

APPELLATE CRIMINAL.

Before Mr. Justice Tek Chand.

KARIM BAKHSH—Appellant,

versus

THE CROWN —Respondent.

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Dec. 9.

Criminal Appeal No. 737 of 1927.

Indian Penal Code, 1860, section 399—Making preparation for the commission of dacoity—One of the conspirators (after preparation had been made) giving information to police and becoming a witness for prosecution—whether an Accomplice or Informer—Indian Arms Act, IX of 1878, sections 19, 20—concealing revolver from police.

Held, that in criminal cases the distinction between an *Informer* and an *Accomplice* assumes at times considerable importance and, in order to determine whether a witness, who first associated with the wrong-doers and subsequently gave information to the police, belongs to the first category or is an *accomplice* whose evidence cannot be accepted without corroboration, it has to be seen whether the witness had entered into the conspiracy for the purpose of detecting and betraying it or whether he is a person who concurred fully in the criminal designs of his co-conspirators for a time and joined in the execution of those designs till either out of fear or for some other reason he turned on his former associates and gave information to the police. If at the time when he joined the conspiracy he had no intention of bringing his associates to book but his object was to take part in the commission of the crime, he cannot be called an informer but is an accomplice; and his position is not modified simply because later on he turns round and carries information to the police.

Wigmore, *On Evidence*, section 2060, *Reg. v. Mullins* (1), and *Reg. v. Dowling* (2), relied upon.

Queen-Empress v. Javecharam (3), and *Emperor v. Chaturbhuj Sahu* (4), referred to.

(1) (1848) 3 Cox's Cr. L. Cases 526. (3) (1894) I. L. R. 19 Bom. 363.
 (2) (1848) 3 Cox's Cr. L. Cases 509, 515. (4) (1911) I. L. R. 38 Cal. 96.

Therefore, where one of the prosecution witnesses in a case under section 399 of the Penal Code had been in the company of the accused persons at the time when plans for committing dacoity were made and took part in the preparation therefor, he was an accomplice and his evidence could not be accepted as sufficient, without corroboration.

On being surprised by the police a member of a party of dacoits escaped and, putting his pistol into a box, left it with a relative for safe custody ;

Held, that his intention was clearly to conceal the pistol from the police, and he was guilty of an offence under section 20 of the Arms Act. That section is not restricted to cases of import or export of arms only.

Chet Singh v. Crown (1), followed.

Ibrahim v. Crown (2), disapproved.

Khem Singh v. Crown (3), *Chandan Singh v. Crown* (4), *Sher Ali v. Emperor* (5) and *Ali Ahmed v. Crown* (6), referred to.

Appeal from the order of Lala Wazir Chand, Magistrate, 1st class, Rawalpindi, dated the 15th June 1927, convicting the appellant.

MUHAMMAD TUFAIL, for MUHAMMAD ALAM, for Appellant.

MULK RAJ, for GOVERNMENT ADVOCATE, for Respondent.

JUDGMENT.

TEK CHAND J.—This judgment will dispose of criminal appeals Nos. 737, 738, 856, 857, 945 and 1080 of 1927, which are directed against the judgment of the Magistrate, 1st Class (with enhanced powers), Rawalpindi, convicting Karim Bakhsh,

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(1) (1926) I. L. R. 7 Lah. 65. (4) (1925) I. L. R. 6 Lah. 151.
 (2) 9 P. R. (Cr.) 1912. (5) 1923, A. I. R. (Lah.) 79.
 (3) 8 P. R. (Cr.) 1915. (6) 1923, A. I. R. (Lah.) 434.

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Mir Zaman, Gheba, Bagga and Fazal Karim, appellants, of an offence under section 399, Indian Penal Code, for having made preparations to commit a dacoity and sentencing each to undergo rigorous imprisonment for seven years, and also against the judgment of the same Magistrate convicting Karim Bakhsh in a separate trial under section 20 of the Indian Arms Act and sentencing him to rigorous imprisonment for seven years, the sentence to run consecutively with that passed against him under section 399, Indian Penal Code.

The principal witness against the appellants in the case under section 399 is Muhammad Jan (P. W. 1), a domestic servant of one *Mirza Kale Khan, Inamkhor*, of *Mauza Kalaujar*, residing in Rawalpindi City. The story told by him is that the appellants, Mir Zaman, Karim Bakhsh and Bagga lived in the same *mohalla* as his employer and that he had known them for a considerable time. On the 7th of May, 1927, he went to the house of Mir Zaman and found Karim Bakhsh and Bagga there. In the course of conversation Bagga informed the party that one *Bawa Ganga Ram*, who lived in the Hindu cremation ground, happened to possess currency notes worth Rs. 900, besides cash and other moveable property, and that a dacoity might be committed in his house. After consultation, it was decided to commit the dacoity at the *Bawa's* house on the following night and during the course of conversation it transpired that Fazal Karim and Gheba, appellants, and Aulia and Muhammad Zaman (absconders) had also agreed to join the commission of the dacoity. It was agreed that the party would meet at the underground near the fort at about 8 P.M., and that Karim

Bakhsh and Fazal Karim would bring pistols. The witness Muhammad Jan was also asked to bring, if possible, a pistol with him. After the plan had been settled Muhammad Jan returned to the house of his employer and at about 8 P.M. on receiving information from Mir Zaman, he left for the meeting place, but without a pistol as his master had kept it under lock and key. Bagga, Karim Bakhsh, Mir Zaman and Muhammad Jan arrived at the meeting ground and went into the depression. About half an hour later Gheba, Fazal Karim, Aulia and Muhammad Zaman also arrived there. Fazal Karim was armed with a spear (Ex. P. 1), and a revolver. Aulia, Bagga and Mir Zaman had spears with them and Karim Bakhsh had a revolver. Mir Zaman and Gheba had *lathis* (Exs. P. 4 and P. 5), while Karim Bakhsh had also with him an iron rod (*sambal*, Ex. P. 6). After consultation, it was decided to commit the dacoity after the moon had gone down. As Fazal Karim and Gheba had not taken their food it was found necessary to send for it from the town. The witness Muhammad Jan was accordingly sent to bring it. He, however, went straight to his employer Kale Khan and told him that a dacoity was going to be committed in which murder might also take place. Kale Khan took the witness to the *thana* and there he related the whole story to Mir Afzal Khan, Sub-Inspector (P. W. 3), and *Chaudhri* Buta Ram, Deputy Superintendent of Police (P. W. 2), who recorded his statement (Ex. P. A.). It was arranged with the police that Muhammad Jan should go back to the spot with the food and some cigarettes and that the police would follow and would surround the locality where the conspirators had assembled, and

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that when Muhammad Jan would light a cigarette or cough the police would fall upon the party. Accordingly Muhammad Jan returned to the meeting place near the fort with food and cigarettes and the police arrived there at about 11 P.M. A short time after he lighted a cigarette and the police at once challenged, whereupon the conspirators readily took to their heels. The police opened fire, wounding Fazal Karim, appellant. Karim Bakhsh, who had a pistol, replied by firing two shots. Fazal Karim, Mir Zaman and Gheba were arrested on the spot, while Karim Bakhsh, Bagga, Muhammad Zaman and Aulia ran away, leaving two *lathis* (Exs. P. 4 and P. 5), a spear (Ex. P. 1) and a *sambal* (Ex. P. 6), which the police took into possession. The next morning four discharged cartridges were recovered by the police on the spot.

Karim Bakhsh voluntarily surrendered himself on the 8th and Bagga was arrested on the 10th from the house of one Ghulam Hussain. In consequence of information supplied by Karim Bakhsh, a revolver was recovered from a trunk which was found in the house of his brother-in-law, Hayat Bakhsh (P. W. 9), the key of which was supplied by Karim Bakhsh's wife.

Bagga, appellant, took the police to the meeting place near the fort on the 13th, and spear (Ex. P. 2) was recovered from the bushes.

In addition to (P. W. 1) Muhammad Jan, the prosecution examined several witnesses. *Chaudhri* Buñ Ram (P. W. 2), Deputy Superintendent of Police, deposed to *Mirza* Kale Khan having produced Muhammad Jan before him at about 10 o'clock on the night in question and to his going to the spot with one Inspector, four Sub-Inspectors and twenty-four Constables. He gave details as to how he divided his

force into four parties and on Muhammad Jan giving the signal challenged the persons assembled and ultimately arrested three of them, the other four making good their escape as Sub-Inspector *Raja Feroze Khan* had got entangled in the wire fencing.

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The evidence of this witness was corroborated by *Mir Afzal Khan*, Sub-Inspector (P. W. 3), *Khan Muhammad Afzal Khan*, City Inspector of Police (P. W. 4). *Mirza Kale Khan* (P. W. 5) deposed to Muhammad Jan having informed him that the appellants and the absconders had assembled near the fort to commit a dacoity in the house of *Bawa Ganga Ram* and his having taken Muhammad Jan to the police and then having accompanied the police to the spot.

Hayat Bakhsh (P. W. 9) declared that his brother-in-law, *Karim Bakhsh*, appellant, had left a box with him on the 8th of May, 1927, and on the 18th he came with the police to his house and asked him to produce the box which was opened with the key which had been supplied by *Karim Bakhsh's* wife and on opening it the revolver (Ex. P. 3) and 9 cartridges (Exs. P. 11/1 to 9) were recovered from it.

Fazal Ilahi (P. W. 11) stated that on information supplied by *Bagga* the police recovered the spear (Ex. P. 2), from bushes growing near the spot near the fort.

Bawa Ganga Ram (P. W. 7), deposed that *Bagga*, appellant, had come to his house on the morning of the 7th and asked for certain medicines and amulets.

The medical evidence produced in the case was that of *Dr. Ahmed Ullah Shah* (P. W. 13), who had examined *Fazal Karim* and found two bullet wounds on his right thigh and a scratch behind the

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left forearm. In his opinion the two wounds were the result of one bullet shot.

Of the appellants Karim Bakhsh and Bagga pleaded *alibi*, alleging that they were in certain villages near Chaklala, while Fazal Karim admitted that he was in the depression near the fort on the night in question and was wounded with a revolver shot, but stated that he was going to Kalanjar on an errand on behalf of *Mirza Kale Khan* when the police with Muhammad Jan met him and on Muhammad Jan pointing out opened fire and arrested them. Gheba's defence was practically the same as that of Fazal Karim. Mir Zaman denied having been arrested on the spot.

On appeal, the first point urged by Mr. Muhammad Tufail for Karim Bakhsh is that the principal witness, Muhammad Jan (P. W. 1), is an accomplice and according to the well-established rule of practice his evidence ought not to be accepted without corroboration. He contends that the lower Court has erred in treating him as an informer and in holding that no corroboration is necessary. The learned counsel in support of his contention has relied on a ruling of the Bombay High Court reported as ~~Case No.~~ *Empress v. Javecharam* (1). This ruling was, however, dissented from in *Emperor v. Chaturbhuj Sahu* (2). In criminal cases the distinction between an informer and an accomplice assumes at times considerable importance, and there are certain well-established principles which ought to be taken into consideration in determining whether a person is an accomplice or an informer. The distinction is clearly brought out by Wigmore in his well-known

(1) (1894) I. L. R. 19 Bom. 363. (2) (1911) I. L. R. 38 Cal. 96.

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work On Evidence, section 2060, in the following passage:—

“When the witness has made himself an agent for the prosecution *before* associating with the wrong-doers or *before* the actual perpetration of the offence, he is not an accomplice; but he may be, if he extends no aid to the prosecution until after the offence is committed. A mere detective or decoy is therefore not an accomplice; nor an original confederate who betrays before the crime is committed yet an accessory after the fact would be, if he had before betrayal rendered himself liable as such.”

In other words, it has to be seen whether the witness had entered into the conspiracy for the sole purpose of detecting and betraying it or whether he is a person who concurred fully in the criminal designs of his co-conspirators for a time and joined in the execution of those designs till either out of fear or for some other reason he turned on his former associates and gave information to the police. If at the time when he joined the conspiracy he had no intention of bringing his associates to book but his sole object was to partake in the commission of the crime, he cannot be called an informer, but is an accomplice, and his position is not modified simply because later on he turns round and carries information to the police. The test laid down by Wigmore is in accord with the observations of Maule J. in his charge to the Jury in the celebrated case *Reg. v. Mullins* (1), and of Erle J. in *Reg. v. Dawling* (2).

It should be borne in mind that in this case the appellants were being tried for an offence under section 399, Indian Penal Code, *viz.*, making prepa-

(1) (1843) 3 Cox's Cr. L. Cases 526. (2) (1848) 3 Cox's Cr. L. Cases 509, 515.

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rations for the commission of a dacoity, and it is admitted by the learned counsel for the Crown that if the facts as alleged by the prosecution be accepted as correct, this offence was complete long before the witness Muhammad Jan (P. W. 1), gave information to the police. According to his own statement he was present at the house of Mir Zaman at 12 noon when the plans for committing the dacoity were hatched and had agreed to go to the meeting place in the evening armed with a revolver. He returned to his master's house soon after and remained there for more than six hours, but during this period he took no steps whatever either to inform the police or his master that a dacoity was contemplated. He then actually proceeded to a spot near the house where the dacoity was to be committed and took part in the preparations for committing the offence. It was only after it had been decided to postpone the dacoity till the moon had gone down and he had been sent to the town to bring food for two of the offenders that he for the first time disclosed the whole affair to his master, who took him to the police, where he made the report (Ex. P. A.).

I have no doubt that, in view of these facts, Muhammad Jan cannot but be regarded as an accomplice and his evidence needs corroboration in material particulars against each appellant.

Taking first the case of the three persons who were arrested on the spot, Fazal Karim, Mir Zaman and Gheba, such corroboration is found in the fact that their names had been mentioned in the report (Ex. P. A.), which had been made before their arrest; *secondly*, that they were arrested on the spot by the police; and *thirdly*, that Fazal Karim had actually

been wounded with the pistol shot fired by the police and Gheba had received injuries from a *lathi* blow. I have no doubt as to the guilt of these three persons and hold that they have been rightly convicted.

As regards Karim Bakhsh, there is the important fact that his name was mentioned in the report made by Muhammad Jan before the police went to the spot, and again, he took the police to the house of his brother-in-law, Hayat Bakhsh, on the 18th and pointed out the box which contained a revolver. Mr. Muhammad Tufail has contended that the evidence of Hayat Bakhsh should not be accepted. But no reason whatsoever has been suggested why Hayat Bakhsh would give false evidence against his own brother-in-law. It is not suggested that any enmity existed between Karim Bakhsh, appellant, and either Muhammad Jan or Hayat Bakhsh. In these circumstances, I find that there is sufficient corroboration of the story given by Muhammad Jan to connect this appellant with the offence.

As regards Bagga, appellant, who was arrested on the 10th, Muhammad Jan deposed that at the meeting at Mir Zaman's house it was Bagga who had suggested that the dacoity should be committed at the house of *Barwa* Ganga Ram. Corroboration of this fact will be found in the evidence of *Bawa* Ganga Ram (P. W. 7), who stated that Bagga had come to him on the morning of the 7th on a pretext of asking for a medicine and an amulet. Muhammad Jan (P. W. 1) had also stated that Bagga was armed with a spear. It is significant that after his arrest Bagga took the police to the spot and at his instance a spear was discovered from the bushes: See the evidence of Nawab Khan (P. W. 6), Sub-Inspector of Police, and Fazal Ilahi (P. W. 11), Muharrir, Octroi Post.

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I find that there is ample corroboration in the statement of Muhammad Jan as against this appellant also. I must, therefore, hold that the evidence of Muhammad Jan with regard to the presence of all the five appellants is corroborated in material particulars by other materials on the record.

Both Mr. Muhammad Tufail for Karim Bakhsb and Mr. Aziz Ahmad for Fazal Karim have contended that the evidence for the prosecution, even if accepted, discloses an offence under section 402 and not one under section 399. I am, however, of opinion that this contention is devoid of all force. As held in *Karmun v. Crown* (1), the mere 'assemblage' to commit dacoity does not amount to 'preparation' within the meaning of section 399 of the Penal Code, but where (as here) the members of the gang had taken into their possession instruments of house-breaking and arms for the purpose of offence and defence and had actually proceeded to a place near the scene of the contemplated dacoity they are guilty of an offence under section 399.

I hold, therefore, that all the five appellants have been rightly convicted under section 399, Indian Penal Code. The sentence of seven years' rigorous imprisonment is by no means severe, in view to the fact that the appellants were armed with revolvers, spears and *lathis*. Had it not been for the fact that the police arrived on the spot on information given by Muhammad Jan the consequences would have been very serious indeed.

I, therefore, dismiss appeals Nos. 737, 856, 857, 845 and 1080 of 1927.

It now remains to deal with appeal No. 738 of 1927 preferred by Karim Bakhsh against his conviction under section 20 of the Indian Arms Act. Mr. Muhammad Tufail for the appellant has made a faint-hearted attempt to argue that it has not been proved that the revolver in question was recovered from the possession of the appellant and that it was he who had concealed it. Having regard, however, to the evidence given by Karim Bakhsh's brother-in-law, Hayat Bakhsh, and of the police officers before whom the revolver was recovered, I have no doubt whatsoever that the learned Judge of the Court below came to a correct conclusion that after Karim Bakhsh had escaped from the place where he and his fellow conspirators were in the depression near the fort, he put the revolver in a box and left it with his brother-in-law for safe custody. The possession in this case was, therefore, that of the appellant.

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The next question to be considered is whether the offence falls under section 19 or section 20 of the Indian Arms Act. Mr. Tufail has relied on the decision of Kensington J. in *Ibrahim v. Crown* (1), where it was held that section 20 of the Arms Act applied only to cases where the import or export of arms is attempted and also on a remark of Scott-Smith J. in *Chandan Singh v. Crown* (2), where the former ruling seems to have been approved. The decisions as to the applicability of section 20 are not uniform, but the balance of authority is against the view taken by Kensington J. in the ruling above cited. The question has been considered in a

(1) 9 P. R. (Cr.) 1912.

(2) (1925) I. L. R. 6 Lah. 151.

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number of cases, *Khem Singh v. Crown* (1), *Sher Ali v. Emperor* (2), *Ali Ahmed v. Crown* (3), and recently by Addison J. in *Chet Singh v. Crown* (4), in which Kensington J.'s view was definitely dissented from. I venture to think that the law has been correctly laid down by Addison J. in the case last mentioned, where he held that 'each case of concealment of arms must be decided on its own facts as to whether it falls under section 19 or section 20 of the Arms Act, but for section 20 to apply there must be some special indication of an intention to conceal the possession of the arms from a public servant, railway official or public carrier'. Applying this test to the present case, I have no doubt whatsoever that the intention of the appellant in putting the revolver in the trunk and keeping it in the house of his brother-in-law, Hayat Bakhsh, was clearly to conceal the revolver from the police. I hold, therefore, that his offence fell under section 20 and he has been rightly convicted.

I am of opinion, however, that the sentence of seven years' rigorous imprisonment imposed on Karim Bakhsh, appellant, under section 20 of the Arms Act is too severe. I think the ends of justice will be met by reducing it to one of rigorous imprisonment for three years, which will begin after the expiry of the sentence of seven years passed against him under section 399, Indian Penal Code. With this modification in the sentence, the appeal is dismissed.

N. F. E.

Appeals dismissed.

Sentence modified.

(1) 8 P. R. (Cr.) 1915. (3) 1923, A. I. R. (Lah.) 434.
 (2) 1923, A. I. R. (Lah.) 79. (4) (1926) I. L. R. 7 Lah. 65.