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REVISIONAL CRIMINAL

Before Mr. Justice E. M. Nanavutty

SOHAN LAL (ACCUSED-APPLICANT) v. KING-EMPEROR
(COMPLAINANT-OPPOSITE PARTY)*

1933
April, 10

*Indian Penal Code (Act XLV of 1860), sections 241 and 243—
Criminal Procedure Code (Act V of 1898), sections 165 and
169—Counterfeit coins, possession of—Search of accused's
house illegal and in defiance of section 165—Persons hostile
to accused entering his house during search—Recovery of
counterfeit coins from his house—Criminal liability, whether
can be fixed on accused—Presence of silver bars and silver dust
in accused's house—Accused's explanation not called for,
effect of.*

Where in a case of possession of counterfeit coins under section 243 of the Indian Penal Code not only is the search conducted in an illegal manner and in defiance of the provisions of section 165 of the Code of Criminal Procedure but at the time of the actual search opportunities are given to certain persons, obviously hostile to the accused to enter his house and place in it any articles which they may choose to bring, the recovery of certain counterfeit coins from the house of the accused in those circumstances is not sufficient to fix criminal responsibility on to him.

Section 342 of the Code of Criminal Procedure provides that for the purpose of enabling the accused to explain any circumstances appearing in evidence against him, the court shall question him generally on the case after the witnesses for the prosecution have been examined. Therefore in a case of possession of counterfeit coins under section 243 of the Indian Penal Code, the court is in error in laying stress upon the

*Criminal Revision No. 35 of 1933, against the order of Babu Shambhu Dayal, Sessions Judge of Hardoi, dated the 7th of March, 1933.

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presence of silver dust and a bar of silver when no explanation is called for from the accused as to why he possessed so much silver in bullion and so much silver dust. *Dwarka Nath Varma v. King-Emperor* (1), relied on.

Where a person is arrested and charged under section 241 of the Indian Penal Code, but is never brought to trial for that offence, nor is pardoned nor is discharged under section 169 of the Code of Criminal Procedure, the whole procedure is, on the face of it, highly irregular, if not absolutely illegal.

Mr. *John Jackson*, for the applicant.

The Assistant Government Advocate (Mr. *H. K. Ghose*), for the Crown.

NANAVUTTY, J.:—This is an application for revision of an appellate order of the learned Sessions Judge of Hardoi upholding the conviction and sentence of the applicant Sohan Lal for an offence under section 243 of the Indian Penal Code.

The story of the prosecution out of which this application for revision has arisen is briefly as follows:

The applicant Sohan Lal and Musammat Vidya, a maidservant of his, were prosecuted by the police under sections 120(b), 240 and 243 of the Indian Penal Code on the allegation that they conspired together to deliver counterfeit of Queen's coin, and were in possession of such counterfeits of Queen's coins knowing them to be counterfeit when they came into possession of them. It is alleged on behalf of the prosecution that one Musammat Dharni, Kachin, went to the shop of Bhikari, while the latter was away at a fair at Bawan, and gave to his mother, Musammat Sundar, two rupees in exchange for small change. When Bhikari returned he asked his mother for the sale-proceeds of the day and he found in the till two counterfeit rupees. Bhikari asked his mother who had given her the two counterfeit rupees and Musammat Sundar told him that they were given to her by a Kachin woman whom she could point out when she came again to the shop. Next day Musammat

Dharni came to the shop of Bhikari and she was pointed out by Musammat Sundar to her son. Musammat Dharni admitted that she had given the two rupees to Musammat Sundar and she produced five more counterfeit coins and showed them to Bhikari. Thereupon Bhikari took this woman to the Kotwali at Hardoi and in the way he was met by Bishambhar Nath who went along with him. Musammat Dharni told Bhikari that these counterfeit coins were given to her by a Brahman woman to whom she used to supply milk. When the party arrived at the police station the whole story was narrated to the Kotwal, and the latter with his second officer and a *posse* of constables went with Musammat Dharni to the house of the accused Sohan Lal. When the police party reached the house of Sohan Lal they found the doors shut from inside and the women folk refused to open the doors until the arrival of Sohan Lal. Sohan Lal was sent for from the house of Dr. Piyare Lal, where he was supervising the construction of some building, and he and Dr. Piyare Lal came together. Sohan Lal was informed that his house was to be searched and he was told to seclude his women folk. After this had been done, Sohan Lal opened the door and the police entered the house to search it. From inside a well in the house 108 counterfeit coins were recovered in a silver mug inside a bucket which had been let down into the well, while some silver dust and a bar of silver and other articles were also recovered. Subsequently a report was written by Bishambhar Nath in Hindi on behalf of Bhikari, and Sohan Lal and Musammat Vidya were prosecuted on the charges set forth above. They were both convicted by the trying Magistrate, Mr. Jamil-uddin, and sentenced to various terms of imprisonment.

In appeal the learned Sessions Judge held that Sohan Lal was guilty of an offence under section 243 of the Indian Penal Code, but not of offences under sections 120(b) and 240 of the Indian Penal Code. He, however,

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reduced the sentence for the offence under section 243 of the Indian Penal Code from two years' rigorous imprisonment to one year's rigorous imprisonment. The learned Sessions Judge allowed the appeal of Musammat Vidya and acquitted her of charges under sections 240 and 120 of the Indian Penal Code.

I have heard the learned counsel for the applicant at considerable length as also the learned Government Advocate on behalf of the Crown and perused the evidence on the record.

The procedure adopted by the police in the investigation of this case is to say the least most irregular and not easy to understand. The first information report made on the 17th of October, 1932 (exhibit 1) which is written in Hindi by Bishambhar Nath on behalf of Bhikari charges one Musammat Dharni with attempting to pass counterfeit silver rupees. Musammat Dharni was arrested. She made a confession which was recorded by a Magistrate on the 21st of October, 1932. After making this confession Musammat Dharni was released on bail and no further action appears to have been taken against her. She had been charged under section 241 of the Indian Penal Code upon the report of Bhikari (exhibit 1). No pardon was offered to her by any Magistrate under section 337 of the Indian Penal Code nor was any order of discharge under section 169 of the Code of Criminal Procedure made in respect of her upon an application by the police that there was insufficient evidence and no reasonable ground of suspicion to justify further proceedings against Musammat Dharni, but somehow from being an accused charged under section 241 of the Indian Penal Code she becomes a witness for the prosecution against the accused Sohan Lal and Musammat Vidya, and her statement as a witness on oath was taken in the present case. She is P. W. 7. I fail to understand this extraordinary procedure adopted by the police. It is true that the evidence of Musammat Dharni

has been disbelieved by both the lower courts, but if she had been prosecuted under section 241 of the Indian Penal Code the true facts of the present case would probably have been revealed, and the accused Sohan Lal would have had an opportunity of showing that she was nothing but a decoy duck or tool in the hands of Bishambhar Nath, the person responsible for the present prosecution being launched through Bhikari.

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In the second place it is admitted by the prosecution witnesses that the first report (exhibit 1) which initiated the proceedings in the present case against Musammat Dharni was written at 12 noon on the 19th of October, 1932, after the search of the house of the applicant Sohan Lal. This also is a very curious proceeding. The Kotwal should have recorded this report at 8.30 a.m. on the morning of the 19th of October, 1932, that being the time that Bishambhar and Bhikari made it. Musammat Dharni (P. W. 7) has also deposed that this report was written at midday after the house of Sohan Lal had been searched, and Bhikari and Musammat Dharni both depose that the report was written in the compound of the police station at Kotwali, Hardoi. This delay in recording this report, as explained by the learned counsel for the applicant, is due to the fact that the police did not wish to record the report against Sohan Lal if no counterfeit coins were found in the latter's house, and Bishambhar Nath did not desire that this report should be made against Sohan Lal if he did not get an opportunity of placing the counterfeit coins in the house of Sohan Lal. Be that as it may, the fact that the report was not recorded at the Kotwali until after the house of Sohan Lal was searched is very significant. Musammat Dharni was the person who was charged in the first information report (exhibit 1). If anybody's house had to be searched it should have been the house of Musammat Dharni, yet no such search took place, and, as pointed out above, no prosecution was ultimately launched against her. She was

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arrested and charged under section 241 of the Indian Penal Code, but she was never brought to trial for that offence, nor was she pardoned nor was she discharged under section 169 of the Code of Criminal Procedure. Thus the genesis of the prosecution is wrapped up in mystery, and the whole procedure is, on the face of it, highly irregular, if not absolutely illegal.

In the third place the provisions of section 165 of the Code of Criminal Procedure were completely violated by Sub-Inspector Rafiq Mohammad when he searched the house of Sohan Lal. The police officer was bound to record in writing the grounds of his belief as to the necessity for searching the house of Sohan Lal, and in specifying clearly the article or articles for which the search was to be made. The Sub-Inspector admits that he omitted to record his reasons prior to his making the search. This also clearly shows that the applicant has been prejudiced in his defence on the merits by the highly irregular, not to say, illegal conduct of the police officer concerned. The police ought really to have proceeded against Musammat Dharni, the person in whose possession the counterfeit coins were found. In my opinion there was no credible information justifying the police in searching the house of Sohan Lal, the applicant before me. The learned Sessions Judge, whilst holding that the search of Sohan Lal's house by the police was entirely illegal, has come to the conclusion that the counterfeit coins were not planted in the house of the accused. In my opinion this conclusion is not correct, in view of the fact that it is fully proved upon the evidence on the record that two unauthorized persons, namely Bishambhar Nath and Musammat Sundar, the mother of Bhikari, had entered the house of Sohan Lal without their persons being searched during the time the police were conducting the search. Now the whole object of conducting a search in accordance with law is to safeguard the interest of the accused person. The law lays down that

the persons of the search witnesses and of the police party must be searched before they are allowed to enter the house so that the owner should not have reasonable grounds for suspecting that one of the search party had planted anything surreptitiously in his house. It is proved upon the evidence on the record and it has been held both by the trying Magistrate as well as by the learned Sessions Judge that Bishambhar Nath bore bitter enmity against Sohan Lal because Musammat Vidya, the *quondam* mistress of Bishambhar Nath, had forsaken her lover and taken up service with Sohan Lal and had refused to leave his service, also that Sohan Lal had refused to give her up to Bishambhar Nath. To allow this avowed enemy of Sohan Lal to enter his house surreptitiously while it was being searched by the police was obviously to create very serious suspicions in the mind of Sohan Lal that he (Bishambhar Nath) had planted these counterfeit coins in his house, and no court can hold that Sohan Lal's suspicions were not well-founded seeing that it was Bishambhar Nath who, on behalf of Bhikari, wrote the first information report (exhibit 1), and appears to be the moving spirit in this case. Then again Musammat Sundar, the mother of Bhikari, ought never to have been allowed to enter Sohan Lal's house. To allow her to do so is tantamount to allowing the complainant Bhikari to enter the house and put whatever he liked inside of it. The counterfeit coins were found in a bucket inside which was the silver mug belonging to the accused. It is in evidence that the police party were leaving the house after making an unsuccessful search when a voice from amongst the crowd standing outside the house of Sohan Lal cried out "search the well." This clearly shows that after some one had planted the counterfeit coins inside the house of Sohan Lal he drew the attention of the search party to the place where the counterfeit coins could be recovered. This is another piece of circumstantial evidence which raises very grave doubts as to

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the genuineness of the search. The learned Sessions Judge has pointed out that from the statement of Musammat Sundar (P. W. 2) it would appear that she twice went inside the house of Sohan Lal while it was being searched, and that there is no evidence that her person was ever searched before she was allowed to enter the house. He has also held that "It is clear that Bishambhar came out from the house of Sohan Lal during the progress of the search unnoticed by anybody. There is no evidence to show that Bishambhar's person was searched when he entered the house of the accused for the first time." Summing up this portion of the case the learned Sessions Judge writes as follows:

"It is, therefore, clear that the door of Sohan Lal was not only not chained from inside when the search party had entered it, but was left unguarded during the progress of the search, and that Bishambhar Nath and Musammat Sundar entered the house after the commencement of the search without their persons being searched, and remained inside the house for a sufficiently long time; Musammat Sundar staying there longer than was necessary for her searching the persons of the females of the house, the purpose for which she was, according to the Kotwal, called inside the house."

This being the conclusion arrived at by the learned Sessions Judge he ought in all fairness to have allowed the appeal of Sohan Lal, and held that in the circumstances of this case the recovery of 108 counterfeit coins from the house of Sohan Lal was not sufficient to fix criminal responsibility on to him. Not only was the search conducted in an illegal manner and in defiance of the provisions of section 165 of the Code of Criminal Procedure but at the time of the actual search opportunities were given to two persons, obviously hostile to Sohan Lal to enter his house and place in it any articles which they may choose to bring.

It has been argued on behalf of the prosecution that the recovery of five articles belonging to Musammat Dharni from the house of Sohan Lal goes to corroborate the story of Musammat Dharni that she got the counterfeit coins from Sohan Lal. I am not prepared to accept this conclusion, and moreover the entry in the search list (exhibit 2) in respect of these five articles said to belong to Musammat Dharni is of a very suspicious nature and Dr. Piarey Lal, one of the search witnesses, has deposed that when he signed the search list it did not contain the entry in respect of the five articles belonging to Musammat Dharni, and the very appearance of the entry shows that it is an interpolation made at some time subsequent to the writing of the rest of the list.

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The learned Sessions Judge has held that the planting of 108 counterfeit coins by Bishambhar Nath is highly improbable because in his opinion Bishambhar Nath could not lay his hands on such a large number of counterfeit coins during the short time at his disposal. I confess I do not follow this reasoning of the learned Sessions Judge. Bishambhar Nath had been released from jail six months before the present prosecution of Sohan Lal, and during that interval it is not inconceivable that he might have collected 108 counterfeit coins if he wished to wreak his vengeance on Sohan Lal. It is, however, not the business of the accused to explain how Bishambhar Nath managed to secure such a large number of counterfeit coins. It is sufficient if he creates reasonable doubts in the mind of the court that the recovery of 108 counterfeit coins from his house was not a genuine recovery. Then again the learned Sessions Judge is of opinion that the fact that the 108 silver coins were found in a silver mug belonging to the accused Sohan Lal fixes the responsibility on to Sohan Lal. I cannot agree with the reasoning of the learned Sessions Judge on this point. Sohan Lal admits that the silver mug is his, and the person who

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planted the 108 counterfeit coins in the house took the natural precaution of putting them in the silver mug belonging to the accused in order to fix the guilt in respect of the possession of these counterfeit coins on to Sohan Lal and, at the same time, to prevent these coins from being scattered in the well if they were merely thrown inside it. It was for that purpose that a bucket was let into the well and the silver mug containing the 108 counterfeit rupees was placed in the bucket. The reason for placing the counterfeit coins in the silver mug is thus obvious. It was to facilitate the recovery of them from the well and to focus guilt in respect of the possession of them on Sohan Lal. The learned Sessions Judge has further emphasized the fact that there was a considerable quantity of silver dust and a bar of silver found in the house of the accused Sohan Lal. No question was asked by the trying Magistrate from the accused as regards his possession of this large quantity of silver dust and bar of silver. The verbal explanation furnished by the learned counsel for the accused Sohan Lal has been rejected by the learned Sessions Judge, and yet he has emphasized the fact that no evidence was led by the accused Sohan Lal to explain away the presence of these articles inside his house, and he has held that the recovery of silver dust is significant as this dust was probably the result of milling. This process of reasoning is entirely unfair to the accused. In *Dwarka Nath Varma v. King-Emperor* (1), their Lordships of the Privy Council delivered themselves of the following pronouncement:

“Section 342 of the Criminal Procedure Code provides that for the purpose of enabling the accused to explain any circumstances appearing in evidence against him, the court shall question him generally on the case after the witnesses for the prosecution have been examined. In pursuance of this section one of the puisne Judges put questions to the doctor. The only questions put on

(1) (1933) 37 C.W.N., 514 (526).

the contents of the post mortem report were as to the congestion of some of the organs, the cause of anti-peristalsis, and the omission from the report of the condition of the faecal matter and clots of blood at the orifice of the ruptures deposed to at the Sessions. The further question is a general question whether there was anything else he desired to say about the charges or evidence. The learned CHIEF JUSTICE told the jury that the absence of blood in the body cavity was a vital point. If so, it is plain that, under section 342 of the Code, it was the duty of the examining Judge to call the accused's attention to this point and ask for an explanation. Probably the departure from the statutory rule was due to the fact that one Judge examined the accused while another summed up, but it deprives of any force the suggestion that the doctor's omission to explain what he was never asked to explain supplies evidence on which the jury could infer that six months before he had conscientiously abandoned a theory which four months before that he had honestly held."

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It is thus clear that the learned Sessions Judge in the present case is in error in laying stress upon the presence of the silver dust and the bar of silver when no explanation was called for from the accused as to why he possessed so much silver in bullion and so much silver dust. In this connection it may be pointed out that the applicant Sohan Lal obtained bail from the Sessions Judge while his appeal was pending in that court after an inquiry had been made from the Kotwal and the latter had reported that the marriage of Sohan Lal's daughter was about to take place. This would show that there was truth in the allegation of the applicant's counsel that the applicant's daughter was shortly due to be married and that silver ornaments in that connection were being prepared in the house at

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the time when the search took place thus accounting for the presence of the silver dust and the bullion.

Nanavatty, J. I have thought long and anxiously over the facts of this case and I find myself constrained to come to the conclusion that the genesis of this case is shrouded in evil. In fact the judgment of the learned Sessions Judge itself furnishes the best vindication of the innocence of the applicant. In my opinion the guilt of Sohan Lal in respect of the charge under section 243 has not been established, and I accordingly allow this application for revision, set aside the conviction and sentence passed upon the applicant Sohan Lal for an offence under section 243 of the Indian Penal Code, acquit him of that charge, and direct his immediate release.

Application allowed.

APPELLATE CIVIL

*Before Sir Syed Wazir Hasan, Knight, Chief Judge,
 and Mr. Justice H. G. Smith*

MUSHRAFI BEGUM, MUSAMMAT (DEFENDANT-APPELLANT) v.
 LALA KUNDAN LAL AND ANOTHER, PLAINTIFFS AND OTHERS-
 DEFENDANTS (RESPONDENTS)*

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Pardanashin lady—Mortgage deed by a pardanashin lady—Mortgage mainly for payment of her husband's debts—Property exclusively of the lady—Lady not applying her mind to contents of deed when read out—Intelligent execution, whether proved—Transfer of Property Act (IV of 1882), sections 3 and 59—Attestation of mortgage deed, proof of—Executant not seeing attesting witnesses—Attention of executant not drawn to attestation by witnesses—Attestation, whether good and valid.

Where an illiterate *pardanashin* lady is said to have executed a mortgage deed which was in a large measure designed for the payment of her husband's debts, and in which the property mortgaged belonged exclusively to her, having been given to her along with other property in lieu of her dower and all that

*First Civil Appeal No. 116 of 1931, against the decree of Pandit Damodar Rao Kelkar, Subordinate Judge of Kheri, dated the 7th of September, 1931.