A

HAROON HAJI ABDULLA

v.

STATE OF MAHARASHTRA

December 14, 1967

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

Evidence Act (1 *of* 1872), *ss.* 30, 114(b) *and* 133—*Confession of co-accused—Extent to which it could be used as corroboration of accomplice evidence.*

Gold was smuggled into India by bringing it in steam launches from places on the Persian Gulf, transhipping it into Indian boats standing out
C at sea, then bringing it to the Indian shores and by being taken away by persons waiting for it. There was a raid on the night of August 13, 1961 while a consignment was being brought in. Many of the smugglers were arrested, the case was investigated into, and on the 14th, the Customs Authorities served notices upon the suspects under s. 171A of the Sea Customs Act. On the 15th, two Customs Officers recorded the statements, in answer to the notices, from two of the suspects K and B, independently, and almost simultaneously. The statement of K implicated himself and
D the appellant in the smuggling and the statement of B contained a confession of his own guilt as well as the implication of the appellant in the smuggling. The appellant himself was served with a notice by the Customs authorities, but he was unwilling to make a statement till he had seen what the others had said.

The appellant and 17 others were tried for the offence of conspiracy to smuggle gold into India. At the trial, K was a witness for the prose-
E cution and B, who was jointly tried with the appellant retracted the confession he made before the Customs authorities alleging duress and torture. He however died before judgment was delivered but after the conclusion of the trial of the case. Some of the accused were acquitted and others, including the appellant, were convicted. In appeal, the High Court, confirmed the conviction of the appellant relying on the evidence of K corroborated by his statement before the Custom authorities and the retracted confession of B.

F In appeal to this Court, it was contended that, as K was an accomplice, no conviction could be based on his evidence unless it was corroborated in material particulars; and the statement of K before the Customs authorities and the confession of B to the Customs authorities, which was later retracted, could not be used for purposes of such corroboration.

G HELD : An accomplice is a competent witness and his evidence could be accepted and a conviction based on it if there is nothing significant to reject it as false. But the rule of prudence, ingrained in the consideration of accomplice evidence, requires independent corroborative evidence first of the offence and next connecting the accused, against whom the accomplice evidence is used, with the crime. Such corroborative evidence could be direct or circumstantial. On such circumstance may be the making of confessions by more than one accused, provided there was no chance for prior consultation between the confessing co-accused for
H implicating another, and they inspire confidence both in their content and in the manner and circumstances of their making. If a confessing co-accused is tried jointly, within the meaning of s. 30 of the Evidence Act, with the accused against whom the accomplice evidence is sought to be used for bas-

ing a conviction, the confession could be referred to as lending some assurance to the verdict. The fact that the confession was later retracted would make no difference unless the admissions made in the confession are satisfactorily withdrawn, or, the making of it explained as having proceeded from fear, duress, promise or the like, of some one in authority. [644 D; 646 A. C-E; 648 D-H; 650 E-F] A

In the present case, though K was an accomplice and his own statement before the Customs authorities could not be used for purposes of corroboration, his evidence, impressed the lower Courts and was accepted by them. There was nothing to make this Court form a different opinion about his veracity. There was no gap of time between the statements of K and B, and it was impossible that the Customs officers could have tutored them to make the statements which agree in many details. Further, both the statements received corroboration at numerous other points in the story from independent evidence. Therefore, the confession of B given independently and in circumstances which exclude any collusion or malpractice affords corroboration to the evidence of K in respect of the appellant. B's confession could also be taken into consideration under s. 30 of the Evidence Act, to lend assurance to the verdict, as B was fully tried jointly with the appellant, and his allegations of duress and torture for retracting his confession came months later and it was impossible to heed them. [644 C-D; 645 D-E; 649 F-G] B C

Rameshwar v. *State of Rajasthan,* [1952] S.C.R. 377, *Nathu* v. *State of U.P.,* A.I.R. 1956 *S. C.* 56, *Subramania Goundan* v. *State of Madras,* [1958] S.C.R. 428, *Ram Prakash* v. *State of Punjab,* [1959] S.C.R. 1219, *Chauraria's* case [1968] 2 S.C.R. 624, *Babhoni Sahu* v. *Emperor,* A.I.R. 1949 P.C. 257, *Emperor* v. *Lalit Mohan Chuckerburty,* I.L.R. 38 Cal. 559 and *Ram Sarup Singh. & Ors.* v. *Emperor,* A.I.R. 1937 Cal. 39, referred to. D

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 42 of 1965. E

Appeal by special leave from the judgment and order dated December, 16, 17, 18, 19, 21, 22 of 1964 of the Bombay High Court in Criminal Appeal No. 53 of 1964.

Nuruddin Ahmed, E. C. Agrawala, Champat Rai, S. V. Pikale and *P. C. Agrawala,* for the appellant. F

Adi P. Gandhi, H. R. Khanna and *S. P. Nayar,* for the respondent.

The Judgment of the Court was delivered by

Hidayatullah, J. The appellant Haroon is the sole appellant from a batch of 18 persons who were tried jointly before the Chief Presidency Magistrate, Esplanade Court, Bombay for offences under s. 120-B of the Indian Penal Code read with s. 167(81) of the Sea Customs Act and certain offences under the Foreign Exchange Regulations Act, 1947. Of these, No. 17 accused (Saleh Mohamed Bhaya) was discharged by the Magistrate, No. 1 accused (Govind Narain Bengali) died after the conclusion of the case but before judgment in the Court of trial and No. 4 accused (Noor Mohammad) jumped bail just before the same judgment. The case against Bengali was held to have G H

A abated and that against Noor Mohammad was kept pending. Nos. 11, 12, 13 and 16 accused were acquitted. Of the remaining accused who were convicted, Haroon alone is before us. His appeal to the High Court of Bombay was dismissed but he obtained special leave under Art. 136 of the Constitution and brought this appeal.

B As this appeal is to be considered on a question of law, it is not necessary to give the facts in detail. The several accused (and many others unknown) were said to be concerned in a criminal conspiracy the object of which was to smuggle gold into India from the Middle East. Gold was brought in steam launches from places on the Persian Gulf and transhipped into Indian boats C standing out at sea, which would then shore it to be taken away by persons waiting for it. The operations were organised by No. 15 accused (Haji Sattar) and his nephew No. 9 accused (Ayub) with the assistance of Bengali, Noor Mohammad and Kashinath (P.W. 1). Four trips, in which gold of the value of nearly a crore of rupees was smuggled, were made and Haroon is said to D have taken part in the third and fourth trips. His share in the affair was only this; that he was present when gold was landed and he helped in taking it away and accompanied Haji Sattar and Ayub in their car.

As the smuggling of gold and the details of the operations are admitted it is not necessary to consider the prosecution evidence E with a view to finding out whether there existed sufficient proof on that part of the case. It may, however be stated that as the raid took place while the last consignment of gold was still with the smugglers and many of them were arrested there and then, no successful attempt to refute it could at all be made. The only question was who were in the conspiracy besides those caught at F the spot. The argument in this appeal is that there is no legal evidence to connect Haroon with the others.

The case agianst Haroon stands mainly on the basis of the statement of the accomplice Kashinath (P.W. 1). Kashinath must be held to be a competent witness in view of our decision in G the *Chauraria's* case(1). Corroboration for Kashinath's evidence on the general aspects of the conspiracy was amply available from diverse sources and this is not denied but in respect of Haroon (whose name does not figure in the rest of the oral or documentary evidence) it was found to exist in the statement of Kashinath before the Customs authorities, and statements made by Bengali and Noor Mohammad also to the Customs Officers, all in answer H to notices under s. 171-A of the Sea Customs Act. The use of these statements is objected to generally and in particular on the

(1) [1968] 2 S.C.R. 624.

following grounds: It is sumitted *firstly* that these statements are not confessions proper to which s. 30 of the Evidence Act can be made applicable; *secondly*, that as Bengali died and Noor Mohammad absconded before the trial was finally concluded against them. their statements are not of persons jointly tried with Haroon; *thirdly* a confession of a co-accused is no better than accomplice evidence and just as one accomplice cannot be held to corroborate another accomplice, the confession of a co-accused cannot also be held to be sufficient corroboration; *fourthly* as these confessions were later retracted their probative value is nil; and *fifthly* Kashinath's previous statement cannot be used to corroborate him as an accomplice cannot corroborate himself. On these submissions it is urged that Haroon's conviction is based really on the uncorroborated testimony of an accomplice.

We may begin by stating that we have read the deposition of Kashinath as the first prosecution witness. We have been impressed by the simplicity of the narrative and there is on record a note by the Magistrate that he was impressed by the manner in which Kashinath deposed. The High Court and the Magistrate have concurred in accepting it and we have not seen anything significant to reject it as false. To corroborate Kashinath, the Magistrate and the High Court have looked into his statement under s. 171-A of the Sea Customs Act. In *Rameshwar* v. *State of Rajasthan*(1) the previous statement was held under s. 157, Evidence Act, corroborative evidence provided it was made "at or about the time when the fact took place." This is perhaps true of other testimony but as pointed out by the Judicial Committee in *Babhoni Sahu* v. *Emperor*(2), the use of the previous statement of an accomplice is to make the accomplice corroborate himself. We have, therefore, not used Ex. A to corroborate Kashinath but we cannot help saying that only two discrepancies were noticed on comparison. The first was that Haroon's name was mentioned in Ex. A in the second trip while in the deposition in Court he was shown to have taken part in the third trip. The details of the trips where his name is mentioned are identical and it seems that in counting the trips, Kashinath has made a confusion, counting the reconnaisance trip as the first trip in his deposition but not in his statement. The second was the omission of a couple of names from the long list of those who were on the beach to receive the gold. This is not of much consequence because any one who tries to give a long list of names, often makes such an omission. On the whole the two statements contained the same story with sufficient details for verification from outside sources. The reception of Ex. A as corroborative of accomplice testimony, although open to some objection, has, however, not affected the case.

(1) [1952] S.C.R. 377. (2) A.I.R. 1949 P.C. 257.

A This leads us to the consideration of the statements of Bengali and Noor Mohammad which were received in corroboration of Kashinath's testimony. These statements contain admission constituting the guilt of the makers under the charged sections. They also mention the name of Haroon, among others, as being concerned in the smuggling and in much the same way as does the B accomplice. The question is, can they be used to corroborate him? These statements are not confessions recorded by a Magistrate under s. 164 of the Code of Criminal Procedure but are statements made in answer to a notice under s. 171-A of the Sea Customs Act. As they are not made subject to the safeguards under which confessions are recorded by Magistrates they must be specially scrutinised to finding out if they were made under threat C or promise from some one in authority. If after such scrutiny they are considered to be voluntary, they may be received against the maker and in the same way as confessions are received, also against a co-accused jointly tried with him. Section 30 of the Evidence Act does not limit itself to confessions made to Magistrates, nor do the earlier sections do so, and hence there is no D bar to its proper application to the statements such as we have here.

No doubt both Bengali and Noor Mohammad retracted their statements alleging duress and torture. But these allegations came months later and it is impossible to heed them. The statements were, therefore, relevant. Both Bengali and Noor Mohammad E were jointly tried with Haroon right to the end and all that remained to be done was to pronounce judgment. Although Bengali was convicted by the judgment, the case was held abated against him after his death. In *Ram Sarup Singh and Others* v. *Emperor*(1), J was put on his trial along with L; the trial proceeded for some time and about six months before the delivery of judgment, when F the trial had proceeded for about a year, J died. Before his death J's confession had been put on the record. R. C. Mitter, J. (Henderson, J. *dubitante*) allowed the confession to go in for corroborating other evidence but not as substantive evidence by itself. Of course, the confession of a person who is dead and has never been brought for trial is not admissible under s. 30 which insists G upon a joint trial. The statement becomes relevant under s. 30 read with s. 32(3) of the Evidence Act because Bengali was fully tried jointly with Haroon. There is, however, difficulty about Noor Mohammad's statement because his trial was separated and the High Court has not relied upon it.

The statement of Bengali being relevant we have next to see H how far it can be held to be legal corroboration of Kashinath's accomplice evidence. The law as to accomplice evidence is well-settled. The Evidence Act in s. 133 provides that an accomplice

(1) A.I.R. 1937 Cal. 39.

is a competent witness against an accused person and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. The effect of this provision is that the court trying an accused may legally convict him on the single evidence of an accomplice. To this there is a rider in illustration (b) to s. 114 of the Act which provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. This cautionary provision incorporates a rule of prudence because an accomplice, who betrays his associates, is not a fair witness and it is possible that he may, to please the prosecution, weave false details into those which are true and his whole story appearing true, there may be no means at hand to sever the false from that which is true. It is for this reason that courts, before they act on accomplice evidence, insist on corroboration in material respects as to the offence itself and also implicating in some satisfactory way, however small, each accused named by the accomplice. In this way the commission of the offence is confirmed by some competent evidence other than the single or unconfirmed testimony of the accomplice and the inclusion by the accomplice of an innocent person is defeated. This rule of caution or prudence has become so ingrained in the consideration of accomplice evidence as to have almost the standing of a rule of law.

The argument here is that the cautionary rule applies, whether there be one accomplice or more and that the confessing co-accused cannot be placed higher than an accomplice. Therefore, unless there is some evidence besides these implicating the accused in some material respect, conviction cannot stand. Reliance is placed in this connection upon the observations of the Judicial Committee in *Bhuboni Sahu* v. *Emperor*(1), a case in which a conviction was founded upon the evidence of an accomplice supported only by the confession of a co-accused. The Judicial Committee acquitting the accused observed:

> "....Their Lordships whilst not doubting that such a conviction is justified in law under s. 133, Evidence Act, and whilst appreciating that the coincidence of a number of confessions of co-accused all implicating the particular accused given independently, and without an opportunity of previous concert, might be entitled to great weight, would nevertheless observe that Courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused. The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a

(1) A.I.R. 1949 P.C. 257.

A man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling a story which in its general outline is true, and it is easy for B him to work into the story matter which is untrue. . . ."

As against this the State relies upon the observations of Imam, J. in *Ram Prakash* v. *State of Punjab*(1):

"The Evidence Act nowhere provides that if the confession is retracted, it cannot be taken into con- C sideration against the co-accused or the confessing accused. Accordingly, the provisions of the Evidence Act do not prevent the Court from taking into consideration a retracted confession against the confessing accused and his co-accused. Not a single decision of any of the courts in India was placed before us to show that a retracted confession was not admissible in evi- D dence or that it was irrelevant as against a co-accused. An examination of the reported decisions of the various High Courts in India indicates that the preponderance of opinion is in favour of the view that although it may be taken into consideration against a co-accused by virtue of the provisions of s. 30 of the Indian Evidence E Act, its value was extremely weak and there could be no conviction without the fullest and strongest corroboration on material particulars. The corroboration in the full sense implies corroboration not only as to the factum of the crime but also as to the connection of the co-accused with that crime. In our opinion, there F appears to be considerable justification for this view. The amount of credibility to be attached to a retracted confession, however, would depend upon the circumstances of each particular case. Although a retracted confession is admissible against a co-accused by virtue of s. 30 of the Indian Evidence Act, as a matter of G prudence and practice a court would not ordinarily act upon it to convict a co-accused without corroboration."

The State further relies upon the observations of Govinda Menon. J. in *Subramania Goundan* v. *State of Madras*(2) where the value of a confession was compared with the value of accomplice evidence.

H The case of the Judicial Committee dealt with accomplice evidence which was sought to be corroborated by retracted con-

(1) [1959] S.C.R. 1219, 1223. (2) [1958] S.C.R. 428.

fessions. The case of this Court dealt with a retracted confession which was sought to be used without corroboration. Both cases treat the retracted confession as evidence which may be used although not within the definition of evidence. But both cases regard this evidence as very weak and only to be used with great caution. Although Govinda Menon, J. in *Subramania Goundan's* case(1) placed a confession on a slightly higher level than accomplice evidence, the observation is intended to convey the difference between the extent of corroboration needed for the one or the other before they can be acted upon. To read more meaning into the observations is not permissible for no such meaning was intended. The confession there considered was also intended to be used against the maker and not against a co-accused. A confession intended to be used against a co-accused stands on a lower level than accomplice evidence because the latter is at least tested by cross-examination whilst the former is not. The observations of Govinda Menon, J. must not be applied to those cases where the confession is to be used against a co-accused. As pointed out by this Court in *Nathu* v. *State of Uttar Pradesh*(2), confessions of co-accused are not evidence but if there is other evidence on which a conviction can be based, they can be referred to as lending some assurance to the verdict.

In this connection the question of retraction must also be considered. A retracted confession must be looked upon with greater concern unless the reasons given for having made it in the first instance (not for retraction as erroneously stated in some cases) are on the face of them false. Once the confession is proved satisfactorily any admission made therein must be satisfactorily withdrawn or the making of it explained as having proceeded from fear, duress, promise or the like from some one in authority. A retracted confession is a weak link against the maker and more so against a co-accused.

In *Rameshwar* v. *State of Rajasthan*(3) this Court laid down certain general rules about the nature of corroboration needed before accomplice evidence may be accepted. It is there pointed out that every detail of the story of the accomplice need not be confirmed by independent evidence although some additional independent evidence must be looked for to see whether the approver is speaking the truth and there must be some evidence, direct or circumstantial which connects the co-accused with the crime independently of the accomplice. One such circumstance may be the making of a number of confessions without a chance for prior consultation between the confessing co-accused. But before even a number of such confessions can

(1) [1958] S.C.R. 428. (2) A.I.R. 1956 S.C. 56.
(3) [1952] S.C.R. 377.

A be used each such confession must inspire confidence both in its content and in the manner and circumstances of its making. If there be any suspicion of false implication the confession must be discarded as of no probative value. This may result from a variety of circumstances of which a few alone may be mentioned, such as why the accused confessed whether he expected a gain B for himself by implicating his co-accused, the part he assigns to himself and that to his co-accused, the opportunity for being coached up to narrate a false story or a story false in certain details. Where there is a single retracted confession corroborating other accomplice evidence, the caution must necessarily be still greater and the probative value smaller. Even if there are more than one such confession and they are proved to be given C independently and without an opportunity for a prior concert, the probative value may increase but the need for caution remains because a number of suspects may be prompted by the same or different motives to embroil a particular individual. It is only when false implication is excluded after close scrutiny that confession of a co-accused can be used to lend assurance to D other evidence. This was so stated by Sir Lawrence Jenkins in *Emperor* v. *Lalit Mohan Chuckerburty*(1) and accepted by this Court, and a retracted confession cannot obviously go further or have higher value.

The offence in this case was detected on the night of August 13, 1961 and investigation went on till the morning of the 14th. E Thereafter the customs authorities served notices upon various suspects and recorded their statements in answer to these notices. The statements of Kashinath (Ex. A) and Bengali (Ex. Z-27) were recorded on the 15th, the former by Karnik (P.W. 24) and the latter by Rane (P.W. 26). These statements were recorded simultaneously or almost simultaneously. The statement of Noor F Mohammad (Ex. Z-17) was recorded by Randive (P.W. 22) on August 19. As there was no gap of time between the statements of Kashinath and Bengali and the incident was only a few hours old, it is impossible that the officers could have tutored them to make statements which agree in so many details. Both the statements receive corroboration at numerous points in the story from G other than accomplice evidence. For example the statements of Kashinath regarding the boats employed, the names of the owners and pilots, the manner the trips were made, the names of persons who took part and what they did, the description of the residences of the muslim co-accused, the furniture and furnishings in the room where gold used to be secreted, the description of the cars employed, and the identity of the several participants other than H Haroon, are amply borne out by evidence which is not accomplice in character. A bare reading of the statement of Kashinath made

(1) I.L.R. 38 Cal. 559, 588.

before the Court and corroborated by his earlier statement to the Customs authorities (except in two particulars already considered) leaves one convinced that he is speaking the truth. We are not seeking corroboration of the accomplice from his own statements because that does not advance accomplice evidence any further. We are only looking into the previous statement to see if it discloses any variation which would put us on further inquiry. The real check comes when one compares these two statements with that made by Bengali. A remarkable degree of agreement is found there also. In fact they are so consistent that Mr. Nuruddin Ahmad sought to make a point and said that they must be the result of collusion. Apart from the fact that there was no time to collude, there are extra details in the different statements which also receive independent corroboration. Further, although Noor Mohammad's statement was not used by the High Court and we have reluctantly left it out of consideration also, nothing was shown to us to destroy the conclusion about the truth of accomplice evidence. If it was, we would have considered seriously whether we should not take it into consideration. Further Haroon himself was also served with a notice like others. He was unwilling to make a statement till he had seen what the others had said. This may well be regarded as peculiar conduct in a man who now claims that he was not concerned with the smuggling.

The High Court has very searchingly examined the evidence of Kashinath and applied to it the checks which must always be applied to accomplice evidence before it is accepted. There is corroboration to the evidence of Kashinath in respect of Haroon from the confession of Bengali given independently and in circumstances which exclude any collusion or malpractice. Regard being had to the provisions of s. 133 of the Evidence Act, we do not think that we should interfere in this appeal by special leave, particularly as we hold the same opinion about the veracity of Kashinath.

The appeal, therefore, fails and is dismissed. Appellant to surrender to his bail.

V.P.S. *Appeal dismissed.*