

S. Harnam Singh

Vs

The State (Delhi Admn.)

Criminal Appeal No. 245 of 1971

(R.S. Sarkaria, P.N. Shinghal JJ)

23.03.1976

JUDGMENT

SARKARIA, J. -

1. The appellant, a goods loading clerk in the Outward Goods Shed, Northern Railway, New Delhi was tried along with on Naresh Chand, an agent of the Birla Cotton & Spg. Wvg. Mills Ltd., Delhi by the Special Judge, on charges under Sections 120B, 477-A, Penal Code and under Section 5(2) of the Prevention of Corruption Act. The trial Court acquitted the appellant of the charge of criminal conspiracy, but found him guilty of the other two charges and sentenced him one each of those counts to rigorous imprisonment for one year. A fine of Rs. 200 was further imposed in addition to the substantive sentence of imprisonment under Section 5(2) of the Prevention of Corruption Act. The sentences were directed to run concurrently.

2. Naresh Chand, the coaccused, was acquitted of all the charges.

3. On appeal, the High Court of Delhi set aside the conviction of the appellant under Section 5(2) of the Prevention of Corruption Act but maintained his conviction and sentence under Section 477-A, Penal Code.

4. Hence this appeal by special leave.

5. The charge under Section 477-A framed against the appellant by the trial Judge, runs as under :

That you in furtherance of the aforesaid conspiracy on the same day and place, being a public servant employed in the Railway Department, wilfully and with intent to defraud on January 11, 1967 falsified the entries in the Marking-cum-Loading Register maintained by you as Goods Loading Clerk at GMR-1 Scale in Outward Goods Shed, New Delhi, by falsely showing therein that 32 bales of cloth belonging to M/s. Birla Cotton Spg. & Wvg. Mills Ltd., Delhi, had reached Outward Goods Shed, New Delhi on January 10, 1967, when in fact these had reached on January 11, 1967 and by making corresponding endorsements on forwarding notes, prepared by Naresh Chand, accused. And thereby you facilitated the issue of invoices and R/Rs and the booking and loading of 32 bales of cloth and you thereby committed an offence punishable under Section 477-A of the Indian Penal Code and within my cognizance.

6. The prosecution case was that booking of goods by rail via Barabanki was closed and restricted

by the Divisional Superintendent, Northern Railways, New Delhi by his order No. 398-T/9 S-1 No. 41 (TR) after January 10, 1967. The appellant entered into criminal conspiracy with Naresh Chand, agent of M/s. Birla Cotton Spg. 7 Wvg. Mills, Delhi, for booking 32 bales of cotton cloth belonging to the said mills by circumventing this order of the Divisional Superintendent, on January 11, 1967. The plan was that the appellant would falsify the entries in the marking-cum-loading register by showing the receipt of the said 32 bales of cloth on January 10, 1967 by antedating that entry, although, in fact, the goods were received in the goods shed and January 11, 1967 when the ban against booking imposed by the Divisional Superintendent had become operative. The appellant falsified these accounts by abusing his position as a public servant from corrupt motives.

7. The prosecution has tried to show by circumstantial evidence that these 32 bales of cloth could not have been received in the Outward Goods Shed of Northern Railway before January 11, 1967. This evidence primarily consists of the gate passes signed by the Excise Inspector showing the clearance of these goods from the mills on January 11. The mills had obtained an allotment order of the despatch of these goods to Jogbani. The valid period for this allotment had expired on January 10, 1967.

8. In his examination under Section 342, Cr.P.C., the appellant admitted that at the relevant time, he was working as goods-cum-loading clerk at the goods shed. He further admitted that traffic restrictions in respect of the booking of this class of goods via Barabanki, as alleged by the prosecution, had been imposed by the Divisional Superintendent of the railways. He further conceded that the entries under the dated 'January 10, 1967' in the marking-cum-loading register, Ex. PW 10/J, evidencing the receipt of the consignments, were in his hand. He however, expressed ignorance if these consignments in question were received in the goods shed only on January 11, 1967. He emphatically denied that he had fraudulently or dishonestly falsified the entries in the marking-cum-loading register, Ex. PW 10/J, in order to obtain a pecuniary advantage for M/s. Birla Cotton Spg. & Wvg. Mills. In reply to the general question he stated that in the discharge of his heavy multifarious duties in connection with the loading of goods he was, as usual, helped by Mukand Lal marker. The appellant could not complete the entries in his making-cum-loading register as he was preoccupied with loading. On January 11, 1967, when at 10 a.m., as usual the appellant came to the goods shed to complete the entries, he was told by Mukand Lal that the bales in question and one other consignment had reached the goods shed on January 10, 1967 in the evening. The appellant had no reason to doubt that information. The appellant added :

Because of this I made the entries of the forwarding notes in my register and noted the same serials on the forwarding notes which has already been marked on the bales. I am innocent. I will produce defence.

9. In short, the appellant's case is that he acted innocently and had no 'intent to defraud'.

10. Mr. Frank Anthony, learned Counsel for the appellant has canvassed two main contentions. The first is that in making the wrong entries in the marking-cum-loading register and the endorsements on the forwarding notes, the appellant could not, in the circumstances of this case, be said to have the mens rea requisite for an offence under Section 477-A, Penal Code. It is maintained that his duty commenced from 10 a.m. and ended at 5-00 p.m. on working days. But the gate clerk known as gatekeeper of the goods shed commenced his duty at 9 a.m., that is, one hour earlier than the loading clerk. It is the gatekeeper, who, according to the Counsel, admits the goods into the goods shed. In this particular case, the goods were allowed to be brought into the goods shed, in the absence of the appellant and he was told by the marker Mukand Lal on the 11th that the 32 bales of

cloth had been received on the 10th. Believing that representation to be true, the appellant, made the entries in question showing the receipt of the goods on January 10, 1967. In these circumstances, it is urged that the entries in question, even if false, were not made by the appellant "wilfully and with intent to defraud" within the meaning of Section 477-A. The strongest circumstance, according to Counsel, which negatives any ulterior motive or intent to defraud on the part of the appellant is that at the time of making the entries, he put the date 'January 11, 1967' under his signature. It is maintained that he did not conceal or suppress the material fact that the entries were being made on January 11. Our attention has been invited, to the serial No. and the signatures with date, which are admittedly in the hand of the appellant, on the forwarding notes PW 10/A. PW 10/B, PW 10/C. It often happens says Mr. Anthony, that if the loading clerk on a particular day receive hundreds of parcels for booking and consequently is unable to make the entries in respect thereof in the various records on that very day, he, as matter of practice, makes the remaining entries on the following day. The appellant, it is argued, in keeping with the practice, made these entries only ritualistically without any criminal intent. It is stressed that his acquittal on the charge under Section 5(1) of the Prevention of Corruption Act by the High Court, which includes a finding that he had no dishonest intention or motive to get a pecuniary advantage for himself or for anybody else, now precludes the prosecution from contending that nevertheless his intention in making these entries was fraudulent, wrongful gain or injury being an element of 'intent to defraud'. In support of this proposition he has referred to Dr. Vimla v. Delhi Administration (1963 Supp 2 SCR 585 : AIR 1963 SC 1572 : (1963) 2 Cri LJ 434) and Tara Chand v. State (AIR 1960 Mad 370 : 1960 Cri LJ 1102).

11. The second contention raised by the Counsel is that the prosecution has not led any evidence to substantiate the factum and the time of the receipt of these cloth bales at the goods shed. It is stressed that the best evidence with regard to this vital fact could be given by Chiranji Lal, the truck driver who is said to have brought these goods from the mills to the goods shed, Mohan Lal, the gate clerk of the goods shed, and Mukand Lal, the marker of the goods. According to the Counsel these material witnesses had been withheld by the prosecution for an oblique motive and consequently and adverse inference should be drawn that if produced, they would have demolished the prosecution case by revealing that, in fact these goods were received in the goods shed sometime before the appellant came on duty on the 11th, notwithstanding the fictitious entries with regard to the exit of these goods from the Birla Mills, shown in the excise gate passes. In this connection, reference has been made to this Court's decisions in Sahaj Ram's case (Sahaj Ram v. State of U.P., (1973) 1 SCC 680); Habeeb Mohd. v. State of Hyderabad (1954 SCR 475 : AIR 1954 SC 51 : 1954 Cri LJ 338).

12. Section 477-A, Penal Code reads thus :

Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant wilfully, and with intent to defraud, destroys alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Explanation : It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or

specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed.

13. An analysis of this section would show that in order to bring home an offence under this provision, the prosecution has to establish (1) that at the relevant time, the accused was a clerk, officer or servant; and (2) that acting in that capacity he destroyed, altered, mutilated or falsified any book, paper, writing, valuable security or account which belonged to or is in the possession of his employer or has been received by him for and on behalf of his employer etc.; (3) that he did so wilfully and with intent to defraud.

14. In the instant case, the existence of the first ingredient is not dispute. With regard to the second, the position is that the entries Q1, Q2 and Q3 in the marking-cum-loading register were admittedly made on January 11, 1967 showing that the goods to which they related, were, in fact, received on January 10, 1967. On the endorsements made on the forwarding notes relating to these goods, however, he put the date January 11, 1967. Question No. 14 put to him in his examination under Section 342, Cr.P.C. was :

It is in evidence that although you received and accepted the aforesaid bales on January 11, 1967, yet you made entries in the Marking-cum-Loading Register of GMR-1 Scale of Outward Shed, New Delhi where you were then working, false showing their receipt as January 10, 1967 to facilitate the booking of these goods. What have you to say to this ?

15. The appellant replied :

No. I shall give detailed answer below.

16. This detailed answer was given by him in reply to question No. 20. We have reproduced its substance earlier in this judgment. The defence taken therein is that when on January 11 at 10 a.m., the appellant came on duty to the goods shed, he was told by the marker (Mukand Lal) that the bales lying there has been received on January 10 in the evening. Believing the information given by the marker to be true, the appellant made these entries (Q1, Q2 and Q3) in the register. Thus, if these goods were actually received on January 11, the entries Q1, Q2 and Q3 could not be said to be false. If they were actually received on the 11th, these entries would not be true, even if they were induced by some representation made by the marker with regard to their receipt. Such representation, if any, made by the marker would be relevant with regard to the third ingredient only.

17. The existence of the third ingredient has been the subject of serious controversy. The question is : Did the appellant make these entries "wilfully and with intent to defraud" ?

18. "Wilfully" as used in Section 477-A means "intentionally" or "deliberately". There can be no difficulty in holding that these entries were made by the appellant "wilfully". The appellant must have been aware that the Divisional Superintendent had by an order prohibited the booking of this class of goods via Barabanki from January 11, 1967. But from the mere fact that these entries were made 'wilfully', it does not necessarily follow that he did so "with intent of defraud" within the meaning of Section 477-A, Penal Code. The Code does not contain any precise and specific definition of the words "intent to defraud". However, it has been settled by a catena of authorities that "intent to defraud" contains two elements viz., deceit and injury. A person is said to deceive another when by practising "suggestion falsi" or "suppressio veri" or both he intentionally induce

another to believe a thing to be true, which he knows to be false or does not believe to be true. 'Injury' has been defined in Section 44 of the Code as denoting "any harm whatever illegally caused to any person, in body, mind, reputation or property".

19. The burden of Mr. Anthony's argument is that the prosecution had not established these elements beyond reasonable doubt. It is maintained that there was no 'deceit' because the appellant did not conceal the fact that he was making the entries meant for January 10, on January 11. In this connection, reference has been made to the endorsements and the entries on the forwarding notes relating to these goods which were manifestly made on the 11th. It is further submitted that there was no intent to cause wrongful gain or wrongful loss to any person either in particulars or in general, and consequently the second element necessary to constitute a fraudulent intention did not exist.

20. As against this, it is contended on behalf of the respondent that this defence plea set up by the appellant was utterly false because these goods, in fact had left the premises of the Birla Mills at 3.30 p.m. on January 11, 1967 and they could not have reached the goods shed in any case before 4 or 4-30 p.m. on that date. Reliance for this argument has been placed on the gate passes Exs. PW 12/E-1 to E-34 which bear the signatures of the Central Excise Inspector, PW 12. Great emphasis has been laid on the fact that in these gatepasses, the time of clearance of the goods from the mills is noted as 15-30 (p.m.) on January 11, 1967.

21. In reply, Mr. Anthony maintains that everything appearing in these gatepasses cannot be accepted as gospel truth. Counsel takes strong exception to, what he says, the manner in which the entry as to time was smuggled into the case. In this connection, Mr. Anthony has emphasised that in his examination-in-chief, PW 12 did not say a word that these packages were in fact allowed to go out of the gate of the mills at 3.30 p.m. on January 11, 1967, that he did not refer even obliquely, to the time noted on these gatepasses; that this fact on which a whole argument is now sought to be built up by the prosecution for the first time in this Court, was never put to the accused during his examination under Section 342, Cr.P.C., that even the gatepasses Exs. PW 12/E-1 to 34 were never specifically put to him and thus no opportunity whatever was given to him to explain this circumstance. This omission, says the Counsel, has greatly prejudiced the appellant in his defence, and coupled with the non-production of the material witnesses as to the receipt of the goods in the goods shed, vitiates the trial and is fatal to the prosecution case. It is further submitted that otherwise too, the entry as to time in the gatepasses is of a suspicious character because such time has not been noted on the gatepasses issued on other days for similar goods. It is contended that despite the requirement of Rules 9 and 52 of the Excise Manual, there is an instance on the record to show that the goods were allowed to be cleared at the gate of the mills although excise duty in respect thereof was actually paid on the following day. It was not improbable - proceeds the argument - that the goods in question might have been allowed to go out of the mills in the evening of the 10th or on the morning of the 11th so as to reach the goods shed before 10 a.m., while, on paper their clearance, in ostensible deference to the rules, was shown as on January 11, 1967. According to the Counsel, there is no rule or prescribed form requiring the time of the exit of the goods to be noted in the gatepasses and there being every reason to suspect a gap between the theoretical observance of the rules and the actual practice, the court should not, in the absence of the best direct evidence of the receipt of these packages in the goods shed, as a matter of caution, spell out everything with regard to the time and date of the exit of these packages from the mills and of their receipt in the goods shed from them.

22. Section 342 of the Code of Criminal Procedure, 1898, casts a duty on the court to put, at any

enquiry or trial, questions to the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him. It follows as a necessary corollary there from that each material circumstance appearing in evidence against the accused is required to be put to him specifically, distinctly and separately. Failure to do so amounts to a serious irregularity vitiating the trial if it is shown to have prejudiced the accused. If the irregularity does not, in fact, occasion a failure of justice, it is curable under Section 537, of the Code.

23. In the instant case, as already observed, the time of the actual exit of the goods in question from the mills was a vital circumstance appearing in the prosecution evidence. Indeed, Counsel for the respondent has primarily stated his arguments on it to show that the goods could not have reached the goods shed before 10 a.m. on the 11th. In view of Section 342, therefore, it was incumbent on the trial Court to put this circumstance clearly and distinctly to the accused during his examination. The failure to do so, amounts to a grave irregularity. The gravity of this irregularity was accentuated by another lapse on the part of the prosecution. That lapse was the failure to produce three crucial witnesses, namely, Chiranjilal, the truck driver, Mukand Lal, the marker, and Om Parkash, the railway gate clerk with his record. It may be noted that these witnesses were cited by the prosecution in the calendar of witnesses and were required to appear along with the records maintained by them. But subsequently, without good reason, they were given up. They were the persons who could give the best and direct evidence with regard to the receipt of these goods in the goods shed. The non-production of this evidence has certainly prejudiced the fair trial of the appellant.

24. Mr. H. R. Khanna points out that the question of the appellant being prejudiced owing to the failure of the prosecution to put this circumstance to him in examination under Section 342, was not raised in the courts below, and consequently, the appellant is debarred from raising it now.

25. The contention must be repelled. Firstly, there was no occasion for the appellant to urge it earlier, because the prosecution have tried to stake a vital part of their case on this circumstance, for the first time in the course of arguments in this Court. Secondly, an objection with regard to the prejudice resulting to the accused from the non-production of the material witnesses whose evidence has direct bearing on the same fact which was sought to be inferentially established from the gatepasses, was urged even in the courts below. The conclusion is therefore, inescapable that on the facts of this case, the aforesaid non-compliance with Section 342, Cr.P.C. coupled with the non-production of the three material witnesses had caused miscarriage of justice. We therefore think that these irregularities have vitiated the trial and conviction of the appellant.

26. Further question to be considered is : Should the case be sent back for retrial ? Again, answer to this question in the circumstances of the case, must be in the negative. Firstly, the appellant on account of his acquittal on the graver charge under Section 5(1) of the Prevention of Corruption Act, stands exonerated of the allegation that he made these entries with any motive or intention to gain a pecuniary advantage. Secondly, his coaccused stands acquitted of all the charges. Thirdly, these proceedings against the accused commenced as far back as May 13, 1959 and the appellant has suffered enough privation, harassment and expense which is a necessary concomitant of protracted criminal proceedings.

27. For the foregoing reasons, we allow this appeal, set aside the conviction, accord the benefit of doubt to the appellant and acquit him.

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