dishonestly concealed the most material fact that the

cheque could never be paid on presentation, and on the other hand confirmed Abdul Razak and Rai Mohan Saha in their belief that it was a good cheque by altering the date from the 12th to the 9th when requested to do so. It makes no difference to the criminality of the transaction that Rai Mohan Saha took the precaution of getting Abdul Razak to sign for the firm on the back of the cheque. Nor does it matter whether the appellant understood the conversation that passed between Abdul Razak and Rai Mohan Saha. So far as the offence under Section 420 of the Indian Penal Code is concerned, I am of opinion that the appellant has been rightly convicted in respect thereof.

32. Having regard, however, to the circumstances mentioned in the judgment of my learned brother, I agree in allowing the offence punishable under Section 420 of the Indian Penal Code to be compounded.

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