SUPREME COURT OF INDIA

Bansidhar Mohanty

Vs.

State of Orissa

Crl.A.No.97 of 1952

(Mehr Chand Mahajan, C.J.I., S. R. Das, N. H. Bhagwati and T. L. Venkatarama Ayyar, JJ.)

19.11.1954

JUDGEMENT

S. R. DAS, J.:-

1. This is an appeal from the judgment of the High Court of judicature, Orissa, pronounced on 24-7-1951 in Government Appeal No. 5 of 1950 whereby the High Court reversed the order of acquittal passed by the Sessions Judge of Sundar Nagar - Sambalpur and convicted the appellant, a sorter employed in the Postal department, of offences under S. 381, Indian Penal Code, and S. 52, Indian Post Offices Act for having on 3-1-1949 stolen an insured cover of the face value of Rs. 3,000 from the mail van attached to 13 Down Passenger train running from Jharsugukla to Tatanagar and sentenced him to undergo rigorous imprisonment for 5 years on each count, the sentences running concurrently and to a fine of Rs. 500 and in default of payment of fine to a further term of rigorous imprisonment for a period of 6 months.

2. At the beginning of its judgment the High Court summarises the prosecution case as follows. The appellant Bansidhar was Head Sorter No. 7-Out-section and Shib Sankar Sahay P. W. 1 was the Head Sorter R. M. S., Northern Division No. 7 Dn. On the date of occurrence. viz, 3-1-1949, Shib Sankar P. W 1 was in charge of the mail van attached to the 13 Down. Passenger train on the Jharsuguda-Tatanagar section. Shib Sankar P. W. 1 took over charge of the mail van at Jharsuguda and travelled in it along with Basudev Chakravarty P. W 3, the second sorter, and Marcus Bari P. W. 4, the van peon.

Before the train left Jharsuguda, the appellant represented to the Head Sorter Shib Sankar P. W. 1 that he wanted to travel by that train as he had misdelivered a parcel at Kulanga. The appellant, therefore, was allowed to travel in the luggage compartment attached to the mail van. After the train left Jharsuguda the appellant entered into the mail van through the intercommunicating door and started giving instructions to Basudev P. W. 3, the second sorter, who was new to his job, as to how he should sort out the letters.

The appellant stood near the pigeon holes of the counter where registered letters are kept and was found unnecessarily officious. Shib Sankar P. W. 1, therefore, advised him not to disturb Basudev P .W. 3 and asked the appellant to go back into the attached luggage compartment which the appellant did. At Bamra station, however, the appellant again came into the mail van and took his stand near the counter. In spite of P. W. 1 Shib Sankar's request the appellant did not leave the mail van; but after loitering there for some time he went into the latrine.

After a short interval Shib Sankar, P. W. 1 directed the second sorter Basudev P. W. 3 to check up the bags as Rajgangpur station was approaching where they had to close their first bags. The second sorter P. W. 3 checked the pigeon holes and told Shib Sankar P. W. 1 somewhere between Godpos and Sonakhan railway stations that one of the insured covers was missing. Shib Sankar P. W. 1 himself took up the checking and discovered, between Sonakhan and Rajgangpur, that an insured article (No. l0 of Sakti) was missing. Shib Sankar P. W. 1, thereupon went towards the latrine door and asked the appellant to come out.

The appellant, however, did not respond but when the train was approaching the distant signal of Rajgangpur station Shib Sankar P. W. 1 heard some sound from which he gathered that some paper was being torn inside the lavatory. He, then, forced open the latrine door and pulled out the appellant. Shib Sankar P. W. 1 suspected the appellant as he was trying to conceal something, in his chest pocket and, therefore, searched him and brought out six one hundred-rupee notes and twenty ten-rupee notes from his pocket.

Shib Sankar P. W. 1 wanted to report the matter to the police, but the appellant implored him not to do so and pleaded that he would take the responsibility for the loss on himself and that he might be proceeded against departmentally. The appellant accordingly wrote two chits (Exs. 1 and 2), one admitting the tearing of an insured letter and the other intended to be sent to his father. The appellant also represented that there were only Rs. 800 inside the cover and that he had thrown off the cover. The appellant, however, undertook to pay the sum of Rs. 3000, the maximum value for which insurance could be effected and handed over another chit at Rajanagpur station.

This chit is marked as Ex. 5. At Rajgangpur station Shib Sankar P. W. 1 sent intimation to the Post Master of that place by a memo Ex. 3. Shib Sankar P. W. 1 also sent Marcus Bari, the van peon P. W. 4, to search the railway track up to the distant signal. It was already dark when the train reached Rajnangpur, and the van peon returned only to report that his search was unsuccessful. The A. S. I, of G. R. P. was informed of the incident at Rajgangpur station at about 7.30 P. M. and a written report (Ex. 4) was given to the A.S.I. at Koolange; and F. I. R. was prepared at the Rourkela police station (G.R.P) the same night at 8.30).

3. On the above facts the appellant was charged under S. 381, Indian Penal Code for having committed theft of the insured cover valued at Rs. 3,000 and he was also charged with an offence under S. 52, Indian Post Offices Act as he was an employee in the Postal department at the date when the offences were said to have been committed.

The trial was held with, the assistance of four assessors who unanimously found the appellant not guilty of either of the offences. The learned Sessions Judge, in agreement with the verdict of the assessors, came to the conclusion that the prosecution case had not been sufficiently proved against and brought home to the appellant beyond all reasonable doubt and accordingly he made an order of acquittal.

The Government having appealed, the High Court reversed the Sessions Judge's order of acquittal and convicted and sentenced the appellant as hereinbefore mentioned. The High Court having refused to grant a certificate of fitness for appeal to this Court, the appellant applied for and obtained from this Court special leave to appeal. The appeal has now come up for disposal before us.

4. The principles on which the High Court should act in an appeal from an order of acquittal have

been quite clearly laid down by the Privy Council in the case of - 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp. 229-230 (A). The same principles have been so often reiterated by this Court that it is hardly necessary to restate them 'in extenso'.

It will be sufficient to refer to the decisions of this Court in -'Surajpal Singh v. The State', AIR 1952 SC 52 (B); - 'Puran v. State of Punjab', AIR 1953 SC 459 (C) and - 'Narayan Ittiravi v. State of Travancore-Cochin', AIR, 1953 SC 478 (D). It is now well settled by the abovementioned decisions that while in an appeal under S. 417, Criminal P. C. the High Court has full power review the evidence upon which the order of acquittal was founded, nevertheless, in exercising the power conferred by the Code the High Court will give proper weight and consideration to such matters as (i) the views of the trial judge as to the credibility of witnesses; (ii) the presumption of innocence in favour of the accused reinforced by the fact of his acquittal at the trial, (iii) the right of the accused to the benefit of any doubt and (iv) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.

The judgment of the High Court now under appeal has to be tested in the light of the above principles.

5. The learned Sessions judge disbelieved the evidence of Shib Sankar P. W. 1, Basudev P. W. 3 Marcus Bari P. W. 4 and the Sub-Post Master, Rajgangpur, Amulaya Ratan Adhicary P. W. 6 regarding the theft of the insured cover and held that the prosecution evidence as to when and how Exs. 1, 2 and 5, namely, the chits said to have been written by the appellant were obtained was inadmissible or in any event, unreliable.

The learned Sessions Judge at great length referred to glaring discrepancies in the statements of the above four witnesses and even to discrepancies in the various previous statements of the same witness. The High Court, however, brushed aside those discrepancies mainly on the ground that such discrepancies were not put to the witnesses as to give them a chance to explain the same. The Judgment of the High Court appears to us to slur over glaring discrepancies or, at any rate, to be a laboured attempt to reconcile the same.

The previous statements made by these witnesses to Shri K. C. Sen Gupta, the Superintendent, R. M. S., P. W. 7, were never produced in Court while those witnesses were under examination but were proved only through the Superintendent, P. W. 7. In the circumstances, it is futile to hold the advocate of the appellant to be remiss in his duty in not drawing the attention of the witnesses to their respective statements made before the Superintendent. Again, where one witness does not corroborate another witness in material particulars the High Court puts the blame on the advocate for the appellant for not having put the statement of a previous witness to a subsequent witness.

We do not think it is any part of the duty of the defence advocate to fill up the lacunae in the evidence adduced by the prosecution. A good deal of weight was placed by the High Court on what have been described as the confessional statements of the appellant contained in the three chits Exs. 1, 2 and 5. Apart from the discrepancies in the Statements of the four witnesses as to the time when and the manner in which the three chits were obtained from the appellant it is quite clear from the evidence that the appellant was completely under the influence of drink throughout the material period.

It is acknowledged by the mail van peon that the appellant, when he entered the mail van at Jharsuguda, was somewhat intoxicated. When the latrine door was forced open the appellant was

found in a reclining posture with his Pyjamas off his body and he was dragged out in a naked condition. According to the evidence of Minaketan Dandasena, A. S. I., G. R. P., P. W. 9, when he entered the van he found the appellant lying down on the floor although not asleep. The content of the three chits, Exs. 1, 2 and 5 are incoherent, the sentences incomplete and do not appear to have been written by a man in his proper senses.

Apart from the discrepancies in the statements of the witnesses referred to by the trial Court it is curious, to say the least, that these chits were not made over by Shib Sankar P. W. I to the A. S. I. P. W. 9 who took charge of the investigation. It is also to be noted that in the report Ex. 4 handed over by Shib Sankar P. W. I to the A. S. I. at Rourkela there is a reference only to "a letter" and not to three chits. It is further significeant that in the report (Ex. 6) male by Shib Sankar P. W. I to the superintendent P. W. 7 there is no mention of any of the three chits at all.

In view of these circumstances it is not at all surprising that the assessors and the learned Sessions Judge did not think fit to place any reliance on the three chits. The criticism of the High Court against this part of the judgment of the Sessions Judge does not appear to be well-founded or cogent.

6. That an insured cover was sent from Sakti Post office insured for Rs. 3,000 and that the same was in the mail bag received by the Head Sorter Shib Sankar P. W. I at Jharsuguda and made over to the second sorter Basudev P. W. 3 shortly after the train left Jharsuguda is not disputed. Basudev P. W. 3 opened the registered bag and found that there were 8 insured covers, one for a particular place, and the other 7 for another particular place, and he kept them in their respective pigeon holes.

The number of insured covers tallied with the list. It will be useful at this stage to note that between Bamra and Rajgangpur there are two station called Godpos and Sonakhan. The distances between the stations are as follows: The distance from Bamra to Godpos is 10 miles, that from Godpos to Sonakhan 7 miles and from Sonakhan to Rajgangpur 4 miles The appellant is said to have entered the mail van from the luggage compartment after the train left Jharsuguda but went back to the luggage compartment on being asked by Shib Sankar P. W. 1 not to interfere with the work of Basudev P. W. 3.

The appellant is said to have re-entered the mail van at Bamra station and to have stood near the counter. He was asked to go back but he did not pay any heed to the admonitions of Shib Sankar P. W. 1 and after loitering in the mail van for some time the appellant, went into the latrine.

According to the evidence of Shib Sankar both before the committing Magistrate as well as at the trial the appellant went into the latrine after the train left Bamra. According to the evidence of the mail van peon Marcus Bari, P.W. 4 the appellant went into the latrine at Bamra station while the train was just starting. When the train came near Godpos, Shib Sankar asked Basudev to recount and check up the insured covers. Between Godpos and Sonakhan. Basudev P. W. 3 discovered that one of the insured covers was missing and he promptly informed Shib Sankar.

This alleged discovery of the loss of the insured cover was said by Shib Sankar in his examination-in-chief to have taken place in between Godpos and Sonakhan and in his cross-examination to have taken place when the train was nearing Godpos. Thereupon Shib Sankar P. W. I knocked at the latrine door and asked the appellant to come outside since one insured cover was missing.

The train had, according to him, arrived at the distant signal of Rajgangpur railway station by that

time and the motion of the train having been slowed down he could hear the tearing sound of a paper. Then he began to push and kick at the latrine door as a result of which the hook went off. and the door opened. He found that the appellant was sitting in a reclining Posture after having taken of his pyjamas.

He dragged the appellant from the place in a naked condition and found that the appellant was putting his left hand on his shirt pocket. The witnesses forcibly brought out six one-hundred rupee notes and twenty ten-rupee notes from his pocket. Afterwards the three chits Exs. 1, 2 and 5 are said to have been written by the appellant. From the evidence it is quite clear that the alleged theft, if any, must have taken place before the appellant entered the latrine. Marcus Bari P. W. 4 said that the appellant went into the latrine, came out and went back again, but this story was not corroborated by either Shib Sankar P. W. 1 or Basudev P. W. 3 according to whom the appellant went into the latrine and remained there until he was dragged out of it by Shib Sankar.

So this part of Marcus Bari's evidence may be safely ignored. According to the evidence, then, the appellant entered the latrine at Bamra station or just after the train had left that station and he entered the latrine with the insured cover. The alleged loss of the insured cover was discovered before the train reached Godpos or, at any rate, between Godpos and Sonakhan. It is not at all intelligible why, in that situation, Shib Sankar P. W. 1 did not send for the police or the Guard or the Station Master when the train stopped at Sonakhan which, according to the evidence of Marcus Bari, it certainly did.

The story of Shib Sankar hearing the tearing sound of paper from outside the latrine door, while the train was in motion, is hard to believe. Apart from the improbability of such a story it is impossible to believe that the appellant who had stolen an insured cover and entered the latrine at or shortly after the train left Bamra did not tear open the cover immediately after entering the latrine but waited patiently until after the train had left Sonakhan, a distance of about 17 miles, and then tore open the insured cover when the train had reached the distant signal of Rajgangpur station.

This discrepancy as to the time of the appellant's entry into the latrine, the improbability of Shib Sankar hearing the tearing sound while the train was in motion, the discrepancy as to the time when he heard the tearing sound certainly threw considerable doubt on the prosecution story and the credibility of the witnesses called in support thereof and the assessors and the trial Court drew their own inferences and gave the appellant the benefit of doubt.

The High Court judgment simply and totally overlooks this aspect of the matter and thereby fails to give due weight to the findings of the trial Court in violation of the principles enunciated in the cases noted above.

7. The assessors laid very great stress on the improbability of the fact that the appellant who had stolen the insured cover would throw away notes of the value of Rs. 2,200/- and retain in his pocket only a sum of Rs. 800/-. One can understand a thief to throw the whole lot away in order to avoid detection but it is not at all intelligible why he should throw away the major part of his booty and retain with him only a small part which if and when detected will be sufficient to prove his guilt.

The assessors laid strong emphasis on this obvious improbability in the reasons given by them for holding the appellant not guilty of either of the offences. The learned Sessions Judge also considered this aspect of the matter to be greatly in favour of the appellant. The High Court, however brushed it aside saying that although Rameshwar P. W. 8, the sender, swore that he had sent

Rs. 3,000/-, his evidence was not conclusive for establishing that twenty-eight one-hundred rupee notes and twenty ten-rupee notes were in fact enclosed in that cover.

The High Court completely overlooked the fact that the receipt for the insured cover (Ex. 8) showed that the weight of the packet was 41 rates only and the evidence of K. C. Sen Gupta, the Superintendent, R. M. S. P. W. 7, that he had verified that if there were twenty-eight onehundred rupee notes and twenty ten-rupee notes the weight would be as entered by the forwarding post office. The High Court was not justified, in the face of such evidence, in speculating that the entire sum of Rs. 3,000/- in notes might not have been sent in that cover.

On the evidence referred to above the conclusion is inescapable that the cover contained Rs. 3,000/- in notes as mentioned by Rameshwar. That being so, it becomes utterly improbable that the appellant had thrown away notes worth Rs. 2,200/-, keeping with him notes of the value of Rs. 800/- only.

8. The High Court further overlooked that at no time was the mail van or the person of Shib Shankar, Basudev or Marcus Bari searched by the police. Although the departmental rules prohibited any person from going out of the mail van without his person being searched, Marcus Bari admittedly went out of the mail van, without undergoing any search of his person, ostensibly in search of the insured cover said to have been thrown way by the appellant near about the distant signal of the Rajgangpur station.

It is significant that the very next day the van peon Marcus Bari P. W. 4 was found to be gambling and was found to have a one-hundred rupee note in his possession. The High Court has completely overlooked these matters which throw considerable doubt on the prosecution case.

9. After going through the record it appears to us that the High Court has failed to observe or act up to the principles so clearly laid down in the cases referred to above. The judgment of the High Court appears to have reversed the decision of the trial Court without noticing or giving due weight and consideration to the inherent weaknesses in the prosecution case to some of which reference has been made above and the evidence in support thereof and appears to have been to a large extent influenced by suspicion.

In our opinion the High Court was not justified, in an appeal from an order of acquittal, in brushing aside the view taken by the trial Court which is by no means patently absurd or unreasonable merely because, as a result of an elaborate and laborious process of reasoning, the High Court came to think that it might be possible to take a different view of the evidence. This approach appears to us to be utterly contrary to the salutary principles hereinbefore referred to.

In our judgment, therefore, the High Court was in error, in the circumstances of this case, to set aside the order of acquittal. Indeed, we see no compelling or even substantial reason for setting aside the decision of the trial Court. We, accordingly, reverse the decision of the High Court and giving the benefit of the doubt acquit the appellant and further direct that his bail bound be discharged.

Appeal allowed.

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