

THE STATE

v.

HIRALAL G. KOTHARI AND OTHERS

(JAFER IMAM, J. L. KAPUR, and K. N. WANCHOO, JJ.)

1959

November 30.

Criminal Law—Pardon—Conspiracy and allied offences—Tender of pardon of approver for main offence—Separate trial of other accused for subsidiary offence—Examination of approver as such for subsidiary offence—Legality—Code of Criminal Procedure, 1898, (Act V of 1898), ss. 339, 377(1).

On March 9, 1956, a conspiracy to divulge the budget proposals on receiving valuable consideration was discovered and a case was registered under s. 165A of the Indian Penal Code, s. 5(2) of the Prevention of Corruption Act, 1947, s. 5 of the Official Secrets Act, 1923, and s. 120B of the Indian Penal Code. Investigation started on March 10, 1956, and thereafter pardon was tendered to M by the Additional District Magistrate under s. 337 of the Code of Criminal Procedure. Owing to technical legal difficulties a complaint under s. 5 of the Official Secrets Act read with s. 120B of the Indian Penal Code was filed against the persons involved and proceedings began before a magistrate on this complaint. In the course of these proceedings the prosecution wanted to examine M as an approver, but the accused persons objected that as the proceedings before the magistrate were only under s. 5 of the Official Secrets Act read with s. 120B of the Indian Penal Code and as no pardon could be tendered under s. 337 of the Code of Criminal Procedure for these offences, M could not be treated as an approver but could be examined only as an ordinary witness. It was contended for the prosecution that as the person to whom pardon was tendered was expected to tell the whole truth including details of other subsidiary offences committed in the course of the commission of the offence for which pardon was tendered, such pardon must be held to include the subsidiary offences though not of the nature mentioned in s. 377(1), and therefore M could be considered as an approver in the present proceedings.

Held, that a pardon under s. 377(1) of the Code of Criminal Procedure could be tendered only with respect to the offences mentioned therein and that as s. 5 of the Official Secrets Act read with s. 120B of the Indian Penal Code was not covered by the words of s. 377(1) no pardon could be granted for an offence of this nature. Consequently, as the proceedings before the magistrate were only with respect to these offences, M could not be treated as an approver for the purpose of these proceedings.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeals Nos. 25 to 27 of 1958.

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Appeals from the judgment and order dated June 25, 1957, of the Punjab High Court, in Criminal Revisions Nos. 184-D, 185-D and 186-D of 1956, arising out of the judgment and order dated October 23, 1956, of the Sessions Judge, Delhi, in Criminal Revision Applications Nos. 249, 250 and 251 of 1956.

Bipin Behari Lal and *R. H. Dhebar*, for the appellant.

G. C. Mathur and *I. N. Shroff*, for the respondent in Cr. A. No. 25 of 1958.

A. G. Ratnaparkhi, for the respondent in Cr. A. No. 26 of 1958.

Respondent in Cr. A. No. 27 of 1959 did not appear.

1959. November 30. The Judgment of the Court was delivered by

Wanchoo J.

WANCHOO J.—These three appeals arise out of three certificates granted by the Punjab High Court in a criminal matter. They will be dealt with together as the point raised in them is common. The brief facts necessary for the purpose are these: There is a Government Printing Press at Rashtrapati Bhavan known as Rashtrapati Bhavan Printing Press which is located in the President's estate in New Delhi. Jacobs was the General Foreman of this Press. Every year the budget proposals are printed at this Press under the supervision of Jacobs. As usual, Jacobs supervised the printing of budget proposals in his official capacity in February 1955 also. It appears that Jacobs entered into a conspiracy to divulge the budget proposals on receiving valuable consideration for the same. Consequently the proposals were divulged to D. P. Chadda and were passed on to certain businessmen of Bombay, including Nandlal More and Hiralal G. Kothari through one A. L. Mehra. All this was done against the provisions of the Official Secrets Act, No. XIX of 1923. Further an offence was committed under the Prevention of Corruption Act, No. II of 1947, also inasmuch as money was paid to Jacobs for divulging the budget proposals. The same thing happened in February 1956, with respect to the

budget proposals for 1956-57. This was discovered on March 9, 1956, and a case was registered under s. 165-A of the Indian Penal Code, s. 5(2) of the Prevention of Corruption Act, s. 5 of the Official Secrets Act and s. 120-B of the Indian Penal Code and investigation started on March 10, 1956. Thereafter, pardon was tendered to A.L. Mehra by the Additional District Magistrate on March 23, 1956, under s. 337 of the Code of Criminal Procedure. The four offences mentioned above were specified in the order of the Additional District Magistrate tendering pardon to Mehra. Thereafter owing to technical legal difficulties a complaint under s. 5 of the Official Secrets Act read with s. 120-B of the Indian Penal Code was filed against the persons involved and it was stated in that complaint that proceedings with the respect to the charge under s. 5(2) of the Prevention of Corruption Act would be taken separately. Proceedings then began before a magistrate on this complaint. It may be mentioned that no proceedings have yet started insofar as the offences under s. 5(2) of the Prevention of Corruption Act and s. 165-A of the Indian Penal Code are concerned.

In the course of these proceedings before the magistrate, the prosecution wanted to examine Mehra as an approver. Thereupon the accused persons objected that as the proceedings before the magistrate were only under s. 5 of the Official Secrets Act and s. 120-B of the Indian Penal Code, Mehra could not be examined as an approver and in consequence the case could not be committed to the Court of Session but should be disposed of by the magistrate himself. The magistrate held that Mehra could be treated as an approver and proceedings before him were therefore in the nature of commitment proceedings. Thereupon there was a revision to the Sessions Judge who took the view that as the proceedings before the magistrate were under s. 5 of the Official Secrets Act read with s. 120-B of the Indian Penal Code and as no pardon could be tendered under s. 337 of the Code of Criminal Procedure for these offences, Mehra could not be treated as an approver and had to be examined as an

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ordinary witness and the proceedings must be held to be trial proceedings before the magistrate and not commitment proceedings. He therefore recommended to the High Court that the order of the magistrate be set aside.

The High court upheld the view of the Sessions Judge and ordered accordingly. It granted certificates under Art. 134(1)(c) of the Constitution; and that is how these three appeals have been filed by the State before us.

The only question that has been urged before us is that the view of the magistrate is correct and Mehra could be treated as an approver and examined as such for the purposes of the proceedings before him. The question whether the case should be committed to the Court of Session does not survive now as we are told that one of the accused has asked for trial by the Court of Session as provided under s. 13(2) of the Official Secrets Act. The High Court examined s. 337 of the Code of Criminal Procedure and came to the conclusion that a pardon under that section could only be tendered with respect to certain offences mentioned therein. It was further of the view that as s. 5 of the Official Secrets Act read with s. 120-B of the Indian Penal Code was not covered by the words of s. 337(1) and as the proceedings before the magistrate were only with respect to these offences, Mehra could not be treated as an approver, to whom pardon had been tendered, for the purpose of these proceedings.

A mere perusal of s. 337 of the Code of Criminal Procedure shows that the view of the High Court is correct. Section 337(1) provides for tender of a pardon in respect of the following offences, namely—

(i) Any offence triable exclusively by the High Court or Court of Session;

(ii) Any offence punishable with imprisonment which may extend to seven years;

(iii) Any offence under any of the following sections of the Indian Penal Code: 161, 165, 165-A, 216-A, 369, 401, 435 and 477-A.

Thus pardon can only be tendered with respect to an offence which falls in one of these categories. It is not disputed that an offence under s. 5 of the Official Secrets Act read with s. 120-B of the Indian Penal Code does not fall within any of these categories. So if the proceedings were with respect only to an offence under s. 5 of the Official Secrets Act read with s. 120-B of the Indian Penal Code, s. 337 of the Code of Criminal Procedure would not apply and no pardon could be tendered to any person. It is urged, however, that s. 337(1) contemplates tender of a pardon on condition of the person pardoned making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof; and this means that the person to whom pardon is tendered is expected to tell the whole truth including details of any other subsidiary offence which might have been committed in the course of the commission of the offence for which pardon is tendered and therefore the pardon so tendered must be held to include the subsidiary offence, even though, if the subsidiary offence alone were committed and were not of the nature mentioned in s. 337(i), no pardon could have been tendered for the same. Reliance in this connection is placed also on s. 339 of the Code of Criminal Procedure, which provides that where any person who has accepted pardon either by wilfully concealing anything essential or by giving false evidence, does not comply with the condition on which the tender was made, he may be tried for the offence in respect of which the pardon was tendered or for any other offence of which he appears to have been guilty in connection with the same matter. It is said that the specific provision for trial for any other offence which might have been committed in connection with the same matter in s. 339 shows that the pardon would cover the other offence also even though it may not be an offence for which the pardon was and could be tendered.

We are of opinion that no such inference could be drawn from the use of these words in s. 339, for that

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section deals with a different contingency altogether, namely, whether the conditions of the pardon had been complied with. It is to be remembered that a pardon tendered under s. 337 is a protection from prosecution. Failure to comply with the conditions on which the pardon is tendered removes that protection. All that s. 339 says, provided the requisite certificate under that section is given by the Public Prosecutor, is that the person to whom the pardon is tendered can be prosecuted for the offence for which the pardon was tendered as also any other offence of which he appears to be guilty *in connection with the same matter*. This would be just the same as if s. 339 merely stated that on failure to comply with the conditions of the pardon such pardon would be forfeited. The words of s. 339 therefore are of no help in construing s. 337 and we must look to the words of 337 in deciding whether a pardon could be tendered for an offence under s. 5 of the Official Secrets Act read with s. 120-B of the Indian Penal Code. The fact that in the application in which the police requested the Additional District Magistrate for tender of pardon or in the order of the Additional District Magistrate tendering pardon, s. 5 of the Official Secrets Act was mentioned along with other offences for which pardon could be tendered would not mean that a pardon could be tendered for an offence under that Act if under the law as provided in s. 337(1) no pardon could be tendered for an offence under s. 5 of the Official Secrets Act. As we read s. 337(1), it is to our mind perfectly clear that pardon can only be tendered under that provision with respect to the three categories of offences mentioned therein and already indicated above and none other. As s. 5 of the Official Secrets Act read with s. 120-B of the Indian Penal Code does not fall within any of these categories no pardon can be tendered with respect to that offence. Therefore, Mehra to whom pardon has been tendered, could not be examined as an approver in the proceedings which are concerned only with an offence under s. 5 of the Official Secrets Act read with s. 120-B of the Indian Penal Code.

Learned counsel for the appellant drew our attention to three cases in support of the view that a pardon under s. 337(1) could be tendered not only for the offences of the kind enumerated therein but also other offences which might be committed in the course of the commission of the offences enumerated therein but which might not be within the terms of s. 337(1). These cases are: *Queen-Empress v. Ganga Charan* (1); *Harumal Parmanand v. Emperor* (2); and *Shiam Sunder v. Emperor* (3). These cases however refer to different circumstances altogether and were not concerned with the interpretation of s. 337(1) of the Code of Criminal Procedure. In all these cases the question that arose before the courts was whether an approver who was prosecuted under s. 339 for certain offences could be or should be so prosecuted. They also turned on the terms of the pardon granted in those particular cases. It was there held that where a question arose how far a pardon would protect an approver, it should not be treated in a narrow spirit, bearing in mind that in countenancing tender of pardons to accomplices the law does not invite a cramped and constrained statement by the approver but requires a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence or offences as to which he gave evidence. The considerations which apply when a trial is taking place under s. 339 of the Code of Criminal Procedure are entirely different. The proviso to s. 339 shows that at his trial, an approver is entitled to plead that he has complied with the conditions upon which tender of pardon was made and if he succeeds in proving that he has complied with the conditions upon which the tender was made he is protected from prosecution with respect to all offences which appear to have been committed in connection with the matter giving rise to the offence for which pardon was tendered. These three cases really turn on the question whether the accused had complied with the conditions upon which the pardon was tendered to him and it was held that he had so complied.

(1) I.L.R. 11 All. 79.

(2) A.I.R. 1915 Sind 43.

(3) A.I.R. 1921 All. 234.

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In those circumstances, the trial under s. 339 was held to be bad. We are not concerned in the present case with s. 339. What we have to decide is whether a pardon under s. 337(1) of the Code of Criminal Procedure can be granted in the case of an offence under s. 5 of the Official Secrets Act read with s. 120-B of the Indian Penal Code. To that there can be only one answer on the terms of s. 337(1), namely, that no pardon can be granted for an offence of this nature. Therefore, as the present proceedings before the magistrate are only for an offence under s. 5 of the Official Secrets Act read with s. 120-B of the Indian Penal Code, Mehra cannot be examined as an approver in that court. There is no force in these appeals and they are hereby dismissed.

Appeals dismissed.

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December 2

CHATURBHAI M. PATEL

v.

THE UNION OF INDIA AND OTHERS

(JAFER IMAM, S. K. DAS, J. L. KAPUR, A. K. SARKAR,
and M. HIDAYATULLAH, JJ.)

Legislative Competence—Validity of enactment—Competence of Central Legislature—Levy of excise duty on tobacco—Pith and substance of legislation—Central Excises and Salt Act, 1944 (I of 1944), ss. 6, 8, Rules—Government of India Act, 1935 (26 Geo. V. Ch. 2), s. 100, Sch. 7, List I, Entry 45, List II, Entries 27, 29.

The petitioner who was doing business in tobacco was charged with the contravention of Rules 151(C) and 226 of the Central Excise Rules, 1944, framed under the Central Excises and Salt Act, 1944. The Collector finding the charges to be proved ordered confiscation of the goods found in the petitioner's warehouse and levied duty thereon in lieu of confiscation and also imposed a penalty of Rs. 2,000. The petitioner challenged the validity of the orders on the grounds, *inter alia*, that ss. 6 and 8 of the Act and the Rules made thereunder were beyond the legislative competence of the Central legislature in view of the fact that though the provisions of the Act which provided for the levy of excise duties might fall within item 45 of List I read with s. 100 of the Government of India Act, 1935, the Act in question would also be covered by items 27 and 29, of List II, as the possession and trade in tobacco were also regulated, and would, to that extent, be *ultra vires*.