In addition to the authorities cited in the lower Court, the following cases were referred to:—*Macgregor* v. *Fergusson*[1]; Arnold, Vol. I, p. 123; *Ashley* v. *Ashley*[2]; *Ætna Life Insurance Co.* v. *France*[3]; *New York Mutual Life Assurance Co.* v. *Armstrong*[4].

The Appeal Court confirmed the decree of the lower Court with costs.

Appeal dismissed.

Attorneys for the plaintiff (appellant):—Messrs. *Bicknell, Merwanji and Motilal.*

Attorneys for the defendants (respondents):—Messrs. *Crawford and Co.*

(1) (1850) Taylor and Bell, 378.
(2) (1829) 3 Sim., 149.
(3) (1876) 94 U. S. Rep., 561.
(4) (1887) 117 U. S. Rep., 591.

ORIGINAL CRIMINAL.

Before Mr. Justice Candy.

EMPRESS *v.* DURANT.

1898.
October 6.

Practice—Procedure—Witness—Accused person calling as witnesses persons charged with him and awaiting a separate trial for same offence—Criminal Procedure Code (Act V of 1898), Sec. 342, Cl. 4—Evidence Act (I of 1872), Sec. 132.

The accused D, a European British subject, was charged together with others who were natives of India, under sections 384, 385 and 389 of the Penal Code (Act XLV of 1860), with conspiring to commit extortion. D claimed to be tried by a mixed jury under section 450 of the Criminal Procedure Code (Act V of 1898). The other accused, who were natives of India, then claimed to be tried separately under section 452. The trial of D then proceeded, and at the close of the case for the prosecution, he proposed to call as his witnesses the persons who had been charged with him and who were awaiting their trial. They objected to be called.

Held, that he was entitled to call them as witnesses and to examine them on oath.

The words "the accused" in clause 4 of section 342 of the Criminal Procedure Code (Act V of 1898) mean the accused then under trial and under examination by the Court.

THE accused, who was a European British subject, was charged with four other persons (three of whom were natives of India)

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under sections 384, 385 and 389 of the Indian Penal Code (Act XLV of 1860) with conspiring to commit extortion.

They all claimed to be tried.

Durant being admittedly a European British subject claimed under section 450 of the Criminal Procedure Code (Act V of 1898) to be tried by a mixed jury, of which not less than half should be Europeans or Americans, or both Europeans and Americans.

The three accused who were natives of India, then claimed under section 452, clause 2, of the Code to be tried separately.*

The trial of Durant then proceeded. He defended himself.

At the close of the case for the prosecution, Durant opened his case and addressed the jury. He then called as his witnesses the three persons who had been charged with him and who were awaiting their trial, *viz.*, Dhanjibhai D. Dady, Cursetji M. Mehta, and Sorabji R. Bottlewalla. Their counsel, however, who were present watching the case, objected to their being called as witnesses.

P. M. Mehta, for the accused Dhanjibhai D. Dady, submitted that an oath could not be administered to his client, who was a co-accused with Durant and was awaiting his trial on the same charges.

He cited *Reg.* v. *Hanmanta*(1); *Empress of India* v. *Asghar Ali*(2); *Queen-Empress* v. *Dala*(3). The law in India is different from English law—*Winsor's case*(4).

Anderson and *Bahadurji*, for Cursetji M. Mehta and Sorabji R. Bottlewalla, also objected.

Durant contended he was entitled to call the co-accused. The cases cited were cases in which accused persons who are illegally pardoned were called as witnesses for the prosecution.

Macpherson, for the prosecution:—Under English law, the co-accused could certainly be called as witnesses—Archbold's Criminal Pleading (20th Ed.), p. 318. The word "accused" in

* One of the accused, who was a European, was tendered a pardon under section 337 of the Criminal Procedure Code (Act V of 1898).

(1) (1877) 1 Bom., 610.
(2) (1879) 2 All., 260.
(3) (1885) 10 Bom., 190.
(4) (1865) 4 F. and F., 363.

the Criminal Procedure Code must mean the accused actually under trial. He referred to section 132 of the Evidence Act (I of 1872).

CANDY, J. :—As to the English law on this subject there can be no doubt. Besides the passage from Archbold referred to by the learned counsel for the prosecution, reference may also be made to Roscoe's Criminal Evidence (4th Ed.), p. 122, where it is clearly shown that so long as the co-accused is not being tried jointly, he can be called as a witness. Mr. Mehta referred to the report of *Winsor's case*[1], but the question dealt with in that report was whether the jury were rightly discharged when the prisoners were tried together before Baron Channell in March, 1865. At the next assizes before Keating, J., in July, 1865, the two prisoners were again put on their trial, and then counsel for prosecution applied for leave to call the younger prisoner (Harris) as a witness against Winsor. Mr. Prideaux said that on the part of Harris he could make no objection to such a course of proceeding, but he would submit whether it would not be necessary that she should be first acquitted. The learned Judge said he had considered the point, and he thought that it was not necessary. Harris was then taken from the bar and Winsor was put upon her trial alone. Mr. Folkard, for Winsor, made no objection on that ground, but submitted that Winsor could not be put on her trial again, the jury in the former case not having been legally discharged. But Keating, J., held (p. 382) that the objection was not tenable; the trial proceeded and Winsor was convicted.

In January, 1866, the case came before the Queen's Bench[2] on a writ of error, and Mr. Folkard, for Winsor, argued (*inter alia*) that the evidence of Harris was improperly admitted.

The Judges all gave judgment for the Crown. There is one important passage in the judgment of Cockburn, C. J., which has been quoted in subsequent cases. He said (pp. 311-2) :—

"In all cases where persons are joined in the same indictment, and it is desirable to try them separately in order that the evidence of one may be received against the other, I think it necessary, for the purpose of securing the greatest possible amount of truthfulness in the person coming to give evidence, to take a

(1) (1865) 4 F. and F., 363. (2) (1866) L. R., 1 Q. B., 289.

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verdict of not guilty as to him, or, if the plea of not guilty be withdrawn by him and a plea of guilty taken, to pass sentence; so that the witness may give his evidence with a mind free of all corrupt influence which the fear of impending punishment, and the desire to obtain immunity to himself at the expense of the prisoner, might otherwise produce."

But in the course of argument in the subsequent case of *The Queen* v. *Payne*[1], Cockburn, C. J., alluded to this passage and said (p. 354): "A notion has gone abroad that I laid down that one of these courses must be taken. That is very different from what I did say. I only spoke of what is convenient."

Payne's case is particularly instructive, because in that case Curtis had actually been called before the Magistrates as a witness on behalf of Payne. Subsequently Curtis was included in the indictment and was tried with Payne. Payne's counsel wanted to call Curtis as a witness, and naturally complained that it was very hard that his client should be deprived of Curtis's evidence by Curtis being made an accused person. To this Cockburn, C. J., said: "The remedy for that is to apply to have the prisoners tried separately. And, if the witness were improperly included in the indictment, the Judge would, no doubt, grant such an application."

It may be remarked that under section 239 of the Criminal Procedure Code (Act V of 1898) it is left to the discretion of the Court to try accused persons together or separately. In *Payne's case* it was held that Curtis could not be examined as a witness on behalf of Payne, because it is a principle of English law that the jury, which has to decide on the guilt or innocence of an accused person, cannot hear that person examined and cross-examined.

Another case in which one accused person was called as a witness on behalf of his co-accused, is the well-known case of *Reg.* v. *Bradlaugh*[2]. Bradlaugh with Ramsay and Foote was indicted for publishing blasphemous libels. Before the jury were sworn, Bradlaugh applied that he might be tried separately and first, arguing (*inter alia*) that he might desire to call his co-accused as his witnesses. Sir H. Giffard, for the Crown, opposed, but Coleridge, C.J., granted the application. When Bradlaugh was called on to enter on his defence, and it was suggested that

(1) (1872) L. R., 1 C. C. R., 349. (2) (1883) 15 Cox., 217.

he might call the other defendants as his witnesses, Avory on behalf of Ramsay objected that this could not be done, unless a verdict of acquittal was taken as against Ramsay. He cited the observation of Cockburn, C. J., in *Winsor's case* (*supra*). Coleridge, C. J., said that there the fellow-prisoner had been called for the Crown. Avory urged that this did not matter, as if the co-defendant were called for the defence he would be liable to cross-examination and could hardly avoid criminating himself. Coleridge, C. J., said he "should endeavour to avoid that by not allowing questions to be asked or answered which might have that effect." As to the dictum cited, he observed "that Cockburn, C. J., did not go the length of saying that the course taken was not legal, even when the fellow-prisoner had been called for the prosecution, to make out a case against the prisoner being tried. Here, however, the co-defendant was to be called for the defendant under trial. He could not prevent this, nor compel the prosecution to take a verdict of acquittal as to the co-defendant to be called. The co-defendant was to be called simply to disprove publication by the defendant Bradlaugh, and any questions to show publication by anybody else would either not be admissible, or, if they tended to criminate the witness, he would not be compellable to answer." I shall have occasion, at a later stage of these remarks, to refer to the difficulties felt by Coleridge, C. J.

Turning to the Indian cases quoted by Mr. Mehta, it may be remarked that *Asghar Ali's case*[1] and the case of *Dala Jiva*[2] are on all fours with *Hanmanta's case*[3], which they followed. It will suffice, therefore, to critically examine *Hanmanta's case* [3], In that case two men, Moro and Ramchandra, were before the Magistrate as accused persons. They under the influence of illegally tendered pardon gave evidence as witnesses. M. Melvill and Kemball, JJ., relied on sections 344 and 345 of Act X of 1872 (the then Code of Criminal Procedure), and their Lordships said:

"The effect of these sections is to render it illegal for a Magistrate to convert an accused person into a witness, except when a pardon has been lawfully granted under section 347. Moro and Ramchandra being accused persons, and

(1) (1879) 2 All., 260. (2) (1885) 10 Bom., 190.

(3) (1877) 1 Bom., 610.

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(3) (1877) 1 Bom., 610.

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not having been legally pardoned, could not be examined as witnesses until they had been acquitted, or discharged, or convicted. Their evidence must, therefore, be rejected as absolutely inadmissible."

Their Lordships then referred to and distinguished the English case of *R.* v. *Rudd*[1], which was also the case of an illegally pardoned accomplice.

Now an obvious consideration which must occur to one on reading this decision in *Hanmanta's case* is that it refers solely to the evidence of an illegally pardoned accomplice, and is based on the combined effect of sections 344 and 345 of the then Code of Criminal Procedure. The provision in section 345 stood by itself as a separate section, and was not, as it now is in the present Code of Criminal Procedure, part of section 342, which deals with the examination of an accused person at the trial of that accused person, and provides that for the purpose of that examination in that trial no oath shall be administered to that accused person. Their Lordships in *Hanmanta's case* did not profess to deal with the case of an accused person, who has been indicted jointly, but is to be tried separately by a different jury or by different assessors, being called as a witness for his co-accused.

There was a case from Burma, ultimately decided by the High Court of Calcutta, in which the decision in *Hanmanta's case* was apparently not followed. It is to be found in Selected Judgments of the Judicial Commissioner, Burma, Vol. I, p. 246, and reference to it will be found at page 667 of the I. L. R., 16 Bom. In that case from Burma an illegally pardoned accomplice had given evidence. The Judicial Commissioner (J. Jardine) said: "The Courts have been strict in excluding evidence on illegal pardons * * *—*Hanmanta's case, Asghar Ali's case.* I hold, therefore, following *Hanmanta's case,* that as he (the witness in question) was not legally pardoned, he could not have been examined as a witness." As the Recorder differed from this view, the case was referred to the Calcutta High Court, which held (Mitter and Field, JJ.) that the evidence was admissible, though of course it would have to be carefully weighed. They said: "Under the Evidence Act, admissibility is the rule and exclusion the exception, and circumstances, which under

(1) (1775) 1 Cowp., 331.

other systems might operate to exclude, are under the Act to be taken into consideration only in judging of the value to be allowed to evidence when admitted."

That the decision in *Hanmanta's case* required a restricted application was evidently felt by Jardine, J., in *Queen-Empress* v. *Mona Puna*[1]. He distinguished the Burma case on the ground that the accused person in that case had not been actually placed before the Magistrate, though the Magistrate had at the request of the Police Superintendent illegally forwarded a pardon, under the influence of which the said person gave evidence as a witness. So Jardine, J., while admitting that the word "accused" is used in several sections of the Criminal Procedure Code as designating supposed offenders, went on to say: "But if we are to follow *Hanmanta's case*, the question arises, what is the meaning of the last sentence of section 342, "No oath shall be administered to the accused"? The decision can best be explained by holding that by "the accused" is meant a person over whom the Magistrate or other Court is exercising jurisdiction; and on the whole we think this restricted meaning best suits the context."

I would go further and say that "the accused" in section 342 must mean the accused then under trial and under examination by the Court. It cannot include an accused over whom the Court is exercising jurisdiction in another trial. I may be trying a murder case in this High Court, and an important witness, either for the Crown or for the defence, may be an accused person who has pleaded to a charge of house-breaking, and whose trial is to come on directly after the murder case. It would be absurd to say that no oath shall be administered to that accused person when he is tendered as a witness in the murder case. As the Judge said in *Asghar Ali's case* (*supra*), an accused person cannot be put on his oath or examined as a witness in the case *in which he is accused*. Dady, Mehta and Bottlewala are not accused persons in the case in which Durant is accused. Their case is to be tried separately. They were co-accused: they are not so now. If they were being tried jointly with Durant, it would be impossible to say that their statements recorded under section 342 of the Code of Criminal Procedure, whether amount-

(1) (1892) 16 Bom., 661.

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ing to confessions or not, could not be taken into consideration by the jury in favour of Durant. Why, then, should Durant be deprived of the benefit of these statements, because these men are not being tried jointly with him? But as they are not now being tried in this case, the only way in which they can make statements is as witnesses, and if they are witnesses, then they must be sworn.

For all these reasons I have no doubt that these persons, whom Durant has tendered as his witnesses, can be examined as witnesses, and, therefore, on oath. The only difficulty in my mind arises from the provisions of section 132 of the Evidence Act. As shown above in *Bradlaugh's case*, Coleridge, C. J., said that he would not allow questions to be asked or answered which might have the effect of incriminating the witness. That course is not open to this Court; for by section 132 of the Evidence Act a witness is not excused from answering any question as to any matter relevant to the matter in issue in any civil or criminal proceeding upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate such witness. When an accused person is making a statement under section 342 of the Code of Criminal Procedure, he can refuse to answer any question. As a witness he is not excused from answering any question as to any matter relevant to the matter in issue. There is, however, an important proviso to section 132 of the Evidence Act, *viz.*, that no such answer which a witness shall be compelled to give shall be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer. As then the jury now trying Durant, and hearing his witnesses examined and cross-examined, will not be the jury which will have to decide as to the guilt or innocence of such of those witnesses as may be subsequently put on their trial, and as the answers which those witnesses may be now compelled to give cannot be proved against them in the subsequent trial, I rule that the witnesses now called by Durant on his behalf can be duly examined and cross-examined on oath.

Attorneys for the prosecution:—Messrs. *Craigie, Lynch and Owen.*

Accused in person.