
(1915) 02 CAL CK 0027
In the Calcutta High Court

Amritalal Hazra and Others

APPELLANT

Vs

Emperor.
 Superintendent and Remembrancer of Legal
Affairs Vs Khagendra Nath Chowdhury and Others

RESPONDENT

Date of Decision : 25-02-1915

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 494
Evidence Act, 1872 — Section 10
Explosive Substances Act, 1908 — Section 4, 5, 6
Penal Code, 1860 (IPC) — Section 120B

Citation : 29 Ind. Cas. 513

Hon'ble Judges : Richardson, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

Mookerjee, J.—On the 21st November 1913, during the early hours of the morning, in execution of a warrant issued by the Deputy Commissioner of Sylhet, a search was made of a room, rented and occupied by one Sasankasekhar Hazra, alias Amritalal Hazra, at 296-1, Upper Circular Road, in the eastern--suburbs of Calcutta. The search warrant authorised the Commissioner of Police to search the premises for explosives, letters, and documents in connection with a bomb outrage committed at Moulvi Bazar on the 27th March 1913. At the search, the Police arrested Sasankasekhar Hazra as also three other persons, Dinesh Chandra Das Gupta, Chandrasekhar De and Sarada Charan Guha, who were found asleep inside the room. The Police found in the room various articles and papers, and amongst others, a tobacco-tin fitted with three iron discs (two inside and one outside) and four iron clamps, another tin of similar size, four clamps made to fit the second tin, and other discs and clamps, finished and unfinished. According to the prosecution, these articles were made for use as the envelope or shell of a lethal bomb. On the 23rd November, J.N. Ghose, the Police officer to whom the warrant had been endorsed for execution, gave the first information, in which it was alleged that the four persons arrested had committed offences under Sections 4 and 5 of the Explosive Substances Act, 1908. On the 26th November, the District Magistrate transferred the case for disposal to Mr Veirh.

On the 6th December, one Kalipada Ghose, alias Upen-dralal Rai Chaudhuri, was arrested in College Street with ten copies of a seditious leaflet called Liberty leaflet, of which two were on pink paper and the other eight on white paper. On the 26th January 1914, one Khagendianath Chaudhuri, alias Sures Chandra Chaudhuri, was arrested in a house at Baranagore in the northern suburbs of Calcutta. Meanwhile, search warrants had been executed in various places and information gathered as to the antecedents of the persons in custody. The original proceedings, commenced on the 23rd November, were then withdrawn by the Public Prosecutor u/s 494, Criminal Procedure Code, and the four persons arrested on the 21st November were discharged on the 19th January 1914. At the same time, a fresh complaint was made in which Sasanka, Dines, Sarada, Chandrasekhar Kalipada and Khagen, along with one Hiranmoy Banerji, who had been, in the interval, arrested at Benares, were charged under Sections 4, 5 and 6 of the Explosive Substances Act as also u/s 120B of the Indian Penal Code. The consent of the Local Government required by Section 7 of the Explosive Substances Act, 1908, was also duly obtained. The Magistrate held that the case against Hiranmoy Banerji had not been established and discharged him. The other six accused were committed to take their trial in the Court of Session. The first charge against them was to the effect that Sasanka, Dines, Sarada and Chandrasekhar, on or about the 21st November 1913, at 296-1, Upper Circular Road, had in their possession or under their control explosive substances, to wit, Exhibits I, V, VI, VII, and other exhibits, all materials for the creation of bombs, with intent by means thereof to endanger life, and had thereby committed an offence punishable u/s 4 (1892) 2 Q.B. 519 : 61 L.J.M.C. 181 : 5 Rule 10 : 67 L.T. 201 : 41 W.R. 144 : 17 Cox, C.C. 542 : 56 J.P. 712 of the Explosive Substances Act, 1908. The second charge was to the effect that Sasanka, Dines, Sarada, Chandrasekhar, Kalipada, and Khagendra, between March 1911 and 21st November 1913, at 296-1, Upper Circular Road, and other places in British India, had conspired, with one another and other persons, to wit, Biroja, Satischandra Chakrabarti, Bhupendranath Sen, Praphulla-ranjan Gupta, Jogeschandra Roy, Nirmal Kanta Roy and other persons, to make and keep explosive substances, with intent by means thereof to endanger life or enable other persons to endanger life, an offence punishable u/s 4(6) of the Explosive Substances Act, 1908, and had thereby committed an offence punishable u/s 120B of the Indian Penal Code. The Sessions Judge, after an elaborate trial with the aid of Assessors, with whose opinion he disagreed, except in the case of Khagendra, came to the conclusion that Sasanka, Dines, Sarada and Chandrasekhar were guilty u/s 4 of Act VI of 1908, and that Sasanka, Kalipada, Dines, Sarada and Chandrasekhar were guilty u/s 120B, Indian Penal Code. u/s 4 of Act VI of 1908, he sentenced Sasanka to transportation for fifteen years and each of the other three, Dines, Sarada and Chandrasekhar, to transportation for ten years. u/s 120B, Indian Penal Code, he sentenced Sasanka, Kalipada, Dines, Sarada and Chandrasekhar each to transportation for ten years. He further directed the sentences under the two sections to run concurrently. As regards Khagendra he accepted the opinions of the Assessors and acquitted him. Against the order of

the Sessions Judge, five appeals have been preferred, one by each of the accused persons who has been convicted. Another appeal has been preferred by the Crown against the acquittal of Khagendra. A Rule has also been obtained by the Crown for enhancement of the sentences upon the five accused who have been convicted by the Sessions Judge. The appeals and the Rule have been exhaustively argued in this Court during 32 days, and the questions of law and fact which arise therein have been discussed from every conceivable point of view. Since the close of the arguments, we have again minutely scrutinised the papers on the record, and we now proceed to record our decision.

2. On behalf of the five accused who have been convicted, the order of the Sessions Judge has been assailed as contrary to law and to the evidence on the record. We shall first examine the grounds upon which the legality of the trial has been called in question. But before we do so, it is necessary to set out the relevant portions of the sections under which the accused have been convicted.

3. Section 4(b) of the Explosive Substances Act, 1908, is in these terms:

Any person who unlawfully and maliciously makes, or has in his possession or under his control, any explosive substance with intent by means thereof to endanger life, or cause serious injury to property in British India, or to enable any other person by means thereof to endanger life or cause serious injury to property in British India, shall, whether any explosion does or does not take place, and whether any injury to person or property has been actually caused or not, be punished with transportation for a term which may extend to twenty years, to which fine may be added, or with imprisonment for a term which may extend to seven years, to which fine may be added.

4. Section 120A, which was introduced into the Indian Penal Code by Act VIII of 1913, is in these terms:

5. "When two or more persons agree to do, or cause to be done, (1) an illegal act, or (1834) 1 A. E. 327 : 3 N.M. 475 : 3 L.J.M.C. 110 : 110 E.R. 1230 : 40 B.R. 304 an act, which is not illegal, by illegal means, such an agreement is designated a criminal conspiracy:

6. "Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy, unless some act, besides the agreement, is done by one or more parties to such agreement in pursuance thereof.

Explanation: It is immaterial whether the illegal act is the ultimate" object of such agreement, or is merely incidental to that object.

7. Section 120B provides the punishment for criminal conspiracy.

8. In the first place, it has been argued on behalf of the accused, that the charge u/s 4 (6) of Act VI of 1908 is materially defective, inasmuch as it omits to state, first, that the accused were in possession of explosive substances or had them under their control, unlawfully and maliciously", and secondly, that it was the

intent of the accused to endanger life in British India." In our opinion, the defects in this charge have not vitiated the trial and conviction, and that the case is covered by Section 225 and by Clause (a) of Section 537, Criminal Procedure Code. It is worthy of note that the objection was not taken before the Sessions Judge, and regard must be had to this circumstance to determine whether the omissions mentioned have in fact occasioned a failure of justice. An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, for, unless he has this knowledge, he may be seriously prejudiced in his defence. In the present case, the law and the section of the law against which the offence is alleged to have been committed, were specifically mentioned in the charge, as required by Clause (1844) 11 C. F. 155 : 9 Jur. 25 : 1 Cox, C.C. 413 : 5 St. Tr. (N.S.) 1 : 7 Ir. L.R. 261 : 8 E.R. 106 : 65 R.R. 59 of Section 221, Criminal Procedure Code; and under Clause (1788) 2 T.R. 581 : 1 Le. C.C. 487 : 2 East P.C. 837 : 1 R.R. 545 : 100 E.B. 312 the fact that the charge was made was equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case. The accused fully understood the nature of the offence with which they were charged and had clearly not been prejudiced by the omissions. The view we take is in accord with that adopted in *Reg. v. Munslow* (1895) 1 Q.B. 758 : 64 L.J.M.C. 138 : 15 B. 192 : 72 L.T. 301 : 43 W.R. 495 : 18 Cox, C.C. 112 where Lord Russell, C.J., observed that it would be a deplorable, if not an absurd, state of the law if such an omission could not be cured by verdict. The first objection must consequently be overruled.

9. In the second place, it has been contended that the charge u/s 120B, Indian Penal Code, is bad, because it does not specify the explosive substance which, it is alleged, the accused had conspired with one another and with other persons to make and keep. The substance of the Argument is that to make and keep explosive substances generally is not an offence, which, it is contended, means, according to Section 4, Clause (b) of the Criminal Procedure Code, an act or omission made punishable by any law for the time being in force," and, according to the second paragraph of Section 40, Indian Penal Code, denotes a thing punishable under that Code or under any special or local law" as defined in Sections 41 and 42. Reference has also been made to Section 10 of the Indian Evidence Act, where the expression is used, two or more persons have conspired together to commit an offence or an actionable wrong." Reliance has been placed in support of the contention of the accused on the decisions in *Bex v. Biers* (1834) 1 A. E. 327 : 3 N. & M. 475 : 3 L.J.M.C. 110 : 110 E.R. 1230 : 40 R.R. 304; *Reg. v. Parker* (1842) 3 Q.B. 292 : 2 G. and D. 709 : 11 L.J.M.C. 102 : 114 E.R. 519; *O'Connell v. Reg.* (1844) 11 Cl. F. 155 : 9 Jur. 25 : 1 Cox, C.C. 413 : 5 St. Tr. (N.S.) 1 : 7 Ir. L.R. 261 : 8 E.R. 1061 : 65 R.R. 59; *Rex v. Mason* (1788) 2 T.R. 581 : 1 Leach C.C. 487 : 2 East P.C. 837 : 1 R.R. 545 : 100 E.R. 312; *Reg. v. Mackenzie* (1892) 2 Q.B. 519 : 61 L.J.M.C. 181 : 5 R. 10 : 67 L.T. 201 : 41 W.R. 144 : 17 Cox, C.C. 542 : 56 J.P. 712. Stress has also been laid upon the cases of *Behari Mahton v. Queen-Empress* 11 C. 106 and *Poresh Nath Sircar v.*

Emperor 33 C. 295 : 2 C.L.J. 516 : 3 Cr. L.J. 153. We are unable to accept as well-founded the contention of the accused that where the illegal act, charged u/s 120B, is the unlawful and malicious possession of explosive substances within the meaning of Section 4 of the Explosive Substances Act, 1908, it is essential to specify in the charge the explosive substances which the accused have conspired to have in their possession or under their control. It is indisputable that a person may be guilty of criminal conspiracy, even though the illegal act which he has agreed to do or caused to be, done, has not been done. As was observed by Cleasby, B. in *Reg. v. Hibbert* (1875) 13 Cox. C.C. 82 conspiracy differs from other charges in this respect, that in other charges the intention to do a criminal act is not a crime of itself, until something is done amounting to the doing or attempting to do some act, to carry out that intention; conspiracy, on the other hand, consists simply in the agreement or confederacy to do some act, no matter whether it is done or not. We very often get facts sufficient to establish the guilt of parties to a conspiracy other than acts which have been done in pursuance of it. Baron Cleasby then gives an example: There may be a conspiracy to set fire to London at different places at once, and that conspiracy may be fully proved, though no part of London has in fact been set on fire, inasmuch as the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means" : *Qninn v. Lenthcm* (1901) A.C. 495 : 70 L.J.P.C. 76 : 85 L.T. 289 : 50 W.R. 139 : 65 J.P. 708 : 17 T.L.R. 749. Reference may also be made to the decision in *Reg. v. Most* (1881) 7 Q.B.D. 244 : 14 Cox C.C. 5. 3 : 50 L.J.M. C 1 13 : 44 L. T, 823 : 29 W.R. 758 : 45 J.P. 696 where it was ruled that the accused who had published an inflammatory article in a newspaper not addressed to any individual, in which he recommended the murder not of any specified individual but of crowned or uncrowned heads of States from Constantinople to Washington, was guilty of misdemeanour u/s 4 of 24 and 25 Vict., c. 100. If the contention of the accused in the case before us were well-founded, there could be no prosecution for a conspiracy to commit murders or dacoities till a murder or a dacoity had been actually committed in pursuance of the conspiracy, though it might be conclusively proved that the conspiracy had been formed, even before a single overt act was done. The gist of the offence is in the conspiracy or agreement, and if the offence goes no further, it may not be possible to say what murders or dacoities it is proposed to commit, or, in a case such as that before us, what particular explosives the accused intend to obtain j See *Russell on Grimes*, 1909, Volume J, page 187, footnote (g)]. The decisions to which our attention has been drawn do not assist the contention of the accused. In *Rex v. Biers* (1834) 1 A. & E. 327 : 3 N. & M. 475 : 3 L.J.M.C. 110 : 110 E.R. 1230 : 40 R.R. 304 the objection to the indictment was upheld on the ground that it misrecited an Act of Parliament (2 Hawkins P.C. Bk. II. Chap. XXV," Section 104). *Rex v. Mason* (1788) 2 T.R. 581 : 1 Leach, C.C. 487 : 2 East P.C. 837 : 1 R.R. 545 : 100 E.R. 312 is an authority for the proposition that an indictment for obtaining proper by a false pretence must not only expressly allege that the pretence was, false but also set out the false pretence sufficiently : *Reg. v. Cates* (1855) Dears C.C. 459 : 3 Com. L.R. 691 :

24 L.J.M.C. 123 : 1 Jur. (S.S.) 429 : 3 W.R. 402 : 6 Cix, C. C 540; Reg, v. Henshaw (1864) L. C. 444 : 33 L.J.M.C. 132 : 10 Jur. (N.S.) 595 : 10 L.T. 428 : 12 W.R. 751 : 9 Cox C.C. 472. But it is worthy of note that although an indictment, which omits to set out the particular false pretence alleged, is held bad where the objection is taken before verdict, if no such objection is taken and there is a verdict of guilty on such an indictment, the defect is deemed cured by verdict: Reg. v. Goldsmith (1873) 2 C.C.R. 74 : 42 L.J.M.C. 94 : 28 L.T. 881 : 21 W.R. 791 : 12 Cox, C.C. 479; Heymann v. Reg. (1873) 8 Q.B. 102 : 28 L.T. 162 : 21 W.R. 357 : 12 Cox, C.C. 383. It is further well-settled that it is not necessary to set out the false pretences in an indictment for a conspiracy to obtain goods by false pretences or for receiving goods obtained by false pretences; in other words, that the indictment in all cases of conspiracy must, in the first place, charge the conspiracy, but that in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed Rex v. Gill (1818) 2 B. A 204 : 20 R.R. 407 : 106 E.R. 34; Reg. v. Ken-rick (1843) 5 Q. B 49; D. M. 208 : 12 L.J.M.C. 133 : 7 Jur. 848 : 114 K.R. 1165; Reg. v. Blake (814) 6Q.B. 126 : 13 L.J.M.C. 131 : 8 Jur. 145 : 66 R.R. 311 : 115 E.R. 49; Sydserff v. Reg. (1847) 11 Q.B. 245 : 12 Jur. 418 : 116 E.R. 467; Reg. v. Gompertz (1846) 9 Q.B. 824 : 2 Cox C.C.145 : 16 L.J.Q.B. 121 : 11 Jur. 204 : 72 R.R. 458 : 115 E.R. 1492 Reg. v. Aspinall (1876) 2 Q B.D.48 : 46 L.S.M.C. 145 : 36 L.T. 297 : 25 W.R. 283 : 13 Cox. C.C. 563; Taylor v. Reg. (1895) 1 Q.B. 25 : 64 L.J.M.C. 11 : 15 Rule 86 : 71 L.T. 571 : 43 W. R. 24 : 18 Cox, C.C. 45 B. Reg, v. Parker (1842) 3 Q.B. 292 : 2 G. D. 709 : 11 L.J.M.C. 102 : 114 E.R. 519 is an authority only for the proposition that where the indictment charged the accused with conspiracy to obtain by false pretences divers goods and merchandise, the prosecutor was bound to state whose the goods and merchandise were, as otherwise he might make an indefinite statement and lie in wait for whatever might come out in the evidence. In O'Connell v. Reg. (1844) 11 Cl. F. 155: 9 Jur. 25 : 1 Cox, C.C. 413 : 5 St. Tr. (N.S.) 1 : 7 Ir. L.R. 261 : 8 E.R. 1061 : 65 R.R. 59 Tindal, C.J., observed as follows: "The crime of conspiracy is complete, if two? or more than two, should agree to do an illegal thing, that is, to effect something in itself unlawful, or to effect by unlawful means something which in itself may be indifferent or even lawful ... It has accordingly been always held to be the law, that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not." The Lord Chief Justice then proceeded to state, with reference to two of the counts to which exception had been taken, that in the opinion of the Judges those counts did not state the illegal purpose and design of the agreement entered into between the defendants with such proper and sufficient certainty, as to lead to the necessary conclusion that it was an agreement to do an act in violation of the law. The act imputed to the defendants was intimidation", and with reference thereto, the Lord Chief Justice observed that as the word was not a technical term, not *vocabulum artis*, having a necessary meaning in a bad sense, it was essential to make clear from the context what species of fear was intended or

upon whom such fear was intended to operate. This view was confirmed by the House of Lords. Lord Campbell observed that the counts of the indictment which stated generally conspiracies to effect changes in the Government and repeal of the legislative union by intimidation and display of physical force were bad, because they gave the defendants no information of the specific offences which they had to answer. In *Meg. v. Mackenzie* (1892) 2 Q.B. 519 : 61 L.J.M.C. 181 : 5 R. 10 : 67 L.T. 201 : 41 W.R. 144 : 17 Cox. C.C. 542 : 56 J.P. 712 where a person was prosecuted u/s 7, 88 and 39 Vict., Chap. 6, for intimidating another person with a view to compel him to abstain from doing an act which that other person had a legal right to do, it was held that the conviction was bad, as the summons did not set out the particular acts alleged to be illegal. The cases reviewed are clearly distinguishable and do not support the contention that when the illegal act contemplated by Section 120A, Indian Penal Code, is the possession of explosive substances u/s 4 (b) of the Explosive Substances Act, 1908, it is essential to specify in the charge the particular substance which the accused have conspired to make or have in their possession or under their control. There is, further, plainly no analogy between the case before us and the class of cases of which *Behari Mahton v. Queen-Empress* 11 C. 106 and *Poresh Nath Sircar v. Emperor* 33 C. 295 : 2 C.L.J. 516 : 3 Cr. L.J. 153 may be taken as the types, where it has been ruled that the charge in a prosecution for unlawful assembly must specify the common object. We are clearly of opinion that the conspiracy charge is not open to objection on the ground that it does not specify the explosive substances for the preparation or possession whereof the alleged conspiracy was formed. We observe, however, that the charge does not follow the language of Section 4 (6) of Act VI of 1908, and uses the expression "make and keep" explosive substances, while it omits the expression "unlawfully and maliciously" and *British India*. It is a wholesome rule that the Court should adhere to the language of the Statute, as far as practicable, when a charge is drawn up; nothing is gained by a paraphrase, while opportunity is afforded to the accused to take exception to the form of the charge. We hold accordingly that there is no force in the second contention, which must accordingly be overruled.

10. It has been argued, in the third place, that the conspiracy charge u/s 120B, Indian Penal Code, is bad, inasmuch as it assigns a wrong date for the commencement of the period during which the conspiracy charged against the accused lasted. The charge specified the period as contained between March 1911 and the 21st November 1913. It is pointed out that Sections 120A and 120B did not find a place in the Indian Penal Code before the 27th March 1913, when Act VIII of 1913 became law. It is obvious that the period should have been restricted between the dates 27th March and 21st November 1913. u/s 222 (1), Criminal Procedure Code, particulars as to the time of the alleged offence were necessary, and the prosecution should have been careful in this respect. No objection to the charge on this ground was, however, taken at the trial till a very late stage of the proceedings, in fact, only in the course of the final arguments, and the error cannot be deemed to have affected the legality of the trial. No

doubt, the accused cannot be convicted, unless the prosecution establishes that the accused were members of the conspiracy after the 27th March 1913, but this involves an investigation of the merits of the case. The third ground thus turns out to be unsubstantial and must be overruled.

11. In the fourth place, the legality of the trial has been questioned on the ground of misjoinder of charges. The substance of the argument is that while four of the accused persons are charged with an offence u/s 4 (b) of Act VI of 1908, all the six accused are charged with conspiracy u/s 120B, Indian Penal Code, and it is contended that a joint trial of all these persons for the two offences charged is illegal, on the authority of the decision of the Judicial Committee in *Subrahmaniam Ayyar v. King-Emperor* 28 I.A. 257 : 25 M. 61 : 11 M.L.J. 233 : 3 Bom. L.R. 540 : 5 C. W. N. 866 : 2 Weir 271. It cannot be disputed that if misjoinder of charges is established, the trial must be deemed illegal, because held contrary to an express provision of the law relating to the mode of trial. The real question in controversy is, whether there has been a misjoinder of charges in the case before us. On behalf of the accused, it has been contended that the same individual cannot be simultaneously charged with an offence as also with conspiracy to commit that offence, and much less can he be tried jointly with other persons alleged to be his co-conspirators, In support of this view, reliance has been placed upon *King-Emperor v. Tirunial lieddi* 24 M 523 : 11 M.L.J. 241 : 2 Weir 340. This decision is, however, of no real assistance to the accused; it is an authority only for the proposition that a man cannot be cumulatively charged with the commission of an offence as also of abetment by conspiracy or otherwise of the very same offence; it is, besides, a decision given before Section 120B, Indian Penal Code, was enacted. In our opinion, the legality of the trial in the present case must be determined with reference to the language of Section 239 of the Criminal Procedure Code, which, so far as it is relevant to the question before us, is in these terms: when more persons than one are accused of different offences committed in the same transaction, they may be charged or tried together or separately as the Court thinks fit." No useful purpose would be served by an elaborate examination of the judicial decision in which the expression "same transaction" has been interpreted, although reference has been made at the Bar to many of the recent cases on the point: *Queen-Empress v. Fakirapa* 15 B. 491; *Emperor v. Sharufalli* 27 B. 135 : 4 Bom. L.R. 930; *Emperor v. Jethalal Harlochand* 29 B. 449 : 7 Bom. L.R. 527 : 2 Cr. L.J. 480; *Emperor v. Datto Hanmant* 30 B. 49 : 7 Bom. L.R. 633 : 2 Cr L.J. 578. (29) 4 Cr. L.J. 420 : 2 N.L.B. 147; *Emperor v. Hari Ttaot* (29) : *Emperor v. Qanesh iftarayan* 17 Ind. Cas. 705 : 14 Bom. L.R. 972 : 13 Cr. L. 3. 833; *Nga Tha Qyi v. Emperor* 15 Ind. Cas. 485 : 13 Cr. L.J. 485 : 5 Bur. L.T. 101; *Ishar Das v. Emperor* 8 Cr. L. J 75 : 18 P.W.R. 1908 Cr; *Emperor v. Gulam* 8 Cr. L.J. 191 : 1 S.L.R. 73; *Pujin Behary Das. v. Emperor* 16 Ind. Cas. 257 : 15 C.L. 3. 517 : 13 Cr. L, J. 609 : 16 C.W.N. 1105 and *Ghoragudi v. Emperor* 5 Ind Cas. 847 : 33 M. 502 : 7 M.L.T. 299 : 20 M.L. 3. 220 : 11 Cr. h. 3. 258 : (1910) M.W.N. 65. It is not possible to frame a comprehensive formula of universal application to determine

whether two or more acts constitute the same transaction : but circumstances which must bear on the determination of the question in an individual case may be easily indicated : they are, proximity of time, unity or proximity of place, continuity of action and community of purpose or design. To take, one illustration : A and B conspire to cheat X; in pursuance of that, conspiracy and in fulfilment of its object A cheats X on a specific occasion. The position may clearly be maintained that the two different offences of conspiracy to cheat committed by A and B and the offence of cheating committed by A alone, have been committed in the same transaction. This view is in accord with that adopted in two recent decisions of this Court, from which we see no reason to dissent in this respect: Superintendent and Remembrancer of Legal Affairs v. Manmohan Roy 26 Ind. Cas. 307 : 21 C.L.J. 195 : 16 Cr. L.J. 3 : 19 C.W.N. 672 and Marsha Nath Chatterjee v. Emperor 26 Ind. Cas. 313 : 21 Ch. J. 201 : 16 Cr. L.J. 9. We hold accordingly that if A, B and C conspire to make or have in possession or under control an explosive substance within the meaning of the Explosive Substances Act, and if in pursuance of such conspiracy, A makes or has in his possession or under his control an explosive substance, they may, if the Court thinks fit, be charged and tried together u/s 120B, Indian Penal Code, and Section 4 (b) of Act VI of 1908. The fourth ground must accordingly be overruled as unsustainable.

12. The fifth, ground on which the legality of the trial is questioned, is that persons who are, alleged to be conspirators in the charge have not been prosecuted, although their names and addresses were known to the prosecution. Reference has, in this connection, been made to Emperor v. Lalit Mohan (Noni Gopal) 10 Ind. Cas. 582 : 38 C. 559 : 15 C.W.N. 593 : 12 Cr. L.J. 286 where it was ruled by Jenkins, C.J., that in a conspiracy case the accused can be charged with conspiracy with persons unknown, but that if they are charged with conspiracy with persons known, then such persons must be named in the charge. It is not necessary for our present purpose to determine whether the Rule 30 stated is not too widely formulated; but it may be observed that a different view has sometimes been maintained. Thus, in Bex v. Stoddart (1900) 2 Cr. Ap. Rule 217 : 25 T.L.R. 612 : 73 J.P. 348: 53 S.J. 578 the legality of a conviction for conspiracy was questioned on the ground that though the prosecution knew that one Klinge was an alleged conspirator, he was not named in the indictment. In support of this objection, reliance was placed on Bex v. Walker (1812) 3 Camp. 264; Reg. v. Thompson (1851) 16 Q.B. 832 : Dears. C.C. 3 : 20 L.J.M.C. 183 : 17 Jur. 453 : 117 E.R. 1100 and Bex v. Robinson (1817) Holt, 595 but it was overruled by the Court of Criminal Appeal. That judicial opinion on the point has not been quite uniform is obvious from an examination of the cases mentioned, as also Rex v. Deakin (1800) 2 Leach C.C. 862 : 2 East P.C. 653. (44): (1843) 1 CK. 82.; Reg. v. Campbell (1843) 1 C. K. 82; Reg. v. Stroud (1842) 1 C.K. 187 : 2 M.C.C. 270 Reg.v. Caspar (1839) 2 M.C.C. 101.9 C. P. 289 Rex v. Bush (1818) R. R 372; Reg. v. Esdaile (1858) 1 F. F. 213 : 2 East; Pleas of the Crown, 651 : 781 : 1 CCL 213 : Russell on Crimes (1909) 186, 187, 1292, 1478. The question has also been the subject of elaborate discussion in the Courts of the United

States. In *People v. Mather* (1830) 4 Wendell 229 : 21 Am. Dec. 122 the charge of the indictment was of a conspiracy to abduct William Morgan, who was supposed to have revealed the secrets of the Masonic fraternity. The indictment was of Mather alone and the charge of the indictment was that Mather with other persons unknown" had conspired, etc., although it was a fact that many of the other persons were well known. The Court held, on the authority of *Reg. v. Kerne* (1709) Unreported, mentioned in the case of *Rex v. Kinnensley and Moore* (1719) 1 Strange 193: 93 E.R. 467 and Anonymous case (1635) C. C. 380 : 79 E.R. 932 that the indictment against Mather alone was good; there was a conviction and a new trial was denied. Marcy, J., observed : In a charge of conspiracy, it seems no more necessary to specify the names of the defendant's co-adjutors than in an indictment for an assault and battery to name others besides the accused who were concerned in the trespass." The view thus taken in *People v. Mather* (1830) 4 W 229 : 21 Am. Dec. 122 was approved in *People v. Richards* (1885) 67 Cali. 412 : 56 Am. Rep. 716 at p. 722 and *United States v. Miller* (1878) 3 H 553 : 26 F. C. 1255. Let us assume, however, that the strict rule formulated in *Emperor v. Lalit Mohan (Noni Gopal)* 10 Ind. Cas. 582 : 38 C. 559 : 15 C.W.N. 593 : 12 Cr. L.J. 286 is well-founded on principle and is supported by balance of authorities; that rule is clearly of no assistance to the accused in this case. That decision does not show that if all the known co-conspirators named in the charge are not pieced pn their trial, the trial of some without the others is vitiated.. It is, indeed open to the Court to place the co-conspirators on their trial separately: *Rex v. Kinnenely and Moore* (1719) 1 S 193 : 93 E.R. 467; *Bex v. Oxford* (1811) 13 East 411 : 104 E.R. 429 : 12 R.R.386; *Bex v. Nichols* (1742) 13 E 412 : 104 E.R. 429 : 12 R.R. 388; *Reg. v. Ahearne* (1852) 2 I. C.L.R. 381 : 6 C. C.C. 6; *People v. Bichards* (1885) 67 C. 412 : 56 A. R. 716 ; *United States v. Miller* (1843) 1 C.K. 82 : Russell on Crimes, (1909) 149, 180 : 3 Chitty on Criminal Law, 1141; Bishop on New Criminal Procedure, Volume I, Sections 464, 1022, Volume II, Section 225; Mc Clain on Criminal Law, Volume II, Section 981. This might, in certain circumstances, be an obvious advantage to the persons actually placed 6n trial; they would be at liberty, if they so desired, to call the alleged coconspirators as witnesses, a course which could not possibly be adopted, if all the co-conspirators were tried jointly. But it has been argued that if persons are allowed to be named as co-conspirators in the charge and are yet not placed on their trial, there may be an inducement to the prosecution to mention the names of persons as co-conspirators indiscriminately, with a view to let in evidence u/s 10 of the Indian Evidence Act, which would otherwise be inadmissible. This apprehension is, in our opinion, groundless, for whenever evidence is attempted to be made admissible under that section, the defence is entitled to insist on strict compliance with its provisions, namely, upon proof of reasonable ground for belief that the persons named have conspired together. We are unable to hold accordingly that the omission of the prosecution to proceed against the alleged conspirators in this case has vitiated the trial of the other persons. The fifth ground, consequently, fails.

13. The sixth ground on which the legality of the trial has been assailed is that the facts disclosed, if believed, indicate that the accused have committed an offence punishable u/s 121A, Indian Penal Code, and should have been tried accordingly. The contention in substance is that the prosecution has been commenced u/s 120B, Indian Penal Code, and Section 4 (b) of Act VI of 1908, with a view to evade the requirements of Section 196 of the Criminal Procedure Code, compliance wherewith, as was ruled in *Barindra Kumar v. Emperor* 7 Incl. Cas. 369 : 37 C. 467 : 14 C.W.N. 1114 : U O. L.J. 453 is imperative in prosecutions for offences against the State. In our opinion, there is no basis for this contention. No doubt, evidence has been adduced on behalf of the prosecution to show that revolutionary literature was in possession of some of the accused persons; no foundation, however, has been laid to establish that the accused had conspired to commit an offence punishable u/s 121 A. Indian Penal Code. But even if it be assumed that the accused could have been successfully prosecuted u/s 121A, it does not follow that it was obligatory upon the Crown to prosecute them under that section. If the accused have committed an offence u/s 4 (6) of the Explosive Substances Act, 1903, in pursuance of a criminal conspiracy, it is open to the Crown to prosecute them for such offences, irrespective of the question of the ultimate design of the alleged conspiracy. On the other hand, the accused might legitimately contend that the trial should proceed strictly on the lines of the charges framed and that evidence, such as would have been appropriate to support a charge u/s 121A, should not be admitted in the disguise of evidence in support of a prosecution u/s 120B. The sixth ground must thus be overruled as untenable. We shall now proceed to examine the merits of the case.

14. The fundamental question on the merits, which has led to protracted discussion in this Court as in the Court below, relates to the true nature of Exhibits I, V, Vi and VII. On behalf of the prosecution, the view has been maintained that these Exhibits constitute materials for the preparation of bombs, while, on behalf of the accused, the theory has been vigorously supported that these articles were used by Sasanka in experiments towards the construction of a cheap acetylene generator. In support of their position, the prosecution have adduced in evidence specimens of bombs, exploded and unexploded, for instance, the Dalhousie Square bomb, dated the 2nd March 1911, the Midnapore bomb, dated the 13th December 1912, the Delhi bomb thrown at the Viceroy on the 23rd December 1912, the Moulvi Bazar bomb, dated the 27th March 1913, the Lahore bomb, dated the 17th May 1913, the Mymensingh bomb, dated the 30th September 1913, and the Bhadreswar bomb, dated the 31st December 1913. Of these, the bombs mentioned first and last did not explode and are practically intact, although the explosive substances contained therein have been removed; all the other bombs exploded and caused destruction of life. The bombs which have been exhibited are obviously all of the same type, and there is expert testimony to this effect. Colonel Muspratt Williams says that the design of these bombs is the work of one controlling mind not that they had necessarily been

made by one man. He adds that he had never met with a bomb of a similar construction before his examination of the series of bombs exhibited in this case. Major, Turner says that the series of bombs from Dalhousie Square to Bhadreswar all belong to the same family and that he had never before come across this kind of bomb. The system adopted appears to have been to use for the shell of the bomb a tin of the kind in which tobacco, cigarettes, or condensed milk is sold, and with it to use iron discs and iron clamps. Exhibit I is made up of a similar tin, similar discs and similar clamps. Exhibits V and VI taken together make up another complete shell of a bomb, which consists of a tin case with three discs and four clamps. The total aggregates to 2 tins, 11 discs, 8 completed clamps and several others in various stages of preparation. The similarity of these articles to the tins, discs and clamps actually used in the bombs exhibited is remarkable and is calculated to strike the intelligent observer, without the aid of expert testimony. Two points of difference, however, have been emphasised on behalf of the defence. It has been argued, in the first place, that whereas the discs found in the room of Sasanka were made of ordinary iron, the discs used in the bombs exhibited were, in some instances, at least, made of galvanised iron. With reference to this circumstance, it has been contended that discs so made could not be used for the purpose of a bomb, as an explosion would take place as soon as the discs came into contact with picric acid. The obvious answer is that, as in the case of the bombs exhibited, these discs, before they could be used in an actual bomb, would have to be lacquered, and lacquer was in fact found in the room. It may also be pointed out that the inner surface of the tin case itself should, for safety, be protected in the same way as the discs, to avoid the formation of picrate of tin which, according to Calonel Muspratt Williams, is a highly sensitive substance. In the second place it has been argued, that as there is a slight difference in the thickness of the iron used for the discs and clamps found in the room and those used in some of the actual bombs exhibited, the articles suspected could not have been intended for use in the construction of a bomb. There is no force in this contention, for, as Major Turner says, inspite of the fact that some of the parts are lighter, the principle remains the same. After careful examination of the tin cases, discs and clamps found, in the room and a comparison there with of the corresponding parts of actual bombs, we have arrived at the same conclusion as the Sessions Judge, namely, that these articles found in possession of Sasanka were suitable for use as bomb shells. This leads us to the question, whether they could have been intended for innocent use. This inquiry is essential, because it is an elementary rule that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. As Alderson, B., says in: *Reg. v. Hodges* (1838) 2 L. C.C.227 to enable the Jury to bring in a verdict of guilty, it is necessary not only that it should be a rational conviction, but that it should be the only rational conviction which the circumstances would enable them to draw. What, then, is the reasonable hypothesis which has been offered as an explanation of the articles found in possession of Sasanka? The theory he

puts forward for acceptance is that at the suggestion of one Jogendra Nath Datt, he was engaged in experiments for the manufacture of a simple and cheap acetylene gas lamp, which could be used as a substitute for the native kupies, and that Exhibit I was only a part of the generator made by him under instructions from Jogendra Nath Dutt, to whom were due the details of the lamp, namely, the tin, discs, clamps and general construction. This theory, however, is not consistent with the admitted facts of the case. In the first place, if Sasanka was still engaged in experiments for the construction of a cheap lamp, how is it that he was in possession of so many completed discs" and-clamps? In the second place, for the purpose of an experiment in the construction of a lamp, it would be essential to have holes on the side of the shells, into which a tube could be inserted for the passage of the gas generated. But no tube, no burner, no carbide--nothing except a solitary cock--was found in the room; nor was there any hole on the side of either of the two tin cases, in which a tube could have been inserted. In the third place, for the purposes of a lamp, even at the experimental stage a disc with a pinhole through which water could pass slowly from one of the chambers to the other, where the carbide would be kept, would be essential, but none such, was found. On the other hand, several discs were found with large perforations, precisely as in the case of discs used; in actual bombs. In the fourth place, this theory of an acetylene generator, was not suggested till a very late stage of the trial. Mr. Lowmah, who was present at the search, asked Sasanka what Exhibit I was, as soon as it came into his hands. The only answer which Sasanka gave was look and see for yourself." Sasanka was subsequently asked the same question by Mr. Tegart and Mr. Denham, but he declined to give any explanation as to the articles found. More than this, there was not the remotest suggestion that he was engaged in experiments on the construction of an acetylene generator, during the entire period that the trial lasted in the Court of first instance, from the 19th December 1913 to the 21st February 1914. In the fifth place,, if Sasanka, as he stated before the Sessions Judge, was still engaged in experiments at the time of his arrest, how was a model lamp, such as he had in contemplation, prepared and got ready-for use under his instruction while he was under arrest? The generator theory was first, put to Colonel Muspratt Williams in course of cross-examination on the 6th April 1914. Mr. Craig of the Linde Ice Factory, under whom Sasanka had worked in the oxy-acetylene department, was examined on the 24th April 1914, and the generator theory was again put to him in cross-examination. But these experts pronounced the idea to be impracticable. It now transpires from the evidence that, in the interval, on or about the 16th April 1914, a model lamp had been prepared by a tinsmith under instructions from Sasanka conveyed through his Pleader. With the article so constructed, Sasanka gave an exhibit in Court on the 14th May 1914, and demonstrated that the gas, generated by contact of the water with the carbide, when carried through a tube affixed to the side of the tin shell, and ignited with a match, gave a tolerably bright light. The exhibition was repeated in this Court by Counsel for the accused. It is not necessary to discuss whether what was exhibited as a lamp was capable of practical use as such : the

answer would depend upon various factors which have not been investigated for instance, the total cost of construction of the article, the price of the carbide consumed, the time during which the light would burn, the strength of the generator to keep the gas intact, and other like matters. Let us assume, however, that the article exhibited was fit for use as a lamp and negatives the confident opinion to the contrary given by expert witnesses. The question inevitably arises, when did Sasanka complete his investigation, as according to his own statement, he was still in the experimental stage when he was arrested and the articles were seized? The truth is that the theory of a generator is an ingenious after-thought of a well-skilled mechanic employed in the oxy-acetylene department of the Linde Ice Factory. In the sixth place, if Sasanka was engaged in experiments upon the construction of a cheap generator, one might, not unnaturally, have expected to find in his library books and papers on acetylene and on generators; on the other hand, what was found in his possession was seditious literature which advocated the use of bombs for the attainment of revolutionary ideals. Upon a review, then, of all the circumstances of the case, the conclusion appears irresistible that Exhibit I and other exhibits similar to its component parts were intended for use, not as acetylene generators, but as bombshells. The fact that they were kept in a room, apparently without any attempt at secrecy, is explained by the circumstance that they were not calculated to attract the attention, much less to excite the suspicion, of persons not familiar with the mechanism of this particular type of bombs and their construction. We are not unmindful that, as has been strenuously argued by Counsel for the defence, in criminal cases there can be no conviction, unless guilt is established with very great clearness. This presumption of innocence signifies no more than this that if the commission of a crime is directly in issue in any proceeding, it must be proved beyond reasonable doubt; in other words, as Thayer points out, (Evidence at the Common Law, page 558) "the whole doctrine when drawn out is, first, that a person who is charged with a crime must be proved guilty, that according to the ordinary rule of procedure and of legal reasoning, *priesumitur pro reo*, that is, *neganti*, so that the accused stands innocent until he is proved guilty; and second, that this proof of guilt must displace all reasonable doubt." When we test the case in the light of these principles, we feel no doubt that the exhibits in question were intended, for use in the construction of bombs-hells.

15. The next important question of fact, which requires determination, is whether the prosecution has proved the existence of a conspiracy to make explosive substances or to possess them or to have them under control, with intent by means thereof to endanger life or to cause serious injury to property in British India. The question may be appropriately considered at this stage, because it is well settled that in a charge of conspiracy, general evidence of the existence of the conspiracy may first be given, before particular facts are proved to show that one or more of the defendants took part in it: *Rex v. Sidney* (1683) 9 St. Tr. 817 (1820) 2 B.B 284 : 1 St. Tr. (C.S.) 1348 : 22 R.K. 662 : 129 B.K. 976; *Rex v.*

Hunt (1820) 3 B.A 566 : 1 St. Tr. (N.S.) 171 : 9 C. P. 94 : 22 R.R. 485 : 106 E.R. 768; Bex v. Frost(1839) 9 C. P. 129 : 4 St. Tr. (N. s.) 85 : 2 M. O.C. 140; Reg. v. Shellard (1840) 9 C. P. 277; Reg. v. Desmond (1868) 11 C. C.C. 146; Reg. v. Deasy (1883) 15 C. C.C. 334. It is now admitted that Sasanka manufactured and was in possession of the articles which, in concurrence with the Sessions Judge we have found, were intended for use in the manufacture of bombs. The question is, whether Sasanka had confederates or associates in the design and its accomplishment. An answer in the affirmative is the only solution admissible in view of incontestable factSi The circumstance that bombs of this particular type have been used in various places in British India, as widely separated from each other, as Calcutta, Lahore, Delhi, Sylhet, Mymensingh and Midnapore, points to the conclusion that more than one person is engaged in these transactions: the bombs are not the handiwork of one individual though they may be the work of one controlling mind. This inference is confirmed by the contents of at least one revolutionary document found in the room of Sasanka, which advocates the realization of the independence of India with the aid of heroic patriots by bloodshed and assassination. This aspect of the case does not, in our opinion, stand in need of elaboration, and the only substantial question for consideration with regard to each of the accused persons is the extent, if any, to which his complicity in the conspiracy charged and proved has been established beyond reasonable doubt. Before we deal, however, with the cases of the individual accused persons, it is necessary to decide an important question of admissibiliy of evidence, which turns upon the true construction of the terms of Sections 14 and 15 of the Indian Evidence Act.

16. At the trial before the Sessions Judge, evidence was adduced by the prosecution to establish that some of the accused had associated with Pulin Behary Das in 1908 or 1910 and that they had been seen from time to time in the premises of the Dacca Anusilan Samity whereof Pulin Behary Das was the leader. Exception was taken on behalf of the defence to the admissibility of this evidence, but the objection was overruled. The objection has been reiterated in this Court, and we have been invited to pronounce a decision on the point. Evidence has been adduced to prove that Pulin Behary Das and some of his associates were convicted in 1912 of offences u/s 121A of the Indian Penal Code, but no evidence has been given as to the nature of the activities of the Samity, of the diffnrent grades of its members and of the extent of their participation in the ultimate aims and purposes of the society; proof in these respects, could, indeed, be hardly attempted without reproduction of the voluminous evidence adduced at the trial of the Dacca Conspiracy case. The defence, however, have elicited in cross-examination of the prosecution witnesses that the activities of the Anusilan Samity were not known to have been in any way connected with bombs.. In these circumstances, we have to decide whether evidence was admissible to prove that some of the present accused had in 1908 or 1910 associated with Pulin Behary Das and had been seen engaged in lathi play or in other innocent pursuits on the Samity premises. In our opinion, the evidence was

inadmissible and should have been excluded. The prosecution has relied upon Section 14 of the Indian Evidence Act, which is in these terms: Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind, or body, or bodily feeling, is in issue or relevant." But, on behalf of the prosecution, the first explanation to the section, which is absolutely fatal to their argument, has been completely overlooked: "A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question." We invited the Counsel for prosecution to explain how evidence of association with Pulin Behary Das in 1908 or presence in his Samity could have any relevancy with reference to the particular matter in question before us, namely, the intention with which the first four accused had assembled in the room, rented by Sasanka, on the night of the 20th November 1913 : but not even a plausible answer was attempted-Illustrations (i), (j), (o) and (p) also plainly indicate that the contention of the prosecution is not well-founded. Nor can the prosecution derive any assistance from Section 15 of the Indian Evidence Act, which is in these terms: Where there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention," the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant. Reference, however, was, made to a number of judicial decisions which throw light upon the questions in controversy, and particularly to *Makin v. Attorney-General for New South Wales* (1894) A.C. 57 : 17 C. 704 : 63 L.J.P.C. 41 : 6 B. 373 : 69 L.T. 778 : 58 J.P. 148; *Blake v. Albion Life Assurance Society* (1878) 4 C.P.D. 94 : 48 L.J.C.P. 169 : 40 L.T. 211 : 27 W.R. 321; *Reg. v. Rhodes* (1899) 1 Q.B. 77 : 68 L.Q.B. 83 : 79 L.T. 360 : 47 W.B. 121 : 62 J.P. 774; *Bex. v. Wyatt* (1904) 1 K.B. 188 : 73 L.J.K.B. 15 : 52 W.R. 285 : 68 J.P. 31 : 20 Cox, C.C. 462 : 20 T.L.R. 68; *Rex. v. Bond* (1906) 2 K.B. 389 : 75 L.J.K.B. 693 : 95 L.T. 296 : 54 W.R. 586 : 70 J.P. 424 : 21 Cox, C.C. 252 : 22 T.L.R. 633; *Bex. v. Fisher* (1910) 1 K.B. 149 : 79 L.J.K.B. 187 : 102 L.T. Ill : 74 J.P. 104 : 26 T.L.E. 122; *Rex. v. Ellis* (1864) 4 F.F. 346. (79): (1873) 12 C. C.C. 400; *rex. v. Ball* (v1911) A.C. 47 : 80 L.J.K.B. 689 : 104 L.T. 47 : 22 Cox. C.C. 361 : 55 S.J. 190; *Rex. v. Bodley* (1913) 3 K.B. 468 : 82 L.J.K.B. 1070 : 109 L.T. 476 : 77 J.P. 465 : 58 S.J. 51 : 29 T.L.R. 700; *Bex. v. Shellaker* (1914) 1 K.B. 414 : 83 L.J.K.B. 413 : 110 L.T. 351 : 78 J.P. 159 : 24 C. C.C. 86 : 30 T.L.R. 19; *Bex. v. Hunt* (1820) 3 B. A 566 : 1 St. Tr. (N.S.) 171 : 9 C. & P. 94 : 22 R.R. 485 : 106 E.R. 768; *Reg. v. Geering* (1849) 18 L.J.M.C. 215; *Reg. v. Garner* (1864) 4 F. F. 346; *Reg. v. Cotton* v(1873) 12 C. C.C. 400; *Reg. v. Jones* (1877) 14 C. C.C. 3; *Reg. v. Ollis* (1900) 2 Q.B. 758 : 69 L.J.Q.B. 918 : 83 L.T. 251 : 49 W.R. 76 : 64 J.P. 518 : 19 C. C.C. 554 No useful purpose would be served by an analysis of the special facts of each of these cases, but the principles deducible therefrom, as to the law administered in England, may be briefly formulated. Facts similar to but not part of the same transaction as the main fact are not, in general, admissible to prove either the occurrence of the

main fact or the identity of its author. But evidence of similar facts, although in general, inadmissible to prove the main fact or the connection of the parties there with, is receivable after evidence aliunde on these points has been given, to show the state of mind of the parties with regard to such fact; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto. In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake, or other innocent condition of mind, evidence that the defendant has been concerned in a systematic course of conduct of the same specific kind as that in question may be given. To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question, and not of a different character and the acts tendered must also have been proximate in point of time to that in question. It is plain that the principles thus formulated are of no assistance to the prosecution. The view we take is consistent with the decisions in *Empress v. Vyapoory* 6 C. 655 : 8 C.L.E. 197 : 4 S. L.R. 125 *Mankura Pasty.*; *Queen-Empress* 27 C. 139: 4 C.W.N. 97; *Baharuddin Mandal v. Emperor* 22 Ind. Cas. 187 : 18 C.L.J. 578 : 15 Cr.L.J. 43; *Girdhari Lal v. Emperor* 6 Ind. Cas. 964 : 26 P.W.R. 1910 : 11 Cr. L.J. 428 and *Emperor v. Debendra Pershad* 2 Ind. Cas. 601 : 36 C. 573 : 9 C.L.J. 610 : 13 C.W.N. 973 : 10 Cr.L.J. 91. With reference to the case last mentioned, it may be noted that the Court properly declined to follow *Reg. v. Holt* (1860) B. C.C. 280 : 8 C. C.C. 411 : 30 L.T.M.C. 11 : 6 Jur. (N.S.) 1121 : 3 L.T. 310 : 9 W.R. 74 which is no longer authority: *Bex v. Smith* (1905) 20 C. C.C.804 : 92 L.T.208 : 69 3. P. 51. We hold, accordingly, that the evidence of association with Pulin Behari Das and the Anusilan Samity is irrelevant, for the purposes of proof of the conspiracy charged in this case, and should not have been admitted.

17. In the consideration of the individual cases, Sasanka, who has been the central figure in this trial, naturally arrests our attention first. We have already held that he made and was in possession of articles intended for use in the construction of bombs. These articles are manifestly explosive substances" within the meaning of that expression as defined in Section 2 of the Explosive Substances Act, 1908. For the purposes of the Act, the expression "explosive substance" is deemed to include any materials for making any explosive substance, also any apparatus, machine, implement or material used or adapted for causing any explosion in or with any explosive substance, also, any part of any such apparatus, machine or implement. This comprehensive definition obviously covers the articles made by Sasanka and found in his possession. The point for consideration is, whether all the elements essential to sustain a conviction have been established. Here, three points require examination, namely, first, were these articles made and possessed by the accused "unlawfully and maliciously"; secondly, can it be said that the accused intended, " by means thereof," to endanger life or cause serious injury to property, when it is, plain that, in the absence, of explosives, the articles are harmless : and thirdly, is it proved that the articles were intended for use in " British India" with a view to

endanger life or injure property? It is worthy of note that Section 4 of Act VI of 1908, which we are called upon to interpret, substantially reproduces the provisions of Section 3 of 46 and 47 Vict. Chapter III (Explosive Substances Act, 1883).

18. In the solution of the first question, we may, consequently, interpret the expression "unlawfully and maliciously" in the sense in which it is familiarly used in the criminal law of England. The term "unlawfully" as is plainly indicated by Section 5 of the Act VI of 1908, which reproduces the provisions of Section 4 of 46 and 47 Vict., Chapter III, signifies "not for a lawful object." The term "maliciously" signifies "intentionally and without justification or excuse or claim of right," Reg. v. Clemens (1898) 1 Q.B. 556 : 19 C. C.C. 18 : 67 L.J.Q.B. 482 : 78 L.T. 204 : 46 W.R. 416; Miles v. Hutohings (1903) 2 K.B. 714 : 20 C. C.C. 555 : 72 L.J.K.B. 775 : 89 L.T. 420 : 52 W.R. 28. Blackburn, J., observed in Bex., v. Ward (1871) 1 C.C.R 356 : 12 C. C.C. 123 that a man acts maliciously when he wilfully does that which he knows will injure another in person or property. This accords with the statement of Littledale, J., in Macpherson v. Daniels (1829) 10 B. C. 263 : 5 M. and Ry. 251 : 8 L.J. (O.S.) K.B. 14 : 34 R.R. 397 : 109 E.K. 448 (93) : (1825) 4 B. C. 247 : 6 D. 296 : 1 C. P. 475 : 3 L.J. (O.S.) K.B. 203 : 28 R.R. 241 : 107 E.R. 1051. malice, in its legal sense, denotes a wrongful act, done intentionally, without just cause or excuse, " which is identical with the language used by Bayley, J., in the earlier case of Bromage v. Prosser (1825) 4 B.C. 241: 6 D.R. 296 : 1 C. P. 475 : 3 L.J. K.B. 203 : 28 R.R. 241 : 107 E.R. 1051. The dictum of Bayley, J., was quoted with approval by Brett, L.J., in Clark v. Molyneux (1877) 3 Q.B.D. 237 : 47 L.J.Q.B. 230 : 37 L.T. 694 : 26 W.R. 104 : 14 C. C.C. 10 and by Halsbury, L.C. and Lord Watson and Lord Herschell in Allen v. Flood (1898) A.C.); 67 L.J. (J.B. 119 : 77 L.T. 717 : 46 W.R. 258 : 62 J.P. 595; the dictum of Littledale, J., was, on the other hand, adopted by Martin, B., in Johnson v. Emerson (1871) 6 Ex. 329 : 40 L.J. Ex.201 : 25 L.T. 337. Blackburn, J., had the matter again under consideration in Reg. v. Pembliton (1874) 2 C.C.R. 119 : 12 C. C.C. 607 : 43 L.J.M.C. 91 : 30 L.T. 405 : 22 W.R. 553 in which he observed that "where any person wilfully does an act injurious to another, without lawful excuse, he does it maliciously." To the same effect is the language used by Bowen, L. J, in Mogul Steamship Co. v. McGregor (1889) 23 Q.B.D. 598 on appeal (1892) A.C. 25 : 61 L.J.Q.B. 295 : 66 L.T. 1 : 4C W.R. 337 : 7 Asp. M.C. 120 : 56 J.P. 101: "maliciously means and implies an intention to do an act which is wrongful, to the detriment of another : the term wrongful imports, in its turn, the infringement of some right. " Reference may also be made, in this connection, to the definition of the term "maliciously" given in the Laws of England, Edited by Halsbury, Volume IX, page 768, Article 1499, as also to the observations of Lord Coleridge, C.J., in Rex v. Martin (1881) 8 q.B.D. 54 : 14 C. C.C. 633 of Lord Lindley in South Wales Miner's Federation v. Glamorgan Coal Co. (1905) A.C. 239 : 74 L.J.K.B. 525 : 92 L.T. 710 : 53 W.R. 693 : 21 T.L.R. 441 and of Collins, M.R., in Bead v. Friendly Society of Operative Stonemasons (1902) 2 K.B. 732 : 71 L.J.K.B. 994 : 87 L.T. 493 : 51 W.E. 115 :

66 J.P. 822. There can be no question, in the case before us, that the bomb, on the construction whereof Sasanka was engaged, was not intended for a lawful object and there can be no controversy also that his act was intentional.

19. In the solution of the second question, namely, the precise import of the expression by means thereof" we are assisted by a decision in *Bex, v. Charles* (1892) 17 C. C.C. 499 which turned upon the construction of Sections 3, 4 and 9 of 46 and 47 Vict., Chap. 3. It is plain that the explosive substance" mentioned in Section 4(b) of Act VI of 1908 need not be such as to enable a person by means thereof alone, without the aid of other substances, to cause, danger to life or injury to property. If this view were not adopted, the comprehensive definition contained in Section 2 would be nugatory. The term explosive substance" as used in Section 4(b) includes any part of any apparatus, machine, or implement intended to be used of adapted for causing or aiding in causing any explosive substance. The definition is of wide generality, and in the case of *Bex, v. Charles* (1892) 17 C.C.C. 499 it was ruled that any part of a vessel which, when filled with an explosive substance, is adapted for causing an explosion, is itself an explosive substance within the Statute. The articles found with the prisoners in that case were a lead bolt, a fuse, a brass bolt, a screw, a brass casting, and evidence was given to show that these were various parts of a vessel, which, when filled with chlorate of potash or other explosive substance, formed a bomb of a highly dangerous character. The articles found in the present case must, consequently be deemed "explosive substances" within the meaning of the Statute.

20. In the solution of the third point, we have to bear in mind that the evidence on the record furnishes no indication that the activities of the members of the conspiracy extend beyond the limits of British India; all the bombs produced at the trial have been found in different parts of British India. The articles themselves were found in a house in the suburbs of Calcutta. From the circumstances, the inference of fact may legitimately be drawn that the "explosive substances," made and possessed by Sasanka, were intended for use in British India. We must hold accordingly that all the elements necessary to sustain a conviction u/s 4(b) of the Explosive Substances Act, 1908, have been established in the case of Sasanka. The elements essential for a conviction u/s 120B, Indian Penal Code, have also been made out. Consequently, his conviction under both the charges must be upheld.

21. We have next to consider the individual cases of the group of three persons found in the room of Sasanka on the morning of the 21st November 1913, namely, Chandra Sekhar, Sarada and Dinesh. We shall discuss them in the order just named.

22. Chandra Sekhar appears to have made the acquaintance of Sasanka in Dacca for the first time in the year 1908, but there is no evidence to show that any communications had passed between them during the five or six years which had elapsed since then. He is proved to have been employed some time past in the

Kohinoor Printing Press at Chittagong owned by his brother, and the record of his attendance there shows that he had not left Chittagong for at least two years prior to his arrest in Calcutta. On the 15th November 1913, he left Chittagong for Calcutta, on business connected, it is alleged, with the press. He arrived at Calcutta on the evening of the 16th November, and is shown to have spent the night in the house of Babu Khitish Chandra Sen, a Vakil of this Court, who comes from Chittagong. Next day he went to the place of his cousin, Sarada Charan Dey, with whom he remained until the evening of the 20th November; he left that evening at about 8 or 8-30, saying that he was to visit a friend who had invited him. In the interval he is proved to have paid a visit to the firm of Messrs. S.K. Lahiri and Co., in connection with the printing of question papers for the Chittagong Municipal School. He asserts that one of the objects of his visit to Calcutta was to expedite the printing and despatch of these question papers. His second object, he alleges, was to visit the firm of Messrs. Erasmus Jones and Co. for the purchase of fancy cards and coloured paper for his press. It is not shown, however, that he visited the latter firm, and it is doubtful whether he went to their premises; at any rate, it is proved that he did not meet the proprietor of the firm or the head clerk. In the early hours of the morning of the 21st November 1913, when the door was opened by Sasanka in response to the demands of the Police, Chandra Sekhar was one of the three persons found asleep in the room. To account for his presence in the room, he alleges that on 18th or 19th November, he had met Sasanka (whom he knew by his real name Amrita Lal) at the Ram Krishna Book Depot, where he himself had gone to purchase some books. Sasanka invited him to his place one evening for a chat, so he went there on the evening of the 20th November, and as it grew late, he was asked to spend the night there. He stayed and early in the morning he was arrested by the Police. There is nothing inherently improbable in this story. On the other hand, any possible theory that he had come down to Calcutta from Chittagong at the invitation of Sasanka for the purposes of a criminal conspiracy, is negatived by two significant facts. In the first place, when arrested, the return half of a railway ticket was found in his possession; this was produced by the prosecution after considerable effort on the part of the defence and was even then not made an exhibit. The defence has suggested that, in this respect, the prosecution was designedly obstructive. The precise attitude of the prosecution in this matter "cannot" be very clearly made out from the record. But we desire to emphasise the view expressed by Jenkins, C.J., in *Earn Eanjan Bay v. Emperor* 27 Ind. Cas. 554 : 19 C.W.N. 28 : 42 C.422: 16 Cr. L.J. 170 in conformity with the ruling in *Reg. v. Holden* (1838) 8 C.P. 608 that it is the duty of the prosecution, not so much to "secure a conviction, as to place all the available evidence in the case fairly and fully before the tribunal by which alone the guilt or innocence of the accused is to be determined. This return ticket shows that Chandra Sekhar, when he left Goalando on his way from Chittagong to Calcutta, intended to return within six days. In the second place, he had started from Chittagong with the very small sum of Rs. 10; out of this, he left one-half with Babu Khitish Chandra Sen in Calcutta. It could hardly have been his intention, with this small sum at

his disposal, to prolong his stay in Calcutta or to engage in a conspiracy for the manufacture of explosives. In fact, the only circumstance against him is his presence in the room of Sasanka on the morning of the arrest; of this, as we have stated, he has offered a not improbable explanation. The Sessions Judge was, as appears from his judgment, considerably influenced in his opinion against this accused by the evidence of his association with Pulin Behary Das and the Anusilan Samity in 1908. That evidence, as we have already held, was inadmissible and should not have been admitted. We further observe that the Sessions Judge mentions that this accused had, on the 20th November 1908, taken out a seditious book, Mooktt Kone Pathay, from the Samity Library. This evidence is not quite trustworthy, and had it not been inadmissible, would have been entirely valueless; more than this, the book mentioned has not been exhibited and no proof whatever has been adduced as to the character of its contents. In our opinion the evidence on the record is not sufficient to sustain the conspiracy charge against the accused Chandra Sekhar.

23. Sarada Charan Guha, the second of the three persons arrested in the room of Sasanka, comes of a family of some means and respectability, resident at Mulgaon in the District of Faridpore. Sarada is the third of the four sons of his father. His second brother, Tara Charan, is demented and is confined in a lunatic asylum. His youngest brother, Debendra, had, notwithstanding the protest of his father, taken in marriage a girl of an inferior caste and had on this account been disinherited. Sarada himself had, as is amply proved by the evidence on the record, incurred the displeasure of his father and of other members of his family by reason of what they considered to be excessive devotion to his wife. The correspondence between the members of the family which has been produced, shows that his conduct at the time of the annual Puja festival had excited unmistakable bitterness of feeling; he was charged not only with the neglect of his father during his illness but also with misappropriation of family funds; the imputation of misconduct in this respect, as appears from the evidence, was, however, a much exaggerated one, if not wholly unfounded. In these circumstances, he is shown to have left Faridpore on the 16th November and reached Calcutta on or about the morning of the 17th November. He states that although he had relations in Calcutta, he did not on his arrival put up with them, but preferred to go to an acquaintance who lived at 88, Upper Circular Road. The next day he happened to meet Sasanka who lived in the same street. Some evidence was adduced to show that he had known Sasanka in 1908; he had at that time a shop at Grosainhat near Mulgaon in Faridpore, Sasanka was then in the employ of the Bajitpur zemindars and had often to come to the Settlement Camp at Gosainhat Bazar. This is said to be how Sarada and Sasanka first became acquainted with each other. There is no evidence, however, to show that any communication had passed between the two since Sasanka left the place about the year 1910. Not only is there no trace of any correspondence between them, the evidence makes it clear that Sarada had not been for at least ten years in Calcutta, where Sasanka was continuously employed since 1910. In

these circumstances, after the lapse of several years, Sasanka and Sarada met again on or about the 18th November 1913. Sarada says that he mentioned to Sasanka how he had quarrelled with his family and left them : he also told him that he had not much money with him and had, on arrival in Calcutta, been taken ill with fever. Sasanka offered to put him up in his own room till he got well, and this, according to Sarada, explains his presence in that room at the time of the search on the morning of the 21st November. There has been much animated discussion in this Court on the question, whether Sarada was in fact ill at the time. His jail history ticket shows that after his arrest on the 21st November, he was, on the 25th November, placed in hospital : his temperature was high, and according to Dr. Mulvany, who wrote to the Magistrate on the 26th November, Sarada apparently had fever for some days and was very weak then. Dr. Makhan Lal Mandal, who attended on him in jail, states that Sarada was at the time suffering from fever, possibly from about a week before. This fits in precisely with the evidence that Dr. Sen Gupta had seen Sarada and had prescribed medicine for him for fever on the 17th November. These facts render it extremely probable that Sarada was ill on or about the 17th November and that his illness continued up to the time he was taken to the jail hospital on the 25th November, though there is no direct evidence to show the precise extent of his illness at the time of his arrest. The events so far narrated do not indicate any criminal act on the part of Sarada or tend to connect him with a criminal conspiracy. But, at the search, five letters were found, written" by him on Sunday the 16th November 1913, though not posted at the time of his arrest. One of these is addressed to his brother Debendra, who had misconducted himself and had been "disinherited, and another is addressed to his uncle Bepin. Two letters are addressed to two elder, sisters of his wife, Sarojini and Hemangini : another letter is addressed to his wife, Charuhasini. Much controversy has centred round these letters, and it has been vigorously urged by the prosecution that they have a very sinister significance. In these letters Sarada announced to his various relations that he had made up his mind to apply himself to the practice of yoga and that he would accordingly remain incognito for a time : he also pressed them to induce his father to alter his testament and to disinherit him. He further stated that he would probably return in six months or a year and referred to the many difficulties in the way of practice of yoga. He exhibited great anxiety for the welfare of his wife and child in the interval. In one passage he said: let me see how mayer lila (the inscrutable ways of the mother) ends." It has been suggested on behalf of the prosecution that Sarada was about to embark on a very dangerous enterprise and that he was in fact the person selected by anarchist conspirators to throw the next bomb. This is nothing more than a suggestion; no evidence has been directed to establish this view, and we are unable to hold that the letters are sufficient to support the theory propounded. The language used in the letters is, no doubt, in some places, peculiar, but on the whole they appear to us to be not very unlike 1 etters such as might be written by a man who had quarrelled with his family and who realised fully, as he himself says in one of these letters, that he had to give up all

hopes of paternal property unless he could act in obedience to the orders of his elders. Much stress has also been laid by the prosecution on the use of the expression *mayer lila*. That expression has in itself no evil significance, and is frequently used by a person in distress who finds all efforts unavailing and realises how inscrutable are the ways of the Providence. At the same time, there can be no question that, by a grievous and perverse misapplication of language, an act of sacrilege which merits the strongest condemnation of all right-minded people--revolutionaries have applied the expression to describe anarchical outrages as if they were deeds sanctioned by the great Mother of the Universe. We have carefully considered the letters of Sarada, and with the knowledge we possess of the circumstances which very probably inspired them, we are unable to say that the expression *mayer lila* used therein has any sinister import. Reference has also been made to the difficulties mentioned in the practice of yoga and to the dangers involved therein. This does not, in our opinion, necessarily indicate any criminal purpose in view, for the practice of yoga by persons not fully qualified for such work has, sometimes been attended with danger. There has been also much discussion as to the purpose Sarada had in view, when he wrote these letters : it is possible that he never seriously intended to practise yoga and that his only object was to write a series of what looked like farewell letters to all his relations, so as to excite their sympathy and make them intercede with his father with a view to bring about reconciliation between the old man and his undutiful son. There has also been some discussion as to why the letters were never posted : it may be that Sarada changed his mind; it is also not improbable that as he was taken ill on his arrival in Calcutta, he could not post the letters. We may add that a desperate effort was made by the prosecution to interpret the term yoga in these letters in the light of a paper on yoga philosophy found in the room of Sasanka. No connection whatever has been established between the two. But even if Sarada was shown to have been aware of the contents of the yoga pamphlet, it would not in any way alter his position. The laborious attempt made by Counsel for the prosecution to interpret the yoga pamphlet, in a sinister sense, was not attended with success. An abstract philosophical disquisition on yoga cannot rightly be cut up into isolated sentences and edited so as to furnish a possible text for revolutionary spirits, without positive proof that it was so used. At the same time, one cannot overlook the lamentable fact that the revolutionary literature, brought to light in this instance and in other cases previously reported, does suggest that such principles as the religious principle of absolute surrender to the Divine Will--a doctrine common to many religions--are employed by designing and unscrupulous men as a potent means to influence and unbalance weak-minded persons and thus ultimately bend them to become instruments in the commission of nefarious crimes, from which they might otherwise recoil with horror. After a minute scrutiny, however, of the letters found in possession of Sarada, we are of opinion that, taken as a whole, they do not admit of the interpretation suggested by the prosecution and do not connect him with the conspiracy charged. Reference has also been made to the circumstance that Sarada undoubtedly gave a false name and incorrect

addresses to the Police, but he has offered a not unreasonable explanation of his conduct. He had been treated by the Police for a long time as a political suspect, and his movements had been constantly watched, a position which even Mr. Tegart admits is not very pleasant. Such attentions on the part of the Police are very irksome and Sarada may well have tried to evade observation. Besides, some foundation has been laid in the evidence to support the allegation of Sarada that he found himself in this unfortunate position because of a quarrel with an influential Panchayet, Akshay Kumar Guha, who gave information to the Police and had him placed under surveillance. It also transpires from draft petitions, found in his possession at the time of his arrest, that he was about to move the Police authorities to have his name removed from the list of political suspects, and to invite an inquiry into the mode of life he led. No weight can also be attached to the fact that when he left Faridpore, he mentioned to a Pleader's clerk an untrue reason for his visit to Calcutta; this may well be explained by a not unnatural reluctance to disclose to every person his family quarrels. On the whole, then, there is really no substantial evidence to connect Sarada with the conspiracy. But, as appears from the judgment of the Sessions Judge, he was to some extent influenced in his opinion against Sarada by evidence of his association with Pulin Behary Das and the Annusilan Samity many years ago. This evidence, as we have held, is inadmissible, but it is also really of the vaguest description and, even if admitted, does not throw any light on the case. Our conclusion is that the conspiracy charge against Sarada has not been established.

24. Dinesh Chandra Das Gupta forms the third member of the group of persons arrested in the room of Sasanka on the morning of the 21st November 1913. His antecedent history has been determined with considerable approach to precision. During the years 1910-12, Dinesh was a student in the Dacca College. On account of ill health, his attendance at lectures fell short of the required minimum, and he left the College towards the close of the Session 1911-12. He appears to have lived with his parents at Faridpore during the next twelve months. In July 1913, he took his admission into the Krishnanath College at Berhampore, where he stayed till the 21st August 1913. He then took a transfer certificate, came down to Calcutta, and, failing to obtain admission elsewhere, joined the Ripon College. He could not secure a seat in a licensed mess or hostel; he stayed accordingly first with a friend in College Street and then in 86/2, Mechua Bazar Street (apparently an unlicensed mess where students resided), from where he intended ultimately to remove to the place of his brother-in-law at 74, Sookea Street. While resident at the Mechua Bazar Street mess, he became acquainted with one Jogesh Chandra Ray, who lived there and who, at the instance of the prosecution, has been named as a coconspirator in the charge in this case; but Jogesh Chandra Ray has not only not been placed on his trial, no evidence even has been adduced to prove his participation in the conspiracy. In September 1913, while still resident at the Mechua Bazar Street mess, Dinesh joined in the relief works undertaken to alleviate the distress of persons affected by the Damodar floods. It was here at Burdwan that he first became acquainted

with Sasanka through Jogesh Chandra Ray. He got an attack of malaria in Burdwan, returned to Calcutta and went to his parents at Paridpore in the first week of October. He had a fresh attack of malaria there and could not return to Calcutta till the 12th November 1913, sometime after his College had re-opened. Next day, he attempted to remove from the Mechua Bazar Street mess to the place of his brother-in-law, but was informed that no room was available there. Consequently, he continued to live in the Mechua Bazar Street mess. He asserts that, on the 20th November, Sasanka came into the mess and asked for his help, as Sasanka had a sick friend (Sarada Gharan Guha) in his own room who required to be nursed. Dinesh acceded to this request, accompanied Sasanka, stayed in his room during the night, and was arrested early in the morning by the Police. There is nothing intrinsically improbable on the face of this account. The only person who could speak to the alleged incident of Sasanka's visit to the Mechua Bazar Street mess on the 20th November, was Jogesh Chandra Ray; the prosecution alleged him to be a co-conspirator but did not prosecute him. When the defence took out summons to cite him as a witness on their behalf, he was reported to have died. We are thus left with the undoubted fact that Dinesh was found in the room and his explanation as to how he was brought there. We have, in the next place, evidence adduced to show that Dinesh and Sasanka knew each other, and that Dinesh possibly now and then visited Sasanka. But nothing really turns on this evidence, because admittedly Dinesh came to know Sasanka in September 1913 on the occasion of the Damodar relief works; yet it is worthy of note that no previous connection whatever between the two has been traced or suggested. Considerable stress, however, has been laid by the prosecution upon a list of names in cipher, found in the breastpocket of a coat claimed by Dinesh as his during the search of the room of Sasanka. The handwriting of this document has not been identified. The cipher list was not put to Jatindra Chandra Majumdar, who had been called to prove the handwriting of Dinesh on two post cards; but it transpired that the document had been shown by the Police to the witness outside Court. Upon this, the defence made the legitimate comment that the document had not been put to the witness in Court, because he had failed to recognise the handwriting when it was shown to him outside. We observe, however, that notwithstanding these circumstances, the Sessions Judge proceeded in his judgment to compare the document with the writing on the post cards, with a view to determine whether it was in the handwriting of Dinesh. This is a course which has not commended itself to high authority: *Barindra Kumar v. Emperor* 7 Ind. Cas. 359 : 37 C. 467 : 14 C.W.N. 1114 : 11 Cr. L.J. 453 *Kurali Prasad Misser v. Anantaram, Tiajra* 8 B.L.B. 490: 16 W.B. (P.C.) 10. Whether the cipher list, however, was or was not written by Dinesh himself, is not very material for the present inquiry. It has been deciphered and turns out to be a list of names of persons, who apparently paid a small monthly subscription for some purpose undisclosed. The defence has suggested that this was probably a list of subscribers to the library which Sasanka kept in the room; it has also been urged that, in any event, the list does not connect Dinesh with any criminal conspiracy. This is, perfectly true; yet one cannot but observe that it would have materially

helped the case for the defence if Dinesh had offered a true explanation of the real nature and purpose of this apparently harmless document, instead of suggesting the very improbable theory that it had been planted in his coat pocket by an unscrupulous Police spy. In this connection reference may usefully be made to the following observations made by Tindal, C.J., in *Ilex v. Frost* (1820) 3 B.A. 566 : 1 St. Tr. (N.S.) 171 : 9 C.P. 94 : 22 R.R. 485 : 106 E.R. 768: On the part of the prisoner, the learned Counsel who appear for him state, and I think they are justified in so stating, that he is not bound to show what was the object or purpose or intent of the acts that were undoubtedly done by the prisoner at the Bar. His Counsel say, the offence charged against him must be proved by those who made the charge, that he stands only to hear the evidence that is given against him, and, therefore, he is not bound to show at all, or in any way whatever, what his real object or design was. Undoubtedly, the proof of the case against the prisoner must depend for its support, not upon the absence or want of any explanation on the part of the prisoner himself, but upon the positive affirmative evidence of his guilt that is given by the Crown. It is not, however, an unreasonable thing, and it daily occurs in investigations, both civil and criminal, that if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon, for his own sake and his own safety, to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence." In this particular case, however, as we have already said, the document, though in cipher and thus calculated to excite suspicion does not, when deciphered, incriminate the accused in whose possession it was found. Reference has lastly been made to the fact that the name of Dinesh appears in a list found at the search of the house of one Madan Mohan Bhowmik. This evidence is obviously valueless, but the Sessions Judge has also correctly held that it is not admissible against the accused. Nothing is known of Madan or of his activities, except that his name appears among some disconnected memoranda contained in a note-book found in Sasanka's room, and the mere fact that Madan had chosen to enter the name of Dinesh in a list prepared by him for some unknown purpose, is obviously irrelevant for the purposes of this trial. On a review of the entire evidence, it is plain that the conspiracy charged against Dinesh cannot be supported.

25. We have next to consider the charge u/s 4 (b) of the Explosive Substances Act, 1908, against Chandra Sekhar, Sarada and Dinesh, against whom, as we have just found, the conspiracy charge has failed. It is obvious, indeed this was conceded by the Counsel for the Crown, that the charge under the Explosive Substances Act must necessarily fail along with the conspiracy charge. Reference was made to a number of judicial decisions to show under what circumstances a person may be deemed to be in possession of a moveable: *Queen-Envpressv. Sangham Jjal* 15 A. 129; A.W.N. (1893) 48 *Emperor v. Gajadhar* 25 A. 262; A.W.N. (1903) 29 *Kashi Rath v. Emperor* 32 C. 557 : 9 C.W.N. 719 : 2 Cr. L.J. 417 *Ashruf Ali v. Emperor* 4 Ind. Cas. 699 : 36 C. 1016 : 11 Cr. L.J. 29 : 14

C.W.N. 233 Emperor v. Hamid Ali and Government of Eastern Bengal and Assam v. Serajuddin 5 Ind. Cas. 555 : 37 C. 24 : 14 C.W.N. 308 Jogji-ban Ghose v. Emperor 2 Ind. Cas. 681 : 9 C.L.J. 663 : 13 C.W.N. 861 : 10 Cr. L.J. 125 Peary Mohan v. Weston 13 Ind. Cas. 721 : 16 C.W.N. 145 : 13 Cr. L.J. 65 Weston v. Peary Mohan 23 Ind. Cas. 25 : 40 C. 898 : 18 C.W.N. 185 Kali Churan Mukherjeev. Emperor 22 Ind. Cas. 148 : 41 C. 537 : 18 C.L.J. 514 : 18 C.W.N. 309 : 15 Cr. L.J. 4 and Nga Pu v. Emperor 13 Ind. Cas. 778 : 18 Cr. L.J. 122 : 4 Bur. L.T. 270. No useful purpose would be served by an analysis of the circumstances of the various cases discussed at the Bar. It is sufficient to say that while it is not necessary to prove manual possession of the explosive substance by the accused, it must be proved that it was in his power or control; possession to be punishable must also be possession with knowledge and assent. The mere fact that Chandra Sekhar, Sarada and Dinesh were in the room, does not show that they were in possession of all or any of the things contained therein; it is not shown that they were even aware of the existence of the tin cases, discs, and clamps or that they were acquainted with their nature and purpose. "We hold accordingly that the charge u/s 4(6) of Act VI of 1908 fails against each of these persons, quite as much as the conspiracy charge. This result is in conformity with the well settled principle that when evidence at the disposal of the prosecution is insufficient to secure a conviction for the crime committed, it is inexpedient, even though it may be lawful, to prosecute the accused for a conspiracy the proof whereof really rests on the establishment of that very crime: Rex v. Boulton (1871) 12 C. C.C. 87 Emperor v. Noni Gopal (Lalit Mohan) 10 Ind. Cas. 582 : 38 C. 559 : 15 C.W.N. 593 : 12 Cr. L.J. 286.

26. We have to examine, in the next place, the case of Kalipada, who was arrested in College Street on the 6th December 1913 with ten copies of the Liberty leaflet in his pocket. The only charge against him is that of conspiracy u/s 120B, Indian Penal Code; there is no substantive charge against him u/s 4 of the Explosive Substances Act, 1908. As regards this accused, there has been prolonged discussion on the question, how he came to be in possession of the Liberty leaflets. Counsel on his behalf contended that the leaflets were planted in his pocket by a Police spy, with a view to create evidence of conspiracy against him. This theory, which, in our opinion, has not been placed above the level of a bold hypothesis and has certainly not been established by the evidence, has been indignantly repudiated by the prosecution; the Crown has further sought to prove affirmatively that the leaflets were printed by Kalipada himself at the Loke Nath Press where he was admittedly employed as a compositor. The evidence shows that Kalipada, whose real name is Upendra Lal Ray Choudhury, belongs to a respectable family resident at Benotia in the District of Faridpore. Their circumstances have altered for the worse, and Upendra found himself driven to earn his livelihood in Calcutta, where he came about the middle of the year 1912. He used to reside at 119/4, Upper Circular Road and obtained employment as a compositor in the Loke Nath Press. He alleges that he adopted the name of Kalipada Ghose, because he felt that his humble occupation might bring discredit

upon his family. He was employed in the press from October 1912 to 6th October 1913 on a regular monthly wage. Work in the press was thereafter temporarily suspended and his services were terminated. He was re-employed, however, on a daily allowance from the 10th to 16th November 1913. There is internal evidence to show that the Liberty leaflet was written after the 30th September 1913, as it makes mention of the College Square outrage, which took place on the 29th September, and the Mymensingh Bomb outrage, which happened on the following day. If, therefore, the leaflet was printed at the Loke Nath Press, it might then have been printed between the 1st and the 6th October or between the 10th and the 16th November. Elaborate evidence of a circumstantial character has been adduced by the Crown to show that the leaflet was printed at the Loke Nath Press. A minute comparison has been made of the types required to print the leaflet with the types found in the press, and quite a number of remarkable coincidences has been discovered. All the types necessary to print the leaflet were found in the press; but the most striking fact in this connection is the presence of a damaged, which must have been used to print some of the copies of the leaflet. The damage to this type was obviously caused by a pin which fell across the face as the printing was in progress. It is extremely improbable that a similar accident to a similar type should have happened in some other press. More than this, coincidences almost equally remarkable have been noticed in the case of types of other letters which had either been damaged or had some special feature, some peculiarity in form or shape. This part of the case does not require much elaboration, because we agree in the conclusion of the Sessions Judge that the evidence though circumstantial, is practically conclusive. We hold then that the Liberty leaflets, found in the possession of Kalipada, were printed at the press where he was employed as a compositor, and it is probable that they were printed by him. There is also indisputable proof that during the whole of the period that Kalipada was employed as a compositor, he was on friendly terms with Sasanka. They regularly took their meals at the same eating house; there is also evidence to show that Sasanka guaranteed regular payment by Kalipada whom he introduced to the hotel keeper; it is further clear that as Sasanka moved from one hotel to another, Kalipada followed him. The question, consequently, arises, how far this association between Sasanka and Kalipada carries the case against the latter. In this connection, it must not be overlooked that there is no evidence to show that the Liberty leaflets were printed by Kalipada, at the instance or under the direction of Sasanka, and that when the leaflets were first found in his possession, Sasanka had already been in custody for two weeks. But it has been suggested on behalf of the Crown that they must have been actually printed before Sasanka was arrested. If it be assumed, however, that they had been printed by Kalipada under the direction of Sasanka, it is remarkable that no copy was found when his room was searched on the 21st November. But even if the theory be accepted that the leaflets were printed by Kalipada under the direction of Sasanka, the case against Kalipada is not materially advanced. No doubt, the leaflet is a seditious document of an inflammatory character and advocates the use of bombs for purposes of

assassination. But it does not follow that even if Sasanka employed Kalipada to print and disseminate seditious literature, he confided to him all his secrets and took him in as a member of the conspiracy to make and possess explosive substances. There is also no evidence to show that Kalipada was in any way an assenting party to the conspiracy in which Sasanka was engaged, or that he was even aware of its existence. There is a further circumstance which militates against such an hypothesis. According to the prosecution, the conspirators had assembled on the night of the 20th November to hold an important conference; if this assumption be well founded, it is remarkable that Kalipada should have been absent from that meeting. In fact, when all the circumstances come to be analysed, the two outstanding facts proved against Kalipada are that he was on friendly terms with Sasanka, and that a fortnight after the arrest of Sasanka he was arrested in College Street with copies of a revolutionary leaflet in his pocket, which had been printed most probably by himself at the press where he was employed as a compositor. In our opinion, whatever suspicions one may entertain as to the mental tendencies of Kalipada, there is not sufficient evidence to connect him with the particular conspiracy charged.

27. We have next to consider the appeal preferred by the Crown against the acquittal of Khagendra Nath Choudhury. Evidence was adduced in the Sessions Court to prove that his real name was Khagendra Nath Choudhury and that he had assumed the name of Suresh Chandra Choudhury for a dishonourable purpose. Suresh, his fellow-student and co-villager, had passed the Intermediate examination whilst he himself was unsuccessful; but he passed himself off as Suresh to enable him to secure the appointment of a teacher in a school at Bhastara in the District of Hooghly. On behalf of the defence, it was contended that this evidence was inadmissible u/s 54 of the Indian Evidence Act, but the objection was overruled. In our opinion, as it was admitted that Khagendra had assumed a false name, evidence should not have been allowed to prove the dishonourable purpose for which the false name had been assumed, a purpose in no way connected with the conspiracy charged against him. It is an elementary rule that a man's guilt is to be established by proof of the facts and not by proof of his character; such evidence might create a prejudice but not lead a step towards substantiation of guilt. As Stephen observed in his General View of the Criminal Law of England [Editon 1863, page 309], "a man's general bad character is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of other people, whereas the opportunity of committing the crime and facts immediately connected with it are marks which belong to very few, perhaps only to one or two persons; if general bad character is too remote, a fortiori the particular transactions of which that general bad character is the effect, are still further removed from proof; accordingly, it is an inflexible rule of English Criminal Law to exclude evidence of such transactions." We must consequently take no account of the circumstances under which Khagendra assumed the name of Suresh. When we come to examine the evidence relevant to the conspiracy

charge, we find this much established that he was acquainted with both Sasanka and Kalipada; he appears to have come down on more than one occasion from Bhastara to Calcutta on account of illness and to have stayed in the room of the one or the other in Upper Circular Road; in fact, in each of these rooms medicine prescribed for him and partially used was found. But the mere fact that Khagendra was acquainted with Sasanka and Kalipada and was possibly on friendly terms with them, is obviously insufficient to connect him with the alleged criminal conspiracy. Considerable stress, however, has been laid upon a letter written by one Biroja from Calcutta on the 17th November 1913 and found in the room of Khagendra at Bhastara. In this letter, Biroja promises to send new paper "in a few days. On behalf of the Crown it has been suggested that the new paper" mentioned in the letter refers to the Liberty leaflet; the suggestion, however, can take rank only as an unproved hypothesis. More than this, there is no evidence to show who this Biroja was, although, at the instance of the Crown, he was named as a co-conspirator in the charge. We know nothing about his activities, and although an attempt was made by some of the prosecution witnesses to prove that a man named Biroja lived with Kalipada for a few days, that evidence when scrutinised turns out to be contradictory and unreliable. We agree with the Sessions Judge that the evidence is not sufficient to connect Khagendra with the particular conspiracy charged.

28. We may here conveniently deal with four important questions of law, raised and discussed before us in connection with the procedure adopted in the Court below, with regard to the examination of the witnesses and of the accused.

29. It appears that, in more than one instance, when the prosecution had called a witness to prove a particular point, (for instance, witnesses Rai Mohan Ray and Atul Chandra Das Gupta), the defence directed the cross-examination to matters wholly unconnected with the examination-in-chief, but yet relevant for the purposes of the trial. Two questions thereupon arose, first, whether in a cross-examination of this description, leading questions could be put to the witness, and secondly, whether the prosecution were entitled to test, by way of cross-examination, the veracity of their own witnesses with regard to the matters elicited by the defence in cross-examination. The answer to these questions must depend upon the provisions of the Indian Evidence Act. Section 138 is in these terms: Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then, (if the party calling him so desires) re-examined."

"The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief."

"The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if, new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

30. Section 143 provides as follows: "Leading questions may be asked in cross-examination."

31. Section 154 is in these terms: "The Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party." It is consequently plain that the accused were entitled, in cross-examination, to elicit facts in support of their defence from the prosecution witnesses, though the facts thus elicited had no relation to the facts to which the witnesses had testified on their examination-in-chief. It is also plain that, in course of cross-examination of this character, the defence were entitled, in view of the generality of the provisions of Section 143, to ask leading questions. It is finally obvious that the Court might, in its discretion, u/s 154, permit the prosecution to cross-examine the witness, even though he had been originally called by them, with regard to the matters elicited by the defence. Indeed, in such circumstances, it would be generally an improper exercise of discretion to refuse the prosecution an opportunity to cross-examine the witness for the purpose indicated. This view is in accord with the law as administered in England. It has been ruled there that though leading questions may, in strictness, be put in cross-examination, even though the witness be favourable to the cross-examiner [*Parkin v. Moon* (1836) 7 Car. & P. 409.], yet when a vehement desire, is betrayed to serve the interrogator, it is certainly improper, and greatly lessens the value of the evidence, to put the very words into the mouth of the witness which he is expected to echo back: *Bex v. Hardy* (1794) 24 St. Tr. 755. Again, as the cross-examination is not limited to the matters upon which the witness has been examined-in-chief, but extends to the whole case, it would be obviously unfair to allow the evidence brought out in cross-examination to pass unchallenged: *Morgan v. Bridges* (1818) 2 Stark 314 : 1 B. and Ald. 647 : 106 E.R. 288, *Bex v. Murphy* (1841) 1 Arms. M. & O. 206. The question was elaborately reviewed by Shaw, C.J., in *Moody v. Bowel* (1835) 17 Pickering 490 : 28 Am. Dec. 317 where the learned Chief Justice summed up his opinion as follows: There is one authority directly in point, where the objection was taken, and it was decided by Lord Kenyon that such leading question is admissible: *Dickinson v. Shee* (1801) 4 Esp. 68; So, in several recent cases, it has been held that where a witness is called to a particular fact, he is a witness to all purposes and may be fully cross-examined to the whole case, and no distinction is suggested as to the mode of cross-examination: *Morgan v. Bridges* (119) *Bex v. Brooke* (1819) 2 Stark 472 : 20 R.E. 723. The weight of authority is in favour of the right to put leading questions under the circumstances stated, and this is confirmed by practice and experience". As is pointed out in *Taylor on Evidence* (Article 1432), in the United States the difficulty is avoided by the adoption of the logically consistent rule that a party has no right to cross-examine any witness, except as to circumstances connected with matters stated in his, examination-in-chief, and if he wishes to examine him respecting other matters, he must do so by making him his own witness and by calling him as such in the subsequent progress of the cause. [See the judgment

of the Supreme Court of the United States delivered by Mr. Justice Story in *Philadelphia and Trenton Railroad Co. v. Stimpson* (1840) 14 Peter 448 : 10 Law. Ed. 535. The view we take is to some extent supported by the decision of the Judicial Committee in *Kalagurla Suryanarayana v. Yarlagadda Naidoo* 6 C.W.N. 513. It may finally be added that the matter is eminently one in the discretion of the trial Judge, and his decision is practically conclusive: *Price v. Manning* (1889) 42 Ch. D. 372 : 58 L.J. Ch.649 : 61 L T. 537 : 37 W.R. 785 *Bice v. Hmoard* (1885) 16 Q.B.D. 681 : 55 L.J.Q.B. 311 : 34.

32. In the course of the trial before the Sessions Judge, a persistent effort was made by the defence to elicit from individual prosecution witnesses whether he was a spy or an informer, and also to discover from Police officials the names of persons from whom they had received information. The Sessions Judge disallowed questions of this character, and, in our opinion, the course he adopted was correct. In *Reg. v. Bernard* (1858) 1 F.P. 240 : 8 St. Tr. (N.S.) 887 when objection was taken to a question put to a witness, whether he had gone to a certain place as a spy, Lord Campbell allowed the objection to prevail, on the ground that the question was not relevant, and that the witness was really called upon to draw an inference from facts within his knowledge. Again, in *Bex v. Smith O'Brien* (1849) 7 St. Tr. (n. S.) 2 it was ruled that disclosures made by informers to the Government, the Magistracy or the Police, with the object of detecting and punishing offender, were privileged. Reference was made to the general rule formulated by Eyre, C.J., in *Bex v. Hardy* (1871) 12 C. C.C. 87 It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained on account of its importance to the public for detection of crimes, that those persons who are the channel, by means of which that detection is made, should not be unnecessarily disclosed; if it can be made to appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it, but it does not appear to me that it is within the ordinary course to do it." It may now be taken as settled rule that witnesses for the Crown in criminal prosecutions undertaken by the Government are privileged from disclosing the channel through which they have received or communicated information: *Rex v. Watson* (1817) 32 St. Tr. 1 . *Reg. v. Richardson* 3 F.F. 693 *Attorney-General v. Briant* (1846) 15 M. and W. 169 : 71 R.R. 610 : 15 L.J. Ex. 265 *Marks v. Beyfus* (1890) 25 Q.B.D. 494 : 59 L.J.Q.B. 479. (1886) 3 T.L.R. 159; but it has been ruled that a detective cannot refuse on ground of public policy to answer a question as to where he was secreted: *Webb v. Catchlove* (1886) 3 T.L.R. 159.

33. A question has been raised here as to the procedure provided in Section 360, Sub-section (1), of the Criminal Procedure Code. The Sessions Judge appears to have strictly carried out the provisions of the section, which require that the evidence of each witness, as it is completed, shall be read over to the witness in the presence of the accused, if in attendance or of his Pleader, if he appears by a Pleader. This procedure appears to have occupied considerable time; but in view

of the decisions iii Mohendra Nath Misser v. Emperor 8 Cr. L.J. 116 : 12 C.W.N. 845. (130) 4 Ind. Cas. 416 : 36 C. 955 : 14 C.W.N. 82 : 10 Cr. L.J. 581 and Jyotish Chandra Mukerjee v. Emperor (136), which are in accord with the case of Kamatohinathan Chetti v. Emperor (137) and were binding on the Sessions Judge, it must be ruled that the procedure he followed is not open to criticism. We may add that in a case of this description, where every passible point was likely to be contested, a strict compliance with the statutory provisions was manifestly desirable.

34. A question has been raised in this Court as to the propriety of the procedure adopted by the Sessions Judge when he accepted written statements from the accused, and our attention has been drawn to Emperor v. Ansuiya (1903) A.W.N. 1. It is sufficient to state that no objection was taken by the Crown in the Court below when the statements were tendered and received. The procedure followed in this case is in accordance with what we believe is the universal practice in the Courts of this Province, and we do not feel pressed by the doubt suggested in the case mentioned. But it is desirable to state explicitly that such a written statement does not take the place of evidence nor of such examination of the accused as is contemplated by the Code.

35. Only one other question now requires consideration, namely, the question of sentence upon Sasanka. Counsel on his behalf pressed for a reduction of the sentence, should our ultimate conclusion be in favour of conviction. The Crown, on the other hand, has obtained a Rule for enhancement of sentence. After anxious consideration of the matter, we have formed the deliberate opinion that the order of the Judge should not be touched in this respect. The offences, of which Sasanka has been proved to be guilty, are of the gravest character, and their heinousness is, if possible, accentuated by the fact that the bombs under construction, if completed, would have been employed for the destruction of human life. The demands of justice, consequently, require a deterrent sentence. At the same time, we are of opinion that the maximum sentence should be reserved for offences of even a worse description, which, it is not difficult to imagine, might fall within the scope of the Explosive Substances Act. From these points of view, the sentences passed on Sasanka by the Sessions Judge are appropriate and should not be disturbed.

36. The result of our decision may now be summarised. Appeal No. 587 of 1914 preferred by Amrita alias Sasanka is dismissed. Appeals Nos. 588, 589, 590 and 598 preferred by Dinesh, Sarada, Chandra Sekhar and Upendra alias Kalipada are allowed. The convictions and sentences upon each of these persons are set aside, and we direct that they be released from custody. Appeal No. 4 of 1914, preferred by the Crown against the acquittal of Khagendra alias Suresh, is dismissed. Rule No. 1293, issued at the instance of the Crown, for enhancement of sentence is discharged.