

A

KISHAN NARAIN

v.

STATE OF MAHARASHTRA

September 7, 1973

[H. R. KHANNA AND A. ALAGIRISWAMI, JJ.]

B

Evidence Act, 1872 (1 of 1872), ss. 124 and 125—Privilege—Notings on confidential file which have no bearing on the guilt or innocence of the accused—If could be brought on the record by the High Court.

The appellant was convicted under s. 165-A, I.P.C. for offering a bribe to a Customs appraiser and was sentenced to rigorous imprisonment and fine. On appeal the High Court upheld the conviction but reduced the sentence of imprisonment to six months.

C

Before the Special Judge the appellant had filed applications for the production of three documents viz. : (i) the application made by S, the informer, for rewards for his services as an informer; (ii) receipts signed by S for the amounts he received as reward and (iii) the notings made by the appraiser on the Central Intelligence Unit file regarding the application by S for reward. The Department objected to their production on the ground that the appraiser could not be compelled to say or divulge any information as to the commission of any offence against the public revenue and that the documents were made in official confidence and public interest would suffer from disclosure of any of the documents on the file. The Special Judge dismissed the applications. When the appeal was pending, the High Court passed an order bringing on record certain portions from the file of the Central Intelligence Unit.

D

Dismissing the appeal to this Court,

E

HELD : (i) The order of the High Court permitting certain portions of the confidential file to be brought on record was not correct. The High Court seemed to have been more concerned with the provisions of s. 125 than with s. 124 of the Evidence Act. While portions brought on record might not contravene the provisions of s. 125 there was no doubt that they contravene s. 124. The notings on the file were made in official confidence. [608—H]

F

(ii) The fact that S had acted as an informer and applied for rewards for his services did not in any way affect the merits of the case. The crucial question was whether the appellant did make an offer of bribe to the appraiser and did give it to him. Documents in respect of which privilege was claimed did not impinge on the question of guilt or innocence of the accused. [609—D]

In the circumstances of this case there was no harassment of the appellant and no case had been made out for reducing the sentence.

Ramjanam Singh v. State of Bihar, A.I.R. 1955 S.C. 643, held inapplicable.

G

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 14 of 1970.

Appeal by special leave from the judgment and order dated 24/26-9-1969 of the Bombay High Court in Criminal Appeal No. 1825 of 1965.

H

H. L. Sibal, S. C. Sibal, Harjinder Singh and Rameshwar Nath, for the appellant.

M. C. Bhandare, M. N. Shroff and Z. A. Khalidi, for the respondent.

The Judgment of the Court was delivered by

ALAGIRISWAMI, J. The appellant was convicted by the Special Judge of Bombay under s. 165-A I.P.C. and sentenced to rigorous imprisonment for one year and to pay a fine of Rs. 10,000. On appeal the High Court of Bombay upheld the conviction but reduced the sentence of imprisonment to six months. The appellant is a partner of a firm owning the New India Knitting Mills in Amritsar. It has a sister concern called J. D. Woollen and Silk Mills, which is owned by a partnership firm of which the appellant's minor son is a partner. On 10-10-1963 the J. D. Mills was given an import licence for Rs. 23,480/- for spare parts for Warp Knitting Machine from Germany. Towards a part of that import licence goods valued at Rs. 11,699/- arrived in Bombay on 16.3.1964. The J.D. Mills arranged for clearance of this consignment by the New Suraj Transit Company having its head office in Amritsar and a branch in Bombay. One Hiro Shahani, who became an approver in this case, was an employee of the clearing agents. Bakubhai Ambalal & Co. were the representatives in India of the machinery manufacturing company.

It appears that in July 1963 there was an anonymous petition against the two mills and on 21.11.1963 an order was made by the Principal Appraiser of the Special Investigation Branch of the Customs that a careful watch should be kept over the imports by the two mills. On 30-3-1964 the J. D. Mills had made a representation to the Deputy Collector incharge of the Appraising Department in the Customs House at Bombay complaining against long delays in clearing their imports and thereafter the appellant also seems to have met the Deputy Collector Customs and protested against excessive scrutiny. The Deputy Collector ordered the matter to be examined and if there was no substance in the complaint against the mills to consider reviving normal examination. By that time the consignment already referred to had arrived. The Bill of Entry in respect of this consignment was prepared on 4-6-1964. The Import Branch sent it to the Special Investigation Branch and that Branch sent it back to the Import Branch. The consignment was examined by one Motwani, who was later examined as P.W. 6 in the case. He was of opinion that the goods were not spare parts but that it was a machine in assembled condition. The Shed Appraiser agreed with this view. The clearing agents thereupon telephoned to the appellant who asked them to make a request for re-examination as provided under the rules. Shahani, the approver, thereupon requested the Principal Appraiser, Almeida for re-examination. Almeida made an order for scrutiny by the scrutinizing appraiser and the shed appraiser. One Vazirani, scrutinising appraiser, made a re-examination accordingly and made a report, which was approved by the shed appraiser, Menon. This went to the scrutinising appraiser, Merchant, who in his turn examined it in the presence of Shahani and Majumdar, the engineer of Bakubhai Ambalal, and recommended issue of show cause notice for mis-declaration. Almeida approved of it on 9-7-1964 and on 17-7-1964 a notice was accordingly issued by Almeida.

A On 1-7-1964 the appellant reached Bombay. Towards the end of that month the Central Intelligence Unit was constituted in the Customs Department and it was to function as the vigilance party of that department. P.W.3, Ramachandra Rao, was one of the appraisers transferred to this unit. He inspected the goods on 1-8-1964. On 4-9-1964 he was directed by the Assistant Collector in-charge, **B** Sonavne to execute warrants of search against Bakubhai Ambalal, who however produced the documents asked for.

The appellant asked Shahani on the 4th to introduce him to Rao. That was not done. On 13-8-1964 the appellant met Rao at Gaylord restaurant where Rao had gone to meet one of his contact men. At that time the appellant is alleged to have made an offer of a bribe of Rs. 5000/- to Rao. Rao told him that he would **C** let him know and later asked Shahani to ask the appellant to meet him at the same place the next day. He duly reported the offer of bribe to his Assistant Collector, Sonavne at 1.30 p.m. The latter took some time to consider the matter and in the evening told Rao that it had been decided to take up the matter with the Special Police Establishment. So on 14-8-1964 Rao went to the S.P.E. Office **D** and was directed to see Mr. Jog, Dy. Superintendent of Police in charge of S.P.E., Bombay who recorded his complaint. Jog took with him to Gaylord two officers of the Income-tax Department, P.W. 4, an Assistant Commissioner of Income-tax and P.W. 5, an Income-tax Officer who later became panchnama witnesses. They were directed to remain close to Rao and to overhear the conversation between him and the appellant. In due course the appellant **E** and Shahani came there. About what happened then we shall refer to in detail a little later. It is sufficient at this stage to say that the appellant passed on two envelopes to Rao and at that moment Jog appeared on the scene and recovered both the envelopes from Rao. The envelopes were found to contain Rs. 2,500/- each. The investigation was carried out and a charge-sheet filed on 30-10-1964. Shahani was arrested on 24-11-1964 and was released on bail. **F** His statement was recorded in January 1965 by police and his confession statement before the Magistrate was ordered on 19-3-1965. On 15-4-1965 an application was made to grant him pardon in order to treat him as an approver and an order was passed in due course. The case was in due course tried and the appellant was convicted as mentioned earlier.

G It appears that on 21-5-1965 Shahani made an application to Customs Department for reward for passing on certain information to that department and on 7-6-1965 he received 3 sums of Rs. 500, Rs. 500 and Rs. 350 as part payment of reward. It also appears that Shahani had made an application for licence to work as clearing agent. Somehow the appellant had got information about these facts as also the noting made by Rao on the application **H** for reward made by Shahani. These facts were denied by both Rao and Shahani in their evidence. Shahani was examined from 15th to 20th of September, 1965 and on the 20th an application was made on behalf of the appellant for production of 3 docu-

ments (i) the application of Shahani dated 21-5-1965 asking for reward, (ii) three receipts signed by him in respect of amounts, about which mention has already been made, and (iii) the Central Intelligence Unit file, of which even the number was given. The Assistant Collector of Customs filed a reply to this application stating that he could not be compelled to say or divulge any information as to the commission of any offence against the public revenue. He also stated that all the documents were made in official confidence and public interest would suffer from disclosure of any of the documents on the file. Another application to the same effect was made on 22-9-1965. Both the applications were dismissed by the Special Judge. Before the High Court, when the appellant's appeal was pending, an application was made on 11-6-1968 by the appellant for summoning the very same three documents for producing which he had applied before the trial court and the High Court passed an order on 5-7-1968 bringing on record certain portions from the file of the Central Intelligence Unit, which is found at pages 453 and 454 of the paper book as Ex. 67 and 68. Consequently, Shahani and Rao were directed to be further examined and they were accordingly further examined before the Special Judge. There was again another application before the High Court on behalf of the appellant in respect of certain questions put to Rao in the course of this examination, which was dismissed by the High Court on 3-3-1969. That need not detain us.

The contention on behalf of the appellant before us was that the meeting between Rao and the appellant on 13-8-1964 was not true, that this charge against him is the result of a conspiracy between Rao and Shahani, the former with the object of advancing himself in his career by posing as an honest officer who refused an offer of a bribe and the latter with the sordid motive of getting reward as an informer, as also of getting a clearing agent's licence in respect of which he expected Rao to be of help to him. Both the Special Judge as well as the High Court were not prepared to place implicit reliance on the evidence of Rao and though the High Court thought that Rao was not playing fair with the court it was not prepared to consider him a liar. We are of opinion that the High Court has not been quite fair to Rao. In regard to Shahani's application for reward and his own dealings with the connected file Rao was really on the horns of a dilemma. As pointed out by the Assistant Collector, Beri, in his reply affidavit to the appellant's application for the production of the three documents which he wanted, Rao could not be compelled to answer questions without breach of the provisions of ss. 124 and 125 of the Evidence Act. We are of opinion that the order of the learned Judge of the High Court permitting certain portions of the C.I.U. file to be brought on record was not correct. The learned Judge seems to have been more concerned with the provisions of section 125 than with section 124 of the Evidence Act. While the portions brought on record might not contravene the provisions of section 125 we have no doubt that it contravenes section 124. The noting made by Rao on the C.I.U.

- A** file was one made by him in official confidence. This was not seriously disputed by Mr. Sibal appearing for the appellant before us. The consequent order passed by the High Court for re-examination of Rao and Shahani naturally put Rao in a very difficult situation and as the learned Judge of the High Court has remarked, he had to do some tight rope walking. He had to choose between his evidence being contradicted by the portions of the file which had been brought on record and his being consistent with the evidence which he had earlier given.
- B** The appellant had somehow managed to get details about all the three records he wanted and the affidavit filed by the Collector of Customs in answer to his second application filed before the High Court had admitted their existence. It would probably have been better, as the learned Judge of the High Court has remarked if the departmental officers had come out right in the beginning boldly with the facts of the case instead of claiming privilege and putting Rao in a difficult situation. It would not have affected the prosecution case in any way. We do not consider that the fact that Shahani had acted as an informer and applied for rewards for his services as an informer in respect of the 3 consignments imported by the J. D. Mills, in any way affects the merits of the prosecution case. The crucial question is whether the appellant did make an offer of a bribe to Rao on 13-8-1964 and did give the bribe on the 14th. The evidence as to Shahani having acted as an informer does not affect this question.
- C**
- D**

- It is not necessary for the purposes of this case to consider the scope of the powers of the court to examine the documents in respect of which privilege is claimed under ss. 123, 124 and 125 of the Evidence Act. Nor do we think that the English decisions on the point would be wholly apt in the circumstances of this country. In England the law regarding evidence is wholly Judge made law but in this country the duty of the Judge is to interpret the provisions of the Evidence Act in its application to the particular circumstances of a case. Whether if in any particular case the guilt or innocence of an accused depended on the production of a document in respect of which privilege is claimed the court could over-rule the claim of privilege is not a question which we need consider. That question does not arise in this case. The documents in respect of which privilege is claimed in this case do not impinge on the question of guilt or innocence of the accused. They do not relate to what happened on the 13th and 14th of August, 1964. We do not, therefore, feel it is necessary to consider the decisions in *Conway v. Rimmer*⁽¹⁾ and *Marks v. Beyfus*⁽²⁾.
- E**
- F**
- G**

- Given the fact that the High Court had permitted certain evidence to come on record, which we consider ought not to have been allowed to come on record, and the proceedings in connection therewith, we consider that the conclusions arrived at by the learned Judge of the High Court on the basis of those materials, as given on page 317 of the paper book, which we extract below, is a correct assessment of the additional evidence :
- H**

"The net result of the perusal of the additional evidence

(1) [1968] 1 All E. R. 574.

(2) [1890] 25 K. B. 494.

on remand on 5-8-1968 and the points discussed above may be summarised as follows :

- (1) That Shahani P.W. 2 did apply for reward on 21-5-1965 and actually did receive the reward on 7-6-1965 in the amounts of Rs. 500/-, Rs. 500/- and Rs. 350/-;
- (2) That Shahani was the informant of the Customs Department at any rate in regard to some three consignments though it is not in evidence as to who was the owner thereof and when was such information given and whether the information was given to Rao or some other officer;
- (3) The extracts Exs. 67 and 68 out of C.I.U. File No. 69 of 1965 were scribed by Rao P.W. 3 and as per admission of Rao they contained the appreciation of services of some informant whose information directly led to the en-trapping of the accused in the present case;
- (4) There is also no warrant in the evidence for assumption that C.I.U. File No. 69 of 1965 really pertained to the information given by Shahani through Shahani is found to have been informant in regard to some three consignments;
- (5) There is also no warrant for assumption that any reward was recommended by Rao to Shahani in regard to any help or in fact Shahani could have given any such help to the Customs Department in regard to the trap arranged against the accused in this case."

Even taking those conclusions into account we do not consider that the prosecution case in respect of the central point has in any way been shaken. The learned Judge of the High Court himself did not find Rao to be wholly unreliable and he did not consider that his evidence could be altogether discarded. We are satisfied on the evidence that the courts below were right in coming to conclusion that the appellant did meet Rao at Gaylord on the 13th. As we have already mentioned the appellant had immediately reported the matter to Assistant Collector, Sonavne, and on the instructions of his higher authorities a complaint was made to the Special Police Establishment. We are not able to accept the argument on behalf of the appellant that there was no such meeting, that it was Shahani that had arranged for the appellant's meeting with Rao at Gaylord on the 14th and that it was Shahani who had arranged to see that the two envelopes which the appellant handed over to Rao contained not the documents relating to the two further consignments but currency notes. That the appellant should have been anxious to be on the right side of somebody in the Customs Department was natural enough. The reason is this : All the appraisers who had looked into the consignment received by the J.D. Mills had taken the view that what was imported

- A** was not spare parts though it was argued on behalf of the appellant that the various spare parts had been put together in order that they might be transported safely and what was imported was not a whole machine. It may well be that what was imported was not a whole machine as held by the Collector of Customs ultimately in 1968. But the spare parts were in an assembled condition and even
- B** Majumdar, the Engineer of Bakubhai Ambalal got the first impression that it was nearly a machine. He could not say what parts were not there. The appellant himself in the statement filed before the trial court has stated that in view of the fact that the spare parts which were imported were in an assembled condition for the purpose of safe transportation without avoidable damage, the Customs examiners and appraisers got the first impression that what was imported was
- C** a machine and not spare parts. It was, therefore, not surprising that all the appraisers who viewed the machine proceeded on the basis that what was imported was not spare parts. Even according to the appellant, he had asked Shahani to introduce him to Rao. Quite possibly Shahani might have told the appellant that Rao was expected to be in the Gaylord on the 13th at 12.30 p.m. We are proceeding on the basis that Shahani's evidence is wholly unreliable. But as we said
- D** earlier, Rao could not have complained to Sonavne at 1.30 p.m. soon after he alleges he had met the appellant at Gaylord at 12.30 p.m. and the appellant had made the offer of bribe, nor gone on further to make a complaint to the Special Police Establishment if he had not met the appellant on the 13th. He could not have done all that merely on Shahani's information that the appellant would meet him (Rao) on the 14th at Gaylords. Nor could it be expected that either
- E** Shahani or Rao would have found Rs. 5,000/- merely to trap the appellant and risk that amount. There is not strong enough motive for either Shahani or Rao to implicate the appellant falsely. We are satisfied that the evidence of Rao as to what happened on the 13th is true and reliable.

- F** As regards what happened on the 14th the evidence of P.W. 4 and P.W. 5 as well as the statements found in the panchnama are not attacked on behalf of the appellant as either false or as not representing the true state of facts. In fact the whole argument on behalf of the appellant is based on the truth of those three pieces of evidence and has been confined to showing that the evidence of Rao is contradictory to these three pieces of evidence and therefore should not be accepted. In assessing the evidence on this point we must first of
- G** all bear in mind that the whole incident took place in a crowded restaurant and given the circumstances of the case the conversation between Rao on the one hand and the appellant and Shahani on the other could only have been in a low tone. PWs 4 and 5 would naturally not have heard every bit of conversation between the three of them. The fact that something is found in Rao's evidence that is not found
- H** in the panchnama or that something is found in the panchnama but is not found in Rao's evidence cannot mean that Rao's evidence is false on points which the panchnama does not refer to. A witness is not like a tape-recorder. When he is giving evidence more than a year later about what happened a year earlier his memory may not serve

him completely right. He may not be able to repeat the exact words used on the occasion or all the words. Allowance must be made for these factors. Making that allowance let us now place side by side statements in the panchnama, which in essence is corroborated by the oral evidence of PWs 4 and 5, and Rao's evidence, as has been done by the learned Judge of the High Court : Rao's evidence was :

"The accused started the conversation by asking me whether I have cleared up the one or two points which I said I would clear up on the previous day. I told the accused that nothing appeared to be wrong with the consignment itself, but there is a rumour that he had paid Rs. 5000/- to Mr. Almeida and Rs. 3000/- to Mr. Vazirani. The accused did not say anything. He requested me to clear up the matters in his favour, as everything was in hands. I asked him (accused) who were the persons present at the time of re-examination by Mr. Vazirani. The accused replied that he himself, his men Madanlal, Clearing Agent's man Mr. Shahani and Mr. Majumdar of M/s Bakubhai Ambalal, were present at the time of the re-examination. The accused told me that the same persons were present when the consignment was inspected later on by Mr. Merchant and Mr. Almeida.

The accused asked me whether I would be willing to accept the money after the consignment was cleared. I told him that this would mean lack of trust in me. The accused told me that he had full trust in me. The accused then asked Mr. Shahani to go out and to get the envelopes from Mr. Madanlal standing outside the restaurant. Shri Shahani went out from the side entry. The accused then told me that this is just a beginning. He told me that more such consignments are expected to come. He told me that for my assistance in clearing the same he would pay me bigger amounts. He told me "Thumbi Khau Hambi Khayenge."

The extract from the panchnama is as follows :

"Shri C. S. R. Rao was telling them that there were a lot of difficulties since the papers had to pass through several officers. The person on the right hand side of Shri Rao (accused) mentioned about some other officials in the customs and asked about some officials of the customs. Then Rao mentioned the names of Almeida and Vazirani. Then in reply to Rao the persons mentioned that they know Shri Almeida and Vazirani the customs officials. They both then talked something which was not clearly audible to us. Shri Rao said that in the matter 'you have to trust me just as I am trusting you'. He then again added 'it is no use bringing such offer to me unless you trust me.' This say was addressed by Rao to the say of the person who was sitting to his left. A few moments later the man on the left side of Shri Rao got up from the chair and walked out of

A the enclosure of the verandah from the western side went up to the foot-path and came back within a couple of minutes by the same way he had gone. He then stood by the side of the person who was sitting on the right side of Shri Rao and we saw him giving hurriedly a few big envelopes to the person sitting on the right side of Shri Rao. He put them in his pocket at the left hand side of his pant. A little later he passed on the big envelopes after taking them out from his pocket to Shri C. S. R. Rao. Shri Rao took them and put them in his right hand coat pocket outside."

B We see that Rao had mentioned about Almeida and Vazirani and the rumour about appellant having paid them certain amounts. These two names find a mention in the panchnama statement which also clearly says that then they talked something which was not audible to PWs 4 and 5. Then in Rao's evidence he says that he told the appellant that it would mean lack of trust in him and the appellant told him that he had full trust in him. In the panchnama it is said that Rao said "you have to trust me as I am trusting you." The point about trusting each other could be understood only if Rao's evidence is correct. There is no other explanation. Then Rao says that the accused asked Shahani to go out and to get the packets from Madanlal and Shahani went out from the side entry. In the panchnama it is mentioned that a few moments later the man on the left side of Shri Rao (Shahani) got up from the chair and walked out of the enclosure of the verandah from the western side, went up to the foot path and came back. We are satisfied that on the substantial question as to what happened there is really no contradiction between the evidence of Rao and the panchnama statement as well as the evidence of the panch witnesses. We find it difficult to accept the case on behalf of the appellant that all that he did say was to ask Shahani to get the papers and that he found that the envelopes he brought contained currency notes when the police came in and took them from Rao. The reaction of the appellant when this happened was not that of an innocent person in such a situation. He would have burst out and abused Shahani. He would have come out with his case then and there. It is difficult to believe the appellant's statement that when he asked Shahani to give Rao the papers in regard to the two consignments Shahani said he had got them outside and he would fetch them and he went out and brought two envelopes which were later found to contain currency notes. He does not explain how the papers happened to be outside and how they could not be either with Shahani or with himself when they were inside the restaurant. The envelopes must have been with somebody outside. It must be Madanlal. This is also consistent with Rao's evidence that shows that the appellant was trying to see if he could postpone the payment till the consignments were cleared. We agree with the conclusion of the courts below that Madanlal was in Bombay on that day and not in Amritsar as was sought to be made out on behalf of the appellant.

H Though in the arguments on behalf of the appellant complete reliance is sought to be placed on the panchas and the panchnama statement, in his statement under s. 342 Cr. P.C. he had said that

both Mr. Rao and Mr. Shahani had cooked the whole matter earlier and made Mr. Jog (D.S.P. of the Special Police Establishment) and the panchas to believe that some bribe was being given to Rao and that all these things have been crammed in the heads of the panchas and they were made to believe that the appellant was going to give bribe to Rao. The whole statement reads as though the panchnama contained something against him. A clever attempt has been made to make it appear that Shahani went out and brought in two envelopes containing currency notes instead of the papers relating to two consignments that appellant expected Shahani to bring. Not being in a position to question the integrity of PWs 4 and 5 or the truth of their evidence an attempt has been made on behalf of the appellant to sail as close as possible to their evidence and to give just a simple twist to make it appear that the appellant was innocent. In addition to the fact that the appellant's reaction was not that of an innocent man falsely accused of giving a bribe we do not believe, as we said earlier that Rao had sufficient motive to trap the appellant by either himself producing the money or to get it from any of the appellant's enemies. We are not able to find any reason to believe that anybody had sufficient enmity with appellant to try to falsely foist a case against him and risk Rs. 5000/- in the process. We are satisfied that the conclusion arrived at by both the courts below about the appellant's guilt is correct and it has been established beyond all reasonable doubt.

The only question that remains is the question of sentence. The learned Judge of the High Court has reduced the sentence of one year's imprisonment awarded by the Special Judge to one of six months on the ground that the appellant paid the bribe only in order to avoid harassment. Even if we accept this conclusion we do not consider that the imprisonment should be reduced below six months to which he reduced it. But we are of opinion that there was no harassment as the facts set out earlier would amply bear out. Nor can we agree with the argument advanced on behalf of the appellant that Rao's evidence to the effect that the appellant asked him whether he would be ready to accept money after the consignment was cleared shows that he had reconsidered his decision of bribing Rao and wanted to turn over a new leaf. What appellant was trying to do was really to try to have the cake and eat it too. We do not consider that this is a case like the one in *Ramjanani Singh v. Bihar State*⁽¹⁾ of a person who had decided finally and firmly not to bribe and where it could be said that he was deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law by those who were the guardians and keepers of the law.

The appeal is dismissed.

P.B.R.

Appeal dismissed.

(1) A. I. R. 1956 S. C. 643.