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 EMPRESS OF
 INDIA
 v.
 BALDEO
 SAHAI.

I would, therefore, set aside the order passed by the Sessions Court in appeal, and restore the finding and sentence of the Court of the Joint Magistrate with this modification, that, in addition to the punishment awarded by the sentence, the criminal Baldeo Sahai pay a fine of Rs. 200, or in default of payment undergo a further imprisonment for six months.

Appeal allowed.

1879
 April 10.

Before Mr. Justice Pearson and Mr. Justice Oldfield.

EMPRESS OF INDIA v. ASGHAR ALI AND OTHERS.

Evidence of Accomplice—Confession by Accused person—Act X of 1872 (Criminal Procedure Code), ss. 344, 345, 347—Act I of 1872 (Evidence Act), s. 24—Pardon.

Where a pardon was tendered by the Magistrate to a person supposed to have been concerned with other persons in offences none of which were exclusively triable by the Court of Session, and such person was examined as a witness in the case, held that, the tender of pardon to such person not being warranted by s. 347 of Act X of 1872, he could not legally be examined on oath, and his evidence was inadmissible.

Held also, that the statement made by such person was irrelevant and inadmissible as a confession, with reference to s. 344 of Act X of 1872 and s. 24 of Act I of 1872.

THIS was an appeal to the High Court by Asghar Ali, Hamid-ud-din, and Achal Behari, from convictions by Mr. W. Duthoit, Sessions Judge of Sháhjahánpur, dated the 16th November, 1878. The facts of the case are sufficiently stated for the purposes of this report in the judgment of the High Court. On behalf of all the appellants it was contended that the statement made on the trial of the appellants by the witness Irtiza Ali was not admissible as evidence against the appellants, and that, such statement being rejected, there was no evidence remaining which would justify the convictions of the appellants.

Mr. Colvin for Asghar Ali and Hamid-ud-din, and Mr. Leach and Babu Dwarka Nath Mukarji for Achal Behari.

The Junior Government Pleader (Babu Dwarka Nath Banarji) for the Crown.

The Court (PEARSON, J., and OLDFIELD, J) delivered the following

JUDGMENT.—The appellants have been convicted by the Sessions Judge of offences under ss. 261, 262, 409, 411, and 414, of the Indian Penal Code, in connection with certain stamp frauds in the Civil Courts of Sháhjahánpur. Asghar Ali is the deputy record-keeper of the Judge's Court. Hamid-ud-din is the decree-writer, and Achal Behari is a literate chaprasi in the Court of the Sháhjahánpur Munsifi. The appellants, together with Irtiza Ali Khan, a copyist in the Judge's office, and four others, were sent up by the police to the Magistrate on charges under ss. 411 and 379, and in the course of the inquiry the Magistrate offered a pardon to Irtiza Ali Khan and admitted him to be a witness for the prosecution. The Magistrate finally committed four of the accused to the Sessions on charges under ss. 261, 263, 109 and 263, 409, 411. In the course of the trial an objection was preferred on their behalf to the Judge to the admission of the evidence of Irtiza Ali Khan, but was disallowed and his evidence was admitted.

The case for the prosecution is that it was part of Achal Behari's business under orders from the Munsarim to punch the stamps on plaints presented, and of Hamid-ud-din to punch them the second time; that Achal Behari instead of punching them removed the unobliterated stamps and replaced them with old stamps that had been once punched supplied by Hamid-ud-din, who in his turn removed once-punched stamps from plaints passing through his hands, replacing them with twice-punched stamps obtained from the record office and taken from old records, such stamps being in their turn replaced by low value stamps from B. files. In brief it was Achal Behari who stole the fresh stamps, and the others assisted in concealing the fraud by a concerted plan of tampering with the stamps in the records, and that the spoil obtained by the sale of the stolen stamps was divided among them.

The fact that the stamps have been taken off the plaints and the records tampered with appears placed beyond doubt, but the objection taken on behalf of the appellants is that the evidence of the approver is inadmissible, and that apart from it there is no sufficient evidence on which the appellants can be convicted of being concerned in the frauds.

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These objections are in our opinion valid. The Magistrate is empowered to tender a pardon to an accused person with a view to examine him as a witness for the prosecution against other persons charged at the same time with him for an offence, in the manner and in the cases specified in s. 347 of the Code of Criminal Procedure, that is, "after recording his reason he may tender a pardon to any one of the persons supposed to have been directly or indirectly concerned in or privy to any offence specified in column 7 of the fourth schedule annexed as triable exclusively by the Court of Session."

In the present case the Magistrate omitted to record his reason for tendering a pardon to Irtiza Ali Khan, and none of the accused before him were charged with any offence exclusively triable by a Court of Session, and we have no ground for inferring that Irtiza Ali Khan was supposed to have been directly or indirectly concerned in or privy to such an offence, and, therefore, the offer of a pardon to him and his examination as a witness by the Magistrate and Judge were illegal and not authorised by s. 347. This examination as a witness not being permissible under s. 347 was contrary to express law.

After the offer to him of a pardon he was under the provisions of s. 347 detained in custody pending the termination of the trial, and his position as one under accusation of an offence was in no way changed when he appeared before the Judge, and could not be altered until he had been discharged, acquitted, or convicted, and with reference to the express provisions of s. 345, being an accused person, so long as he was in that position he could not be put on his oath or examined as a witness in the case in which he was accused.

His statement is also irrelevant and inadmissible with reference to s. 344, Criminal Procedure Code, and s. 24, Evidence Act. The evidence of Irtiza Ali Khan is therefore absolutely inadmissible.

There is a decision by the Bombay High Court (1) quite in point and to a similar effect, and another by the same Court under the old Criminal Procedure Code, where evidence taken illegally under s. 209 of that Code on an offer of pardon was rejected (2).

(1) *Reg. v. Hanmanta*, I. L. R., 1 Bom., 610.

(2) *Reg. v. Remedios*, 3 Bom. H. C. Rep., Cr. C., 59.

The case referred to by the Sessions Judge (1) is not in point, for in that case the prisoner had been discharged by the Magistrate for want of evidence and does not appear to have been offered a pardon. We may add that the statements of Irtiza Ali Khan are exceptionally untrustworthy, for he is believed by the Magistrate and the Judge to have fabricated false evidence against some of those whom he accused, and on this ground we should reject his statements against the appellants unless distinctly corroborated as against them, which we do not find to be the case.

Setting aside the evidence of the accomplice, there is nothing against the prisoners but bare suspicion arising out of the positions they held and opportunities they had of access to the records. On two occasions some old stamps were found, in Asghar Ali's house once, and on another occasion hidden under the carpet where Nur Ali, a relation of the record-keeper, was sitting, but the Courts below suspected that these stamps were placed by Irtiza Ali Khan in the place where they were found. As to any opportunities the appellants may have had of getting at the stamps on the plaints and records, it is clear that Hamid-ud-din and Achal Behari were not the only persons through whose hands the records passed, and others besides them had access to them in the Munsif's Court, and these persons have one point in their favour, that the record-keeper of the Judge's Court gave receipts for the records, and they may say, with some show of reason, that the receipts would not have been given if the records had been tampered with. Nor was Asghar Ali the only person in the record office who had access to the records, and indeed it is admitted that many other persons must have been engaged in the frauds.

There is nothing therefore to fix the guilt on any of the appellants, and indeed the counsel for the prosecution was unable to support the conviction on other evidence than that of the approver, whose testimony we have rejected. We set aside the convictions and direct the release of the prisoners.

Convictions quashed.

(1) *Queen v. Behari Lal Bose*, 7 W R., Cr. 44.