Privy Council Appeal No. 1 of 1924.

Barendra Kumar Ghosh - - - - - - - *Appellant*

v.

The King-Emperor - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 23RD OCTOBER, 1924.

Present at the Hearing:

LORD ATKINSON.
LORD SUMNER.
SIR JOHN EDGE.

[*Delivered by* LORD SUMNER.]

This was an appeal from the High Court of Calcutta brought in a criminal matter under Art. 41 of the Letters Patent. The Trial Judge reserved no question of law and the case came to the High Court on the certificate of the Advocate-General of Bengal under Art. 26. Objection was taken at their Lordships' bar to the competence of this appeal on the ground that Art. 41 does not give an appeal to their Lordships from the determination of the High Court, unless the case came before that Court at the instance of the Trial Judge. Thereupon the appellant applied in the alternative for special leave to appeal. The materials being the same in both proceedings though the questions arising are not identical, their Lordships were able to decide the appeal and the application together and, in view of the gravity and urgency of the case, they dispensed with a formal petition for special leave to appeal. After hearing the arguments, they announced last July the substance of the advice, which they would humbly tender to His Majesty, namely, that the appeal should be dismissed. At the same

their Lordships intimated that they were unable to advise that the application for special leave to appeal should be granted. Their reasons are as follows.

On August 3rd, 1923, the Sub-Postmaster at Sankaritolla Post Office was counting money at his table in the back room, when several men appeared at the door which leads into the room from a courtyard, and, when just inside the door, called on him to give up the money. Almost immediately afterwards they fired pistols at him. He was hit in two places, in one hand and near the armpit, and died almost at once. Without taking any money the assailants fled, separating as they ran. One man, though he fired his pistol several times, was pursued by a post office assistant and others with commendable tenacity and courage, and eventually was secured just after he had thrown it away. This man was the appellant ; the others escaped. The pistol was at once picked up and was produced at the trial.

There was evidence for the prosecution, such as the jury was entitled to act upon, that three men fired at the postmaster, of whom the appellant was one ; that he wore distinctive clothes by which he could be and was identified ; and that, while these men were just inside the room, another was visible from the room through the door standing close to the others but just outside on the doorstep in the courtyard. This man was armed but did not fire.

Except for a doubt as to the total number of the men concerned in the attack, most of the witnesses concurring in the above statement while ultimately the prisoner said they were only three in number, the evidence of the eye-witnesses was consistent and uniform. The pistol thrown away by the prisoner was a German automatic self-ejecting pistol. An ejected shell was found just inside the room near the door, and it fitted this pistol. The bullet which killed the postmaster was cut out of his back and was produced, and it also fitted the ejected shell and the pistol carried by the prisoner. This bullet was distinctively of German make. It was not however conclusively proved that no other assailant had a similar pistol to that which the prisoner had or used a similar bullet to that found in the deceased.

The appellant was defended by five counsel. A few of the witnesses were cross-examined by them but very sparingly, and only to test their adherence to their evidence given in chief. Most of them were not cross-examined at all. No affirmative defence was indicated in any part of this cross-examination and no witnesses were called on the part of the prisoner, but after the case for the prosecution was closed the prisoner made an oral statement, which of course was not on oath and was not cross-examined to. Here for the first time some foundation was laid, though vaguely, for what eventually became the case raised on this appeal.

According to the prisoner, he was the man outside the room. He said that he stood in the courtyard and was very much frightened.

The prosecution had left his purpose to be inferred from his position and his action. Whether he was present as one of the firing party or as its commander or as its reserve or its sentinel was of no special importance on the case made for the Crown. What was singular was the prisoner's own reticence on these matters. He dealt with none of them. Why he was there at all and why he did not take himself off again he did not say, nor did he even indicate his precise position in the yard. Accordingly the evidence called by the prosecution, that the man outside was close to the men inside and, being visible by those within, would also see what went on within, was never challenged at all. The appellant's account was: "I took my stand on the portico"—this ran round two sides of the courtyard and according to the plan is consistent with a position on the steps of the doorway—

> "After a minute I heard two sounds, *dum dum*: when I heard the sounds I was confused. I perspired heavily and could not remember anything. Afterwards I heard *chor chor*: not finding the others there, I ran away."

Finally he said (and it was to this that the only affirmative part of his counsel's cross-examination was directed)—

> "I have never assaulted anyone in my life. This is my first offence. I throw myself on the mercy of the Court. I was married hardly three months ago."

The charges preferred were murder under section 302 of the Indian Penal Code, and voluntarily causing hurt under section 394, while jointly concerned in an attempted robbery. To the first charge he pleaded not guilty. To the second he pleaded guilty of robbery. Their Lordships do not pause to remark on the inconsistency of this latter plea with the argument subsequently advanced in the High Court. There were further charges of attempted murder and attempt to commit culpable homicide, which were abandoned by the prosecution at the outset.

The learned trial judge, Page J., directed the jury carefully, upon the footing, that the prisoner was one of the men inside the room, that he was one of those who fired, and might be the man who fired the fatal shot, and that in any event, if they were satisfied in terms of section 34 of the Code, that the postmaster was killed in furtherance of the common intent of all, then the prisoner was guilty of murder, whether he fired the fatal shot or no. He did not deal with the prisoner's statement until the prosecuting counsel reminded him of it, when he told the jury that its weight was for them, but it formed part of the evidence which they had to consider. He gave no express direction on the subject either of attempted murder or of abetting murder. It appears to their Lordships that, as the whole summing up was rested, in sentences more than once repeated, upon the prisoner being one of those inside the room and on his firing at the postmaster, the direction to the jury to take his statement into account might well be understood as impliedly instructing them to acquit, if they believed his whole statement as to his action and his connection with the murder to

be true, since in that case the conditions would not be fulfilled on which throughout the summing-up it was stated that the guilt of the accused must rest. This view, however, was not put forward in the Court below, and their Lordships are quite satisfied to deal with the matter as it was presented to the High Court upon the question of misdirection.

The note of the defence submitted, which was taken by the trial judge is as follows: "No evidence of murder, because no evidence that prisoner killed him." This he overruled, saying quite rightly "there is evidence that accused fired the fatal shot." If the defence subsequently raised before the High Court had been put before him intelligibly, it should have been a submission that the jury ought to acquit if they thought that the accused either fired and missed or did not fire at all, and that they must not find that he fired the fatal shot without weighing the fact that the prosecution had not actually proved that neither of the other men fired from a German automatic pistol like the prisoner's, though there was evidence making it improbable that they were armed as he was. As to the subsequent defence resting on abetment, it does not appear to have been thought of at all. It would be a circumstance proper to be considered on the application for special leave, that, neither in cross-examination nor in argument before the verdict was found, was any point about abetment taken, nor was even any point as to an attempt clearly urged. It was not too late to have amended the charge and to have given further directions to the jury (Criminal Procedure Code, Section 227) and points not properly raised at the trial are not points which, in ordinary circumstances, deserve much consideration as grounds for special leave. In the present case, however, their Lordships think it unnecessary to dwell further on this matter.

In the period of over sixty years which have elapsed since the Indian Penal Code came into force, a very large number of cases have of course been reported, in which joint commission of crime, attempts to commit crime, and abetments of crime, in many and very various forms, have been the subject of judicial rulings. With insignificant exceptions the Code has been interpreted in all the Indian Courts down to a few years ago in conformity with the English law existing in 1860.

The learned judges in the High Court examined the authorities so fully and exhaustively that it would serve no good purpose if their Lordships were to discuss them again *seriatim*. The chief authority for the appellant is a decision of Stephen, J., in 1914, in *Emperor* v. *Nirmal Kanta Roy* (41 Calc. 1072), a case in which two men, obviously acting in concert, having both fired at a policeman, one hitting and killing him and the other failing to hit him at all, that learned judge directed the acquittal of the latter, who was charged under Sections 302/34 with murder. He held that, applying Section 34 to the case, the criminal act was the killing of the policeman: that only one man killed him, not both: that all the prisoner did was to try to kill him, and that the criminal

act charged was not done by several persons at all, that is to say *was not under the circumstances a joint act*, and he added "the only act he can be liable for under the section is one done by several persons, of whom he was one, that is by the man who escaped and himself . . . In order to make the accused liable for murder under Section 34 it would be necessary to say that an offence and an attempt to commit it are the same 'act,' which seems to me not to be the case." This view of the meaning of Section 34 was adopted in *Emperor* v. *Profulla Kumar Mazumdar* (50 Calc. 41), the High Court observing that "Section 34 does not create an offence—the provisions thereof merely lay down a rule of law." Reference may also be made to 40 All. 103 and 1919 Punjab Record Criminal Rulings, Nos. 21 and 24.

Before 1914 there seems to have been no case in Bengal in which the view of Section 34 formulated by Stephen, J., in *Nirmal's* case was adopted by any judge, while the cases to the contrary are numerous. It is evident that till then the view now contended for had a very small place in the voluminous body of criminal decisions, and it has since been as often criticised as followed, and more often than not has been disregarded altogether. This is so in all the courts in India. The doing to death of one person at the hands of several by blows or stabs, under circumstances in which it can never be known which blow or blade actually extinguished life, if indeed one only produced that result, is common in criminal experience and the impossibility of doing justice, if the crime in such cases is the crime of attempted murder only, has been generally felt. It is not often that a case is found where several shots can be proved and yet there is only one wound, but even in such circumstances it is obvious that the rule ought to be the same as in the wider class, unless the words of the Code clearly negative it. Of course questions arise in such cases as to the extent to which the common intention and the common contemplation of the gravest consequences may have gone, and participation in a joint crime, as distinguished from mere presence at the scene of its commission, is often a matter not easy to decide in complex states of fact, but the rule is one that has never left the Indian Courts in much doubt. As illustrations of the course of decision, reference may be made to the cases of *Jan Mahomed* (1 W.R. Cr. R. 49), *Mahabir* 21 All. 263. *Keshwar Lal Shaha* (29 Calc. 496), *Gouridas Namasudra* (36 Calc. 659). *Kanhai* (35 All. 329), and *Manindra Chandra Ghose* (41 Calc. 154).

The appellant's argument is, in brief, that in Section 34 "a criminal act," in so far as murder is concerned, means an act which takes life criminally within Section 302, because the section concludes by saying "is liable for that act in the same manner as if the act were done by himself alone," and there is no act done by himself alone, which could make a man liable to be punished as a murderer, except an act done by himself and fatal to his victim. Thus the effect is that, where each of several persons does something criminal, all acting in furtherance of a common intention,

each is punishable for what he has done, as if he had done it by himself. Such a proposition was not worth enacting, for, if a man has done something criminal in itself, he must be punishable for it, and none the less so that others were doing other criminal acts of their own at the same time and in furtherance of an intention common to all. It follows from the appellant's argument that the section only applies to cases where several persons (acting in furtherance of a common intention) do some fatal act, which one could do by himself. Criminal action, which takes the form of acts by several persons, in their united effect producing one result, must then be caught under some other section and, except in the case of unlawful assembly, is caught under attempts or abetment. By way of illustration it may be noted that, in effect, this means, that, if three assailants simultaneously fire at their victim and lodge three bullets in his brain, all may be murderers, but, if one bullet only grazes his ear, one of them is not a murderer and, each being entitled to the benefit of the doubt, all must be acquitted of murder, unless the evidence inclines in favour of the marksmanship of two or of one.

This argument evidently fixes attention exclusively upon the accused person's own act. Intention to kill and resulting death accordingly are not enough : there must be proved an act, which kills, done by several persons and corresponding to, if not identical with, the same fatal act done by one. The answer is that, if this construction is adopted, it defeats itself, for several persons cannot do the same act as one of them does. They may do acts identically similar, but the act of each is his own, and because it is his own and is relative to himself, it is not the act of another or the same as that other's act. The result is that Section 34, construed thus, has no content and is useless. Before the High Court the appellant's Counsel put an illustration of their own, which may be taken now, because, the whole range of feasible illustrations being extraordinarily small, this one is equally exact in theory and paradoxical in practice. Suppose two men tie a rope round the neck of a third and pull opposite ends of the rope till he is strangled. This they said really is an instance of a case under Section 34. Really it is not. Obviously each is pulling his own end of the rope, with his own strength, standing in the position that he chooses to take up, and exerting himself in the way that is natural to him, in a word in a way that is his. Let it be that in effect each pulls as hard as the other and at the same time and that both equally contribute to the result. Still the act, for which either would be liable, if done by himself alone, is precisely not the act done by the other person. There are two acts, for which both actors ought to suffer death, separately done by two persons but identically similar. Let us add the element, that neither act without the other would have been fatal ; so that the fatal effect was the cumulative result of the acts of both. Even this does not make either person do what the other person does : it merely makes the act, for which he would be liable if done by himself alone, an attempt to murder and not an act of murder, and accordingly

the case is not an illustration of Section 34. To this the reply was made before the High Court, that, in a case where death results from the cumulative effect of different acts, each actor must be deemed guilty of murder, though whether because it cannot be shown that it was not his act alone which took the victim's life, or because the absurdity of the argument had to be disclaimed somehow, it is not easy to determine. Yet absurd it is, and absurd it must remain. "Where two men have done a man to death," said the learned counsel (Record 127), "your Lordships will not inquire into the individual effect of each blow: but the point I am insisting on is that the doing to death must have been the joint acts of both." This concession, rational enough in itself, is another way of saying that the section really means "when a joint criminal act has been done by the acts of two persons in furtherance of a common intention each is liable for that joint criminal act, as if he had done it all by himself." On the other hand, if it is read as the appellant reads it, then, returning to the illustration of the rope, if both men are charged together but each is to be made liable for his act only and as if he had done it by himself, each can say that the prosecution has not discharged the onus, for no more is proved against him than an attempt, which might not have succeeded in the absence of the other party charged. Thus both will be acquitted of murder, and will only be convicted of an attempt, although the victim is and remains a murdered man. If, on the other hand, each were tried separately by different juries, either jury or both, taking the view that the violence used by the man before them killed the man, whom they knew to be dead, might return unimpeachable verdicts of murder, and then both men would be justly hanged.

As soon, however, as the other sections of this part of the Code are looked at, it becomes plain that the words of Section 34 are not to be eviscerated by reading them in this exceedingly limited sense. By Section 33 a criminal act in Section 34 includes a series of acts and, further, "act" includes omission to act, for example, an omission to interfere in order to prevent a murder being done before one's very eyes. By Section 37, when any offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence. Even if the appellant did nothing as he stood outside the door, it is to be remembered that in crimes as in other things "they also serve who only stand and wait." By Section 38, when several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act. Read together, these sections are reasonably plain. Section 34 deals with the doing of separate acts, similar or diverse, by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act"

in the first part, because they refer to it. Section 37 provides that, when several acts are done so as to result together in the commission of an offence, the doing of any one of them, with an intention to co-operate in the offence (which may not be the same as an intention common to all), makes the actor liable to be punished for the commission of the offence. Section 38 provides for different punishments for different offences as an alternative to one punishment for one offence, whether the persons engaged or concerned in the commission of a criminal act are set in motion by the one intention or by the other.

The other part of the appellant's argument rests on Sections 114 and 149, and it is said that, if Section 34 bears the meaning adopted by the High Court, these sections are otiose. Section 149, however, is certainly not otiose, for in any caes it creates a specific offence and deals with the punishment of that offence alone. It postulates an assembly of five or more persons having a common object, viz., one of those named in Section 141 (*R.* v. *Sabed Ali*, 11 Beng. L.R. at p. 359), and then the doing of acts by members of it in prosecution of that object. There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of Section 34, is replaced in Section 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap, but Section 149 cannot at any rate relegate Section 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all.

As to Section 114, it is a provision which is only brought into operation when circumstances amounting to abetment of a particular crime have first been proved, and then the presence of the accused at the commission of that crime is proved in addition; (*Abhi Misser* v. *Lachmi Narain* 27 Calc. 566). Abetment does not in itself involve the actual commission of the crime abetted. It is a crime apart. Section 114 deals with the case, where there has been the crime of abetment, but where also there has been actual commission of the crime abetted and the abettor has been present thereat, and the way in which it deals with such a case is this. Instead of the crime being still abetment with circumstances of aggravation, the crime becomes the very crime abetted. The section is evidentiary not punitory. Because participation *de facto* (as this case shows) may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence plus prior abetment can mean nothing else but participation. The presumption raised by Section 114 brings the case within the ambit of Section 34.

The prosecution gave no evidence of any prior connection

of the accused with the crime, but began the case at the time when the assailants appeared at the post office. The discovery of sundry pistols and daggers among the appellant's effects, some hours after the crime, was proved but not that they were those used in the commission of the murder. There was nothing in the prosecution's case to show that he had instigated or aided the commission of the crime before the actual commission began. The evidence on this matter was wholly supplied by the prisoner himself. His statement was that earlier in the day, when he was reclining on his couch after a meal, "one, whom he knew to be a God-fearing man and a man of learning," came and took him to a house, where he found two young men. Here he was solicited to go with them in order to commit a dacoity, and when he reluctantly consented and was shown how to use the pistol with which, like the others, he was then supplied, he stipulated that he was not to be a party to any dacoity or murder and was told there was to be no murder and he was to be there merely for show. It is plain from his statement that these persons had some hold over him, for when, by way of excusing himself, he had said, "My brother is in Government service and draws large pay. The money I earn is enough for me," he states that the other man "looked at me for a time. I could not speak"; and when he had been told that he was to be there only for show, he adds, "I was not in a position to speak. I went with them." Thus his statement goes at most to abetting a dacoity, the crime to the actual commission of which he pleaded guilty, but, as he had stipulated with success that there was to be no murder, it is not itself a statement showing an abetment of murder. Strictly, therefore, there was no evidence of any such abetment as has to be proved before Section 114 comes into operation. As to the appellant's presence at the post office, it has been already pointed out that he gave no explanation of it at all, but his story was much more consistent with participation in the actual commission of the crime than with mere bodily presence after previous abetment. Indeed, he says that, when he ran away, the others had already disappeared; thus it would seem that he covered their retreat. At any rate, his statement supports presence by way of actual participation in the criminal act or series of acts by which the postmaster was killed rather than such conduct as adds to previous abetment bodily presence at the commission of the crime abetted and nothing more, and Section 114 was never really made applicable for want of proof of abetment of the very crime, at the commission of which the appellant was actually present.

For these reasons their Lordships think that only the most unsubstantial foundation was laid for any discussion of Section 114 at all, but, as it was fully considered by the High Court, they state their own concurrence in the conclusion of the learned Judges below. Even if it be the case that the accused could have been convicted as an abettor, present at the commission of the offence, this is not to say that, if to presence there is added proof of participa-

tion, he could not also be convicted under Sections 34 and 302. Participation must depend on the facts, but it is not negatived merely because actual presence and prior abetment are proved.

Their Lordships do not think it useful to go at length into the history of the preparation and enactment of the provisions of the Indian Penal Code, which played no inconsiderable part in the discussion of this subject in India. That the criminal law of India is prescribed by and, so far as it goes, is contained in the Indian Penal Code; that accordingly (as the Code itself shows) the criminal law of India and that of England differ in sundry respects; and that the Code has first of all to be construed in accordance with its natural meaning and irrespective of any assumed intention on the part of its framers to leave unaltered the law as it existed before, are, though commonplaces, considerations which it is important never to forget. It is, however, equally true that the Code must not be assumed to have sought to introduce differences from the prior law. It continues to employ some of the older technical terms without even defining them, as in the case of abetment. It abandons others, such as principal in the first or the second degree, but it must not be supposed that, because it ceases to use the terms, it does not intend to provide for the ideas which those terms, however imperfectly, expressed. One object which those who framed the Code had in view, was to simplify the law; and to get rid of the terms "principal in the first degree" and "principal in the second degree" and others was no doubt a step in that direction, but to introduce a general section, Section 34, which has little, if any, content, and to attach a wholly new importance to abetments and attempts, was to complicate not to simplify the administration of the law, for participation and joint action in the actual commission of crime are, in substance, matters which stand in antithesis to abetments or attempts. If Section 34 was deliberately reduced to the mere simultaneous doing in concert of identical criminal acts, for which separate convictions for the same offence could have been obtained, no small part of the cases which are brought by their circumstances within participation and joint commission would be omitted from the Code altogether. If the appellant's argument were to be adopted, the Code, during its early years, before the words "in furtherance of the common intention of all" were added to Section 34, really enacted that each person is liable criminally for what he does himself, as if he had done it by himself, even though others did something at the same time as he did. This actually negatives participation altogether and the amendment was needless, for the original words expressed all that the appellant contends that the amended section expresses. One joint transaction by several is merely resolved into separate several actions, and the actor in each answers for himself, no less and no more than if the other actors had not been there. This got rid of questions about principals in the first or the second degree by ignoring them, and

the object of the framers of the Code was attained. In truth, however, the amending words introduced, as an essential part of the section, the element of a common intention prescribing the condition, under which each might be criminally liable when there are several actors. Instead of enacting in effect that participation as such might be ignored, which is what the argument amounts to, the amended section said that, if there was action in furtherance of a common intention, the individual came under a special liability thereby, a change altogether repugnant to the suggested view of the original section. Really the amendment is an amendment, in any true sense of the word, only if the original object was to punish participants by making one man answerable for what another does, provided what is done is done in furtherance of a common intention, and if the amendment then defines more precisely the conditions under which this vicarious or collective liability arises. In other words, " a criminal act " means that unity of criminal behaviour, which results in something, for which an individual would be punishable, if it were all done by himself alone, that is, in a criminal offence.

Their Lordships are accordingly of opinion that the Full Bench of the High Court rightly construed Section 34 of the Indian Penal Code, and that the view taken of it in *Nirmal Kanta Roy's* case is not correct. This disposes of the main question raised in the appeal and in the application for special leave. Assuming that Page J., in taking the view of Section 34 which he did take, directed the jury correctly on the subject, there is admittedly little left in the general objections to his summing-up. It was very fully examined by the Full Bench of the High Court, and the learned Judges were unanimously of opinion that it did not call for any review. Their Lordships do not think it necessary to re-examine it sentence by sentence, or to reiterate the reasons which the learned Judges gave for their conclusion. It is enough to say that, having fully considered the summing-up themselves, they entirely concur in the conclusion of the Full Bench. The learned Judge's direction was not erroneous in point of law, and it sufficiently dealt with the material facts. It therefore contained no misdirection: still less was it such a summing-up as affected the due course of justice and the right of the prisoner to be fairly tried according to law within the strict and narrow limits, which have long been laid down by their Lordships' Board when special leave to appeal is asked for in criminal matters.

The argument against the competence of the appeal was substantially as follows. Subject to the satisfaction of the conditions which Art. 41 contains, the appeal is a limited appeal as of right, and must, therefore, be strictly construed. It is given in two cases only, and beyond those cases any appeal is incompetent. The two cases are these: first, that the High Court, in the exercise of its original criminal jurisdiction, has passed a judgment, order or sentence; and, second, that there has been a criminal case where the Court, exercising original jurisdiction in that case, has itself

reserved a point or points of law for the opinion of the High Court. The present case does not fall within the words "from any judgment order or sentence of the said High Court of Judicature . . . made in the exercise of original criminal jurisdiction" but it must be brought within the second alternative. Now, the Advocate-General of Bengal, under Art. 26 of the Letters Patent, granted his certificate that in his judgment "whether the alleged direction or the alleged omission to direct the jury do not in law amount to a misdirection should be further considered by the said High Court." After full consideration of the question so raised, the Full Bench of the High Court made its order in the following terms: "The order of the Court is that the application made by the prisoner under clause 26 of the Letters Patent do stand dismissed"; and this is the order by which the Appellant is really aggrieved. It is true that in his petition to the High Court for a declaration of the fitness of his case for further review, he says "that, being aggrieved by the said dismissal of his application and by the judgment and sentence passed and pronounced upon him by the Hon'ble Mr. Justice Page, your petitioner prays for leave to appeal therefrom to the King's Most Excellent Majesty in Council"; but this statement is doubly inexact. The High Court does not and does not purport to grant leave to appeal: it grants or withholds a declaration of its opinion on the fitness of the case for appeal. Further, the appeal is from the order of the High Court itself refusing to exercise its power to interfere with the trial and sentence. If it had discharged the sentence and directed an acquittal to be entered, the appellant would not have been aggrieved by the judgment and sentence of Page, J., at all. If it had altered the sentence, his grievance would have been that the alteration did not go far enough. The complaint is that the High Court dismissed the application, and this is the order from which he claims to appeal. Accordingly his application is made in a case which does not fall within the words "in any criminal case where any point or points of law have been reserved for the opinion of the High Court in manner hereinbefore provided by any Court which has exercised original jurisdiction"; for the points of law were not reserved by the Court which exercised original jurisdiction, nor did the Court exercise its discretion in the matter in terms of Art. 25. That article provides that, but for the case therein excepted, "there shall be no appeal to the High Court from any sentence passed in any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or more Judges of the High Court," and although Art. 26, which states what is to be done with these points reserved, introduces a new reserving authority, the determination of the High Court on the question reserved is final, except only for the express provision of Art. 41. It says:—

> "And we do further ordain that on such point or points of law being so reserved as aforesaid, or on its being certified by the said Advocate-General that in his judgment . . . a point or points of law which

> has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case . . . and finally determine such point or points of law. . . ."

Now, Art. 41 names, as part of the defining limits of the right to appeal to His Majesty in Council, a reservation of points of law by a Court exercising original jurisdiction, which is not the reservation made in this case, and the fact that a reservation by the Advocate-General is mentioned and provided for in Section 26, and is omitted from Section 41, makes the intention clear. When an authority outside the High Court is empowered to bring about a right of first appeal by a certificate of his own, that appeal is to the High Court and is finally concluded by its determination. There is no second appeal. When the reservation originates within the High Court itself, then, subject to the approval of the High Court to the fitness of the case in that regard, a second appeal is competent. With Art. 41 the Advocate-General has nothing to do. The proceedings of the two tribunals, the High Court exercising original criminal jurisdiction and the High Court determining by its judgment points reserved for its consideration, are strictly two proceedings, and, when the trial judge is *functus officio* and the whole matter has passed to the Court in review, the conditions under which the further decision in review can be brought before His Majesty in Council under Art. 41 are strictly limited to those which that section prescribes for that very case. Such was the submission on behalf of the respondent, and there can be no doubt that it was a weighty one.

Having arrived at the above-stated conclusion on the construction of the Code, which goes to the root both of the appeal and the application for special leave, their Lordships do not, however, think it necessary to proceed with the question whether in this case an appeal under Art. 41 of the Letters Patent is competent. In 1901 an appeal (*Subrahmania Ayyar* v. *King Emperor*, 25 Madr. 61) was heard and determined by their Lordships' Board, in which the decision under review was that of the High Court at Madras in a criminal matter, brought before it on the certificate of the Advocate-General under Art. 26. The terms of the Letters Patent of the High Courts of Calcutta and Madras are for the present purpose identical. No objection was taken by counsel that under these circumstances an appeal to their Lordships' Board under Art. 41 was incompetent, nor is any question raised on this point in the judgment of the Board, and the explanation of this circumstance probably lies in the fact, that, in addition to the appeal under Art. 41, special leave to appeal had been applied for and had been granted by Her Majesty in Council on 29 June 1900. The decision in that case does not therefore conclude this matter, but their Lordships think it inexpedient to deal with the objection now, since on the other grounds above stated the appeal itself in their opinion must fail. They desire, however, to say that they must not be understood as giving any encouragement to appeals in criminal matters under Art. 41,

where no point of law has been raised by the trial judge, nor are appellants, who have chosen this mode of bringing their case before the Board, to assume that an application for special leave to appeal as an alternative will be granted or even entertained by their Lordships.

For similar reasons they do not deal with other considerations relating to the grant of special leave to appeal to His Majesty such as the following. Although in general hardly anything could more conspicuously violate natural justice than to convict and sentence a man for an offence of which he was not guilty, it may be that irregularity alone is the proper term to use, when, the facts being the same, the evidence the same, the guilt the same, and the punishment the same, error has occurred in indicting him under the section which charges the full offence instead of under the sections which charge an attempt at or an abetting of the full offence, especially when this error could have been corrected in time, if the accused had put his counsel in a position to raise his defence clearly and in due form at the trial. Upon this point also their Lordships express no opinion at present.

In the Privy Council.

BARENDRA KUMAR GHOSH

v.

THE KING-EMPEROR.

DELIVERED BY LORD SUMNER

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