Radhakishan

Vs

State of U. P.

Criminal Appeals Nos. 160 to 162 of 1960

(Syed Jafar Imam, J. R. Mudholkar, N. Rajgopala Ayyangar JJ)

27.09.1962

JUDGMENT

MUDHOLKAR, J. -

These three appeals arise out of three separate trials before the Additional Sessions Judge, Bulandshahr, but were argued together as they raise identical questions. In all these trials, the appellant, who was a postman attached to the Bulandshahr post office was tried for offences under s. 52 of the Indian Post Office Act, 1898 (VI of 1898), and in two of them, also for offences under ss. 467 and 471 of the Indian Penal Code. Briefly stated the allegations against the appellant were that he either stole or secreted five registered letters and that he fabricated three receipts showing that the registered letters were received by the addressees. The learned Additional Sessions Judge acquitted the appellant of all these offences. The State then preferred an appeal against his acquittal in these three cases to the High Court of Allahabad but restricted the appeal to the acquittal of the appellant in respect of offences under s. 52 of the Indian Post Office Act, 1898 (hereafter referred to as the Act). The High Court held that the appellant had secreted the five registered letters in question and on this finding set aside his acquittal and convicted him in each of the three appeals for offences under s. 52 of the Act and sentenced him to undergo rigorous imprisonment for a period of one year in each case. The appellant has come up to this Court by special leave.

Briefly stated the prosecution case is that when the house in which the appellant lives along with his father Diwan Singh, a retired Police Head Constable, was searched by the C.I.D. Inspector, S. N. Singh, along with Masood Murtaza, Sub-Inspector of Police, Bulandshahr on May 12, 1956 in connection with a case against Greenwood Publicity, they accidentally discovered a large number of letters and postcards and also the five registered letters in question. At the time of the search the appellant who happens to be a trade union official, was not in Bulandshahr but was away on leave at Delhi in connection with a postal conference. There articles were found in an almirah, the key of which was produced by the appellant's father. The articles were not listed at the spot but were taken to the Kotwali in a sealed packet and later on listed there. A number of other articles were also seized at that time but we are not concerned with them as they have no connection with the charges against the appellant.

Briefly, the appellant's defence in all these cases is that there are two factions in the Bulandshahr post office and that these articles were planted by the opposite party. According to him, the planting must have occurred in the Kotwali when the Sub-Inspector purported to make a list of the articles seized from the house in which the appellant lives. Further, according to him, neither the house nor the almirah from which the articles are said to have been seized was in his exclusive possession. He stated - and that fact is not denied - that the house which consists of two rooms only has been rented

in his father's name, that both of them live in those two rooms and that the almirah was in his father's possession inasmuch as the key was produced by him.

On behalf of the appellant Mr. B. C. Misra has raised the following six points :

> (1) That on the findings arrived at by the High Court no offence under s. 52 of the Post Office Act has been made out.
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> (2) That it has not been established that the five registered letters were in the exclusive possession of the appellant.
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> (3) That the search was illegal inasmuch as it was in contravention of the provisions of ss. 103 and 165 of the Code of Criminal Procedure.
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> (4) That in examining the appellant the Additional Sessions Judge did not comply with the requirements of s. 342 of the Code of Criminal Procedure.
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> (5) That the High Court has not found that there were compelling reasons for setting aside the appellant's acquittal.
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> (6) The sentences in the three cases having been ordered to run consecutively the total sentence is excessive.

We will deal with the last four points first. So far as the alleged illegality of the search is concerned it is sufficient to say that even assuming that the search was illegal the seizure of the articles is not vitiated. It may be that where the provisions of ss. 103 and 165, Code of Criminal Procedure, are contravened the search could be resisted by the person whose premises are sought to be searched. It may also be that because of the illegality of the search the Court may be inclined to examine carefully the evidence regarding the seizure. But beyond these two consequences no further consequence ensues. The High Court has chosen to accept the evidence of the prosecution with regard to the fact of seizure and that being a question to be decided only by the Court of fact, this Court would not re-examine the evidence for satisfying itself as to the correctness or otherwise of the conclusions reached by the High Court. In so far as the contravention of provisions of s. 342, Code of Criminal Procedure, are concerned it is sufficient to point out that no grievance was made either before the Court of the Additional Sessions Judge or before the High Court that there was such a contravention and the appellant was prejudiced and we cannot allow the point to be raised for the first time here, the reason being that whether there was prejudice is a question of fact and cannot be permitted to be agitated for the first time in an appeal under Art. 136 of the Constitution. As regards the fifth point, it is sufficient to say that this Court has held that an appeal from acquittal need not be treated differently from an appeal from conviction and if the High Court finds that the acquittal is not justified by the evidence on record it can set aside the acquittal without coming to the conclusion that there were compelling reasons for doing so. In so far as the sentence is concerned, bearing in mind the fact that the maximum sentence awarded under s. 52 of the Act is seven years it would not be right to say that in ordering the sentences in the three cases to run consecutively the appellant is being very severely punished.

In so far as s. 52 of the Act is concerned the argument is that the prosecution having merely shown that the registered letters were recovered from an almirah in the house in which the appellant lives the utmost that could be said is that he was in possession of letters, that is, assuming that he was in the exclusive possession of the house and the almirah. The mere fact of possession, according to

learned counsel, does not suffice to show that the letters were secreted by the appellant. It is contended that for an officer of the post office to be found guilty for any of the acts specified in s. 52 it has further to be shown that he was entrusted with the postal article with respect to which he is alleged to have committed any of those acts. Section 52 of the Act runs thus :

> "Penalty for theft, dishonest, misappropriation, secretion, destruction, or throwing away of postal articles. - Whoever, being an officer of the Post Office, commits theft in respect of, or dishonestly misappropriates, or, for any purpose whatsoever, secretes, destroys or throws away, any postal article in course of transmission by post or anything contained therein, shall be punishable with imprisonment for a term which may extend to seven years, and shall also be punishable with fine."

The first act referred to in this section is theft. Surely it cannot be contended that any 'entrustment' is necessary with regard to that act. Indeed, if entrustment were proved and the article entrusted is not found to have been disposed of in the manner permissible under the Act, the offence committed would be not theft but criminal breach of trust. But, according to Mr. Misra, the appellant cannot be said to have secreted the letter just because it was found in the almirah which is said to have been in his exclusive possession. To secrete means, according to the dictionary "to hide". In connection with a postal article addressed to some person the fact that it is retained in his possession by an officer of the post office in an almirah and that too for an inordinately long period would be tantamount to hiding that article. Of course, what act amounts to "secreting" would necessarily depend upon the facts of each case and in our opinion in a case like the present, what has been established by the prosecution would sustain an inference of secreting. Further, a perusal of s. 55 makes it clear that where the entrustment of an article is made an ingredient of an offence, the legislature has used appropriate words to make the matter clear. If, therefore, it was the intention of the legislature that for an officer of the post office to be punished for secreting, destroying or throwing away a postal article in the course of transmission by post, entrustment of that article to him was essential it would have used language similar to that used by it in s. 55. It seems to us that bearing in mind the fact that an officer of the post office having in the course of his duties access to postal articles kept or lying in the post office, the legislature has deliberately enlarged the scope of s. 52 so as to encompass secretion, destruction or throwing away of postal articles by an officer of the post office even though they may not have been entrusted to him or even though the are not articles with which he is required or is competent to deal in the course of his duties. The object of the provision is to prevent postal articles 'in course of transmission by post' from being tampered with, and so the 'secreting, destruction' etc., of postal articles to which the provision is directed is to such secreting, destruction, etc., as would frustrate or tend to frustrate their delivery to the addressees.

Then Mr. Misra contended that it would not be correct to say that the five registered letters recovered from the almirah were in the course of transmission by post because that recovery was made 7 or 8 months after those letters had been dispatched and that no complaint had ever been made regarding their non-delivery by the senders or the addressees of those letters. He further referred to the fact that at least in respect of three of the registered letters acknowledgements purporting to be from the addressee were obtained and were with the post office. He admitted that the prosecution allegation was that those documents were fabricated but that case having failed before the Court of Sessions and the Government not having appealed against that part of the decision of that court it must be held that at least three of those letters were duly received by the addressees. The expression "in course of transmission by post" has been defined in s. 3(a) of the Act as follows :

> "a postal article shall be deemed to be in course of transmission by post from the time of its being delivered to a Post Office to the time of its being delivered to the addressee or of its being returned to the sender or otherwise disposed of under Chap. VII."

The mere fact that there is even a delay of several months in delivering a postal article to the addressee would not mean that the article had ceased to be in course of transmission. It is common experience that delivery of postal articles is now and again delayed for a considerable length of time - may be through accident or through the negligence of the postal employees. It is probably for this reason that the definition clearly lays down that until an article dispatched by post is delivered or can be said to be delivered that it will be deemed to be in course of transmission. We cannot, therefore, accept the first part of this contention of Mr. Misra.

As regards the other point, that is, based on the fact that there were acknowledgements in respect of three letters in the post office we may point out that the existence of these acknowledgements would no more than raise a presumption that those articles were delivered to the addressees. The addressees have been examined in this case and they have deposed that the letters in question were not received by them. Their evidence has been believed by the High Court and therefore, there is an end to the matter. In the circumstances, therefore, we do not accept Mr. Misra's contention that the act of an officer of the post office in being in possession of a postal article for an inordinate length of time has no significance and cannot justify the conclusion that he had secreted the article.

The next and in our opinion the most important question to be considered is whether the prosecution has established that the five registered letters in question were recovered from the possession of the appellant. As already stated, all that the prosecution has been able to prove in this case is that these letters were found in an almirah of the house in which the appellant lives jointly with his father and of which the key was furnished by the father. Dealing with this question the High Court has observed as follows :

> "In the first place, the respondent alone had the opportunity and the means to secure such a large number of postal articles.
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> (2) that at least nine of those postal articles were addressed to the respondent himself (vide Ex. Ka-9, serial no. 66),
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> (3) that Dewan Singh, who, we are informed is a very old man, would not foist the said incriminating articles on his son and thus ruin his career for ever, and
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> (4) that the respondent alone can be said to have had some motive for secreting and concealing the registered letters and other postal articles in question."

Before the High Court could take into consideration the circumstance that as between himself and his father the appellant had a better opportunity to get at postal articles it had to find affirmatively that the almirah was in the exclusive possession of the appellant. We have not been able to discover anything in the judgment which directly bears on this question. As the key was produced by the appellant's father and there is no evidence that it was ever with the appellant it would not be legitimate to infer that the almirah was even in the appellant's joint, much less in his exclusive, possession. The circumstance that the almirah contained, apart from the registered letters in question, certain other articles belonging to the appellant cannot sustain an inference that the

almirah was in the appellant's possession exclusively or even jointly with his father. We may recall that the almirah contained a large number of articles belonging to the father and since he had the key with him it must be he who must be deemed to be in possession of the almirah and consequently of its contents including the registered letters in question.

Apart from that, out of the four reasons given by it, the last, as pointed out by the High Court itself, is a speculative reason and must, therefore, be left out of consideration. The second 'reason' is no reason at all because a very large number of articles found in the almirah admittedly belong to the father. The third reason that the father would not foist articles to incriminate the son and thus ruin his career assumes that had the father kept the articles he could have done so only if he wanted to incriminate the son. We cannot understand why the father, if he happened to get possession of the articles from some source may not have kept them in the almirah in the same way in which he had kept the other articles belonging to him. That leaves, therefore, only the first reason. We doubt if on the basis of this reason alone the High Court could have held that though the looked almirah was not in the exclusive possession of the appellant, these articles were in his exclusive possession. If the point to be established was whether the appellant had availed himself of the opportunity to procure the articles it could have been established by showing that he was in their exclusive possession. But to say that he must be deemed to be in exclusive possession of these articles and not merely in their joint possession along with his father because he had the opportunity to get at the articles and then infer that he must have utilized the opportunity and was therefore in their exclusive possession would be arguing in a circle. Moreover since entrustment of the articles has not been established, the taking away of the articles by the appellant from the post office (if that is how he came by the articles) would be theft but it has not been found that he committed any theft. Indeed, had it been so found he could have been convicted under s. 52 without the Court having to consider whether he had secreted the articles. We may mention that Mr. Mathur who appears for the State does not even suggest that the articles were stolen by the appellant. Therefore, the contention that he had an opportunity to get at the articles loses all significance and can possibly have no bearing on the question as to the nature of possession attributable to the appellant.

In the circumstances we must hold that the prosecution has failed to prove that these letters were in the exclusive possession of the appellant. No presumption can, therefore, be drawn against him that he had secreted them from the mere fact that they were found in the almirah which, at best, may be regarded as being in the joint possession of himself and his father. But, as already stated, even an inference of joint possession would not be legitimate.

For these reasons we allow the three appeals and set aside the conviction and sentences passed against the appellant.

Appeal allowed.

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