

upon that determination partly depends the obligation to answer. We prefer the decisions of the majority in the two High Courts, and hold that the depositions were admissible.

Mr. Jackson for the accused wishes us to note that he argued that under section 167 of the Indian Evidence Act we have no power to deal with the case on the evidence apart from the depositions, but we are not prepared to accept this argument.

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Appeal dismissed.

J. V. W.

CRIMINAL REVISION.

Before Mr. Justice Trevelyan and Mr. Justice Rampini.

BAM CHAND CHATTERJEE (PETITIONER) v. HANIF SHEIKH
 (OPPOSITE PARTY).*

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Witness—Examination of witnesses—Cross-examination—Right of co-accused to cross-examine witness called by another co-accused for defence where their cases are adverse—Evidence Act (I of 1872), s. 137.

One accused person may cross-examine a witness called by another co-accused for his defence when the case of the second accused is adverse to that of the first.

The petitioner Ram Chand Chatterjee was employed as a mob or Head Assistant in the Mohespore Silk Factory belonging to Messrs. Lewis, Payne and Company, and he was charged under s. 381 of the Penal Code with the theft from the godowns of the factory of a quantity of *chassams* (coccons), which he was observed by the complainant Hanif Sheikh, a sirdar on the factory, to deliver to one Nattoo Behari Chatterjee, who was at the same time charged under s. 411 of the Penal Code with dishonestly receiving the stolen property, knowing it to

* Criminal Revision, No. 635 of 1893, against the order passed by R. H. Anderson, Esq., Officiating Sessions Judge of Murshidabad, dated the 13th September 1893, affirming the order of Babu Nogendro Nath Pal Chowdhry, Deputy Magistrate of Berhampore, dated the 26th of August 1893.

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have been stolen, and who had been seized by Hanif and some other servants of the factory (whose attention had been called by Hanif to what was going on), and taken to Berhampore to Mr. Gallois, the General Manager of the factory, by whom the matter was placed in the hands of the police; the police investigation resulting in the accused being charged as above.

Both the accused pleaded not guilty. Natoo Behari stated that he had purchased the *chassams* from Ram Chand, and whilst he was taking away what he had purchased he was seized upon and taken to the Manager. Ram Chand stated that he was on bad terms with the sirdars, the witnesses for the prosecution, and that the case was got up by them; he denied knowing anything of the *chassams*. The Deputy Magistrate who tried the case found that Natoo's story was probably true, and that the evidence adduced for the prosecution did not show any bad faith or dishonesty on Natoo's part; and he accordingly acquitted him under s. 258 of the Criminal Procedure Code. He found Ram Chand guilty of the offence with which he was charged, and sentenced him to six months' rigorous imprisonment: this sentence was confirmed by the Sessions Judge on an appeal by Ram Chand from the conviction.

Ram Chand then petitioned the High Court against the conviction and sentence on various grounds, the only one material to this report being that he "should have been allowed to cross-examine the witnesses examined by Natoo Behari for his defence."

Babu *Boido Nath Dutt* for the petitioner.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the

Babu *Boido Nath Dutt*:—Natoo and Ram Chand were accused. Natoo tried to throw the whole guilt on Ram and for that purpose and with that intent examined witnesses to prove that Ram Chand had sold the *chassams* (cocoon) to him. Natoo was therefore an adverse party within the meaning of s. 137 of the Evidence Act, and Ram Chand had therefore the right to cross-examine the witnesses examined by Natoo; *Lord v. Colvin* (1) is in favour of my contention. Ram Chand has therefore been prejudiced by the refusal of the Magistrate to allow

(1) 3 *Drew*, 222.

him to cross-examine Nattoo's witnesses. The Judge in convicting Ram Chand has relied on the evidence of Nattoo's witnesses, which was under the circumstances illegal.

The *Deputy Legal Remembrancer* (Mr. Kilby) for the Crown:—
An accused person has no right to cross-examine the witnesses of a co-accused. A co-accused can never be said to be in the position of an adverse party, and there is no right, therefore, to cross-examine witnesses produced by such a party—See *Queen v. Surroop Chunder Paul* (1).

The judgment of the Court (TREVELYAN and RAMPINI, JJ.) was as follows:—

In this case it appears that the co-accused called certain witnesses. The case of the co-accused was one we think adverse to that of the applicant before us. The applicant before us says that he applied to be allowed to cross-examine those witnesses, but was not allowed to do so. The statement that he was not allowed to do so is made on affidavit, and is not contradicted by the Deputy Magistrate. We think there might be many cases of failure of justice if a co-accused were not allowed to cross-examine witnesses called by a person whose case was adverse to his, for the effect might be, practically, that a Court might act upon evidence which was not subjected to cross-examination. The Evidence Act gives a right to cross-examine witnesses called by the adverse party. That being so, we set aside the conviction and sentence, and direct the Deputy Magistrate to recall those witnesses who had been called by Nattoo Behari Chatterjee, and give the applicant before us an opportunity of cross-examining those witnesses. He will then reconsider the case with reference to such evidence as may be elicited by such cross-examination, and dispose of it according to law. As no other witnesses were tendered than those examined, we do not think it right to allow other witnesses to be called.

J. V. W.

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