LAXMIPAT CHORARIA AND ORS.

v.

STATE OF MAHARASHTRA

December 14, 1967

[M. HIDAYATULLAH AND C. A. VAIDIALINGAM, JJ.]

Evidence Act, 1872, *ss.* 118, 132, 133—*Criminal Procedure Code*, 1898, *ss.* 337, 338, 342(4) *and* 494—*Indian Oaths Act, s.* 5—*Appellants convicted under s.* 120B *and s.* 167(81) *of Sea Customs Act of smuggling—Accomplice giving evidence not prosecuted—Whether prosecution or Magistrate bound to arraign accomplice where complaint by Assistant Collector excludes him—Upon failure to make accomplice an accused if he can be competent witness—Photostat copies of documents—When admissible evidence.*

Constitution of India, Art. 14—*Taking accomplice evidence by using s.* 494 *Cr. P.C. if constitutional.*

The three appellants were convicted under s. 120B I.P.C. and s. 167(81) of the Sea Customs Act for having entered into a criminal conspiracy among themselves and with a Chinese citizen in Hong Cong to smuggle gold into India with the help of E, an Airlines stewardess. E gave evidence at the trial as a witness for the prosecution. Her testimony was clearly that of an accomplice and although she could have been prosecuted, she was not arraigned. It was contended, *inter alia*, on behalf of the appellants (i) that it was the duty of the prosecution and/or the Magistrate to have tried E jointly with the appellants and the breach of this obligation vitiated the trial; in the alternative, E's testimony must be excluded from consideration and the appeal re-heard on the facts; (ii) that no oath could be administered to E as she was an accused person in 'a criminal proceeding' within the meaning of s. 5 of the Indian Oaths Act as shown by her own statements made to the Customs officials and in Court; she could not therefore be examined as a witness; furthermore, the provisions relating to tender of pardon to accomplices contained in Chapter XIV of the Criminal Procedure Code do not apply to offences under s. 120B (first Part) I.P.C. and s. 168 (81) of the Sea Customs Act; the only ways in which E's testimony could have been obtained was either to take her plea of guilty and convict and sentence her or withdraw the prosecution against her under s. 494 Cr. P. C. Not to send up a person for trial with the sole object of taking accomplice evidence is illegal. Furthermore, under s. 351 read with s. 91 of the Code it was the duty of the Court to have detained E and included her in the array of accused before it; (iii) the evidence of E in respect of the identification of two of the appellants was inadmissible because she had been shown their photographs before her statements were taken; (iv) the photostats of certain documents without the production of the originals were wrongly admitted and should have been excluded; and (v) selection of E as one out of several accused was discriminatory.

HELD : dismissing the appeal,

(i) The offences were non-cognizable and were investigated by customs officers under the Sea Customs Act and not by the police under Chapter XIV of the Code. Therefore, no question of the application of ss. 169 and 170 arose. The accused were placed on trial on the complaint of the

A Assistant Collector of Customs under the authority of the Chief Customs Officer, Bombay. Although the Magistrate was taking cognizance of offences and not of offenders, it was no part of his duty to find offenders in view of the bar of s. 187A if the complaint did not name a particular offender. All that the Magistrate could do was to take a bond from E for her appearance in court if required. [629 C-E]

B Under s. 118 of the Evidence Act, all persons are competent to testify unles the court considers that they are prevented from understanding the questions put to them for reasons indicated in that section. Under s. 132 a witness is not excused from answering any relevant question upon the ground that the answer will incriminate him or expose him to a penalty of forfeiture of any kind and when compelled to answer such question is protected against arrest or prosecution by the safeguard in the proviso to s. 132 as well as in Art. 20(3). The evidence of E could not therefore be ruled out as that of an incompetent witness. Since C E was a self-confessed criminal, in conspiracy with others who were being tried, her evidence was accomplice evidence. S. 133 of the Evidence Act makes the accomplice a competent witness against an accused person. For this reason also E's testimony was that of a competent witness. [630 B-H]

(ii) The competency of an accomplice is not destroyed because he could have been tried jointly with the accused but was not and was D instead made to give evidence in the case. Section 5 of the Indian Oaths Act and s. 342 of the Code of Criminal Procedure do not stand in the way of such a procedure.

If any accomplice is not prosecuted but is tendered as a witness, the bar of the Indian Oaths Act ceases because the person is not an accused person in a criminal proceeding. The interrelation of s. 342(4) of the Code and s. 5 of the Indian Oaths Act, both of which prohibited the giving E of oath or affirmation to an accused on trial is fully evidenced by the simultaneous amendment of the Code in 1955 by which the right to give evidence on oath is conferred on the accused and provisions *in pari materia* are made in s. 5 of the Oaths Act. The only prohibition against the use of accomplice testimony exists in the rule of caution about corroboration and the interdiction of influence in any form by s. 343 of the Code. If any influence by way of promise of pardon has to be made, F the provisions of ss. 337 and 338 or of the Criminal Law Amendment Act have to be observed. That, however, applies to special kinds of cases of which the present was not one. [632 F-H]

The expression 'criminal proceeding' in the exclusionary clause of s. 5 of the Indian Oaths Act cannot be used to widen the meaning of the word 'accused'. The same expression is used in the proviso to s. 132 of the Indian Evidence Act and there it means a criminal trial and not G investigation. The same meaning must be given to the exclusionary clause of s. 5 of the Indian Oaths Act to make it conform to the provisions *in pari materia* to be found in ss. 342, 342A of the Code and s. 132 of the Indian Evidence Act. The expression is also not rendered superfluous because, given this meaning, it limits the operation of the exclusionary clause to criminal prosecutions as opposed to investigations nad civil proceedings. [633 D-F]

H (iii) If the court is satisfied that there is no trick photography and the photograph is above suspicion, the photograph can be received in evidence. It is, of course, always admissible to prove the contents of the document, but subject to the safeguards indicated to prove the authorship. This is all the more so in India under s. 10 of the Evidence Act

to prove participation in a conspiracy. Detection and proof of crime will be rendered not only not easy but sometimes impossible if conspirators begin to correspond through photographs of letters instead of originals. But evidence of photographs to prove writing or handwriting can only be received if the original cannot be obtained and the photographic reproduction is faithful and not faked or false. In the present case no such suggestion exists and the originals having been suppressed by the accused, were not available. The evidence of photographs as to the contents and as to handwriting was receivable. [638 F-H] A B

(iv) If the prosecution had to rely only on the identification by E to fix the identity of the suspects, the fact that their photographs were shown to her would have materially affected the value of identification. However there was considerable other evidence of identification and the prosecution was not required to rely only on this identification.

(v) Section 337 Cr.P.C. has been held not to offend Art. 14 and the matter of taking accomplice evidence outside s. 337 by using s. 494 or otherwise is not very different. It cannot be held that there was any breach of the Constitution in selecting E out of several accused to give evidence. [640 F] C

Case law discussed.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeals Nos. 50—52 of 1964. D

Appeals from the judgment and order dated January 17, 24, 1964 of the Bombay High Court in Criminal Appeals Nos. 961 to 963 of 1962.

A. K. Sen, R. Jethmalani, Jethmalani, Kumar M. Mehta, B. Parthasarathy and *J. B. Dadachanji,* for the appellants (in Cr. A. No. 50 of 1964). E

R. Jethmalani, Kumar M. Mehta, Jethmalani and *J. B. Dadachanji,* for the appellants (in Cr. As. Nos. 51 and 52 of 1964).

K. G. Khandalawala, H. R. Khanna, B. A. Panda, R. H. Dhebar and *S. P. Nayar,* for the respondent (in all the appeals). F

The Judgment of the Court was delivered by

Hidayatullah, J. The appellants who are three brothers appeal by certificate against their conviction under s. 120-B of the Indian Penal Code and s. 167(81) of the Sea Customs Act and the sentences of imprisonment and fine respectively imposed on them. A fourth brother had filed Criminal Appeal No. 55 of 1964 but did not press it at the hearing. One other person (S. L. Daga) was also convicted with them but has not appealed. These persons were found to have entered into a criminal conspiracy among themselves and with others including one Yau Mockchi, a Chinese citizen in Hong Kong, to smuggle gold into India. The method adopted was to insert strips of gold (about 250 *tolas*) under the lining of the lid of a suitcase, which could be retrieved by G H

A unscrewing the metal corner supports and pulling on strings attached to the strips. The suitcases were brought into India by air stewardnesses, and Ethyl Wong (P.W. 1), an Anglo-Chinese girl employed by Air India, was one of them. Discovery came, after gold was successfully smuggled on many occasions, when Yau Mockch approached one Sophia Wong of the B.O.A.C. line. She was engaged to a police officer and informed her superior officers. A trap was laid. Yau Mockchi was caught with a suit-case with gold in it after he had explained to Sophia how the gold was inserted and how it could be taken out. On the search of his person and also of his place of business, visiting cards of several persons including those of Ethyl Wong and Laxmipat Choraria (Crl. Appeal 50/64), photographs of Laxmipat and Balchand Choraria (Crl. Appeal No. 52/64), their addresses and telephone numbers, and other incriminating letters, accounts, cables, etc., were found. Immediately thereafter raids took place in India and at Hong Kong where the other two accused who are not before us (Kundanmal Choraria and S. L. Daga) were running a firm called Global Agencies. Numerous documents (some in simple code) and account books were seized. Many of these documents were photostated. The originals were unfortunately returned under the orders of the Supreme Court of Hong Kong and have since been suppressed. On the strength of these materials the prosecution was started.

At the commencement of the trial Ethyl Wong was examined as the first witness and gave a graphic account of the conspiracy and the parts played by the accused and her own share in the transactions. Her testimony was clearly that of an accomplice. Although she could have been prosecuted, she was not arraigned and it is her testimony which has been the subject of a major part of the arguments before us. No effort has been spared to have it excluded. In two other appeals which we are deciding today with these appeals, the evidence of the accomplices was also questioned on the same grounds. For convenience the whole question has been considered here. In these appeals it is, however, admitted that if her evidence is received, it is sufficiently corroborated both generally and in respect of the three appellants before us. But the evidence of Ethyl Wong is questioned in respect of the identification of Laxmipat and Balchand because she was shown their photographs before her statement was taken. The use of the photostats without the originals is also questioned and it is submitted that these documents should be excluded. The main argument is that Ethyl Wong could not be examined as a witness because (a) no oath could be administered to her as she was an accused person since s. 5 of the Indian Oaths Act bars such a course and (b) it was the duty of the prosecution and/or the Magistrate to have tried Ethyl Wong jointly with the appellants.

The breach of the last obligation, it is submitted, vitiated the trial and the action was discriminatory. In the alternative, it is submitted that even if the trial was not vitiated as a whole, Ethyl Wong's testimony must be excluded from consideration and the appeal reheard on facts here or in the High Court. It is further submitted that in any event, Ethyl Wong's evidence was so discrepant as to be worthless. In the appeal of Balchand an additional point is urged and it is that the incriminating documents against him were compared with a letter Z 217 purported to be written by him but not proved to be so written.

Since the appeals were argued mainly on law, we need not trouble ourselves with the facts. Ethyl Wong admittedly carried gold for Yau Mockchi on several occasions. She admitted this in court and her evidence receives ample corroboration as to the mode employed from the statement of Sophia Wong and the seizure of the suitcase when Yau Mockchi had explained how the gold was secreted. We may say at once that if Ethyl Wong's evidence is not to be excluded from consideration for any reason, then we see no reason not to believe her. Apart from the fact that the High Court and the court below have concurrently believed it already, we find ample corroboration for it from her own previous statements made without warning, her pointing out the flats where she delivered gold, her cable written in code to inform the parties in Hong Kong after successful smuggling, her visiting card in the possession of Yau Mockchi, the passenger manifests showing her trips, the entries in the hotel registers and the telephone calls made by her to the flat of the accused and so on and so forth. No doubt there are some discrepancies in her account and she corrected her first version on points on which she had made mistakes. But this is explained by the fact that when she was first accosted, she was unprepared and shocked by the discovery. The corrections were made by her after reviewing in her mind her past trips and without any prompting by the customs authorities. Both statements were voluntary and without any collusion on the part of the customs officials. On the whole her testimony impressed us and as it has been accepted by the High Court and the Magistrate we shall not go into it for the third time. We shall accordingly address ourselves to the objections to its admissibility and the propriety of examining a self-confessed criminal as a witness against her former associates.

The argument is that s. 5 of the Indian Oaths Act prohibits the administering of oath or affirmation to an accused person in a criminal proceeding and Ethyl Wong, by her own statements made earlier to the customs officials and later in court, showed herself to be the unknown carrier shown at No. 12 of the complaint. It is, therefore, contended that she could not be examined

A as a witness. Next it is submitted that as the provisions relating to tender of pardon to accomplices contained in Chapter XXIV of the Code do not apply to offences under s. 120-B (First Part) of the Indian Penal Code and s. 168(81) of the Sea Customs Act. the only two ways in which Ethyl Wong's testimony could have been obtained was either to take her plea of guilty and convict B and sentence her or to withdraw the prosecution against her under s. 494, Indian Penal Code. Not to send up a person for trial with the sole object of taking accomplice evidence is said to be illegal. Further it is argued that under s. 351 read with s. 91 of the Code it was the duty of the Court to have detained Ethyl Wong and included her in the array of accused before it. We C shall now consider these arguments.

The offences were non-cognizable and were not investigated by the police. The investigation was by customs officers under the Sea Customs Act and not by the police under Chapter XIV of the Code. Therefore, no question of the application of ss. 169 and 170 arose. Ethyl Wong's statements were obtained under s. 171-A D of the Sea Customs Act. The persons were placed for trial on the complaint of the Assistant Collector of Customs under the authority of the Chief Customs Officer, Bombay. Although the Magistrate was taking cognizance of offences and not of offenders. it was no part of his duty to find offenders in view of the bar of s. 187A if the complaint did not name a particular offender. All E that the Magistrate could do was to take a bond from Ethyl Wong for her appearance in court if required. At the time of Ethyl Wong's examination the appellants had raised the question that she should also be tried. The Magistrate said that he would later consider the matter. Then it appears to have been forgotten. Nor did the appellants raise the question again. Apparently they only F wanted that Ethyl Wong should be tried jointly with them so that her testimony might not be available against them but were not interested in her separate trial.

In so far as the customs authorities are concerned it is clear that they had some reason to think that Ethyl Wong might be one of the carriers as her visiting card was found with 26 other such G cards in Yau Mockchi's possession. But it was not certain that she was one of the carriers until she was questioned or there was some other evidence against her. The complaint was filed in court on April 6, 1960 and the case was to commence on January 2, 1961. On December 27, 1960 Ethyl Wong landed at the Bombay Air Terminal. Two customs officers were waiting for her and H questioned her. It was then that Ethyl Wong made her first statement (Ex. 1) admitting her own share in the smuggling racket set up by Yau Mockchi. On December 29, 1960 she gave a second statement (Ex. 2) and corrected certain inaccuracies in

her first statement. On January 2, 1961 she was examined as the first prosecution witness. A

Now there can be no doubt that Ethyl Wong was a competent witness. Under s. 118 of the Indian Evidence Act all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them for reasons indicated in that section. Under s. 132 a witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any criminal proceeding (among others) upon the ground that the answer to such question will incriminate or may tend directly or indirectly to expose him to a penalty or forfeiture of any kind. The safeguard to this compulsion is that no such answer which the witness is compelled to give exposes him to any arrest or prosecution or can it be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. In other words, if the customs authorities treated Ethyl Wong as a witness and produced her in court, Ethyl Wong was bound to answer all questions and could not be prosecuted for her answers. Mr. Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks s. 132 (proviso). In India the privilege of refusing to answer has been removed so that temptation to tell a lie may be avoided but it was necessary to give this protection. The protection is further fortified by Art. 20(3) which says that no person accused of any offence shall be compelled to be a witness against himself. This article protects a person who is accused of an offence and not those questioned as witnesses. A person who voluntarily answer questions from the witness box waives the privilege which is against being compelled to be a witness against himself, because he is then not a witness against himself but against others. Section 132 of the Indian Evidence Act sufficiently protects him since his testimony does not go against himself. In this respect the witness is in no worse position than the accused who volunteers to give evidence on his own behalf or on behalf of a coaccused. There too the accused waives the privilege conferred on him by the article since he is subjected to cross-examination and may be asked questions incriminating him. The evidence of Ethyl Wong cannot, therefore, be ruled out as that of an incompetent witness. Since Ethyl Wong was a self-confessed criminal, in conspiracy with others who were being tried, her evidence was accomplice evidence. The word accomplice is ordinarily used in connection with the law of evidence and rarely under the substantive law of crimes. Accomplice evidence denotes evidence of a participant in crime with others. Section 133 of the Evidence Act makes the accomplice a competent witness against an accused person. Therefore, Ethyl Wong's testimony was again that of a competent witness. It has been

B C D E F G H

A subjected to scrutiny and the usual checks for corroboration and was, therefore, received with due caution. The short question that remains is whether she could be administered an oath in view of the prohibition in s. 5 of the Indian Oaths Act.

We have already shown above that Ethyl Wong was not an B accused person at the trial. Now the Indian Oath Act provides :

> "5. Oath or affirmation shall be made by the following persons :
>
> (a) all witnesses, that is to say, all persons who may lawfully be examined or give, or be required to give, evidence by or before any court or person C having by law or consent of parties authority to examine such persons or to receive evidence;
>
> . . . . . .
>
> Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath D or affirmation to the accused person unless he is examined as a witness for the defence....."

Mr. Jethmalani in interpreting the exclusionary clause argues that every person against whom there is an accusation (whether there be a prosecution pending against him or not) is an accused E person, more so a person against whom an investigation is going on or has been made. In this connection he has referred to those sections of the Code of Criminal Procedure where the word 'accused' occurs and has attempted to establish that sometimes the word is employed to denote a person on trial and sometimes a person against whom there is an accusation but who is not yet F put on his trail. He has also referred to the expression 'in a criminal proceeding' which he says are words of sufficient amplitude to take in a person against whom an investigation is to be made or has been made on an accusation. In either case, he submits, the case of Ethyl Wong must fall within the exclusionary clause.

G There is no need to refer to the sections of the Code of Criminal Procedure because it may safely be assumed that the word 'accused' bears these different meanings according to the context. That does not solve the problem of interpretation of the same word in the Code for there it may have been used in one of the two senses or both. The historical reason behind the prohibition H in the Indian Oaths Act and s. 342 of the Code, need not be gone into either. It is well-known that formerly a person on his trial could not give evidence. At Common Law, the parties to a civil action were not allowed to give evidence because of their personal

interest and in criminal trials, the private prosecutor could give evidence because he represented the Crown but not the accused. The Common Law of England was altered by statutory enactments between 1843 and 1898 and finally by the Criminal Evidence Act 1898 the accused was allowed to give evidence. The discomfiture of the first person to give evidence on his own account while under cross-examination is also well-known. He was literally convicted out of his own mouth by the cross-examination by the Attorney General. In India the right was first conferred by the Code of Criminal Procedure Amendment Act XXVI of 1955. This Amending Act added s. 342A to the Code :

"342. Accused person to be competent witness.

Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial :

Provided that—

. . . . . .

and added the words "unless he is examined as a witness for the defence" to the exclusionary clause in s. 5 of the Indian Oaths Act. Yet the provisions of s. 343 of the Code continues that except as provided in ss. 337 and 338 of the Code, no influence, by means of any promise or threat or otherwise shall be used on an accused person to induce him to disclose or withhold any matter within his knowledge. The section prohibits influence in two ways—in the making of the disclosure and in the withholding of the disclosure. In other words, the prosecuting agency has to be neutral unless it seeks to prosecute the person himself. If they do not prosecute a particular person and tender him as a witness, the bar of the Indian Oaths Act ceases because the person is not an accused person in a criminal proceeding. The interrelation of s. 342(4) of the Code and s. 5 of the Indian Oaths Act, which both prohibited the giving of oath or affirmation to an accused on trial is fully evidenced by the simultaneous amendment of the Code in 1955 by which the right to give evidence on oath is conferred on the accused and provisions *in pari materia* are made in s. 5 of the Oaths Act. The only prohibition against the use of accomplice testimony exists in the rule of caution about corroboration and the interdiction of influence in any form by s. 343 of the Code. If any influence by way of promise of pardon has to be made, the provisions of ss. 337 and 338 or of the Criminal Law Amendment Act have to be observed. That, however, applies to special kinds of cases of which the present is not one. They are

A concerned with offences triable exclusively by the High Court or the Court of Session, or offences punishable with imprisonment which may extend to seven years and certain offences specially named for which special provision has been made in the Criminal Law Amendment Act. In other words, we are not concerned with the provisions for tender of a pardon found in the Code or the B Criminal Law Amendment Act.

The position that emerges is this : No pardon could be tendered to Ethyl Wong because the pertinent provisions did not apply. Nor could she be prevented from making a disclosure, if she was so minded. The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break C a smugglers' ring. Ethyl Wong was protected by s. 132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness although her evidence could only be received with the caution necessary in all accomplice evidence. The expression 'criminal proceeding' in the exclusionary clause of s. 5 of the Indian Oaths Act cannot be used D to widen the meaning of the word accused. The same expression is used in the proviso to s. 132 of the Indian Evidence Act and there it means a criminal trial and not investigation. The same meaning must be given to the exclusionary clause of s. 5 of the Indian Oaths Act to make it conform to the provisions *in pari materia* to be found in ss. 342, 342A of the Code and s. 132 of E the Indian Evidence Act. The expression is also not rendered superfluous because if given the meaning accepted by us it limits the operation of the exclusionary clause to criminal prosecutions as opposed to investigations and civil proceedings. It is to be noticed that although the English Criminal Evidence Act, 1898, which (omitting the immaterial words) provides that "Every person charged with an offence.....shall be a competent witness F for the *defence* at every stage of the proceedings" was not interpreted as conferring a right on the prisoner of giving evidence on his own behalf before the grand jury or in other words, it received a limited meaning; see *Queen* v. *Rhodes*(1).

Before we leave this subject we may refer to certain rulings to G which our attention was drawn. Mr. Jethmalini has referred to *Karim Buksh* v. *Q.E.*,(2) *Da* v. *Sivan Chetty*(3), *Parameshwarlal* v. *Emperor*(4), *Emperor* v. *Johrit*(5), *Albert* v. *State of Kerala*(6). These cases arose in connection with s. 211 of the Indian Penal Code. The expression "causes to be instituted criminal proceedings" was held to include the making of a report to the police or H to such officer whose duty it is to forward the report for action

(1) [1889] 1 Q.B. 77.
(2) I.L.R. 77 Cal. 574 (F.B.)
(3) I.L.R. 32 Mad. 258.
(4) I.L.R. 4 Patna 472.
(5) A.I.R. 1931 All. 269.
(6) A.I.R. 1966 Kerala. 11.

by the police. It is argued that in s. 5 of the Indian Oaths Act the words 'criminal proceedings' must receive wide interpretation. Mr. Jethmalini also relied upon *Karam Ilahi* v. *Emperor*(1) where a Division Bench of the Lahore High Court has held that, since according to the Criminal Procedure Code a person becomes an accused person as soon as he has been arrested by the police for an offence, the word 'accused' in s. 5 of the Indian Oaths Act must also receive a similar meaning. We have already shown that the exclusionary clause in s. 5 is to be interpreted as a whole and 'criminal proceedings' means a criminal inquiry or a trial before a court and the 'accused' means a person actually arraigned, that is, put on a trial. In fact this meaning finds support even from the Lahore case on which Mr. Jethmalini relies. The scheme of the two provisions being different it is impossible to use the meaning given in respect of s. 211 of the Indian Penal Code, in aid of the construction of similar words in s. 5 of the Indian Oaths Act.

On the side of the State many cases were cited from the High Courts in India in which the examination of one of the suspects as a witness was not held to be illegal and accomplice evidence was received subject to safeguards as admissible evidence in the case. In those cases, s. 342 of the Code and s. 5 of the Indian Oaths Act were considered and the word 'accused' as used in those sections was held to denote a person actually on trial before a court and not a person who could have been so tried. The witness was, of course, treated as an accomplice. The evidence of such an accomplice was received with necessary caution in those cases. These cases have all been mentioned in *In re Kandaswami Gounder*(2), and it is not necessary to refer to them in detail here. The leading cases are : *Queen Emperor* v. *Mona Puna*(3), *Banu Singh* v. *Emperor*(4), *Keshav Vasudeo Kortikar* v. *Emperor*(5), *Empress* v. *Durant*(6), *Akhoy Kumar Mookerjee* v. *Emperor*(7), *A. V. Joseph* v. *Emperor*(8) *Amdumiyan and others* v. *Crown*(9), *Gallagher* v. *Emperor*(10), and *Emperor* v. *Har Prasad, Bhargava*(11). In these cases (and several others cited and relied upon in them) it has been consistently held that the evidence of an accomplice may be read although he could have been tried jointly with the accused. In some of these cases the evidence was received although the procedure of s. 337, Criminal Procedure Code was applicable but was not followed. It is not necessary to deal with this question any further because the consensus of opinion

(1) A.I.R. 1947 Lah. 92.
(2) A.I.R. 1957 Mad. 727.
(3) I.L.R. 16 Bom. 661.
(4) I.L.R. 33 Cal. 1353.
(5) I.L.R. 59 Bom. 355.
(6) I.L.R. 23 Bom. 213.
(7) I.L.R. 45 Cal. 720.
(8) I.L.R. 3 Rang. 11.
(9) I.L.R. 1937 Nag. 315.
(10) I.L.R. 54 Cal. 52.
(11) I.L.R. 45 All. 226.

A in India is that the competency of an accomplice is not destroyed because he could have been tried jointly with the accused but was not and was instead made to give evidence in the case. Section 5 of the Indian Oaths Act and s. 342 of the Code of Criminal Procedure do not stand in the way of such a procedure.

B It is, however, necessary to say that where s. 337 or 338 of the Code apply, it is always proper to invoke those sections and follow the procedure there laid down. Where these sections do not apply there is the procedure of withdrawal of the case against an accomplice. The observations of Cockburn, C.J. and Blackburn and Mellor, JJ. in *Charlotte Winsor* v. *Queen*(1) must always be borne in mind. Cockburn, C.J. observed :

C

> "No doubt that state of things, which the resolution of the judges, as reported to have been made in Lord Hold's time, was intended to prevent, occurred; it did place the prisoner under this disadvantage; whereas, upon the first trial that most important evidence could not be given against her, it was given against her upon the second, so that the discharge of the jury was productive to her of that disadvantage. I equally feel the force of the objection that the fellow prisoner was allowed to give evidence without having been first acquitted, or convicted and sentenced. I think it much to be lamented."

D

E To keep the sword hanging over the head of an accomplice and to examine him as a witness is to encourage perjury. Perhaps it will be possible to enlarge s. 337 to take in certain special laws dealing with customs, foreign exchange, etc. where accomplice testimony will always be useful and witnesses will come forward because of the conditional pardon offered to them. We are, therefore, of the opinion that Ethyl Wong's evidence was admissible.

F

The case was one under s. 120-B of the Indian Penal Code. As the existence of a conspiracy is proved beyond a shadow of doubt, s. 10 of the Indian Evidence Act is attracted. That section provides :

G

> "10. Things said or done by conspirator in reference to common design.
>
> Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention

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(1) [1966] 1 Q.B. 289.

was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it."

The conspiracy was headed by Yau Mockchi who in a sense was the brain behind the whole racket. The discovery with him of the visiting card and photograph of Laxmipat and the photograph and addresses of Balchand was an incriminating circumstance as Ethyl Wong was connected with Yau Mockchi on the one hand and these brothers at the other. Further letters and writings of all the brothers were seized which were related to the conspiracy. Unfortunately, the originals were not available at the trial but only photostats of the letters. The photostats have been proved to our satisfaction to be genuine photographs of the letters. The copies were made through the Indian Embassy and bore the certificate. The use of the photostats without the originals was questioned before us but not in the High Court. Since it was a pure question of law, we allowed it to be raised. It is submitted that expert testimony as to handwriting can only be based upon the examination of the originals and not photographs. It is pointed out that there is nothing in the Evidence Act which makes a photograph of a disputed writing the basis of conviction. Nor, it is submitted, expert testimony can be invited about it. Reliance is placed on *M'Cullough* v. *Munn*(1) and Phipson on Evidence 10th Edition p. 146.

In our opinion this submission cannot be accepted. Apart from the fact that this was not argued in the High Court and the handwriting was admitted there, the law as propounded is not sound. The originals were suppressed by the appellants after they were returned. The order of the Supreme Court of Hong Kong has not been produced before us and we do not know why the original documents were returned. Adequate precaution against the suppression of these documents apparently was not taken. This was perhaps necessary because the offence was a part of an international smuggling racket, in which offenders had to be tried in two different countries and both countries needed the documents as evidence. If the photostats were not available this prosecution would have been greatly jeopardised.

Even if the originals be not forthcoming, opinions as to handwriting can be formed from the photographs. It is common knowledge that experts themselves base their opinion on enlarged photographs. The photos were facsimiles of the writings and could be compared with the enlargements of the admitted comparative

(1) [1908] 2 I.R. 194.

material. In Phipson (10th Edn.) paragraphs 316/317 the rules as to identification of handwriting is stated from the Criminal Procedures Act, 1865 as follows :—

> "Comparison of a disputed writing with any writing proved to be satisfaction of the judges to be genuine shall be permitted to be made by witnesses etc....."
>
> (para 316)

In dealing with the scope of the rule, Phipson observes :

> "Under the above Act, both the disputed and the genuine writings must be produced in court, and the former, if lost, cannot be compared, either from memory or from a photographic copy, with the latter, and the latter must also be duly proved therein."
>
> (para 317).

Phipson himself in paragraph 316 observes that the production of 'real' evidence is not now compulsory. For the first part of the proposition in paragraph 317 reference is made to *M'Cullough* v. *Munn.*(1). That was an action for libel contained in a letter alleged to have been written by the defendant. The original was lost but a photographic copy of the letter was available, and the envelope had been preserved. The photograph was seen by the jury but the Judge ruled that the photograph was evidence of the contents of the letter but not of the handwriting and could not be compared with other admitted writings. The jury gave a verdict for the plaintiff which was set aside by the Divisional Court and a new trial was ordered. At the second trial, the photograph was not tendered but a 'plain copy' was put in. The trial resulted in a verdict for the defendant. The Divisional Court refused to set aside the verdict. The plaintiff then relied upon *Lucas* v. *Williams*(2) claiming that the photograph was evidence. The Lord Chancellor and Holmes L.J. observed:

> "The plaintiff would have been justified in putting in the photograph as evidence of the contents of the libel, and apparently it was the only legal evidence by way of copy of its contents; and, I think, they might also, on the authority of the decision in *Brookes* v. *Tichborne* (5 Ex. 929) have used it for purposes of calling attention to peculiarities of spelling and use of capital letters and punctuation..."

At the first trial Lord Chief Baron ruled (with which Wright, J. agreed in the King's Bench)—

(1) [1908] 2 I.R. 194 (C.A.)

(2) [1892] 2 Q.B. 113.

> "that upon the loss of the original letter the photograph was admissible to prove the contents of that letter, but that it could not be used for purposes of comparison with genuine documents."

The above observations have received adverse comments from Wigmore (3rd Edition) Vol. III paragraph 797. The earlier cases probably took into account the possibility of trick photography and the changes likely by adjustment of the apparatus. Wigmore rightly points out that unless we are prepared to go to the length of maintaining that exact reproduction of the handwriting by photography is in the nature of things impossible, the photograph must be admissible in proof. Wigmore then observes :

> "The state of the modern photographic art has long outlawed the judicial doubts above quoted. All that can be said is that a photograph of a writing *may* be made to falsify, like other photographs and like other kinds of testimony, and that a qualified witness affirmation of its exactness suffices to remove this danger, —as much as any such testimonial danger can be removed. Accordingly, it is generally conceded that a photographic copy of handwriting may be used instead of the original, so far as the accuracy of the medium is concerned."

In the footnotes to the above passage many cases are cited from various countries and in regard to the Irish case just cited by us the author observes that it raised "a doubt which was perversely unnecessary".

On the whole, we think that if the court is satisfied that there is no trick photography and the photograph is above suspicion, the photograph can be received in evidence. It is, of course, always admissible to prove the contents of the document, but subject to the safeguards indicated, to prove the authorship. This is all the more so in India under s. 10 of the Evidence Act to prove participation in a conspiracy. Detection and proof of crime will be rendered not only not easy but sometimes impossible if conspirators begin to correspond through photographs of letters instead of originals. Many conspiracies will then remain unproved because one of the usual methods is to intercept a letter, take its photograph and then to send it on and wait for the reply. But evidence of photographs to prove writing or handwriting can only be received if the original cannot be obtained and the photographic reproduction is faithful and not faked or false. In the present case no such suggestion exists and the originals having been suppressed by the accused, were not available. The evidence of photographs as to the contents and as to handwriting was receivable.

A Regarding the specimen writing in the letter Z 217, with which the impugned writings were compared, we think the letter must be treated as genuine for the purpose of comparison of handwriting. The letter was written on June 1, 1960 from Bombay to one Begraj Choraria at Bidsedar. It was admittedly recovered from Balchand appellant's ancestral house. It was addressed to B Dadaji Sahib and it contains numerous references to domestic matters which are usually written in such letters. Corroboration of some of the things said there was available from other sources. It is impossible to think that such a letter could have been forged and planted at Bidsedar in the ancestral home. The letters in BC series 1-45 were rightly compared with it to determine Balchand's C handwriting.

The next question is whether Ethyl Wong's identification of Laxmipat and Balchand, whose photographs were shown to her at the Air Terminal at Bombay should be accepted. Reference in this connection has been made to English cases in which it has been laid down that the showing of a large number of photographs D to a witness and asking him to pick out that of the suspect is a proper procedure but showing a photograph and asking the witness whether it is of the offender is improper. We need not refer to these cases because we entirely agree with the proposition. There can be no doubt that if the intention is to rely on the identification of the suspect by a witness, his ability to identify should be tested E without showing him the suspect or his photograph, or furnishing him the data for identification. Showing a photograph prior to the identification makes the identification worthless. If the prosecution had to rely on the identification by Ethyl Wong to fix the identity of the suspects, the fact that photographs were shown would have materially affected the value of identification. But the prosecution was not required to rely on Ethyl Wong's identification. F It had other evidence on this point. Further, before Ethyl Wong had seen the photographs she had given the names and description of the suspects. In addition to identifying the suspects from the photograph, Ethyl Wong had shown the flat in Bombay and the record of telephone calls at her hotel showed that she was in touch with the suspect in Bombay. Again, she spoke of the suspect at G Calcutta and gave a description of the visiting card without having seen it. This visiting card is blue in colour and has the device in the left hand corner of a heart with a *Swastika* as an inset in the heart. When she pointed out the flat, she was accompanied by a customs officer who did not even know what it was all about. It is also significant that Balchand's photograph was demanded H from Hong Kong. It was also said that if the photograph was not available, address and telephone number would do. In Yau Mockchi's possession photographs, addresses and visiting cards were found. There are other letters which speak of certain goods

to be brought and the account books show that they were sent from Hong Kong. One significant article is a Rolex watch which was asked for and was bought in Hong Kong. The letters themselves and the account of gold purchased etc. and the commission paid speak volumes. Gold was described as 'lali' and its fineness and price were mentioned. To refer to gold as 'lali' in the letters was to employ a childish code which is easily broken when one sees the weight of 'lali' in *tolas*, the price and the fineness. The internal evidence of the letters furnishes all necessary clues to the identity and inter-relation of the several conspirators. No wonder the identity of the writers and recipients of the letters was not specially challenged in the High Court.

Mr. Jethmalini attempted to argue several questions of fact but in view of the practice of this Court and the concurrent findings of the High Court and the Magistrate, we have not attempted to go into the evidence. In fact we can only say that there is such overwhelming evidence of the complicity of the appellants that when the points of law fail there is very little to be said in their favour.

The last contention that there has been discrimination and violation of Arts. 14 and 20 is without substance. Reliance was placed on *S. G. Jaisinghani* v. *Union of India and others*(1) that the absence of arbitrary power is the first essential of the rule of law and here there is room for selecting one out of several accused to lead accomplice evidence. Reference was made to other cases of this Court where unrestrained power of selection without guidelines was held to offend Art. 14. But the case of the accomplice evidence is different. Section 337 of the Code of Criminal Procedure has already been held not to offend Art. 14 and the matter of taking accomplice evidence outside s..337 by using s. 494 or otherwise is not very different. We do not hold that there was any breach of the Constitution in receiving Ethyl Wong's evidence. To hold otherwise would shut out accomplice evidence completely.

There is thus no force in the appeals. Mr. Jethmalini argued that the High Court was wrong in enhancing the sentences of Balchand and Poonamchand appellants and the sentence of Laxmipat which is the maximum permissible under law was also too severe. Gold smuggling has become one of the major difficulties in maintaining our economic structure. The case evidences an international ring of smugglers. In view of this we see no reason to interfere. The appeals will stand dismissed. Appellants to surrender to their bail.

R.K.P.S. *Appeals dismissed.*

(1) [1967] 2 S.C.R. 703.