

Dharmanand Pant

Vs

State of Uttar Pradesh

Criminal Appeal No. 50 of 1955

(B. Jagannath Das, Syed Jafar Imam, P. Govinda Menon, J. L. Kapur JJ)

30.01.1957

JUDGMENT

GOVINDA MENON J. -

The police charge sheet dated November 13, 1949, which originated the proceedings out of which this appeal has arisen, was to the effect that the appellant, the Head Clerk of the Civil Surgeon's office at Almora, misappropriated a sum of money entrusted to him during a portion of the period he was functioning as Head Clerk. Though the charge-sheet did not specifically state the exact amount misappropriated, the matter was cleared up when the charge against him under s. 409, Indian Penal Code, was framed, namely, that between September 26, 1947, and February 11, 1948, he in his capacity as a public servant, having been entrusted with Rs. 1,118-10-9, committed criminal breach of trust in respect of that amount. This is also evident from the amounts detailed in column 3 of question 2 that had been put to him by the learned trial Magistrate. The trial court found that on account of the improper and unsatisfactory state of affairs in which the accounts were kept in the Civil Surgeon's office, for which not only the accused but two successive Civil Surgeons were responsible, no offence has been brought home to the accused and, therefore, he was acquitted. The State preferred an appeal to the High Court of Allahabad which by its judgment dated June 7, 1954, set aside the acquittal, found the accused guilty of an offence under s. 409 of the Indian Penal Code, and sentenced him to rigorous imprisonment for a period of three months. On an application to this court for special leave under Act. 136(1)(c) of the Constitution, the same was granted by the order dated July 30, 1954, and it is in pursuance to the special leave so granted that the appeal is before us.

It will be useful and necessary to give a brief resume of the events which led up to the order of the High Court of Allahabad, referred to above. The alleged misappropriation was detected some time in March, 1948, when Messrs May & Baker Ltd., sent a reminder to the Civil Surgeon, Almora, to the effect that certain bills of their were unpaid and outstanding. Thereupon the then Civil Surgeon, Dr. Kar, enquired into the matter and found that the appellant, who was Head Clerk when he took charge, was on leave. On sending an intimation to the appellant to submit an explanation, the latter sent a letter Exhibit P. 8 on March 5, 1948, containing certain statements which the prosecution alleges showed that the appellant was guilty of criminal misappropriation.

Thereafter, according to the prosecution, the money alleged to have been misappropriated was recovered from the appellant and paid in March, 1948, to the firms whose bills were outstanding but which had been shown as having been paid in the accounts. The matter was put into the hands of the police for investigation only in June, 1949, when the Deputy Commissioner of Almora ordered the Deputy Superintendent of Police to look into the matter. After investigation, a charge-sheet was

filed on November 13, 1949, and the case was finally submitted by the S. P. O. Almora, on July 10, 1950, and was received in court some time later, the exact date of which does not appear from the records. A case was registered in the court of the S. D. M. Almora, on August 7, 1950, against the accused under s. 409 of the Indian Penal Code. Therefore, witnesses were summoned but no witness seems to have been examined for some time. The order-sheet dated November 7, 1950, shows that when the file was submitted, the S. P.O, the accused and Advocates appeared in court, but as the necessary papers had to be requisitioned from the Accountant-General's office, the case was adjourned to November 14, 1950, and the S. P. O. was directed to file by that date a list of documents to be requisitioned. Nothing seems to have been done on November 14, 1950, and the matter was postponed to November 30, 1950, and on that date the District Government counsel, engaged in the case, stated that the documents in the Accountant-General's office would have to be summoned and examined. As the Magistrate was of opinion that it was an indefinite thing, he consigned the file under s. 249 of the Criminal Procedure Code, to the record room with the direction that it would be taken out when the documents were available. It has not been explained before us how s. 249 of the Criminal Procedure Code could be applied to a case like this, nor is it applicable to cases falling under the Chapter dealing in the warrant cases; but one thing is clear that after November 30, 1950, the case seems to have been dropped for a fairly long time. Evidently the prosecution was not ready and might not probably have been serious. Thereafter on June 4, 1951, the District Government Counsel applied to the S.D.M. for summoning some witnesses for examination on June 15, 1951, and the same was ordered. The proceedings were then transferred to the Judicial Officer, Almora, who began the examination of witnesses on June 16, 1951. He examined P.W. 1 (Shib Lal Tewari) on June 16, 1951, P.W. 2 (Bishun Singh) on August 21, 1951, P.W. 3 (Mohan Singh) on the same date, P.W. 4 (Shiv Lal Sah) and P.W. 5 (D. N. Pandey) on October 25, 1951, and Hira Lal (P.W. 6) on November 10, 1951. In the meantime on September 1, 1951, the District Government counsel applied to the court of examining three witnesses on behalf of the prosecution, namely Dr. D. M. Kar, Sri R. P. Kapoor and D. N. Pandey and the Magistrate directed summonses to issue to them on the same date. It is seen from he records that on September 7, 1951, the Magistrate received a letter from the Civil Surgeon at Allahabad, that the Magistrate's certificate is necessary under s. 507(2) of the Criminal Procedure Code and s. 33 of the Evidence Act to the effect that it is necessary that the personal attendance of the medical officer is desirable and that a commission should not issue for examination for those witnesses. The letter further stated that if a commission could be arranged, the same may be arranged to record the evidence of D. M. Kar at Allahabad. Neither the counsel for the appellant here, nor Mr. Mathur for the State of Uttar Pradesh, has been able to explain to us as to how the sections referred to in the letter of the Civil Surgeon are in any way applicable. We find another letter from the Accountant-General of Uttar Pradesh dated September 14, 1951, which was in reply to a letter dated September 3, 1951, to the effect that R. P. Kapoor, the senior auditor of the Accountant-General's office, had been directed to attend court on September 19, 1951, but he was not authorised to give evidence from the unpublished records of the Accountant-General's office for which privilege was claimed under s. 123 of the Evidence Act. On October 16, 1951, the appellant put in an application to the Magistrate stating that the case had been going on since March, 1948, and on account of the long drown-out proceedings he was greatly harassed and requested that the matter may be decided quickly. In this state of circumstances, the District Government counsel put in an application on October 26, 1951, stating that permission may be given to examine three witnesses on commission. Nevertheless, it also stated that the case had been pending for a long time. The petition further referred to the fact that the presence of Dr. D. M. Kar and R. P. Kapoor in court was necessary. The Magistrate on the same date passed an order that commission be issued to examine these witnesses. On October 29, 1951, the prosecution submitted interrogatories for the examination of Dr. B. R. Jain and Srimati

Malti Devi Joshi. On November 14, 1951, the prosecution submitted the interrogatories for the examination of Sri G. R. K. Tandan, Sri Lakshmi Shankar, Sri Biswanath and M. N. Dube. With regard to Dr. D. M. Kar, the interrogatories were filed in court on November 10, 1951. On November 12, 1951, the accused put in an application objecting to questions Nos. 5, 6 and 9 to be put to Dr. D. M. Kar on the ground that they are leading questions which cannot be put in examination-in-chief and stating further that the appearance of Dr. D. M. Kar and Sri Kapoor for recording their evidence in person before the court is necessary and their cross-examination in court be arranged for the purpose. If that was not possible, the cross-interrogatories attached to the petition may be sent along with the interrogatories. The learned Magistrate on that application made an order that the questions should be modified in a different language than what they have been put. The cross-interrogatories to these witnesses were filed on subsequent dates the details of which it is unnecessary to mention. We find from the record an application by the prosecution with an order thereon dated November 14, 1951, to the effect that in addition to the important witnesses for whose examination on commission an application had been made, four more witnesses should be examined in person. The reason given by the prosecution was that the accused was anxious for an early judgment and hence he request for examining the witnesses. The prosecution reiterated that the four witnesses mentioned therein may be summoned and examined in person. On this the Magistrate passed the following order :-

"On the last date of hearing was settled that all the remaining P.Ws would be examined on commission, and on that understanding the questions for Sri Kapoor were also supplied today. But if the prosecution wants that Sri Kapoor's evidence is so very necessary, I give only one opportunity to call him to court for one occasion. He should be telegraphically informed to be present on 30-11-1951, and if he cannot be available for any reason, then the interrogatories prepared by him be sent at once. This case is hanging on, since a very long time. Only Sri R. P. Kapoor can be called on the next day of hearing. For all the witnesses commission may be issued as they are being far away from Almora."

The result of these proceedings was that, among others, the important witnesses such as the two Civil Surgeons during whose period the alleged misappropriation took place, as well as the auditors, were examined on commission by interrogatories, even though the prosecution - as also the accused were anxious that at least the most important of them should be examined in the court. The cross-interrogatories submitted by the accused deal with the points raised in the question put in examination-in-chief. The interrogatories were answered by the witnesses before the officer to whom the commission was issued and it is as the result of the evidence so taken that the accused has been convicted.

As stated in the judgment of the High Court the defence of the accused was that the undisbursed amounts were kept in the safe in the office and were disbursed on later occasions though the cash books showed that the disbursements were earlier. In short, the case comes to this, that even though in the cash books there have been entries of disbursements on particular dates, the actual disbursements took place later and during the intervening period the money remained in the safe itself without the appellant having had any dominion or possession over the same. If that is so, no question of criminal misappropriation would arise. The learned Judges of the High Court considered this defence as unacceptable and in view of the admissions contained in Ex. P. 8, they came to the conclusion that there has been a temporary misappropriation of the amounts. In the view which we take in consequence of the arguments advanced before this Court and the facts above noticed from the record, it has become unnecessary and in fact inexpedient to express any opinion regarding the

truth or otherwise on either the prosecution version or the defence case. At the stage at which the important witnesses for the prosecution were directed to be examined by interrogatories on commission, it was evident that the plea of the accused could not have been before the court and no assumption can be made as to how the case was going to get shaped later on.

The question is whether in a prosecution like this where the Head Clerk of a Civil Surgeon's office is being arraigned for criminal breach of trust of sums during a particular period, and especially where the misappropriation, if any, could have been found out much earlier if the superior officers had been prompt in checking the registers and doing the duties assigned to them under the rules and regulations governing the office, it can be said that the trial is in stick consonance with established rules of practice and not in violation of the same, where the important witnesses' testimony has been obtained outside the court, which has to deal with the and determine the case.

It is an established cardinal principle of Criminal jurisprudence obtainable in all systems of law that in criminal proceedings the evidence against the accused should be recorded in his presence and in open court so that the accused may be enabled to challenge such parts of the statement which he wishes to challenge and the presiding officer may have the advantage and opportunity of hearing the witness in person, noting his demeanour and finding out for himself on such observation whether what the witness deposes is true or otherwise. There is also the further advantage so far as the accused is concerned of testing the truth or otherwise of the deponent's testimony by cross-examination in a public place like a court and which may develop from point to point effectively with reference to the answers that a witness gives. But where on account of particular reasons it is not possible to get the presence of the witness in court, the Criminal Procedure Code provides for examination on commission which can be direct examination by counsel for the prosecution and cross-examination by the accused or his counsel. Section 503, as it stood before the amendment of 1955, provided that where in the course of an inquiry, trial or other proceeding under the Code, it appears to a High Court, court of Sessions, District Magistrate or Presidency Magistrate, that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such court or Magistrate may dispense with such attendance and issue a commission for the examination of the witness in accordance with the provisions of that Chapter. Sub-section (2) provided that if in the course of an inquiry, trial or other proceeding under the Code before any Magistrate, other than a District Magistrate or Presidency Magistrate, it appears that a commission ought to be issued for the examination of a witness whose evidence is necessary for the ends of justice and that the attendance of such witness cannot be produced without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate shall apply to the District Magistrate stating the reasons for the application; and the District Magistrate may either issue a commission or reject the application. One of the methods provided for the examination of witnesses on commission is contained in s. 506, of the Criminal Procedure Code, which is as follows :

- (1) The parties to any proceeding under this Code in which a commission is issued may respectively forward any interrogatories in writing which the court or Magistrate directing the commission may think relevant to the issue, and it shall be lawful for the Magistrate, Court, or officer to whom the commission is directed, or to whom the duty of executing it is delegated, to examine the witness upon such interrogatories;
- (2) Any such party may appear before such Magistrate, court of officer by pleader, or if not in custody, in person, and may examine, cross-examine and re-examine (as the

case may be) the said witness.

By the Code of Criminal Procedure (Amendment) Act, XXVI of 1955, in s. 97, for the words 'District Magistrate or the Presidency Magistrate' in sub-s. (1) of s. 503 the words 'any Magistrate' were substituted and sub-s. (2) was omitted but a proviso was added to sub-s. (1) which in the circumstances of this case is unnecessary to refer to. The result of the amendment is that before the enactment of s. 97 of Act XXVI of 1955 no Magistrate other than a District Magistrate or a Presidency Magistrate could issue a commission and if any such subordinate Magistrate finds it expedient, necessary or essential to have a witness examined on commission, he has to apply to the District Magistrate who will either issue the commission himself or reject the application. The District Magistrate in issuing the commission, or rejecting the request is acting judicial and his orders are subject to supervision and control by the appellate or revisional court.

On the assumption that the commission was regularly set up by an order of the District Magistrate as contemplated by the above provisions, the question is as to whether there was sufficient justification for deviating from the normal practice of examining witnesses in court. We have not been shown that the attendance of the two Civil Surgeons, as well as the auditor and the other witness, could not have been procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, could be unreasonable, and nobody has suggested that the two officers who had held the post of Civil Surgeon of Almora, lived at any other place than in Uttar Pradesh, and there is not even suggestion of gross inconvenience or delay and expense unreasonable in the circumstances which would justify their being kept out of court. If the Magistrate had issued summonses to these witnesses and found that it was difficult to procure their attendance in the normal course of things, then he could have adopted the procedure of waiving the attendance in court. Some attempt should have been made to find out whether the normal practice would not have been followed and it is only after the impossibility of such a process is ascertained that a commission should have been issued. The mere fact that the proceedings have got protracted for an extraordinary length of time for reasons which do not appear clearly on the record, but giving room for the impression that the higher officers concerned were not prepared to take the matter seriously in view of the amount having been made up - can by itself be no ground for issuing a commission; that is, at best only delay in the disposal of the case, and not delay in obtaining the evidence of the witness in court. There appears no possible justification on the record for the issue of the commission and much more so for the issue of mere interrogatories.

The issuing of a commission under the Code of Civil Procedure is governed by ss. 75-78 and O. XXVI, r. 1 of which lays down the cases in which a court may issue a commission to examine a witness. Ordinarily when a person resides within the local limits of the jurisdiction of the court and is not exempted under the Code from attending court or who is on account of sickness or infirmity, unable to attend the court, he should be examined in court. Under the Civil Procedure Code ss. 75-78 and O. XXVI, r. 4, a witness may be examined on commission if he is a resident beyond the local limits of its jurisdiction, or a person who is about to leave such limits before the date on which he is to be examined in court, or any person in the service of the Government who cannot in the opinion of the court attend without detriment to his public duties. No such limitations have been imposed for the examination of witnesses on commission under the Code of Criminal Procedure. But that by itself should make the presiding officer observe greater care and caution in issuing a commission to examine a witness, for, as already stated, it is the inherent right under ordinary circumstances of every accused person to have the evidence against him recorded in open court and in his presence and where any departure from that mode is necessary, the same should be limited to exceptional cases and the Criminal Procedure Code provides how and where such discretion ought to be

exercised.

As early as in the case *Queen-Empress v. T. Burke* [I.L.R. (1884) 6 All. 224.], it has been held that it is not proper to allow the evidence of an important witness for the prosecution to be taken on commission on the ground that it would be inconvenient for the witness to attend court. That ss. 503 and 506 of the Criminal Procedure Code should be used sparingly and only in the clearest possible cases, has been laid down in *Mohammad Shafi v. Emperor* [A.I.R. 1932 Patna 242.]. It is not necessary to refer to case law on the point because the matter is one to be decided on the facts in each case. As a general rule it may be said that the important witnesses on whose testimony the case against the accused person has to be established, must be examined in court and usually the issuing of a commission should be restricted to formal witnesses to such witnesses who could not be produced without an amount of delay or inconvenience unreasonable in the circumstances of the case. The idea of examining witnesses on commission is primarily intended for getting the evidence of witnesses other than parties principally interested such as a complainant or any person whose testimony is absolutely essential to prove the prosecution case. In short, witnesses in a criminal case should not be examined on commission except in extreme cases of delay, expense or inconvenience and in particular the procedure by way of interrogatories should be resorted to in unavoidable situations. The discretion to be used by the Magistrate is a judicial one and should not be lightly or arbitrarily exercised.

In these circumstances, we have to note that the evidence of the two Civil Surgeons and that of the auditor would be the foundation for the case against the appellant and that being the case, it seems to us that they ought to have been examined in court. As we are of the view that the Magistrate has acted improperly in having the essential witnesses examined on commission, we feel that the accused has not had a fair trial.

From the review of the proceedings outlined above, it also does not appear that the trying Magistrate approached the District Magistrate with an application as contemplated in s. 503(2), Criminal Procedure Code. In response to the request of the District standing counsel, the Magistrate himself directed that the commission should be issued as desired, on October 26, 1951. Further by the order dated November 12, 1951, the alleged leading questions were ordered to be modified and presented in a style and diction which would cure the defect of the leading nature of the questions. The order dated November 14, 1951, does not also show that there was any attempt made to approach the District Magistrate, for we find in the order-sheet the remarks of the Magistrate, mentioned above at an earlier stage.

We have ourselves examined the original records called for from the lower courts and the result of our scrutiny comes to this. In continuation of the order made by the trying Magistrate dated October 26, 1951, that commissions will be issued as desired, on November 19, 1951, he has himself issued a commission to examine the witnesses as required under ss. 503 and 506 Criminal Procedure Code. The summons has emanated from the Judicial Officer II, Magistrate 1st Class, Almora, addressed to the District Magistrate, Lucknow, stating 'It was necessary for the purpose of the trial to examine the person named in the margin as a witness on behalf of the prosecution and the District Magistrate, Lucknow, is appointed Commissioner with authority under the provisions of ss. 503 and 506 of the Criminal Procedure Code to examine and cross-examine the said witness upon interrogatories, etc.' The summons has been submitted to the District Magistrate, Almora, for favour of forwarding the commission to the District Magistrate, Lucknow, for execution. Similarly the summonses to examine other witnesses on commission on the same date have also been issued and all of them have been dispatched to the District Magistrate, Lucknow, for the purpose of complying with the

commission. It is nowhere seen that the District Magistrate of Almora has exercised his independent judgment or judicial discretion as contemplated in the last clause of sub-s. (2) to s. 503, Criminal Procedure Code, as to whether any such commission should issue or not. What the Code contemplates is that the District Magistrate to whom the trying Magistrate submits a request for issuing a commission, should himself issue the commission or reject the application. It also says that the applying Magistrate should state the reasons for the application. We do not find from the record anything to show that the District Magistrate, Almora, who under the Code ought to be the authority issuing the commission, has complied with the imperative provisions of the Code. All that can be gleaned from the record is that the District Magistrate, Almora, has simply acted as a forwarding authority for sending the commission issued by the trying Magistrate. In the present case, as stated already the District Magistrate, Almora, had the power either to accept the request of the trying Magistrate and issue the commission, or reject the same, and an order made either way should be a judicial one after considering the matter in its entirety. No such thing seems to have been done. Such being the case, we are constrained to observe that an elementary rule of practice essential for justifying the examination of witnesses on interrogatories has not been conformed to. The point is of vital importance for the reason that if the essential pre-requisite for the validity of the issuing of a commission has not been complied with, the evidence so taken would be improper and could not be used against the accused. This is a defect which goes to the root of the matter and is vital in content. Thus the entire proceedings are vitiated and the evidence of the witnesses taken on commission will have to be completely eschewed from the record.

We, therefore, allow the appeal and remit the case for retrial, according to law, to the court of first instance in the light of observations made above. It will not be necessary to re-examine the witnesses who have already been examined in court unless the court thinks it necessary.

Appeal allowed. Case remanded for retrial.

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