

Jivan thereupon applied to the High Court to set aside the sanction, as it did not refer to any specific portion of his deposition as being untrue.

Govardhan M. Tripathi for the accused.

JARDINE, J. :—Section 195 of the Code of Criminal Procedure ought to be used in such a way as to give the person, against whom the sanction for prosecution is given, some means of knowing definitely in what the criminal act consists—*In re Báláji Sitárám*⁽¹⁾; *In re Har Dial*⁽²⁾. In the present case the sanction relates to the giving of false evidence in a long deposition; but not the very slightest indication is given in the proceedings as to what story or statement was in the opinion of the Sessions Judge false. The Judge issuing a sanction for a prosecution ought to apply his mind closely to the facts with a view to ascertain whether they really constitute an offence, and also to prevent a sanction issued with one purpose or design being abused to the furtherance of some other—*Chintáman Dev v. Chintáman Dev*⁽³⁾.

We, therefore, on the petition of Jivan Ambaidás revoke the sanction for his prosecution.

Sanction revoked.

(1) 11 Bom. H. C. Rep., 34.

(2) I. L. R., 6 All., 105.

(3) P. J., 1878, p. 253.

APPELLATE CRIMINAL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

QUEEN-EMPRESS *v.* JAVECHARA'M*

Evidence Act (I of 1872), Secs. 25 and 26—Confession—Confession made to a police officer by accused while in police custody—Accomplice—Spy—Distinction between a spy and an accomplice—Evidence of an accomplice—Evidence.

A statement made to a police officer by an accused person while in the custody of the police, if it is an admission of a criminating circumstance, cannot be used in evidence under sections 25 and 26 of the Indian Evidence Act (I of 1872).

The action of a spy and informer in suggesting and initiating a criminal offence is itself an offence, the act not being excused or justified by any exception in the Indian Penal Code (XLV of 1860) or by the doctrine which distinguishes the spy from the accomplice.

* Criminal Appeal, No. 57 of 1894.

1894.

IN RE
JIVAN
AMBÁIDÁS.

1894.

April 2.

1894.

QUEEN-
EMPRESS
v.
JAVECHARÁM.

But the act of a detective in supplying marked money for the detection of a crime cannot be treated as that of an accomplice.

Distinction between a spy and an accomplice pointed out.

Rex v. Despard(¹), *Reg. v. Mullins*(²), *Queen-Empress v. Mona*(³), referred to and followed.

APPEAL from the decision of W. R. Hamilton, Presidency Magistrate.

The accused Javecharám, who was a ticket collector at the Grant Road Station in the service of the B. B. & C. I. Railway Company, was charged, under section 408 of the Indian Penal Code (XLV. of 1860) with criminal breach of the trust as a servant for selling certain railway tickets and appropriating the sale-proceeds to his own use. He was also charged with abetment of the offence of criminal breach of trust under section 116.

Accused No. 2, Ahmed Hussein, was charged with dishonestly receiving stolen property, knowing the same to be stolen, under sections 411 and 414 of the Penal Code.

The Presidency Magistrate convicted both the accused of the offences charged, and sentenced accused No. 1 to eighteen months' rigorous imprisonment, and accused No. 2 to one year's rigorous imprisonment.

His reasons for convicting, as stated in his judgment, were as follows :—

“There is no doubt that accused No. 2, Ahmed Hussein, was caught in the act of selling the second halves of certain railway return tickets to Mahomed Ali. The money he had received for 15 tickets was found on him, which was marked money, and the 15 tickets were in the hands of Mahomed Ali. Besides, 7½ other tickets were found on Ahmed Hussein which had not been sold. Mahomed Ali may be an informer, and may not have a good character, but the fact of buying and selling these tickets cannot be disputed.

“Ahmed Hussein explained how he got these tickets from one Javecharám and one Paul. This statement is not a confession, but is merely an explanation of a fact which may be innocent. For instance, a person might say ‘I did not steal these things, but I got them from A.’ This would not be a confession, but a denial of guilt and a simple explanation of the fact of possession. Therefore the admission of so much of Ahmed Hussein's statement as merely explained how he got the tickets, does not appear to be open to objection, although by itself it is of no value to prove that he did get them from Javecharám.

(1) 28 State Trials, 346 at p. 489.

(2) 3 Cox C. C., 526.

(3) I. L. R., 16 Bom., 661.

"In consequence of this statement, the police laid a trap to discover if Javecharám had any connection with Ahmed Hussein. On the morning of the 30th January, 1894 (Ahmed Hussein was arrested on the evening of the 29th) they took Ahmed Hussein and others to the Grant Road Station, and it is proved that Ahmed Hussein had a short conversation with Javecharám, who is a ticket collector at the station, and that Ahmed Hussein with Mahomed Ali and Ali Agi, a police sepoy in plain clothes, went into a coffee shop at the foot of the Grant Road bridge, while the detectives placed themselves on the other side of the road. In an hour or more, Javecharám was seen to go to the coffee shop and speak to Ahmed Hussein for a few minutes. He went back to the station and returned to the coffee shop in half an hour. There he sat down with Ahmed Hussein and Mahomed Ali, and Ahmed Hussein asked him for some tickets. Javecharám asked him for the money for the tickets he had given to him the day before. Ahmed Hussein explained he had sold them and that Mahomed Ali wanted to buy two more. Javecharám replied that he had just been to the station, but had not been able to get any tickets; he would bring them the next day. It was then arranged that Mahomed Ali should pay for the two tickets he wanted, and that they should be sent to his address, which Javecharám wrote down on a piece of paper. This writing is proved to be the writing of Javecharám. He also gave Mahomed Ali a receipt for Rs. 4 for the price of the two tickets promised, and as Ahmed Hussein said he would pay Javecharám Rs. 10 for the 12 tickets already sold through him the day before, Javecharám included that in the receipt which was handed over to Mahomed Ali. The money Rs. 10 *plus* Rs. 4, which was marked money, was paid to Javecharám, and then on a signal the detectives crossed the road, entered the room, and found them all together in the back room of the shop.

"Mahomed Ali, who in fact is the informer in the case, at once told the police officer that the money had been paid to Javecharám, and Javecharám produced the money and cried that '*zulum*' had been committed on him. This is said to mean that Mahomed Ali had forced the money into Javecharám's pocket against his will or without his knowledge. It is proved, however, that when the police came in, they were sitting happily together, and '*zulum*', therefore, does not imply any violence, but some trick. Mahomed Ali also said that a paper with his address would be found on Javecharám, and the paper was found. The receipt for the Rs. 10 *plus* Rs. 4 was produced by Mahomed Ali.

"It is contended that as the receipt is a receipt for 12 tickets only, and as 15 tickets were sold, besides $7\frac{1}{2}$ taken from Ahmed Hussein, it is impossible that the 12 tickets could be the same as these $22\frac{1}{2}$ tickets, and, therefore, that there is no connection between Javecharám and Ahmed Hussein which can be proved. Ahmed Hussein had stated that he had got the tickets from Javecharám and Paul, and the tickets were as likely to be those which Paul had supplied. The fact that the receipt refers to 12 tickets only, is not inconsistent with the fact that Javecharám gave the $22\frac{1}{2}$ tickets to Ahmed Hussein or at least a part of them. It is consistent with the fact that Javecharám was told that 12 tickets had been sold and that Rs. 10 had been paid for them. It must be remembered that these statements were part of a plot. Mahomed Ali had only Rs. 10 in marked money, and he would know that Javecharám would accept Rs. 10 for 12 tickets, the balance being the share of

1894.

QUEEN-
EMPRESS

JAVECHARÁM.

1891.

QUEEN-
EMRESS
v.
JAVECHARÁM.

Mahomed Ali for selling these tickets. It may possibly be true that Paul had given some of the 22 tickets to Ahmed Hussein, but I think it to be clearly proved that 12 at least of these tickets were given by Javecharám for which he received Rs. 10.

“It is denied, however, that the receipt is in his writing. Unfortunately the prosecution have not been able to call any witnesses to prove the handwriting, in Gujaráthi, of Javecharám. The fact that it is his writing must, therefore, rest upon the statement of Mahomed Ali alone. It is also noticeable that no pencil was found on Javecharám, or in the shop. It is not said that the pencil was searched for, but the fact that it was not found, tells in his favour.

“Javecharám was first charged with criminal breach of trust in respect of the tickets sold, but I have found it necessary to add another charge of abetment with reference to the conspiracy to sell 2 tickets to Mahomed Ali for Rs. 4. This rests on the evidence of Mahomed Ali and the fact that his address was written down by Javecharám and found upon him, and, further, that the receipt given by Javecharám refers to his having received the Rs. 4, and the fact that the Rs. 4 were found in his pocket. Ali Agá was an eye-witness to the payment of the money, although he did not see any writing being made, this having taken place in another room. I believe there is no reasonable doubt that the facts occurred as stated by Mahomed Ali, and I, therefore, conclude that he was engaged with Mahomed Ali and Ahmed Hussein in a conspiracy to obtain for the former 2 tickets of the company, and that he received Rs. 4, which is an act in pursuance of that conspiracy: see section 107, clause 2, Indian Penal Code. I presume it is not meant by that section that he must have done something to obtain the tickets, and that any collateral act is sufficient to satisfy the terms of the section, but this construction is open to question.

“I find Javecharám guilty, first, of criminal breach of trust as a clerk or servant, and, secondly, of abetment of criminal breach of trust as a clerk or servant, and I sentence him to eighteen months' rigorous imprisonment—sections 116 and 408, Indian Penal Code; that is, to one year on the first charge and six months on the second charge.

“I find Ahmed Hussein guilty of dishonestly receiving stolen property, knowing it to be stolen, and sentence him to suffer one year's rigorous imprisonment—sections 411 and 414, Indian Penal Code.”

The accused No. 1 appealed to the High Court.

Jardine and *Russell* (with *Motilál M. Munshi*) for accused:—The statement of accused No. 2, that he received tickets from accused No. 1, is an admission of an incriminating character, and being made to the police while accused No. 2 was in police custody, it is inadmissible under sections 25 and 26 of the Evidence Act—*Imperatrix v. Pandharináth*⁽¹⁾. The witness Mahomed is an informer and the real instigator of the offence.

(1) I. L. R., 6 Bom., 34.

He was a tool in the hands of the police, whose object was to get the offence committed. This man and the detective who supplied the marked money, as well as the other police witnesses who laid a trap for the accused, are all tainted witnesses; they are accomplices, and as such their evidence is entitled to no weight unless it is corroborated in material particulars. There is nothing to corroborate their statements. The receipt which is produced, is a clear fabrication. The money found on the accused No. 1 was thrust on him against his will and in spite of his protest.

Lang (Advocate General) for the Crown:—The Magistrate rightly held that the statement of accused No. 2 was not incriminating. He does not say that he got the tickets from accused No. 1, knowing the same to be stolen property. He does not admit his guilt. His statement does not amount to a confession. It is, therefore, admissible in evidence. As to the evidence of Mahomed Ali and of the police witnesses, it cannot be treated as accomplice evidence. Mahomed Ali's story is, moreover, amply corroborated by independent evidence. The accused is found in possession of the marked money. He also produced from his pocket the Rs. 10 note which was given him on account of the price of the tickets sold. His explanation that the note and the money were thrust on him by the police, is a lie and an afterthought. He did not protest against it at the time of the arrest. He does not account for his presence at the tea shop where he was arrested. He does not explain what he was doing there at the time. The receipt, Exhibit 1, is conclusive proof of his guilt. There is nothing to show that it is forged.

JARDINE, J.:—Mr. Jardine, as counsel for the prisoner Javecharám, has raised several questions on the law of evidence, which we will consider before dealing with the facts. He objects to the Magistrate recording and using as evidence the statement made by the other prisoner, Ahmed Hussein, while in the custody of the police, *viz.*, that he had received the railway tickets from Javecharám and another. We are of opinion that this is an admission of a criminating circumstance on which the prosecution evidently rely, and which has weighed with the Magistrate

1894.

QUEEN-
EMPRESS
2.
JAVECHARÁM.

1894.
 QUEEN-
 EMPRESS
 v.
 JAVECHARÁM.

in his judgment on the facts. The ruling in *Imperatrix v. Pandharináth*⁽¹⁾, being applicable, we must hold that the admission of this statement as evidence was contrary to sections 25 and 26 of the Indian Evidence Act.

Mr. Jardine then contended that the witness Mahomed Ali, as well as the detective Murár Ráo, who supplied the marked money used as payment for the tickets, and the other two policemen, Myá Ján and Agá Ali, who were present as detectives when the alleged corrupt payment for the tickets was made to Javecharám, are participators in the crime, and that, therefore, their evidence, being that of accomplices, must be weighed with caution and requires corroboration, as settled by a long series of judgments—*Queen-Empress v. Maganlál*⁽²⁾; *Queen-Empress v. Chagan*⁽³⁾. But we find in the evidence no suggestion of any criminal act as done by Myá Ján and Agá Ali.

With regard to Murár Rao's supplying the marked money, we are not able to pronounce that this act makes him an accomplice. We believe that in an unreported case a similar act was so treated here, following the principle of *Empress v. Umi*⁽⁴⁾. The action of the spy and informer, Mahomed Ali, in suggesting and initiating the present offence of selling these tickets, by going to the prisoner, Ahmed Hussein, and offering to buy some used tickets, does appear to this Court to have been a criminal offence, the act not being excused or justified by any exception in the Indian Penal Code, or by the doctrine which distinguishes the spy from the accomplice, applied by Lord Ellenborough in *Rex v. Despard*⁽⁵⁾, by Mr. Justice Maule in *Reg. v. Mullins*⁽⁶⁾, and by this Court in *Queen-Empress v. Mona Puna*⁽⁷⁾ and *Queen-Empress v. Shankar*⁽⁸⁾. Mahomed Ali appears from his own account to have been the first instigator of the present offence; not merely a spy, who knowing of criminal doings, or doings which will culminate in a crime, merely pretends to concur with the perpetrators. Mere good intention does not ordinarily excuse a criminal act. As remarked by Cockburn, C. J., in the case of

(1) I. L. R., 6 Bom., 34.

(2) I. L. R., 14 Bom., 115.

(3) *Ibid.* 331.

(4) I. L. R., 6 Bom., 126.

(5) 28 State Trials, at p. 489.

(6) 3 Cox C. C., 526 at p. 531.

(7) I. L. R., 16 Bom., 661.

(8) Cr. Rul. 91 of 21st Dec. 1888.

the Confessional Unmasked, *The Queen v. Hicklin*⁽¹⁾, whom we quote about illegal proclamations of indemnity to criminals in *Queen-Empress v. Chagan*⁽²⁾, honest objects may not be attained by breaking the law, and a man must be taken to have intended what was the natural consequence of his act.

The strictness of the law and the habit of the Courts not to allow exceptions not sanctioned by the Legislature have been illustrated in several important judgments of this Court, *e. g.*, in *Maganlal's case*⁽³⁾, where we dealt with the excuse of fear as regards criminal acts done to avert supposed injury to the perpetrator, in *Queen-Empress v. Ganesh Khanderao*⁽⁴⁾ as regards hoaxes and jokes carried too far. The reason may be found in the fact, that when an enterprise stamped as criminal by the law is once begun, the beginner, who without any immoral intention has started it, may soon find himself powerless to control the circumstances, the passions of others, or his own inclinations; and so the very evil he sets himself to combat may result from his criminal act. He may set his trap to catch a habitual criminal, and the bait may be an enticement to a person who has not been tempted to the crime before. Therefore, as a safeguard to the tempter and the tempted, whose good faith may waver, as well as to other people put in peril, the law marks off certain acts as punishable. This discussion shows the need of appraising the action of Mahomed Ali, whom the learned counsel discredits as a breaker of the law and an accomplice.

We will now examine the authorities. At the trial of Colonel Despard for high treason, Lord Ellenborough says (p. 489) those persons do not partake of the criminal contamination of accomplices who enter into "communication with the conspirators with an original purpose of discovering their secret designs, and disclosing them for the benefit of the public." In *Reg. v. Mullins*, Mr. Justice Maule defined two sorts of witnesses. Of one sort he said (p. 531) : "They were persons who understanding, as they say, that there were dangerous designs entertained by certain Chartist societies, joined the meetings and pretended to sympathise with

(1) L. R., 3 Q. B., 360.

(3) I. L. R., 14 Bom., 115.

(2) I. L. R., 14 Bom., 331.

(4) I. L. R., 13 Bom., 506.

1894.

QUEEN-
EMPRESS
v.
JAVECHARAM.

1894.
 QUEEN-
 EMPRESS
 v.
 JAYECHARÁM.

the views of the conspirators in order that they might communicate their designs to Government. They joined the scheme for the purpose of defeating it, and may be called spies." The others, he says, "were really Chartists, concurring fully in the criminal designs of the rest for a certain time, until getting alarmed, or from some other cause, they turned upon their former associates and gave information against them. These persons may truly be called accomplices." The learned Judge afterwards gives the following direction:—"An accomplice confesses himself a criminal and may have a motive for giving information, as it may purchase immunity for his offence. A spy, on the other hand, may be an honest man; he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and if he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men, I can see no impropriety in his taking upon himself the character of an informer. The Government are, no doubt, justified in employing spies; and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur with the perpetrators. Under such circumstances they are entirely distinguished, in fact and in principle, from accomplices, and although their evidence is entirely for the jury to judge of, I am bound to say that they are not such persons as it is the practice to say require corroboration."

We have to apply these principles to such indications as the evidence affords of the conduct of Mahomed Ali; and treating him as the first instigator of the offence, we are inclined, but not without doubt, to hold him to be an accomplice.

But in the present case the sagacity of the Court has to be applied to the whole evidence. Turning to the merits, we find, as indeed the Magistrate points out, that Mahomed is not confirmed by any other person as to Javecharám having written the highly incriminating receipt, Exhibit 1, which was found on Mahomed. Neither is any pencil produced. It is argued that Javecharám could not have been so foolish as to give so damning a writing as this receipt. It is clear that Mahomed might have brought such a writing with him, and that he has an interest

in procuring a conviction. But, on the other hand, all our experience shows that criminals are often very rash: were it otherwise, many more would escape. Again, as the spy may be a liar about this incident, it may be remarked that the receipt chimes in with the trap laid by giving a note of Rs. 10 value and four marked rupees. This note and money were found on the prisoner, who says they were thrust upon him, as also the paper containing Mahomed's address. A careful study of the evidence induces us to believe that these articles had not been thrust on Javecharám against his will. He made no reasonable vigorous protest at the time. His story is inconsistent with his actions that morning: he does not explain what he was doing at his visits to the tea shop. Moreover, the detective Ali Agá deposes to seeing Javecharám receive the marked money from Mahomed and the other prisoner. The whole story told by the prosecution witnesses, including the events of the 28th and 29th January and the capture of Ahmed Hussein, appears to hang together; and even the incident of the receipt, Exhibit I, becomes less improbable when we remember that Javecharám was dealing with artful men, anxious to detect him and to produce good evidence in the Police Court. He got a large sum, considering his pay, *viz.* Rs. 10 for tickets received and Rs. 4 payment in advance; and it may well be that his avarice made him incautious and complaisant with these good paymasters. There appear to be no signs of falsehood in the evidence, which, moreover, the prisoner has not in any way rebutted. There is no reason to give more weight to his mere denial than to the evidence, which has been believed by the Magistrate who took it, and which contains much corroboration of Mahomed's story at all points. There being no rebutting evidence, the rule of the Privy Council, that when there are two conflicting stories the Court should believe the one which is the most probable, does not come into play.

For these reasons we confirm the sentence of one year's rigorous imprisonment awarded in respect of the first charge. We do not think the mere receipt of the Rs. 4 from the instigator, Mahomed Ali, and the promise of Javecharám to supply more used tickets, constitute the offence of abetment within the meaning of sec-

1894.

QUEEN-
EMPRESS

JAVECHARÁM.

1894.

QUEEN-
EMPRESS

JAYECHARÁM.

tion 107 of the Indian Penal Code. We, therefore, acquit the prisoner of that offence and reverse the sentence of six months' rigorous imprisonment passed therefor.

Sentence varied.

CRIMINAL REFERENCE.

Before Mr. Justice Jardine and Mr. Justice Ranade.

IN RE RAGHUNATH MAKUND.

1894.

April 4.

Municipal Act (Bombay Act III of 1888), Sec. 353—Notice to a house-owner to reduce the height of his building given more than three months after its completion—"Completion"—Meaning of the word.

One Raghunáth Makund was served with a notice, under section 353 of the City of Bombay Municipal Act (Bombay Act III of 1888), requiring him to reduce the height of a building which he had erected. The building was completed in June, 1893, and the notice was issued on 13th January, 1894. Raghunáth was prosecuted for not complying with this notice. He contended that the notice was time-barred, as it had not been given within three months after the completion of the building. In answer to this plea it was urged, on behalf of the Municipality, that the building could not be said to have been completed, unless and until such accommodations as privies and cesspools had been executed in accordance with the requirements of the Health Department, and that, therefore, the notice was within time.

Held, that the notice was time-barred. The word "completion" in section 353 of Bombay Act III of 1888 must be taken in its ordinary sense, and the Court cannot read into the section "in accordance with sanitary regulations" or "sanitary officers' opinions."

THIS was a reference by P. H. Dastur, Fourth Presidency Magistrate, under section 432 of the Code of Criminal Procedure (Act X of 1882).

The reference was in the following terms:—

"Mr. Raghunáth Makund has built a new house at Girgaum Back Road. The width of the street on which it abuts is about 9' 7" and the height of this building from the ground level to the eaves is 47' 6".

"By by-law 30 of the building by-laws made by the Bombay Municipality it is provided that 'a person who shall erect a new building which abuts on a street of less than 50 feet in width . . . shall not without the written permission of the Commissioner erect such a building to a greater height than one and a half times the width of that street.'