

SaleemuddIn Vs. State

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Court : Delhi

Decided On : Apr-20-1971

Reported in : ILR1971Delhi432

Judge : Hardayal Hardy and; V.S. Deshpande, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 2; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 417; [Evidence Act, 1872](#) - Sections 45

Appeal No. : Criminal Appeal No. 132 of 1969

Appellant : Saleemuddin

Respondent : State

Advocate for Pet/Ap. : B.S.C. Singh and; K.L. Arora, Advs

Judgement :

Hardayal Hardy, J.

(1) This judgment will dispose of two criminal appeals and one criminal revision. The appellant in Criminal Appeal No. 132 of 1969 is Saleemuddin while the appellant in Criminal Appeal No. 27 of 1970 is the State of Delhi which is also a petitioner in Criminal Revision No. 49 of 1970.

(2) The appellant Saleemuddin was being tried along with one Riaz Ahmed, a Pakistan national. Two other persons, Mohd. Atique and Mohd. Yunis were also being tried along with them. The charge against all of them was one of conspiracy to commit illegal acts, namely, to commit offences under Section 3 of the Indian Official Secrets Act, 1923. By a judgment dated October 31, 1969 delivered by the Additional Sessions Judge, Riaz Ahmed, Mohd. Atique and Mohd. Yunis were acquitted of the charge framed against them while Saleemuddin was convicted and sentenced to rigorous imprisonment for five years for an offence punishable under Section 120B Indian Penal Code read with Section 3 of the Indian Official Secrets Act, 1923 and also to rigorous imprisonment for five years under Section 3. In a judgment which but for the errors to which we shall presently refer, is extremely well written, the learned trial Judge has held that Riaz Ahmed being a foreign national could not be tried in this country for the offence of conspiracy which according to him was committed outside India. He has also held that there was no evidence of Mohd. Atique and Mohd. Yunis having allegedly participated in the conspiracy. As regards Saleemuddin he has held that there 'was a criminal conspiracy at Lahore during the months of April-May 1968 between Saleemuddin and some Pakistani nationals belonging to the Pakistan Intelligence, namely, M. A. Bajwa and Malik Salim etc., to commit the offence of spying in India and make sketches and collect other information relating to defense installations in this country.

(3) Riaz Ahmed no doubt joined that criminal conspiracy at Lahore and subsequently came to India to join Saleemuddin to assist him in his espionage activities. He was, however, arrested before he could contact Saleemuddin at Bareilly. Saleemuddin did commit acts of espionage at Bareilly by making a rough sketch and preparing an intelligence report relating to Izzat Nagar Air-port at Bareilly. He also sent some reports to the Pakistan Intelligence earlier and was therefore guilty of conspiracy and espionage. [After discussing the facts, the judgment proceeded.]

(4) The case was tried by Shri K. S. Sidhu, Addl. Sessions Judge Delhi. who on a consideration of the material placed before him arrived at the conclusion alluded to above. The learned trial Judge was of the view that the confessions Ext. Pc, Pg

and PM/7 allegedly made by Saleemuddin, Mohd. Atique and Mohd. Yunis respectively could not be treated as voluntary and had, therefore, no evidentiary value. It is not necessary for us to re-produce that various reasons mentioned in paragraphs 22 to 37 of the judgment and the authorities noted therein as we are fully in agreement with learned trial Judge.

(5) As regards the confession Ex. PK/1 made by Riaz Ahmed and recorded by Shri D. V. Kapoor, Sub-Divisional Magistrate Delhi, the learned trial Judge was of the opinion that the learned Magistrate had taken all necessary precautions to satisfy himself that the confession made by the accused was voluntary. The said confession was no doubt made after the accused had remained in police custody for nearly 13 days, but in the opinion of the learned trial Judge, this circumstance alone did not detract from the voluntary nature of the confession. We are in agreement with the trial Judge on this point. The said confession has, therefore, to be read as evidence against Riaz Ahmed.

(6) According to that confession, Riaz Ahmed had entered into conspiracy with M. A. Bajwa, a Pakistan Intelligence Officer in April 1964. It was agreed between them that Riaz Ahmed would be sent to India to collect information regarding defense installations in this country. He was given training as a spy by the Pakistan Intelligence a from May 1968 to July 1968. On August 10, 1968 he was introduced by M. A. Bajwa to Malik Salim, another Pakistan Intelligence Officer telling him that Riaz Ahmed was being sent to India under the assumed name of Asif. to contact Saleemuddin at Bareilly. The two Pakistan Intelligence Officers gave him the documents Exs. PI, PL/1, PL/2, PL/3 and PL/4 before he entered India on his espionage mission on the night before August 12, and 13, 1968. According to the confession, Riaz Ahmed was arrested by the police in front of the Railway Station, Delhi Main on August 13, 1968 at about 10.13 P.M. The confession showed that Riaz Ahmed was a party to the conspiracy hatched at Lahore by the Pakistan Intelligence for collecting information regarding the air-fields in India. The documents recovered from him at the time of his arrest also confirm his participation in the conspiracy. The fact of his arrest and the recovery of the documents, is fully supported by Surjit Singh (Public Witness 1) and Lajpat Rai (Public Witness 2). Besides the documents mentioned above a cash amount

of Rs, 447.07 in Indian currency was also found from him. He did not have any travel documents. There is thus no reason to doubt that he was arrested in the manner alleged by the prosecution and the incriminating documents were recovered from him at that time.

(7) EX. PI is a letter purporting to have been written by Malik Salim to Saleemuddin on August 12, 1968. The letter was delivered to Riaz Ahmed for being delivered to Saleemuddin at Bareilly. In this letter Malik Salim was apparently telling Saleemuddin that instead of Riaz he was sending Asif because Riaz had to under-go 'some surgery. The word 'Riaz' obviously has reference to another person bearing that name. But since the name of the accused was also Riaz he was being sent under the assumed name of Asif. Ex. PL/1 is a photograph of Saleemuddin bearing his signatures on its back. Saleemuddin has admitted in his statement under Section 342 Cr.P.C. that it was his photograph and that it bore his signatures. The fact that this photograph was recovered from Riaz Ahmed at the time of his arrest goes to show that Riaz Ahmed had at some stage prior to the said recovery joined the conspiracy between Saleem-ud- din, M. A. Bajwa and Malik Salim of the Pakistan Intelligence for collecting information regarding the defense installations in India. Ex, PL/2 is the slip containing the address of Saleemuddin at Bareilly. Ex. PL/3 is a typed brief captioned 'mission' containing instructions as to the job which Riaz Ahmed was expected to perform. This further confirmed his participation in the conspiracy. Ex. PL/4 is a slip of paper containing two addresses of Lahore to which Riaz Ahmed was required to send his communications from India. This also connects him with the conspiracy.

(8) These documents conclusively prove that Riaz Ahmed was a party to the conspiracy between M.A. Bajwa, Malik Salim and Saleemuddin for the purpose of collecting information regarding the air fields in India for use by its enemies.

(9) According to the trial Judge, the offence of criminal conspiracy by Riaz Ahmed was committed by him at Lahore in Pakistan. The offence was complete as soon as Riaz Ahmed who was a national of Pakistan, agreed to be a party to the conspiracy at Lahore. For entering into India without a pass-port and a visa, he was prosecuted and convicted and sentenced under Section 14 of the Foreigners

Act, 1946 read with rules 6 and 3 of the Indian Pass-port Rules, 1950 and Section 3 of the Indian Pass-port Act, 1920. He was arrested in India before he could do any illegal act in this country in pursuance of the conspiracy and that is why no charge for an offence under Section 3 of the Indian Official Secrets Act, 1923 was framed against him.

(10) The argument presented on his behalf and accepted by the trial Judge was that the courts in this country have no jurisdiction to try a foreign national on a charge involving an offence alleged to have been committed by him in a foreign land. For this purpose. Sections 2 and 4 of the Indian Penal Code were pressed into service.

(11) The sections read -

'2. Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India. '4. The provisions of this Code apply also to any offence committed by- (1) any citizen of India in any place without and beyond India; (2) any person on any ship or aircraft registered in India wherever it may be. Explanation:-In this section, the word 'offence' includes every act committed outside India which, if committed in India, would be punishable under this Code.'

(12) It seems to us that the learned trial Judge fell into a serious error in arriving at this conclusion.

(13) On behalf of the State the attention of the learned Judge was invited to a decision of the Supreme Court in Mobarik Ali Ahmed v: The State of Bombay : 1957 CriLJ1346 and to a Bench decision of Bombay High Court in Abdul Kadar Saleh Mohomed and others v. State : AIR1964 Bom133 . In an elaborate discussion the learned Judge distinguished both those cases and came to the conclusion that the offence of criminal conspiracy committed by Riaz Ahmed was complete as soon as he agreed to be a party to it at Lahore. Both the elements of crime, means read and the act, were committed by him at Lahore and he did not commit any overt act in India in pursuance of the conspiracy. He was, therefore, acquitted of that charge.

(14) There is a fallacy in the learned Judge's view which is opposed to the very language of sections 120A and 120B of the Indian Penal Code. It is true that a mere agreement may bring the conspiracy into existence and since the offence of criminal conspiracy is a substantive offence a mere agreement would render the persons taking part in that agreement liable for being prosecuted on the charge of conspiracy. But it has nowhere been said in the Code that as soon as an agreement is entered into between the persons concerned the offence no longer exists. Criminal conspiracy may come into existence and may persist and will persist so long as persons constituting the conspiracy remain in agreement and so long as, they are acting in accord, in furtherance of the object for which they had entered into the agreement. This was the view taken by a Division Bench of Calcutta High Court in *Abdul Rahman and others v. Emperor* : AIR1935 Cal316 (3).

(15) The same view was also taken by the Supreme Court in *Mohd. Hussain Umar Kochra etc. v. K. S. Dilip Singhji and another* : 1970 CriLJ9 where it was said that the agreement is the gist of the offence but in order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons co-operate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy.

(16) In another case it was said that the conspiracy is like a running stream. Some persons join it in the beginning while others join it later. But they are all parties to the same general conspiracy, leaving aside certain other-unrelated conspiracies or separate conspiracies among some of the members who co-operate towards their separate ends.

(17) In the present case, the learned trial Judge has himself found that Riaz Ahmed was a party to the conspiracy between M.A. Bajwa, Malik Salim and Saleemuddin for the purpose of collecting information regarding air fields in India for use by its enemies. He has not talked of any other conspiracy between those persons or one or more among them and some other persons on the Indian soil which: could be regarded as a separate conspiracy. As such there was a general conspiracy among the four persons named by the Judge and may be with others, with the uniform object as mentioned by him. That conspiracy did not abort nor was it abandoned. None of the persons who joined the said conspiracy dropped out although some other persons did join the said conspiracy at a later stage. The conspiracy, therefore, continued until it was broken up. The common intention of the conspirators some of whom joined it at an earlier stage while others joined it at a later stage, was to work for the furtherance of the common design. When Riaz Ahmed set his foot on the Indian soil without any travel documents he did so in furtherance of the common design of the conspirators. His visit to this country was an illegal act or an act which was not illegal but was accomplished by illegal means. This act was in furtherance of the common design. Being a party to a conspiracy while it was being continued he became liable to be tried for the offence of conspiracy with Saleemuddin who was an Indian national because the offence of conspiracy was continued within the Indian territory although the other conspirators were out of India.

(18) As was said by Patel J., in the Bombay case cited above that by its very language Section 120B must apply to those who are members of the conspiracy during its continuance. The emphasis is on the words 'are parties'. It is not that the agreement as such is punishable, but being a party to a conspiracy is punishable. It is intended to be treated as a continuous offence, and whoever is party to a conspiracy during the period for which he is charged, is liable under Section 120B.

(19) The learned trial Judge referred to the observations of Mr, Justice Holmes in United States v. Kissel (1909 218 Us 601 : 54 L E1168 and quoted the full passage from that judgment by adding that the observations were made by Mr. Justice Holmes in the context of 'a conspiracy of the type alleged' i.e. a conspiracy in restraint of trade and was, therefore, confined to that extent. We do not agree

with learned Judge in the view he has taken of the observations made by Mr. Justice Holmes: The observations were no doubt made in a case of un-lawful conspiracy in restraint of trade but they have a reference to the law of general conspiracy for it was said in that passage that 'a conspiracy is a partnership in criminal purposes. That as such it may have continuation in time, is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act.'

(20) The trial Judge has also referred to the passage in paragraph 607 at page 329 of Vol. 10 of Halsbury's Laws of England (3rd Edition). The learned trial Judge is right when he says that the word used in that passage is 'county' and not 'country', but that by itself will not make any difference. The passage was no doubt written in the context of local jurisdiction and was, therefore, inapt, but para 581 at page 318 of the said volume which relates to 'acts outside English territory,' makes it plain that for the purposes of criminal jurisdiction, an act may be regarded as done within English territory, although the person who did the act may be outside the territory, for instance, a person who, being abroad, procures an innocent agent or uses the post office to commit a crime in England is deemed to commit an act in England. Similarly if a person, being outside England, initiates an offence, part of the essential elements of which take effect in England, he is amenable to English jurisdiction, for though 'the person who had initiated an offence is a foreigner, he can be tried if he subsequently comes to England. In *Mobarik All Ahmed v. The State of Bombay*, Jagannadhadas J. who wrote the judgment of the Court, has referred to a passage in Hackworth's Digest of International law (1941 Edition) Vol. II, at page 188, where there is a reference to the opinions of certain eminent American Judges. The following dictum of Mr. Justice Holmes noticed therein has been quoted by his Lordship, It reads :-

'ACTS done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power.'

(21) His Lordship also referred to the following quotation from the judgment of the Permanent Court of International Justice, dated 7th September, 1927 in the case relating to S. S. Lotus (published in Hyde's International Law) (second edition) Vol. I at page 798 :-

'IT is certain that the Courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there.'

(22) Once it is held that the offence of conspiracy is a continuing offence and any act done by one of the conspirators on the Indian soil after the offence of conspiracy had been initiated abroad, would give jurisdiction to the Indian Courts, as if the offence itself was committed in the national territory.

(23) In the passage in paragraph 581, Halsbury's Laws of England, the instances of a person who being abroad procures an innocent agent or uses the post office to commit a crime in England cannot be treated as exhaustive. There can be several other instances and in that sense the visit of Riaz Ahmed to this country after the offence of conspiracy was initiated in Pakistan, would be deemed to be an act committed in India in furtherance of that conspiracy once he set foot on the Indian soil. We are thus satisfied that the visit of Riaz Ahmed after the act of conspiracy was initiated in Pakistan, was itself an overt act in India which rendered him liable to be proceeded against on the charge of conspiracy.

(24) In the judgment of Patel J, in the Bombay case the words 'every person' in Section 2 of the Indian Penal Code, have been contrasted with the use of the words 'any person' in Section 3 and 4(2) of the Code and it is said that the words in Section 2 are indicative of the idea that to the extent that the guilt for an offence committed within India can be attributed to a person, every such person without exception is liable for- punishment under the Code. The offence of Riaz Ahmed's entry into India for furtherance of the design of conspiracy is an act committed within India. His liability to be tried for the offence of conspiracy is, therefore, not

to give any extra territorial operation to the law for it is in respect of an offence of which the legality is in India, that the liability is fastened on him and the punishment is awarded by the law when his presence in India was secured by the police. In this view of the matter we differ from the learned trial Judge and hold Riaz Ahmed guilty of the offence of conspiracy under Section 120B Indian Penal Code. In respect of the overt act he has already been convicted and sentenced, the question of his being tried for the same offence, therefore, need not arise in this case.

(25) This brings us to the case of Mohd. Yunis as during the pendency of the appeal Mohd. Atique is reported to have died. The necessary papers showing his death were shown to us and we asked the learned counsel for the State if the factum of Mohd. Atique's death was being questioned by the State. We were told that the State was satisfied about his death. The appeal against him, therefore, abates.

(26) According to the learned Judge, the evidence produced by the prosecution relating to the alleged participation of Mohd. Yunis in the conspiracy, consisted of his confessional statement (Ex.PM/7), recovery of an incriminating document (Ex. FEE) from his possession, the oral testimony of Chander Pal (Public Witness 16) and Ravi Kumar (PW4) and the evidence of the handwriting expert. The confession (Ex. PM/7) has been discarded by the learned Judge and we have already said that we are in agreement with him. The said document, therefore, cannot be used against him.

(27) With regard to the evidence of recovery of an incriminating document (Ex. PEE) the learned trial Judge has found that it would not be safe to hold that the said document was recovered from the possession of the accused. We feel constrained to differ from him. We are quite aware of the fact that the accused has been acquitted by the trial Judge and we are dealing with this appeal as an appeal from acquittal under Section 417 read with Section 423 Criminal Procedure Code. The law relating to such appeals has been laid down by the Supreme Court in several decisions. Mr. Frank Anthony who appeared for the accused referred to one of the earlier decisions of the Supreme Court in *Tulsiram Kana v. The State* :

AIR 1954 SC1 . He also referred us to three other decisions of the Supreme Court in the years 1967 and 1968 viz. Sher Singh and others v. The State of Uttar Pradesh : 1967 CriLJ1213 Laxman Kalu Nikalje v. The State of Maharashtra : 1968 CriLJ1647 and Mathai Methews v. The State of Maharashtra : (1970)3SCC772 .

(28) Recently there has been another judgment of the Supreme Court in Ramabhupala Reddy and others v. The State of Andhra Pradesh : 1971 CriLJ422 . The principle laid down in these cases is that the power of an appellate court to review evidence in appeal against acquittal is as extensive as its powers in appeals against conviction. But before an appellate court can set aside the order of acquittal, it must carefully consider the reasons given by the trial Court and must give its own reasons to reject those reasons. It should be borne in mind that the presumption of innocence of the accused and the fact that the trial Judge had the advantage of seeing and hearing the witness re-enforces the presumption of innocence and the appellate court should not disturb an order of acquittal except on very cogent grounds. Mr. Anthony, therefore, submitted that while dealing with the case of this accused we should bear the above principles in mind.

(29) According to the learned Judge the case of the prosecution relating to the recovery of Ex. Pee is that on arrival at Bareilly in the early hours of morning on August 15, 1968 Bajaj took sometime in locating the house of Saleemuddin. He located the same around noon time. He then went back to the police station Killa, Bareilly and contacted the local Police there. Accompanied by the local police and the two witnesses Bhagwati Pershad (Public Witness 5) and Basheshwar Nath (Public Witness 7) he went to the house of Saleemuddin at about 4.15 P.M. He remained busy at that house until 8.00 P.M. From 9.00 P.M. to 10.30 P.M. he interrogated Saleemuddin at the police station and it was on some disclosures made by Saleemuddin that Bajaj organized another raid for the arrest of Mohd. Yunis and recovery of incriminating articles. Nirankar Sarup (Public Witness 9) and Har Pershad (Public Witness 10) were summoned by the Killa Police Bareilly. They arrived at the police station at about 11 P.M. Taking these persons with himself Bajaj and the raiding party went to the house of Mohd. Yunis at 33 Phoolwalan Bareilly. Mohd. Yunis was found present in the house. He made a

disclosure statement (Ex. PUU) in consequence of which a sketch (Ex. PEE) indicating important places and buildings at the Izzat Nagar Air-field, Bareilly was recovered from his house.

(30) Learned trial Judge has held that the house of Mohd. Yunis is not far away from the house of Saleemuddin. Although the exact distance was not mentioned, both the houses are within the jurisdiction of the same police station and Mohalla Phoolwalan is not far away from the house of Saleemuddin in Mohalla Phoota Darwaza. According to the learned Judge, if Mohd. Yunis who was living in a house close by and the proceedings for the search of the house of Saleemuddin continued from 4.30 P.M. to 8.00 P.M. he must have in all probability come to know that the house of Saleemuddin had been raided and would have taken steps, to remove the offending article. The evidence does not furnish any material in support of this particular observation of the learned Judge. Bajaj and other members of the raiding party were in plain clothes. There is no evidence on record to show that when the house of Saleemuddin was being searched from 4.30 to 8.00 P.M. any other persons besides the members of the raiding party and the occupants of the house were present. The search took place inside the house. Even while the police was waiting outside for 15 to 20 minutes before Saleemuddin arrived there, there is nothing to suggest that their presence was being marked by any members of the public. There is also no evidence to show that Mohd. Yunis was present in his house throughout during the period the police was in or around the house of Saleemuddin or any member of his family or some friend of his was present on that occasion. The police came to his house sometime after 11 P.M. It is not known how long before that time, Mohd. Yunis had returned home. The two houses of Saleemuddin and Mohd. Yunis are no doubt within the jurisdiction of police station Killa but they are not in the same street. We were told that the house of Mohd. Yunis is at a distance of about 220 yards from the house of Saleemuddin and that they are in different streets. It is therefore not possible to agree with the trial Judge that Mohd. Yunis 'must have in all probability come to know that the house of Saleem- ud-din had been raided' nor does it follow there from that Mohd. Yunis would have destroyed the incriminating document before the police raided his house.

(31) The trial Judge has also held that the evidence of Nirankar Sarup. Har Pershad cannot be implicitly relied upon. Nirankar Sarup does not belong to the locality of Mohalla Phoolwala. His shop is very close to the police station. He also admitted that Bhagwati Pershad (PW. 5) who had earlier lent his services to the police at the time of its raid on the house of Saleemuddin, is one of his co-sharers in the rickshaw business. The learned Judge has also held that he had been specially called by the police through a constable from a paan shop at about 11.00 P.M. when the police was getting ready to go for the search of the house of the accused. We have looked into the evidence of this witness and since the observations of the learned Judge are not based on the impressions formed by him when the witness was under examination, it is open to us to look into his evidence.

(32) Nirankar Sarup admitted in cross-examination that Bhagwati Pershad used to keep his rickshaws, 5 or 6 in number, in his stand and passed on the profits from those rickshaws to him. But assuming there was some kind of partnership between them in the rickshaw business, Bhagwati Pershad was not a witness in the case of raid on the house of Mohd. Yunis. If from the same locality the police summoned two persons who were co-sharers in their business and the services of one of them were utilised as an independent witness of search in one case, it does not follow that the other person whose services were utilised several hours thereafter for search in a different house, would cease to become reliable.

'THE evidence discloses that Bajaj was not even aware of Mohd. Yunis being involved in the case when he had searched the house of Saleemuddin. It is only after Saleemuddin was taken to the police station and interrogated that the name of Mohd. Yunis was revealed and thereafter Bajaj proceeded to the house of Mohd. Yunis. It has not been shown that Nirankar Sarup was known to Bajaj. He was called to the police station through a constable who according to the witness, was not even known to him. A suggestion was put to him in cross-examination that some one had lodged a report against him that he had kidnapped some one's daughter and that he had succeeded in getting the case dropped by using his influence with the police. He denied the suggestion and nothing has been placed on record to show that there is any truth in the allegation. If the evidence of

Bhagwati Pershad has been believed by the learned trial Judge, there is no reason why the evidence of this witness who is apparently more respectable than Bhagwati Pershad. should not be believed. According to his statement, his house is at a distance of about 100 to 125 yards from Thana Killa whereas the distance from his house to the house of Mohd. Yunis would be between 3 to 4[^] furlongs. Can it be said under these circumstances that he was not a witness from the locality The search was carried out sometime after 11.00 P.M. It was the month of August. There might have been quite a number of persons living near the house of Mohd. Yunis but if the police took with themselves some one whose house was half a mile away from that house, it cannot be said that the witness did not belong to the locality, particularly when no connection has been shown between Bajaj or any other police officer belonging to Police Station Killa at Bareilly.

(33) The next witness of search is Har Pershad (Public Witness 10).' He actually belongs to Mohalla Phoolwalan, and is therefore a witness from the locality. He said that in his presence Mohd. Yunis had told the police that a map was lying in almirah in his house and that he could produce it. The map Ex. Pee was produced from between two books lying in the almirah. The recovery memo Ex. Public Witness bears the signature of this witness. In cross-examination it was brought out that he had instituted a complaint against Fiaz-ud-din father of Saleemuddin and that showed his enmity against the accused. It however transpired that he had done so after this case, because the accused had harassed him a lot through their friends and relations by trying to bring influence on him not to give evidence against them. The witness resisted those attempts and the accused got him beaten up by goondas.

(34) Mr. Anthony argued that the witness was a manufacturer of kites and was earning Rs. 150.00 p.m. The suggestion was that he was not a respectable witness. The search took place after 11 P.M. Some persons would be awake in the month of August but generally it is persons in that income bracket who are available at that time.

(35) In cross-examination it was brought out that the witness had been convicted in a case under Sections 380/411 Indian Penal Code sometime in 1957. But it

transpired that he was acquitted on appeal by the Sessions Judge and the judgment Ex. Dd was placed on record. It is not permissible to attack the credibility of a witness on the ground of his previous conviction when he had been acquitted by a court of appeal. Another ground urged by Mr. Anthony was that the witness had stated that he signed the sketch Ex. Fee and also the recovery memo Ex. Puu, and in fact he had signed only one of those documents. The other witness Nirankar Sarup had mentioned that he had signed only one of the two documents. If the witness made a slight mistake, it cannot be said that his evidence as such is not relevant or admissible. Both the witnesses of sketch have supported the prosecution case about the recovery of Ex. FEE.

(36) Mr. Anthony lastly argued that Nirankar Sarup could not give the direction in which the main entrance of the house of Mohd, Yunis was situated. The witness gave a complete description of the inner apartments and merely because he could not say whether the main entrance was to the East or to the West or to the North or to the South, would hardly discredit his testimony.

(37) We, therefore, hold that the prosecution evidence fully establishes the recovery of Ex. Fee from the house of Mohd. Yunis. There is also the evidence of the handwriting expert, Shri B. Lal (FW 14). According to that witness, the document Ex. Pee is entirely in the hand of Mohd. Yunis and all the writings in that document are in his hand. But there is one piece of writing (Ex. Q 11/1) which is encircled red and is in the handwriting of Saleem-ud- din. If there was no connection between Saleemuddin and Mohd. Yunis a document showing the building etc., in Izzat Nagar Air-port prepared by Mohd. Yunis could not contain the writing of Saleem-ud- din. The presence of this document, therefore, clearly establishes the association between Saleemuddin and Mohd. Yunis and the possession of Ex. Pee shows the common concert between them. The association between Saleemuddin and Mohd. Yunis is also amply proved by the oral testimony of Chander Pal (Public Witness 16) and Ravi Kumar (Public Witness 4). Ravi Kumar who was a leading Air-craftsman at the Izzat Nagar Air-port at Bareilly was living in a private accommodation. He and his wife used to go to Bara Bazar for shopping. They used to buy cosmetics etc. from a shop known as Citizens Centre.

(38) MOHD. Atique was one of the salesman at that shop. In 1968 Mohd. Atique introduced him to another person whom he described as a compounder working with a doctor. He saw that man sitting in that shop on 5 or 6 different occasions. One day that man whom he identified as Saleemuddin, requested him to take him to the Aerodrome as he had not seen an air-craft. He said he was sorry he could not do so because civilians were not allowed to enter the Aerodrome. During his subsequent visits Mohd. Atique introduced him to Mohd. Yunis. He was told that Mohd. Yunis was a student of M.Sc. and was working in a rubber factory in Bareilly. He denied the suggestion that he had made the statement in court under the fear of dismissal on the allegations of mixing up with civilians. The police came to know about this witness from one of the documents found from the possession of Saleemuddin and, therefore, examined him as a witness.

(39) The witness is a Maharashtrian. He has no animus against the accused. Nothing has been brought on record to show that he was making the statement in court under pressure from the police. No question was put to him about his acquaintance with Bajaj. The only outcome of his evidence is that the shop of Mohd. Atique was the rendezvous of Saleemuddin and Mohd. Yunis and that Saleemuddin was eager to visit Izzat Nagar Air-port.

(40) Chander Pal was a cleaner in a truck which was employed to carry bricks from the kiln of Asa Nand to the Air-port for Bharat Builders who were doing construction work there. During that period two youngmen, Saleemuddin and Mohd. Yunis met him at the kiln and asked him about Izzat Nagar Air-port. He told them of what he knew. They then asked him if he knew the name of any officer working at the air-port and whether there was any officer Gupta by name. The witness pleaded his ignorance.

(41) In cross-examination he stated that the two accused spent about 3 to 4 hours at the kiln and that he did not ask them why they were asking those questions. This evidence by itself is not of any importance but when read in conjunction with the sketch (Ex. PEE) which shows the various buildings and their location in the air-port and which bears the writings of Mohd. Yunis and Saleemuddin, it is apparent that these two persons must have been going round and meeting

persons who had occasion to be inside the air-port.

(42) There is also the testimony of Bajaj. The learned trial Judge is right when he says that the accused cannot be convicted on the sole testimony of Bajaj. But if the independent witnesses as to the search are believed, the testimony of the investigating officer can also be read along with that evidence. We do not think that an investigating officer of the rank of Deputy Superintendent of Police is not worthy of credit. By itself his evidence may not be treated as sufficient to form the basis of an accused's conviction. But it cannot be said that the evidence is false or not true.

(43) Learned trial Judge has found fault with the evidence of the handwriting expert, B. Lal on the ground that he had compared the questioned writings Q11 in Ex. Pee with the un-proved or un-admitted writings in Ex. PII, Ex. PLL/1 to Ex. PLL/8. We find that Mohd. Yunis was asked to give his specimen writings before a magistrate. Exs.S.7 to S9 in Exs.P11, Pjj and Pkk are those writings. When B. Lal was asked to give his opinion he compared the disputed writings in Q11 with the specimen writings Exs.S7 to S9. He also compared the disputed writings with the un-proved writings in Exs. PII and PLL/1 to PLL/ 8.

(44) An examination of his opinion shows that out of. 15 reasons given by him 9 reasons relate to the comparison of the disputed writings with the specimen signatures in Exs.S7 to S9. The 10th reason also deals with that though it also deals with one of the un-admitted writings. The other 5 reasons relate to comparison of the disputed writings with the un-admitted writings. There is no rule of law that if the handwriting expert has used some un-admitted writings for comparison, his opinion with regard to the admitted writings must also be rejected. In his examination under Section 342 Criminal Procedure Code . the accused was asked about both kinds of comparison, he did not give any separate Explanationn with regard to the comparison between the disputed writing and his admitted writing.

(45) The opinion of the handwriting expert, as was said by the Supreme Court in Shashi Kumur Banerjee and others v. Subodh Kumar Banerjee : AIR 1964 SC529 , can rarely, if ever. take the place of substantial evidence and before acting on

such evidence it is usual to see if it is corroborated by clear direct evidence or by circumstantial evidence. But the evidence is relevant and admissible under Section 45 of the Evidence Act. In the present case, it is also not contradicted by the contrary evidence of another expert produced in behalf of the accused and, therefore, is an additional piece of evidence against the accused.

(46) MOHD. Yunis was identified at the identification parade held by Shri O. P. Yadav (Public Witness 37) on September 21, 1968 by Chander Pal and Ravi Kumar. This evidence has been rejected by the trial Judge on the ground that the magistrate had made the accused wear the same clothes which he had been wearing at the time of his admission to the jail and if the witnesses had been instructed in advance regarding the kind of clothes the accused was wearing at the time of his admission to jail, they would not have found it difficult to spot him out just from his dress. The magistrate was an Indian Administrative Service officer. Neither the two witnesses nor the magistrate nor the police officer who had arranged the parade were asked if the witnesses were told in advance by some one about the clothes the accused would be wearing. No adverse inference can therefore be drawn against the prosecution on this behalf.

(47) For the above reasons, we find it difficult to agree with the trial Judge and are of the opinion that the case against Mohd. Yunis about his being a party to the criminal conspiracy stands proved beyond reasonable doubt.

(48) We now come to the case against Saleemuddin. His confession (Ex. PC) has been held to have no evidentiary value. The remaining evidence on which the prosecution rely to prove the charge of criminal conspiracy consists of :-

'(i) Disclosure statement, EX. Pqq 409HCD/71-3 (ii) Incriminating articles listed in the recovery memo, Ex. Prr, recovered in consequence of the disclosure statement, Ex. PQQ. (iii) Incriminating articles mentioned in memo Ex. Ptt recovered from the possession of the accused in the search of his house.'

This evidence has been believed by the learned trial Judge and it has been held that the witnesses have given truthful evidence in that behalf.

(49) Counsel for Saleemuddin argued that Saleemuddin was in fact, arrested by the police near Mahatma Gandhi statue at Bareilly at about noon on August 15, 1968 and that the prosecution story about his arrest at about 4. P.M. in front of his house and about his having made a disclosure statement is false. There is absolutely no material to support this allegation.

(50) Bajaj, Bhagwati Pershad and Basheshwar Nath deposed that he was arrested in front of his house at 4. P.M. and recovery of documents was also made on that very day. The delay in searching the house of the accused was explained by Bajaj who also explained why no note was made in the Roznamcha of police station Killaat Bareilly regarding his arrival there and the posting of the police officials to keep watch over the movements of Saleemuddin until 3.20 P.M. There is no reason to doubt the correctness of this Explanationn.

(51) The documents recovered from the possession of the accused and from the search of his house clearly implicate this accused. Apart from Ex. Pqq, Ex. Pcc is the intelligence report which had been prepared by the accused and had been kept ready by him for delivery to Riaz Ahmed who was expected to contact him at Bareilly. Ex. Pqq (S2) is a specimen writing of the accused made in the presence of a magistrate. B. Lal (Public Witness 14) deposed that the writer of Ex. Pcc was the same person who had written the specimen writing Ex. Pq (S2). Ex. Pq contains an exact re-production of the contents of Ex. PCC. It was written in Ex. Pcc that on July 29 from 7.45 P.M. to 8.30 P.M. there was a black out in Bareilly. The name of the Wing Commander at Bareilly was also mentioned and it was stated that the writer had made friends with Ravi Kumar who was employed in the repairing station at the Izzat Nagar Air Port. It was further mentioned in this report that the area of the aerodrome was being extended and that a sketch of the air field was under preparation. There was also a reference to an under-ground air-field in the cantonment area and that the writer was trying to locate it.

(52) EX. Pz recovered from the possession of the accused is an incomplete rough sketch of the Izzat Nagar Air-port. B. Lal, the document expert, compared the writing in Ex. Pz with the specimen writing Ex.PQ/3 of Saleemuddin and deposed that the disputed words in Ex. Pz were written by Saleemuddin. The reference in

the sketch to Ex. Pcc also goes to show that this sketch was prepared by the accused. The recovery of the typed brief Ex.PY and the handwritten brief in Urdu (Ex. PAA) from the possession of the accused further establishes that he was engaged in espionage activities at Bareilly in pursuance of a criminal conspiracy, in terms of these briefs. The pocket diary Ex. Pbb contains some nothings in his hand which further establish that he was engaged in espionage activities at Bareilly. This document shows that he had seen some movie on June 21, at Bareilly. In Ex. Pbb he made an entry thereof (Ex. Q8/5) giving the tail numbers of some aeroplanes which seem to have been shown in flight in the news reel. There is another entry dated June 20, showing that he had already dispatched one intelligence report (Ex. RPT) to the other conspirators in Pakistan. Ex. Pss is a post-card letter purported to have been written by one Anwar Nasim from Pakistan to Saleemuddin accused at Bareilly. In that letter Anwar Nasim was remonstrating with the accused and had inquired if Riaz Ahmed had met him. There is also a mention of the accused not having accomplished the job.

(53) It will thus be seen that there is overwhelming evidence to prove the charge of criminal conspiracy against the accused. The confession (Ex. PK/1) made by Riaz Ahmed also lends assurance to the conclusion that Saleemuddin accused was a party to the criminal conspiracy. The documents recovered from Riaz Ahmed also fortify the conclusion that Saleemuddin was a party to the conspiracy for collecting information regarding defense installations in India. Ex. PI, handed over to Riaz Ahmed by Malik Salim for onward delivery to Saleemuddin at Bareilly is another document incriminating the accused. In that letter the word 'Sari' has been written. But according to the cipher code adopted by the conspirators the word 'Sari' stood for 'Intelligence Report.' The documents recovered from Riaz Ahmed viz. PL/I, PL/2, and PL/3 are also incriminatory of Saleemuddin. These documents clearly establish the guilt of Saleemuddin in the charge of criminal conspiracy.

(54) There is also evidence implicating the accused in an offence under Section 3 of the Indian Official Secrets Act. One of the counts relates to the rough sketch Ex. Pz and to the intelligence report Ex. PCC. These documents clearly establish the implication of the accused in offence under Section 3 of the Indian Official Secrets Act, 1923.

(55) In their examination under Section 342 Criminal Procedure Code all the three accused denied their complicity in the offence alleged against them. Riaz Ahmed stated that he was a Pakistani national and had entered India on August 13, 1948 without any travel documents. He admitted that he had visited India on two occasions on the authority of travel documents. But this time it was on the advice of his maternal uncle who was residing at Amritsar that he came to India without any travel documents. He said that he had done so because he was advised by his maternal uncle that if he wanted to settle in India he should come without a pass-port. He denied having made a confession and added that he was arrested at Amritsar and that he had written on the Railway Time Table (Ex. PX) at Amritsar Railway Station the words Sohan Lal, because he wanted to settle down in India with Sohan Lal as his name. He said that he did not disclose to the police the name of his maternal uncle and that he did not know any of the other accused.

(56) Saleemuddin and Mohd. Yunis also denied all connections with the conspiracy. As regards the photograph (Ex. PL/1), Saleem-ud- din admitted that it was his photograph and that he had also signed it at the back. He said he had sent it from Bareilly to his beloved Noor Bihar of Sialkot and that in the accompanying letter he had mentioned about his meeting with Capt. Shukla and that is why the letter was censored and retained. He denied having made the confession. Mohd. Yunis denied his connection with the conspiracy. He also denied having made any confession. He admitted that he was identified by Chander Pal and Ravi Kumar at the identification parade, but being the tallest among all the participants in the parade and having been asked to put on the same clothes which he was wearing at the time of his admission to jail and with his glasses removed, he was made to join the parade. He stated that he was suffering from tuberculosis and heart trouble.

(57) The statement of the accused is thus one of denial. There is clear evidence to support the case of conspiracy against all the three accused. There is also evidence of an offence under Section 3 of the Indian Official Secrets Act, 1923 against Saleemuddin and Mohd. Yunis.

(58) The question that arises for consideration is what sentence should be inflicted on them. The maximum sentence provided for the offence under Section 3 of the Indian Official Secrets Act, 1923 is 14 years. The offences have been committed by the accused after great deliberation and planning both in Pakistan and in India. The information that the accused were collecting in India relates to military secrets of vital nature. The learned Addl. Sessions Judge has himself held that the offences being serious the accused deserved deterrent punishment. Supplying information about defense installations in this country to a country which has already been at war with this country. is a dangerous pastime. It imperils not only the security of the country but exposes its military equipment and people to destruction. In previous cases, we have given a sentence of ten years R.I. to the accused. There is no reason why we should not do so in this case. We therefore convict Riaz Ahmed and Saleemuddin of the offence of conspiracy and give them the sentence of ten years' rigorous imprisonment each. The sentence of five years rigorous imprisonment awarded by the trial Court to Saleemuddin appears to us to be highly in-adequate. For the offence under Section 3 of the Indian Official Secrets Act we also award Saleemuddin a sentence of ten years rigorous imprisonment. Both the sentences against him will, however, run concurrently.

(59) The case against Mohd. Yunis stands on a different footing. He is a young college student reading for the M.Sc. There is no evidence to connect him with any of the accused in Pakistan nor is there any evidence of his having sent any previous report to Pakistan. Being a young student he appears to have come under the influence of Saleem- ud-din and lost sight of the fact that he owed a duty to the country in which he was born and where he was living. His old father is working in some private firm while his brother is serving the Government. In such circumstances the ends of justice will be met if he is given a sentence of three years' rigorous imprisonment on both the counts. The sentences on each count will run concurrently. The sentence awarded to him is, however, not to be treated as a precedent in such cases. It is the state of his health and want of evidence about his connections with foreign spies which impel us to treat his case with leniency. We are told that he is due to appear for his M.Sc. examination soon. The jail authorities may make arrangements for his taking the examination.

(60) The result is that the appeal of Saleemuddin is dismissed while the appeal and Criminal revision filed by the State are allowed. The appeal against Mohd. Atique abates.

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