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Chotalal died, leaving him surviving his two widows, named Bai Shangar *alias* Gheheli and Bai Moti, but no issue. Chanchal married one Chimanlal, to whom she bore a son Mafatlal, who apparently was born at the time of his uncle Chotalal's death. On the death of Chotalal, disputes arose between his mother Bai Harkor and his two widows. Ultimately the disputes were referred to arbitrators, who made an award declaring the minor Mafatlal to be the heir to the estate of his deceased uncle Chotalal. A decree was passed in the Subordinate Judge's Court embodying the result of the arbitration, and in that decree Chotalal's widows Bai Shangar and Bai Moti were declared to be the guardians of the minor Mafatlal. Thereupon, Chotalal's mother Bai Harkor presented an application to the District Judge for the removal of Bai Shangar and Bai Moti from the guardianship, and a question having arisen as to whether s. 39 of the Guardians and Wards Act (VIII of 1890), which authorizes the District Court to remove a guardian appointed or declared by the Court or a guardian appointed by a will or other *instrument*, was applicable to the case of a guardian appointed under a decree, and the Judge not being satisfied that the word *instrument* in s. 39 of the Act could be held to include "a decree," he made the reference in the following terms:—

"As there is considerable doubt in my mind on the matter, and as no appeal appears to lie against my order refusing to remove [377] the guardians, I beg to submit the following question * *. Does the word "instrument" in s. 39 of Act VIII of 1890 include the decree of a Subordinate Judge sitting as a Civil Court of original jurisdiction ?"

The opinion of the Judge was in the negative.

There was no appearance for the parties.

OPINION.

SARGENT, C.J.—We think that the anguage of the section requires that the word "instrument" should be confined to instruments *ejusdem generis* with a will, and that the decree, by which the first appointment of the guardians in this case must be regarded as having been made, is, therefore, not an instrument within the contemplation of the section.

Order accordingly.

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CRIMINAL REFERENCE—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Telang, Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* MUGAPA BIN NINGAPA.* [3rd July, 1893.]

Criminal procedure—Charge—Alternative charge—Contradictory statements—Statement made to a police officer during a police investigation—Contradictory statement made before a Magistrate holding a preliminary inquiry—Giving false evidence—Indian Penal Code (Act XLV of 1860), s. 193—Separate charges.

Where a person has made two contradictory statements, one to a police officer making an investigation under Chap. XIV of the Code of Criminal Procedure (Act X of 1882), and the other to a Magistrate holding a preliminary inquiry, he cannot be charged, and still less convicted, on an alternative charge.

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* Criminal Reference, No. 61 of 1893.

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In such a case, if there is no other evidence at the trial but the contradictory statements made by the accused, separate charges cannot be framed.

[R., 26 M. 55 (59)=1 Weir 169; 2 Weir 300; D., 6 Bom. L.R. 379 (392)=28 B. 533.]

THIS was a reference to a Full Bench.

The facts of this case, so far as they are material for the purposes of this report, are as follow:—

One Fakirapa was murdered on the 21st December, 1892.

During the course of the police investigation of the case the accused was examined by the chief constable under the provisions [378] of s. 161 of the Code of Criminal Procedure (X of 1882). On this occasion he stated that he had gone to the field where Fakirapa was lying, and questioned him as to who had assailed him, and that he named Kyundgu Mudkir, Yella Hubali, Yella Ahetti, Kon Bassaya, Tarrihal Bassaya and some other persons.

Tarrihal Bassaya was, thereupon, charged with murder. At the preliminary inquiry held by Mr. Bonus, a First Class Magistrate of Dharwar, the accused was examined as a witness. On that occasion he stated that he was told by the deceased Fakirapa that he had been beaten by Kadpatta Kalla and Kon Bassaya and that the deceased did not mention the names of Kyundgu Mudkir, Yella Hubali, Yella Ahetti and Tarrihal Bassaya.

Accused was, thereupon, prosecuted for intentionally giving false evidence in a judicial proceeding under s. 193 of the Indian Penal Code (XLV of 1860).

The First Class Magistrate convicted him of this offence, and sentenced him to one month's rigorous imprisonment.

The District Magistrate, in revising the proceedings of the case, was of opinion that the sentence passed on the accused was wholly inadequate, considering the serious nature of the offence. He was also of opinion that as the accused had made contradictory statements, one to the police and the other to the Magistrate, he ought to have been charged in respect of both and convicted in the alternative. He had been convicted of giving false evidence, although no evidence was taken or recorded to show that his statement to the police was false. On these grounds the District Magistrate referred the case to the High Court under s. 438 of the Code of Criminal Procedure (Act X of 1882), recommending that the conviction and sentence should be quashed and a retrial ordered.

The case was heard by a Division Bench (Candy and Fulton, JJ.), who made the following reference to a Full Bench:—

"We agree with the District Magistrate that the evidence does not prove that the accused gave false evidence before the police, but that it establishes, *prima facie*, either that he gave false evidence in a stage of a judicial proceeding before Mr. Bonus, or [379] that he gave false evidence (punishable under the latter part of s. 193, Indian Penal Code) before the chief constable when holding an inquiry under Chap. XIV of the Criminal Procedure Code.

"Before, however, remanding the case for retrial we have to decide whether on the above facts a charge or charges can be framed which may lead to a conviction. If we accept the judgment in *Imperatrix* v. *Annya* (1), apparently this question must be answered in the negative; but as the remarks in this judgment are in the nature of *obiter dicta*, and appear

(1) Criminal Ruling No. 40 of 1890.

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inconsistent with the decision in *Imperatrix* v. *Kabhai Ujam* (1) and with the tendency of the decision in *Imperatrix* v. *Kalidas Samal* (2), we are unable to accept it as a conclusive authority.

"Under the circumstances we think it desirable to refer to a Full Bench the question, whether an accused person can be convicted, in the alternative, of intentionally giving false evidence in a stage of a judicial proceeding before a Magistrate, or of intentionally giving false evidence before a police officer making an investigation under chap. XIV of the Code of Criminal Procedure (see *Reg.* v. *Mahammad* (3); *Queen-Empress* v. *Ramji* (4); *Queen-Empress* v. *Ismal* (5); *Queen-Empress* v. *Bharma* (6); *Imperatrix* v. *Kabhai Ujam* (1), *Imperatrix* v. *Kalidas Samal* (2); *Imperatrix* v. *Annya* (7) and if so, in what form the charge or charges should be framed, when the only available evidence is the fact that two contradictory statements have been made.

"Apparently in *Queen-Empress* v. *Ramji* (4) the possibility of charging in the manner adopted in the later case of *Kabhai Ujam* (1) was not considered."

This reference was heard by a Full Bench (Sargent, C. J., and Telang, Candy and Fulton, JJ.).

There was no appearance for the Crown or for the accused.

JUDGMENT.

PER CURIAM.—He cannot be charged and, therefore, still less convicted on an alternative charge, having regard to the ruling **[380]** in *Imperatrix* v. *Kabhai Ujam* (1) which, we think, should not be re-opened.

As to the propriety of framing separate charges where there is no other evidence before the Magistrate, but the contradictory statements made by the accused, the decision in *Imperatrix* v. *Kabhai Ujam* (1) and the opinion in *Imperatrix* v. *Annya* (7) are, we think, necessarily conflicting. After a careful consideration of the question we are of opinion that we ought to adopt the reasoning of the Court in the latter case, and must, therefore, hold that separate charges under the above circumstances cannot be framed.

The question, therefore, must be answered in the negative.

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18 B. 380 (F.B.).

CRIMINAL REFERENCE—FULL BENCH.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Telang, Mr. Justice Candy and Mr. Justice Fulton.

QUEEN-EMPRESS *v.* RAIJI DAJI.* [3rd July, 1893.]

Criminal Procedure Code (Act X of 1882), s. 487—Magistrate competent to try an accused person for disobedience of a summons issued by him as Mamlatdar.

A Magistrate is not debarred by s. 487 of the Code of Criminal Procedure (Act X of 1882) from trying an accused person under s. 174 of the Indian Penal Code (XLV of 1860) for disobedience of a summons issued by him in his capacity of Mamlatdar.

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* Criminal Reference, No. 34 of 1893.

(1) Criminal Ruling No. 26 of 1887.
(2) Criminal Ruling No. 57 of 1889.
(3) 13 B.L.R. 324.
(4) 10 B. 124.
(5) 11 B. 659.
(6) 11 B. 702.
(7) Criminal Ruling No. 40 of 1890.