K. N. Mehra

Vs

The State of Rajasthan

Criminal Appeal No. 51 of 1955

(B. Jagannadhadas, Syed Jafar Imam, P. Govind Menon JJ)

11.02.1957

JUDGMENT

JAGANNADHADAS J. -

The appellant, K. N. Mehra, and one M. Z. Phillips were both convicted under s. 379 of the Indian Penal Code and sentenced to simple imprisonment by the trial Magistrate for eighteen months and a fine of Rs. 750 with imprisonment in default of payment of fine for a further term of four months. The conviction and sentence against them have been confirmed on appeal by the Sessions Judge and on revision by the High Court. The appeal before us is by special leave obtained on behalf of the appellant Mehra alone.

Both Mehra and Phillips were cadets on training in the Indian Air Force Academy, Jodhpur. The prosecution is with reference to an incident which is rather extraordinary being for alleged theft of an aircraft, which, according to the evidence of the Commanding Officer, P.W. 1, has never so far occurred. The alleged theft was on May 14, 1952. Phillips was discharged from the Academy just the previous day, i.e., May 13, 1952, on grounds of misconduct. Mehra was a cadet receiving training as a Navigator. The duty of a Navigator is only to guide a pilot with the help of instruments and maps. It is not clear from the evidence whether Phillips also had been receiving training as a Navigator. It is in evidence, however, that he knew flying. On May 14, 1952, Phillips was due to leave Jodhpur by train in view of his discharge. Mehra was due for flight in a Dakota as part of his training along with one Om Prakash, a flying cadet. It is in evidence that he had information about it. The authorised time to take off for the flight was between 6 a.m. to 6.30 a.m. The cadets under training have generally either local fights which mean flying area of about 20 miles from the aerodrome or they may have cross-country exercises and have flight in the country through the route for which they are specifically authorised. On that morning admittedly Mehra and Phillips took off, not a Dakaota, but a Harvard H.T. 822. This was done before the prescribed time, i.e., at about 5 a.m. without authorisation and without observing any of the formalities, which are prerequisites for an aircraft-flight. It is also admitted that some time in the forenoon the same day they landed at a place in Pakistan about 100 miles away from the Indo-Pakistan border. It is in the evidence of one J. C. Kapoor who was the Military Adviser to the Indian High Commissioner in Pakistan at Karachi, that Mehra and Phillips contacted him in person on the morning of May 16, 1962, at about 7 a.m. and informed him that they had lost their way and force-landed in a field, and that they left the plane there. They requested for his help to go back to Delhi. Thereupon Kapoor arranged for both of them being sent back to Delhi in an Indian National Airways plane and also arranged for the Harvard aircraft being sent away to Jodhpur. While they were thus on their return to Delhi on May 17, 1952, the plane was stopped at Jodhpur and they were both arrested.

The case for the prosecution, as appears from the questioning of the trial Magistrate under s. 342 of the code of Criminal Procedure, was that Mehera along with his co-accused Pillips stole away the aircraft Harvard H. T. 822 and few with it to Pakistan with a Harvard intention. The defence, as appears from the answers thereto, was as follows. Mehra went to the aerodrome on the morning of May 14, at the usual time and took off the aircraft along with Phillips and they flew for some time. After a short while the weather became bad and visibility became poor and hence they turned the aircraft back towards Jodhpur-side by guess. They continued what they thought to be the return journey for some time; but finding the petrol nearing exhaustion they force-landed in a field which, on enquiry, they came to know was in Pakistan territory. This defence has not been accepted and the Courts below have held the prosecution case to have been proved.

Learned counsel for the appellant, Shri Sethi, attempted to minimise the gravity of the incident by characterising it as a thoughtless prank on the part of a young student aged about 22 years who was receiving training as a flying cadet and that there can be no question of any offence under the Penal Code having been committed, whatever may have been the breach of rules and regulations involved thereby. None of the three courts below who have death with this case were prepared to accept any such suggestion. Indeed in view of the fact that the appellant himself has not put forward any such defence it is impossible to accede to it. The next contention of the learned for the appellant - and that appears also to be the defence of the appellant - is that as a cadet under training he was entitled to take an aircraft on flight, no doubt subject to certain rules and regulations and that what at best happened was nothing more than unauthorised flight by a trainee as part of his training which was due and in which he lost his way. He had to get force-landed in an unknown place and this turned out to be Pakistan territory. The prosecution case, however, is that the flight to Pakistan was intentional and that such flight in the circumstances constituted theft of the aircraft. The main question of fact to be determined, therefore, is whether this was intentional flight into Pakistan territory. It has been strenuously pressed upon us that the trial court was not prepared to accept the story that the flight was an intentional one to Pakistan and hence there was no justification for the appellate court and the High Court to find the contrary. It is also pointed out that Kapoor, the Military Adviser to the Indian High Commissioner in Pakistan, gave evidence that when the appellant and Phillips met him at Karchi on the morning of May 16, 1952, they told him that they wanted to fly to Delhi with a view to contact the higher authorities there. It was also pointed out that neither the appellant nor Phillips took with them in the flight any of their belongings. Now it is clear from the judgments of the courts below that both High Court on revision, as well as the Sessions Judge on appeal, came to a clear finding on his matter against the appellant. It is true that the trial court said that the suggestion that the appellant and Phillips wanted to go to Delhi was not beyond the realm of possibility. But it gave effect to this possibility only for determining the sentence. The trial Court also seems to have been of the view that the flight was intended for Pakistan as appears from the following passage in its judgment.

> "Although the facts on the record point almost conclusively that they were heading towards Pakistan, it is impossible to dismiss the other theory beyond the realm of possibility that they were going to Delhi to contact the higher authorities there."

In contemplating this possibility the trial Court seems to have lost sight of the fact that the Delhi theory was not the defence of the appellant in his answers to the questioning under s. 342 of the Code of Criminal Procedure. It was obviously an excuse given to Kapoor in order to impress him that their flight was innocent and to persuade him to sent them back to Delhi instead of to Jodhpur. The significance of this plea, however, is that the suggestion that the flight was by way of a prank or as part of the flying lessons though unauthorised in the particular instance, is clearly untenable.

In view however of the somewhat halting finding of the trial Court on this matter, we have been taken through the evidence. It would be enough to mention broadly the facts from which, in our opinion, the conclusion arrived at by the Courts below that the flight was intends for Pakistan is not without sufficient reason and justification. As already stated, the aircraft in which the appellant was scheduled to fly on the morning of May 14, was a Dakota but he took off in a Harvard plane. It is in evidence that this was done between 5 a.m. and 5-30 a.m. i.e., before the prescribed time. The plane had just then been brought out from the hangar in order to be utilised for some other flight in the regular course. Appellant started the engine himself by misrepresenting to P.W. 12, the mechanic on duty at the hangar, that he had the permission of the Section Officer in charge. He was scheduled to have the flight along with another person, a flight-cadet by name Om Prakash. But he did not fly with Om Prakash, but managed to take with him a discharge cadet, Phillips, whom knew flying. Before any aircraft can be taken off, the flight has to be authorised by the Flight Commander. A flight authorisation book and form No. 700 have to be signed by the person who is to take off the aircraft for the flight. Admittedly these have not been done in this case and no authorisation was given. The explanation of the appellant is that this is not uncommon. These, however, are not merely empty formalities but are required for the safety of the aircraft as well as of the persons flying in it. It is impossible to accept the suggestion of the appellant that it is usual to allow trainees to take off the aircraft without complying with these essential preliminaries. No such suggestion has been made in cross-examination to any of the officers, and witnesses, who have been examined for the prosecution. It is in evidence that as soon as the taking off of the aircraft was discovered, it inevitably attracted the attention of officers and other persons in the aerodrome and that radio signals were immediately sent out to the occupants in the aircraft to bring the same back to once to the aerodrome. But these signals were not heeded. The explanation of the appellant is that the full apparatus of the radio-telephone was not with them in the aircraft and that he did not receive the message. The appellant goes so far as to say that there were also no maps or compass or watch in the aircraft. It is proved, however, on the evidence of the responsible officers connected with the aerodrome and by production of Ex. P-6, that this particular aircraft, before it was brought out from the hangar, had been tested and was airworthy. It is difficult to believe that the flight would have been undertaken without all the equipment being in order. Even according to the evidence of Kapoor, the Military Adviser to the Indian High Commissioner in Pakistan, the appellant and Phillips had told him that the plane was airworthy. The suggestion of the appellant, therefore, in this behalf cannot obviously be accepted. It has been pointed out to us that there is some support in the evidence for the suggestion of force-landing on account of the weather being bad and the visibility being poor. This may be so, but would not explain why the aircraft got force-landed after going beyond the Indo-Pakistan border. There is evidence to show that the appellant Mehra was feeling some kind of dissatisfaction with his course and was contemplating a change. Seeking employment in Pakistan was, according to the evidence, one of the ideas in his mind, though in a very indefinite sort of way. Having regard to all these circumstances and the fact that must be assumed against the appellant that an airworthy aircraft was taken off for flight and that a person like Phillips who knew flying sufficiently well and who was discharged the previous day, was deliberately taken into the aircraft, we are satisfied that the finding of the Courts below, viz., that the flight to Pakistan was intentional and not accidental, was justified. It is, therefore, not possible to treat the facts of this case as being a mere prank or as an unauthorised cross-country flight in the course of which the border was accidentally crossed and force-landing became inevitable.

It has been strenuously urged that if the flight was intended to be Pakistan the appellant and Phillips would not have contacted Kapoor and requested him to send them back to Delhi. But this does not necessarily negative their intention at the time of taking off. It may be that after reaching Pakistan

the impracticability of their venture dawned upon them and they gave it up. It may be noticed that they were in fact in Pakistan territory for three days and we have nothing but their own word as to how they spent the time on the 14th and 15th. However this may be, if the circumstances are such from which a Court of fact is in a position to infer the purpose and intention and the story of having lost the way cannot be accepted having regard to the aircraft being airworthy, with the necessary equipment, the finding that it was a deliberate flight to Pakistan cannot be said to be unreasonable. It may be true that they did not take with them any of their belongings but this was probably part of the plan in order to take off by surprise and does not exclude the idea of an exploratory flight to Pakistan. We must, therefore, accept the findings of the Courts below. In that view, the only point for consideration is whether the facts held to be proved constitute theft under s. 378 of the Indian Penal Code.

Theft is defined in s. 378 of the Indian Penal Code as follows :

> "Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit left."

Commission of theft, therefore, consists in (1) moving a movable property of a person out of his possession without his consent, (2) the moving being in order to the taking of the property with a dishonest intention. Thus (1) the absence of the person's consent at the time of moving, and (2) the presence of dishonest intention in so taking and at the time, are the essential ingredients of the offence of theft. In the Courts below a contention was raised, which has also been pressed here, that in the circumstances of this case there was implied consent to the moving of the aircraft inasmuch as the appellant was a cadet who, in the normal course, would be allowed to fly in an aircraft for purposes of training. It is quite clear, however, that the taking out of the aircraft in the present case had no relation to any such training. It was in an aircraft different from that which was intended for the appellant's training course for the day. It was taken out without the authority of the Flight Commander and, before the appointed time, in the company of a person like Phillips who, having been discharged, could not be allowed to fly in the aircraft. The flight was persisted in, in spite of signals to return back when the unauthorised nature of the flight was discovered. It is impossible to imply consent in such a situation.

The main contention of the learned counsel for the appellant, however, is that there is no proof in this case of any dishonest intention, much less of such an intention at the time when the flight was started. It is rightly pointed out that since the definition of theft requires that the moving of the property is to be in order to such taking. "such" meaning "intending to take dishonestly", the very moving out must be with the dishonest intention. It is accordingly necessary to consider what "dishonest" intention consists of under the Indian Penal Code. Section 24 of the Code says that "whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly". Section 23 of the Code says as follows :

> "Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled.
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> 'Wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled.
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> A person is said to gain wrongfully when such person retains wrongfully, as well as

> when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property."

Taking these two definitions together, a person can be said to have dishonest intention, if in taking the property it is his intention to cause gain, by unlawful means, of the property to which the person so gaining is not legally entitled or to cause loss, by wrongful means, of the property to which a person so losing is legally entitled. It is further clear from the definition that the gain or loss contemplated need not be a total acquisition or total deprivation but it is enough if it is a temporary retention of property by the person wrongfully gaining or a temporary "keeping out" of property from the person legally entitled. This is clearly brought out in illustration (1) to s. 378 of the Indian Penal Code and is uniformly recognised by various decisions of the High Courts which point out that in this respect "theft" under the Indian Penal Code differs from "larceny" in English law which contemplated permanent gain or loss. (See Queen-Empress v. Sri Churn Chungo [[1895] I.L.R. 22 Cal. 1017], and Queen-Empress v. Nagappa [[1890] I.L.R. 15 Bom. 344]). In the present case there can be no reasonable doubt that the taking out of the Harvard aircraft by the appellant for the unauthorised flight has in fact given the appellant the temporary use of the aircraft for his own purpose and has temporarily deprived the owner of the aircraft, viz., the Government, of its legitimate use for its purposes, i.e., the use of this Harvard aircraft for the Indian Air Force Squadron that day. Such use being unauthorised and against all the regulations of aircraft-flying was clearly a gain or loss by unlawful means. Further, the unlawful aspect is emphasised by the fact that it was for flight to a place in Pakistan. Learned counsel for the appellant has urged that the courts below have treated absence of consent as making out dishonestly and have not clearly appreciated that the two are distinct and essential constituents of the offence of theft. The true position, however, is that all the circumstances of the unauthorised flight justify the conclusion both as to the absence of consent and as to the unlawfulness of the means by which there has been a temporary gain or loss by the use of the aircraft. We are, therefore, satisfied that there has been both wrongful gain to the appellant and wrongful loss to the Government.

The only further questions that remain for consideration, therefore, are whether the causing of such wrongful gain or loss, was intentional and if so whether such intention was entertained at the time when the aircraft was taken. If, as already found, the purpose for which the flight was undertaken was to go to Pakistan, and if in order to achieve that purpose, breach of various regulations relating to the initial taking out of such aircraft for flight was committed at the very outset, there is no difficulty in coming to the conclusion, as the courts below have done, that the dishonest intention, if any, was at the very outset. This is not a case where a person in the position of the appellant started on an authorised flight and exploited it for a dishonesty purpose in the course thereof. In such a case, inference of initial dishonest intention may be difficult. The question, however, is whether the wrongful gain and the wrongful loss were intentional. It is urged that the well-known distinction which Penal Code makes, in various places, between intention to cause a particular result and the knowledge of likelihood of causing as particular result has not been appreciated. It is also suggested that the decided cases have pointed out that the maxim that every person must be taken to taken to intend the natural consequence of his acts, is a legal fiction which is not recognised for penal consequences in the Indian Penal Code. (See Vullappa v. Bheema Row [A.I.R. 1918 Mad. 136 (2) F.B.). Now whatever may be said about these distinctions in an appropriate case, there is no scope for any doubt in this case, that though the ultimate purpose of the flight was to go to Pakistan, the use of the aircraft for that purpose and the unauthorised and hence unlawful gain of that use to the appellant and the consequent loss to the Government of its legitimate use, can only be considered intentional. This is not by virtue of any presumption but as a legitimate inference from the facts and

circumstances of the case. We are, therefore, satisfied that the facts proved constitute theft. The conviction of the appellant under s. 379 of the Indian Penal Code is, in our opinion, right and there is no reason to interfere with the same.

Learned counsel for the appellant has very strenuously urged that the circumstances of the case do not warrant the imposition of a substantial sentence of (simple) imprisonment for eighteen months. He also urges that the appellant, who is now on bail, has undergone his sentence for nearly an year and presses upon us that the interests of the justice in the case, do not require that, after the lapse of over four years from the date of the commission of the offence, a young man in the appellant's situation should be sent back to ail to serve out the rest of the sentence. We have ascertained from the Advocate appearing for the Government that the appellant has already served a sentence of 11 months and 27 days. Learned counsel for the appellant has also informed us that the appellant was in judicial custody for about eleven months as an under-trial prisoner. In view of all the circumstances of the case, we agree that the interests of justice do not call for being sent back to jail.

While therefore, maintaining the conviction of the appellant, K. N. Mehra, we reduce the sentence of imprisonment against him to the period already undergone. The sentence of fine and the sentence of imprisonment in default thereof shall stand. With this medication, in sentence, the appeal is dismissed.

Appeal dismissed, and sentence modified.

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