APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice N. J. Wadia.

K. V. KORTIKAR (ORIGINAL ACCUSED No. 1), PETITIONER *v.* EMPEROR.* 1934 December 19

Criminal Procedure Code (Act V of 1898), section 342—Accused person, meaning of—Charge-sheet mentioning a person as accused, but not sent up for trial—Same person mentioned also as a witness—Evidence of such person, whether admissible.

The accused, referred to in section 342 of the Criminal Procedure Code, 1898, means an accused person under trial who has to be questioned by the Court in respect of the evidence against him.

A charge-sheet sent up to the Magistrate by the police contained in its second column the names of two persons as accused persons, but as persons not sent up for trial, and then in appendix to the charge-sheet their names were cited as witnesses. A question having arisen as to whether the evidence of these two persons was admissible :

Held, that the two persons could not properly be said to be accused persons and, therefore, there was no provision of law which would make their evidence inadmissible.

Queen-Empress v. *Mona Puna*,[1] followed.

Banu Singh v. *Emperor*,[2] applied.

CRIMINAL REVISIONAL APPLICATION from an order passed by D. C. Joshi, Sessions Judge, Bijapur, in Criminal Appeal No. 26 of 1934 confirming an order of conviction and sentence passed by V. V. Medhi, Special Magistrate, First Class, Pandharpur, in Criminal Case No. Special 1 of 1933.

Admissibility of evidence.

One K. V. Kortikar (petitioner) was, along with four others, charged with having committed offences under section 120B read with sections 406, 408, 409, 477A of the Indian Penal Code, the substance of the charges against him being that as Deputy Nazir of the District Court of Sholapur, he misappropriated moneys forming part of the estates of minors.

* Criminal Application for Revision No. 348 of 1934.

(1) (1892) 16 Bom. 594. (2) (1906) 33 Cal. 1353.

1934

KORTIKAR v. EMPEROR

The charge-sheet sent up to the Magistrate by the police contained in its second column the names of two men, viz., Laulkar and Limaye as accused persons who were not sent up for trial, and then in its third column the names of five persons as accused persons who were sent up for trial. Next in the appendix, attached to the charge-sheet, Laulkar and Limaye mentioned in the second column were cited as witnesses. At the trial of the accused for the above offences Laulkar and Limaye gave evidence for the prosecution which ended in the conviction of the accused.

The accused, other than accused No. 3, appealed to the Court of Session at Sholapur by separate appeals which were transferred under the orders of the High Court to the Sessions Judge, Bijapur, who subsequently confirmed with a slight modification the order of conviction and sentence passed by the trying Magistrate.

Accused No. 1 applied to the High Court.

Carden Noad, with *P. B. Gajendragadkar*, for the accused.

P. B. Shingne, Government Pleader, for the Crown.

BEAUMONT C. J. This is an application in revision by the applicant who was convicted by the Special Magistrate, First Class, at Pandharpur, of offences under various sections of the Indian Penal Code, the substance of the charges against him being that as Deputy Nazir of the Sessions Court of Sholapur he misappropriated monies forming part of the estates of minors. He appealed against his conviction and his appeal was dismissed by the Sessions Judge at Bijapur.

The original complaint made to the police by the successor of the applicant as Deputy Nazir of the Sessions Court had alleged that ten persons had committed these offences, viz., the present applicant the then Deputy Nazir and various subordinate officials and others, including a man named Laulkar who was the estate peon of the Pandharpur Circle.

On that complaint to the police, a special officer of the Criminal Investigation Department made an investigation into the subject-matter of the complaint, and it is, I think, quite clear from his evidence and from the form of the charge-sheet that he discovered evidence against Laulkar amongst others. That being so, it was the duty of the police under sections 170 and 173 of the Criminal Procedure Code to send all the persons against whom they thought there was sufficient evidence before a Magistrate to be dealt with under the Code. In fact the police did not do that, because apparently they came to the conclusion that it would be convenient if this man Laulkar was not sent up before a Magistrate but was used as a witness. What they did, therefore, was to send up a charge-sheet, the printed form C.I.D./4, and in the second column of that form under the heading "Names and addresses of accused persons not sent up for trial, whether arrested or not arrested, including absconders" they gave the name of this man Laulkar, and of another man named Limaye who was substantially in the same position, though his evidence is of less consequence. Then in column 3, which gives the names and addresses of accused persons sent up for trial, they included five persons; so that the net result was that there were five accused persons shown as sent up for trial, and two persons shown as accused persons not sent up for trial, and in the appendix, giving the names of witnesses, the names of Laulkar and Limaye (the two persons whose names were included in the second column of the charge-sheet) were included, so that the police must have known what share these two persons had taken in the offence. As I have said, in my opinion, the proper course for the police to have adopted was to send up as accused persons to the Magistrate all those against whom they had obtained evidence in connection with the alleged offence, and I think that the learned Magistrate, when he found that the two persons described as accused persons not sent up for trial were amongst the witnesses, and must, therefore, be

1934

KORTIKAR
v.
EMPEROR

Beaumont C. J.

available, ought to have had those two persons arrested and brought before him. The Criminal Procedure Code gives certain powers under which the evidence of an accomplice can be made available. He can be granted a conditional pardon by the Magistrate under section 337 of the Criminal Procedure Code, or the Public Prosecutor, with the consent of the Magistrate, can withdraw the charge under section 494 of the Criminal Procedure Code. In my opinion those powers ought to be exercised where the prosecution consider that the evidence of an accomplice is necessary, and the police have no right to take upon themselves not to charge a person against whom they have evidence because they require him as a witness. Where that improper course is adopted, the evidence of the accomplice so obtained is entitled to very little weight. He has been granted no pardon and though, if compelled to answer incriminating questions by the Court, he cannot be prosecuted for those answers and can claim the protection of section 132 of the Indian Evidence Act, still he may be prosecuted on the strength of any other evidence which may be available, and he is, therefore, at the mercy of the police.

But the preliminary question with which we have to deal in this revision application is whether the evidence of Laulkar and Limaye was admissible, apart from its weight. It has been argued by Mr. Carden Noad that Laulkar and Limaye were accused persons because they were shown in the charge-sheet as accused persons not sent up for trial, and that accused persons cannot give evidence. Section 342 of the Criminal Procedure Code provides that no oath shall be administered to the accused; but it is clear from the earlier part of that section that the accused there referred to means an accused person under trial who has to be questioned by the Court in respect of the evidence against him. In my opinion, however irregular was the conduct of the police in this case, in point of fact these two persons, Laulkar and

Limaye, included in the second column of the charge-sheet, never were, properly speaking, accused persons. They certainly were not accused persons within the meaning of section 342 of the Criminal Procedure Code. They were never under arrest and they were never sent up before a Magistrate and no process was ever issued against them. That being so, I think there is no provision of law which makes their evidence inadmissible. That opinion is in accordance with the decision of this Court in *Queen-Empress* v. *Mona Puna*,[1] where the Court held that an accused person means a person over whom the Magistrate or other Court is exercising jurisdiction, a view which was approved by the High Court of Calcutta in *Banu Singh* v. *Emperor*.[2] In this case, therefore, the evidence of Laulkar and of Limaye is admissible.

N. J. WADIA J. I agree.

The objection to Laulkar's evidence is that although he was an accused along with the present appellant he was examined as a witness on oath. He is mentioned in the charge-sheet in column 2 as an accused person not sent up for trial. In fact in the list of witnesses which was attached to the charge-sheet as appendix A he was mentioned as a witness. The section which prevents an accused being examined on oath is section 342 of the Criminal Procedure Code. That section, however, applies clearly only to a person who is on trial before a Court at the time, and he can be so brought before the Court only after process has been issued by the Magistrate against him under section 204 of the Criminal Procedure Code. In the present case admittedly no such process had been issued against Laulkar and he was, therefore, never before the Court as an accused. The mere inclusion of his name in the charge-sheet could not make him an accused for the purposes of section 342 of the Criminal Procedure Code. None of the cases which have been cited

(1) (1892) 16 Bom. 661.

(2) (1906) 33 Cal. 1353.

1934

KORTIKAR v. EMPEROR

N. J. Wadia J.

before us deal with the case of a person who was not actually before the Court on trial though his name may have been mentioned in the charge-sheet. I, therefore, agree that there was no legal objection to Laulkar being examined on oath as a witness.

[Their Lordships then delivered judgments on the merits of the case which are not material for the purposes of this report.]

Application dismissed.

Y. V. D.

PRIVY COUNCIL.

J. C.*
1935
March 11

VIJAYSINGJI CHHATRASANGJI *v.* SHIVSANGJI BHIMSANGJI.

[On Appeal from the High Court at Bombay]

Hindu Law—Adoption—Bombay Presidency—Adoption by widow—Estate not vested in widow.

The holder of an impartible estate in the Bombay Presidency died in 1899 survived by a widow and a son. The son inherited the estate but in 1915 was adopted into another family. In 1917 the widow made an adoption to her deceased husband. The High Court held that the adoption was invalid, on the ground that upon the adoption in 1915 the estate had become vested in the then heir :—

Held, that the widow had power to make the adoption, for the purpose of continuing the line of her deceased husband, although the estate was not vested in her.

Amarendra Mansingh v. *Sanatan Singh*, followed.

It became unnecessary to decide whether the son upon being adopted out of the family in 1915, retained the estate which he had inherited from his natural father.

Decree of the High Court, 56 Bom. 619, reversed.

APPEAL (No. 85 of 1933) from decrees of the High Court (April 12, 1932) affirming a decree of the First Class Subordinate Judge at Nadiad (March 27, 1929).

* *Present :* Lord Thankerton, Lord Alness, and Sir Shadi Lal.

(1) (1933) 12 Pat. 642 ; L. R. 60 I. A. 242.