CASES

DECIDED IN THE

HIGH COURT OF BOMBAY.

IN CRIMINAL JURISDICTION.]

1875.
February 10.

The Appeal of the Government of Bombay.

REG. v. RA'MA'JIRA'V JIVBA'JIRA'V and another.

The Indian Penal Code, Section 21, Clause 9, and Section 193—Public Servant—Officer—Izáphatdár—The Code of Criminal Procedure, Sections 455 and 456—Charge—Conviction of offence not charged—Re-trial.

The word "officer" in Section 21, Clause 9, of the Indian Penal Code means a person employed to exercise to some extent a delegated function of Government : he must be either himself armed with some authority or representative character, or his duties must be immediately auxiliary to those of some one who is so armed. Hence an *Izáphatdár*, *i. e.*, a lessee of a village who has undertaken to keep an account of its Forest revenues and pay a certain proportion to the Government, keeping the remainder for himself, is not an officer, and, therefore, not a public servant within the meaning of Section 21.

The making up falsely of accounts with the intention of producing them before a Forest officer not empowered by law to hold an investigation and take evidence is not a fabrication of false evidence within the meaning of Section 193 of the Indian Penal Code.

Where a person was charged by an Assistant Session Judge with (1) attempting to commit criminal breach of trust as a public servant ; (2) framing as a public servant an incorrect document to cause an injury; (3) framing as such public servant an incorrect document to save a person from punishment, and was acquitted on the ground that he was not a public servant, though the Judge found that he had framed the document with a fraudulent intent,

The High Court held that the Judge ought to have convicted him of attempting to cheat under Sections 455, 456 of the Code of Criminal Procedure ; and, as the facts which he would have had to meet on that charge were the same as he had to meet on the charge of criminal breach of trust, allowed the objection urged at the hearing, though not distinctly taken in their appeal by the Government, and ordered a re-trial of the accused.

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THE accused No. 1, Rámájiráv bin Jivbájiráv, was tried before George Ayerst, Assistant Session Judge of Tanna, under Sections 409, 511, 167, 218, and 193 of the Indian Penal Code, of having, as a public servant, attempted to commit criminal breach of trust; of having, in the same capacity, fraudulently framed an incorrect document to injure, and of having similarly framed such a document with intent to save a person from punishment. The second accused was tried of having abetted the first in the commission of these offences, and both were acquitted on all heads of charge.

The facts of the case are thus stated in the finding of the Assistant Session Judge:—

"Accused No. 1, Rámájiráv, is the Izáphatdár (lessee of forest revenues) of the village of Varsále. He passed an agreement, Exhibit G, to the Collector. It is alleged for the prosecution, and, for the purpose of the present argument, it may be assumed to be true, that the accused No. 2, Parshrám, is the agent of accused No. 1, Rámájiráv. That in accordance with Exhibit G the former, at the instance of the latter, prepared certain accounts which corresponded with the passes given to the cartmen who took away the wood from the Varsále jungles. That these accounts, Exhibit A, were shown to the Forest Inspector as correct. That another set of accounts, Exhibit D, was found in the house of accused No. 1, from which accounts and from other evidence it appears that the accounts, Exhibit A, were false and incorrect. That they were framed with a view to defraud Government, to whom accused No. 1, Rámájiráv, had agreed to pay five annas in the rupee of the total profits, barring one-third remitted for conservancy expenses."

Upon these facts Mr. Ayerst found that the accused Rámájiráv was not a public servant within the meaning of the Penal Code, and that the forest officer to whom he produced the accounts was not an officer empowered by law to collect forest dues, although he regretted to find that a very

considerable fraud had, in fact, been committed by the accused persons upon the Government. 1875.

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The appeal was heard by WEST and NA'NA'BHA'I HARIDA'S, JJ.

Dhirajlál Mathurádás, Government Prosecutor, for the Government:—The accused No. 1, Rámájiráv, is a lessee of the village of Varsále, which was formerly under attachment. On the attachment being removed an agreement was entered into between him and the Government, whereby, in consideration of receiving a third of the forest revenues, he undertook to pay five annas in the rupee on the remaining two-thirds, and agreed to supply the Government with full particulars of the timber he proposed to cut each year, to issue passes to the labourers employed in cutting it, and keep accounts of the entire forest revenues. It is thus clear that it was part of the first accused's duty to keep accounts, and he was remunerated by payment of a proportion of the revenues: in other words, he was paid by fees. The Government had employed him to perform this duty for them. He is, therefore, an officer within the meaning of Section 21 of the Indian Penal Code, and the Judge below was wrong in holding he was not. The Judge has admittedly disposed of this case on this technical point, for on the merits he distinctly holds that the first accused committed a very considerable fraud upon the Government, and that the second accused, his servant and manager, abetted him. Section 457 of the Code of Criminal Procedure provides that "when a person is charged with an offence and part of the charge is not proved, but the part which is proved amounts to a different offence, he may be convicted of the offence which he was proved to have committed, though he was not charged with it." When the Judge found that the accused Rámájiráv was not a public servant, he ought to have found him guilty of attempting to cheat. The accused ought also to have been found guilty of fabricating false evidence, as the false accounts were intended for production before the forest officer, a public servant.

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Branson and *Hon'ble Mandlik* for the acquitted accused.

Branson :—The accused No. 1 is a mere lessee. His rights and liabilities arose out of the contract with Government, not by virtue of any office or employment. A person whom the law considers as subject to an income tax is bound to account for his profits and income; but he cannot, therefore, be an officer. Section 21 distinguishes officers from persons who are public servants.

Mandlik :—The Government in their appeal to this Court do not urge that the Judge below committed an error in not finding the accused guilty of attempting to cheat; and the Government Prosecutor cannot take the objection now. In *Reg.* v. *Abdul Sáheb* (*a*) MORGAN, C.J., and HOLLOWAY, J., held that, although the Session Judge might have allowed convictions for some offences for which the accused were manifestly guilty to stand, they would not, in the exercise of their discretion, reverse the acquittal under Section 272. With regard to the argument that Rámájiráv should have been convicted under Section 193 of the Penal Code, the forest officer was not by any law empowered to collect dues.

February 3rd.—WEST, J. :—We are of opinion that the word "officer" in clause 9 of Section 21 of the Indian Penal Code is used in a definite sense. It is not superfluous (the words "whose duty it is as such officer" sufficiently show this), and is not merely equivalent to the word "person," which occurs in several clauses of the same section. We do not think that the fact of certain duties being enumerated as constituting one, who is an officer, a public servant, necessarily has the effect of making any one, on whom any of those duties devolves, an officer. Two things must combine to meet the requirements of the clause quoted above. In the first place, there must be an officer; and, in the second, he must be under an obligation to perform one of the duties there enumerated.

(*a*) 10 Mad. Jur. 55.

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We must, therefore, see who is an officer. It is clear that it is not every one who has to do with Government in pecuniary matters, or who has to render accounts, or to submit documents, who is a Government officer. Seeking the help of English law, we find, in Bacon's Abridgment at Vol. 6, page 2, the article headed "Of the nature of an officer, and the several kinds of officers," commencing thus: "It is said that the word 'officium' principally implies a duty, and, in the next place, the charge of such duty; and that it is a rule that where one man hath to do with another's affairs against his will, and without his leave, that this is an office, and he who is in it is an officer." And the next paragraph goes on to say: "There is a difference between an office and an employment, every office being an employment; but there are employments which do not come under the denomination of offices; such as an agreement to make hay, herd a flock, &c.; which differ widely from that of steward of a manor," &c. The first of these paragraphs implies that an officer is one to whom is delegated, by the supreme authority, some portion of its regulating and coercitive powers, or who is appointed to represent the State in its relations to individual subjects. This is the central idea; and applying it to the clause which we have to construe, we think that the word "officer" there means some person employed to exercise, to some extent, and in certain circumstances, a delegated function of Government. He is either himself armed with some authority or representative character, or his duties are immediately auxiliary to those of some one who is so armed. *Deshmukhs* and *Deshpándes* would thus be sufficiently within the meaning of the clause, they being appointed to perform for the State a portion of its functions, or to aid those who are its active representatives, but not an *Izáphatdár* or lessee such as the accused. In consequence of some dispute pending between him and the Government, the possession of a village is withdrawn from him, but it is restored to him on his undertaking to keep accounts of the forest revenues and pay five-sixteenths of the proceeds to the Government after making, in the first place, a certain deduc-

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tion, namely, of one-third of the receipts, for himself. He is, we think, not an officer, but a mere contractor bound by his engagement, but not, by the terms of an office or employment, to pay a certain proportion to Government. There is no delegation to him of any authority for coercion or interference, nor is he an assistant appointed to help any one who is vested with such authority. He appears to have had the rights only of a private proprietor, and to have exercised them entirely at his own discretion. It depended entirely on him to allow any person at all to cut timber within the limits of his village. He could make his own terms. He was bound by his agreement to give passes to all who cut timber in order to prevent fraud on the Government, but the penalty for omitting to give these passes was that the timber taken without them was to be treated as Government property, and thus be subject to a second payment. A collateral undertaking of this kind did not make him an officer, nor did his undertaking to keep accounts. These were contractual duties, fraudulent deception in discharging which might subject him to punishment for cheating, but not duties attached to any office conferred on him or his predecessor in title, failure to perform which with integrity could make him liable, as an officer, to the special penalties prescribed for delinquent public servants.

February 10.—The fabrication of accounts in this case, if they were fabricated, was not a fabrication of false evidence within the meaning of Section 193 of the Indian Penal Code. To fabricate false evidence is to do something which satisfies the definition in Section 192, and to this it is essential that there should be an intent that the false entry or statement should be used "in a proceeding taken by law before a public servant as such." It does not appear that the forest officer, much less that his subordinate, was empowered by law to hold an investigation and take evidence in any matter at all. His functions seem to be purely ministerial, and no proceedings, by way of investigation, being provided for and regulated by law, the statement laid before him,

though false, would not be false evidence fabricated so as to expose the fabricator to the penalties of Section 193.

The point last taken is that the Assistant Judge ought to have convicted the accused severally of attempt at cheating and abetment of that offence. This point was probably not present to the mind of the Government Prosecutor when he drew up the appeal, although in a vague way it is covered by his fourth ground of objection, and we should not have allowed it to be argued, had we thought that the accused would thus be unfairly prejudiced. But we do not think that they are unfairly prejudiced, and further time has not been asked for by their advocate on the ground of surprise. We, therefore, proceed to consider the objection on its merits.

Section 456 of the Code of Criminal Procedure, taken with Section 455 of the same Act, would, we think, have enabled the Assistant Session Judge to convict the accused in this case of attempting to cheat and abetting that offence, though they were not directly charged with these crimes. The legal character of the acts done by them might well be considered ambiguous, and the evidence given would apply to the one offence as well as to the other. In being called on to rebut the charge of attempt to commit criminal breach of trust and of abetment, the accused had to meet the same facts as if they had been charged with attempt to cheat; it was only the legal aspect of them that would be varied in the two cases. This being so, and the Assistant Session Judge having held that the accused had in fact falsified accounts in order to defraud the Government, we think he ought, holding the view he did, to have convicted the accused under the provisions of Section 456, though it would have been still better had he acted on the suggestion of the committing Magistrate and prepared charges of attempt at cheating and abetment of that offence. It would be, we think, a wrong exercise of our discretion, if we did not, in such a case, order a re-trial of the accused, and we, accordingly, direct that they be re-tried.

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This re-trial is to be held by a different Court, but, as held, for the purpose of Section 473, in the case of *Reg.* v. *Gulábdás Kuberdás* (*b*), a different court is, we think, constituted by the Session Judge from that of the Assistant Session Judge. His mind is as likely to be free from prejudice as that of any other judicial officer; and looking to the definition of Criminal Court in Section 4, the requirement of the law will thus be satisfied at the least cost of public and private inconvenience.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION.]

January 19.

Suit No. 138 *of* 1871.

MIRZA' ALI AKBAR, Khán Bahádur ..... *Appellant.*

ABDUL LATIFF SHUSTRI and others ..... *Respondents.*

Practice—Petition for leave to appeal to the Privy Council, and a certificate under Act VI. of 1874 *Sections* 5, 7, *and* 9.

IN reply to a question to the Court (WESTROPP, C.J., and WEST, J.,) on the point of practice, by *Scoble*, A. G., who represented one of the respondents:

WESTROPP, C.J., said:—We think that the petition itself should distinctly state what the substantial question of law is that it is proposed to submit to the Privy Council, and that, at this side of the Court, all petitions for leave to appeal to the Privy Council should be signed by counsel, and that, at the other side of the Court, such petitions should be signed by counsel, or a pleader.

(*b*) 11 Bom. H. C. Rep. 98.