

In Re: Kandaswami Gounder

In Re: Kandaswami Gounder

SooperKanoon Citation : sooperkanoon.com/801350

Court : Chennai

Decided On : Feb-01-1957

Reported in : AIR1957Mad727; 1957CriLJ1287

Judge : Somasundaram and ;Basheer Ahmed Sayeed, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 337, 342, 342A and 494; [Evidence Act, 1872](#) - Sections 132; Oaths Act, 1873 - Sections 5; [Indian Penal Code \(IPC\), 1860](#) - Sections 201, 300, 302, 379 and 411

Appeal No. : Referred Trial No. 123 of 1956, (Cri. Appeal No. 650 of 1956)

Appellant : In Re: Kandaswami Gounder

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : V.L. Ethiraj and ;M. Narayanamurthi, Advs.

Disposition : Appeal dismissed

Judgement :

1. The appellant, Kandaswami Gounder, has been found guilty under Section 302, I. P. C. for the murder of one Tholkkaran Ramaswaim Gounder and sentenced to death by the learned Additional Sessions Judge of Coimbatore division. The deceased was running a mutton shop. He used to slaughter goats in his shop and send the skins to Pollachi. He was also manufacturing illicit arrack and selling it. The appellant along with P. W. 3 and a brother-in-law of the appellant and a few

others used to visit the house of the deceased, eat mutton there and take illicit arrack sold by the deceased.

The deceased used to carry the illicit arrack manufactured by him and sell the same in the village of Anikkadavu. The appellant was very much dissatisfied with the deceased for the reason that the deceased had spoiled the appellant's brother-in-law one Palaniswami by making him drink illicit arrack and go after the women. Two months prior to the occurrence, which is said to have taken place on 30th March 1956, the appellant had quarrelled with the deceased on this very same ground, and since then both of them were not on talking terms.

As a result of the influence of the deceased on the brother-in-law of the appellant viz., Palaniswami, the appellant's sister could not live with her husband and the appellant was smarting under the misfortune that had befallen his sister, whose life he felt had become ruined. It also transpires that the deceased was responsible for causing obstruction in the settlement of the marriage of the appellant's younger brother by giving information to the bride's party who came from Pollachi, that the girl married to him would have to cook for a big family, as a consequence of which the arrangement seems to have broken up and the appellant was put to the necessity of finding another girl in Doddanpatti for his younger brother.

2. On the date of the occurrence, that is, 30th March 1956, at about lamp lighting time, the deceased took along with him to the village of Anikkavadu three bottles of illicit arrack in a gunny bag M. O. 1. Of three bottles, M. O. 2 is one which is intact and the other two bottles having been broken in the course of the occurrence, their broken pieces are M. O. 3 series. The deceased also carried a torch light with him which is M. O. 4. He is said to have also carried with him a sum of Rs. 100 in M. O. 6, a cloth money purse.

The appellant who appears to have sworn to wreak vengeance against the deceased for ruining Palaniswami and preventing him from living with his wife, the sister of the appellant, went to the house of the deceased on the evening of the date of the occurrence and obtained information about the movements of the deceased. It is also stated that the appellant met the deceased that evening and demanded some arrack which the deceased refused to supply him.

3. Having come to know that the deceased had left for Anikkadavu, the appellant followed the deceased, Before he actually started on his intended errand to finish off the deceased, he called P. W. 12 Sennjappan, a friend of his and induced him to accompany him on the representation that the deceased was going with arrack and that both of them may snatch and go away. P, W. 12 fell into the snare and accompanied him. After passing a distance of a mile, the appellant saw the deceased and flashed a battery light and made sure that he was no other than the deceased.

He ran towards him and pulled out his legs as a result of which the deceased fell down. The appellant stabbed him twice or thrice in his nape with a bichuva M. O. 1. P. W. 12, who did not expect such a tiling to take place, is said to have obstructed the appellant from stabbing the deceased when he got his finger hurt. When the deceased had fallen on the ground, the appellant gave a forcible stab on his abdomen with the bichuva. The result of this stab was that the deceased succumbed to the injuries.

The person of the deceased was searched by the appellant and the packet kept in the waist of the deceased together with the battery light attached thereto were removed. The bottle of arrack which was intact in the gunny bag was also removed and they were all brought to the house of P. W. 12. The bag was opened and it was found to contain only a small sum of Rs. 8-3-0. P. W. 12 got angry with the appellant as he had been deceived and as he was made a party to the commission of the crime by the appellant and he therefore refused to receive the share of the money.

He, however, was given the battery light by the appellant. The appellant confessed to P. W. 12 that he committed the murder because the deceased had ruined the life of his younger sister, who had been driven out by her husband. The appellant is said to have washed the bloodstained veshti and the knife and returned to his house. On the way, there was a well belonging to one Nataraja Naicker and the empty bag, which contained the money was thrown in that well.

The bottle of arrack which was found to be intact was buried in the field of Srinivasa Naicker, which was being watched by P. W. 12. The bichuva with which

the deceased was stabbed was kept in the left in the house of the appellant. The appellant is a watchman in Nataraja's garden at Pudur, After two days, the master of this appellant produced the appellant before the Sub Inspector of Velur, who arrested him and questioned him. As a result of the confession made by the appellant before the Sub Inspector, the knife, the money and the bottle were all recovered.

4. The dead body of the deceased was discovered by P. W. 4 at 9 a.m. on Saturday in his master's field at Anikkadavu. He heard people talking that near Karungalai Amman Kovil, the body of the deceased was lying in the field of his master Chetty Gounder. He found the body in the field and as his master was not in the house he reported the matter to the village munsif of Sengodagoundanpudur. Ex. P. 1 is the report given by him. P. W. 9, the village munsif, made a report to Negaman police station and? to the Sub-Magistrate, Udamalpet.

He went to the scene of occurrence and was also present at the inquest. He was also present when the police seized M. Os. 1,3, 5, 9 to 14, 17 and 18 under Ex. P. 19. He attested that Exhibit. P. W. 15, the head constable, who received the report from the village himself reached the scene of occurrence at 5 p.m. He seized the blood stained earth from near the body of the deceased, M. O. 12, the arrack smelling earth, M. O. 13 and blood stained stones, M. O. 14 series.

He also found a pen knife M. O. 5 in the pocket of the shirt and one rupee note and one eight anna coin in the pocket of the banian worn by the deceased. He held the inquest between 5-30 to 7 p.m. on the same date and examined P. Ws. 1 and 2, the wife and the son of the deceased and also P. W. 4 and a few others. P. W. 15 sent the body of the deceased through P. W. 7 to P. W. 6, the doctor, for post mortem examination. Ex. P. 7 is the post mortem certificate issued by the doctor.

It discloses the following external injuries (1) An incised wound 2 inches by 1 inch and muscle deep on the middle right side neck; (2) A transverse incised wound 2 inches by 1 inch and penetrating deeply and situated on the inner angle of the right shoulder blade; (3) An incised wound obliquely placed one inch by half inch

by half inch on the upper third vertebral groove; (4) An incised wound obliquely placed over the middle left shoulder; (5) A perforating incised wound transversely placed 3 inches by two inches on the lower part middle of abdomen just below the umbilicus, through which one foot of small intestine is prolapsed.

The gut prolapsed was dark blue in colour. On internal examination it was found that the abdomen was bloated, there was no fracture of the ribs, that the right lung was covered with blood and that there was a cut one inch long on the lower lobe of the right lung. The opinion of the doctor as to the cause of death was that the deceased died of shock and haemorrhage and perforating injuries in the mesentery, transverse mesocolon and gangrene of the prolapsed intestine.

The fifth injury was necessarily fatal and the doctor opined that all the injuries could have been caused by a weapon like M. O. 8. The doctor also examined P. W. 12, Senniappan. Ex. P. 8 is the wound certificate issued to P. W. 12. It discloses a V shaped incised wound one inch each limb and 1 inch apart at its widest part and with the limbs directed distally situated over the middle and back of the right thumb. The doctor was of the opinion that it could have been caused during the course of a struggle while handling a weapon.

5. The Sub Inspector, P. W. 16, arrived on the scene after the inquest and converted the charge against the appellant to one under Section 302 I. P. C. Later the Circle Inspector also arrived on the scene. A mud pot, M. O. 7, was recovered by the Sub Inspector of Police on the same night from the house of the deceased and it contained barks of babul trees. As already stated the appellant was arrested in front of an elementary school in Velur, which is about one mile away from Vahaitholuvu. He gave a confessional statement, the relevant portion of which is marked as Ex. P. 22 in the presence of P. W. 14, the village munsif.

From his person, a sum of Rs. 2-15-0 and blood? stained dhoti and banian M. Os. 15 and 16 were also seized. As stated already, a blood-stained bitchuva, M. O. 8 and a leather sheath, M. O. 8 (a) were produced by the appellant from the loft of his house. Further, the appellant took the sub-inspector to Adivallayankadu and produced M. O. 2 an intact bottle of illicit arrack from a pit which he dug up. He also showed the well, in which he had drown M. O. 6, the cloth purse. M. O. 6 was

recovered only on the 4th April 1956 by P. W. 10, the driver, as the earlier attempts were not successful. The appellant gave a confessional statement, Ex. P. 4 (a) to the learned Sub Magistrate, Pollachi on the 7th April 1956.

6. The sub inspector, P. W. 16, also arrested P. W. 12 near Chuckler quarters in Velur and he also gave a confessional statement, Ex. P. 6 (a) to the same magistrate on the 11th April 1956. A charge sheet was filed against both in the lower court and both were committed to take their trial before the learned Sessions Judge.

(6a) Before the case was taken up for trial in the sessions court, the learned Public Prosecutor put in a written application for splitting up the case against the two accused and the application was ordered. The case therefore against P. W. 12, who was a co-accused in the committal magistrate's court, was therefore split up and held over. He was to be tried under Sections 201 and 411 I. P. C. The appellant was also charged under Section 379 I. P. C., but that charge was also held in abeyance.

Before the learned Sessions Judge, 16 witnesses were examined for the prosecution, and the learned Sessions Judge giving the weight to the confession made before the learned magistrate by the appellant and believing the evidence of the prosecution witnesses and taking into consideration the fact that M. O. 8 recovered from the appellant was stained with blood, according to the report of the Serologist, and so also the fact that M. Os. 15 and 16 were stained with human blood, according to the Chemical examiner, though not according to the Serologist, came to the conclusion that the case against the appellant stood proved and found the appellant guilty under Section 302 I. P. C., and sentenced him to the extreme penalty under the law subject to confirmation by this court.

7. In the course of the hearing of the appeal, Mr. V. L. Ethiraj, appearing on behalf of the appellant, at the outset raised a point in regard to the competency of P. W. 12 to figure as a witness in the case against the appellant. He argued that P. W. 12 was once a co-accused and was committed by the trial magistrate to take his trial before the learned Sessions Judge along with the present appellant. Such being the case, the contention of the learned counsel was that unless the

procedure in Section 337 Crl. P. C., was strictly followed, P. W. 12 could not be a competent witness and his evidence could not go on record in proof of the offence said to have been committed by the appellant.

8. Section 337 Crl. P. C., lays down that in the case of any offence triable exclusively by the court of session, or any offence punishable with imprisonment which may extend to seven years or any offence under any of the following sections of the Indian Penal Code, namely, Sections 161, 165, 165-A, 216-A, 369, 401, 435 and 477-A the district magistrate, a presidency magistrate, a Sub-divisional magistrate or any magistrate of the first class may, at any stage of the investigation or enquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof.

This section enables the judicial officer to tender a pardon to any person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence with a view to obtaining the evidence of that person, who may be supposed to have been directly or indirectly concerned in or privy to the offence. In order to exercise this power, the person to whom a pardon is to be given must be directly or indirectly concerned in or privy to the offence, which is being tried before the concerned judicial magistrate or judge and the pardon is to be given only for the definite purpose of obtaining the evidence of the person, who may be directly or indirectly concerned in or privy to the offence which is being tried before the said magistrate or judge.

Mr. V. L. Ethiraj argued on the basis of this section that P. W. 12, though he has been put up for trial before the sessions judge for other offences than one for which the present appellant was being tried, does not cease to possess the character of a co-accused in the case, it is true that originally the appellant was charged before the committal court under Sections 302 I. P. C., and 379 I. P. C., for the murder of Tholkaran Ramaswami Gounder and P. W. 12 was charged

along with him under Sections 201 and 411 I. P. C.

That being so, P. W. 12 can be said to be a person directly or indirectly concerned in or privy to the offence which was being tried by the sessions court against the appellant, put before the trial commenced before the learned sessions judge as already observed, the case against P. W. 12 was separated and he now stands charged separately for offences under Sections 201 and 411 I. P. C., and he has (till to take his trial for those charges.

The question then is whether even after the case against the appellant and P. W. 12 had been separated, he still remained a co-accused along with the appellant and whether in order to obtain his evidence there should be a pardon tendered to him and whether, if such a pardon is not tendered, he cannot be a competent witness, prima facie the language of the section, might seem to bring this P. W. 12 within the scope of the section.

For, even though he is no more a co-accused, still he was one directly concerned in or privy to the offence for which the appellant was being tried, but in practice this section does not seem to have been always resorted to for securing the evidence of a co-accused, once his case is separated, The case law on the point also does not seem to require that there should be a pardon tendered before a person directly or indirectly concerned in or privy to the offence is to figure as a witness in the trial. For this purpose resort could also be had to Section 494 CrI. P. C., instead of the magistrate proceeding under the empowering Sec. 337.

9. A series of decisions have been referred to us by the learned counsel in support of the proposition that a co-accused offering to give evidence does not cease to be a co-accused, and the evidence of a co-accused, unless and until a pardon is tendered, cannot be accepted as that of a competent witness against the other accused. But we are afraid these decisions do not lend support to the proposition put forth by the learned counsel for the appellant. The earliest case among those cited is the one reported in *Charlotte Winsor v. Queen*, 1866-1 QB 289 (A).

In that case the main point that arose for consideration was whether the discharge of a jury by a judge could be reviewed by a court of error, and whether the

discharge of the first Jury without a verdict was equivalent to an acquittal. It was held that the Judge had a discretion to discharge the jury and that the discharge of the first jury without a verdict was not equivalent to an acquittal and that a second jury process might issue. In the course of the hearing and argument of the case, the question as to the improper reception of the evidence of an accomplice also appears to have come up for consideration. At page 311 the following passage occurs in the judgment of Cockburn C. J.:

"It was pressed on us also that the evidence of the accomplice, Harris, had been improperly received. That is a matter which we cannot take into account. It was alleged that the accomplice came forward to give evidence under peculiar circumstances. The plaintiff in error and Harries were both joined in one indictment, and on the first occasion were tried together. On the second, it was proposed on the part of the prosecution to sever the trial with the view to the one prisoner becoming a witness against the other.

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

In all cases where two persons are joined in the same indictment, and it is desirable to try them separately, in order that the evidence of the one may be received against the other, I think it necessary, for the purpose, of insuring the greatest possible amount of truthfulness in the person coming to give evidence, to take a verdict of not guilty as to him, or if the plea of not guilty be withdrawn by him, and a plea of guilty taken, to pass sentence; so that the witness may give his evidence with a mind free of all the corrupt influence, which the fear of impending punishment and the desire to obtain immunity to himself at the expense of the prisoner, might otherwise produce.

This objection is not set forth upon the record; in a civil case a question as to the reception of evidence may be raised on a bill of exceptions, but in a criminal case it cannot be raised upon the record so as to constitute a ground of error; we part not, therefore, take it into consideration. Whether this circumstance should have any influence elsewhere is matter upon which it is not for us to pronounce an opinion."

Our attention has been drawn to the following further observations of Blackburn J., at page 319 :

"The last objection made was, that the evidence of the fellow prisoner was improperly received. It is sufficient to say that that objection does not appear upon the record; the improper reception of evidence moreover cannot be a ground of error. I may, however, observe, although the question does not come before us, I do not think Harris was an inadmissible witness, but being admissible she was completely within the category of accomplices.

It would be right to tell the jury to look at her evidence with great caution. I do not doubt that the judge did carefully caution the jury, nor do I doubt that there was ample confirmatory evidence. I agree that it would be judicious as a general rule, where the accomplice, is indicted, that the indictment as to her should be disposed of before she is called as a witness, so that the temptation to strain the truth should be as slight as possible. I do not think that this is an objection to the legality of the evidence, but is a matter which affects the degree of credit which ought to be given to her testimony." In the judgment of Mellor J., the following passage occurs at page 323 :

"There is only one Other point referred to by the Lord Chief Justice which it is necessary to mention. Owing to the accidents of this case it happened that, on the second trial, the prisoner was in a different position to what she had been on her first trial. On the first occasion, the witness Harris was tried with her. On the second occasion, Harris was not tried with the prisoner. On an application specially made on the part of the Crown, the prisoner was tried by herself, and Harris, although she had not pleaded guilty, and although no verdict of acquittal was taken, was called as a witness.

She was, therefore, liable herself to be tried. I think the temptation held out by this course, especially to an ignorant witness to give false evidence, was very great; a witness ought always to give evidence without fear of any consequence pending over him. I am, however, of opinion that the Judge on the second trial had no alternative but to receive the evidence which I think was clearly admissible, although subject to strong observation as to its weight." Lush J., observed as follows at page 327 :

"The other objection relates to the admissibility of the evidence of Harris on the second trial. As to that, it is enough to say in my judgment her testimony was admissible, but whether admissible or not, it is an objection which cannot be put on the record, and therefore cannot be treated as a ground of error, for these reasons I am of opinion that our judgment must be for the Crown."

It has to be remembered that so far as the case before us is concerned, there is not merely a separate trial of P. W.12 ordered on the application made by the Public Prosecutor but that the charge for which P. W. 12 is to be tried is not also the same as that against the appellant. It has to be noted that P. W. 12 after the separation of the trial stands charged for the offences under Sections 201 and 411 I. P. C, and he does not figure any more as an accused -along with the first appellant.

If we follow the dicta laid down by the Judges in 1866-1 QB 289 (A), there can be nothing by way of a legal objection said against P. W. 12 being a competent witness against the appellant and against his evidence being admissible under the Evidence Act. All that the Judges have stated is that it is eminently desirable that a certain rule of produce should be followed if an accomplice is to be taken as a witness and not that such an accomplice is an incompetent witness or that the evidence of such an accomplice is inadmissible. They have also ruled that a great amount of caution should be administered to the Jury when the evidence of an accomplice is received in the case. In a later decision reported in *Queen v. Payne*, (1872) 1 CCR 349 at p. 354 (B), Cockburn J., has himself made clear the scope and meaning of, his observations in 1866-1 QB 289 (A). There he has observed as follows :

"A notion has gone abroad that I laid down that one of these courses must be taken. That is very different from what I did say. I only spoke of what is convenient."

In *Subrahmaniam Aiyar v. Queen Empress*, 10 Mad LJ 147 (FB) (C), a public servant was committed to take his trial along with B, at the Criminal Sessions of the High Court, having been charged with having conspired with B to commit various acts of bribery or extortion as such public servant from several persons and at various times extending over a period of nearly three years, and further charged with two specific acts of extortion or bribery from two of the individuals named in the first count (2nd and 4th counts), and lastly with bribery from another of the individuals named in the first count (8th count).

When the trial began and before the jury was empanelled, upon application by the Crown Prosecutor to the presiding Judge to tender a pardon to B. B was called upon to plead and he pleaded guilty. After the plea was recorded the presiding Judge tendered a pardon to B under Section 337 Cr. P. C. In the course of the trial B was examined as a witness for the Crown. A was convicted by the Jury upon the first count of conspiracy, upon the second count of bribery or extortion and upon the sixth count of bribery and acquitted upon the fourth count of bribery or extortion. A was thereupon sentenced by the presiding Judge.

Upon application by A's counsel under Clause 26 of the Letters Patent, the Advocate General having certified that the decision of the presiding Judge upon some points of law was erroneous and upon others deserved to be further considered, the case was heard by a Full Bench of six Judges. The Full Bench held (1) That as the case was not exclusively triable by a court of sessions the tender of pardon to B was illegal; (2) That the evidence of B was legally admissible against A. (Davies J., dissenting;) and (3) That the trial of more than 3 charges was illegal and therefore the first count of conspiracy should be struck out.

In deciding that the evidence of B, who was once a co-accused and who was given pardon on his admission of guilt, was admissible against the appellant in that case, though the pardon was not legal, the Full Bench followed the dicta laid down in 1866-1 QB 289 (A). In the judgment of Arnold White C, J., in the said decision,

the following passage occurs at page 158 :

In the case of Winsor v. Queen (A), it was held by the Exchequer Chambers, on a writ of error from the court of Queen's Bench, that when two prisoners were jointly indicted and pleaded not guilty, but only one was given in charge to the jury the Other was an admissible witness although his plea of not guilty remained on the record undisposed of. Unless precluded from so doing by any express provision of the law of India, I should be prepared to apply the principle of this decision to the facts of the present case and to hold that, when the second accused had pleaded guilty, as between him and the Crown, no issue remained to be tried, and that his incompetency to give evidence was removed notwithstanding that, at the time he gave his evidence, his plea of guilty remained on the record undisposed of.

In support of the view that the evidence of the second accused was inadmissible, it has been argued that the plea of guilty, in itself, did not amount to conviction, that, at the time he gave his evidence, the trial of the second accused was not at an end, and that he then was an "accused person" and therefore incompetent to give evidence on oath. Our attention was drawn to a number of sections of the CrI. P; C. (Sections 243, 245, 246, 255, 257, 263 (g) and (h), 305, 308, 307, 309, 412, 582) as showing that the Criminal Procedure Code contemplates some further proceeding by the tribunal before which the admission or the plea becomes a 'conviction'. The word 'conviction' with its cognate expressions would seem to be used somewhat loosely in the Procedure Code.

For example, in Section 271 'convicted' seems to mean nothing more than 'sentenced', since the Code contains no other provision for dealing with an accused person who pleads guilty. It may be that it would have been more strictly regular if the learned Judge, after recording the plea of guilty, had stated or recorded in set terms that he convicted the second accused on his plea of guilty. But, in my judgment, the question of the admissibility of the evidence of the second accused ought not to be decided on the narrow and technical ground that he had not been "convicted" in the sense in which the word is used in certain sections of the Criminal Procedure Code, but on the broad ground that when he gave his evidence he was not in charge of the Jury and no issue remained to be

tried as between him and the Crown."

In this Full Bench decision there was no doubt a plea of guilty by one of the accused but the conviction and sentence had not been passed. The contention that since the witness had not been convicted and sentenced, he remained still a co-accused and hence an incompetent witness was repelled-and the admissibility of his evidence was upheld.

10. In *Banu Singh v. Emperor*, ILR 33 Cal 1358 (D), it has been observed by a Bench of the Calcutta High Court as follows;--

The law, however, is well settled, and there can be no controversy on the point that an accomplice, if he is not an accused under trial in the same case, is a competent witness and may, as any other witness, be examined on oath. Even if a person be indicted with others, as in the present case, the local Government or the Public Prosecutor, acting on instructions from the local Government, may, with the consent of the Court, withdraw the prosecution, obtain an order of discharge, and then tender him as a witness to be examined on oath," The Bench has further observed as follows :--

"The disability to be examined as a witness on oath against the persons who are brought before the Court on the Same indictment, may thus Cease on the withdrawal of the indictment against him." It may be noticed that in this case when the indictment against P.W. 12 was withdrawn from the joint trial along with the appellant, it amounted to his ceasing to be a co-accused, and he was no more a co-accused in the same trial against the appellant. There was, therefore, no impediment in his 'being administered an oath as a Witness against the appellant in the trial in which P.W. 12 was not any more concerned. It is to be seen that all the earlier authorities on the subject have all been reviewed in the Calcutta decision.

11. In *Harihar Singa v. Emperor*, ILR 1937-J Cal 711 : (AIR 1936 Cal 356)(E), one of the points that arose for consideration before the Full Bench in the case was "whether the Court may consent to the Public Prosecutor withdrawing from the prosecution of any person, under the provisions of Section 494 (a), CrI. P. C., for

the purpose of obtaining that person's evidence as a witness." At p. 725 (of ILR Cal): (at pp, 358-359 of AIR), the Chief Justice of the Calcutta High Court has observed as follows :--

"However, in view of the doubt that has been cast by the referring Judges on the cases of G.V. Raman v. Emperor, ILR 56 Cal 1023: (AIR 1929 Cal 319) (F); Abdul Majid v. Emperor, ILR 60 Cal 652: (AIR 1933 Cal 537) (G); and Md. Saleuddin v. Emperor, 39 Cal WN 698 : (AIR 1935 Cal 281) (H), and the likelihood of that doubt giving rise to difficulty in other cases, we have thought fit to go into the questions raised. As regards questions (1) and (2), I see nothing in Section 494 which prevents a Public Prosecutor if he thinks it is in the interests of the administration of justice, from withdrawing the case as against one of the accused for the purpose of calling him as a witness against the others. It may well be in the interests of justice that the Public Prosecutor should so withdraw so that such evidence should be given to help to secure a conviction against the others. In the same way for the same reasons it may well be that the Court ought to give its consent to such withdrawal."

This is exactly what the Public Prosecutor has done in the case before us, as already pointed out. All the earlier authorities, both textual as well as decisions, were again reviewed by the Full Bench, and Derbyshire, C. J., has made the following further observations at p. 729 (of ILR Cal): (at p. 360-of AIR).-

"On principle and authority, therefore, I am of the opinion that the answers to questions (1) and (2) must be 'yes' (that is to say, the Court may consent to the Public Prosecutor withdrawing from the prosecution of any person, under the provisions of Section 494 (a), Crl. P. C., for the purpose of obtaining that person's 'evidence as a witness, and the case of ILR 56 Cal 1023: (AIR 1929 Cal 319) (F). upon this point was rightly decided."

Further observations of the learned Chief Justice may also be usefully quoted in this connection:--

"I wish, however, to add this: Section 337, Crl. P. C., which only applies to the offences of a more serious character therein specified, provides safeguards in the

interests both of the Crown and the accused. I think in cases where Section 337 is available it is better that the accused should be dealt with under that section."

"I am, however, far from saying that even where Section 337 can be applied it is contrary to law to discharge the approver under Section 494 (a). It must be remembered that the approver dealt with under Section 337 gives his testimony with a contingent charge hanging over his head; also that the evidence of an accomplice, whether dealt with under Section 337 or Uncharged under Section 494 (a) or acquitted under Section 494 (b) is the evidence of an approver and as such open to suspicion."

12. In "Keshav Vasudeo Kortikar v. Emperor, ILR 59 Bom 355: (AIR 1935 Bom 186) (I), it was held that the accused, referred to in Section 342, Crl. P. C., 1898, meant an accused person under trial who ought to be questioned by the Court in respect of the evidence against him. A question having arisen as to whether the evidence of two persons who were shown as accused but not sent up for trial in the charge-sheet but who were cited as witnesses was admissible ; it was held that the two persons not sent up for trial and cited as witnesses could not properly be said to be accused persons and that there was no provision of law which would make then evidence inadmissible. The decision reported in Queen Empress v. Mona Puna," ILR 16 Bom 661 (J) was followed. This case does not directly apply, to the facts in the present case for, as a matter of fact, P.W. 12 in the present case was committed to sessions to take his trial along with the appellant and his case was later on separated on an application made by the Public Prosecutor.

13. Apart from these decisions the learned Public Prosecutor has invited our attention to a decision reported in Empress v. Durant, ILR 23 Bom 213 (K). Candy, J., has held that the words 'the accused' in Clause (4) of Section 342, Crl. P. C. (Act V of 1898), meant the accused then under trial and under examination by the Court. At p. 219 the learned Judge has observed as follows:--

"I would go further and say that 'the accused' in Section 342 must mean the accused then under trial and under examination by the Court. It cannot include an accused over whom the Court is exercising jurisdiction in another trial. I may be trying a murder case in this High Court, and an important witness, either for the

Crown or for the defence, may be an accused person who has pleaded to a charge of house breaking, and whose trial is to come on directly after the murder case, It would be absurd to say that no oath shall be administered to that accused person when he is tendered as a witness in the murder case.

As the Judge said in *Empress of India v. Asghar Ali*, ILR 2 All 260 (K1), an accused person cannot be put on his oath or examined as a witness in the case 'in which he is accused. Dady, Mehta and Bottlewala are not accused persons in the case in which Durant is accused. Their case is to be tried separately. They were co-accused; they are not so now. If they were being tried jointly with Durant, it would be impossible to say that their statements recorded under Section 342, Crl. P. C., whether amounting to confessions or not, could not be taken into consideration by the Jury in favour of Durant.

Why, then, should Durant be deprived of the benefit of these statements, because these men are not being tried jointly with him? But as they are not now being tried in this case, the only way in which they can make statements is as witnesses, and if they are witnesses, then they must be sworn. For all these reasons I have no doubt that these persons, whom Durant has tendered as his witnesses, can be examined as witnesses, and therefore, on oath."

14. The learned Judge then goes on to discuss the difficulty that arose in his mind from the provisions of Section 132 of the Evidence Act. We shall refer to Section 132 of the Evidence Act at a later stage of this judgment with regard to an erstwhile accused person giving evidence. In *Akhoy Kumar Mookerjee v. Emperor*, ILR 45 Cal 720: (AIR 1919 Cal 1021) (L), a Bench of the Calcutta High Court has held that Section 5 of the Oaths Act (X of 1873) and Section 342 (4), Crl. P. C., apply only to the accused actually under trial at the time, and that such person could not, therefore, be sworn as a witness, and no accused jointly tried is a competent witness for, or against the co-accused, but that when the accused persons are tried separately, each, though implicated in the same offence, is a competent witness at the trial of the other. This Bench has followed the decision in *Reg v. Narayan Sundar*, 5 Boni HCR 1 (M) and ILR 23 Bom 213 (K), and has approved of ILR 33 Cal 1353 (D) and *Amrita Lal Hazra v. Emperor*, ILR, 42 Cal

957: (AIR 1916 Cal 188) (N),

15. In *A.V. Joseph v. Emperor*, ILR 3 Rang 11; (AIR 1925 Rang 122) (O), Baguley, J., has held after a review of all the previous cases that there was ample justification for the dictum that it was beyond controversy that when an accomplice was not jointly tried with the accused, he was a competent witness for or against the accused. In *Karamalli Gulamalli v. Emperor*, ILR 1939 Bom 42: (AIR 1938 Bom 481) (P), it has been held by a Bench of the Bombay High Court, that the expression 'accused' as used in Section 342, Crl. P. C., 1898, mean the accused then under trial and examination by the Court and could not include an accused over whom the Court was exercising jurisdiction in another trial. The Bench followed the decisions in ILR 23 Bom 213 (K); *Emperor v. Govind Balvant Laghate*, 18 Bom LR 266: (AIR 1916 Bom 229) (Q); and *Emperor v. Kazi Dawood*, ILR 50 Bom 56: (AIR 1926 Bom 144) (R). In that case a charge-sheet having been preferred against ten persons accused of certain offences, the prosecution applied for the separate trial of one of those persons so as to enable them to examine him as a witness for the prosecution. The Magistrate granted the application and the person then gave evidence. A question having arisen as to whether this person was a competent witness and his evidence admissible, it was held that the person was a competent witness, since he was not an accused for the purposes of Section 342, nor for the purposes of Section 343, Crl. P. C., 1898, there being no evidence of any promise or inducement having been made to him which would render his evidence inadmissible. It was also held that the value to be attached to the evidence of such a person was a question distinct from that of its admissibility, A Bench of the Allahabad High Court in *Emperor v. Har Prasad Bhargava*, ILR 45 All 226: (AIR 1923 All 91) (S) held that it was not necessary, in order to make an accomplice a competent witness, that the procedure prescribed by Section 337, Crl. P. C., should be invariably "made use of and that whatever effect the circumstances under which the witness's evidence was given might have upon its credibility, there could be no objection to its admissibility. It was also made clear in this decision that Section 337, Crl. P. C., was an empowering section, that it was addressed to certain Courts of justice, and had nothing to do with the powers or discretion of an executive authority, such as a local Government, in the matter of instituting, or refraining from instituting, any prosecution, and that the Legislature

had seen fit to limit its operation to the case of any offence triable exclusively by the Court of Session or High Court,' and other offences as mentioned in the section. In *Amdumiyar v. Empeior*, AIR 1937 Nag 17 (T), a Full Bench of the Nagpur High Court held:

"The word 'inquiry' used in Section 342 does not include investigation and the word 'accused person' must mean one over whom the Magistrate is exercising jurisdiction. Therefore when a person against whom there was sufficient evidence to justify his production for enquiry and trial before a Magistrate under Section 170, is not prosecuted by the police, such person is not an accused person within the meaning of Section 342, There is nothing which precludes the Court from administering an oath to such a person. Hence he can be a competent witness even though he was not pardoned under Section

337. But his evidence must ordinarily be of less value than that of a person who has been granted a valid pardon and is no longer under fear of a prosecution."

Therefore, in the light of the rulings in the decisions that have been referred to above and with which we agree, we are of the opinion that in so far as P.W. 12 is not accused person within the meaning of Section 342 CrI. P. C., it is quite legal to administer him an oath as a witness and there is no legal impediment in his figuring as a competent witness against the appellants, so far as the offence under Section 302, I. P. C., is concerned, though P.W. 12 was a co-accused with the appellant at an earlier stage and he stood charged Before the committal Court and the Sessions Court under Sections 201 and 411, I. P. C. In our opinion, when once the application of the Public Prosecutor was granted, for separation of the trial of the two accused, the necessary result was that P.W. 12 was no more a co-accused in the trial of the appellant under Section 302. I. P C. and therefore there was nothing that Could prevent him from being a competent witness against the appellant. As has been observed in the various decisions, the weight that could be attached to his evidence when he appears as a witness against the appellant is quite a different and distinct matter from the admissibility of his evidence as a competent witness.

16. A question has also been raised as to whether the benefit of the proviso to Section 132 of the Evidence Act can be claimed by such a witness, who was once a co-accused but has since ceased to be such by reason of the Separation of his trial with the other accused. Section 132 of the Evidence Act lays down that the witnesses are not excused from answering questions on the ground that their answers will incriminate them; but the proviso is to the effect that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceedings, except a prosecution for giving false evidence by such answer. We do not think that a witness in the position of P.W. 12 in the present case could be denied the benefit of this proviso to Section 132 of the Evidence Act. He is as much a witness as any other, when once he is not an accused person within the meaning of Section 342, Crl. P. C. The legal position of such a witness does not differ from the position of any other ordinary witnesses, and there is nothing that could prevent such a person from taking benefit under the proviso to Section 132 of the Evidence Act. When an oath could be administered to such a person, then naturally the incidents to Section 132 of the Evidence Act will also attach themselves to such a person - as a witness.

17. A further question has also been raised as to whether an accused person giving evidence under the amended Section 342 (A) could claim the benefit of the proviso to Section 132 of the Evidence Act. The principle underlying Section 342 (A) seems to be that an accused person within the meaning of Section 342 shall be a competent person for the defence and he could also be administered oath for his appearing as a witness for himself or for any person charged together with him at the same trial. This section has also stipulated some further conditions to be satisfied when such a person gives evidence for himself or for any other person charged along with him at the same trial. He shall not be called as a witness except on his own request in writing and that his failure to give evidence shall not be made, the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial. Section 342 (A) seems to contemplate a very-special procedure to enable the accused to figure as a witness for himself and for any other accused who may be charged with him at the same trial subject to the conditions laid down

therein. The question as to how far he could claim benefit under the proviso to Section 132 is one that does not arise in this appeal and we do not think that we are called upon to express any opinion at this stage. We shall reserve our opinion on this aspect for a future occasion when the issue directly arises in any proceedings before us.

18-25. His Lordship, after examining the evidence, continued to state as follows:

On a consideration, therefore, of the entire evidence in the case, we are of the opinion that the learned Sessions Judge came to the right conclusion, when he held that the offence of murder of the deceased had been established against the appellant beyond any reasonable doubt. As has been pointed out by the learned Additional Sessions Judge, there are no extenuating circumstances in the case, and we are of the view that the conviction and sentence imposed against the appellant are quite warranted, and there is no ground for us to interfere with the same.

26. In the result, the conviction and sentence are confirmed and the appeal is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com