Mohd. Husain Umar Kochra Etc.

Vs

K. S. Dalipsinghji and Another Etc.

Criminal Appeal Nos. 139 to 144 of 1966

(CJI M. Hidayatullah, S. M. Sikri, R. S. Bachawat, G. K. Mitter, J. M. Shelat, V. Bhargava, J. C. Shah, V. Ramaswami-I, A. N. Grover JJ)

31.03.1969

JUDGMENT

BACHAWAT, J. -

1. The six appellants are A-8, Mohamed Hussain Omer Kochra alias Mr. Buick alias Naznen, A-12, Maganlal Naranji Patel, A-16, N. B. Mukherjee, A-15, N. S. Rao, A-14, Parasuram T. Kanel, A-6, Lakshmandas Chaganial Ehatia alias Sham. In this Judgment "A" means accused. Forty persons including the appellants were jointly prosecuted for criminal conspiracy to import and deal in gold punishable under Section 120-B of the Indian Penal Code, read with Section 167(81) of the Sea Customs Act, 1878 and for substantive offences punishable under Section 167(81).

2. A-1 to 5, A-18 to 35 and A-37 are absconding or being foreigners are not amenable to the processes of the Court. A-1 Iamal Shuhaibar, A-2 George Shuhaibar and A-3 Jawadat Shuhaibar of Beirut and A-4 Yusuf Mohamed Lori alias Abdulla of Bahrein sent gold from the Middle East. A-5 Juan Castarner Casanovas and A-18 Bernardo Sas of Geneva are foreign collaborators. A-19 Hamad Sultan and A-37 Chunilal alias Professor Kamal alias Dwarkadas of Bombay were concerned in the smuggling of gold. A-20 to A-35 Mrs. Gisele Minot, B. J. Lupi, J. P. Hoffman, Jacques Minot, Geoffre Allan, M. Torrens, Mrs. Mora Margaret, Armand Yavercowaki, Gran Powell, G. J. Plamant, Mrs. A. Ramel, Mrs. S. B. Taylor, J. C. Catino, E. D. Gill, A. J. Mascardo and A. A. Grant are foreigners and are said to have carried gold from foreign countries to India by air.

3. The trial proceeded against A-6 to 17, A-36 A-38, A-39 and A-40. A-6 Lakshmandas is a financier. A-14 Parasuram is his brother-in-law. A-7, Rabiyabai Usman alias Grandma is the mother of A-9 Rukaiyabai Mohamed Hussain Kochra, A-10 Abidabai Usman and A-38 Hassan Usman. A-8 Kochra is the husband of A-9. A-11 Murad Asharnoff remitted funds to foreign countries. A-12 Maganlal Naranji Patel and A-13 Mafatlal Mohanlal Parekh are bullion merchants of Bombay. A-15 N. S. Rao, A-16 N. B. Mukherji, A-17 Timothy Miranda, A-39 D. K. Deshmukh and A-40 Jacob Miranda alias Tambaku were mechanics in the employ of the Air India International. A-36 Francis Bello was as a co-conspirator. The Additional Chief Presidency Magistrate, 3rd Court, Esplanade, Bombay, acquitted A-9, 10, 13, 39 and 40 of all the charges. He convicted A-6, 7, 8, 11, 12, 14, 15, 16, 17, 36 and 38 of criminal conspiracy and substantive offences under Section 167(81) and passed sentences of imprisonment and fine.

4. All the convicted persons filed appeals in the High Court. During the pendency of the appeal A-11 absconded. The High Court upheld the conviction of A-36 and A-7 but directed that A-36 be released on probation and that A-7 do pay a fine of Rs. 4,000 and undergo simple imprisonment for

a day only. The High Court dismissed the appeals of A-6, 8, 11, 12, 14, 15, 16 and 17. The present appeals have been filed by A-6, 8, 12, 14, 15 and 16 after obtaining special leave.

5. The first count charged that all the 40 accused persons along with Mohamed Yusuf Merchant, Pedro Fernandez and other persons at Bornbay and other places from 1st November, 1956 to 2nd February, 1956 were parties to a continuing criminal conspiracy to acquire possession of, carry or remove, deposit at harbour, keep conceal and deal in gold and knowingly to be concerned in fraudulent evasion of duty chargeable on gold and of the prohibition and restriction applicable thereto and committed an offence punishable under Section 120-B, I. P. C., read with Section 167(81) of the Sea Customs Act, 1878. The other counts charged the accused persons individually with offences punishable under Section 167(81).

6. In broad outline the prosecution case is as follows : Before November 1, 1956 some of the accused persons along with other were concerned in the illegal importation of gold. In or about November 1956 Pedro Fernandez and Yusuf Merchant hatched the present conspiracy to which A-11 Murad Ahaharnoff was a party. The scheme was that necessary finances would be arranged, remittances to foreign countries would be made through Murad, gold would be sent by air from foreign countries to Bombay, Delhi, Calcutta and other airports and the smuggled gold would be sold in India. A-6 Lakshmandas, A-8 Kochra and A-7 Rabiyabai were approached for the necessary finances. Between February 3 and July 8, 1957 eleven carriers brought gold by air from Switzerland. Lakshmandas financed the first four transactions and his telegraphic address "Subhat" was used for receipt and despatch of cables. On February 3, 1957 the first carrier Gisele Minot came to Bombay. On February 25, 1957, the second carrier B. J. Lupi and on March 9, 1957 the third carrier J. P. Hoffman came to Delhi. The fourth carrier Jacques Minot went to Colombo. Kochra and Rabiyabai financed the subsequent transactions and allowed the use of his telegraphic address "Nazneen". Cables used to be sent in codes known as the "Private Dictionary," "the new Geneva Code" and "the Beirut Code", and "the Behrein Code". Lakshmandas ceased to be a financier but he continued to participate in the disposal of gold. On April 8, 1957 the fifth carrier Mora Margaret went to Colombo. On April 19, 1957 the sixth carrier Geoffre Allan and on May 3, 1957 the seventh carrier came to Bombay. At about this time A-12 is said to have joined the conspiracy. On May 21, 1957 the eighth carrier Grant Powell came to Delhi. On June 9, 1957 the ninth carrier Mora Margaret and on June 24, 1957 the tenth carrier Armand Yavercowaski came to Bombay. On July 8, 1957 the 11th carrier Grant Powell came to Calcutta. A-37 Chunilal who was despatched to contact the carrier disappeared with the gold. Thereafter the smuggling of gold stopped for some time.

7. In August 1957 Yusuf and A-38 Hassan representing Kochra and Rabiyabai went to Beirut and induced A-1 to A-3 Jamal Shuhaibar and his two brothers to join the conspiracy. The scheme was that the Shuhaibar brothers would send gold from the Middle East, Kochra and Rabiyabai would remit the necessary fund and that A-19 Hamad Sultan would have an interest in the venture. Pedro also came to Beirut. Accounts between him and Yusuf were settled. It was decided that Pedro would continue to send gold from Switzerland, that Kochra and Rabiyabai would supply the necessary finances and that Pedro would receive a half share of Yusufs profits in the smuggling of gold from the Middle East. Between November 7, 1957 and February 13, 1958 eleven carriers of gold sent by Pedro came to Bombay. On February 24, 1958 the twelveth carrier A. J. Mascardo was arrested in Delhi. Simultaneously gold was sent from the Middle East. On November 3, 1957 Grant Powell carrying gold sent by the Shuhaibar brothers came to Calcutta, but he was arrested. In November 1957 A-4 Yusuf Mohamed Lori of Bahrein acting for Shuhaibar brothers came to India and it was decided that gold would be hidden in the body of Air India International planes by a mechanic at Beirut or Bahrein and would be removed in Bombay by another mechanic and that Kochra and

Rabiyabai would supply funds on the guarantee of Murad. From time to time the services of the mechanics, A-15 N. S. Rao, A-39 D. K. Deshmukh, A-40 Jacob Miranda, A-17 Timothy Miranda and other mechanics, were requisitioned. Between December 12, 1957 and January 15, 1958, 4 or, 5 consignments of gold concealed inside the belly of aircrafts were sent by Lori to Bombay. Due to disturbances in the Middle East the smuggling of gold stopped for some time. Since October 1953 eleven consignments of gold were sent to Bombay. On February 1, 1959 the Rani of Jhansi carrying the 11th consignment of gold was searched by the customs officers at the Santa Cruz Airport, Bombay and the gold was seized.

8. On February 2, 1959 the residence of Yusuf Merchant was searched and many incriminating articles were seized. From time to time Yusuf was interrogated, and his statements were recorded. On October 24, 1959 the investigation was completed. The trial started in July 1960. The prosecution examined PW-2 Yusuf Merchant and other accomplices and witnesses and exhibited numerous documents. Yusuf Merchant, the main witness on behalf of the prosecution implicated all the appellants in the crime. The courts below accepted his testimony, found that it was corroborated in material particulars, and convicted the appellants.

9. All the appeals were heard together. We shall note only those arguments which were raised in this Court by Counsel. Having regard to those arguments the following general questions affecting all the appellants arise for decision :

> (1) was the import of gold in contravention of Section (1) of the Foreign Exchange Regulation Act, 1947 punishable under Section 167(81) of the Sea Customs Act, 1878;
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> (2) did the prosecution establish the general conspiracy laid in charge No. 1;
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> (3) did the learned magistrate wrongly allow a claim of privilege in respect of the disclosure of certain addresses and cables and if so, with what effect :
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> (4) did lie wrongly refuse to issue commission for the examination of Pedro Fernandez; and
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> (5) did he wrongly refuse to recall PW 50 Ali for cross-examination ?

10. As to the first question, the law since the passing of the Customs Act, 1962 admits of no doubt. The import and export of goods by sea, land and air may be prohibited absolutely or subject to conditions under Section 11. Customs duties are leviable under Section 12 on all goods so imported or exported. The fraudulent evasions of duties and of prohibitions are punishable under Section 135.

11. In the present case we are concerned with the law in force before 1962. The Sea Customs Act, 1878 contained a number of prohibitions on imports by land or sea (Section 18) and authorized the imposition of further prohibitions and restrictions on import or export by sea or by land (Section 19). The Act also provided the machinery for the enforcement of prohibitions and restrictions by means of search, seizure, confiscation and penalties. Several other statutes contained further prohibition and restrictions on the import or export of goods. Section 8 of the Foreign Exchange Regulation Act, 1947 is one such enactment. A notification, dated August 253 1948 as amended up-to-date issued under Section 8(1) of the Act directed that "except with the general or special permission of the Reserve Bank no person shall bring or send into India (a) any gold coin, gold bullion, gold sheets or gold ignot whether refined or not ..... ". Section 23-A of the Act provided

that the restrictions imposed by "Section 8(1) shall be deemed to have been imposed under Section 19 of the Sea Customs Act, 1878 and all the provisions of that Act shall have effect accordingly .....". The effect of Section 23-A was that the contravention of the notification under Section 8(1) attracted to it each and every provision of the Sea Customs Act, 1878 in force for the time being including Section 167(81) of the Sea Customs Act, 1878 which was inserted by the Amending Act XXI of 1955.

12. It is to be noticed that Section 19 of the Sea Customs Act, 1878 authorised the imposition of prohibitions and restrictions on the import or export of goods by sea and land only. But the notification dated August 25, 1948 issued under Section 8(1) of the Foreign Exchange Regulation Act, 1947 restricted the bringing into India of gold from, any place outside India by land, sea and air. Section 23-A of the Foreign Exchange Regulation Act, 1947 created the fiction that the restriction had been imposed under Section 19 of the Sea Customs Act, 1878, so that all the provisions of that Act would be attracted to a breach of the notification. But the statutory fiction did not cut down the wide ambit of the notification or limit its application to imports and exports by sea and land only. An import of gold by air without the permission of the Reserve Bank was a breach of the notification, and the breach attracted to it the provisions of Section 167(81) of the Sea Customs Act, 1878.

13. The matter may be looked at from another point of view. When the Sea Customs Act, 1878 was passed. goods could be imported or exported by sea and land only. Transport by air was unknown. After the Second World War traffic by air began. There is force in the contention that the import or export by air is a species of import or export by land. The aircraft carrying goods lands or takes off from land. The prohibition or restriction on the import or export of goods by land is a prohibition or restriction on the import or export by aircraft, landing or taking off from land. A fraudulent evasion of the restriction imposed by the notification under Section 8(1) of the Foreign Exchange Regulation Act, 1947 was punishable under Section 167(81) of the Sea Customs Act, 1878 and criminal conspiracy to evade the restriction was punishable under Section 120-B of the Indian Penal Code.

14. In this connection a question arose whether customs duty was leviable on imports and exports by air and whether a fraudulent evasion of the duty was punishable under Section 167(1). The Sea Customs Act, 1878 and the rules and notifications made thereunder set up a complete machinery for the levy of sea customs duties. Section 20 provided for a levy of customs duties on goods imported or exported by sea. Payment of the duty was enforced by compelling all foreign trade to pass through certain ports. Drastic powers were given for detection, prevention and punishment of evasions of duty. The Land Customs Act, 1924 set up the machinery for the levy of land customs duties, and Section 9 of the Act applied for the purpose of this levy several provisions of the Sea Customs Act, 1878 with suitable modifications and adaptation. Rules 53 to 64 contained in Para IX of the Indian Aircraft Rules, 1920 framed under Sections 3 and 6 of the Indian Aircraft Act, 1911 provided for the levy of air customs duties. The duty was leviable under Rules 58 and 59 on goods imported or exported by air "as if such goods were chargeable to duties under the Sea Customs Act, 1878". Rules 63 provided that all persons importing or exporting goods into and from India "shall so far as may be observed, comply with and be bound by the provisions of the Sea Customs Act, 1878", with certain adaptations. The Indian Aircraft Act, 1934 repealed the Indian Aircraft Act, 1911 but the Indian Aircraft Rules, 1920 continued in force in view of Section 24 of the General Clauses Act, 1897. The Indian Aircraft Rules, 1937 framed under Sections 5 and 8 of the Indian Aircraft Act, 1934 preserved and continued Para IX of the Indian Aircraft Rules, 1920. Until the passing of the Customs Act, 1962 Part IX of the Indian Aircraft Rules, 1920 continued to be the

basic law for the levy of air customs duties. On behalf of the appellants it was argued that : (1) Rules could not authorise the levy of a tax, (2) Rules could not create a new offence punishable under Section 167(81) of the Sea Customs Act, 1878, (3) a contravention of the Rules was punishable under Section 10 of the Indian, Aircraft Act, 1934 and not under Section 167(81). On behalf of the respondent our, attention was drawn to Section 16 of the Indian Aircraft Act, 1934 which provided

> "The Central Government may, by notification in the Official Gazette, declare that any or all of the provisions of the Sea Customs Act, 1878, shall, with such modifications and adaptations as may be specified in the notifications, apply to the import and export of goods by air."

Counsel for the respondent argued that (1) the notification, dated March 23, 1937 continuing Part IX of the Aircraft Rules, 1922, was a sufficient declaration under Section 16, (2) Section 16 was a piece of conditional legislation, and by force of Section 16 and on the declaration being made the duty became leviable on goods imported and exported by air, and a fraudulent evasion of duty became punishable under Section 167(81) of the Sea Customs Act, 1878. We do not think it necessary to express any opinion on these questions having regard to our conclusion that a fraudulent evasion of the restriction imposed by Section 8(1) of the Foreign Exchange Regulation Act, 1947 was punishable under Section 167(81).

15. As to the second question the contention was that the evidence disclosed a number of separate conspiracies and that the charge of general conspiracy was not proved. Criminal conspiracy as defined in Section 120-A of the I. P. C. is an agreement by two or more persons to do or cause to be done an illegal act or an act which is not done by illegal means. The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of persons co-operate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only. The cases illustrate the distinction between a single general conspiracy and a number of unrelated conspiracies. In S. K. Khetwani v. State of Maharashtra((1967 1 SCR 595.) and S. Swaminatham v. State of Madras(AIR 1957 SC 340.) the Court found a single general conspiracy while in R. V. Griffiths((1962) 1 All ER 448.) the Court found a number of unrelated, separate, conspiracies.

16. In the present case there was a single general conspiracy to smuggle gold into India from foreign countries. The scheme was operated by a gang of international crooks. The net was spread over Bombay, Geneva, Beirut and Bahrein. Yusuf Merchant and Pedro Fernandez supplied the brain power, Murad Aaharanoff remitted the funds. Lakshmandas Kochra and Rabiyabai supplied the finances, Pedro Fernandez and the Shuhaibar brothers sent the gold from Geneva and the Middle

East, carriers brought the gold hidden in jackets, mechanics concealed and removed gold from aircrafts and others helped in contacting the carriers and disposing of the gold. Yusuf, Pedro and Murad and Lakshmandas were permanent members of the conspiracy. They were joined later by Kochra, the Shuhaibar brothers and Lori and other associates. The original scheme was to bring the gold from Geneva. The nefarious design was extended to smuggling of gold from the Middle East. There can be no doubt that the continuous smuggling of gold sent by Pedro from Geneva during February 1956 to February 1958 formed part of a single conspiracy. The settlement of accounts between Yusuf and Pedro at Beirut did not end the original conspiracy. There can also be no doubt that the smuggling of gold from Beirut by the Shuhaibar brothers and from Bahrein by their agent Lori were different phases of the same conspiracy. The main argument was that the despatch of gold from Geneva was the result of one conspiracy and that the despatch of gold from the Middle East was the result of another separate and unrelated conspiracy. The courts below held, and in our opinion rightly, that there was a single general conspiracy embracing all the activities. Pedro had a share in the profits of the smuggling from Geneva. He got also a share of Yusuf's profits from the smuggling of the Middle East gold. Apparently Shuhaibar brothers and Lori had no share in the profits from the smuggling of the Geneva gold but they attached themselves to the general conspiracy originally devised by Yusuf and Pedro with knowledge of its scheme and purpose and took advantage of its existing organization for obtaining finances from Kochra and Rabiyabai and for remittances of funds by Yusuf. Each conspirator profited from the general scheme and each one of them played his own part in the general conspiracy. The second contention is rejected.

17. As to the third question, we find that on or about February 22, 1962 the prosecution took out a summons to the Deputy Accountant General Telegraphs Check Office, Calcutta, for the production of all records pertaining to 15 cable addresses including "Subhat" and "Nazneen" together with the summons under Section 171-A previously issued by the customs officers to the Telegraphs Check Office, for the production of the cables and the receipts given by the customs officers to the Telegraphs Check Office for the cables so produced. Pursuant to the summons issued on February 22, 1962 Mr. Madhavan, Superintendent of the Telegraphs Check Office, Calcutta, produced in court the cables, summons and receipt. All the cables relating to the aforesaid 15 cable addresses, and two more addresses with which the appellants were concerned were exhibited at the trial. The summons under Section 171-A was a consolidated summons issued by the customs officer to the Telegraphs Check Office for the production of the cables relating to the investigations in the present case and several other cases. The receipt was a consolidated receipt for the cables produced under the summons. Affidavits were filed by Mr. P. C. Kalla, Senior Depuy Accountant, Post and Telegraphs and Mr. S. K. Srivastava, an Additional Collector of Customs, Calcutta, claiming privilege under Section 124 of the Evidence Act in respect of the disclosure of the other cable addresses mentioned in the summons and receipts and the cables sent to those addresses. The learned Magistrate upheld this claim of privilege. In our opinion, the privilege was not properly claimed under Section 124. It is difficult to say that the other cable addresses and cables were communications to a public officer in official confidence. However, we find that the other addresses and cables were required in connection with investigations unconnected with the present case and did not relate to any person or persons concerned in the offences for which the appellants were being tried. The other cables and cable addresses were not relevant to the defence, and their non-disclosure has not occasioned any failure of justice.

18. As to the fourth question it appears that Pedro Fernandez was a material witness. In 1959 he wrote a letter to Yusuf stating that he was willing to come to India and to be examined as a witness. The prosecution tried to contact him but his whereabouts could not be traced. On April 18, 1962 the defence applied for the issue of a commission "to the appropriate authority or court either in

Switzerland or in United Kingdom or in Pakistan for examination of Pedro Fernandez and Gimness as witnesses for the defence". Except stating that the defence undertook to pay all expenses and supply all relevant information the application did not give any other particulars. The learned Magistrate rejected the application. He held and in our opinion rightly that the application was misconceived and proper grounds for the issue of the commission under Section 503 of the Code of Criminal Procedure had not been made out. The defence did not produce any letter from Pedro or any other material indicating that he was willing to be examined on commission. Even his address was not given. The Court could not issue a roving commission to a Court or authority either in Switzerland or in United Kingdom or in Pakistan. The application was not made in good faith and was liable to be rejected on this ground alone.

19. As to the last question, we find that examination-in-chief of P. W. 50 All commenced on October 7, 1960 and was concluded on October 10, 1960. His cross-examination commenced on August 21, 1961 and was concluded on September 4, 1961. On March 6, 1962 and again on June 21, 1962 the defence applied for recalling Ali for cross-examination. The learned Magistrate rejected the two applications. According to the defence Ali was repentant and wanted to say that he had given false evidence. In our opinion, no ground was made out for recalling Ali. There was no affidavit from Ali nor was there any other material showing that his testimony was incorrect in any material particular. The Court has inherent power to recall a witness if it is satisfied that he is prepared to give evidence which is materially different from what he had given at the trial. In this case there was no material upon which the Court could be so satisfied. The learned Magistrate rightly disallowed the prayer for recalling Ali.

20. Jethamalani argued that the rough notes of statements given by Yusuf to the customs officers had been destroyed and that the defence was thereby prejudiced. This point was not taken either in the Trial Court or in the High Court. In our opinion, Counsel ought not to be allowed to raise this new point for the first time in this Court.

21. On the merits, we find that the two courts have recorded concurrent findings of fact. Normally this Court does not re-appraise the evidence unless the findings are perverse or are vitiated by any error of law or there is a grave miscarriage of justice. The courts below accepted the testimony of the accomplice Yusuf Merchant. Section 133 of the Evidence Act says :

> "An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimoney of an accomplice."

Illustration (b) to Section 114 says that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. The combined effect of Sections 133 and 114, Illustration (b) is that though a conviction based upon accomplice evidence is legal the Court will not accept such evidence unless it is corroborated in material particulars. The corroboration must connect the accused with the crime. It may be direct or circumstantial. It is not necessary that the corroboration should confirm all the circumstances of the crime. It is sufficient if the corroboration is in material particulars. The corroboration must be from an independent source. One accomplice cannot corroborate another, see Bhiva Doulu Patil v. State of Maharashtra((1963) 3 SCR 811.) and R. v. Baskerville.((1916) 2 KB 658.) In this light we shall examine the case of each appellant separately.

Case of Accused No. 8 Mohammed Hussain Umar Kochra (Cr. A. No. 139 of 1966)

22. Yusuf Merchant deposed that Kochra and his mother-in-law A-7 Rabiyabai acted as financiers after the fourth transaction, that Kochra's cable address "Nazneen" at 19 Erskine Road and his telephone was used in connection with the gold smuggling activities. The arrangement was that cables addressed to "Nazneen" would be received at No. 19, Eraskine Road and would then be forwarded to the Warden Road residence of Rabiyabai or the Napean Sea Road residence of Kochra land that on receiving phone messages Yusuf would collect the cables. Yusuf's testimoney has been corroborated in material particulars.

23. Kochra's mother resided at 10, Eraskine Road, 4th floor Esmail Building, Bombay-3. Exhibit Z-70, dated February 19, 1957 is the application for the registration of "Nazneen". This document purports to have been signed by Ismail Kader, a domestic servant of Kochra's mother. It was proved that the signature "Ismail Kader" and the address 19, Erskine Road, 4th floor, Esmail Building, Bombay-3 on Ex. Z-70 were in the handwriting of Rajabali Karmalli, another servant of Kochra's mother. Rajabali Karmalli lived in Koehra's garrage in Napean Sea Road. Kochra's mother was invalid and Kochra held a power-of-attorney for her for management of the family property. Rajabali Karmalli was under Kochra's control and was his trusted servant. Kochra had his office in the ground floor of the building at 19, Erskine Road and his denial that he had no office there is false. Both Rajabali Karmalli and Ismail Kader have now disappeared and cannot be traced. Several cables sent to Nazneen in connection with the gold smuggling have been exhibited. The other cables could not be traced. Kochra registered "Nazneen" because he desired to join the conspiracy and received the cables sent to this address. The registration of Nazneen was not procured by Yusuf in collusion with Rajabali Karmaili or Ismail Kader. Though Yusuf surreptitiously used other addresses for the receipt of his cables, Nazneen was used with the full knowledge and approval of Kochra.

24. On or about August 13, 1957 Yusuf and Hassan went to Beirut for inducing the Shuhaibar brothers to join the conspiracy. About August 15, Kochras's wife Rukaiyabai and Hassan's wife reached Beirut. A cable (Z-745) dated August 16, 1957 was sent from Beirut imforming "Nazneen" that Rukaiyabai had arrived safely. On a consideration of the materials on the record including the written statements of Kochra and Rukaiyabai the courts below have found that this cable was received by Kochra. The cable Z-745 was produced by P. W. 207 on April 4, 1962 after the examination of Yusuf Merchant had been concluded. An application for recalling Yusuf filed on the same date was rejected. A point was made that Kochra was prejudiced by the rejection of this application. Counsel suggested that Yusuf sent the cable Z-745 from Beirut and that this fact could be established if Yusuf was recalled for cross-examination. We shall assume that Yusuf despatched the cable. But the fact remains that the cable was received at "Nazneen". It was an intimation of the safe arrival of Rukaiyabai at Beirut and was obviously meant for her husband. The courts below rightly held that the cable was received by Kochra, and that there was no substance in the defence case that he was not aware of the existence of Nazneen. The rejection of the application for recalling Yusuf did not prejudice Kochra.

25. The carrier Grant Powell arrived in Calcutta on November 3, 1957 and was arrested. P. W. 127 Chandiwala and Jagbandhudas were sent to Calcutta to contact the carrier. Yusuf's brother P. W. 50 Ali also went to Calcutta. On November 6, Ali sent a telephone message to Kochra informing him of a message from Chandiwala that there was a raid in his room by the customs officials and that the carrier had not come. Kochra received the message on his telephone No. 72328 at his residence. Exhibit Z-459 dated November 7, 1957 is a copy of the bill for this telephone call. Thereafter Kochra contacted Chandiwala on the telephone and 'assured him that nothing would happen and asked him to return to Bombay immediately. On November 7, 1958 Ali sent a phone message to Kochra at his telephone No. 72328 informing him that Chandiwala was returning to Bombay.

Exhibit Z-459 dated November 7, 1957 is the copy of the bill for this telephone call. Taking into account Kochra's statement, Ex. Z-703 Para 6 and his written statement Para 72 the courts below rightly held that Kochra received the two telephone messages from Ali relating to matters connected with the gold smuggling. Even after the receipt of these messages Kochra allowed the use of Nazneen for receipt of cables from Pedro and acceptance of cables by Yusuf, P. W. 31 Mastakar, proved that Kochra did not send any complaint to the telepgraphic office that Nazneen was registered or was used without his authority.

26. Mr. Mehta suggested that (a) Nazneen was used before Kochra joined the conspiracy and that (b) Kochra did not join the conspiracy on or about April 8, 1957 when the fifth carrier came and in this connection read to us several documents. The courts below rejected this contention and we find no reason for re-appraising the evidence. It may be pointed out that by the cable Ex. Z-69 dated March 14, 1957 and the letter Ex. Z-71 dated March 17, 1957 Yusuf informed Pedro of the registration of Nazneen and by the cable Ex. Z-77 dated March 17, 1957 Yusuf asked him to send the cables to the new address. The materials on the record show that Kochra had then joined the conspiracy and the address Nazneen was used for despatch and receipt of cables after march 17, 1957. Mr. Mehta commented on the fact that Yusuf implicated Kochra for the first time in his statement given on April 30, 1957 and that Yusuf had not referred to Kochra in his earlier statements. Yusuf at first wanted to shield his friend Kochra. The customs officers discovered the existence of Nazneen on or about April 20, 1959. On being then questioned with regard to Nazneen, Yusuf was compelled to disclose his connection with Kochra and the circumstances under which Nazneen came to be registered.

27. The materials on the record clearly establish the connection of Kochra with the conspiracy and materially corrborate the testimony of Yusuf Merchant. The courts below rightly convicted Kochra.

Case of Accused No. 12, Maganlal Naranji Patel (Cr. A. No. 140 of 1966)

28. The prosecution case is that since May 3, 1957 Maganlal was buying the smuggled gold from Yusuf Merchant and that when consignments of gold bearing the mark 'Chaisso" and having the fineness of about 99.99 came from Beirut, Yusuf Merchant and Maganlal had the gold melted in the silver refinery of P. W. 127 Chandiwala at Bandra by his employees Bahadulla and Shankar in December 1957 and Ram Naresh and Mohamed Rafique in February 1958 with a view to remove the mark "Chaisso" and to reduce the fineness of the gold. The Mark "Chaisso" and the 99.99 fineness indicated that the gold was of foreign origin. The object of melting the gold and reducing the fineness was to destroy the tell-tale evidence of its origin. For the purpose of implicating Maganlal the prosecution relied on the testimony of P. W. 2 Yusuf Merchant, P. W. 127 Mohamed Chandiwala and P. W. 68 Mohamed Rafique. It is common case that Yusuf and Chandiwala are accomplices. The question in issue is whether P. W. 69 Mohamed Rafique was also an accomplice. The two courts held that Rafique was not an accomplice but we are unable to agree with this finding. The melting was done late in the night after normal working hours. The melting of gold in the silver refinery was unusual. On no other occasion gold was melted in the refinery. Rafique was asked to keep the matter secret. For two hours' secret work, he got about Rs. 10 though his daily wage was Rs. 3 only. Once, the gold was brought in a jacket usually worn for carrying smuggled gold. In his statement Ex. 25-K Yusuf admitted that of the two workmen Rafique had more intimate knowledge of the reason for the secret handling of the gold. The secrecy of the job, the unusual hours, the special remuneration, the carriage of gold in jackets, the user of silver refinery for the melting of gold, inside knowledge of Rafique of the purpose of the melting, lead to the irresistible conclusion that Rafiqe was knowingly a party to melting of smuggled gold with intent to destroy the

evidence of its foreign origin and to evade the restrictions on its import. He was clearly a participes crimines in respect of the offences with which Maganlal was charged and was liable to be tried jointly with him for those offences. As pointed out by Lord Simonds in Davis v. Director of Public Prosecution(1954 AC 378, 400-402.) a participes crimines in respect of the actual crime charged is an accomplice. The witness concerned may not confess to his participation in the crime, but it is for the Court to decide on a consideration of the entire evidence whether he is an accomplice. Rafique was an accomplice, and his evidence cannot be used to corroborate the evidence of Yusuf and Chandiwala, the other accomplices. There is no corroboration of the evidence of the accomplices from an independent source. On the materials on the record it is not safe to convict Maganlal of the offences with which he is charged.

29. We may also point out that the positive case of Yusuf and Chandiwala was that Rafique melted the gold in February 1958. The books of Chandiwala show that in February 1958 Rafique did not work in the refinery. In his place one Kedar worked there. Chandiwala suggested that Kedar was another name of Rafique. This is an impossible story. Rafique himself did not say that his other name was Kedar. Thumb-impressions of the workers used to be taken on he muster roll of the refinery but that document was not produced and the identity of Rafique with Kedar was not established. The High Court rightly held that Kedar and Rafique were different persons. The High Court made a new case for the prosecution and held that Rafique might have melted the gold towards the latter part of December 1958. Mr. Khandelwala frankly stated that he could not support this finding. In this Court Mr. Khandelwala maintained that the gold was melted by Rafique in February 1958 and that Rafique was also known as Kedar. For the reasons given above, we are unable to accept this case. In our opinion, Criminal Appeal No. 140 of 1966, should be allowed and accused No. 12 Maganlal Naranji Patel must be acquitted of all the charges.

Case of Accused No. 16, N. B. Mukherjee (Cr. A. No. 141 of 1966)

30. Mukherjee was the engineer-in-charge of Group A base maintenance. According to the prosecution Mukherjee was responsible for removing gold from aircrafts bringing gold from the Middle East. P. W. 2 Yusuf Merchant, P. W. 49, Maxie Miranda, P. W. 129, C. B. D' Souza, P. W. 143 Bhide and P. W. 148 Zahur, implicated Mukherjee. All these witnesses are accomplices. The High Court found that their evidence has been corroborated in material particulars from independent sources. We are unable to accept this finding. Mr. Khandelwala argued that the following circumstances corroborated the evidence of the accomplices :-

(1) the reference to Mukherjee in Ex. Z-209, a letter, dated July 8, 1958 from Lori to Yusuf, and Ex. Z-226, a letter, dated August 16, 1958 from Bello to Yusuf;

(2) Mukherjee's leave application Z-558, dated December 13, 1958 and Z-313, dated January 18, 1959, a cable from Yusuf to jamal;

(3) simultaneous statements of a number of accomplices; and

(4) Ex. Z-697 the retracted confession of Bello.

Mr. Khandelwala did not rely on any other circumstances.

31. In Ex. Z-209 Lori referred to Bello's friend. Ex. Z-226 is a letter of Bello to Yusuf referring to "our friend." Those two letters do not refer to Mukherjee by name. There is no corroboration from any independent source, that Mukherjee was one of the co-conspirators referred to in these letters.

The two letters cannot be regarded as a corroboration of Yusuf's evidence.

32. On December 13, 1959 Mukherjee applied for leave from January 19 to February 2, 1959. The leave application Ex. Z-558 was allowed on December 14, 1958. This document is innocuous and does not implicate Mukherjee in the crime. Maxie Miranda now says that Mukherjee asked Maxie not to remove the gold during his absence on leave, that Maxie desired to remove the gold surreptitiously without Mukherjee's knowledge and arranged for the change in the place of concealment of gold in aircrafts and that accordingly Z-213, a cable, dated January 18, 1959 was sent by Yusuf to jamal informing the latter that a new place of concealment had deen airmailed. Ex. Z-313 on the face of it does not implicate Mukherjee. The prosecution had to rely entirely on the evidence of Maxie Miranda and other accomplices for the purpose of implicating Mukherjee. Ex. Z-558 and Ex. Z-313 do not connect Mukherjee with the crime.

33. Section 114 of Evidence Act says thus as to Illustration (b) "A crime is committed by several persons, A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable". If several accomplices simultaneously and without previous concert give a consistent account of the crime implicating the accused the Court may accept the several statements as corroborating each other, see Haroon Haji Abdulla v. State of Maharashtra.(70 Bom LR 240, 245.) But it must be established that the several statements of accomplices were given independently and without any previous concert, see Bhuboni Sahu v. The King.(LR 76 IA 156-7.) In the present case the Rani of Jhansi was searched on February 2, 1959. Yusuf gave his first statement on February 3, 1959. He did not then implicate Mukherjee. Maxie Miranda gave his statement on February 4, 1959 implicating Mukherjee. No other accomplice made a statement on that date. There was ample opportunity thereafter for the accomplices meeting together and conspiring to implicate Mukherjee. On February 8, 1959 C. B. D' Souza, Bhide and Yusuf made separate statements implicating Mukherjee. On June 27, 1959, Zahur made a similar statement. These statements cannot be regarded as having been made independently and without any previous concert and do not amount to sufficient corroboration of the accomplice evidence.

34. On February 11, 1959 Bello made a confession implicating Mukherjee. At the trial he retracted the confession. Under Section 30 the Court can take into consideration this retracted confession against Mukherjee. But this confession can be used only in support of other evidence and cannot be made the foundation of a conviction, see Bhuboni Sahu's case (supra) page 156. It cannot be used to support the evidence of the other accomplices.

35. In our view, Criminal Appeal No. 141 of 1966 should he allowed and Mukherjee should be acquitted of all the charges.

Case of Accused No. 15, N. S. Rao (Cr. A. No. 142 of 1966)

36. In this case there is sufficient independent corroboration of Yusuf's testimony implicating Rao. Counsel for the appellant did not dispute the finding of the High Court that Rao is guilty of, the offences with which he had been charged. The High Court rightly convicted N. S. Rao.

Case of Accused No. 14, Parasuram T. Kanel (Cr. A. No. 143 of 1966)

37. Counsel did not dispute the finding of the High Court that there is sufficient independent corroboration of accomplice evidence implicating Kanel. We have perused the records and we find

that the High Court rightly convicted Kanel of the charges against him.

Case of Accused No. 6, Lakshmandas Chhaganlal Bhatia (Cr., A. No. 144 of 1966)

38. The courts below accepted the testimony of Yusuf Merchant implicating Lakshmandas in the conspiracy and other specific charges against him. Lakshmandas acted as the financier in the first four transactions and subsequently participated in the disposal of gold. Yusuf's testimony has been corroborated in material particulars. It is sufficient to mention two circumstances, which connects Laksmandas with the criminal conspiracy and other charges against him.

39. Exhibt Z-20 shows that on November 26, 1956, Lakshmandas had the telegraphic address "Subhat" registered. The application for registration of "Subhat" was signed by Lakshmandas. The address for the delivery of the cables was Lakshmandas Chhaganlal Bhatia, 8, Little Gibbs Road, Alimanor Building, 1st Floor, Bombay-6. Numerous cables with regard to the smuggling of gold were received by Lakshmandas at the telegraphic address "Subhat". The evidence shows . that the address "Subhat" was registered for the purpose of the smuggling activities only. It does not appear that any cable relating to any legitimate business was received by Lakshmandas at this telegraphic address.

40. The third carrier J. P. Hoffman arrived in Delhi. The contact of Lakshmandas with this carrier is clearly established. Ex. Z-64 is a cable, dated March 6, 1957 from Yusuf to Pedro stating that he was awaiting the party at Hotel Marina in Delhi and that the code name was captain. The passenger manifest of the Indian Airlines Corporation (Ex. Z-566) shows that A-14 P. T. Kanel the brother-in-law of Lakshmandas travelled from Bombay to Delhi by flight No. 125166 on March 7, 1957. The reservation chart. Z-566-A shows that the reservation for Kanel was made from telephone No. 70545 of Lakshmandas. The register, of Hotel Marina, New Delhi, Ex. Z-65 shows that Kanel arrived at the Hotel, March 8, 1957 at 7-30 a.m. and occupied room No. 22. At the Hotel Kanel declared that Thamba Chetty Street, Madras, was his permanent address, though in fact he had no such address at Madras. The telephone register of Marina Hotel Ex. Z-65-C shows that on March 8, Kanel attempted to contact telephone No. 70545 but the call was cancelled. The passenger list of Indian Airlines Corporation Ex. Z-567-A shows that a seat was booked for Bhatia by plane from Bombay to Delhi and the manifest shows that he travelled by the plane on March 9, 1957. The manifest of K. L. M. Airways Ex. Z-489 shows that HofFman travelled by plane from Geneva and arrived at Palam Airport, New Delhi, on March 9. The register of Hotel Marina Ex. Z-66 shows that Hoffman arrived at the Marina Hotel on March 8 at 1-40 a.m. and occupied room No. 39. The bill of Hotel Marina Ex. Z-65-B shows that Kanel was charged Rs. 3/8/-extra for a guest and that he left the Hotel on March 10. The passenger manifest Ex. Z-537 shows that on March 10, 1957 Kanel and Lakshmandas travelled by the same plane from Delhi to Bombay and their ticket Nos. were 194885 and 194886. There is nothing to show that Kanel and Lakshmandas came to Delhi for any legitimate business. The documentary evidence completely corroborates Yusuf's testimony that Kanel came to Delhi, and later he was joined by Lakshmandas and that the object of their visit was to contact the carrier Hoffman and to receive from him the smuggled gold. The courts below rightly convicted Lakshmandas of the charges against him.

41. Counsel for the appellants pleaded for instigation of the sentences. The courts below passed on them sentences of rigorous imprisonment on the charge of conspiracy and on the individual charges for which they were convicted and directed that the sentences on all the charges except the charge of criminal conspiracy would run concurrently. Counsel argued that a separate punishment on the conspiracy charge was not justified and referred us to the following passage in Ghanville William's

Criminal Law, 2nd Ed., (General Part), Article 220, page 685 :

"Conspiracy is a useful feature on which to seize for punishing inchoate crime; it is not, in general, an aggravating factor when crime has been committed. Where there is a prosecution for a consummated crime and for conspiracy to commit it, no separate punishment would be justifiable on the conspiracy count. However, the fact that criminals are organized professionally for crime may be taken into consideration in determining the punishment for the crime."

42. We find that offence under Section 167(81) of the Sea Customs Act, 1878, was punishable with imprisonment for a term not exceeding two years or to fine or to both. A party to a criminal conspiracy to commit this offence was punishable under Section 120-B(1) of the Indian Penal Code in the same manner as if he had abetted the offence. A criminal conspiracy is a separate offence, punishable separately from the main offence. The sentences passed by the courts below cannot be said to be illegal. However, in the present case, Yusuf and Pedro, the ring leaders of the conspiracy, have escaped punishment. There has been a prolonged trial commencing in July, 1960 and ending in conviction on September 30, 1963. Considering all the circumstances, we think, that the sentences on all the charges should run concurrently.

43. In the result, Criminal Appeal No. 140 of 1966 is allowed and Maganlal Naranji Patel is acquitted of all the charges. Criminal Appeal No. 141 of 1966 is also allowed and N. B. Mukherjee is acquitted of all the charges.

44. Criminal Appeal Nos. 139 of 1965, 142 of 1966, 143 of 1966 and 144 of 1966 are allowed in part and we direct that all the sentences passed on the appellants will run concurrently. In other respects, the appeals are dismissed.

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