ORISSA HIGH COURT

State of Orissa

Vs

Minaketan Patnaik

Supreme Court Appeal No. 11 of 1952

(Jagannadha Das, C.J., Panigrahi and Narasimham, JJ.)

12.12.1952

JUDGMENT

Jagannadha Das, C.J.

1. This is an application for leave to appeal to the Supreme Court against, the judgment of this Court in Government Appeal No. 3 of 1951.*One Sri Minaketan Patnaik, Civil Supplies Officer, Bolangir, was prosecuted for having committed an offence under Section 161, Penal Code, by accepting a sum of Rs. 200/- as illegal gratification from one Purushottam who was examined as P. W. 1. The trial court disbelieved the oral evidence given in support of the prosecution case and acquitted the accused. As against that acquittal, the State Govt. filed an appeal to this Court. It was heard by my learned brothers, Panigrahi and Narasimham, JJ. Ultimately, the appeal was dismissed by this Court. It is against that dismissal that this application for leave to appeal is made by the State.

* Reported as 1952 Cri LJ 1393.

2. The case for the prosecution very shortly stated was as follows : P. W. 1 is the purchasing agent of the firm of Shivashankar Tricumjee. The accused on two occasions, once on 25.1.1950, and again on 12.2.1950, demanded a bribe from P. W. 1 in order that he may use his official position to facilitate certain exports of Kudo from Kantabanji railway station, for the benefit of P. W. 1 and his principal. It is further the case of the prosecution that a few days after 12.2.1950. the principal of P. W. 1, viz., P. W. 4, was informed about it and thereafter, on information given by him to the Police, a trap was laid for the detection of the same. In pursuance of this trap, P. W. 1, accompanied by another person P. W. 3, went to the residence of the accused on 5.3.1950, with marked currency notes of Rs. 200/- which were handed over by P. W. 1 to the accused. Within half an hour and in accordance with the prearranged plan, the District Magistrate with the C. I. D. Inspector, and another neighbour of the accused, proceeded to the house of the accused and seized the marked notes from the accused. It will be seen from the above narration that the case against the accused depends on proof of the two previous alleged demands as well as of the actual offer and acceptance of the bribe in pursuance of those demands. The evidence of the earlier demands is that of P. W. 1, corroborated by that of P. W. 4, who speaks to P. W. 1 having

conveyed informations to him as to the demands. The evidence of the actual offer and acceptance is that of P. W. 1 and P. W. 3. The evidence of the fact that the offer itself was the outcome of a planned trap is that of the C. I. D. Inspector examined as P. W. 8. On an appreciation of the evidence of these witnesses, the trying Magistrate was not prepared to accept the same and acquitted the accused. A perusal of the judgments of my learned brothers, shows that Panigrahi, J., agreed with the trial court and rejected the evidence as unreliable, while Narasimham, J., was inclined to hold that the prosecution case has been sufficiently made out on the evidence of these witnesses. But though thus inclined he did not wish to express dissent from the order of dismissal of the appeal which was passed by the other Judge, Panigrahi, J., and accordingly agreed thereto.

3. The main ground that has been urged before us for the purpose of grant of leave to appeal to the Supreme Court is that inasmuch as the two learned Judges came to different conclusions as to the innocence or guilt of the accused, the dismissal of the appeal was erroneous and contrary to the specific and mandatory procedure prescribed for such contingency by Section 429 of the Criminal Procedure Code. The said section runs as follows :

> "When the Judges composing the Court of appeal are equally divided in opinion, the case with their opinions thereon shall be laid before another Judge of the same Court and such judge after such hearing if any as he thinks fit, shall deliver his opinion and the judgment or order shall follow such opinion."

It is accordingly contended that the only proper course was for the case to have been laid before a third Judge for his final opinion which would be the governing (opinion?) for the disposal of the appeal. This contention, however is untenable on the facts of this case. It is true that when two Judges are divided in their opinion, the matter has to go to a third Judge and has to be disposed of according to his opinion. But, the "opinion" contemplated by Section 429 is nothing more or nothing less than the decision as to the operative order to be passed in the case. It is not merely what may be called the inclination of the Judge as to the view to be taken on the questions arising in the case. Under Section 424, Criminal Procedure Code, the provisions relating to the judgment of the Criminal Court of Original Jurisdiction, apply to the judgments of the Appellate Court (other than the High Court). Section 367 shows what are all the requirements of a judgment. It is clear therefrom that the actual direction regarding the result of the case as provided in sub-sections (2), (3), and (4) forms the essential part of the judgment. It is only where there is any difference as to those requisites, that is, those relating to the disposal of the case, that it can be said that the judges are divided in opinion. In the present case, my learned brother Panigrahi, J., concluded with the following words :

> "I have no hesitation in agreeing with the view taken by the learned Additional District Magistrate that the accused has been the victim of a carefully laid plot, designed by P. W. 4, and that the prosecution has failed to bring the guilt home to the accused beyond reasonable doubt. This appeal must accordingly be dismissed."

The other learned Judge, Narasimham, J., at the outset of his judgment stated as follows :

> "I have carefully gone through the judgment of my learned brother Panigrahi, J. Though I

do not wish to dissent from the order proposed by him, I find myself (with great respect) unable to agree with his views both on questions of law and as regards the appreciation of the evidence."

And finally at the end of his judgment, he stated as follows :

"If this were an appeal against conviction, I would, relying on the evidence of Bhoramall and the fantastic nature of the explanation given by the Civil Supplies Officer to account for his possession of the incriminating currency notes, have had no hesitation in holding that the Civil Supplies Officer accepted the sum of Rs. 200/- offered by Purushottam (P. W. 1)."

The learned Judge proceeded to say :

"As it is admitted that the said sum was not part of the legal remuneration of the Civil Supplies Officer, as soon as the prosecution has proved that the Civil Supplies Officer accepted the sum, the presumption under Section 4 of the Prevention of Corruption Act (II of 1947) would apply and in the absence of any evidence on the side of the accused it must be held that the sum was accepted as bribe."

Further on, however, he stated as follows : "But this is an appeal against an acquittal and different considerations, therefore, arise. Moreover, my learned brother has also taken a different view. As pointed out in the recent decision of the Supreme Court in - '*Surajapal Singh v. The State*[1]*',* in hearing an appeal against an order of acquittal under Section 417, Criminal Procedure Code the High Court should bear in mind :

"that the presumption of innocence of the accused is further reinforced by his acquittal by the trial Court, and the findings of the trial Court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons". Though I am inclined to take a view different from that taken either by the trial Court or by my learned brother, I cannot say that there are very "substantial or compelling reasons" for reversing the finding of the trial court especially when the presumption of innocence of the accused is doubly reinforced partly by the order of acquittal passed by the trial Court and partly by the view taken by my learned brother on the facts of this case. "The alternative view on facts taken by the learned lower Court and by my learned brother may also be justified from the evidence on record.' I do not, therefore, wish to express dissent from the order proposed by my learned brother dismissing the appeal (See - 'Govt. Appeal No. 11 of 1950 (B) whore Hon'ble Mr. Justice B. Jagannadha Das (as he then was) adopted a similar course under similar circumstances)."

It is quite clear therefore that the operative opinion of the learned Judge in spite of his being inclined to take a contrary view of the facts and law, on the merits of the case, was that the

accused should get the benefit of doubt and it is on this ground that he concurred in dismissing the appeal. To my mind, therefore, it is quite clear that the case does not fall within the contingency contemplated by Section 429, Criminal Procedure Code. It is neither illegal, nor uncommon for a Judge to have a definite view on the facts and law of a particular case, but not to be prepared to insist in giving effect to his own view so as to dissent from the view taken, by the other Judge or Judges. For instance, in the case in - '*Jagannath Agarwalla v. Emperor*[2]*',* one of the two Judges differed from the view taken by the other Judge. Notwithstanding it he agreed with the order proposed by him with the following words :

> "Though with regret I differ from the view taken by my learned brother, I do not refuse to sign the order which he proposes to make" and the learned Judge proceeded to give the reasons for the course he finally decided to adopt. A similar instance of difference of views, but final agreement as regards the operative order in the case is to be found in - '*Sidebotham v. Holland', (1895) 1 QB 378* (D)(SUPRA). The report shows that a question arose therein as to whether in the case of an yearly tenancy commencing on 19-5-1890. a notice given on 17-11-1893, to quit and to deliver up possession of the premises on 19th May following, can be said to be a six months' notice ending with the year of the tenancy and therefore valid. Two of the learned Judges 'who composed the Bench, Lord Halsbury, and Lindley, L.J., were of the opinion that such a notice was valid while the other learned Judge, Smith, L.J., after a lengthy discussion, was prepared to hold that such a notice was not valid. But he wound up his judgment with the following noteworthy passage to be found at p. 389 of the report :
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> "I own that the "inclination of my opinion" is that the present notice is bad because it does not expire upon the last day of same year of the tenancy: but as Lord Halsbury and Lindley, L.J., are of opinion that, inasmuch as this was a full six months' notice given to quit upon the anniversary of the day upon which the tenancy commenced, it is good though the tenancy expired at midnight the day before, I yield to what they say, and will not differ from them, and hold that this unmeritorious technicality must prevail; and I content myself with expressing what I have said."

It appears to me, therefore, that a Judge is perfectly entitled to make up his mind whether he decides to give effect to his own view or yield to the views of the other Judges from whom he differs. If he decides to do the latter that is his opinion and the precedent difference is only "the inclination of his opinion" in the expressive phraseology of Smith, L.J. In a criminal case where the proof of the guilt of the accused is in question and the doctrine of 'benefit of doubt' is of paramount consideration, it is perfectly in keeping with the traditions of the British system of Criminal Jurisprudence, which has been adopted and followed in this country, that the very fact of another Judge of the High Court, in addition to the Magistrate of the trial Court, holding a view against the guilt of the accused, might well be considered if a Judge so chooses, as a factor entitling the accused to the benefit of doubt and on that
ground not agreeing to press his own view to the point of reference to a third Judge. That is the course which my learned brother has adopted and that was also the course which as pointed out by him in his judgment, I had adopted in Govt. Appeal No. 11/50, in the judgment to which I was a party. I can see nothing contrary to Section 429, Criminal Procedure Code, in such a procedure

and no question of violation of any fundamental principles of criminal law arises by the adoption of such a course. Leave cannot, therefore be granted on this ground.

4. It is next contended that the decision in the case raises a substantial and important question of law and that therefore leave should be granted under Article 134(1)(c) of the Constitution, which provides for an appeal to the Supreme Court, if the High Court certifies that the case is a fit one for appeal to the Supreme Court. In support of this argument, it is pointed out that the question of law raised in this case is whether or not decoy witnesses for bribery and corruption, are to be treated as accomplices whose evidence requires corroboration. It is further stated that there is some difference of view in High Courts as regards this question and that neither the Privy Council nor the Federal Court, nor the Supreme Court have so far given any direct decision on the question. At this stage, I must state that when this application for leave to appeal came up in the first instance before the Division Bench consisting of myself and my learned brother Narasimham, J. I was inclined to take the view that even if such a question did arise on this case, that would not be a sufficient ground for permitting a further appeal to the Supreme Court by the State as against the acquittal of an accused confirmed by the High Court. My learned brother was inclined to think that that would not be a legitimate consideration and that the question of law raised was one of sufficient importance and that leave may be granted under Article 134 (1) (c) of the Constitution. We accordingly thought it desirable to hear this application as a Special Bench of three Judges, including the other learned Judge who was a party to the disposal of the appeal.

5. It is undoubtedly correct to say that Article 134(1) is sufficiently wide to cover the case of an appeal to the Supreme Court against an order of acquittal; because that Article refers to "any judgment or final order in a criminal proceeding in a High Court." But there can be no doubt that the standard applicable in respect of Clause (c) of Article 134 (1) is not the same as that indicated in Clause (c) of Article 133 (1), which relates to civil matters; notwithstanding that the requirement in the two said sub-clauses (c) is couched in the same terms, viz., "if the High Court certifies that the case is a fit one for appeal to the Supreme Court." So far as civil cases are concerned, the standard of fitness contemplated thereby for the purpose of granting leave is well settled by a series of decisions of the High Courts, and the Privy Council with reference to the corresponding provision in Section 110 of the Civil Procedure Code , and a substantial question of law of general importance has been held sufficient for grant of leave. But so far as Article 134 (1) (c) is concerned, it is now settled, by a series of decisions of all the High Courts in which the question arose, after the commencement of the new Constitution, that the principles, which regulate the grant of leave in criminal matters under the said clause, are to be the principles which were adopted by the Privy Council as regulating the grant by that tribunal for special leave to appeal to itself.
In - '*Bana Behara v. State of Orissa*[3]', (E) it has been held by this Court that in granting leave in criminal matters, under Article 134 (1) (c), this Court should adopt the principles enunciated by the Supreme Court in - '*Pritam Singh v. State*[4]', in granting special leave to itself under Article 136. The Supreme Court in that case followed the prior decision of the Federal Court in - '*Kapildeo Singh v. The King*'[5], which in its turn, adopted the same standard, that is adopted by the Privy Council in the leading case, - 'In *re Abraham Mallory Dillet*'[6], (H). These principles were constantly reiterated by the Privy Council in various Indian cases, vide, - 'Macrea, Ex Parte', 20 Ind App 90 (PC) (I); - '*Ibrahim v. The King*[7]', (J); - '*Dal Singh v. King Emperor*[8]', - '*Taba Singh v. Emperor*'[9], - '*Mohindar Singh v. Emperor*[10]', '*Otto George Gfeller v. The King*[11]', and -

'*Easwaramurthy Goundan v. Emperor*[12]', The decision of this Court in - 'AIR 1951 Orissa 261', (E), laying down the standard which should regulate the grant of leave under Ci. (c) of Article 134 (1) has been repeatedly followed by this Court in a number of subsequent cases. The same standard has also been adopted by all the other High Courts as appears from the following cases. See - '*W.H. King v. Emperor*[13]', - 'In *re Paddayya*[14]', - '*Chowthmal Sharma v. Hiralal*[15]', - '*Kali Prasad v. The State*[16]', - '*Habib Mahomed v. Hyderabad State*[17]', - '*Chunchu Narayana v. Karapati Kesappa*[18]', and - '*Raghubans Prasad v. Lakhan Gope*[19]', There can be no doubt, that it is only in very exceptional cases where the judgment of a Court is affected by grave and substantial irregularities resulting in miscarriage of justice that leave to appeal is to be granted under Article 134 (1) (c). To my mind, therefore, it is extremely doubtful whether where leave to appeal is sought against an acquittal by the High Court on appeal, any question of miscarriage of justice as regards the particular accused is likely to arise in view of the well-recognised principle of British Jurisprudence, relating to benefit of doubt laid down in the case in - '*Rex v. Schama*[20]', and - '*Woolmington v. Director of Prosecutions'. (1935) AC 402* . Two cases, however, have been brought to cur notice, which are said to militate against this view. They are the cases in - '*Emperor v. Benorilal Sarma*'[21], (Y) and -'*Emperor v. Sibnath Banerjee*[22]', (Z). In the first case, the appeal to the Privy Council was against an acquittal of the accused by the High Court confirmed by the Federal Court. In the second, the appeal to the Privy Council was as against an order of the Federal Court dismissing appeals to that Court from the High Court of Calcutta, directing release of certain persons, on applications made to it under Section 491, Criminal Procedure Code, for directions in the nature of Habeas corpus. It is to be noticed however as appears clearly from the reports of these two cases given in the report in the Indian Appeals, that the appeals were entertained by the Privy Council on leave granted by the Federal Court itself under Section 208(b) of the Government of India Act, 1935. It may be seen that under the Government of India Act, there was no appeal to the Federal Court against the judgment of the High Court in a criminal matter, excepting when it fell within the scope of Section 205(1) thereof, which provides for appeal to the Federal Court, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution Act, or any Order-in-Council made thereunder. Therefore, whenever any criminal appeal came to the Federal Court from, the High Court, it was only on the footing that a question of constitutional law was involved. It is, therefore, clear that the grant of leave by the Federal Court for appeal to the Privy Council in such cases would only be, because, a question of what may be called 'constitutional importance' arose. That was also the position in the two cases in 'AIR 1945 PC 48 ' and 'AIR 1945 PC 156 ', referred to above. These two cases cannot consequently be treated as a guide on the question whether leave to appeal under Article 134(1)(c) is to be granted against an acquittal. merely because some substantial question of law arises in the case. Indeed, it is noteworthy that in 'AIR 1945 PC 156 ', which related to an appeal against an order of discharge on a Writ of Habeas corpus, the Privy Council in the first instance felt a doubt as to the competency of such an appeal. This appears from the following passage at p. 157 of the report:

> "Having regard to the known and well-settled principles of the English law that a discharge, or an order directing discharge, under a writ of habeas corpus is final and not subject to appeal, and the importance of preserving safeguards of the liberty of the subject, their Lordships asked for arguments of counsel on the competency, in the present case, of the appeals by the Crown from the High Court to the Federal Court, which might equally affect the competency of the further appeal to this Board."

Their Lordships after consideration held that as regards that matter, the position under Criminal Procedure Code, as regards appeals in respect of proceedings under Section 491 thereof is, in effect, the same as that stated in - '*Cox v. Hakes*'[23], (Z1), that there is to be no appeal against an order of discharge under Habeas corpus thereby weakening the safeguards of the liberty of the subject, unless such an appeal is especially provided for. They held, however, that having regard to the scheme of the Government of India Act, 1935, as emerges from the various provisions relating to appeals to Federal Court from the High Courts, and of further appeal to the Privy Council from the Federal' Court, it was the intention of the Act to provide for such appeals in matters of constitutional importance. On that ground, they held that an appeal to themselves was competent. This case, though it relates only to a discharge on a habeas corpus application, emphasizes the larger principle that an appeal to a higher Court which jeopardises the liberty of the subject once secured by the decision of the competent Court, is not to be allowed, except where such appeal is clearly provided for. It appears to me that the same principle must apply to an appeal against an acquittal. It is well-known that an appeal against an acquittal is not an ordinary feature of the English law and that the Criminal Procedure Code, in India has made a departure therefrom by specifically providing for it in Section 417. It appears to me, therefore, quite clear, that it would be against the policy of the Legislature to construe Article 134(1)(c) of the Constitution as permitting the High Court to grant leave to appeal as against the judgment of acquittal confirming the acquittal already secured by the accused from the trial Court. The view that I have taken is substantially in accord with that taken in the case in - '*State of Hyderabad v. Baquer Hussain*[24]', (Z2).
The position of the Supreme Court however in such a matter may possibly be different inasmuch as it may well have much wider powers under the Constitution to permit such an appeal by its own special leave, in very exceptional cases, in view of the very different and wide language of Article 136 as distinguished from Article 134.

6. Whether or not my view on this aspect is correct, I am inclined to think that in this case there are no sufficient grounds for certifying that this is a fit one for granting leave. As already stated what has been urged is that a substantial question of law may he said to arise, on which, as is stated to us, there appears to be no decision of the Privy Council or the Supreme Court. It has been further urged that the different views expressed by the two learned Judges of this Court is bound to create confusion for the subordinate Courts of this State and will lead to complications. I do not agree that these are enough grounds in a case like this. In the first place. I am not satisfied that the final decision in this case can be said to be ultimately dependent upon the view taken by the two learned Judges on the questions of law which arose in this case, viz., as to whether decoy witnesses in trap cases are to be treated as accomplices whose evidence requires corroboration. It appears to me that though the two Judges were inclined to differ on that question, ultimately the decision turned on the appreciation of the evidence and the weight to be attached to each of the important witnesses, so far as I can gather from a perusal of the judgments. In the second place, even if it can be said that the views taken by each of the learned Judges depended substantially upon their views as to the legal question, I do not consider it legitimate to assume that it will necessarily create any confusion in the minds of the subordinate Courts. Exhypothesi the two Judges held two different views on the question of law, and if so, their views do not constitute by themselves, any binding authority for the lower Courts so as to be the cause for any confusion on their part. Each of the views is entitled to respect and neither can be binding. The lower Courts will be left to determine for themselves, on the authority of the

binding decisions, if any, as to what is the law which is to be followed by them. If the State is anxious to have that law clarified by a higher authority, they must wait for an appropriate occasion, but the liberty of the subject, secured by an acquittal, cannot be lightly jeopardised by the grant of leave for further appeal against the acquittal. This application must accordingly be dismissed with costs.

7. After the conclusion of the hearing of the application, my attention has been drawn to an unreported judgment of the Supreme Court in an appeal against acquittal recently disposed of by the Supreme Court, of which an extract appeared in the Amrit Bazar Patrika. A copy of the judgment was requested for, from the Supreme Court and it has since been received. That judgment is in Supreme Court, in the matter of -'*The State of Madhya Pradesh v. Ramkrishna Limsey*[25]*',* (Z3). The appeal arose in the following circumstances. Three persons of whom one was an advocate of the High Court of Nagpur, and another a friend of his, and the third a client of his, were all charged and convicted for having murdered a certain person. The 1st accused, the advocate, was sentenced to death and the two others were sentenced to transportation for life by the Sessions. Judge. On appeal the Nagpur High Court acquitted all of them. Against that acquittal the State of Madhya Pradesh obtained from the Supreme Court itself special leave to appeal under Article 136 of the Constitution. In finally
dismissing that appeal, his Lordship Justice Mahajan, who delivered the judgment of
the Court stated as follows :

> "This appeal is before us by special leave. Article 134 of the Constitution permits an appeal to this Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India, if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death. It does not provide for an appeal from a judgment, final order, or sentence in a criminal proceeding of a High Court if the High Court has on appeal, reversed an order of conviction of an accused person and has ordered his acquittal. In other words, there is no provision in the Constitution corresponding to Section 417 of the Code of Criminal Procedure Code, and such an order is final, subject, however, to the overriding powers vested in this Court by Article 136 of the Constitution."

These observations appear to me to support the view that I have been inclined to take, viz., that as against an acquittal, on appeal to the High Court no leave to appeal ought to be granted under Article 134, but that in exceptional cases it is within the prerogative of the Supreme Court under Article 136 to grant leave where circumstances amounting to grave miscarriage of justice or obvious perversity or deceipt by fraud, are made out. Nor is this view inconsistent with what has been decided in 'AIR 1951 Orissa 261 '. In that case all that was laid down is that the High Court in granting leave under Article 134(1)(c) has to adopt the same standard of strictness as indicated in ' AIR 1950 Supreme Court 169 ', and it was pointed out that otherwise anomalous results would follow. But this does not mean that if in an exceptional case, having regard to the very different and wide language of Article 136, the Supreme Court in exercise of "its discretion" sees reason to grant special leave in the individual case, such an instance can form a guide to the High Courts with reference to the standard of "fitness". The significance of the latest (and so far) unreported decision of the Supreme Court is that though their Lordships granted special leave in

case of acquittal on what may appear to be exceptional circumstances at that stage, they very distinctly point out that the fact of no right of appeal being provided in Article 134 is an important consideration for judging whether they should finally interfere as against an acquittal. If so, it appears to me to be an equally important consideration as a guide for the standards regulating "fitness" under Article 134(1)(c). It is also to be noticed that the Supreme Court in the above unreported case say that even the final exercise of their jurisdiction (on grant of special leave under Article 136) would not be justified for merely correcting errors of law of the High Court.

Panigrahi, J.

8. I am in entire agreement with the reasoning of my Lord the Chief Justice and would direct that leave should be refused in this case.

9. There was undoubtedly some divergence of opinion between me and my learned brother Narasimham, J., regarding the credibility of Bhoramal (P. W. 3). (After stating some of the discussion of the evidence made by the trial Court His Lordship proceeded :)

10-12. I came more or less to the same conclusion regarding the value to be attached to the evidence of Purushottam, Bhoramal and the C.I.D. Inspector. In para 6 of my judgment I said :

> "Where a spy suggests and instigates a criminal offence the action of the spy is not justified by any exception in the Penal Code or by doctrine which distinguishes a spy from an accomplice."

In para 7 I said that

> "the evidence of a spy or decoy witness, though admissible in evidence and may be acted upon, the value to be attached to that evidence will depend upon the character of the person employed; where on the other hand the spy or the Police officer goes beyond the limit of collecting evidence and instigates or solicits the commission of a crime, he will be guilty of abetment."

I did not say, nor suggest, that a decoy witness or a police spy who offers money to a public servant for entrapping him is an abettor of the offence of bribery and as such an accomplice, in all cases and regardless of the circumstances. I also pointed out the distinction between a spy as such and an accomplice who is put forward as a spy witness. I said :

> "The line may be drawn thus. If a police officer receives information that an offence has been committed or is about to be committed and engages spies to witness the commission he acts as a mere detective; that may be necessary in the interests of justice to enable him to secure evidence. But if he suggests or induces the commission of a crime and instigates others to take part in the crime, in order to arrest the offender while in the act, he is no better than an agent provocateur."

The question whether a witness who is engaged by the Police to act as a spy is to be believed must be decided by the Judge who tries the case and his reliability would be determined by the circumstances of the particular case. There can be no rule of general application. The fact that a person is engaged to witness a crime does not make him an accomplice unless he is proved to have participated in the commission of the crime. If he has participated in the crime, the mere fact that he was engaged by the police will not entitle him to claim immunity from being charged as an accomplice. Whether he is the one or the other will depend upon the view taken by the Judge of fact having regard to all the circumstances of the case. This distinction has been recognised in - '*The King v. S.N. Singh Rai*[26]*',* (Z4), a decision by a Division Bench of this Court. The difference of opinion between me and Narasimham, J., was confined to the question as to whether Bhoramal was a reliable witness. I rejected the evidence of this witness as I held that he was not a disinterested witness but was a fellow-conspirator with the others. My learned brother while accepting his evidence
hesitated to convict the accused as he held that the view taken by the lower Court and by me was also justified by the evidence on the record. If Bhoramal is to be regarded as an accomplice, there can be no dispute that his evidence would require corroboration. The point of difference is, therefore, narrowed down to the issue as to whether in the circumstances of this case, Bhoramal's evidence should have been accepted. I am accordingly of opinion that no question of law is involved such as would justify leave being granted for appeal to the Supreme Court.

13. Two Courts have concurrently held that the accused is not guilty of the charge laid against him. But for Section 417, Criminal Procedure Code, there would be no appeal against an order of acquittal passed by the trial Court. The power conferred on the State Government, it should be noted, is an exceptional power and should be sparingly used. The power is not available to a private prosecutor and is expressly vested in the Govt., so that a person acquitted of a charge may not be put on trial over again. I am reluctant to believe that sub clause (c) of Clause (1) of Article 134 of the Constitution introduces any new principle of law regarding the presumption of innocence of an accused person. If as has been ruled by the Supreme Court in ' AIR 1952 Supreme Court 52 ' the High Court should be slow to interfere with an order of acquittal unless there are substantial or compelling reasons, how can a certificate that the case is a fit one for appeal to the Supreme Court, be granted by the High Court after it had affirmed the judgment of acquittal passed by the trial Court? A mere divergence of opinion between the Judges on a matter which does not affect the decision of the appeal itself cannot constitute a sufficient ground for grant of such a certificate, because the only question before the Court is whether the prosecution had proved the charge against the accused. Whether Bhoramal is to be believed or not is a question of fact. Whether the evidence of an accomplice should be corroborated is, undoubtedly, a question of law. But the applicability of this principle to the particular facts of a case is not such a substantial question of law as to render the case a fit one for grant of a certificate for leave to appeal to Supreme Court.

Narasimham, J.

14. With great respect to my Hon'ble colleagues I wish to express my dissent from the view taken by them. In my opinion this is a fit case for granting certificate to the State of Orissa under sub-Clause (c) of Clause (1) of Article 134 of the Constitution for leave to appeal to the Supreme Court against the judgment of a Division Bench of this Court in Government Appeal No. 3 of 1951.

15. (After narrating the facts (which are given in para 2 of this report His Lordship proceeded:) The trying Magistrate acquitted Sri Minaketan Patnaik. A Government appeal against the order of acquittal was heard by a Division Bench of this Court consisting of my learned brother Panigrahi, J., and myself. We both differed fundamentally in the approach to the whole question. My learned brother was of the view that Purushottam and Bhoramal (P. Ws. 1 and 3) were admittedly spies or decoy witnesses and were also accomplices inasmuch as they abetted the commission of the offence under Section 161, Indian Penal Code, by Sri Minaketan Patnaik. He thought that the C.I.D. Inspector Sri N.N. Ray (P. W. 8) was also an abettor and as such an accomplice because he instigated the commission of the crime. Having thus taken the view that these three principal witnesses were accomplices he observed that their evidence should not be accepted without independent corroboration and that such corroboration was wanting in the case. I may quote the following passage from his judgment.

> "12. x x x x x
> "The evidence of Purushottam (P W. 1) and that of the C.I.D. Inspector (P. W. 8) is that of abettors, as the one instigated and the other aided the commission of a crime. The evidence of Bhoramal (P. W. 3) is that of an abettor' either on the supposition that he knew and aided P. W. 1 in his nefarious design or that he himself attempted to bribe the accused. I refuse to place any reliance on the testimony of any of these witnesses uncorroborated as it is by any other independent evidence; and such attempt as has been made to corroborate it has failed."

He noticed the divergence of views taken by the Courts in India on the question as to whether a spy or decoy witness was an accomplice. In - '*Emperor v. Chaturbhuj Sahu*[27]', (Z5) followed in - '*Govind Balaji v. Emperor*[28]', (Z6) and - '*Mohanlal Moolchand v. Emperor*[29]', (Z7) it was held that such a witness was not an accomplice. In - '*Queen Empress v. Javechha Ram*[30]', (Z8); - '*In re Lakshminarayan Iyer*[31]'. (Z9) and - '*In re Koganti Appaya*[32]', (Z10), however, it was held that some class of decoy witnesses may be accomplices. In considering whether a trap witness in a bribery case is an accomplice or not my learned brother seems to have taken the view that the trap witness who offers money to a public servant while creating in the letter's mind the impression that it is being offered as an illegal gratification, is an abettor inasmuch as he either instigates the commission of the offence of bribery by the public servant or intentionally aids in the commission of that offence.

16. I, however, took a different view on this important question of law and relied mainly on Illustration (a) to Section 109, Indian Penal Code, which, in substance, defines the offence of abetment of bribery by the giver of the bribe. In my view a decoy witness engaged by the police to offer money to a public servant for the purpose of entrapping the latter and not for the purpose of giving him a reward for showing favour in the exercise of his official functions has not the necessary criminal intention to make him an abettor. I, therefore, did not agree with my learned brother that Purushottam (P. W. 1) Bhoramal (P. W. 3) and the C. I. D. Inspector (P. W. 8) were abettors and as such accomplices. On the facts of the case, however, I considered that in view of the unsatisfactory features in the evidence given by Purushottam it may not be safe to accept his evidence without corroboration. Such corroboration was, in my opinion, found in the evidence of

his companion Bhoramal (P. W. 3) which was, on the whole, quite satisfactory. I also saw no reason to disbelieve the evidence of the C. I. D. Inspector (P. W. 8) or of the other official witnesses regarding the circumstances under which the currency notes were recovered from the possession of Sri Minaketan Patnaik. In the end, however, while observing that if it was an appeal against conviction I would have no hesitation in confirming the conviction, I did not express dissent from the order proposed by my learned
brother in view of the principles laid down by the Supreme Court in ' AIR 1952 Supreme Court 52 ' regarding the circumstances under which the High Court should
exercise its powers under Section 417, Criminal Procedure Code.

17. The following two important questions of law arise out of the two judgments delivered by my learned brother Panigrahi, J., and myself in Government Appeal No. 3 of 1951.

> (i) Whether a decoy witness or police spy who offers money to a public servant for the purpose of entrapping him is an abettor of the offence of bribery (S. 161, Indian Penal Code) and as such an accomplice.
> (ii) Whether the principles laid down in Section 145, Evidence Act, are applicable in respect of the previous oral statement of a witness. So far as I am aware, there is no decision either of the Federal Court or of the Supreme Court on these two questions.

18. The importance of the first question of law can hardly be over-emphasised. As pointed out by Alverston, C.J., in the well-known case of - '*Rex v. Mortimer*'[33], (Z11), though no Court likes police traps

> "it is only fair to remember that it is almost impossible to detect this class of offence in any other way."

Consequently, if as a proposition of law it is laid down that such trap witnesses are abettors of the offence of bribery and as such accomplices, the principle of Illustration (b), Section 114, Evidence Act, would apply and the rule of prudence which has now crystallized into a rule of law regarding the necessity of adequate independent corroboration of the evidence of an accomplice would apply with full force. On the other hand, if it be held that such trap witnesses are not accomplices the question as to whether the evidence of a particular trap witness requires corroboration or not would depend on the facts of each case, the antecedents of that witness and the way in which he has fared in the cross-examination. Ordinarily it is impossible to obtain independent corroboration of the evidence of bribery and consequently if trap witnesses are branded as accomplices merely because they are trap witnesses, it may become difficult - almost impossible - to successfully prove a charge under Section 161, Indian Penal Code, against any public servant and that provision of the Indian Penal Code may as well be relegated to the class of those obsolete provisions such as thuggery (S. 310) etc., which have only historical interest. A Court should also take judicial notice of the fact that in recent times a special drive has been organised not only by the State Governments all over India but also by the Union Government for suppression of corruption amongst public officials, and, apart from the passing of special laws like the Prevention of Corruption Act, 1947, special departments have been created for the purpose of detection of such offences. The question as to whether previous information arrange

traps for detecting corruption amongst officials and the decoy officers of those departments who on receipt of witnesses engaged to assist them are, in law to be branded as accomplices has far-reaching importance not only in
the State of Orissa but also all over India and a final decision of this question would vitally affect all future prosecutions for the offence of bribery. One of the important grounds taken by the learned Government Advocate in support of this leave petition
was the impossibility of detecting offences like bribery, if the view taken by my learned brother Panigrahi, J., prevails. (See ground No. 4).

19. The second question of law is undoubtedly not of so much importance as the first one. But its significance also should not be minimised. It is well known that criminal cases depend primarily on oral evidence and in subordinate Courts there is a tendency to contradict witnesses by their so-called previous oral statements proved through the mouth of other witnesses without first giving them an opportunity of explaining the same. Section 145, Evidence Act in terms, refers only to previous written statements and there is a difference of view, see - '*Mt. Misri v. Emperor*[34]', (Z12) and - *'Mutawandas v. Emperor*[35]', (Z13), as to whether the principles of Section 145, Evidence Act, should be applied to the previous oral statement of a witness also. In the present case this question assumes some importance because one of the reasons for my learned brother disbelieving Purushottam (P. W. 1) was his previous oral statement as proved by Bhoramal (P. W. 3) to the following effect :

> "Purushottam told me that he had not met the C. S. O. before and wanted me to accompany him."

This question, however, was not put to Purushottam in cross-examination and he was thus not given an opportunity of explaining the same. My learned brother while commenting on the aforesaid statement of Bhoramal has observed :

> "If this statement were to be believed then Purushottam's story of having seen the Civil Supplies Officer on 12-1-50 at Bolangir and then again at Kantabanjhi must be discredited."

If, however, that statement be held to be inadmissible for contravention of the principles of Section 145, Evidence Act, such a reasoning could hardly be adopted.

20. I should however point out that this second point of law was not specifically
raised in the grounds of the leave petition. But during the course of the discussions between the Bench and the Bar at the time of arguments this point was referred to by me. By itself this point of law would undoubtedly not justify the granting of leave to appeal to the Supreme Court. But if the matter is taken to the Supreme Court in view of the importance of the first question of law a final decision of this question also will be of much help in the administration of criminal justice.

21. I am fully alive to the importance of the fact that not only had the trial Court acquitted the opposite party but the High Court also in disposing of the appeal maintained the order of acquittal though the two Hon'ble Justices who constituted the Bench differed both on the questions of law and on facts. But sub clause (c) of Article 134(1) of the Constitution does not

either expressly or by necessary implication forbid
the granting of leave to appeal even against an order of acquittal where exceptional circumstances are shown. In this respect the law is fundamentally different from what it was prior to the advent of the Constitution. Under the Government of India Act,
1935, there was no provision for granting leave to appeal either to the Federal Court
or to the Privy Council against an order in a criminal case unless an important question regarding the interpretation of the Government of India Act, 1935 arose out of that order in which case a certificate could be granted by the High Court under Section 205 and by the Federal Court to the Privy Council under Section 208. But the makers of the Constitution while inserting a similar provision under Article 132 for the grant of a certificate for leave to appeal to the Supreme Court whether in a civil or criminal proceeding where a substantial question of law as to the interpretation of the Constitution was involved thought it advisable to insert a separate provision in sub clause (c) of Clause (1) of Article 134 providing for an appeal to the Supreme Court against a judgment in a criminal proceeding if the High Court certifies it to be a fit case (sub-clauses (a) and (b) of Clause (1) of that Article may be left out of these discussions because they confer an unconditional right of appeal to a certain class of persons sentenced to death). I would agree with my Lord the Chief Justice that though the language of Clause (c) of Article 134 (1) is identical with that of sub-Clause (c) of Article 133(1) dealing with civil proceedings the standard of fitness required in a criminal proceeding may be of a far more severe type than that required in a civil proceeding, especially when the certificate that is asked for is against an order of acquittal. But where exceptional circumstances are shown which would otherwise justify the grant of a certificate under Article 134 (1)(c) the mere fact that the order of the High Court is an order of acquittal would not be a ground for withholding the certificate. There is no justification for the Court to limit the express terms of Article 134(1)(c) by mere construction so as to exclude cases of acquittal from its operation.

22. Though their Lordships of the Supreme Court have not yet laid down the principles which should guide a High Court in granting a certificate under sub clause (c) of Clause (1) of Article 134, the decision reported in ' AIR 1950 Supreme Court 169 ' and the recent unreported decision in 'Cri. Appeal No. 40 of 1952 (SC) (Z3)' dealing with the scope of Article 136 afford a valuable guide. In the earlier decision their Lordships observed :

> "On a careful examination of Article 136 along with the preceding article, it seems clear that the wide discretionary power with which this Court is invested under it is to be exercised sparingly and in exceptional cases only, and as far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this article..... The only uniform standard which in our opinion can be laid down in the circumstances is that Court should grant 'special leave to appeal only in those cases where special circumstances are shown to exist'."

Their Lordships pointed out that the principles laid down by the Privy Council in granting special leave in criminal cases may not apply too rigidly after the advent of the Constitution. But some of those principles were useful as furnishing in many cases a sound basis for invoking the discretion of the Supreme Court in granting special leave. They further observed :

> "Generally speaking, this Court will not grant special leave, unless it is shown that

> exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against."

The recent decision of the Supreme Court in 'Cri. Appeal No. 40 of 1952 (Z3)' was an appeal against an order of acquittal passed by the High Court of Nagpur. Special leave was granted though it appears from a perusal of the judgment of their Lordships of the Supreme Court that the whole case depended on facts and no important question of law was involved. It is true that after granting special leave and hearing the parties their Lordships declined to interfere with the order of acquittal passed by the Nagpur High Court; but they reiterated their previous view that the exercise of their extraordinary jurisdiction under Article 136 was not justifiable in criminal cases unless

> "exceptional or special circumstances are shown to exist or that substantial and grave injustice has been done."

They further observed :

> "In the case of an order of acquittal where the presumption of the innocence of an accused person is reinforced by that order, it seems to us that the exercise of this jurisdiction would not be justified for merely correcting errors of fact or law of the High Court. An occasion for interference with an acquittal order may arise, however, where a High Court acts perversely or otherwise improperly or has been deceived by fraud."

It should be noticed that these observations were made in respect of the order passed after the case had been heard. But in view of the earlier decision it may be reasonably inferred that at the time of granting leave the main questions which appear to have weighed with their Lordships were

> "whether exceptional or special circumstances existed and whether the case presented features of sufficient gravity to warrant a review of the decision appealed against."

In the present case these features are clearly found. There is a divergence of view by two Judges of this Court on a very important question of law which will have a far-reaching effect in all future prosecutions for an offence under Section 161, Indian Penal Code, and which may also affect many cases that are likely to be either under investigation or actually pending in subordinate Courts in respect of that offence. Doubtless their Lordships of the Supreme Court observed in the aforesaid judgment that for "merely correcting errors of law of the High Court" their Lordships would not be prepared to exercise their special jurisdiction under Article 136. In the context however it appears that they were not referring to important questions of law having far-reaching effect in the administration of criminal justice in the whole of India. This Court has held in 'AIR 1951 Orissa 261 ' that the principles laid down by the Supreme Court in granting special leave under Article 136 would equally apply when leave to appeal is sought under Article 134(1)(c).

23. With great respect I must point out that it is not quite correct to say that the ultimate decision of the case which undoubtedly depends on the weight to be attached to the evidence of the three important witnesses (P. Ws. 1, 3 and 8) will not be materially affected by the decision of the Supreme Court on the important questions of law mentioned above. My learned brother Panigrahi, J., held that these three important witnesses were in law accomplices and then sought for independent corroboration of their evidence in material particulars. If, however, their Lordships of the Supreme Court hold that such trap witnesses are not accomplices and the credibility to be attached to their evidence should be judged like that of any other witness in a criminal case, the approach to the whole question would be different. Similarly, if the so-called previous statement of Purusottam to Bhoramal which was elicited during the cross-examination of Bhoramal (referred to in para. 7) is held to be inadmissible, Purusottam's story about the demand of bribe from him by the opposite party on two previous occasions would not have been so easily discredited.

24. It was urged that if another case involving the same questions of law arises the matter may be decided by a larger Bench so as to lay down the law for the guidance of the subordinate Courts and that it was inadvisable to jeopardise the liberty of a subject by taking up this question to the Supreme Court mainly for an authoritative decision on these questions of law. I might have been inclined to accept this argument if there was a reasonable chance of the same questions arising for the decision of this Court in the near future in an appeal or revision against an order of conviction. But I should point that the divergent views expressed by me and by my learned brother Panigrahi, J., have already been reported; see '*State v. Minaketan Patnaik*[36]', (Z14) and the subordinate Courts who have to try cases of a similar nature may be under a dilemma as to which view to follow. Any one with some experience of the psychology of a subordinate Magistrate can reasonably say that in the circumstances of this type a trying Magistrate would be inclined to follow the path of least resistance and to acquit the accused holding that the trap witnesses are accomplices and that it would be unsafe to accept their evidence without independent corroboration. Therefore, the chances of a convicted person coming up to this Court either in appeal or in revision for determination of these questions of law are remote. The very fact, though nearly eight months have elapsed since we delivered judgment, that no criminal appeal or revision dealing with the said questions of law appears to have been filed in this Court, supports that view. The only other alternative occasion for a decision of these questions would be if and when the Government file an appeal against an order of acquittal that may be passed by a subordinate Court, in another case, when a larger Bench of this Court may be constituted. If such a contingency arises, the jeopardy to the liberty of another accused person secured by an order of acquittal, about which my Lord has rightly (if I may say so with respect) expressed so much concern in the last portion of para. 6 of his judgment, cannot be avoided. The delay that is likely to ensue before such a contingency arises and the confusion that is likely to be created during the interim period cannot be ignored. The more satisfactory and speedier course would be to allow this question to be taken to the Supreme Court

[36] AIR 1952 Ori 267

in the present case so that even if my view be held to be incorrect an accused acquitted by the trying Magistrate in a future case may not be further harassed. These are features of sufficient gravity to warrant a review of the decision of this Court by the Supreme Court.

25. It is undoubtedly the settled principle of English law that the liberty of a subject should not be lightly jeopardised. In - '*Reg v. Tyrone County Justices*'[37], (Z15) Palles C.B. emphasised the

principle in the following terms :

> "I, therefore, first rest my view on settled principles, that, before you can appeal against an acquittal the words must be clear, express, and free from any ambiguity."

In - '(1890) 15 AC 506 (522)' (Z1) Lord Halsbury insisted on the need of express legislation before the right of personal freedom can be made subject to the delay and uncertainty of appeal. 'In - '*Benson v. Northern Ireland Road Transport Board*'[38], (Z16) the same principle was followed and it was held that very clear statutory language would be needed to establish, by way of exception to the general rule, a right of appeal from a decision dismissing a criminal charge. But notwithstanding the existence of this well-known principle the Privy Council in - 'AIR 1945 PC 156 ' held that an appeal against an order directing the setting at liberty of a person would lie in view of the express provisions of Sections 205 and 208, Government of India Act. Thus there is sufficient authority for the view that the well-known principle about non-jeopardising the liberty of a subject, must give way where there are constitutional provisions providing for an appeal in criminal matters in special cases. It is true that prior to the advent of the Constitution such appeals were limited to questions involving interpretation of the Government of India Act. But that limitation was imposed by the very provisions (Ss. 205 and 208 (b)) which provided for appeals in special cases. But where the present Constitution allows an appeal even against orders of acquittal when the High Court is satisfied about the fitness of the case, the same principle would apply and the far-reaching consequences which are likely to ensue if the questions of law on which I and my learned brother Panigrahi, J., have differed, are allowed to remain in the present unsettled form outweigh other considerations based on general principles of English law regarding the liberty of a subject. Moreover, at this stage it cannot be stated with any degree of certainty that the liberty of the opposite party would, in fact, be jeopardised even if their Lordships of the Supreme Court decide the questions of law against him. The application for leave is filed by the State and not by a private prosecutor and the State would, for obvious reasons, be more interested in obtaining clarification of the important questions of law in the interest of administration of criminal justice rather than in seeing that a particular person wrongly acquitted is sent to Jail.

26. Thus, in my opinion, in the interest of all concerned it is very necessary that the case should be taken up to the Supreme Court as soon as possible so as to ensure a speedy clarification of the important questions of law referred to in the preceding paragraphs. I would, therefore, certify that this is a fit case under sub clause (c) of
Clause (1) of Article 134 of the Constitution.
Application dismissed.

Cases Referred.

[1] AIR 1952 SC 52
[2] AIR 1920 Cal 352
[3] AIR: 1951 Oris 261
[4] AIR 1950 SC 169
[5] AIR 1950 FC 80
[6](1887) 12 AC 459
[7](1914) AC 599
[8] AIR 1917 PC 25

[9] AIR 1925 PC 59
[10] AIR 1932 PC 234
[11] AIR 1943 PC 211
[12] AIR 1944 PC 54
[13] AIR 1950 Bom 380
[14] AIR 1951 Mad 329
[15] AIR 1951 Ass 38
[16] AIR 1952 All 630
[17] AIR 1951 Hyd 71
[18] AIR 1951 Mad 721
[19] AIR 1951 Pat 437
[20](1914) 84 LJ KB 396
[21] AIR 1945 PC 48 : 72 Ind App 57 (PC)
[23](1890) 15 AC 506
[24] AIR 1952 Hyd 40 : 1952 Cri LJ 352
[25] Cri Appeal No. 40 of 1952
[26] AIR 1951 Ori 297
[27]38 Cal 96
[28] AIR 1936 Nag 245
[29] AIR 1947 Nag109
[30]19 Bom 363
[31] AIR 1918 Mad 738
[32] AIR 1938 Mad 993
[33](1911) 1 KB 70
[34] AIR 1934 Sind 100
[35] AIR 1939 Nag 13

[37](1906) 40 Irish LT 181
[38](1942) AC 520