APPELLATE CRIMINAL.

Before S. K. Ghose and Henderson JJ.

BIMALKRISHNA BISWAS

v.

EMPEROR.*

1935

Jan. 23, 24, 25.

Accomplice—Accomplice testimony, nature of corroboration required—Evidence of a convicted accomplice, if better than that of an approver—Indian Evidence Act (I of 1872), s. 114.

Per Ghose J. It may not be illegal to base a conviction on the uncorroborated testimony of an accomplice. It may also not be illegal to base a conviction upon such testimony if it is corroborated by other accomplice evidence. But that is not tantamount to saying that independent corroboration is not necessary or corroboration of one tainted evidence by another tainted evidence is independent corroboration.

Merely because it is not illegal is not a reason for acting on such evidence. The court is not merely to record a conviction that is not illegal, but it is to record a conviction that is properly based. The rule of law requiring independent corroboration is a rule of caution derived from judicial experience of ages. There may be circumstances which may lessen the degree of corroboration required, but these circumstances themselves have to be proved by independent evidence and it does not make the rule of caution inapplicable.

Ambica Charan Roy v. *Emperor* (1) followed.

Nirmaljeeban Ghosh v. *Emperor* (2), *Aung Hla* v. *King-Emperor* (3) and other cases distinguished.

The evidence of a convicted accomplice may stand on a higher level than that of an approver. That is a circumstance which may not be left out of account, but the fact remains that an accomplice is an accomplice and, more or less, having regard to the circumstances of each case, he ought to be corroborated by other evidence.

Queen-Empress v. *Hussein Haji* (4) and *Mahammad Yusuf* v. *Emperor* (5) referred to.

A conspiracy to commit terrorist crimes is not the same thing as a conspiracy to possess arms in contravention of the Arms Act. It is a fallacy to suppose that, merely because one was a member of the larger organisation for the furtherance of terrorist movements, he was also a member of the smaller organisation for the possession of arms.

*Criminal Appeals, Nos. 623 and 624 of 1934, against the order of T. P. Bhattacharjya, Special Magistrate of Barrackpore, dated July 23, 1934.

(1) (1931) 35 C. W. N. 1270.
(2) (1934) I. L. R. 62 Calc. 238.
(3) (1931) I. L. R. 9 Ran. 404.
(4) (1900) I. L. R. 25 Bom. 422.
(5) (1931) I. L. R. 58 Calc. 1214.

1935

Bimalkrishna Biswas v. Emperor.

Per HENDERSON J. A rule of law is not the same thing as a rule of prudence. The rule of law is that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. To say that an accomplice is to be corroborated in material particulars is not the same thing as to say that he is to be corroborated by a witness who is not an accomplice. No doubt it is a rule of prudence to say that ordinarily evidence which is itself tainted should not be accepted as corroboration of tainted evidence. But it is opposed to all common sense to lay down that in a case, the circumstances of which show that the rule of prudence does not apply, the court is precluded from acting on evidence which it believes to be true.

Aung Hla v. *King-Emperor* (1) followed.

CRIMINAL APPEALS.

The material facts and arguments appear sufficiently from the judgments.

Santoshkumar Basu and *Mohitkrishna Sanyal* for the appellant in appeal No. 623.

Narendrakumar Basu, Lalitmohan Sanyal and *Phaneendramohan Sanyal* for the appellant in appeal No. 624.

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

GHOSE J. The appellants in these two appeals were tried before a Special Magistrate of Barrackpore on charges under section 19A of the Arms Act as amended by Bengal Act XXI of 1932 and section 120 B of the Indian Penal Code. They have all been convicted under those sections and the appellant Ashwinikumar Ghosh has also been convicted under section 19A of the Arms Act as amended by Bengal Act XXI of 1932. Bimalkrishna Biswas has been sentenced to undergo rigorous imprisonment for 7 years and each of the other two appellants has been sentenced to undergo rigorous imprisonment for 5 years. Besides these appellants, four other persons were put on trial. Out of these, three, namely, Kalidas Ghosh, Lakshmanchandra Adhikari and Panchanan Samanta pleaded guilty and were convicted on that plea and each of them was sentenced to undergo rigorous imprisonment for 6 months. They have been examined as witnesses

(1) (1931) I. L. R. 9 Ran. 404.

for the prosecution, Kalidas as prosecution witness No. 37, Lakshman as prosecution witness No. 38 and Panchanan as prosecution witness No. 39. Another accused Pankajkumar Mitra was granted pardon and examined as a witness, prosecution witness No. 34.

The case for the prosecution is as follows: On the 18th February, 1934, Bimal was arrested under section 54 of the Code of Criminal Procedure. He was released the next day, but was re-arrested. On the 19th March, as the result of certain information received, the police searched the house of Kalidas and arrested him. He made a confession which was recorded on the 23rd March. On the same day the house of one Bimalabala Debee was searched and three revolvers, which are marked as Exts. IV, V and VI in the case, were recovered. Thereupon, a first information report, Ext. 3, was drawn up. On the 20th March, there was a search in the houses of Lakshman, Panchanan and Gopimohan Dawn, but nothing incriminating was found. Gopi was arrested on the 21st March and the other two on the 22nd March. Lakshman and Panchanan made confessions, which were recorded on the 22nd March. On the 21st March, there was a search in the house of the appellant Ashwini. In a flower tub in the garden attached to his house were found two revolvers and a pistol which are marked as Exts. VII, VIII and IX in the case. He was arrested and another first information report, Ext. 40, was drawn up. These two first information reports were amalgamated and the case was taken up as one case. On the 24th March, the library of the *Byayam-Samiti* was searched and some articles including two proscribed books were found. On the 31st March, a tank close to the house of Ashwini was searched and certain articles including some photographs of persons convicted of terrorist offences were found. On the 3rd April, the approver Pankaj was arrested and he made a confession which was recorded on the following day. After further investigation, chargesheet was submitted on the 14th

1935

Bimalkrishna Biswas v. Emperor.

Ghose J.

May and the accused persons were put on their trial on the 11th June. On the 18th June, Pankaj was granted pardon and on the same day charges were drawn up against the remaining six, out of whom the three persons named above pleaded guilty. No orders were passed on that day, but on the 28th June the three confessing persons were sentenced and on the same day they were examined as witnesses.

The prosecution case rests on the find of two sets of fire-arms, one on the 19th March, 1934, in the house of Bimala Debee and the other on the 21st March, 1934, in the garden of Ashwini. As regards the alleged conspiracy, the charge runs as follows :—

That you between January, 1934, and March, 1934, at Baranagore and Alambazar, P. S. Baranagore, were party to a criminal conspiracy with others known and unknown, to possess fire-arms, *viz.*, revolvers, pistols and cartridges, in furtherance of terroristic movements, and thereby committed an offence punishable under section 120B of the Indian Penal Code read with section 19A of the Indian Arms Act (XI of 1875) as amended by Bengal Act XXI of 1932 and within my cognizance.

It has been pointed out that, in so far as the alleged offence under the Arms Act is concerned, it was incumbent on the prosecution to prove that the fire-arms were possessed in contravention of sections 14 and 15 of the Act, in other words, that they were in possession without license or other legal authority. As regards the weapons marked Exts. VII and VIII, there is the evidence of T. W. Hart, the Arms Expert, prosecution witness No. 16, brought out in answer to questions in cross-examination to the effect that the ownership of these weapons cannot be traced and the learned magistrate, therefore, considers that they have been smuggled. But as regards the other set of fire-arms, Exts. V and VI, there is no evidence formal or otherwise to show that they had been held without license. No doubt, the accused do not claim them and the circumstances would also indicate that they had not been found in the lawful possession of any body, but I only mention it in order to show that in a case of this nature having regard to the charge it is incumbent on the prosecution to lead some evidence which would

justify an inference that the possession was against the provisions of the Arms Act.

1935

Bimalkrishna Biswas v. Emperor.

Ghose J.

As is stated in the charge, the prosecution case is that these fire-arms have been possessed in furtherance of terrorist movements. That in itself is not an offence under the Arms Act. It is necessary to say this, because the judgment of the learned magistrate shows that there has been some confusion in his mind as to what the prosecution has got to prove. It may be that there is a conspiracy to commit terrorist crimes and it may be that there is a conspiracy to possess fire-arms in contravention of the Arms Act. But the two things are not the same. The prosecution has led some evidence to show that the accused in these cases are members of an organisation, the object of which is to commit terroristic offences. If this is proved it would not follow, in the absence of other evidence, that the accused were also parties to a criminal conspiracy for the specific and definite purpose of possessing fire-arms in contravention of the Arms Act. Mr. Khundkar for the Crown has contended that the evidence as to terrorist organisation is relevant for the purpose of showing that it may lead to an inference that, if some members of the organisation were in possession of fire-arms, the others were also in a conspiracy to possess fire-arms. Whether that is so or not would depend upon the nature of the evidence indicating the connection between the two different kinds of conspiracy. But, nevertheless, they are different conspiracies and it is a fallacy, into which the learned magistrate seems to have fallen, to suppose that merely because one was a member of the larger organisation, one was also a member of the smaller organisation, although the immediate objects of the two were not one and the same.

In this case, the prosecution evidence is as follows: —There is the evidence of the approver and there is the evidence of the three accomplices. This evidence is specific evidence regarding the possession of the fire-arms. Then there is a certain amount of general

1935

Bimalkrishna Biswas v. Emperor.

Ghose J.

evidence for the purpose of showing that there was an organisation which was at one time called "*Yubaksangha*" and subsequently called "*Byayam-Samiti*" and some of the accused were members of this organisation. A good deal of this evidence is of a a colourless character and indicates nothing more than that it is apparently a harmless club for the promotion of games and study. There is only this much that, as the result of the police search, two proscribed books, among other articles, were found. But that does not carry us very far, so far the present case is concerned. There is also the evidence of some police officers, particularly of Amarendrakumar Sen, prosecution witness No. 35, which is largely of a hearsay character. This evidence, to my mind, is not sufficient to establish that the accused were members of an organisation to commit terrorist crimes, far less would it establish that the accused were parties to the conspiracy which is mentioned in the charge. Then there is the evidence of the approver and the accomplices. With regard to this, it is important to remember the circumstances under which these persons were apprehended and brought to court. Lakshman and Panchanan were arrested on the 20th March. Kalidas was arrested on the 19th March. Before they were brought to the magistrate, they were all kept in custody at Baranagore *thânâ*. Then they were produced before a magistrate and their confessions were recorded. It is also worthy of note that, although they pleaded guilty on the 18th June, they were not convicted until the 28th June and the sentences passed on them were disproportionately lenient, inspite of certain reasons recorded by the magistrate, and in view of the sentences which he thought fit to pass on the nonconfessing accused. Immediately after their conviction, the three prisoners were examined as witnesses. These circumstances lend support to the argument that there was some sort of arrangement by which these three prisoners were made available as witnesses for the prosecution against these appellants. Now, whether we consider the evidence of these three witnesses or the evidence of the

approver, it is important to remember that they are all subject to the well-known rule that it is unsafe to rely on the testimony of an accomplice without independent corroboration both as to the crime and as to the identity of the criminal. Mr. Khundkar has drawn our attention to a number of cases, in which he has contended that this rule has not been followed. *Aung Hla* v. *King-Emperor* (1), *Nga Nyein* v. *King-Emperor* (2), *Rattan Dhanuk* v. *King-Emperor* (3). He has also referred to the unreported decision of this Court, *Emperor* v. *Sharatchandra Dhupi* (4) and *Nirmaljeeban Ghosh* v. *Emperor* (5). I do not understand these cases to lay down anything more than this that it is not illegal to base a conviction on the uncorroborated testimony of an accomplice. It is also not illegal to base a conviction upon such testimony if it is corroborated by other accomplice evidence. But that is not tantamount to saying that independent corroboration is not necessary, or that the corroboration of one tainted evidence by another tainted evidence is independent corroboration. The aforesaid argument that it is not illegal does not take us very far; it is not illegal to do a great many other things, for instance it is not illegal to believe what is improbable, it is not illegal to impose the maximum penalty prescribed by law, and so forth. But merely because it is not illegal is not a reason for doing any of these things; in every case, the question is what is just and proper. As has been pointed out by Rankin C. J. in a judgment to which I was a party [see *Ambica Charan Roy* v. *Emperor* (6)] we are here not merely to record a conviction that is not illegal, but we are here to record a conviction that is properly based. Now, the rule of law requiring independent corroboration is a rule of caution which applies to all accomplice evidence. In England, it is based on principles derived from the judicial experience of ages.

(1) (1931) I. L. R. 9 Ran. 404.
(2) (1932) I. L. R. 11 Ran. 4.
(3) (1928) I. L. R. 8 Pat. 235.
(4) (1934) Cr. Appeal No. 421 of 1933 decided by C. C. Ghose A. C. J. and Costello and Mallik JJ. on the 9th Jan.
(5) (1934) I. L. R. 62 Calc. 238.
(6) (1931) 35 C. W. N. 1270.

1935

Bimalkrishna Biswas v. Emperor.

Ghose J.

In India, it is expressly confirmed by section 114 of the Evidence Act. The qualification to illustration (*b*) under section 114 only points out that in a particular case there may be circumstances, for instance circumstances showing previous concert among accomplices to be highly improbable, which may lessen the degree of independent corroboration required. But these circumstances themselves have to be proved by independent evidence and it does not make the general rule of caution inapplicable, for without corroboration the risk remains and that is what the court has to remember. Mr. Khundkar has also contended that an accomplice after conviction stands on a higher level than an approver. *Queen-Empress* v. *Hussein Haji* (1) and *Mahammad Yusuf* v. *Emperor* (2). That also is a circumstance which may not be left out of account, but the fact remains that an accomplice is an accomplice and, more or less, having regard to the circumstances of each case, he ought to be corroborated by other evidence. Now, in the present case, as I have pointed out, the conditions under which the accomplices were brought to court as witnesses after their conviction are not free from suspicion, and I do not think that it will be at all safe to accept the evidence of these three persons and of the approver as corroborating one another to such an extent as to do away with the rule of caution and justify us in accepting their evidence without material corroboration from other and more independent witnesses.

I may first refer to the case of the appellant Ashwini. In his case the conviction rests mainly upon the find of the fire-arms and cartridges which are marked as Exts. VII, VIII and IX. These were recovered from a flower tub in his garden by Sub-Inspector Phanindrabhooshan Sen, prosecution witness No. 36 and he is corroborated by Haricharan Basak, a neighbour prosecution witness No. 28. The accomplices who give direct evidence are Lakshman,

(1) (1900) I. L. R. 25 Bom. 422. (2) (1931) I. L. R. 58 Calc. 1214.

1935

Bimalkrishna Biswas v. Emperor.

Ghose J.

prosecution witness No. 38 and Panchanan, prosecution witness No. 39. Their evidence is to the effect that Bimal gave two revolvers to Lakshman and he gave them to Panchanan. Panchanan kept them for a few days in his house but on the 19th March, the day when Kalidas's house was searched, Lakshman and one Hirankumar asked Panchanan to return the box, whereupon Panchanan returned the box with the revolvers to Lakshman who gave it to Hiran and Hiran made it over to Ashwini. In so far as Ashwini's part in this business is concerned, it is amply corroborated by the fact that the weapons were found in his garden. The defence is that the weapons might have been planted and it is pointed out that according to the evidence the garden has a fence 1½ ft. high and it is open from outside. But the circumstances show that the search was a *bonâ fide* one. The search party went to the spot at 5-30 A.M. and at first the house was searched but nothing was found, and then the garden was searched and the whole business lasted till 9 A.M. Lakshman was arrested on the 20th and Panchanan on the 21st March and the search took place on the 21st March. In these circumstances the evidence of the accomplices is sufficiently corroborated by other and independent evidence and the conviction in the case of Ashwini is correct. There is also no reason to interfere with the sentence.

As regards the appellant Bimal, the only direct evidence with regard to the find of the weapons marked Exts. IV, V and VI is that of the approver Pankaj and of the accomplice Kalidas. These weapons were actually found with Bimala Debee, prosecution witness No. 9. Her evidence, coupled with that of Sambhunath Ghosh, prosecution witness No. 4 and that of Doctor Kshiteeshchandra Mitra, prosecution witness No. 10, corroborates the accomplice only in so far as the part taken by Kalidas is concerned. On the other hand, there appears to be some discrepancy between the story as given in the confession of Kalidas and his

1935

Bimalkrishna Biswas v. Emperor.

Ghose J.

deposition in court. Also it is clear from the evidence of prosecution witnesses Nos. 4, 9 and 10 that Kalidas actually handed over the weapons to Bimala on the 1st March when the appellant Bimal was already in custody. Therefore as regards Bimal's part in this business there is no independent corroboration of the evidence of the accomplices. Then as regards the other find, *viz.*, that of Exts. VII, VIII and IX, the evidence is again that of the accomplices Lakshman, prosecution witness No. 38 and Panchanan, prosecution witness No. 39. As I have already said in this case it will be unsafe to rely on this accomplice testimony without independent corroboration. There is some general evidence of association and it is of too general a character to prove the connection of the appellant Bimal with the particular conspiracy which is the subject matter of the charge. In the case of Bimal therefore the evidence is not sufficient to justify the conviction and his appeal must be allowed.

Then, as regards the appellant Gopi, the evidence does not connect with the possession of either set of fire-arms. The only evidence is that of the accomplice Kalidas, prosecution witness No. 37 and of another accomplice Lakshman, prosecution witness No. 38 and their evidence is to the effect that the appellant Gopi was introduced to them by Bimal. Here again there is want of independent corroboration. The only other evidence is of a general nature to the effect that he was, on some occasion, seen at the *Byayam-Samiti* and sometime he was seen in the neighbourhood of the place where he was living. This evidence, as mentioned already, is of too vague a character and does not connect the appellant Gopi with the particular offence which is the subject matter of the charge. In the case of the appellant Gopi we think that the evidence does not justify conviction.

The result is that the appeal of Ashwini is dismissed. The appeals of Bimal and of Gopi are

allowed and each of these two appellants is acquitted of the offence under sections 120B of the Indian Penal Code and 19A of the Arms Act and they are directed to be set at liberty.

HENDERSON J. The appellants were convicted of conspiracy to possess arms in contravention of the provisions of the Indian Arms Act. Although the prosecution adduced a great deal of evidence which, in my judgment, was entirely useless, they did not take care to see that the necessary formal evidence to show that the provisions of the Indian Arms Act were contravened was before the court. If it had not been for the fact that a police officer, in the course of his cross-examination, made a statement from which it can be inferred that the arms recovered from the house of Ashwini were not covered by any license, it would have been very difficult for us to avoid sending the case back and ordering the necessary evidence to be recorded, however harassing that oourse might have been to the appellants themselves.

The judgment of the learned magistrate has not been of as much assistance to us as is desirable. He has really done little more than make an abstract of what the prosecution evidence is. He then finds that it suggests that the accused and other persons were members of a conspiracy to commit acts of terrorism. Now, that is quite a reasonable view to take and indeed it is difficult to suppose that any persons would conspire to possess arms merely for the pleasure of contravening the provisions of the Arms Act or that they would do so unless they were members of another conspiracy, the object of which could not be attained without the possession of fire-arms. Now, it is quite obvious that it by no means follows that the members of the larger conspiracy must necessarily be implicated in the subsidiary activities connected with the collection of arms. Mr. Khundkar, however, has explained to us that the prosecution case is that all the accused persons were, in fact, connected with the subsidiary conspiracy. Unfortunately the learned

1935

Bimalkrishna Biswas v. *Emperor.*

Henderson J.

magistrate did not approach the case from that point of view at all and it is difficult to say whether he really brought his independent judgment to bear on the various matters which were placed before him. He says nothing about the reliability or otherwise of the accomplices: he does not say what evidence of corroboration he finds with respect to the individual accused and he does not really discuss the evidence with regard to its credibility and so on. The result is that the case had to be argued before us at greater length than would otherwise have been necessary.

Before we can uphold the convictions of the appellants, we must be satisfied that they are proved to be members, not of a conspiracy to commit acts of terrorism, but a conspiracy to possess arms in contravention of the provisions of the Indian Arms Act. The principal witnesses on whom the prosecution rely are the approver and the three accused persons who pleaded guilty. In this connection, Mr. Khundkar raised the question whether the evidence of an accomplice could be corroborated by that of another accomplice. On this point, I desire to say that I adhere to what was stated in the judgment delivered in the appeals arising out of the conspiracy to murder Mr. Burge to which I was a party. *Nirmaljeeban Ghosh* v. *Emperor* (1). A rule of law is not the samething as a rule of prudence. The rule of law is contained in section 114 of the Evidence Act, which lays down that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. To say that an accomplice is to be corroborated in material particulars is not the same thing as to say that he is to be corroborated by a witness who is not an accomplice. No doubt it is a rule of prudence to say that ordinarily evidence which is itself tainted should not be accepted as corroboration of tainted evidence. But, in my judgment, it is opposed to all common sense to lay down that, in a case, the circumstances of which show that the rule of

(1) (1934) I. L. R. 62 Calc. 238.

1935

Bimalkrishna Biswas v. Emperor.

Henderson J.

prudence does not apply, the court is precluded from acting on evidence which it believes to be true. I cannot better illustrate this point than by quoting from the judgment of Sir Arthur Page in the case of *Aung Hla v. King-Emperor* (1). The passage to which I refer begins at the bottom of page 429 and is in these terms :—

> War is waged and a battle fought against the forces of the Crown by certain rebels. The question is whether A. B. was a rebel who took part in the battle. Suppose the only evidence against A. B. is that of two approvers each of whom testify that A. B. was one of those who fought in the battle, and it is proved that both of these approvers are on bad terms with A. B. Obviously, the fact that unreliable and discredited testimony is given by two witnesses instead of one will not render the evidence of either witness the more worthy of credit. But suppose there are 30 rebels who have made statements either as approvers or by way of confession that have been made voluntarily ; who come from different villages, and with respect to whose statements there is no reason to think that there was any collaboration or collusion between the parties making them ; none of them, so far as it is possible to judge, being actuated by malice towards A. B., and suppose that each of these 30 rebels should happen in his statement to implicate A. B. stating that he also took part in the battle and was a party to the rebellion, could it be suggested that the cumulative effect of so many statements, apparently independent and impartial, all implicating A. B. could not reasonably lead to the conclusion that A. B. was a rebel and took part in the battle ? We think, clearly not.

Applying this principle to the facts of the present case, I am not prepared to say that the evidence of these four witnesses is of such a character as can safely be relied on as mutually corroborative. In the first place, we have no guarantee that they were not acting in concert or that they had no opportunities of consultation. Then again, the circumstances in which the three who pleaded guilty were convicted on their plea and sentenced on the 28th June, suggest there might have been a bargain between them and the prosecution to the effect that they might be dealt with lightly if they agreed to give evidence. It is quite clear that before they were convicted and sentenced the prosecution knew that they were willing to depose and the sentences inflicted are not only inadequate but out of all proportion to the sentence inflicted upon the appellant Gopi, whose case can hardly be distinguished from theirs. My learned brother has dealt with their

(1) (1931) I. L. R. 9 Ran. 404.

1935

Bimalkrishna Biswas v. Emperor.

Henderson J.

evidence in detail and I am satisfied that it would not be safe to rely upon it in the absence of material corroboration.

On this aspect of the case, I need only say that, so far as Bimal and Gopi are concerned, I find no material corroboration at all, whereas in the case of Ashwini it is conclusive. I agree that the appeal of Ashwini should be dismissed and the appeals of Gopi and Bimal should be allowed.

Appeals allowed in part.

A. C. R. C.