

BOMBAY HIGH COURT

Emperor

Vs

Biram Sardar

(John Beaumont, Kt., C.J. Sen, J.)

27.11.1940

JUDGMENT

John Beaumont, C.J.

1. In this case the accused, other than accused No. 6, who were convicted by the Additional Sessions Judge of East Khandesh under Section 395 of the Indian Penal Code, appeal against their convictions. We are indebted to Mr. R.R. Desai, who has represented the accused as amicus curix for the industry he has devoted to the case and the ability with which he has presented it.

2. The case has some peculiar features. All the accused, except accused No. 18, are from the village of Savkheda in taluka Yaval, and it appears that on March 5, 1940, the Sub-Inspector of Police of Yaval received information that a dacoity was contemplated that night at the village of Shirkoli, taluka Jalgaon. So he went to Jalgaon and reported to the Sub-Inspector of Police there and put in a written report, which is exhibit 8, in which he mentioned the names of the nineteen men who, he was informed, were going to commit the dacoity. The Sub-Inspector of Police of Jalgaon and the City Sub-Inspector of Police of Jalgaon accordingly went to Shirkoli with a party of police, some of them armed and some unarmed. Unfortunately they did not arrive at Shirkoli until about 11 o'clock at night, when the dacoity was in progress, and instead of blocking the exits from the village, the police seem to have entered the village at one end, and, when the dacoits started to throw stones at them, the police fired, whereupon all the dacoits ran away from the other end of the village. The result was that full advantage of this information, which at any rate was good as to the fact that a dacoity was contemplated, was not taken and no arrests were made. But the police suspecting that the dacoits would go back to Savkheda, and realizing that for that purpose they would have to cross the river Tapti at one or other of the fordable places at Kolnhavi or Thorgaon, posted police at those places. But the police did not arrive at Kolnhavi until about 6 o'clock in the morning by which time there had been ample opportunity for any of the dacoits to get across the river. Accused No. 1 and; accused No. 2 were arrested at Jalgaon. Accused Nos. 8 and 10, among the present appellants, were arrested at Savkheda, and the other

appellants were arrested at Thorgaon trying to cross the river. All the arrests were made on the 6th, that is to say, in the early morning after the dacoity. None of the stolen property was recovered, and the evidence against the various accused consists primarily of evidence of identification, and experience shows that evidence of identification of those taking part in dacoities at night is apt to be unreliable.

3. I think that we shall have to be very critical in dealing with the evidence because of this report which the police had obtained and which mentioned the names of various persons. The learned Government Pleader has made a great effort to induce us to treat exhibit 8, report made by the Sub-Inspector of Police of Yaval to his superior in Jalgaon, mentioning the names of suspects, as a sort of first information, and as affording evidence that the persons named in that report were under suspicion in connection with this dacoity; but it is quite clear that the report cannot be used for any such purpose. The Sub-Inspector of Police has not in his report disclosed the source of his information, and the mere fact that he says that somebody told him that certain persons were going to commit a dacoity is no evidence at all against those persons. If the Sub-Inspector of Police wanted to prove as against the accused the information which he had received, he would be bound to give evidence as to the source of his information, and to call his informant, and that, no doubt for sufficient reasons, he was not prepared to do. All that the report amounts to, therefore, is that the Sub-Inspector of Police did receive information which caused him to think that there might be a dacoity at Shirsoli and which induced him to go to Shirsoli with a police party. But his information affords no ground of suspicion whatever against any of the accused, and we have to see whether the evidence against the various accused is sufficient to justify their conviction. The learned Sessions Judge and the assessors were for the most part unanimous in believing the different witnesses, and this Court always differs with reluctance from the unanimous opinion of the trial Judge and the assessors as to the credibility of witnesses. In this case I am prepared to assume that the witnesses who were regarded as honest by the learned Sessions Judge and the assessors were in fact honest; but as to some of them I think they were not in a position to be certain of the facts to which they deposed. I think that the risk of mistake on their part is in some cases too great to be run.

[His Lordship then discussed the evidence against the accused and found that the evidence against accused Nos. 1-5, 15 and 18 was not sufficiently reliable.]

4. Mr. Desai has also raised a point of law which is occasioning a good deal of trouble to the High Courts in India, and that is the question whether information leading to the discovery of a fact and prima facie admissible under Section 27 of the Indian Evidence Act is inadmissible having regard to the terms of Section 162 of the Criminal Procedure Code. That trouble started with the decision of the Privy Council in *Narayma Swami v. Emperor* . In that case their

Lordships pointed out that Section 162 of the Code of Criminal Procedure, which prohibits any statement made by any person to a police-officer in the course of an investigation under Chapter XIV from being used as evidence for any purpose, except as mentioned in the section, is wide enough to include a statement made to the police by a person who, either at the time of the statement, was, or afterwards became, an accused; and as far as I know, that view had always been acted upon by this Court. Their Lordships further pointed out that on that reading of Section 162 there would to some extent be a conflict between that section and Section 27 of the Indian Evidence Act, and they observed that the question might arise whether Section 162 pro tanto repeals the provisions of Section 27 of the Indian Evidence Act, or whether Section 27 of the Indian Evidence Act is saved by Section 1, Sub-section (2), of the Criminal Procedure Code, and their Lordships left that question open. Since that decision the matter has been considered by four of the High Courts in India. The High Court of Madras (*Subbiah Tevar, In re* [1939] Mad. 947) and the High Court of Patna (*King-Emperor v. Mayadhar Pothal*¹) have taken the view that Section 27 of the Indian Evidence Act is not affected by Section 162 of the Criminal Procedure Code, being saved by Section 1(2). On the other hand, a full bench of the Lahore High Court in *Hakatan v. The Crown*² by a majority have held that Section 27 of the Indian Evidence Act is pro tanto repealed by Section 162 of the Criminal Procedure Code, and the same view has also been taken by a full bench of the Allahabad High Court" in *Emperor v. Baldeo*³ Having read the various judgments of the other High Courts, some of which extend to a considerable length. I am reluctant to add to the number of judgments on the point; but the lower Courts in this province are entitled to guidance. I prefer the view taken by the High Courts of Madras and Patna to the view taken by the High Courts of Lahore and Allahabad. Section 1(2) of the Criminal Procedure Code reads: In the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force.

5. Most, if not all, of the learned Judges agree that Section 27 of the Indian Evidence Act is a special law in force at the date of the passing of the amended Section 162, and that point seems to me beyond question. It is a law applicable to a particular subject within Section 41 of the Indian Penal Code. But the view accepted in Lahore and Allahabad is that Section 162 amounts to a "specific provision to the contrary", because the prohibition therein is expressed in the most clear and emphatic terms. But surely much more than that is required. Section 1(2) enacts a rule of construction to be applied in the interpretation of the Code. That rule is that where there is a conflict between the Code and a special law, the special law is to prevail in the absence of a specific provision to the contrary. But the provision must be to the contrary of the rule of construction, and not merely of the special law. The section presupposes a conflict, and a conflict is none the less a conflict because it is clear for all to see. Reliance has been placed on the use of the word "specific" rather than "express." I am myself inclined to think that "specific provision"

is a stronger expression than "express provision," and means a provision clearly expressed. I do not see how a provision arising by implication only can be said to be specific. But if this is going too far, I am clearly of opinion that 'the language of the Code giving rise to the implication must at any rate be so directly contradictory to the special law that it can be affirmed with certainty that the legislature intended to override the special law. There is, however, nothing in the language of Section 162 which suggests that the legislature had in mind Section 27 of the Indian Evidence Act. The language of the two sections is quite distinct, and to a large extent the respective subject-matters are not identical. Section 162 deals with all statements made to a police-officer in the course of an investigation; Section 27 of the Indian Evidence Act merely deals with information received from a person accused of an offence in the custody of a police-officer which leads to a discovery. The two sections only overlap in respect of statements made to a police-officer in the course of an inquiry which lead to a discovery. It seems to me impossible to hold that Section 162 contains a specific provision that Section 27 of the Indian Evidence Act is not to prevail over it.

6. Another argument which appealed to the High Courts of Lahore and Allahabad is based on the history of the two sections. It is said that the legislature must have known when they amended Section 162 in 1923 that originally the subject-matter of Section 27 of the Indian Evidence Act had been included in the Code; that prior to 1893, when the terms of Section 162 were in conflict with Section 27 of the Indian Evidence Act, the latter section was expressly saved from the operation of the former section, and that the Court is bound to assume that the omission to insert in 1923 an express provision saving the operation of Section 27 was deliberate, more particularly as in the section as it existed from 1898 there was an express saving of Section 32 of the Indian Evidence Act. I do not suppose that any one seriously doubts that the omission of the legislature in 1923 to deal with Section 27 in one sense or another was due to the fact that it was not present to the minds of the legislators that the amendment of Section 162: would appreciably affect Section 27; but if the Court must deal with the matter pedantically, one may suggest that the omission to save Section 27 may have been due to a just appreciation by the legislature of the true effect of Section 1(2), and to a reluctance to insert an unnecessary saving clause in respect of Section 27, merely because the legislature of 1898 had inserted such a clause in the case of Section 32. This explanation, if not conspicuous for its probability, seems to me much more probable than the hypothesis that the legislature, realising the conflict between the amended Section 162 and Section 27, and intending to repeal the latter section pro tanto, and thereby to alter the law as it had existed for fifty years, nevertheless omitted any mention of Section 27. In my opinion to read Section 162 of the Criminal Procedure Code as overriding Section 27 of the Indian Evidence Act is to ignore the terms of Section 1(2) of the Code.

7. The point is really not of very much substance in the present case as against the accused whose

appeals have been dismissed. But, as I have said, the lower Courts are entitled to have a lead from this Court on a question which arises so frequently, particularly in dacoity cases, as to the admission of evidence under Section 27 of the Indian Evidence Act. I think that those Courts may safely proceed on the assumption that at present the law has not been altered by anything which the Privy Council said.

8. In the result, the appeals of accused Nos. 1, 2, 3, 4, 5, 15 and 18 will be allowed and the appeals of accused Nos. 8, 10, 12, 13, 14 and 16 will be dismissed.

Cases Referred.

1(1939) I.L.R. 18 Pat. 450

2[1940] Lah. 242, F.B

3[1940] All. 396, F.B