

## REG.

v.

DAYA'L JÁ'IRA'J, KHATA'O LADHA' and KALLIA'NJÍ' LADHA'.

*Separation of Jury—Discretion of Judge—Felony and Misdemeanor  
—Ind. Pen. Code—Letters Patent—Certificate of Advocate General.*

By the practice of the Supreme Court at Bombay before the Indian Penal Code came into operation, on a trial for treason or felony the jury (as in England) was kept together during the night under the charge of officers of the Court; but on a trial for misdemeanor it was in the discretion of the Judge whether they should be kept together, or allowed to return to their homes for the night, the latter being generally done; and after the Code came into operation, the practice continued the same, as well in the Supreme Court, as subsequently in the High Court;—the Judges applying the Rule by determining whether the offence under trial would by the old law have been a felony or a misdemeanor.

Where the Judge, on a charge under Sec. 467 of the Ind. Pen. Code, permitted the jury to separate on the first day of the trial and before verdict:—

*Held* that the exercise of his discretion was not a matter to be reviewed by the High Court under Sec. 26 of the Letters Patent, there being no error in any point of law; as the offence charged was only a misdemeanor under the law in force before the Ind. Pen. Code took effect.

1866.  
December 6.  
Reg.  
v.  
Dayál Jáíráj.

THE prisoners were tried before Mr. Justice ANSTEY—then an Acting Judge of the High Court—and a Special Jury at the Third Criminal Sessions of 1865, charged in various counts with offences against the Indian Penal Code, and were found guilty, under Sec. 467, of having forged a “valuable security,” and sentenced, the first and second prisoners, respectively to transportation for life, and the third prisoner to suffer rigorous imprisonment for four years; and the Court adjudged, under Sec. 62 of the Penal Code, that the rents and profits of the moveable and immoveable estates of the first and second prisoners, respectively, should be forfeited to Government.

The case\* was now brought before the Court (consisting of COUCH, C. J., ARNOULD, WESTROFF and SARGENT, JJ.) under

\* The Report is by the Editor, who was Acting Clerk of the Crown.

Sec. 26 of the Amended Letters Patent of 28th December 1865, on the certificate of *The Honorable L. H. Bayley, H. M.'s Advocate General*, to whom it had been represented "that, in consequence of the length of the said trial, it was impossible that the same could be finished in the course of the first day, and that it became necessary to adjourn the hearing thereof until the next day" (the 30th of September 1865); "that when the Court rose, on the evening of the first day, to adjourn until the next day, the said presiding Judge in the exercise of his discretion, and without the consent of the said Dayál Jáiráj, Khatañ Ladhá and Kallianjí Ladhá, and of any or either of them, or of their or any or either of their counsel learned in the law, being asked or given, suffered and permitted each and every of the gentlemen of the said special jury, so empanelled as aforesaid, to separate and disperse for the night, and to retire to their several and respective houses and homes until the said Court should resume the hearing of the said trial upon the following morning, which the said gentlemen of the said special jury then thereupon severally and respectively accordingly did, without any person or persons having been sworn, affirmed, or directed to keep them together until the said Court should resume the hearing of the said trial upon the following morning;" and that the hearing of the said trial was resumed on the morning of the following day before the said presiding Judge and the same special jury, and was concluded in the evening of the same day, when the said prisoners were respectively found guilty and sentenced, &c.— which sentences they were still respectively undergoing. "And whereas, by reason of the premises aforesaid, it may be doubtful whether the said trial, convictions and sentences were, or any or either of them was, valid and legal: Now I, Lyttleton Holyoake Bayley, Her Majesty's Advocate General at Bombay, do under and by virtue of the power by the Amended Letters Patent for, &c., conferred upon Her Majesty's Advocate General at Bombay, HEREBY CERTIFY that certain points of law which had been decided by the said High Court of Judicature at Bombay in its Ordinary Original

1866.  
December 6.  
Reg.  
v.  
Dayál Jáiráj.

1866.  
December 6.  
Reg.  
v.  
Dayál Jáiráj.

Criminal Jurisdiction aforesaid against the said Dayál Jáiráj, &c., should, in my judgment, be further considered by the said High Court, in this, that is to say, whether by reason of the separation and dispersion of the gentlemen of the said special jury between the first and second days of the said trial in manner aforesaid, the said trial of the said Dayál Jáiráj, &c., was not vitiated, and whether the said convictions and sentences of the said Dayál Jáiráj, &c., or some or one of them, were or was not in consequence illegal, and ought not to be set aside and reversed.”

Couch, C. J.—The prisoners’ counsel should begin.

*McCulloch* (with him *Green* and *Hayllar*) for the Crown.—I have certain preliminary objections to take. (The *Advocate General* does not appear here for the Crown, as he appeared for the prisoners at the trial.) It is too late now to object to any *mala praxis* which may have occurred during the trial. Objection should have been taken on behalf of the prisoners when, after the jury had been permitted to separate, the hearing of the trial was resumed. Another objection is the time which has elapsed since the conviction and sentence. [Couch, C. J.—The Advocate General has here certified to the Court in the exercise of his discretion. He was not obliged to certify.] He merely wished to bring the whole matter before the Court for its opinion. [Couch, C. J.—We are not to direct the Advocate General in the exercise of his discretion.] This certificate is not in accordance with the provision of the Charter; and deals rather with facts, which may be disputed, than with questions of law. *Mellor’s Case* (a) shows what is meant under the English Statute (by which the Court for Crown Cases Reserved was established) by the words “any question of law shall have arisen at the trial;” and also *Stubbs’ Case* (b). In a writ of error facts may be stated; but there the Court of Queen’s Bench may decide that there has been a mis-trial, and that the case must be tried again. Under the Charter there is no power

(a) *Dear. & Bell*, 468. (b) 555, *Ibid.*

to award a new trial. This mode of procedure by certificate is inconvenient.

1866.  
December 6.

Reg.  
v.  
Dayál Jáiráj.

COUCH, C. J.—We are all of opinion that this is the proper form in which to consider the case.

*Howard* (with him *Farran*) for *Dayál Jáiráj*; and (with him *Ferguson*) for *Kallíanjí Ladhá*.—It would seem to have been intended by the Charter (Secs. 25 and 26) to give to this Court the powers of the Court of Queen's Bench and of the Court of Crown Cases Reserved: Steph. Crim. L., p. 224. Under the old law the jury was not allowed to separate. The rule, however, was subsequently relaxed, in cases of mere misdemeanor; but that practice was again disapproved of: Co. Litt. 227 b.; 3 Inst. 110.; Ld. Raymond 84; 1 Ventris 69; 2 Hale, P. C. 294; Hawkins, P. C., 622; *Lord Delamere's Case*, 11 St. Tr., per *Herbert*, Ld. C.J. I shall now show to what extent the relaxation was allowed in modern times. [COUCH, C. J.—Sec. 38 of the New Charter leaves the practice as it was in the Supreme Court; and that practice is well known to this Court. It was the same as the practice of the Courts in England, which is quite settled.] I shall contend that the punishment attached to the offence in this case, under Sec. 467 and Sec. 62 of the Penal Code, makes it a felony. [COUCH, C. J.—Before the Penal Code the offence would only have been a misdemeanor: you must show that it became a felony by the Code.] It is for the Crown to draw the distinction. I contend that the old law applies to every case which is not shown to be *not a felony*. 1 Russ. Cri. 45; Steph. Crim. L. 56.

*Pigot*, *Dunbar* and *Scoble* for *Khatáo Ladhá*.—The conviction in this case cannot be supported. *Hardy's Case* (c), *Kinnear's Case* (d), *Reg. v. Fowler* (e), *Caroline Winsor's Case* (f). The offence of which the prisoners were found guilty was a felony in everything but the name. It was neither a misdemeanor by enactment, nor by analogy. The prisoner

(c) 24 St. Tr. 417.

(d) 2 B. & Ald. 462.

(e) 4 B. & Ald. 273.

(f) Law Rep. 1 Q. B. 289, 309.

1866.  
December 6.  
Reg.  
v.  
Dayál Jáiráj.

here is not in the position of a person tried for a misdemeanor in the Supreme Court. The nature of the offence was altered by the punishment imposed by the Penal Code. The real question here is, was the case one in which the Judge had a right to exercise his discretion at all. Unless it can be shown that the offence was a misdemeanor, the Judge was wrong. Had the offence in this case been made a felony by the Statute of 9 Geo. IV. c. 74, it would certainly be considered to remain so. Sec. 62 of the Penal Code points out a class of cases analogous to felonies; and to which all the incidents of procedure in cases of felony should be applied. The Judge committed an error in law in holding that the case was one of misdemeanor, and in then exercising his discretion. The case was one of felony according to analogy.

December 7.

*McCulloch, Green and Hayllar* for the Crown.—No ground for avoiding the verdict has been shown, and no precedent for such a course. It is contended that the Judge was not right in allowing the jury to separate. That is not the question, but whether the Judge had a discretion by law. In the present case the offence was not made a felony by 9 Geo. IV., c. 74, s. 72; nor would the Court allow a criminal enactment to be strained by an equitable construction so as to make an offence a felony. What, then, was the effect of the Penal Code? It has not abolished the distinction between felony and misdemeanor; but it has not made any offence a felony. All offences under it are in the nature of misdemeanors. The essence of a felony is that it has as its consequence forfeiture; and the nature or the extent of the punishment is not the proper test: Russ. Cri.; Hawkins P. C. Every offence not originally a felony or made one by statute is at law a misdemeanor. All the decisions have been based on the technical distinction; not on considerations of the gravity of the offence or the severity of the punishment. There was no practice that in the High Court juries in such cases of forgery as the pre-

sent were not allowed to separate. The Judge is not bound by a principle of analogy. He can exercise his discretion until a practice has been established. The essence of discretion is freedom of opinion in the Judge; and the cases show that it cannot be reviewed. *Reg. v. Wolf (g)*. There was no rule except that of the Supreme Court, which obtained when the Penal Code was introduced, and before the High Court was established, and which was grounded on the distinction between felony and misdemeanor. [ARNOULD, J.—I may mention that Sir M. SAUSSE, C. J., and I agreed to observe that rule when the Penal Code came into force here; and the rule was, I believe, always followed in the Supreme Court. WESTROPP, J.—It has also been followed in the High Court.] If there is any rule on the subject, it is the old rule; if there be no rule, the Judge may exercise his discretion in all cases under the Penal Code, as he would have done formerly in cases of misdemeanor, and that discretion is not subject to review.

1866.  
December 7.  
Reg.  
v.  
Dayál Jáiráj.

*Howard* in reply.—That the jury should not be discharged unnecessarily is an admitted principle. The discretion of the Judge, if he had a right to exercise it, was certainly not wisely exercised. I contend that, with respect to procedure, all the offences in the Penal Code are to be treated as felonies; and that if the distinction has been abolished, the old strict rule should be applied. I object to have the exception extended into a rule. If the distinction into felonies and misdemeanors still obtains, upon what principle is the distinction into two classes to be based? The nature of the punishment is the only sound test. The Penal Code is founded on definitions, not on enumeration.

*Pigot* in reply.—The real point is, can the case be treated as if it were a misdemeanor in England? If so it would be difficult to get out of the rule of the Supreme Court. The rule in *Kinnear's Case* amounts to this: that the practice had grown up in cases of misdemeanors, and that it could not, therefore, be said to be against the law. But the question

(g) 31 Law J., Mag. Ca.

1866.  
December 7.  
Reg.  
v.  
Dayál Jáiráj.

here is, had the Judge any discretion to exercise? The technical distinction no longer existing, we should ascertain the principle and apply it to offences under the Penal Code. The Penal Code does not employ the words "felony" and "misdemeanor." But it distinctly divides crimes into two classes, analogous in respect of punishment to those called in England felonies and misdemeanors; and the principles laid down in *Kinnear's Case* should be applied here just as if the Penal Code had described these classes as they are known in England. The apparent anomalies in the punishments attached to felonies and misdemeanors in England may be explained by the tendency of modern legislation to the mitigation of punishments on the one hand, and by the increase of cases of importance on the other hand.

*Cur. adv. vult.*

December 20.

COUCH, C. J.—The trial in this case took place when the original Letters Patent constituting the High Court, dated the 26th of June 1862, were in force. By the 38th clause of those Letters Patent it was ordained that the proceedings in all criminal cases which should be brought before the High Court in the exercise of its ordinary original criminal jurisdiction, and also in all other criminal cases over which the Supreme Court then had jurisdiction, should be regulated by the procedure and practice then in use in the Supreme Court.

The Letters Patent of the 28th of December 1865, by virtue of which the High Court now exercises its jurisdiction, continue this by ordaining in Clause 38 that the proceedings in such criminal cases shall be regulated by the procedure and practice which was in use in the High Court immediately before their publication, subject to any law which had been or might be made in relation thereto by competent legislative authority for India.

Now the practice of the Supreme Court, upon the adjournment of a criminal trial, before the Indian Penal Code came

into operation, was the same as the practice of the courts in England. That practice was that the jury on a trial for treason or felony were kept together during the night under the charge of officers of the Court; but on a trial for misdemeanor it was in the discretion of the Judge whether they should be kept together, or should be allowed to return to their homes for the night, the latter being generally done: *Rea v. Kinneer* (h). From this case it appears that this had become the practice in the year 1819; and it has continued to be so to the present time.

1865.  
December 20.  
Reg.  
v.  
Dayál Játráj.

In the Indian Penal Code there is no such division of offences as that of felonies and misdemeanors, the word "offence" being used to denote anything made punishable by the Code, and the gravity of the offence being measured only by the punishment which may be awarded for it; but we have the authority of two of the members of this Court—one of whom was a Judge of the Supreme Court, and the other the leading counsel in the Court—for saying that the practice of the Supreme Court continued to be the same after the Indian Penal Code came into operation, and that the Judges applied the rule by determining whether the offence under trial would by the old law have been a felony or a misdemeanor. Except in the few cases where a new offence is created by the Penal Code—and these may well be left in the discretion of the Judge—there is no difficulty in doing this; and it is always in the power of the Judge, by the exercise of his discretion, to prevent any anomaly that might be caused by a rigid application of the rule.

The offence with which the accused were charged in this case was, under the law which was in force before the Indian Penal Code took effect, only a misdemeanor, as the instrument forged did not come within the description of any of the instruments in Sec. 72 of the 9 Geo. IV., c. 74, the forgery of which was a felony. It is true that by virtue of

(h) 2 B. & Ald. 462.

1866.  
 December 20.  
 Reg.  
 v.  
 Dayál Jáiráj.

Sec. 467 of the Penal Code, and the definition in Sec. 30 of the words "valuable security," the punishment for it is now the same as for the offence described in the 9 Geo. IV., c. 74, and that the Court has power to adjudge the forfeiture of the rents and profits of the moveable and immoveable estate of the convict during the period of his transportation or imprisonment; but that does not make the offence a felony: 1 Hawk. P. C., bk. 1, c. 7, s. 6.

It is still possible to apply the rule of practice of the Supreme Court, and we are bound by the Letters Patent to apply it. According to that practice, it was in the discretion of the Judge in such a case as the present, whether he should allow the jury to separate; and the exercise of his discretion is not a matter to be reviewed by this Court, under Sec. 26 of the Letters Patent, there being no error in any point of law. If any authority were necessary for this proposition it is to be found in the judgments of the Judges in the case of *Winsor v. The Queen* and the cases there referred to (i).

We, therefore, hold that no good cause has been shown in this case for our reversing the conviction.

(i) Law Rep. 1 Q. B. 289; affirmed by the Ex. Cham. in Error, *Ibid.*, 309.