APPELLATE CRIMINAL.

Before Teunon and Richardson JJ.

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Oct. 9.

AKHOY KUMAR MOOKERJEE

v.

EMPEROR.*

Witness—Competency of a person, accused of an offence, as witness against another implicated therein, but separately tried—Admissibility of the deposition of a witness against himself on his subsequent trial—Evidence Act (I of 1872) ss. 118, 132—Oaths Act (X of 1873) s. 5—Criminal Procedure Code (Act V of 1898) s. 342 (4).

Section 5 of the Oaths Act (X of 1873) and section 342 (*4*) of the Criminal Procedure Code apply only to the accused actually under trial at the time. Such person cannot, therefore, be sworn as a witness, and no accused jointly tried is a competent witness for, or against, the co-accused.

But when accused persons are tried separately, each one, though implicated in the same offence, is a competent witness at the trial of the other.

Reg. v. *Narayan Sundar* (1) and *Empress* v. *Durant* (2) followed.

Banu Singh v. *Emperor* (3) and *Amrita Lal Hazra* v. *Emperor* (4) approved.

Queen-Empress v. *Mona Puna* (5), *Subrahmania Ayyar* v. *King-Emperor* (6) and *Queen-Empress* v. *Hussein Haji* (7) referred to.

A previous deposition is admissible against the witness on his subsequent trial, unless he has brought himself within the protection of the proviso to s. 132 of the Evidence Act.

King-Emperor v. *Nanda Gopal Roy* (8) explained and distinguished.

ON the 22nd January, 1917, one Surendra Nath Ghose, a weighman in the firm of Hara Nath, Shashi

* Criminal Appeal, No. 479 of 1917, against the order of Abdus Salam, Third Presidency Magistrate, Calcutta, dated July 27, 1917.

(1) (1868) 5 Bom. H. C. R. 1.
(2) (1898) I. L. R. 23 Bom 213.
(3) (1906) I. L. R. 33 Calc. 1353, 1357.
(4) (1915) I. L. R. 42 Calc. 957, 986.
(5) (1892) I. L. R. 16 Bom. 661.
(6) (1901) I. L. R. 25 Mad. 61.
(7) (1900) I. L. R. 25 Bom. 422
(8) (1916) 20 C. W. N. 1128, 1132

Bhusan, Kedarnath Burman, received six Government currency notes, of Rs. 1,000 each, from Raj Kumar Mookerjee. At about 8 P.M. of the same day, Surendra Nath was passing through Kantapooker on his way home when he was waylaid by three men and robbed of the money. He informed the police who communicated with the Paper Currency Office. On the 26th January, Sheo Pershad Chatterjee, a clerk in the Currency Office, presented two of the stolen notes for encashment and was arrested. On information given by him, the present appellant was also arrested. They were put on trial before Mr. Keays, Second Presidency Magistrate, and separate trials were directed to be held. The case of Sheo Pershad was first taken up, and the appellant was examined as a prosecution witness. Sheo Pershad was convicted by the Magistrate, but acquitted by the High Court.

The appellant was then tried before Moulvi Abdus Salam, Third Presidency Magistrate, on a charge, in the alternative, under s. 411 or 414 of the Penal Code. Sheo Pershad was examined by the prosecution at the trial, and stated that he had received the two notes from the appellant to be cashed, and the previous deposition of the appellant containing an admission to the same effect was admitted in evidence against him. He was convicted under the above sections, in the alternative, and sentenced to one year's rigorous imprisonment, on the 27th July. He now appealed to the High Court.

Babu Manmatha Nath Mookerjee, for the appellant.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

Cur. adv. vult.

TEUNON AND RICHARDSON JJ. The appellant, Akhoy Kumar Mookerjee, *alias* Bhut Nath Mookerjee,

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has been convicted by the Third Presidency Magistrate Mr. Abdus Salam, in the alternative, under section 411 or section 414 of the Penal Code, and sentenced to rigorous imprisonment for one year.

The case relates to two currency notes of Rs. 1,000, each, which were undoubtedly stolen on the 22nd January, 1917, and subsequently, on the 26th January, presented for encashment at the Paper Currency Office, by Sheo Pershad Chatterjee, a clerk of that office. Sheo Pershad's arrest led to the arrest of the appellant. The police placed the two men for trial before Mr. Keays, the Second Presidency Magistrate. Mr. Keays, as he was at liberty to do, directed that they should be tried separately. Sheo Pershad's case was taken first, and at his trial the appellant was put in the witness-box and gave evidence. In the result, Sheo Pershad was convicted, but the conviction was subsequently set aside by this Court. Now the appellant has been tried, and his deposition in Sheo Pershad's case has been used as evidence against himself. His learned pleader, Mr. Manmatha Nath Mookerjee has urged on his behalf that the deposition is inadmissible mainly on the ground that the appellant was not a competent witness for or against Sheo Pershad.

The general rule on the subject of the competency of witnesses is contained in section 118 of the Evidence Act:

"All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

The Evidence Act is silent as to accused persons, but section 5 of the Indian Oaths Act (Act X of 1873)

provides that "Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person," and clause (4) of section 342 of the Criminal Procedure Code similarly provides that "No oath shall be administered to the accused." It is undisputed, therefore, that an accused person actually under trial cannot be sworn as a witness, and that if two or more persons are being jointly tried, none of them is a competent witness for or against the others. But in our opinion this exception to the general rule goes no further, and has no application to an accused person who is not at the time under trial. Accordingly when two persons, though they may be accused of complicity in the same offence, are tried separately, each is a competent witness at the trial of the other.

We are disposed to regard the law as settled in this sense, and it is only in deference to the arguments addressed to us that we go further into the matter.

It is hardly contested that the provision in the Criminal Procedure Code, regard being had to its context, applies only to the accused actually under trial, and it appears to us that the language of the Oaths Act is capable of, and should receive, a like interpretation. The accused person in a criminal proceeding is the accused who is the subject of that particular proceeding.

This view is in accord with English practice: Stephen's "Digest of the Law of Evidence," Article 108; Archbold's Criminal Pleading, Evidence and Practice, 23rd edition, page 394 *note*. In India the law was laid down as we have stated it so long ago as the year 1868 by Couch C.J. and Newton J. in *Reg.* v. *Narayan Sundar* (1). It is true that the Oaths

(1) (1868) 5 Bom. H. C. R. 1.

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Act had not then been passed. but section 204 of the first Criminal Procedure Code (Act XXV of 1861) was to the same effect as the corresponding provision in the present Code to which we have referred. It may be that some difficulty has since been caused in this connection by certain decisions relating to illegal or irregular pardons. The earlier cases are referred to, and distinguished or explained in *Queen-Empress* v. *Mona Puna* (1). In these and other cases the true question appears to be whether several persons having been placed on their trial together, the proceedings as against one of them have come to an end so as to remove the impediment to his being examined as a witness for or against the others: see *Subrahmania Ayyar* v. *King-Emperor* (2) *per* Arnold C.J., and *Queen-Empress* v. *Hussein Haji* (3). On this question, as it has arisen in particular cases or in particular circumstances, there may have been some conflict of opinion and the decisions may not be entirely reconcilable. Possibly, too, traces may be found of some confusion between the competency of a person as a witness and the admissibility of any evidence such person may have to give. However that may be, in the case before us the appellant and Sheo Pershad were never on their trial together. Sheo Pershad was tried separately. In such a case the rule applicable is that laid down in *Reg.* v. *Narayan Sundar* (4). already cited, and again in *Empress* v. *Durant* (5). The latter case, which was decided by Candy J., upon the present Code, is clearly in point. Full reasons for the decision, with which we generally concur, will be found in the judgment of the learned Judge, and if the decision was not actually approved and adopted by this Court in

(1) (1892) I. L. R. 16 Bom. 661.
(2) (1901) I. L. R. 25 Mad. 61, 67.
(3) (1900) I. L. R. 25 Bom. 422.
(4) (1868) 5 Bom. H. C. R. 1.
(5) (1898) I. L. R. 23 Bom. 213.

Banu Singh v. *Emperor* (1), it was certainly not dissented from. In fact at page 1357 of the report, the learned Judges (Mitra and Holmwood JJ.), say this :—

"The law, however, is well settled . . . 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."

That expression of opinion, even if it be nothing more, certainly supports our conclusion that the appellant was a competent witness at the trial of Sheo Pershad, a conclusion which is also supported by the observations of another Bench of this Court in *Amrita Lal Hazra* v. *Emperor* (2).

We may mention that, as the cases show, it may often be to the advantage of the accused actually under trial that a person alleged to be an accomplice should be put into the witness-box.

It was next argued that if the appellant was a competent witness at Sheo Pershad's trial, the evidence he gave was not admissible against himself at his own trial. It was not suggested that the appellant had brought himself within the protection afforded to witnesses by the proviso to section 132 of the Evidence Act. His evidence was voluntarily given. Reference was, however, made to certain observations in *King-Emperor* v. *Nanda Gopal Roy* (3). There were special facts in that case. Nanda Gopal and others were placed on their trial before a Presidency Magistrate. Nanda Gopal was discharged. The other accused were convicted and appealed to this Court. This Court before disposing of the appeal directed that Nanda Gopal should be examined as a witness. No question was raised as to his competency, and his evidence was duly taken by the Magistrate and sent

(1) (1906) I. L. R. 33 Calc. 1353. (2) (1915) I. L. R. 42 Calc. 957, 986.
(3) (1916) 20 C. W. N. 1128, 1132.

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up to this Court. Then the appeal of the other accused was dismissed, and the learned Judges at the same time issued a Rule upon Nanda Gopal to show cause why the case against him should not be further inquired into. The Rule was heard by the Chief Justice and Walmsley J., and in discharging the Rule the learned Chief Justice incidentally said that "the evidence of Mr. N. G. Roy, given under the direction of the Court, could not be used against him if he were to be retried." But the point was not decided and could not be decided at that stage. The Rule was discharged because it was considered unfair that the proceedings against Nanda Gopal should be revived upon the strength of statements made by him in the witness-box, in the course of an examination directed by this Court. The ground taken was quite independent of the further question whether those statements would or would not have been admissible against him supposing he were retried. Section 132 of the Evidence Act was not referred to, and, apart from that, the case is distinguishable from the present upon the facts. The case of an accused person who is discharged and then gives evidence and against whom an order for further inquiry is then made, may be subject to considerations which are not applicable to the present case. Upon that question we need express no opinion. In the present case we are unable to say that the Magistrate committed any error of law by admitting the appellant's deposition at Sheo Pershad's trial as evidence against him at his own trial.

It was lastly argued that the Magistrate could not properly find on the materials before him that the appellant "knew or had reason to believe" that the notes were stolen property. Reference was made to *Empress* v. *Rango Timaji* (1). No doubt mere

(1) (1880) I. L. R. 6 Bom. 402.

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carelessness or suspicion might not amount to criminal knowledge though the question might be one of degree. But in the present case the accused admits a dishonest mind. He says: "I did not know that the notes were stolen: I thought they were forged." There is nothing in the notes themselves to suggest that they were forged. We are of opinion that the evidence, including the statements of the appellant himself and the letter which he placed in his sister's custody, afford ample warrant for the finding that he knew or in fact believed that the notes had been stolen.

For the reasons given, this appeal must be dismissed. The appellant, if on bail, must surrender and undergo the remainder of his sentence.

E. H. M. *Appeal dismissed.*

CRIMINAL REVISION.

Before Richardson and Beachcroft JJ.

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Nov. 28.

MANHARI CHOWDHURI

v.

EMPEROR.*

Autrefois Acquit—Trial for theft and receiving stolen property charged in the alternative—Acquittal by the High Court—Subsequent trial under s. 54A of the Calcutta Police Act (Beng. IV of 1866) relating to the same act or series of acts—Act or possession punishable under s. 54A whether an offence—Criminal Procedure Code (Act V of 1898), ss. 4 (1) (o), 236, 237 and 403 (1).

Under s. 403 (1) of the Criminal Procedure Code an acquittal of offences under s. 380 and s. 411 of the Penal Code, charged in the alternative, bars a subsequent trial for an offence under s. 54 A of the Calcutta

* Criminal Revision, No. 1109 of 1917, against the order of K. B. Das Gupta, 4th Presidency Magistrate of Calcutta, dated Sep. 21, 1917.