

CALCUTTA HIGH COURT

Amarendra Nath Roy

Vs.

State (Calcutta)

Criminal Appeal No. 38 of 1954

(Guha Ray and Sen, JJ.)

11.01.1955

JUDGMENT

Guha Ray, J.

1. The Appellant Amarendra Nath Roy Was Convicted Under Section 409, Indian Penal Code. By A Special Judge, West Bengal First Special Court, Alipore and Sentenced To R.I. For One Year and A Fine Of Rs. 1000/- And In Default To R.I. For Three Months More.

2. The State Transport Department of the Government of West Bengal has an office at P.11 Mission Row Extension. It has also another office known as the Lake Depot and started on 1-4-1950. From the very inception of the Lake Depot the present appellant was working as the Depot Cashier there. Prior to that he was working as Depot Cashier at the Mission Row Office. The case For the prosecution briefly is that all collections of the Lake Depot are Sent by the Head Depot Cashier, Suhrid Kumar Bose, p.w.1, through some of his Depot Cashiers in an armed van of the Transport Department from the Lake Depot for depositing in the iron safe meant exclusively For the cash from the Lake Depot and that the present appellant Amarendra who though attached to the Lake Depot, was really in charge of that iron safe kept at the Mission Row Extension office for deposit of the cash Sent from the Lake Depot Office and as such was entrusted with the keys of that safe used to keep the cash along with the challans made out by the Lake Depot Office for deposit of this money in the Reserve Bank on the following day. On 7-2-1953, Suhrid Bose Sent a sum of Rupees 6752/9/6 of which Rs. 802/9/6 consisted of coins, Rs. 3045/- of one rupee notes and Rs. 2905 of notes of the denomination of Rs. 2/-, Rs. 5/- and Rs. 10/-. This money was Sent along with two sets of challans in triplicate, one of the challans being for coins and the other for notes, through Anil Krishna Ghose, a Depot Cashier of the Lake Depot who was accompanied by KaliDas Sarkar, a peon attached to the Lake Depot Office in an armed cash van. The money was made over by Anil Krishna Ghosh to the appellant who received and kept the amount in the iron safe in the preSence of Anil Krishna Ghose and the peon. It was to be deposited on 9-2-1953 in the Reserve Bank as the 8th February was a Sunday. The amount, however, could not be deposited in the Reserve Bank on the 9th as the State van did not arrive from Belgharia office that day. The appellant informed Suhrid Kumar Bose over the phone that the cash could not be deposited that day as the armed van did not arrive. On the 10th

the armed van of the State Transport left with Jitendra Nath Bose who was in charge of the Belgharia cash section of the State Transport and who carried with him the cash from Belgharia to the Mission Row Office. After the arrival of the armed van from Belgharia at the Mission Row Office at about 10.30 a.m. the Appellant Amarendra Nath Roy opened the iron safe with the keys in his custody and found that the bundle of notes amounting to Rs. 2905/- and kept in the iron safe was missing. He reported this matter to Jitendra Nath Bose of Belgharia office who had accompanied the van. Jitendra Nath Bose asked him to make a thorough search but even after the search the bundle could not be traced out. At the instance of the appellant Jitendra Nath Bose then rang up Suhrid Kumar Bose, the Head Depot Cashier of the Lake Depot and gave him the information. The appellant also had a talk with Suhrid Kumar Bose over the phone. Suhrid Kumar Bose then came to the Mission Row Office and questioned the appellant. Thereafter he rang up the Chief Accountant of the Belgharia office and informed him that he was going to Belgharia in connection with a serious matter. Then Suhrid Kumar Bose, Jitendra Nath Bose and Ashutosh Sanyal who was the cashier in charge of the Mission Row Office at the time, together with the appellant went to the Chief Accountant S.Dutta of Belgharia, p.w. 5 Suhrid Kumar Bose reported the matter to S.K. Dutta who again reported the matter to Lalit Mohan Bakshi, p.w.7, the Director of Administration at the time. The appellant submitted a statement in connection with the matter and this is Ex.5. Lalit Mohan Bakshi then Sent an information (Ex.6) to the Hare Street Police Station reporting the incident through Suhrid Bose. The appellant also accompanied Suhrid Bose to the Hare Street police Station. Thereafter they returned to the Mission Row Office. Adhip Chandra Mukherjee, p.w.6 who was the Director of Operation of the State Transport and, S.K. Dutta, the Chief Accountant of the Belgharia Office, then went to the Mission Row Office for making enquiries. On their arrival they found that the Police had not yet arrived. Adhip Chandra Mukherjee rang up the Dy. Commissioner of Police at Lalbazar and a little later Sasanka Mohan Banerjee, p.w.17, an Inspector of the Detective Department, Lalbazar, who was deputed by the Dy. Commissioner to investigate the matter, arrived along with T.M. Chakravarty, p.w.15, another Inspector of Police. They inspected the iron safe in the presence of Suhrid Bose, A.C. Mukherjee, the appellant and others. The appellant was asked to open the safe and he did so with the keys in his custody, the safe having double locks. After opening the safe the appellant brought out two sets of challans and the remaining cash amounting to Rs. 3847/9/6 along with the duplicate keys of the iron safe which were lying inside the safe. The police officer found nothing to indicate tampering with the safe. During the investigation the safe was also examined by p.w.8 Bhabatosh Chatterjee, Officer of Messrs. Roy 'Co., of 100 Harrison Road, Calcutta, which had supplied the safe in question to the Mission Row Office. He also found no signs of tampering with the safe. The appellant was arrested on 3-4-1953 and after investigation he was Sent up in charge sheet. On these facts he was charged with having committed criminal breach of trust in respect of the missing amount of Rs. 2905/- out of a sum of Rupees 6752/9/6 which had been entrusted to him on 7-2-1953.

3. The defense of the appellant seems to have been that the money in question was never actually made over to him because on the 7th he was out at the Reserve Bank up to 2 p.m. and in his examination under Section 342, Criminal Procedure Code he made the further case that he was not actually in charge of the keys of the safe because the money used to be brought by Suhrid Bose himself in his absence in the Mission Row Office and he himself put the money into the safe with the keys which the appellant had left with Anil Krishna Ghose, cashier of the Mission Row at the time and then on the 10th he met Suhrid Bose in a bus near Thanthania and Suhrid Bose asked him to take the keys and he did so and opening the safe with the keys he discovered

the shortage.

4. The first question for decision in this appeal is whether the money was actually received by the appellant and the second is whether, if the money was actually entrusted to him, he committed criminal breach of trust in respect thereof. That the appellant was a Depot cashier of the Lake Depot at the relevant time is not disputed and has been proved beyond all manner of doubt. In deciding whether the appellant was actually entrusted with the money on the 7th of February alleged by the prosecution the evidence that is to be considered is that of Suhrid Kumar Bose, P.W.1, Anil Krishna Ghose P.W.2 and KaliDas Sarkar P.W.11. These are the three witnesses on that point. Of these three witnesses, P.W.1 says only that on the 7th he made over the money to Anil K. Ghosh, Depot Cashier of Lake Depot and Anil Ghosh and KaliDas Sarkar say that the money was actually made over to the appellant who in their presence kept the money inside the safe. The question now is whether these three witnesses there is any reason to disbelieve. (His Lordship then discussed evidence and concluded :) On the evidence therefore it must be held that the amount of Rs. 6752-9-6 including the amount of Rs. 2905 in higher denomination notes was actually made over to the appellant by Anil on 7-2-1953.

5. The next question for decision is whether it was the appellant who is responsible for the disappearance of the amount of Rs. 2905/- which consisted, as already stated of higher denomination notes of Rs. 2/-, Rs. 5/- and Rs. 10/-. The evidence against the appellant is entirely circumstantial for no one actually saw him taking out these notes. The inference about his guilt arises mainly from the fact that he was in charge of the keys and as such he alone had access to the safe so that if from the safe this amount disappeared it is he and he alone who could have been responsible for its disappearance. As against this Mr. Dutt on behalf of the appellant has argued that it is in evidence that the keys of the safe at least occasionally were with persons other than the appellant and before this particular safe was allotted for the deposit of the cash from the Lake Depot it was actually being used by the Mission Row Office so that at that time also other people handled the keys. He has next argued that the prosecution did not adduce evidence of the two duplicates being inside the safe itself till 19-9-1953 when Akshoy Kumar Das, P.W.9 who was an accountant of the State Transport Department of the Belgharia office and who accompanied Suhrid, the appellant and others to the Mission Row Office from the Belgharia office was examined. He states in this examination-in-chief for the first time that the appellant opened the safe himself with the two keys in his custody and that the other set of two keys was found within the iron safe. Suhrid P.W.1, Jitendra P.W.3 and Adhip P.W.6 who were examined also and who claimed to have been present when the safe was opened by the appellant did not say anything about the duplicate keys having been found inside the iron safe. He further said that the police did not make an inventory of the things found inside the safe when it was opened and from these facts his contention is that it is doubtful at best where these duplicate keys actually were and in order to set this doubt at rest the prosecution invented at a very late stage of the case the story that these keys were actually inside the safe. The prosecution case as already stated is that the appellant himself was in charge of the safe and that the custody of the two sets of keys of the safe, four in number, the safe one with double locks were also with the appellant. The appellant in his report Ex.5 says nothing at all about the keys, though he says then that he opened the safe as usual on the 10th. The Sub-Inspector of Police in whose presence the safe was opened and its contents taken out admits that he did not prepare any inventory of the contents of the safe. He says that he noted the fact in his diary. It does not appear that he was confronted with his diary. We asked for the production of the diary in this Court but it could not be produced and the

explanation given was that it was handed over to the learned trying Judge and it could not since be traced. Whether the explanation is correct or not the fact remains that the Sub-Inspector of Police stated in his evidence that he noted the contents of the safe in his diary. There is also no reason why the witnesses should actually speak of the find of the duplicates inside the safe if they were actually not there. Apart from Akshoy Kumar Das P.W.9, the Sub-Inspectors T.M. Chakravartty and the Investigating Officer S.M. Banerjee say so. If, as a matter of fact, the duplicates were not there as alleged by these witnesses it is most unlikely that the appellant would not have stated anything about these duplicate keys which according to the evidence of these three witnesses were in the safe and which according to Suhrid was with him along with the other set. There is therefore no reason to disbelieve this evidence about the finding of the duplicate keys inside the safe although it appears that it was not till Akshoy Das came into the box that the prosecution adduced any evidence about the find of the duplicates inside the safe.

6. The other contention of Mr. Dutt is that as other people had occasions to handle the keys it was possible that casts or photographs of those keys were taken by them or by others and the money taken out by means of duplicates prepared from the casts or photographs of the keys. Although it might be possible we do not think it at all probable. Till the safe was actually allotted to the Lake Depot no body had any reasons to take the cast of the keys because it was unknown then to what use it might ultimately be put. Again when the keys were in the hands of the head cashier of the Mission Row Office it is hardly possible that he would allow casts to be taken of these keys. That leaves the only other alternative that the accused who was in charge of those keys and who alone had the opportunity of taking out part of the money deposited in the safe by himself did actually take out this money. In this connection the evidence of P.W.10 Dibakar Dutt who was a Depot cashier of the Mission Row Office of the State Transport Department may be considered. He says that at about 7 or 7-30 p.m. on 9-2-1953 he saw the appellant attending office at the Mission Row in the room where the cash safes were located. He further says that he never before saw the accused on any previous day attending the office room at that hour of the night and he never saw the accused at any Mission Row Office after sunset except on 9-2-1953. Of course he further states that the accused was sitting behind him and he did not notice what he was actually doing but he handed over to him a piece of paper on which was written things like 10 X 5, 5X something else showing the amount to be remitted on the day following to the Bank. It is in evidence that prior to the actual deposit a summary advice had to be Sent to the Bank of the amount to be deposited and this advice was also to be Sent with the actual deposit. It is the evidence of this witness that this piece of paper was handed over to him by the appellant with a request that he should see that the summary note was Sent to the Bank next morning. But the witness was off duty next morning and he does not say anything more as to what happened to this piece of paper. As far as this witness is concerned no definite conclusion can be arrived at on this basis of his evidence because no attendance register used to be kept For the appellant for his attendance at the Mission Row Office so that although the witness says that he never before saw the appellant at that hour of the night at that office there is really no knowing whether ever before he actually attended the office at that hour of the night. Apart from the evidence therefore already referred to, the evidence of Dibakar shows further that the appellant was in the office on the 9th of February between 7 and 7-30 p.m. although the witness P.W.10 had never before seen him there. It is therefore established that as the man in charge of the keys the appellant had opportunities of taking out the money which he himself had kept in the safe. From these facts the conclusion seems to us to be inescapable that it was the appellant who was responsible For the disappearance of the cash. On the merits therefore, he appears to us to have been rightly

convicted under Section 409, Penal Code.

7. On behalf of the appellant Mr. Dutt raises certain points of law. The first is that although the appellant was prosecuted under Section 409, Penal Code, it is really an offence covered by Section 5(1)(c) of the Prevention of Corruption Act (Act 2 of 1947) and is punishable under Section 5(2) of that Act. Section 6 requires sanction for prosecution and as the appellant was prosecuted without any sanction the prosecution is bad. Section 6 reads as follows :

"No Court shall take cognizance of an offence punishable under Section 161 or S.165, Penal Code or under sub-section (2) of Section 5 of this Act, alleged to have been committed by a public servant, except with the previous sanction,

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, or some higher authority of the State Government.

(c) In the case of any other person, of the authority competent to remove him from his office."

8. As the appellant was not prosecuted under Section 5(2), S.6 is not applicable in terms to the present prosecution but Mr. Dutt's contention is that it is not open to the prosecution to circumvent the provisions of this Act by merely choosing to prosecute him under a section of the Indian Penal Code although substantially the offence complained of comes within the mischief of Section 5(2) of the Act. He seeks to reinforce this argument by a reference to Section 10 of the W.B. Criminal Law Amendment (Special Courts) Act, 1949. His second point of law is that the provisions of the Prevention of Corruption Act constitute a special legislation For the punishment of certain corrupt public servants in certain cases and as such it overrides the general law on the matter. He further argued that this Act by implication repeals the provisions of S.409, Penal Code as far as public servants are concerned. His third point of law is that the State makes a discrimination between different persons of the same category when it chooses to prosecute some under Section 409, Penal Code and others committing the same act under Section 5(2) of the Prevention of Corruption Act. As these points are more or less inter-connected, they have to be investigated together. The Prevention of Corruption Act (Act 2 of 1947) is an Act For the more effective prevention of bribery and corruption. Section 5 of the Act was at first intended to be enforced for a period of three years from the commencement of the Act on 11-3-1947. Then this period has been increased ultimately to 10 years so that there is no doubt that this section is still in force. Section 3 of the Act makes an offence punishable under Section 161, S.165 or Section 165A, Penal Code a cognizable offence and then Section 4 lays down,

"Where in any trial of an offence punishable under Section 161 or Section 165 of the Indian Penal Code it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain for himself or for any other person,. any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as mentioned in the said S.161, or, as the case may be without consideration or for a consideration which he knows to be inadequate."

Then Section 5 defines an offence which is described as criminal misconduct in the discharge of official duty. It runs as follows:

"(1) A public servant is said to commit the offence of criminal misconduct in the discharge of his duty,

(a) If he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification (other than legal remuneration) as a motive or reward such as is mentioned in S.161, Penal Code.

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned; or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or

(d) if he, by corrupt or illegal means or by otherwise abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage.

(2) Any public servant who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment for a term which may extend to seven years, or with fine or with both.

(3) In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his Known sources of income may be proved and on such proof the Court shall presume, unless the contrary is proved that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction thereof shall not be invalid by reason only that it is based solely on such presumption.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, a police officer below the rank of Deputy Superintendent of Police shall not investigate any offence punishable under sub-section (2) without the order of a Magistrate of the first class or make any arrest therefor without a warrant." Sub-section (4) was amended and sub-section (4) as it now stands after its amendment by Act 59 of 1952 on 12-8-1952 runs as follows :

"The provisions of this section shall be in addition to and not in derogation of any other law For the time being in force and nothing contained herein shall exempt any public servant from any proceeding which might apart from this section be instituted against him."

Then Section 6 provides for previous sanction being taken before a prosecution is launched under Section 161, or S.165, Penal Code or under Section 5(2) of this Act. It seems to us on examination of the provisions of this Act that it creates a new offence altogether, an offence termed criminal misconduct in the discharge of official duty and although Clause (c) of Section 5(1) overlaps to some extent the definition of criminal breach of trust it is one form of criminal misconduct as defined by the section. The main item on which this Act introduces a departure from the ordinary criminal law consists in the first place in creating certain presumptions, a presumption under Section 4(1) and a presumption again under Section 5(3). The presumption under Section 4(1) is only in connection with an offence punishable under Section 161 or S.165, Penal Code but the presumption under Section 5(3) is in respect of all kinds of offences which come within the definition of criminal misconduct in the discharge of official duty and the rule laid down in this subsection is that where an accused person or any other person on his behalf is in possession, for which the accused person cannot satisfactorily account, of pecuniary resources or properties disproportionate to his known source of income the Court shall on proof of such possession, unless the contrary is proved, presume that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefore shall not be invalid by reason only that it is based on such presumption. Another important departure from the ordinary criminal law is the provisions of Section 7 whereby an accused person, if he chooses to examine himself as a witness For the defense may do so. Another thing worth noticing is that the punishment for an offence of misconduct in the discharge of official duty by public servants is 7 years' imprisonment or fine or both and the punishment for an offence under Section 409, Penal Code is transportation for life or imprisonment for 10 years and fine. The Act as already stated is For the more effective prevention of bribery corruption and criminal breach of trust which under Clause (c) of Section 5(1) of the Act is one form of criminal misconduct in the discharge of duty though punishable under the ordinary law with imprisonment for 10 years or even transportation for life is made punishable under Section 5(2) of the Prevention of Corruption Act with only 7 years imprisonment. There is thus a reduction of Sentence in the case of any offence of criminal misconduct when it takes the shape of criminal breach of trust. To say that the Legislature wanted bribery and corruption to be more effectively prevented by making the Sentence more lenient in one type of cases is on the face of it absurd but at the same time as this has been done it must have been done deliberately.

What then could have been the object of the Legislature in doing so? It seems to us that this really provides the key to the whole Act. It is really an Act which aims on the punishment of corrupt public servants by introducing certain new rules of presumption, the most important of which is the presumption under Section 5(3). The Act, in our opinion, seems clearly intended to meet the cases of public servants who in the opinion of the State are corrupt but at the same time against whom these rules of presumption have got to be invoked because other tangible evidence to prove their corrupt practices may not be forthcoming. An examination of the terms of Section 5(3) of the Prevention of Corruption Act side by side with those of Section 8 of the W.B. Criminal Law Amendment (Special Courts) Act seems to strengthen this view. As the prosecution has to proceed more or less on the strength of certain rules of presumption For the first time created in this Act the Sentence provided under Section 5(2) may very well have been deliberately reduced in case of misconduct in the shape of criminal breach of trust. If we are correct in this, it follows that, for embarking on a prosecution of this character where these presumptions have to be invoked, the previous sanction of the authority concerned has to be taken; but as Section 6 stands it would be only when there is prosecution under this Act and not

otherwise.

Section 26 of the General Clauses Act runs as follows :

"Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice For the same offence."

The choice lies with the prosecutor as to whether the offender should be prosecuted and punished under one or other of the two enactments under both of which the act or omission complained of might fall. This choice of the prosecutor is always there and if the authorities in any particular case decide on a prosecution under the Prevention of Corruption Act then and then only the question of sanction would arise and not otherwise. Section 10 of the West Bengal Criminal Law Amendment Act to which Mr. Dutt referred in this connection, by providing that the provisions of the Prevention of Corruption Act shall apply to trials under the Act i.e., to trials by Special Judges created by this Act does not by means extend the scope of Section 6 of the Prevention of Corruption Act to trials under the West Bengal Criminal Law Amendment Act though such trials are not for offences mentioned in Section 6 to which Section 6 must always be restricted. Nor does it extend the scope of any of the other sections of the Prevention of Corruption Act which are made applicable to trials under the West Bengal Criminal Law Amendment (Special Courts) Act only when such trials are for offences under Section 5 of the Prevention of Corruption Act which is item No.7 of the Schedule to the West Bengal Criminal Law Amendment (Special Courts) Act. It is true that this effect could have been secured even without Section 10 of the West Bengal Criminal Law Amendment Act For the provisions of the Prevention of Corruption Act fully ensure this and yet if this was introduced, it is evidently by way of abundant caution. That disposes of the first contention of Mr. Dutt.

The second contention about the implied repeal of Section 409 under the Indian Penal Code from the provisions of the Prevention of Corruption Act is based on the view taken in a Punjab case, - '*The State v. Gurcharan Singh*¹', That view of the law has become completely outdated as a result of the amendment of S.5, sub-section (4) to which reference has already been made; and although even without that amendment it is at best doubtful whether that view was correct, in view of the amendment it can no longer be held to be good law.

9. The third point of Mr. Dutt, namely, about discrimination may well be disposed of by saying that the Prevention of Corruption Act although it does not expressly lay down any basis for classification does by implication in its various provisions lay down a line of

¹ AIR 1952 Pun 89

classification of offenders who are to be prosecuted under that Act. It is the case of those public servants alleged or suspected to be corrupt who cannot be brought within the law by available evidence and who can only be brought to justice by certain rules of presumption which was intended to be met by this Act. Thus, there is an implied basis of classification so that no question of discrimination really arises.

10. In the result, we do not think there is any substance in any of these points of law and as already found the appellant has been rightly convicted under Section 409, Penal Code. The Sentence also, in our opinion, is not unduly severe in the circumstances of this case.

11. The conviction and the Sentence therefore are affirmed and the appeal dismissed. The appellant will now surrender to his bail forthwith and serve out the Sentence.

Sen, J.

12. I agree.

Appeal dismissed.