CALCUTTA HIGH COURT

Ah Foong

Vs

Emperor

(Sanderson, C.J. Beachcroft, J.)

17.05.1918

JUDGMENT

Sanderson, C.J.

1. This is an appeal by Ah Foong Chinaman who was charged along with two others withan alleged offence under Sezction 9, Clauses (c) and (d), of the Opium Act of 1878. The appellant was called the third accused in the trial Court.

2. The facts of this case may be shortly, stated as follows: The Excise Officers apparently had got information about a contemplated dealing with some opium, and having engaged two taxi-cabs they proceeded to a place called Ghoosery, and having stopped at a certain place near the darga they waited: and presently another taxi-cab drove up, and the Excise Officers ran out and seized the persons who were in the taxi-cab: one was the first accused who was sitting inside the taxi-cab, the other was the second accused who was the driver of the taxi-cab; they then found inside the taxi-cab three gunny bags-the first accused was sitting in the cab with his feet either on or over the bags. The bags were taken out and opened in the presence of the first and the second accused, as I understand the evidence on the record, and they were found to contain opium; it appears that the total amount of the opium was about 52 seers. I ought, perhaps, to have stated that this was on the 14th of November 1917, and the time the taxi-cab drove up near the darga at Ghoosery was, according to the evidence of the Inspector of Excise, about 10 o'clock at night.

3. The first and the second accused made statements to the Excise Officers.

4. The first accused, according to the evidence of the Inspector of Excise said, "he was at New Market that evening and was called by a Chinaman to a house, he said he could point out. He went with the Chinaman to the house and saw two other coolies there. This Chinaman gave these three bags to the three coolies and asked the first accused and the other two coolies to go to FreeSchool Street with the Chinaman. When they all got there they found the taxi-cab waiting

there. Under instruction of the Chinaman they put the bags into the car, and the first accused was asked to go in this taxi and he did so and came to Ghoosery. The second accused stated that he was at Free School Street at 8 P.M., where the Chinaman came with three coolies and asked him to take the bags to Ghoosery with this cooly, the first accused. Both accused said they would point out the Chinaman. The second accused also stated that the Chinaman said that, on his return from Ghoosery, this cooly would point out the Chinaman's house who would pay the fare, etc." It was stated in the evidence that the cooly was wearing clothes. I think he was wearing a dhuti and a shirt, and learned counsel described him as dressed like a Babu. The first and second accused were arrested, and they were taken by the Excise Officers to a place, No. 5, Alimuddin Street, where the opium was deposited and placed under lock and key for safety. Then the following facts may be taken from the Inspector's evidence:--"Then we all with the accused went to Chandney. The first accused showed us the way. Then he took us to Temple Street and asked to stop the car there. Then he took us to Gumgar Lane" (Gumgar Lane is a lane which runs at right angles with Temple Street and seems to connect with Temple Street on the south and Chandney Chawk Street on the north) "and pointed out a house. We had got out of the car in Temple Street. Petty officer Ram N. Lal went with the two accused and stood near the door of 2, Gumgar Lane"--that is a house on the east side of the Gumgar Lane, not very far from the southern end of the Gumgar Lane--"I with Sub-Inspector B.C. Banerji stood about three or four yards from the door. After a minute or two, the third accused (i.e., the present appellant) opened the door. No one called out. The car was 12 or 15 yards from the door of No. 2, and five or six yards from a room in that house. The third accused opened the sudderdoor of 2, Gumgar Lane, and said in Hindustani 'pahunchaya'--which has been translated by the assistance of the learned Counsel at the Bur and also with the help of my learned brother to mean Have you caused it to arrive', or it may mean, 'have you got there and have you come back'--"The first and second accused were in front of the door and he addressed them. Thereupon Ham N. Lal arrested him. I went up and saw the third accused drop some papers which he had in his hand. I picked them up. They were one note of Rs. 100 and ten notes of Rs. 10--Rs. 200 in notes altogether We took all the accused inside No. 2 and searched it but found nothing". I do not think I need read the cross-examination except this; "We passed ahead of Gumgar Lane and stopped a few paces to the cast of it. The Chinaman's house is to the left in Gumgar Lane entering from Temple Street"--that I think must be a mistake, and must be to the right side as you enter from Temple Street.--"The first two accused came up with Ram Narain and almost immediately the third accused, the Chinaman, appeared. He was arrested as soon as he said 'pahunchaya'. The two accused never knocked at the door before the third accused came. The third accused denied the whole thing. Mahomed Ebrahim gave his address as 7, Chandney Chawk. He attended Court with subpoena on the 16th November. There are no windows on the Temple Street side of the Chinaman's house".

6. Now, those are the facts. The evidence of the Inspector is corroborated by the Sub-Inspector and also by Ram Narain Lal.

7. Then came a witness whose evidence has been the subject of comment by the learned Counsel for the appellant and by the learned Advocate-General. It is not long, and I propose to read it:--"My name is Mahomed Ebrahim. I am by occupation hide-broker. My maternal uncle lives at 1, Gumgar Lane. I know third accused. He lives at No. 2, opposite my uncle's house. X have known third accused for five or six months. I remember the day the Inspector arrested third accused about two months ago. But the Inspector and Sub-Inspector were not dressed as they are now. I saw the motor later. About 7-30 or 8 P.M., as I stepped out of my house on the same night of the arrest, I saw the third accused with three coolies, one of them, the first accused, coining out of the third accused's house. All three coolies had baskets in their heads: each basket containing a bag of this colour and tied like this. (Exs. I to III). They went towards Temple Street Hospital. I told this Inspector about that at about 12 P.M. At that time I saw two motor cars. This was after I had returned from the dewali mela, and was purchasing cigarettes from a panwalla. I then saw two motor cars and the accused in custody, and I enquired what was the matter. I was told opium had been seized at Ghoosery. I asked, was it in gunny bags. The Inspector asked how I knew that; then I made the statement above mentioned to him." The cross-examination is as follows:--"I get commission for sales from employer Kiramat. I do not keep accounts. I live with my uncle. The motor was to the east of the lane." The cross-examination commenced on the 7th of February and was continued on the 8th:--"All coolies do not have baskets. I had no talk ever with these accused. The mela lasted three days. I was going off and on all three days." There were four sentences taken down on the first day of the cross-examination and four sentences on the second day of the cross examination--that is the whole of the record of the cross-examination.

8. I think 1 have stated all the facts upon which the prosecution relies. I should also refer to the fact that, when the Excise Officers went to Gumgar Lane on this night, one of the important points was that the third accused came out without any summons as if he were expecting the return of the first and the, second accused, and that he had in his hand notes which amounted to Rs. 200, and, addressing the first and the second accused, he immediately said "pahun chya" The third accused was arrested and he was subsequently charged with the offence to which I have referred. The three accused were tried jointly for the alleged offence before the learned Magistrate. The first accused was convicted, the second was acquitted, the third accused was. convicted and he alone has appealed to this Court. The first accused was sentenced to. six months' rigorous imprisonment, and the appellant was sentenced to one year's rigorous imprisonment.

9. Now, there have been several points raised in this case on behalf of the appellant, with which I

must deal--some of which in my judgment are not good ones, and some of which are good.

10. The learned Magistrate has relied to a large extent upon the statements made by the first and the second accused as being matters which he was entitled to take into consideration as against the third accused, the appellant in this case. He has also relied upon the evidence of the fourth prosecution witness, M. Ebrahim.

11. The first important ground, upon which the learned Counsel for the appellant has relied, is that the learned Magistrate was wrong in taking into consideration the statements of the first two accused against the appellant. I propose to deal with that question first.

12. One of the points Mr. Das, the learned Counsel for the appellant, urged was that, assuming that these two statements of the first and the second accused were confessions, they were not admissible in evidence, inasmuch as they were made to people who were in reality Police officers, although not called Police officers: and, that consequently, under the provisions of Section 25 of the Evidence Act, these statements ought not to have been admitted. In my judgment that is not a good point. I do not think it is possible that the Excise Officers in this case could be said to be Police Officers, and that the statements made by the first and the second accused were not admissible by reason of the fact that they were made to Police officers.

13. Another point raised by the learned Counsel was that, inasmuch as the first and second accused had at the trial made statements which were quite inconsistent with those which they were alleged to have made to the Excise Officer, the statements in question should not be admitted under Section 30 of the Evidence Act. The language of Section 30 which is material to this point is--"the Court may take into consideration such confession as against such other person as well as against the person who makes such confession." As I understand, the learned Counsel's point was that, in order that the confession should be admissible, it must be a confession in which the maker of it persists up to and at the time of the trial and that, if he had made a confession before the case came up for trial and withdrew it and did not continue to make the confession at the time of the trial, then it would not be admissible. I do not think that point is a good one. I think the meaning of the Section is clear. The wording is that "When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession." I think the use of the word, "makes" in the present tense there does not mean, any thing more than this--that it may be taken into consideration as against such other person as well as against the maker of such confession. I think that is the common sense view of the construction of the Section, and the ground upon which the learned Counsel relied was not a

good one.

14. Now, I come to a more substantial ground. The learned Counsel argued that these statements made by the first and the second accused were not confessions at all. For the purpose of seeing whether they are confessions or not, it is essential, first of all, to consider the nature of the offence with which the accused had been charged or were likely to be charged. The second matter is that the whole of the statement must be read for the purpose of seeing whether in the opinion of the Court they are confessions or not whatever I say in this case is confined to the particular statements which were made in this case, and having regard to the facts of this case: and it is not necessary for me to say more than this that, having read these statements more than once and considered the points put forward by the learned Advocate General and the learned Counsel for the appellant, my learned brother and I are agreed that these statements are not confessions. Speaking for myself, I think they are consistent with an attempt on the part of the makers of the statements to exculpate themselves from the charge which had been or which was likely to be made against them: and, consequently I think that they ought not to have been taken into consideration against the appellant.

15. Then with regard to the other matter upon which the learned Magistrate relied, namely, the evidence of M. Ebrahim, my learned brother and I have come to the conclusion that it would not be safe for us to rely upon the evidence of this man. Judging as far as we are able from the record which is before us, it is clear that the learned Magistrate understood his evidence to be to this effect that at 7-30 or 8 in the evening, on the date of the occurrence, this witness was going out of a house which is opposite to No. 2, Gumgar Lane, and as he came out he saw the appellant with, three coolies carrying bags in baskets on their heads and that be was in a good position to see exactly what was taking place. In order to make my meaning clear, I will read a few sentences from the learned Magistrate's judgment:--"Mahomed Ebrahim, a hide broker, states that he lived at 1, Gumgar Lane" (which is opposite to No. 2, Gumgar Lane) "and knew the third accused for five or six months, and that on the day of his arrest about 7-30 or 8 P.M., he saw the third accused come out of his house with the first accused and two coolies; each of the three latter was carrying a basket bin which was a sack like those containing the opium. Then be described how the party went towards Temple Street. Then he said:--"M. Ebrahim in his evidence stated he lived at 1, Gumgar Lane. The defence have called a woman named Calden who says she lives there and he does not. Fakiruddin, the landlord, supports her. He, however, stated to me that it was a large house, so that it was quite possible that other people live there without his being aware of it."

16. Now, the first point to which I wish to draw attention is this: The Magistrate says that M. Ebrahim stated that he lived at No. 1. Gumgar Lane. I do not find in his evidence anything to

justify that conclusion. What he did say was "my maternal uncle lives at 1, Gumgar Lane," and the evidence of the first prosecution witness, the Inspector, was that M. Bbrahim gave his address as 7, Chandney Chawk, which is a street to the north of Gumgar Lane. It may be that the witness intended that the Magistrate should believe that he lived at 1, Gumgar Lane, and it is obvious to my mind that the Magistrate was under the impression that this is what he had stated--I quite appreciate what the learned Advocate-General said about the maternal uncle and the paternal uncle: but even then I do not think that that justifies the conclusion that the learned Magistrate has come to, namely, that this witness lived at I, Gumgar Lane. I think that is a serious matter when we are considering the evidence of the witness. The record shows that he did not live at 1, Gumgar Line, but that he lived at 7, Chandney Chawk. If it be true that he was in fact coming out of the house where he lived, viz. 7, Chandney Chawk, and that he was endeavouring to lead the Court to believe that he then could see what the third accused was doing opposite to 2, Gumgar Lane, then I think that we should come to the conclusion that the witness should not be relied on.

17. In those circumstances, having regard to the fact that we are of opinion that the statements made, by the 1st and 2nd accused to the Excise officers ought not to have been taken into consideration against, the appellant, and having regard to the fact that we think that the evidence of the fourth prosecution witness, M. Ebrahim, ought not to be relied on. and having regard to the state of the evidence on the record, the question arises--ought this conviction to stand?

18. There are certain material facts still left. They are the facts--assuming them to be proved by the prosecution--that the first and the second accused were found in possession of opium, that they went with the Excise officers to No. 2, Gumgar Lane, that the third accused came out without any knocking or summons, that he had Rs. 200 in his hand, and that, addressing the first and second accused, he immediately said "pahunchaya". Although these facts may give rise to grave suspicion in our minds as to whether the third accused was innocent of the offence charged against him there is a doubt arising in our mind for this reason that it may be that the third accused was never in possession of the opium, and it may be that he never took any part in the transport, and it may be that he was only a person who was to pay the remuneration which had been agreed upon in respect of the transport of the opium. If that view is a possible view, and if that view is consistent with the evidence which remains in this case, after we have eliminated the statements of the first and second accused and the evidence given by the fourth prosecution witness, then I think it is right for the Court to say that the appellant ought to get the benefit of the doubt, and this conviction ought to be quashed.

19. I desire to make one or two observations about the method of procedure followed in this case.

20. It seems obvious to us that there have been irregularities in the procedure in this case. Section

342 of the Criminal Procedure Code provides as follows:--"For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any enquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." It does not appear that the procedure which is there laid down was carried out in this case. I quite agree with what the learned Advocate-General said that, inasmuch as the first and second accused put in written statements, with regard to these accused there would not he so much in that point. So also with regard to the third accused, it may be that in this case he may not have been prejudiced by this procedure not having been carried out. But to my mind that is no excuse for not carrying out the plain provisions of the Code of Criminal Procedure.

21. Another matter to which I wish to refer is that my learned brother and I think that the record of the evidence in this case is not satisfactory, and the Court has been placed in a position of difficulty by reason of that fact. Section 362 of the Code of Criminal Procedure which is applicable to this case provides that "In every case in which a Presidency Magistrate imposes a line exceeding two hundred rupees, or imprisonment for a term exceeding six months, he shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from has dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record." With regard to the evidence of M. Ebrahim, the learned Counsel for the appellant stated (hat the record of the cross-examination was unsatisfactory and incomplete. He alleged that the third accused was defended by a learned pleader of position, and that he had a note of the cross-examination by that learned pleader: and, we adopted the somewhat unusual course of looking at the note of the learned pleader's cross-examination which was taken, as I understand, by his junior. For the purpose of seeing whether it was substantially accurate, we compared the note of the evidence in chief with that on the record, and we found that there was substantially no difference between the evidence in chief as recorded by the Magistrate and the evidence in chief as taken down by the learned pleader. But when we came to look at the cross-examination we found there was a serious difference. I have already pointed out that the only note the Magistrate had of the cross-examination was in our opinion unsatisfactory it consisted of eight sentences of the cross examination which took place on two days, and the learned pleader's note of it occupied two pages. Several material facts were referred to in the learned pleader's note of the cross-examination, of which there is no sign in the learned Magistrate's note.

22. Now, I wish to draw attention to the fact that it is the duty of the Magistrate, in a case which comes within Section 362, to take a note of all the material facts, whether they appear in the

course of the examination in chief or in the course of cross-examination: and, in this case it was especially necessary because this was the only independent witness, the other witnesses being Excise officers--(I say nothing whatever against them, but they were the people who were engaged in. the arrest of this man)--and it was also especially necessary in such a case as this where there was an appeal upon facts; and it is impossible for the Court to deal with these cases unless the learned Magistrate, in the first instance, takes a full and proper note of all the material facts. I wish to say that we have not formed an opinion about the inadequacy of this note solely from the fact that we looked at the learned pleader's note and compared it with the record of the evidence by the Magistrate. We looked at the pleader's note because Beachcroft, J.

23. It is not necessary for me to say much, as I agree substantially with the remarks made by the learned Chief Justice.

24. With reference to witness No. 4, I need only say that it seems to me to be clear that he desired to give the Court the impression that he lived at 1, Gumgar Lane. He gave the Magistrate that impression: and it is also clear to my mind that he gave the defence that impression, who took steps to call a witness to prove that he did not live at that house, whose evidence would not have been relevant for any other purpose.

25. Then, one remark I should like to make with reference to the procedure adopted in connection with accused No. 2 who was acquitted. The Magistrate charged him on the 15th of February. Between that date and the completion of the trial I can see nothing in the evidence which would tend in any way to minimise the effect of the evidence as against that accused. The only thing on the record, namely, the accused's own written statement, would rather go against him, as that is in some respects obviously false. That being so, and the Magistrate considering the evidence not sufficient at the end of the trial to convict this person, he ought not, in my opinion, to have charged him with this offence. If the evidence was not sufficient at the end of the trial, it was equally insufficient on the 15th of February. The course which the Magistrate ought to have taken was to discharge the accused and to examine him as a witness in the case.