

CALCUTTA HIGH COURT

Syed Yawar Bakht Chowdhury

Vs

Emperor

(Lodge , J.)

05.02.1940

JUDGMENT

Lodge, J.

1. These are appeals against convictions and sentences under Sections 467 and 467/109, I.P.C., and under Section 81, Registration Act. The facts are rather complicated and need to be set out in some detail, in order that the arguments advanced before us may be properly appreciated. Syed Yawar Bakht Choudhuri was in debt to Debendra Kumar Roy to the extent of Rs. 5001-3-3; Mt. Kaniz Ahammed Choudhurani, wife of Syed Yawar Bakht Choudhuri was in debt to the same creditor to the extent of Rs. 336; two minor sons of the late Afroz Bakht Chudhuri, brother of Syed Yawar Bakht Choudhuri were in debt to the same creditor to the extent of Rupees 13, 162-12-9; the total debt of these members of the family to this creditor thus amounting to Rs. 18,500. The creditor had obtained decrees in respect of these debts. In order to satisfy this creditor's claims, it was settled that certain properties belonging to (1) Syed Yawar Bakht Choudhuri, (2) Mt. Kanij Ahammed Choudhurani, (3) Najamannessa Bibi, another wife of Syed Yawar Bakht Choudhuri, (4) the two minor sons of the late Afroz Bakht Choudhuri, (5) Abdul Matin Choudhuri, (6) Mohammad. Motasin Choudhuri and (7) Jamilunnessa Bibi sister of Syed Yawar Bakht Choudhuri should be transferred to the creditor. The value of these properties was estimated at Rs. 20,000, and it was decided that the creditor vendee should pay in cash to Jamilunnessa Bibi the sum of Rs. 1500 and that the remainder of the consideration money should be retained by him in full satisfaction of the debts specified above.

2. Accordingly a deed of sale was drawn up on 10th February 1936. As the vendors were numerous and lived at different places, the execution of the document by all the adult vendors was not completed until the end of April 1936. The two minor sons of the late Afroz Bakht Choudhuri were wards of a guardian appointed by the District Judge of Sylhet under the provisions of the Guardians and Wards Act. The sanction of the District Judge was therefore necessary before the certificated guardian could consent to execute the document on behalf of the minor. The document was presented to the District Judge on 30th April 1936 and his sanction

was sought for. The document was returned by the District Judge's office on 29th May 1936 after sanction had been granted. On 9th June 1936 the document was presented at the Balaganj Registry office by Syed Yawar Bakht Choudhuri. The latter admitted execution of the document on his own behalf and on behalf of his two wives and his two minor nephews. The Sub-Registrar granted the usual receipt to Syed Yawar Bakht Choudhuri who made over the same to the vendee Debendra Kumar Roy. The document was then sent by Registered post from the Sub-Registrar Balaganj to the Sub-Registrar Habiganj in order that the admission of Abdul Matin Choudhuri might be obtained. The latter admitted execution, and the document was returned to the Sub-Registrar, Balaganj, again by registered post. On three occasions the Sub-Registrar of Balaganj was taken to the house of Syed Yawar Bakht Choudhuri in order that the admission of execution by Jamilunnessa Bibi might be obtained. On the first two occasions, the Sub-Registrar was unable to meet the lady. On the third occasion, i.e. on 16th August 1936, Jamilunnessa Bibi denied execution of the document. In the meantime, on 25th July 1936 execution had been admitted by Mohammad Motasim Choudhuri. On 7th September 1936, the Sub-Registrar refused registration in so far as Jamilunnessa Bibi was concerned.

3. On 18th September 1936 the vendee, Debendra Kumar Roy appealed to the District Registrar against the order refusing registration, and prayed that the document be called for from the Sub-Registrar. The document reached the District Registrar's Office on 2nd October 1936. The vendee on examining the document came to the conclusion that certain alterations had been made therein. He accordingly applied for certified copy of the document and after obtaining that copy he filed a petition of complaint before the Magistrate on 17th October 1936 accusing some of the executants of the documents, and others of forgery and conspiracy to forge. He alleged that the original document provided for the sale to him of all the remaining interest of the executants in Schedule 1, of all their interest in Schedule 2, and of the entire 5 annas 2 1/2 gandas interest in Schedule 3 which belonged to Syed Yawar Bakht Choudhuri and his two wives Mt. Kanij Ahammed Choudhurani and Najamannessa Bibi; whereas the document in the condition in which it reached the District Registrar's Office, provided merely for the transfer of 2 1/2 gandas share in these properties to the vendee. He alleged further that pp. 4 and 52 of the original document had been removed and other pages substituted in their place, and that minor verbal alterations had been made in other parts of the document. While the magisterial enquiry was proceeding, there was a talk of compromise between the parties. Two more documents were executed in favour of the vendee, the sum of Rs. 1500 was paid to Jamilunnessa Bibi, and the latter admitted execution of the original document; the Registration appeal was allowed; and the vendee, Debendra Kumar Roy applied to the Magistrate for permission to withdraw from the prosecution.

4. The task of prosecution was then under-taken by the Government, but on 31st March 1938, the Public Prosecutor, under orders of the Local Government, applied under Section 494, Criminal P.C., to withdraw from the prosecution. Permission was granted, and the accused were discharged. The order of discharge was subsequently set aside by this Court, and a further

enquiry ordered. As a result, five of the accused were committed to the Court of Sessions to stand their trial, the remaining accused persons being discharged. The accused Troilokhyanath Dutta was charged under Section 467, I.P.C., with forging the document; Abul Abbas Mohammad Abdul Ali, Sub-Registrar of Balaganj was charged under Section 81, Registration Act, Syed Yawar Bakht Choudhuri, Abul Abbas Mohammad Abdul Ali, Troilokhyanath Dutta, Mohammad Aftar and Mohammad Jamshed Ahammad Choudhury were charged under Section 120B/467, I.P.C., with the offence of conspiring to forge a valuable security. Before the trial was commenced in the Sessions Court, the learned Additional Sessions Judge of Sylhet framed an additional charge of abetment under Section 467/109, I.P.C., against Syed Yawar Bakht Choudhuri, Abul Abbas Mohammad Abdul Ali, Mohammad Aftar and Mohammad Jamshed Ahammad Choudhury. The accused were tried by the Additional Sessions Judge of Sylhet with the aid of a common jury. Eighteen persons were summoned to attend as Jurors. Of these eleven were in attendance when the case was taken up. Four of the eleven were selected, but objection was taken either by the Crown or by the defence against each of the remaining gentlemen summoned. Thereupon, acting under Section 279(2), Criminal P.C., the learned Additional Sessions Judge chose a gentleman who was present in Court and whose name was on the list of jurors for the district. The defence objected to this gentleman sitting as a juryman, but the learned Additional Sessions Judge after due consideration of the grounds urged, overruled the objection, and the trial proceeded.

5. After all the evidence had been recorded and the arguments of the learned Public Prosecutor were being heard, the Court enquired whether sanction of the Local Government to the prosecution under Section 120B/467, I.P.C., had been obtained, as required by Section 196-A, Criminal P.C. The learned Public Prosecutor then realized for the first time that no such sanction had been obtained, and prayed that the charge under Section 120B/467, I.P.C., be cancelled: and the Court ordered that that charge be cancelled. The jury returned an unanimous verdict of not guilty in so far as accused Mohammad Aftar and Mohammad Jamshed Ahammad Choudhury were concerned. The learned Additional Sessions Judge accepted this verdict and acquitted these two accused. The jury were divided with regard to the remaining three accused. The majority of the jury three against two found Troilokhyanath Dutta guilty of forgery and Syed Yawar Bakhat Choudhury and Abul Abbas Mohammad Abdul Ali guilty of abetment of forgery, and Abul Abbas Mohammad Abdul Ali guilty of an offence punishable under Section 81, Registration Act. The learned Additional Sessions Judge accepted the majority verdict and sentenced Troilokhyanath Dutta under Section 467, I.P.C., to 4 years' rigorous imprisonment, Syed Yawar Bakht Choudhury and Abul Abbas Mohammad Abdul Ali under Sections 467/109, I.P.C., to 4 years rigorous imprisonment. No separate sentence was passed under Section 81, Registration Act. The three accused convicted and sentenced by the learned Additional Sessions Judge have appealed to this Court. Their appeals were heard together and will be disposed of by this one judgment.

6. It has been contended on behalf of the appellants, that the defence objection to the juryman

selected under Section 279(2) of Criminal P.C., should have been upheld, and that as this objection was not upheld, the jury was not properly constituted and the trial was consequently illegal. Section 278(a), Criminal P.C., provides that an objection taken to a juror on the ground of some presumed or actual partiality in the juror, shall be allowed. The defence filed a petition of objection to this particular juror alleging partiality in the juror. The learned Additional Sessions Judge thereupon passed the following order viz:

I overrule the defence objection against him after due consideration of the grounds urged in support of this objection and on being satisfied that there is no good ground or reason for accepting the objection.

7. Section 279(1), Criminal P.C., provides that: Every objection taken to a juror shall be decided by the Court and such decision shall be recorded and shall be final.

8. In view of this provision the learned Advocate-General has contended that this Court is not entitled to consider whether the decision of the learned Additional Sessions Judge in overruling the objection was right or wrong. The learned advocate for the appellants on the other hand has contended that the decision of the learned Additional Sessions Judge is final only in a limited sense that is to say, it cannot be challenged during the trial but it may be challenged during appeal. In our opinion, if the Court decides that no presumed or actual partiality in the juror has been made out, that decision is absolutely final and cannot be challenged in appeal. If, however, a Court were to find that some presumed or actual partiality in the juror had been made out, but in spite of this finding were to overrule the objection, the decision of the Court overruling the objection might perhaps be challenged in appeal. In view of the clear finding in the present case, that the objection on the ground of presumed or actual partiality had not been made out to the satisfaction of the Court, that decision cannot, in our opinion, be challenged.

9. The next argument addressed to us on behalf of the appellants, was to the effect that it was unfair, unjust and improper to convict the appellants under Section 109 of abetment by conspiracy after cancelling the charge under Section 120B/467, I.P.C. The learned advocate argued that inasmuch as there was a specific charge of conspiracy under Section 120B, I.P.C., the abetment contemplated in the charge under Section 467/109, I.P.C., must have been abetment as defined in Clauses 1 and 3 of Section 107, I.P.C., and not abetment as defined in Clause 2 of that Section. Consequently the learned Additional Sessions Judge was not justified in asking the jury to find the accused guilty of abetment on the ground that they had engaged in a conspiracy to forge the document. In our opinion there is no force in this argument. In the charge under Section 109, I.P.C., no particular form of abetment was set out. If sanction of the Local Government under Section 196A, Criminal P.C., had been granted, there was no legal bar to the jury finding the accused guilty both under Section 120B/467, I.P.C., and under Section 467/109, I.P.C., if they were satisfied that there had been the conspiracy and abetment by conspiracy. "Whether separate sentences could have been imposed is a different question with which we are not concerned. The trial proceeded almost to a conclusion on the assumption that the charge under Section

120B/467, I.P.C., had been validly framed. Evidence as to conspiracy had been led by the prosecution and been considered by the defence. "When it was discovered that no sanction under Section 196A, Criminal P.C., had been granted, the legal consequence was merely as if the charge under Section 120B/467, I.P.C., had never been framed. The accused could not be acquitted or convicted of the offence punishable under Section 120B, I.P.C. The Public Prosecutor could not withdraw under Section 494, Criminal P.C., from the prosecution under Section 120B, because there was no valid prosecution. If the Court, instead of passing an order that the charge be cancelled, had directed the jury to ignore the charge for the reason that they were not entitled to return a verdict on that charge, there could not have been even a suggestion that the jury were not entitled to consider whether the offence of abetment by conspiracy had been made out. In the circumstances we are unable to find that it was either illegal or unjust or unfair to the accused to consider whether the offence of abetment by conspiracy had been proved.

10. The learned advocate appearing for the appellant Syed Yawar Bakht Choudhury contended that in his charge to the jury, the learned Additional Sessions Judge had failed to draw the attention of the jury to evidence which was in favour of the accused. The learned advocate placed before us evidence to show that the value of the properties in Schedule 1 land 2 was such that it was improbable that the vendors should have agreed to transfer their entire interest in the lands of Schedule 3. He also drew our attention to the oral evidence regarding the draft document and the memoranda produced by the prosecution witnesses in support of their evidence 'aa to the original contents of the document, and argued that this oral evidence was not placed before the jury, and that the jury were consequently induced to attach too much importance to these documents. In our opinion the learned Additional Sessions Judge dealt fairly with all this evidence in his charge to the jury and placed the material facts fairly before the jury for their consideration. We are unable to find that there was any misdirection in the charge in the manner in which this evidence was dealt with.

11. The learned advocate further argued that the learned Additional Sessions Judge committed a serious mistake in telling the jury that the Sub-Registrar accused had married the daughter of a sister of accused Syed Yawar Bakht Choudhury, and that that mistake had seriously prejudiced the accused. In the first place it is not by any means clear from the record that there was any mistake. In the second place, the mistake if any, was only in respect of the exact relationship between the parties. We are unable to hold that the accused were in any way prejudiced if the statement was incorrect. On behalf of Abul Abbas Mohammad Abdul Ali, it was pointed out that the document passed through many hands, and" it was argued that there was no evidence whatever to prove that he had any hand in the forgery. In his charge to the jury the learned Additional Sessions Judge pointed-out in detail, the people into whose hands the document passed, and the evidence regarding the manner in which it passed' from one to the other. The learned Additional Sessions Judge warned the jury that they must acquit this accused if they were not absolutely convinced from the evidence and circumstances that the forgery could not have

been committed without the connivance and concurrence of this accused. In our opinion the matter was properly explained to the jury, and it was for the latter to decide on the evidence whether or not this accused was guilty.

12. On behalf of the appellant Troilokhyanath Dutta, it has been argued that he was a mere servant of the accused Syed Yawar Bakht Choudhury and might have written up the substituted page 3 in all innocence under his master's orders. In other words it is argued that though he may have-altered the document in the manner alleged, it may be that he did so without any criminal intention. The learned Additional Sessions Judge discussed this aspect of the case in his charge and made it clear that the accused could not be found guilty unless he had the necessary criminal intention. We are unable to find any misdirection in the charge on this point.

13. The last argument placed before us referred to the sentences imposed on the appellants. All three have received the same sentence viz., 4 years rigorous imprisonment. We are of opinion that a servant acting under the direct orders of his master should not be punished as severely as the latter, and farther that a government servant who abuses the trust placed in him in the manner in which appellant Abul Abbas Mohammad Abdul Ali did, should be punished more severely than the other appellants. We therefore alter the sentences as follows : Abul Abbas Mohammad Abdul Ali is sentenced under Section 467/109, I.P.C., to undergo four years' rigorous imprisonment; Syed Yawar Bakht Choudhury is sentenced under Section 467/109, I.P.C., to undergo three years' rigorous imprisonment; and Troilokhyanath Dutta is sentenced under Section 467, I.P.C., to undergo two years rigorous imprisonment. With this modification the appeals are dismissed. The appellants must surrender and serve out their sentences.

Bartley, J.

14. I agree.