

(1912) 04 MAD CK 0055
In the Madras High Court

Muthukumaraswami Pillai and Others

APPELLANT

Vs

King-Emperor

RESPONDENT

Date of Decision : 17-04-1912

Acts Referred:

Citation : (1912) ILR (Mad) 397

Hon'ble Judges : Wallis, J;Sundara Ayyar, J;Miller, J;Benson, J;Abdur Rahim, J

Bench : Full Bench

Judgement

Benson, J.—In this case fourteen persons were tried by a Special Bench of this Court, constituted u/s 6(b) of the Indian Criminal Law

Amendment Act, 1908, for an offence punishable u/s 121A, Indian Penal Code (conspiring to commit certain offences against the State), and also

with abetting the murder of Mr. Ashe. The Special Bench acquitted all the accused on the latter charge. The majority of the Court (Sir Arnold

White, C.J., and Ayling, J.) convicted the first seven and the fourteenth accused of the offence charged u/s 121-A and acquitted the remainder.

The third Judge of the Special Bench (Sankaran-Nair, J.) convicted the first, second, sixth and fourteenth accused and acquitted the remainder.

The late Advocate-General has given a certificate under Clause 26 of the Amended Letters Patent of 1865 to the effect that the decision of the

Court on certain specified points of law requires farther consideration. The present Advocate-General, who, as Public Prosecutor, appeared for

the Crown at the trial, raises a preliminary objection that the Letters Patent do not authorize the grant of a certificate in a case tried by a Special

Bench, appointed under the Indian Criminal Law Amendment Act of 1908. His content on is that cases under the Act must be dealt with in

accordance with the special procedure prescribed by the Act and that there is no provision in it for a review of judgment either on a certificate

from the Advocate-General or otherwise. The Act however, does not profess to lay down complete rules of procedure: the ordinary procedure

has to be followed except in so far as it is modified by the Act: there is nothing in the Act to modify the ordinary procedure in this particular

respect; Clause 26 of the Letters Patent gives powers to the High Court on the Advocate General's certificate to review in every case mentioned

in Clause 35 of the Letters Patent, i.e., in "any criminal trial before the Courts of original criminal jurisdiction which may be constituted by one or

more of the judges of the said High Court." The present trial satisfies these conditions and is therefore open to review on a certificate granted by

the Advocate General.

2. The points of law which are certified as requiring further consideration are stated as follows in the certificate of the Advocate-General:

1. That in my judgment the opinion of the majority of the Court that the evidence of an accomplice need not be corroborated in material particulars

before it can be acted upon, and that it would be open to the Court to convict on the uncorroborated testimony of an accomplice if the Court was

satisfied that the evidence was true, requires to be further considered; and it requires to be further considered whether Section 133 of the Indian

Evidence Act read with Section 114, illustration (b), does not merely intend to lay down that a conviction upon the uncorroborated testimony of an

accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special

circumstances.

2. That in my judgment the opinion of the majority of the Court that the previous statements of an accomplice can legally amount to corroboration

of the evidence given by him at the trial should be further considered.

3. That in my judgment the opinion of the majority of the Court that the statements made by prosecution witness No 6 and prosecution witness

No. 12 to prosecution witness No. 31 were made to an authority legally competent to investigate the facts within the meaning of Section 157 of the

Indian Evidence Act, should be further considered.

4. That in my judgment the opinion of the majority of the Court that the

statements of prosecution witness No. 6 and prosecution witness No 12 to prosecution witness No. 31 were not rendered inadmissible by reason of the provisions of Section 25 of the Indian Evidence Act, should be further considered.

5. That in my judgment the opinion of the learned Judges that, while the statements made by a person to a police officer in the course of an investigation and taken down in writing may not be proved by the production of the writing, they may be proved by oral evidence, requires to be further considered.

3. The facts of the case, so far as is necessary to understand the questions raised, may be briefly stated as follows:

The accused are alleged by the prosecution to have conspired at various places between January 1910 and 17th June 1911 with certain persons

not before the Court, viz. with one Vanchi Iyer, who is proved to have shot himself on the 17th June 1911, immediately after murdering Mr. Ashe

(who was then District Magistrate of Tinnevely), one Dharmaraja Iyer, who is now dead (the case for the Crown being that he committed suicide)

and one Madasami who has absconded, and also with three others, Arumugam, Somasundaram and Ramasami Aiyar, who were given a pardon

under the usual conditions and taken as approvers and called as witnesses (Nos. 6, 12 and 17) for the prosecution in this case. The approvers

have given evidence as to a certain treasonable society founded by the first accused, Nilakanta, of which they were all members. They have also

given evidence of meetings of the society at Tenkasi and Tutieerin and elsewhere attended by the accused, and there is no question, but that, if the

accused were present at these meetings and took the "blood oath" as alleged by the approvers, they are guilty. "The chief evidence against the

accused is the evidence of the several approvers. They are admittedly accomplices. The questions of law that have been raised relate to the legal

validity of an accomplice's evidence, if uncorroborated, and to the admissibility and legal effect of certain statements made by two of the

accomplices (Arumugam and Somasundaram) in this case prior to the trial. The following are the circumstances under which the statements were

made: Mr. Ashe was murdered for political reasons by Vanchi Iyer on 17th June, and Vanchi immediately afterwards shot himself. When his house

at Shencottah was searched next day (18th), certain letters were found which showed that Arumugam (prosecution witness No. 6) was in communication with him; so on the evening of the next day (19th) immediately after the arrival of Mr. Thomas, the Deputy Inspector General of the Criminal Investigation Department), a party of police was despatched to Tuticorin to search his house. The party was in charge of Mr. Johnson, Assistant Superintendent of Police, a gazetted officer of three years' standing and of Veeraraghava Aiyar (prosecution witness No. 31), an Inspector of the Criminal Investigation Department who had just arrived with Mr. Thomas from Madura, Having arrived at Tuticorin the party surrounded the house of Arumugam about two hours after midnight and sealed it with a view to search it after daybreak. Arumugam was awakened and told that his house would be searched in connection with the murder and he was asked if he knew anything about it, He then offered to tell all he knew, and his statement was thereupon taken and recorded in the Inspector's note book. On information given by Arumugam, the house of Somasundaram (prosecution witness No. 12) was searched the next day, and he in like manner made a statement to Veeraraghava Aiyar, which was recorded by him. Three days later, both these men made statements substantially to the same effect) to Mr. Cox, the Magistrate, which he recorded u/s 164, Criminal Procedure Code. At the trial before the Special Bench, which began in the following September and went on for some months, Arumugam and Somasundaram were examined as witnesses for the prosecution and gave evidence, as already stated, involving not only their own guilt, but also the guilt of several of the accused who took the "blood oath" at the treasonable meetings held at Tenkasi and Tuticorin. In order to corroborate this evidence of the accomplices, given at the trial, the prosecution relied on the statements recorded by the Magistrate, Mr. Cox. They also called the Inspector, Veeraraghava Aiyar, to give evidence of the statements made to him by the accomplices. The defence objected to this evidence as inadmissible but the majority of the Special Bench held that the Inspector might give oral evidence of the statements made to him, but could not use the writing in his note-book as evidence. The learned Judges of the Special Bench state in their judgments that the extent to which, and the conditions under which, the evidence of the accomplices should be acted upon was the subject of much

argument and contention before them, and their judgments show that they considered the various questions raised with the greatest care and came

to their conclusions after a full examination not only of the codified law of India, but also of the case law of the courts in England and India relating

to the questions raised.

4. I will now turn to the five points of law which the Advocate-General certifies should be further considered.

5. The first is thus stated-

The opinion of the majority of the court that the evidence of an accomplice need not be corroborated in material particulars before it can be acted

upon, and that it would be open to the court to convict on the uncorroborated testimony of an accomplice if the Court was satisfied that the

evidence was true, requires to be further considered; and it requires to be further considered whether Section 138 of the Indian Evidence Act read

With Section 114, illustration (6), does not merely intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not

illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances." The

substantive provision of the Indian Code Law is contained in Section 133 of the Indian Evidence Act, 1872, which, in explicit terms, declares that

an accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the

uncorroborated testimony of an accomplice." But with this section it is also necessary to bear in mind Section 114 which provides that "the court

may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human

conduct and public and private business, in their relation to the facts of the particular case." To assist the courts in applying the general words of the

section, various illustrations are appended to it. One of these relates to accomplices, and it is stated as follows: "The court may presume that an

accomplice is unworthy of credit, unless he is corroborated in material particulars. But the court shall also have regard to such facts as the

following, in considering whether such maxim does or does not apply to the particular case before them; A, a person of the highest character, is

tried for causing a man's death by an act of negligence in arranging certain

machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself." And again, "a crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable." In my opinion there is nothing in the illustration (b) to Section 114 which overrides, or renders nugatory, the plain and explicit declaration contained in Section 133, or which requires us to hold that the evidence of an accomplice must always, and in all circumstances, be regarded as unworthy of credit unless it is corroborated in material particulars, or which requires us to hold that it is not open to the court to act on such evidence, even when the court believes it to be perfectly true. The very term of the illustration itself appears to be intended to guard against such an interpretation. The words are the court may presume" (not "the Court shall presume") "that an accomplice is unworthy of credit, unless he is corroborated in material particulars." But it then adds a caution to show that the presumed unworthiness is not a rule of universal application. It states the presumption "a maxim," not a rule of law, and says, "but the court shall also have regard to 'certain facts' in considering whether such maxim does or does not apply to the particular case before it." It then refers to the case of a person of the highest character giving evidence of an offence committed by the negligence of himself and another person of equally high character. The witness is an accomplice, and he is not corroborated in any particular, still less in material particulars yet the Court should have regard to various circumstances, viz., the high character of the witness, and of the accused and the nature of the offence alleged, and would be at liberty to refuse to draw any presumption against the credibility of the witness, even though his evidence stood alone and uncorroborated.

6. Judges do, no doubt, ordinarily regard the evidence of an accomplice with great suspicion, and rightly so, for reasons which are so manifest and so often stated that it is unnecessary to restate them here, and Judges do ordinarily require corroboration in material particulars before they will act on the evidence of an accomplice. It is the duty of the Judge to explain to the jury

the taint and infinity which ordinarily attach to the evidence of an accomplice, and to remind them that they may presume that his evidence is unworthy of credit unless corroborated in material particulars. But it is also his duty to refer to any circumstances or facts (such as those referred to in the illustrations to Section 114) which show that the presumption should not be drawn in the particular case or which rebut the presumption, if drawn, and he should instruct them that if, having scrutinized the evidence of the accomplice with care and caution, and having considered it in the light of the circumstances in which it was given, and all other circumstances, bending to show its truth or falsehood, they believe it to be true, they should act upon it, even though there may be no corroboration of it in the strict sense of the word, but that if they are not satisfied of its truth they should refuse to act upon it.

7. This is, in effect, how the majority of the Special Bench have laid down the law. In my opinion they have correctly stated the law as laid down in

the Indian Evidence Act, and in the Indian and English cases quoted by them: *Reg. v. Rantasami Padayachi* ILR (1878) Mad. 394, *Ramaswami*

Gounden v. Emperor ILR (1904) Mad. 271 per Bhashyam Aiyangar, J, *Queen-Empress v. Gobardhan* ILR (1887) All. 528 per Cockburn, C.J.,

Reg. v. Gallagher (1883) 15 Cox. C.C. 291, per Coleridge, C.J and *Rex. v. Tate* (1908) 2 K.B. 680, per Lord Alverstone, C.J.

8. The suggestion made in the latter part of the Advocate-General's first point, if I understand it aright, is that the presumption of

untrustworthiness must always, and in all circumstances, first be drawn, and the evidence cannot in any case be acted upon unless "special

circumstances" are found which rebut the presumption. I think this way of stating the law is less accurate than that adopted by the majority of the

Special Bench and might possibly mislead juries by leading them to think that circumstances affecting their judgment should be technically divided

into two classes, special and non-special or ordinary and that unless a circumstance could be technically labelled "special" it should not be at all

considered by them. Section 114 speaks simply of "facts" not special circumstances" and the caution attached to illustration (b) merely says "the

court shall also have regard to such facts as the following "not special" facts or "special" circumstances. Any fact which is admissible as evidence,

and which is duly proved, may, in my opinion, be considered for what it is worth, without attempting to classify it as a "special" or non-special fact.

In this connection, however, it may be abated that the majority of the Special Bench do, in fact, refer to a number of what may well be called

special circumstances, which powerfully influenced their opinion as to the credibility of the accomplice witnesses. It is, therefore, difficult to

understand what practical purpose was to be served in the present case by the further consideration of the first question raised by the certificate of

the Advocate-General.

9. In dealing with the first point in the Advocate-General's certificate, Mr. Govindatrag have Aiyar, on behalf of the accused, desired to argue that

the view of the majority of the Special Bench as to what constitutes "material particulars" in illustration (b) to Section 114 is incorrect. We,

however, were unanimous in holding that no such question was raised in the certificate of the Advocate-General and that it was not open to the

accused's pleader to argue any question of law not raised in the certificate. Mr. Govindaragbava Aiyar contended that as soon as a certificate was

granted in regard to any point of law the whole case was opened up for consideration under Clause 26 of the Letters Patent. That clause is as

follows: "On its being certified by the said Advocate-General that, in his judgment, there is an error in the decision of a point or points of law

decided by the Court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said Court should be

further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally

determine such point or points of law, and thereupon to altar the sentence passed by the Court of original jurisdiction, and to pass such judgment

and sentence as to the said High Court shall seem right." I do not think that these words can be held to open up the whole case as if on appeal, for

Clause 25 enacts that there shall be no appeal. The grant of the certificate no doubt gives the Court "power and authority to review the case or so

much of it as may be necessary," that is, in my opinion, "necessary" in order to determine the point or points of law raised, This is clear from the

words "and finally determine such point or points of law" which follow the word "necessary"; after the point or points of law have been finally

determined, then, or to use the word in Clause 26 "thereupon," the Court may alter the sentence and pass such judgment and sentence as may seem right and the Court may, of course, then go into the case so far as is necessary in order to enable it to do this correctly. When the case has reached that stage, then the Court has to be guided by Section 167 of the Indian Evidence Act which enacts that "the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision," This view is in accordance with the judgments of Beaman and Davar, JJ, in the case reported in Emperor v. Narayan Raghunath Patki ILR (1908) 32 Bom. 111, where the question is fully discussed.

10. Turning now to the second point in the Advocate-General's certificate, it is stated as follows: "In my judgment the opinion of the majority of the Court that the previous statements of an accomplice can legally amount to corroboration of the evidence given by him at the trial, should be further considered." There were two sets of previous statements of Arumugam and Somasundaram admitted at the trial, viz., (1) their statements to Inspector Veeraraghava Aiyar and (2) their statements, four and three days respectively later, to the same effect to the Magistrate, Mr. Cox, recorded by him, u/s 164 Criminal Procedure Code. I think that the opinion of the majority of the Full Bench on the question of their admissibility is right. The law on the subject is contained in Section 157 of the Indian Evidence Act, 1872, which reproduces in a simplified form the provision in Section 31 of Act of 1855 and enacts that "in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact may be proved" This section, which differs widely from the English law, expressly states that a former statement made by a witness may if made under the conditions stated in the section, be proved in order to corroborate the evidence of the witness at the trial No exception is made in the section, or elsewhere in the Act, so as to exclude such former statements in the case of a witness who is an accomplice. It was contended in the argument that

the general rule as to the admissibility of former statements laid down in Section 157 is limited in the case of accomplices by a special rule to be

inferred from illustration (6) to Section 114. It may, however, be doubted whether such a method of reasoning is not contrary to accepted canons

of interpretation. It seems unreasonable to hold that the express rule of law stated in Section 157 can be limited by a maxim which is not of

universal application. The validity of the suggested reasoning depends on an assumption that the Court must always and in all circumstances,

presume that an accomplice is unworthy of credit, whereas we have seen in dealing with the first point certified by the Advocate-General that there

may be circumstances in which the Court would be justified in not drawing the presumption. The illustration itself gives an instance of such a case.

In such a case it is impossible to see any reason why the evidence of the accomplice witness should not be corroborated by a previous statement

to the same extent and subject to the same conditions as in the case of a witness who was not an accomplice. I do not think that there is anything in

the Indian Evidence Act to exclude the evidence of accomplices from the plain and express rule in Section 157, nor can it be suggested that

corroborate"" is used in Section 157 in a different sense from that in which it is used in illustration (b) to Section 114. The former statement of an

accomplice is, therefore, legally admissible to corroborate his testimony at the trial and the weight to be attached to it, or, in other words, how far it

does really corroborate the evidence given at the trial must vary with the facts of each case. No hard-and-fast rule, capable of mechanical

application, can be laid down. In the great majority of cases, it would, no doubt, be found to be merely the repetition of tainted evidence affording

no ground for believing it to be true, and, therefore, adding nothing whatever to its value. On the other hand, if there was evidence, or even a

suggestion, put forward by the defence that the evidence given by the witness at the trial was the result of recent influences brought to bear upon

him, it would be most important to be able to prove that the witness had made statements to the same effect as his evidence at the trial long before

the influences relied on by the defence had been brought to bear upon him. For example, take the accomplice, Arumugam, in the present case. He

gave evidence at the trial involving several other persons beside himself, and stating various particulars about the treasonable meetings which they

attended. If the prosecution proposed to corroborate that evidence by proof of a former statement made months after his arrest, and when the police had collected their other evidence, and had, in fact, completed the scheme of the case to be proved against the accused, it is obvious that the former statement would add no strength to, would be no real corroboration at all, of the evidence of the witness at the trial But, is not the case very different when, as was found by the majority of the Special Bench, it appears that Arumugam first told the same story at a time, and under such circumstances, as to entirely negative the idea that It was either falsely concocted by himself or suggested to him by the police; when it appears that the story told was not what the police wanted at that time, nor was such as was supported by the evidence then in their hands, nor was such as would have been concocted by Arumugam either of his own motion, or in consultation with Madasami or Somasundaram, if he was anxious to protect himself or them from prosecution for complicity with Vanchi Aiyar in them under of Mr. Asbe, nor was such as Arurmugams" previous relations with the parsons then named would render probable? Is it not unreasonable to say that those and similar matters referred to by the majority of the Special Bench ought not to have been considered in judging whether Arumugam was a truthful witness or not? So, too, if there was reason to think that owing to the lapse of time the memory of a witness at the time of the trial could not be wholly rolled on, the fact that he had made a statement to the same effect when the facts were fresh, in his memory would be highly relevant in corroboration of the evidence at the trial. The rule, then, would seem to be that the former statements are legally admissible, and may be considered for what they are worth, but that the weight to be attached to them depends entirely on the facts of each case. The point raised in the Advocate-General's certificate is whether such statements ""can legally amount to corroboration of the evidence given at the trial."" It is not clear whether this mews ""are legally admissible as corroboration ""or whether it means ""can legally amount to corroboration in material particulars within the meaning of illustration (b) to Section 114."" If it means the former, I have stated the answer above. If it means the latter, I do not thick that the question is one that arises in this case,

11. In the argument before us it was assumed by the pleaders for the defence, that Arumugam and Somasundaram were found by the majority of

the Court to be unworthy of credit by reason of their being accomplices, and that it was, therefore, necessary to find that they were corroborated

in material particulars within the meaning of Section 114, illustration (b) before their evidence could be relied on, and that the former statements

made by them were used as such corroboration. I do not think that this is a correct view of the judgment of the majority of the Special Bench, I do

not anywhere find that they arrived at the conclusion that the approvers were untruthful witnesses. On the contrary they distinctly arrived at the

conclusion that they were truthful witnesses. In arriving at this conclusion they state that they were influenced by the demeanour of the witnesses,

and by the way in which they stood the test of cross-examination. They say that each of those witnesses "was subjected to the most rigorous and

searching cross-examination at the hands of one after another of the ten learned Counsel and vakils appearing for the defence for periods extending

over two or three days" and that though the cross-examiners had the advantage of being able to compare their evidence at the trial with three prior

statements (viz., those made before Veeraraghava Aiyar, and before Mr. Cox and before the Committing Magistrate) "the prolonged cross-

examination did not succeed in breaking down the evidence of any of the three approvers," and conclude by saying, "we do not consider that there

is anything in the evidence of the witnesses inconsistent with its substantial truth." They had previously referred to the circumstances under which

the approvers made their first statements, especially the intrinsic evidence of truthfulness to be derived from the very nature of the facts stated.

They pointed out that the circumstances under which the statements were first made strongly negated the idea that they were the result either of

concoction by the witnesses themselves or of suggestion by the police; that the story told was not what the police wanted, and that the persons

implicated were not those that would probably have been implicated if the police had suggested the statements or wished to obtain evidence to fit

in with the letters then in their hands, They also pointed out that the story told was not such as would have been concocted by Arumugam either

by himself or in consultation with Madaami or Bo nasuadaram in order to save themselves from prosecution for complicity with Vanchi Aiyar in

the murder of Mr. Ashe. They also considered that the conduct of Arumugam in not destroying the highly seditious literature found in his house,

and his previous relations with the persons accused as conspirators, negated the idea of the story having been concocted by the witnesses. In view of all the circumstances in which the statements were made and the inferences to be drawn from the nature of the statements and the conduct of the witnesses themselves, the majority of the Special Bench found it "impossible" to believe that the statements were "tutored" by the police or "conceded" by the witnesses themselves. If the evidence was not "tutored" by the police or "concocted" by the witnesses themselves, there would be no reason for regarding it as other than truthful in the ordinary sense, that is truthful so far as the witnesses themselves knew and believed, though, of course, the witnesses might make an unintentional mistake like any other honest witnesses. This view is not inconsistent with the fact that the majority of the Special Bench acquitted the 9th and 13th accused, though they were apparently implicated by the approvers, Ramasmi and Arumugam respectively. It will be seen that they were acquitted, not because the approvers were found to be intentionally giving false evidence against them, but because there was a doubt in each case as to whether the accused was the person really referred to by the approver as present at the meetings.

12. It is clear, then, that the majority of the Special Bench, for reasons stated, came to the conclusion, that the accomplice witnesses were truthful witnesses and were not unworthy of credit so as to require corroboration in material particulars, if that phrase is to be interpreted (as some of the benches do interpret it) as requiring that the corroboration should be by the evidence of independent witnesses. We have already seen, in dealing with the first point raised by the Advocate-General, the corroboration is not legally necessary if there are circumstances which lead the court to the conclusion that the witness though an accomplice is a truthful witness.

13. The question, then, "whether the previous statement of an accomplice can legally amount to corroboration in material particulars of the evidence given at the trial within the meaning of illustration (b) to Section 114" is one that is not expressly raised by the certificate of the Advocate-General, nor do I think that it is one which it is necessary to consider in order to decide the questions raised by him, or the correctness of the judgment of the majority of the Special Bench. I have already shown how the

former statements have been used in their judgment to corroborate the evidence of the witnesses given at the trial, and I have expressed the opinion that they were admissible u/s 157 and were properly used.

14. If, however, it is necessary in this case to determine whether the phrase ""material particulars"" in illustration (b) to Section 114 is to be regarded, as in some sense, a technical expression implying corroboration by independent or untainted evidence, I am unable to go so far and to say that as a matter of law the previous statement of an accomplice can never amount to corroboration in material particulars.

15. The pleader for the defence relies on the cases reported in *Reg, v. Malapabin Kapana* (1874) 11 Bom. H.C.R. 196 and *Queen-Empress v.*

Bepin Biswas ILR (1884) Calc. 970.. In the former it was said, at page 197, that the previous statement of an accomplice ""can scarcely be said to

answer the purpose for which juries are advised by Judges to require the evidence of an accomplice to be confirmed."" In the latter, the Judges

refer with approval to the *Bombay case*, but add at page 974, It is not necessary for us to consider whether the rule should be extended as far as

to exclude a statement made before arrest but we have no doubt at all that the exact correspondence in details of several statements made by an

approver in the course of a trial is not corroborative evidence, such as, we ordinarily require to make it safe to convict any particular prisoner."" It is

clear that the Judges in that case did not lay down any such absolute rule as is now suggested by the pleaders for the defence.

16. If there are some circumstances in which a prior statement may amount to sufficient corroboration, we cannot say as a matter of law that a

prior statement can never be corroboration in material particulars though no doubt, in the great majority of cases, it will be found that the prior

statements do not add anything to the credibility of the evidence given at the trial. As I have already said, how far a prior statement does

corroborate evidence given at the trial is a matter to be determined by the jury (or, where there is no jury, by the Judge), on a consideration of all

the facts of the case including the time when, and the circumstances in which, the former statement was made, and the facts related in the statement

considered in their relation to the knowledge of the speaker at that time and all the surrounding circumstances.

17. It may be added that very little light as to the application of Section 157 can be gained from a consideration of English cases, since the English

law has no rule similar to that in Section 157 and is generally unfavourable to the admission of former statements of a witness to corroborate his

evidence at the trial, though permitting it in certain cases.

18. The third, fourth and fifth points certified by the Advocate-General relate to three objections that were taken to the admissibility of the

statements made by the accomplices, Arumugam and Somasundaram, to Veeraraghava Aiyar. It may be stated at once that the admissibility or

inadmissibility of these statements cannot make any difference in the decision of the present case, since the majority of the Special Bench who

admitted the statements expressly say that they find it impossible to believe that the statements were either tutored or concocted, even if the

witnesses' statements to Veeraraghava Aiyar are discarded and if regard is paid only to their statements recorded, four and three days respectively

later, to the same effect, by Mr. Cox, the Magistrate, u/s 164, Criminal Procedure Code, the admissibility of which is not, and cannot be, disputed.

As, however, the questions are raised in the Advocate-General's certificate and are of great general importance, I will state my opinion in regard

to each of them.

19. The objection referred to in the fifth point depends on the construction of Section 162 of the Criminal Procedure Code and may be very

shortly dealt with. All the Judges of the Special Bench are agreed as to the proper construction of that section. The same construction was placed

upon it in the recent case of *Fanindra Nath Banerjee v. Emperor* ILR (1909) Calc. 281. The words of the section are clear. I agree with the

conclusion arrived at by all the Judges of the Special Bench, and for the reasons stated in their judgments.

20. The third point may also be shortly disposed of. The question is whether Veeraraghava Aiyar was an authority "legally competent;" within the

meaning of Section 157 of the Indian Evidence Act, to investigate the facts in relation to which the former statements of Arumugam and

Somasundaram were made, that if, the facts relating to the murder of Mr. Asbe. It was contended before us that the words "competent to

investigate" must refer exclusively to the persons competent to hold the police

investigation into an alleged offence under chapter 14 of the Criminal Procedure Code. But I do not think that this view is correct. The words in the Evidence Act are perfectly general, "competent to investigate the fact"-Can it be supposed for instance that a statement made before a civil court relating to some fact, the existence of which the Court was legally competent to try, and otherwise relevant u/s 157 of the Indian Evidence Act in a subsequent criminal trial, could be shut out on the ground that the word "investigate" would not include a trial by a civil court? I take it that the answer must be in the negative. It is unfortunate that there was no adequate inquiry before the Special Bench as to how far Inspector Veeraraghava Aiyar was an authority legally competent to investigate the facts relating to the murder of Mr. Asha. The Deputy Inspector-General of his Department, Mr. Thomas, was a witness, but he was never asked any question at all as to the Inspector's competency to investigate. The result is that we are obliged to deal with the case on very imperfect information as to the facts. On the whole, however, I am inclined to hold that the Inspector was legally competent to investigate the facts relating to Mr. Ashe's murder. He was an Inspector of the Provincial Criminal Investigation Department, a branch of the Police, whose work is not confined to any particular district, but which was created "to assist in the investigation of crimes which are of such a special character that the local officers are unable to deal with them adequately without help." (G.O. No. 913, Judicial dated 2nd July 1908.) He was directed by the head of his own department (the Deputy Inspector-General) and by the local District Superintendent of Police to search certain houses, including the house of Arumugam at Tuticorin, in connection with Mr. Ashe's murder. It is not contended that his deputation for this duty was other than legal or that he was not legally competent to conduct or take part in the searches. I take it that conducting the searches was an integral part of the investigation, and legal competency to conduct the searches, carried with it legal competency to do all things properly incidental to, and connected with, the searches, and included the listening to any statements relating to the murder or these who took part in it, made by the persons whose houses were being searched.

21. I do not think that the words "investigate the fact" in Section 157 of the

Indian Evidence Act should be construed in a narrow sense so as to restrict competency to the Police officer who, under chapter 14 of the Criminal Procedure Code, is charged with the investigation of an offence. I am, therefore, not prepared on the evidence before me to dissent from the view of the majority of the Special Bench that the Inspector was an officer legally competent to investigate the facts relating to Mr. Ashe's murder within the meaning of Section 157 of the Indian Evidence Act. A suggestion was thrown out that "the fact" in this case must be the conspiracy, not the facts generally relating to the murder of Mr. Ashe, and it was argued that in that view, the Inspector could not investigate it without the order of a magistrate, as it (the conspiracy) is a non cognizable offence. This argument, I think, proceeds on an incorrect view. The Inspector was engaged in and upon the investigation of facts relating (so Mr. Ashe's murder, and the statement was made to him by the person whose house was being searched and it was made as a matter "relating" to the murder. It cannot be regarded as relating only to the conspiracy and not at all to the murder.

22. It remains to notice the fourth point in the Advocate-General's certificate which is as follows "--"That in my judgment the opinion of the majority of the court, that the statements of prosecution witness No. 6 and prosecution witness No. 12 to prosecution witness No. 31 were not rendered inadmissible by reason of the provisions of Section 25 of the Indian Evidence Act, should be further considered," Section 25 of the Indian Evidence Act states that "No confession made to a Police officer shall be proved as against, a person accused of any offence," The words of Section 25 in their plain and ordinary meaning seem to me to render the statements made by the accomplices to the Police Inspector, Veeraraghave Aiyar inadmissible. The statements are confessions: they were made to a Police officer and it is now sought to use them as against some of the accused in this case. The majority of the Special Bench point out that in Section 26, the confession (when made not to a Police officer but while in his custody) is expressly made inadmissible only as against the person who made it, but may be proved as against other persons and observes that as the "mischief" of the two sections is the same, Section 25 also should be understood as only excluding a confession made to a

Police officer from being used as against the person making it. It is difficult to accept this view without putting too great a strain on the plain

language of section "25. It certainly is difficult to see any satisfactory reason why the scope of the two sections should be different, but that is

hardly a sufficient reason for not construing each section to as to give effect to its plain language. It seems to be especially undesirable to extend the

language of Section 25 beyond its plain meaning when the effect of doing so might tend to encourage those corrupt practices of the police in regard

to working for confessions which it is the policy of the law to prevent. There is much force in the observation of Batchelor, J., in the case reported

in Emperor Vs. Harisingh Ganpatsingh, , that a confession which is inadmissible against the person making it, ought a fortiori to be inadmissible

against another person implicated by it The case in Queen-Empress v. Tribhovan Manekohand ILR (1985) 9 Bom. 131 cited by Mr. Napier for

the prosecution, is hardly an authority for his contention, as the present question did not arise in that case. The point that West, J., was enforcing

was that Section 25 did not refer to the use of a confession in other than a criminal proceeding, that an enquiry u/s 523, Criminal Procedure Code,

was not a criminal proceeding, and that a confession could, therefore, be used as an admission in an enquiry under that section.

23. Since writing the above, I have had the advantage of perusing the judgments which my learned brothers, Wallis and Miller, JJ., are about to

pronounce on this question. I am much impressed by the force of the argument that may be drawn against my view from reasoning founded on the

history of Sections 24 to 26 which are embodied first in the Code of Criminal Procedure of 1861 and afterwards transferred without material

alteration to the Indian Evidence Act of 1872, but I am still inclined, on the whole, to the opinion that effect must be given to the language of

Section 25, and that it renders the statements of Arumugam and Somaandaram to Inspector Veeraraghava Aiyar, inadmissible.

24. But as I have already pointed out this can make no difference in the decision of this case, since the majority of the Special Bench expressly

stated that it is impossible to believe that the evidence of the sixth and twelfth prosecution witnesses was either "tutored" by the police or

connected by the witnesses themselves, even if the "with" statements to Veeraraghava Aiyar are discarded and if regard is paid only to their

statements made a few days later to the magistrate, the admissibility of which is not, and cannot be, disputed. In other words the learned Judges

were prepared to act on the evidence of these witnesses as truthful, apart from any corroboration derived from their statements to the Inspector. In

these circumstances, it is not open to us as a court of review to go into the facts and consider whether the learned Judges ought or ought not to

have arrived at that conclusion.

25. I would therefore dismiss the petitions that have been presented asking us to set aside the convictions of the accused.

Wallis, J.

26. This was a case tried before three Judges of this Court, under Act XIV of 1908, and comes before us on a certificate of the then Advocate-

General pursuant to Clause 26 of the Letters Patent that certain points of law which in his opinion were decided by the Judges, or, a majority of

them, require to be further considered. Objection was taken at the outset by the Officiating Advocate General that Clause 26 does not apply to

criminal trials before the High Court under Act XIV of 1908, Reference was made to Clause 24 conferring extraordinary original criminal

jurisdiction on this Court and it was contended that the accused before the Court were not "persons brought before it on charges preferred by the

Advocate-General or by any magistrate or other officer specially empowered by the Government in that behalf" so as to come within that clause,

but were committed to this Court for trial by a magistrate acting under the powers conferred upon him by Section 6 of Act XIV of 1908.

Assuming that to be so and that the jurisdiction of the Court does not arise under Clause 24 but under an Act of the Indian Legislature to which the

provisions of the Letters Patent are subject, I am still of opinion that the objection fails, because clauses 25 and 26 of the Letters Patent, as to

points of law being reserved by the Court or certified by the Advocate General, are perfectly general in their terms and, in my opinion, apply

equally to all criminal trials before this Court whether in the exercise of its ordinary or extraordinary original criminal jurisdiction under clauses 22

and 24 of the Letters Patent or of any future statutory original criminal jurisdiction that may be conferred upon it by a competent legislature, further,

Act XIV of 1908, nowhere says that clauses 25 and 26 of the Letters Patent are

not to apply to trials under the Act and the presumption is

strongly against any intention on the part of the Indian legislature to modify by implication provisions of the Letters Patent issued under an Act of

Parliament. I think therefore we were" bound to hear and dispose of the application for review, however much our so doing may tend to defeat the

object of this special legislation, which was to sure the speedy trial of these cases, or may further interfere with the business of the Court by

withdrawing five Judges from their ordinary duties.

27. The Advocate-General's certificate has been granted under that part of Clause 26 which empowers him to certify that "'a point or points of law

which has or have been decided by the said Court shall be further considered.'"

The certificate purports to have been granted upon certain

representations made to the learned Advocate-General and does not: show whether the written judgments of the Court were before him, They are

before us and we have to satisfy ourselves in the first place as to what was actually decided by the majority or the full Court as the case may be

with reference, to each of the points of law and as to whether the decision was erroneous.

28. The points before us arise on the Indian Evidence Act, I of 1872, and, as the learned Officiating Advocate-General has argued, it is

undoubtedly our duty in construing that Act, which is in the nature of a Code, to follow the language of the sections of the Act, so far as they are

clear, and, only in cases of ambiguity or obscurity, to fall back upon the English law upon which it was based.

29. The certificate as to the first point is as follows:

That in my judgment the opinion of the majority of the Court, that the evidence of an accomplice need not be corroborated in material particulars

before it can be acted upon, and that it would be open to the Court to convict on the uncorroborated testimony of an accomplice if the Court was

satisfied that the evidence was true, requires to be further considered; and it requires to be further considered whether Section 133 of the Indian

Evidence Act read with Section 114, illustration (6), does not merely intend to lay down that a conviction upon the Uncorroborated testimony of

an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special

circumstances.

30. As to this, I am of opinion that the proposition that it would be open to the Court to convict on the uncorroborated testimony of an accomplice

in the sense and in the terms in which it is stated in the judgment of the majority of the Judges is correct and does not amount to an error in law.

Section 114 of the Indian Evidence Act authorises the Court to make certain presumptions of fact. Nine well-known maxims are there given as

illustrations of the section, the-second of which is ""the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in

material particulars."" They are all presumptions which may naturally arise, but the legislature by the use of the word ""may"" instead of ""shall,"" both in

the body of the section and in the illustrations, shows that the Court is not compelled to raise them but is to consider whether, in all the

circumstances of the particular case, they should be raised, To make this clearer still, there is the additional provision: ""But the Court shall also

have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it,"" and then as to

each of these maxims, instances are given of facts in which the maxim is inapplicable, and, in the case of the maxim now in question, there are two

such instances. Now, if Section 114 stood alone, I do not see how it could be said that it was not open to the Judges of fact in the particular case,

whether judge or jury, to apply or not apply any of these maxims, having regard to all the facts of the case before them; and this is expressly stated

by the draftsman, the late Sir Fitzjames Stephen, in his Indian Evidence Act, at page 174, ""Finally, it declares in Section 114 that the Court may it:

all cases whatever draw from the facts before it whatever inferences it thinks just."" But as regards the particular maxim, Section 114 does not stand

alone, because Section 133 provides that ""a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an

accomplice."" If the law was so laid down in the Act, it was, I have no doubt, because it was the English law as understood at the time and had

been the law ever since the decision of Atwood's case (1787) 1 LCr. 464 by the twelve Judges at the close of the eighteenth century and because

the draftsman and the legislature were not prepared with anything to substitute for it. They were not of course unaware of the well-established

practice of the courts in England and India according to which, to use the language of Sir Fitzjames Stephen in Article 121 of his Digest of the Law

of Evidence published in 1876, "when the only proof against a person charged with a criminal offence is the evidence of an accomplice,

uncorroborated in any material particular, it is the duty of the Judge to warn the jury that it is unsafe to convict any parson upon such evidence,

though they have a legal right to do so." The adoption of the practice in England may be traced in *R. v. Wells* (1829) 1 M. & M. 326 where it is

said to deserve all the reverence of law. In these cases the Judges told the jury they ought not to convict on the evidence of accomplices, whether

one or more, unless it was confirmed or corroborated not only as regards the offence generally but as regards the particular accused, but the

decision was invariably left to the jury; and in *Reg. v. Mullins* (1848) 7 St. 1111, Appx, A. Maule, J., pointed this out and observed that these

directions to the jury were not directions on points of law which the jury were bound to adopt but observations respecting facts to assist the jury in

their endeavour to judge of the facts. Then in *Reg. v. Stubbs* (1855) DC.C. 555 the Court of Crown Cases Reserved held that the omission of the

Court to warn the jury that they ought not to convict one of the accused, as to whom the evidence of the accomplices was not corroborated, was

only a departure from the usual practice, which was again stated by the Judges, and did not involve any question of law on which the Court of

Crown Cases Reserved could review the case under 12 Vict. . 78. The law was laid down precisely in the same way by the Court of Queen's

Bench in *Reg. v. Boyes* (1861) 9 Cox. C.C. 32 and by Lord Coleridge, L.C.J., sitting with Brett, M.R. and Grove, J., at the Central Criminal

Court for the trial of Gallagher, *Reg. v. Gallagher* (1881) 16 Cox. C.C. 291 and by Cave and Collins, JJ., in *In re Meunieri* (1894) 9 Q.B. 415.

Under the larger powers now given by the Act, 1907, the Court may now treat a failure to comply with the well-established practice of directing

juries as to how the evidence of accomplices is to be regarded as having involved a miscarriage of justice within the meaning of Section 4, *Rex v.*

Tate (1908) 2 K.B. 680; but this in no way affects the authority of the above decisions; nor are they affected by the fact stated by Sir Alfred Wills

in his "Circumstantial Evidence," at page 365, that in one case Baron Bramwell and in another he himself withdrew the case from the jury when

there was no corroboration and directed an acquittal. In India at any rate such a course would be a direction at variance with the provisions of the Indian Evidence Act.

31. As regards the practice in India it has been observed that the danger of acting on the uncorroborated evidence of accomplices is even greater

than in England; and before the passing of the Indian Evidence Act it was held by a Full Bench of the Calcutta High Court in *Elahee Buksh's Case*

(1866) 5 W.R. Cr. R. 80 on a review of the English authorities that a failure to direct the jury in accordance with the practice was a misdirection

on which the conviction could be set aside. With regard to the effect of the Indian Evidence Act on the practice: I cannot altogether agree with the

observation which has been sometimes made that the practice was embodied in Section 114, illustration (b). The legislature might, of course, have

enacted that no one should be convicted on the evidence of accomplices "unless corroborated in some material particular by evidence, implicating

the accused," as in 48 and 49 Vict., Cap. 69; but this would have been a serious departure from the law as previously understood both in England

and in India and in my opinion the legislature were not prepared to go so far but were content with enacting the maxim as ordinarily applicable,

whilst leaving it to be applied or not according to the circumstances of the particular case. They must, however, I think, have contemplated that the

law as declared rather than newly enacted in the section would continue to be applied under the safeguard of the practice; and it is not, I think,

surprising that the practice should have continued unaffected by the passing of the Act, as appears from the Indian cases which are fully reviewed

in the judgment of Mr. Justice Sankaran Nair. The practice, it must be borne in mind, was one of advising the jury not to convict on the

uncorroborated evidence of an accomplice, leaving it to them whether to follow the advice or not, a liberty they undoubtedly possess u/s 114 read

with Section 133 of the Indian Evidence Act. The same degree of liberty must necessarily be reserved where the Court itself is the judge of fact

instead of the jury. In such a case the Judge cannot be required consistently with the provisions of the Indian Evidence Act to direct himself not to

convict on the uncorroborated evidence of an accomplice. All that he can be required to do is to exercise extreme caution in departing from such a

well-established rule of guidance. In such a case, the learned Judges constituting the majority lay it down that it is the duty of the Court to bear in

mind that it is tainted evidence, to scrutinize it with the utmost care, accept it with the greatest caution, consider it in the light of the circumstances in

which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible. Then if you believe it, act on it

even if there is no corroboration in the strict sense of the word. This direction seems to me to be in accordance with the law laid down by this Court in

Reg. v. Ramasami Padayachi ILR (1878) Mad. 394 and Ramaswami Gounden v. Emperor ILR (1904) Mad. 271, If the alternative proposition as

to special circumstances put forward in the certificate of the learned Advocate-General means more than this and involves an enquiry as to

law in each case whether there are special circumstances entitling the Court to act on uncorroborated evidence I am unable to agree with it. I am of

opinion that in the judgment of the majority on this point there is no error of law entitling us to interfere under Clause 26 of the Letters Patent.

32. The second point is whether the previous statements of an accomplice can legally amount to corroboration of the evidence given by him at the

trial. Reading the certificate with the judgment of the majority of the Court it appears to me that the question for our consideration is whether such

previous statements if proved can be regarded as amounting to corroboration of the accomplice in material particulars within the meaning of

Section 114, illustration (6) of the Indian Evidence Act, as it is scarcely disputed that u/s 157 such statements are admissible in corroboration. I do

not think that the Courts in England have ever attempted to define exhaustively what will amount to corroboration—a question which appears to be

rather one of fact depending on a consideration of all the circumstances of the case. In India, the evidence of previous statements made in certain

circumstances is admissible u/s 157 of the Indian Evidence Act to corroborate the testimony of the witness. It is therefore admissible evidence in

corroboration of the evidence even of a witness who is an accomplice, and I am not prepared to say as the Advocate-General wishes us to say

that the previous statements of an accomplice cannot legally amount to corroboration of the evidence given by him at the trial. I think that previous

statements admissible as corroboration u/s 157 of the Indian Evidence Act may or may not amount to sufficient corroboration and that whether

they will be so or not depends on the facts and circumstances of the particular case. That previous statements may in some cases amount to

corroboration where, as in the present case, there are the previous statements of several accomplices was pointed out in *Elahee Buksh's Case*

(1866) 5 W.R. Cr. R. 80, the leading Indian authority. Sir Barnes Peacock, at page 84 observed but if two or three persons should be

apprehended at different places, at long distances from each other, and should each confess and give a similar account as to the persons associated

with them in a particular dacoity, the statement of each, if made under such circumstances as not to raise a presumption of collusion might be

proved in corroboration of his evidence; such statement being admissible as corroborative evidence under Act II of 1855, Section 31"" which is the

same as Section 157 of the present Act. It is in my opinion clear that in the opinion of the learned Judge the previous statements of the accomplices

in those circumstances would amount to sufficient corroboration of their evidence, and this is also in accordance with the dictates of good sense, In

England, previous statements of witnesses whether accomplices or not, are not generally admissible in evidence; but when admissible in exceptional

cases as in regard to assaults on women, they are admitted, it is now settled, as evidence of corroboration-*Rex v. Osborne* (1905) 1 K.B. 551 and

it is clear from the recent decision of the Court of Criminal Appeal in *R. v. Ellsom* (1911) 76 J.P. 38 that in the opinion of the Court such

statements, if properly before the Court, may, when considered in the circumstances in which they were made, amount to strong corroboration of

the evidence of an accomplice. Taken by itself the previous statement may of course be as tainted and untrustworthy as the evidence in the box

and not supply any real corroboration; but on the other hand, the circumstances in which it was made may afford strong corroboration of its

truthfulness apart from the credibility of the accomplice, as in the case put by Sir Barnes Peacock which has now been inserted as an illustration to

Section 114 (6) of the Indian Evidence Act.-"" A crime is committed by several persons. A, B and C, three of the criminals, are captured on the

spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner

as to render previous concert highly improbable."" In such a case the previous statements not only corroborate each other but also the sworn

statements in the box, and they are evidently regarded as confirming the (tainted evidence of the accomplices and making it right to act on that)

evidence. It is true that they are given in the section rather as facts rendering corroboration, unnecessary than as amounting themselves to

corroboration but this, it appears to me, is a distinction which makes no real difference, as the Court is invited to believe the evidence and act upon

it. The previous statements received and acted upon by the majority of the learned Judges in this