APPELLATE CRIMINAL.

Before Rankin C. J. and C. C. Ghose J.

1931

Dec. 3.

JAFFARUL HOSSAIN

v.

EMPEROR.*

Admissibility—Expert evidence, what is—Confidential record, if can be compelled to be produced—Secondary evidence, if can be given of confidential record—Indian Evidence Act (I of 1872), s. 123.

The evidence of a witness, who does not speak from any special knowledge based on his experience or training but from information derived from an entry in a confidential record not produced before the court, is not admissible as expert evidence.

Under section 123 of the Indian Evidence Act, the confidential record of the Controller of Stationery relating to the water mark of cartridge papers cannot be compelled to be produced in court.

Quaere—Whether secondary evidence can be given of an entry in a confidential record which cannot be required to be produced in court ?

A prosecutor who does not prove an entry and who does not give secondary evidence of the contents of the entry, cannot, to substantiate a case of forgery, call a witness, who merely says that, if the entry is true, a certain cartridge paper came into existence subsequent to a certain date. The witness is thereby asked to give an inference from an entry as to which no evidence was to be taken.

CRIMINAL APPEAL.

The material facts appear from the judgment of the Court.

Ramendrachandra Ray and *Sureshchandra Talukdar* for the appellants.

The Deputy Legal Remembrancer, Khundkar, and *Nirmalchandra Chakrabarti* for the Crown.

RANKIN C. J. In this case, two appellants are before us, Jaffarul Hossain and Abdul Majid. They have each been convicted under section 193 of the Indian Penal Code of the offence of perjury and sentenced to rigorous imprisonment for a term of three years.

*Criminal Appeal, No. 294 of 1931, against the order of K. Gupta, Addl. Sessions Judge of Mymensingh, dated Feb. 7, 1931.

It appears that, being a party to certain rent suits, one Gagan put in evidence certain documents. These documents included four *kabuliyats* and they also included some *talab-bâkis*, rent receipts and counterfoils of rent-receipts (*checkmurhis*). The *kabuliyats* purported to have been executed by certain persons in 1316 B. S. The other documents were said to have come into existence in connection with the tenancies on dates subsequent to that year. The prosecution case as against the two appellants was that Jaffar Hossain, in giving evidence, said "It is not true that these "*kabuliyats* are forged documents" and Abdul Majid said "as regards the *kabuliyats*.....I wrote and "attested them on their respective dates. It is not true "that these *kabuliyats* have been forged afterwards." It will be seen, therefore, that, as against these two appellants, the case of perjury was confined to their evidence about the *kabuliyats*.

The case was tried before the learned Additional Sessions Judge of Mymensingh and the prosecution evidence, to show that the four *kabuliyats* were forged documents, was based upon evidence adduced to the effect that the cartridge papers, on which those *kabuliyats* were written, did not come into existence until a date subsequent to the date of the *kabuliyats*. The date of the *kabuliyats* was the 20th April, 1909. It has to be conceded and is admitted that the prosecution case as regards this depends on whether the evidence given by the first prosecution witness, Pradyotkumar Sen Gupta, is admissible in evidence as to the fact that the papers were not in existence for public use at the date which the documents bear. This witness is an assistant in the office of the Deputy Controller of Stationery, Calcutta. He stated that he had received the permission of the head office to give evidence. He further stated that he had special knowledge as to the date of the issue of cartridge papers and about the period for which such papers were issued. That was at the commencement of his

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examination-in-chief, and this was said obviously for the purpose of making his standing clear as an expert witness. He then went on to point to the four sheets of cartridge papers in question and stated that they bore the water-mark "T" and said that none of the cartridge papers had been in existence on or before the 20th April, 1909. The Public Prosecutor not content with this evidence asked the witness—"Were the "papers available at any time before 1925?" Whereupon the witness claimed privilege alleging that this matter was a State secret and the learned Judge allowed his claim and did not order him to answer the question. The witness, however, went on with his examination-in-chief a little further. He said: "Cartridge papers bearing a particular letter are "issued for a particular fixed continuous period and "are not repeated for any other future period." Asked "When were the cartridge papers marked T "first issued?", the witness claimed privilege which was allowed. He then said "the issue of cartridge "papers to the public is controlled by our office." That was the position at the end of his examination-in-chief, and it will be observed that when he said that none of the cartridge papers in question was in existence on or before the 20th April, 1909, as far as it appears, he might have been speaking of his own expert knowledge on the date of the issue of the cartridge papers. It might have been derived either from what he gathered at the time, 1909, or what he came to learn as an expert subsequently; so that, on the face of his evidence, the question to which we have now to address ourselves is not shown to have arisen. The cross-examination, however, put a different complexion on the matter. In cross-examination, he said that he had only been in the office of the Deputy Controller of Stationery since 2nd February, 1925. He said that he considered the period for which this kind of papers was issued as a State secret. He then went on to give evidence:—

I stated, after consulting a confidential record, that the cartridge papers were not in existence before April, 1909. This confidential record is signed

by the Assistant Controller; it was given to me by the Assistant Controller on Thursday last. This is an unpublished record....My confidential record shows the period for which a particular mark will remain current. I base on this my statement that one particular mark will remain current for one particular period. It is not written in so many words that one mark will not be current for more than one period; but it appears from the record that one mark is for a fixed period only, against each mark a particular period is mentioned. I had no connection with the office of the Controller of Stamps prior to 1925, February. ....I consider the confidential record to be correct as it bears the signature of the Assistant Controller and it is one of the records of the office.

The learned Judge, in his charge to the jury and in his order sheet, has made it clear that he asked the witness whether the witness was prepared to let the judge inspect the entry upon which he based his evidence,—the entry having reference to the cartridge papers with the water-mark "T" and showing the period for which they were current. The witness was not prepared to let the judge see it or to let the lawyers on either side see it and he was not prepared to produce it, having regard to his claim that it contained matters which were "State secrets," that is to say, it was contrary to public interest that he should produce it.

In these circumstances, we have to consider whether the prosecution and the convictions in this case which are entirely based upon this evidence can be allowed to stand, that is, whether the evidence given in this way is admissible. I am of opinion that, if it had appeared that the witness was speaking from a special knowledge of cartridge papers, not basing his evidence merely upon a particular entry in a book but basing it upon his experience which might contain or comprise consultation of many books and handling of many documents, it may very well be that the evidence which he gave to the effect that these cartridge papers were not in existence in April, 1909, would be admissible evidence. But the cross-examination shows that that was not the position. The witness was not saying "From my knowledge of cartridge papers "acquired since 1925, I can say as an expert that these

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"papers could not have been in existence so far back "as 1909," but what he said was—

> I know nothing about this matter except that I have seen an entry in an official book signed by the Assistant Controller, the contents of which entry I believe to be true. That entry states the date on which this kind of paper was first issued and it gives the period during which it was current or was supplied for public use.

He did not profess to know anything about the matter except what he found in the entry. Then he said:—

> It is contrary to public interest to show you the entry. It is contrary to public interest to tell you what the entry says, and that is the reason why I do not want to state in public the date on which the papers were issued and the period for which they were issued. That would facilitate all kinds of forgeries and would deprive the Controller of Stationery of a valuable means of preventing forgery. Although, therefore, the court is not to be informed even what the entry is, I am going to say that, if this entry is true, then these papers with the water-mark were not in existence in 1909.

Now, the question is, can evidence be given in that way? My opinion is that it cannot. It is clear enough to my mind on the facts of this case that the witness was not compellable to produce the book and to show the entry, and it is clear enough to my mind that he was not compellable to state the contents of the entry from his recollection. Section 123 of the Evidence Act is quite sufficient authority for that proposition. The entry being one which cannot be required to be produced in court, a question arises whether, under the Evidence Act, it is open to a party to give secondary evidence of its contents and the sections of the Evidence Act are not altogether clear upon that question. There is room for the view that in some cases where a witness is not compellable to produce a document, the party who can get other secondary evidence can give secondary evidence of it. On the other hand, it would seem only commonsense to say that section 123 would prevent any person from giving secondary evidence of the document in a case such as the present. It is not necessary for the purpose of the present case that we should decide that point at all and I do not say anything upon the question whether secondary evidence could in such a

case have been given of this entry. The question before us is, whether a person who does not prove an entry and does not give secondary evidence of the contents of the entry can call a witness who merely says that if the entry is true, the paper came into current use at a date subsequent to 1909. Can he say "I will not tell you what the date is, I will not show "you the entry or tell you what it is; all that I will "say is that it shows that on some date subsequent to "1909 these papers came into existence?" I know of no way in which evidence of that kind can be given. That is not expert evidence. Assuming the entry in this case for the sake of argument to be true and that the cartridge paper with the water-mark T was first brought into existence in 1919, it is not expert evidence for a man to say that, if that were true, it was not in existence in 1909. The witness was being asked to give a very plain inference from an entry as to which no evidence was to be taken. I know of no method in which that could be done. Whatever could be done by expert evidence, it could not be done by that witness, whose sole knowledge of the matter was the fact that he had seen an entry which was not produced.

My view of this matter is that the basis of the prosecution case is inadmissible in evidence and, that being so, very much though I may regret it so far as the other circumstances of the case are concerned, I feel obliged to allow this appeal and direct that the appellants be acquitted. If they are on bail, they will be discharged from their bail-bonds.

GHOSE J. I agree.

Appeal allowed; accused acquitted.

A. C. R. C.