

# CALCUTTA HIGH COURT

Banu Singh

Vs

Emperor

(Mitra and Holmwood, JJ.)

18.06.1905

## JUDGMENT

### **Mitra and Holmwood, JJ.**

1. The appellants, except Gouri Singh, are not represented before us. The Advocate-General has appeared to support the conviction.
2. The main question argued before us relates to the legality of the conditional pardon to Mohendm Bind and the admissibility of his evidence.
3. On the 3rd May 1906 we held in an appeal in another case under Section 400, Indian Penal Code, tried by the same Deputy Commissioner of Maubhum, in which the same Mohendro Bind figured as an approver-witness and was given conditional pardon under the same order of the Government, that his evidence was inadmissible. *Paban Singh v. Emperor*<sup>1</sup> An offence under Section 400, Indian Penal Code, is exclusively triable by a Court of Session, and in that case the conditional pardon could have been tendered by the Deputy Commissioner under Section 337 of the Criminal Procedure Code. In the present case, which is triable by a Court of Sessions as well as a Presidency Magistrate or a Magistrate of the first class, no pardon could be given to an accomplice by a Magistrate under Section 337 of the Code, and Sections 337 and 338 do not apply. It was contended in that case that the conditional pardon granted to Mohendro Bind might be considered as a pardon tendered by a Magistrate of the first class in a case exclusively triable by a Court of Sessions, but the argument could not be accepted, as, even if Mohendro Bind could be examined as a witness, the conditional pardon having been legally tendered, the Deputy Commissioner was incompetent under Clause (4) of Section 337 to try the case. We held also that the Local Government could not tender a conditional pardon and thus make the evidence of an accomplice admissible against his co-accused. This last point has been re-argued before us.
4. The question of the authority of a Local Government in British India to tender a conditional pardon to an accomplice for the purpose of his being examined as a competent witness against

persons, who are being tried for an offence, of which the accomplice is himself, by his own confession, guilty, is one of some difficulty. Neither the Code of Criminal Procedure nor any other Statute or Act confers such a power on a Local Government in India. The method of approvement by special proclamation in the London Gazette or otherwise by which in England pardon is sometimes promised upon certain conditions has its foundation in the common law of England. The method is not now approved of, and is in disuse, as the promise of pardon by proclamation in the Gazette does not give the party a legal right to exemption from punishment. The strict performance of the condition gives only an equitable title to a recommendation for mercy; Russel on Crimes, 6th Edition, Vol. III, 642-3; *R. v. Rudd*<sup>2</sup> In cases of treason or felony, conditional pardon may be tendered by the Justices before commitment, and it; has to be approved of by the Court of Sessions. This practice seems to be the foundation of the procedure laid down by our Code in Sections 337 and 338. It seems to us that Local Governments in India cannot, from their very constitution, exercise the powers, which the common law of England vests in the Crown or the Secretary of State in England. Our Code of Procedure is exhaustive; it has given certain powers to the Local Governments and the Governor-General in Council, but the power of tendering conditional pardon is given only to Magistrates of certain classes and Sessions Judges in particular kinds of cases. In *Beg. v. Hanumanta*<sup>3</sup> Melvill J. seems to be of opinion that the tender of pardon in this country must be in conformity with the Code of Criminal Procedure, which, and which alone, should regulate trials in criminal cases. The tender of a conditional pardon by the Local Government, even if it was actually tendered by a proper officer and accepted by Mohendra Bind, would not by itself make him a competent witness and his evidence admissible.

5. The law, however, is well settled, and there can be no controversy on the point that an accomplice, if he is not an accused under trial in the same case, is a competent witness and may, as any other witness, be examined on oath. If he is not seat up for trial or if he is tried separately or if he is convicted, he may give evidence admissible on oath. Even if a person be indicted with others, as in the present case, the Local Government or the Public Prosecutor, acting on instructions from the Local Government, may, with the consent of the "Court, withdraw the prosecution, obtain an order of discharge, and then tender him as a witness to be examined on oath. The law is thus briefly stated in Archbold's Criminal Pleadings (23rd Ed.), 391: "Where it is proposed to call an accomplice for the Crown, it is the practice (a) not to include him in the indictment or (b) to take his plea of guilt; or before calling him either (c) to offer no evidence and permit his acquittal; or (d) to enter a nolle prosequi." *Winsor v. Queen*<sup>4</sup> and *Queen v. Payne*<sup>5</sup> contain the most recent exposition of these rules. They have also been adopted in this country : *Queen v. Rehary Lall*<sup>6</sup> *Mohesh v. Mohesh*<sup>7</sup> *Queen-Empress v. Mona Puna*<sup>8</sup> and *Queen-Empress v. Tirbeni Sahai*<sup>9</sup>Section 494 of the Code authorizes the Public Prosecutor as representing a Local Government in this country to withdraw a prosecution against any one of a number of accused persons, and thus obtain a verdict of discharge or acquittal so far as such person is concerned. On such a discharge or acquittal he becomes a competent witness against other persons accused of the same offence. The disability to be examined as a witness on oath against the persons, who are

brought before the Court on the same indictment, may thus cease on the withdrawal of the indictment against him.

6. Irrespective, therefore, of the conditional pardon held out by the Local Government, if Mohendro Bind had been properly discharged under Section 494 of the Criminal Procedure Code, and his order of discharge were duly recorded, and if he ceased to be an accused, there could be no question that he would be a competent witness against the appellants before us. The procedure followed to obtain his deposition against the appellants has, however, been highly irregular. His name could have been withheld from the list of the accused sent up by the "A" form for trial, and then he might have been examined on oath though an accomplice and it would then have been unnecessary for the Local Government to irregularly tender him a pardon in a case, which is not a case triable exclusively by the Court of Sessions. Curiously the Local Government tendered a pardon in two cases or two sets of cases of different natures by one and the same order, i.e., one under Section 400 and another under Section 401 of the Indian Penal Code, and no distinction was made between the two classes of offences. The Magistrate again ought not to have taken any part in the tendering of a pardon by the Local Government, because in his capacity of a Magistrate he had no jurisdiction to tender pardon in a case under Section 401 of the Indian Penal Code. There is then the further irregularity that the Magistrate omitted to record an order of discharge when the Public Prosecutor withdrew the charge. It appears from the affidavit of one Nadir Hossein submitted to us on behalf of the Crown that Mohendro Bind was not enlarged after the withdrawal under Section 494 of the case against him, but he was kept in custody notwithstanding the withdrawal of the charge, pending the trial of the other case, in which also he was to be examined as an approver. In *Reg. v. Hanumanta* (1877) I.L.R. 1 Bom. 610(Supra), it has been held that the evidence given by a person to whom a pardon, has not been lawfully granted is not relevant, that person not having been acquitted, discharged, or convicted. In *Empress of India v. Ashgar Ali*<sup>10</sup> the evidence of an accomplice, to whom a pardon had been irregularly tendered, was held to be irrelevant and inadmissible. The learned Judge in the latter case relied on *Reg. v. Hanumanta* (1877) I.L.R. 1 Bom. 610(supra) and *Reg. v. Remsdios* (1867) 3 Bom. H.C. Cr. 59, observing: "After the offer to him (the accomplice) of a pardon, he was, under the provisions of Section 347, detained in custody, pending the termination of the trial, and his position as one under accusation of an offence was in no way changed when he appeared before the Judge, and, could not be altered, until he had been discharged, acquitted or convicted, and with reference to the express provisions of Section 345, being an accused person so long as he was in that position, he could not be put on his oath or examined as a witness in the case in which he was accused." Judging by these authorities the evidence of Mohendro Bind would appear to be wholly inadmissible against the other persons accused in this case. In any view of the case, the tender of pardon was illegal, and the man was neither formally acquitted nor discharged. He continued to be as before in the clutches of law, and to all intents and purposes an accused.

7. There is, however, a view of the case in which the evidence of Mohendro Bind may, in strict

law, be held to be admissible according to some of the authorities. Though not legally tendered a pardon, discharged or acquitted, the proceedings show that he was not tried along with the other persons accused with him. He could thus be tendered as a witness and examined on oath. In *Queen-Empress v. Mono Puna* (1892) I.L.R. 16 Bom 661(Supra), Jardine J. held that the evidence of an accomplice illegally discharged by the Police was admissible. In *Empress v. Durant* (1898) I.L.R. 23 Bom. 213(Supra) Candy J. allowed an accomplice, who was being separately tried, to be called as a witness for one of the persons accused and tried for the same offence. Such a view is in accordance with the rule in England, and it seems to us that Mohendro Bind having ceased to be tried along with the other persons, though not formally discharged, might, if the authorities cited he correct in applying English law in this country, be examined as a witness on oath. If we eliminate from our consideration the irregular proceedings that ended, in the examination of Mohendro Bind as a witness, if we suppose that he continued to be one of the accused, though for the purpose of being examined as a witness against whom the prosecution was withdrawn, with the possibility of its being revived at any time, he might, under the above authorities, be a competent witness. Neither the tender of conditional pardon by the Local Government, even if it was actually tendered, nor the conditional pardon tendered by the Magistrate could be efficacious in the matter. The withdrawal of the prosecution may be the only ground for holding that Mohendro Bind might be examined as a witness on oath against the appellants, but it is doubtful, having regard to the circumstances under which the withdrawal was made leaving the witness still in vinculis, whether his evidence would be admissible.

8. The utmost caution is necessary in admitting or using the evidence of an approver. It not only requires corroboration in material particulars for its use, but its evidentiary value depends considerably upon the circumstances under which his evidence is tendered. In *Winsor v. Queen*(1866) L.R. 1 Q.B. 289(supra) Cockburn C.J. observed: "In. all cases where two persons are joined in the same indictment, and it is desirable to try them separately, in order that the evidence of the one may be received against the other, I think it necessary, for the purpose of insuring the greatest' possible amount of truthfulness in the person coming to give evidence, to take a 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 the 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." Blackburn, Mellor and Lush JJ. were of opinion that the evidence of an accomplice not tried under the same indictment was admissible, but that the evidence though admissible was tainted and subject to strong observations as to its weight. Lord Blackburn said that before an accomplice was called, "the temptation to strain the truth should be as slight as possible." In *Queen v. Payne* (1872) 1 C.C.R. 349 Lord Cockburn stated, in the course of argument of. counsel, that though the evidence of an accomplice under such circumstances was admissible, it was inconvenient to admit such evidence.

9. The practical effect then of our holding that Mohendro Bind was legally competent to be

examined as a witness is the same as if we held the contrary, because we must discard his evidence before the Deputy Commissioner as utterly worthless. The admissibility in law of the evidence carries us no further than that we must reject it on another ground. His miserably bad character, coupled with, his strong desire to get an immunity for himself at the sacrifice of those with whom, according to himself, he associated as a principal in acts of great heinousness, prevents our placing the slightest reliance on him.

10. Thus in any view of the matter we must reject the evidence of Mohendro Bind, and with the rejection of this evidence the conviction must be set aside, the rest of the evidence being merely corroborative. In the view we take, it is unnecessary for us to discuss the value of the corroborative evidence.

11. We regret we have been obliged to come to this conclusion. It has been forced upon us by the irregularities in the proceedings in the tender of conditional pardon and the withdrawal of the prosecution against the person, whose evidence is the mainstay of the prosecution without a record of the necessary order of discharge.

12. Next comes the question whether we should acquit or discharge the appellants before us or commit them to the Court of Sessions for retrial. The prosecution having failed on account of irregularities in tendering Mohendro Bind as a witness, irregularities which may now be avoided, the proper procedure being followed, we direct that the case be committed to the Court of Sessions at Purulia for retrial.

#### Cases Referred.

- 1(1906)10 C.W.N. 847
- 2(1775) Cowp. 331
- 3(1877) I.L.R. 1 Bom. 610
- 4(1866) L.R. 1 Q.B. 289
- 5(1872) L.R. 1 C.C.R. 349
- 6(1867) 7 W.R. Cr. 44
- 7(1882) 10 C.L.R. 552
- 8(1892) I.L.R. 16 Bom. 661
- 9(1898) I.L.R. 20 All. 426
- 10(1879) I.L.R. 2 All. 260