CRIMINAL REFERENCE.

Before Mr. Justice Holmwood and Mr. Justice Doss.

1910
Sept. 8.

EMPEROR
v.
CHATURBHUJ SAHU.*

Accomplice—Spy or detective associating with a wrong-doer for the purpose of discovery and disclosure of an offence—Necessity of Corroboration—Evidence Act (I of 1872) ss. 114, 133.

A person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence, either before associating with wrong-doers or before the actual perpetration of the offence, is not an accomplice but a spy, detective or decoy whose evidence does not require corroboration, though the weight to be attached to it depends on the character of each individual witness in each case. But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission is an accomplice requiring corroboration.

Rex v. *Despard* (1), *Reg.* v. *Dowling* (2), *Reg.* v. *Mullins* (3), *Rex* v. *Bickley* (4), *Reg.* v. *Shankar Shobag* (5) approved of.

Queen-Empress v. *Javecharam* (6) distinguished by Holmwood J. and dissented from by Doss J.

Grimm v. *United States* (7), *State* v. *McKean* (8), *State* v. *Brownlee* (9), *Wright* v. *State* (10), *People* v. *Bolanger* (11), *People* v. *Farrel* (12), *Commonwealth* v. *Downing* (13), *Commonwealth* v. *Baker* (14), *State* v. *Baden* (15), *People* v. *Noelke* (16), *Campbell* v. *Commonwealth* (17),

* Criminal reference No. 175 of 1910 against the order of J. C. Twidale, Sessions Judge of Bhagalpore, dated July 19, 1910.

(1) (1803) 28 How. St. Tr. 346, 489.
(2) (1848) 3 Cox. C. C. 509.
(3) (1848) 3 Cox. C. C. 526.
(4) (1909) 2 Cr. App. Rep. 53; 73 J. P. 239.
(5) (1888) Ratan.Unrep.Cr.Ca.428.
(6) (1894) I. L. R. 19 Bom. 363.
(7) (1894) 156 U. S. 604.
(8) (1873) 36 Iowa 343: 14 Am. Rep. 530.
(9) (1892) 84 Iowa. 783: 51 N. W. 25.
(10) (1880) 7 Tex. Ct. App. 574: 32 Am. Rep. 599.
(11) (1886) 71 Cal. 17: 11 Pac. 799.
(12) (1866) 30 Cal. 316.
(13) (1855) 4 Gray 29.
(14) (1891) 155 Mass. 289: 29 N. E. 512.
(15) (1887) 37 Minn. 212: 34 N. W. 24.
(16) (1883) 94 N. Y. 137:
(17) (1877) 84 Penn. 187.

O'Grady v. *People* (1), *Andrews* v. *United States* (2), *Shepard* v. *United States* (3), and *Connor* v. *People* (4) referred to by Doss J.

THE facts of the case are as follows. The Excise Deputy Collector of Bhagalpore deputed one Bibhuti Bhusan Fouzdar, in April last, to purchase cocaine from the petitioner, as a spy or detective, the money necessary for the purpose being supplied by the Excise Sub-Inspector. Bibhuti accordingly bought a phial of cocaine on the 5th April, alleged to have been sold to him by the petitioner, and two more the next day which he made over to the Excise Deputy Collector. The petitioner was put on his trial before Babu Surendra Nath Mozumdar, Deputy Magistrate of Bhagalpore, under s. 46 of the Bengal Excise Act (V of 1909), charged with the illicit sale of cocaine on the 6th April. The only witnesses examined in the case were the Excise Deputy Collector, the Excise Sub-Inspector, Bibhuti and one Kanai Ram Marwari. The evidence of the first three witnesses is summarized in the judgment of the High Court. Kanai stated that Bibhuti did not purchase the cocaine from the present petitioner but from another. The Magistrate convicted the petitioner and sentenced him to a fine of Rs. 200. The Sessons Judge of Bhagalpore reported the case to the High Court under s. 438 of the Criminal Procedure Code, and recommended the reversal of the conviction and sentence on the ground that Bibhuti was an instigator of the offence alleged and, therefore, an accomplice, and not a mere spy or detective, and that his evidence was without corroboration regarding the purchase of cocaine from the petitioner.

Mr. Huq (with him *Babu Sailendra Nath Palit*), for the petitioner.

Babu Sirish Chandra Chowdhury, for the Crown.

HOLMWOOD J. I need only say that I entirely concur in the findings which my learned brother is about to deliver as

(1) (1908) 12 Col. 512: 95 Pac. 316.
(2) (1895) 162 U. S. 420.
(3) (1908) 164 Fed. 584.
(4) (1893) 36 Am St. R. 308.

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the judgment of the Court, but I desire to dissociate myself from any reliance on American rulings which are of no authority in this country and in my opinion have no value, except in so far as they depend on the prior decisions of English Judges which are in themselves sufficient authority for the view we have taken. I may also point out that in the case of *Queen-Empress* v. *Javecharam* (1) the Judges cited with approval the English cases upon which we have relied in this case; and, in my opinion, it would be very easy to distinguish that ruling from the present case on the facts, and it, therefore, would not be necessary to dissent from it, although I agree with my learned brother that it is opposed to the recent ruling in *Rex* v. *Bickley* (2).

With regard to the order on a similar unreported reference in Chambers, which has been referred to before us, I would point out that the matter was not argued before the learned Judges, and the order is merely "that for the reasons given by the Sessions Judge the conviction and sentence are set aside." Those reasons having, upon an examination of all the authorities and on a full discussion of the question by learned counsel, turned out to be unfounded, I do not think it necessary to regard this order as a ruling of the Court on a point of law.

Doss J. This is a Reference by the Sessions Judge of Bhagalpore, under section 438 of the Criminal Procedure Code, recommending that the conviction and sentence on the petitioner be set aside on the ground that it is based on the uncorroborated testimony of an accomplice.

The narrative of facts is short and simple. The Excise Deputy Collector of Bhagalpore deputed one Bibhuti Bhusan Fouzdar, a student of Tej Narain Jubilee College, to purchase cocaine from Chaturbhuj Sahu, the petitioner. Bibhuti Bhusan purchased a phial of cocaine on the 5th April, and two phials on the 6th April, with money supplied by the Excise Sub-Inspector, and handed them over to the Deputy Collector

(1) (1894) I. L. R. 19 Bom. 363. (2) (1909) 2 Cr. App. Rep. 53: 73 J. P. 239.

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on the 6th. The petitioner was tried for the illicit sale of cocaine under the summary procedure by the Deputy Magistrate of Bhagalpore. Bibhuti Bhusan in his evidence deposed to the purchase of cocaine from the accused under instructions from the Excise Deputy Collector, who stated that he gave such instructions, and received the three phials of cocaine from him. The Excise Sub-Inspector stated that he gave money to Bibhuti Bhusan in order to purchase the cocaine. The petitioner has been convicted under section 46 of Act V of 1909, and has been sentenced to a fine of Rs. 200.

On these facts the learned Sessions Judge is of opinion that Bibhuti Bhusan must be deemed to have acted as an instigator of the offence committed, and that he cannot therefore, according to the decision of the Bombay High Court in *Queen-Empress* v. *Javecharam* (1) be considered in the light of a mere spy or a detective, but is one who falls within the category of an accomplice, whose evidence, according to the ordinary rule, cannot be believed without corroboration. The question raised is of considerable importance and of not infrequent occurrence in practice. We have, therefore, felt it our duty to examine at some length the authorities bearing on the subject with a view to ascertain the essential ingredient which differentiates a spy or a detective from an accomplice.

In *Rex* v. *Despard* (2), where the accused was tried for high treason, Lord Ellenborough in his summing up to the jury said "But there is another class of persons which cannot properly be considered as coming within the description or as partaking of the criminal contamination of an accomplice; I mean persons entering into communication with the conspirators with an original purpose of discovering their secret designs and disclosing them for the benefit of the public. The existence of such original purpose on their part is best evinced by a conduct which precludes them from ever wavering in or swerving from the discharge of their duty, if they might otherwise be disposed so to do."

(1) (1894) I. L. R. 19 Bom. 363. (2) (1803) 28 How. St. Tr. 346, 489.

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In *Reg.* v. *Dowling* (1), in which the accused was tried on a charge of treasonable conspiracy, the Central Criminal Court held that a person who enters into a conspiracy for the sole purpose of detecting and betraying it does not require confirmation as an accomplice, although his evidence should be received by the jury with caution. In his summing up to the jury, Erle J., adverting to the particular witness, said that, "although he had been designated as a spy or a traitor, and an accomplice, if his object in entering into the confederacy was not to deceive or entrap any one, but to serve his country, he was entitled to praise instead of censure. If he only lent himself to the scheme for the purpose of convicting the guilty, he was a good witness, and his testimony did not require confirmation as that of an accomplice would do: he was not an accomplice, for he did not enter the conspiracy with the mind of a co-conspirator, but with the intention of betraying it to the police, with whom he was in communication."

In *Reg.* v. *Mullins* (2), the Central Criminal Court held that a person employed by Government to mix with conspirators and pretend to aid their designs for the purpose of betraying them does not require corroboration as an accomplice. Maule J., in his direction to the jury, distinguished between two classes of witnesses. As to one class he said, "they were persons who understanding, as they say, that there were dangerous designs entertained by certain Chartist societies, joined the meetings, and pretended to sympathise with the views of the conspirators, in order that they might communicate their designs to Government. They joined the scheme for the purpose of defeating it, and may be called spies." As to the other class he said "on the other hand, they were really Chartists, concurring fully in the criminal designs of the rest for a certain time, until getting alarmed, or from some other cause, they turned upon their former associates, and gave information against them. These persons may be truly called accomplices. Now as to spies, I know

(1) (1848) 3 Cox. C. C. 526. (2) (1848) 3 Cox. C. C. 509.

of no rule of law which declares that their evidence requires confirmation, nor any rule of practice which says that juries ought not to believe them." Later on, the learned Judge thus stated the reason for this distinction. "An accomplice confesses himself a criminal, and may have a motive for giving information, as it may purchase immunity for his offence. A spy, on the other hand, may be an honest man, he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and if he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men, I can see no impropriety in his taking upon himself the character of an informer. The Government are, no doubt, justified in employing spies; and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur with the perpetrators."

This case has been recently followed by the Court of Criminal Appeal (Lord Alverstone L. C. J. and Bigham and Walton JJ.) in *Rex* v. *Bickley* (1), where the prisoner was convicted under 24 and 25 Vict. c. 100, s. 59 of having unlawfully supplied a noxious thing to a woman with intent to procure her miscarriage. The woman, who was not pregnant, acted under police instructions in order to trap the prisoner. It was contended on appeal that there was misdirection as no warning had been given to the jury that they should regard the evidence of the woman to whom the drugs had been supplied as that of an accomplice. The Court held that "the fact that the woman was a police spy in no way invalidated her evidence, nor must her evidence be regarded as that of an accomplice." And proceeded to affirm that "as the law stands at present, it seems established that a police spy does not need corroboration."

In *Reg.* v. *Shankar Shobag* (2) Birdwood and Jardine JJ., following the rule stated in section 971 of Taylor on Evidence, which is based on the summing up of Lord Ellenborough in *Rex* v. *Despard* (3), held that persons who have entered into

(1) (1909) 2 Cr. App. Rep. 53: 73 J. P. 239.

(2) (1888) Ratan Unrep. Cr. Ca. 428.

(3) (1803) 28 How. St. Tr. 346, 489.

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communication with conspirators, but who in consequence of either a subsequent repentance or an original determination to frustrate the enterprise, have disclosed the conspiracy to the police authorities under whose direction they continue to act with their guilty confederates till the matter can be so far matured as to ensure their conviction, belong to the class of persons apparently accomplices to whom the rule requiring corroborative evidence does not apply, and that the early disclosure is considered as binding the party to his duty, and though a great degree of disfavour may attach to him for the part he has acted as an informer, yet his case is not treated as that of an accomplice.

In *Queen-Empress* v. *Javecharam* (1) Jardine and Ranade JJ. held with dubiety that the action of the spy and informer in the case, in suggesting to the prisoner, at the instance of the police, to sell some used tickets and his offering to buy some of them, amounted to a criminal offence and that, as the first instigator of the offence, he should be regarded as an accomplice whose evidence could not be believed without corroboration. In their judgment the learned Judges thus observed "Mohamed Ali appears from his own account to have been the first instigator of the present offence; not merely a spy, who knowing of criminal doings, or doings which will culminate in a crime, merely pretends to concur with the perpetrators. Mere good intention does not ordinarily excuse a criminal act." With every respect to the learned Judges we are unable to follow this decision, which is opposed to the recent ruling by the Court of Criminal Appeal in the case of *Rex* v. *Bickley* (2) where the woman who asked the prisoner to supply her with a noxious drug to cause her miscarriage, and who in doing so acted under police instructions, was clearly the first instigator, and yet the Court held that that circumstance did not deprive her of the character of a spy.

The object of the instigation in all these cases is not the prepetration of the offence, but the detection of it; not the transgression of law, but the securing of evidence for the

(1) (1894) I. L. R. 19 Bom. 363. (2) (1909) 2 Cr. App. Rep. 53.

enforcement of public justice. It may be argued that the State should not punish as an offence against itself an act which was instigated by its own official, a position which was vigorously, though unsuccessfully, maintained before the Supreme Court of the United States by the counsel for the appellant in *Grimm* v. *United States* (1). It may be urged with equal force that if the act is an offence, mere good intention on the part of the instigator does not render him less a participant in the crime and hence falling within the ambit of the rule requiring corroboration. But logical conclusions, however attractive, must yield to the over-riding necessities of legal policy. The correct solution of the matter in our opinion seems to be this:—Spies or decoys are generally employed for the purpose of ferreting out habitual offenders in certain classes of offences. In such case, the punishment is indeed aimed not so much against the offence committed in consequence of such instigation as against the series of similar offences which the offender is believed to have been in the habit of committing before the last offence and which, but for recourse to such stratagem, would have remained undetected for an indefinite period. In respect of such previous offence the spy or informer is *ex hypothesi* not an accomplice. It is not difficult to conceive a large variety of cases in the field of criminal l w where the detection of the offence cannot be successfully effected except by the employment of such artifice; to exclude evidence so obtained for mere lack of corroboration, however unimpeachable such evidence may be in any particular case, would not unoften lead to the disastrous result of placing the transgressors of law beyond the reach of public justice.

The rule laid down in *Rex* v. *Despard* (2) has been followed in a long and uniform current of decisions in America where it has been held that one who as a spy or a detective associates with criminals solely for the purpose of discovering and making known their crimes, and who acts throughout with this purpose, and without any criminal intent, is not an accomplice, and it is immaterial that he encourages or aids

(1) (1894) 156 U. S. 604. (2) (1803) 28 How. St. Tr. 346, 489.

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in the commission of the crime. See *State* v. *McKean* (1), *State* v. *Brownlee* (2), *Wright* v. *State* (3), *People* v. *Bolanger* (4), *People* v. *Farrel* (5), *Commonwealth* v. *Downing* (6), *Commonwealth* v. *Baker* (7), *State* v. *Baden* (8), *People* v. *Noelke* (9), *Campbell* v. *Commonwealth* (10), *O'Grady* v. *People* (11) (where several other cases on the point are collected), and *Grimm* v. *United States* (12).

In the recent case of *Shepard* v. *United States* (13), where the accused being suspected of being engaged in employing the mails for the dissemination of vicious and immoral literature in breach of the post-office laws which prohibited the use of the mails for such a purpose, an agent of the post office department, acting as a Government detective, wrote decoy letters to the accused which induced the latter to send such objectionable matter in return through the post: it was held that the writing of the decoy letter did not make the detective a party to the offence so as to render his testimony subject to the rule relating to accomplices.

The case of *Connor* v. *People* (14) cited by the learned counsel for the appellant in the case of *Rex* v. *Bickley* (15) has, as pointed out in the judgment of the Court, no bearing upon the present question. Moreover, it is opposed to the ruling of the Supreme Court of the United States in the cases of *Grimm* v. *United States* (12), and *Andrews* v. *United States* (16).

But though the testimony of a spy does not stand in need of corroboration in order to be acted upon, it is entirely for the Judge of fact to decide in each particular case what

(1) (1873) 36 Iowa. 343: 14 Am. Rep. 530.
(2) (1892) 84 Iowa. 473: 51 N. W. 25.
(3) (1880) 7 Tex. Ct. App. 574: 32 Am. Rep. 599.
(4) (1886) 71 Cal. 17: 11 Pac. 799.
(5) (1886) 30 Cal. 316.
(6) (1855) 4 Gray 29.
(7) (1891) 155 Mass. 289: 29 N. E. 512.
(8) (1887) 37 Minn. 212: 34 N. W. 24.
(9) (1883) 94 N. Y. 137:
(10) (1877) 84 Penn. 187.
(11) (1908) 42 Col. 312: 95 Pac. 346.
(12) (1894) 156 U. S. 604.
(13) (1908) 164 Fed. 584.
(14) (1893) 36 Am. St. Rep. 300.
(15) (1909) 2 Cr. App. Rep. 53; 73 J. P. 239.
(16) (1895) 162 U. S. 420.

weight he will attach to this kind of evidence, the question depending upon the character of each individual witness.

It may sometimes be difficult to draw the line of discrimination between an accomplice and a pretended confederate, such as a detective, spy or decoy; but we think, that the line may be drawn in this way:—If 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 an accomplice if he extends no aid to the prosecution until after the offence has been committed.

With regard to the order on a similar reference in Chambers, which has been referred to before us, it is sufficient to say that in the face of the authorities which we have already discussed we are unable to accept the opinion implied in the order as sound.

For these reasons, we are unable to accept the recommendation of the learned Sessions Judge to set aside the conviction and sentence.

Conviction upheld.

E. H. M.