

# **BOMBAY HIGH COURT**

Keshav Vasudeo Kortikar

Vs

Emperor

(John Beaumont, Kt., C.J. N Wadia, J.)

19.12.1934

## **JUDGMENT**

### **John Beaumont, Kt., C.J.**

1. This is an application in revision by the applicant who was convicted by the Special Magistrate, First Class, at Pandharpur, of offences under various sections of the Indian Penal Code, the substance of the charges against him being that as Deputy Nazir of the Sessions Court of Sholapur he misappropriated monies forming part of the estates of minors. He appealed against his conviction and his appeal was dismissed by the Sessions Judge at Bijapur.

2. The original complaint made to the police by the successor of the applicant as Deputy Nazir of the Sessions Court had alleged that ten persons had committed these offences, viz., the present applicant the then Deputy Nazir and various subordinate officials and others, including a man named Laukar who was the estate peon of the Pandharpur Circle. On that complaint to the police, a special officer of the Criminal Investigation Department made an investigation into the subject-matter of the complaint, and it is, I think, quite clear from his evidence and from the form of the charge-sheet that he discovered evidence against Laukar amongst others. That being so, it was the duty of the police under Sections 170 and 173 of the Criminal Procedure Code to send all the persons against whom they thought there was sufficient evidence before a Magistrate to be dealt with under the Code. In fact the police did not do that, because apparently they came to the conclusion that it would be convenient if this man Laukar was not sent up before a Magistrate but was used as a witness. What they did, therefore, was to send up a charge-sheet, the printed form C.I.D./4, and in the second column of that form under the heading " Names and addresses of accused persons not sent up for trial, whether arrested or not arrested, including absconders " they gave the name of this man Laukar, and of another man named Limaye who was substantially in the same position, though his evidence is of less consequence. Then in column 3, which gives the names and addresses of accused persons sent up for trial, they included five persons ; so that the net result was that there were five accused persons shown as sent up for trial, and two persons shown as accused persons not sent up for trial, and in the appendix, giving the

names of witnesses, the names of Laulkar and Limaye (the two persons whose names were included in the second column of the charge-sheet) were included, so that the police must have known what share these two persons had taken in the offence. As I have said, in my opinion, the proper course for the police to have adopted was to send up as accused persons to the Magistrate all those against whom they had obtained evidence in connection with the alleged offence, and I think that the learned Magistrate, when he found that the two persons described as accused persons not sent up for trial were amongst the witnesses, and must, therefore, be available, ought to have had those two persons arrested and brought before him. The Criminal Procedure Code gives certain powers under which the evidence of an accomplice can be made available. He can be granted a conditional pardon by the Magistrate under Section 337 of the Criminal Procedure Code, or the Public Prosecutor, with the consent of the Magistrate, can withdraw the charge under Section 494 of the Criminal Procedure Code. In my opinion those powers ought to be exercised where the prosecution consider that the evidence of an accomplice is necessary, and the police have no right to take upon themselves not to charge a person against whom they have evidence because they require him as a witness. Where that improper course is adopted, the evidence of the accomplice so obtained is entitled to very little weight. He has been granted no pardon and though, if compelled to answer incriminating questions by the Court, he cannot be prosecuted for those answers and can claim the protection of Section 132 of the Indian Evidence Act, still he may be prosecuted on the strength of any other evidence which may be available, and he is, therefore, at the mercy of the police.

3. But the preliminary question with which we have to deal in this revision application is whether the evidence of Laulkar and Limaye was admissible, apart from its weight. It has been argued by Mr. Garden Noad that Laulkar and Limaye were accused persons because they were shown in the charge-sheet as accused persons not sent up for trial, and that accused persons cannot give evidence. Section 342 of the Criminal Procedure Code provides that no oath shall be administered to the accused ; but it is clear from the earlier part of that section that the accused there referred to means an accused person under trial who has to be questioned by the Court in respect of the evidence against him. In my opinion, however irregular was the conduct of the police in this case, in point of fact these two persons, Laulkar and Limaye, included in the second column of the charge-sheet, never were, properly speaking, accused persons. They certainly were not accused persons within the meaning of Section 342 of the Criminal Procedure Code. They were never under arrest and they were never sent up before a Magistrate and no process was ever issued against them. That being so, I think there is no provision of law which makes their evidence inadmissible. That opinion is in accordance with the decision of this Court in *Queen-Empress v. Mona Puna*<sup>1</sup>, where the Court held that an accused person means a person over whom the Magistrate or other Court is exercising jurisdiction, a view which was approved by the High Court of Calcutta in *Banu Singh v. Emperor*<sup>2</sup>. In this case, therefore, the evidence of Laulkar and of Limaye is admissible.

**N.J. Wadia, J.**

4. I agree.

5. The objection to Laukar's evidence is that although he was an accused along with the present appellant he was examined as a witness on oath. He is mentioned in the charge-sheet in column 2 as an accused person not sent up for trial. In fact in the list of witnesses which was attached to the charge-sheet as appendix A he was mentioned as a witness. The section which prevents an accused being examined on oath is Section 342 of the Criminal Procedure Code. That section, however, applies clearly only to a person who is on trial before a Court at the time, and he can be so brought before the Court only after process has been issued by the Magistrate against him under Section 204 of the Criminal Procedure Code. In the present case admittedly no such process had been issued against Laukar and he was, therefore, never before the Court as an accused. The mere inclusion of his name in the charge-sheet could not make him an accused for the purposes of Section 342 of the Criminal Procedure Code, None of the cases which have been cited before us deal with the case of a person who was not actually before the Court on trial though his name may have been mentioned in the charge-sheet. I, therefore, agree that there was no legal objection to Laukar being examined on oath as a witness.

6. [The judgment then dealt with the merits of the application.]

Cases Referred.

1(1892) I.L.R. 16 Bom. 661

2(1906) I.L.R. 33 Cal. 1353