R. v. E. B. JORDAN AND J. J. NEL.

A Criminal Review Case of 1933.

Perjury—two persons charged separately with perjury—two or more persons cannot be tried jointly for perjury—joint trial whether by consent or otherwise a nullity.

It is well established that two or more persons cannot be tried jointly for perjury; while more than one witness in a trial may give false evidence identical in terms, such false evidence is the individual act of the particular witness and is not an act joint with that of any other witness who swears to a similar falsehood.

In each of the cases of *Rex* v. *Crane* and *Rex* v. *Dennis and Parker* (both quoted below), it was held on appeal that the trial in question was a nullity; and the Appellate Court, having in each case set aside the conviction, directed that there be a proper trial.

In the case here reported, the trial of two persons jointly for perjury was held by the High Court to be a nullity and the conviction of each of the two convicted persons was quashed but no direction was given as to their standing their trial in proper manner and presumably the High Court did not consider that either person should be so tried.

In the case of *Rex* v. *McDonnell* 20 Cr. App. R. 163 where the Court of Criminal Appeal found the trial to have been a nullity, the Court quashed the conviction but did not direct that the appellant stand his trial; in that case, however, the appellant had been detained in prison pending the appeal for six weeks instead of the nine or ten weeks he would have had to serve had the conviction and sentence been upheld and the Court evidently considered that he had suffered enough punishment; in the present case both appellants had been on bail.

There is some doubt whether, in cases where the original trial has been held to be a nullity, the order of the Court of Criminal Appeal directing that the appellant be properly tried is an order of " venire de novo " or not; the House of Lords in the case of *Crane* v. *Director of Public Prosecutions* seems to have found that the order is not strictly " venire de novo " but an order of " venire de novo " was subsequently made by the Court of Criminal Appeal; see *Rex* v. *Henry Williams* 19 Cr. App. R. 67; and the term " venire de novo " has been used in refusing to make an order for a proper trial in *Rex* v. *McDonnell* (*supra*), *Rex* v. *Robert Wilde* 24 Cr. App. R. 98; in *Rex* v. *Gee and Others* 25 Cr. App. R. 198 the headnote refers to an Order *in the nature of* " venire de novo " and Goddard J., who delivered the judgment of the Court of Criminal Appeal, was careful to say that there was power to " order that a proper trial should take place ", and did not use the term " venire de novo ".

It would appear that an order for a proper trial to take place is correctly described not as " venire de novo " but " in the nature of ' venire de novo ' ".

Hall, J.: Mr. Turner having withdrawn the appeal as will be seen from attached correspondence, I proceed to review this case.

There were two accused charged separately with perjury in one criminal case.

The record in the perjury case commences:

> " The court decides to take these cases together, Mr. Turner agreeing."

In *Rex* v. *Philips et al.* 2 Strange 921, 93 E.R. (943), it was held that two persons cannot be jointly indicted for perjury. In *Rex* v. *Dennis and Parker* (1924) 1 K.B. 867, 18 Cr. App. Rep. 39, AVORY, J. delivered the judgment of the Court of Criminal Appeal as follows:

> " We cannot accede to the suggestion made by Mr. Clements, that because this is a test case we should overlook a manifest want of jurisdiction in the court of trial. It is always the duty of this court, even although objection is not put forward by counsel, or in the notice of appeal, to take note of a point which goes to the jurisdiction of the court of trial.
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> In *Rex* v. *Crane* (26 Cox C. C. 667; 124 L. T. Rep. 256; (1920) 3 K.B. 236) it was held that where two indictments were proceeded with at one and the same time against two persons, this being done upon the assumption by judge and counsel alike, that the defendants were jointly indicted, the trial was a nullity. To use the words of LORD READING, C.J., ' The proceedings were void *ab initio*: from the moment the prisoners were given in charge of the jury the trial was a nullity '. That view was confirmed on appeal to the House of Lords in *Crane* v. *Director of Public Prosecutions* (*ante* p. 43; 125 L.T. Rep. 642; (1921) 2 A.C. 299), the matter being considered of sufficient importance for the Attorney-General to give his certificate. LORD ATKINSON there said, ' Where an accused person has pleaded " not guilty " to the offences charged against him in an indictment, and another accused person has pleaded " not guilty " to the offence or offences charged against him, in another separate and independent indictment, it is, I have always understood, elementary in criminal law, that the issues raised by those two pleas cannot be tried together '.
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> That being so, does the fact that in this case counsel for the defendants and counsel for the prosecution consented to the two indictments being tried together make any difference ? We are told that counsel consented for convenience to the two indictments being tried together, although it would appear that they never communicated that consent to the recorder, who has stated to us that he was throughout under the impression that the defendants were jointly indicted. It is said that that consent distinguishes the present case from *Rex* v. *Crane* (*ubi sup.*). In our opinion

consent cannot give jurisdiction in a criminal court, if indeed it can in any court, where no jurisdiction exists. As was said during the argument in the House of Lords in *Crane* v. *Director of Public Prosecutions* (*ubi sup.*): ' An irregularity can be waived by consent, but jurisdiction in criminal matters cannot be conferred by consent '. This appears to us a question of jurisdiction and not a question of regularity or irregularity. No criminal court has jurisdiction to try two separate indictments at one and the same time, and therefore the consent given to such a trial cannot give jurisdiction. In these circumstances, however regrettable it may be that another trial should be necessitated, we must follow the course taken in Crane's case, and make an order awarding a *venire de novo* for a trial of these two defendants according to law."

I cannot find either in the Magistrates Courts Ordinance or in the Rules any authority for joinder of charges in inferior courts (in this connection see section 127 of the Criminal Procedure Code), but LOGAN, J. held that in the circumstances rule 40 of the High Court Rules, 1931, should be used as a guide for inferior courts in the Territory. This ruling may not be strictly correct in law, but it must be remembered that the basic principle is that every charge must be tried separately unless coming within the exceptions as contained in the aforesaid rule.

Presuming for the moment that rule 40 (4) of the High Courts Rules, 1931, was in law applicable to the inferior courts, it might appear at the first blush that the words " different offences committed in the same transaction " would cover the position in the present case. Section 239 (*d*) of the Indian Procedure Code has practically similar words to those cited above. In Sohoni's Commentaries on the Indian Code, twelfth edition, at page 600, there is the following note referring to the aforesaid section:

" Where two persons are severally charged with giving false evidence in their depositions in a certain trial, their offences are distinct and they must be tried separately under the provisions of section 233 unless a conspiracy is proved. . . . A lie by a witness is none the less his own particular lie and it is his own and not another's lie that can alone be used against him or be the subject of a prosecution on that account. . . . The words ' the same transaction ' in this section cannot embrace the examination of all the witnesses throughout a trial, but could apply only to the examination of each witness as such separately."

In view of the above I must quash the convictions herein and the bail bonds of the appellants are cancelled.

In the circumstances it becomes unnecessary for me to deal further with the case.

The £20 deposited must be returned to the persons concerned.