FEDERAL HIGH COURT

Lieutenant Hector Thomas Huntley

Vs

Emperor

(Zafrulla Khan, J.)

24.04.1944

JUDGMENT

Zafrulla Khan, J.

1. Ordinance 29 of 1943 was promulgated by the Governor-General on nth September 1943. It empowered the Central Government to constitute two Special Tribunals (Section 3), and provided that the Tribunals shall have jurisdiction to try the cases allotted to them in Schedule 1 (Section 5). Schedule 1 set out in two lists the names of persons to be tried by the Tribunals and specified in the case of each by reference to sections of the Indian Penal Code the offence or offences in respect of which they were to be tried. Entry No. 6 in the first list reads:

Lt. H.T. Huntley, Station Master, Jamalpur, E.I. Railway...Section 161, Penal Code.

2. Lt. Huntley (hereinafter referred to as the appellant) was tried and convicted by the Tribunal sitting in Calcutta of an offence under Section 161, Penal Code, and was sentenced to 18 months' rigorous imprisonment and a fine of ₹ 500 and in default of payment of the fine to a further period of six months' rigorous imprisonment.

3. The Ordinance excluded appeals from orders and sentences of Special Tribunals (Section 7) but preserved the revisional jurisdiction of the High Courts under Chap. 32, Criminal P.C. (Section 8). The appellant accordingly moved the Patna High Court, which had jurisdiction in the matter, in revision. The High Court dismissed the revision petition but granted a certificate under Section 205 (1), Constitution Act. Hence the appeal to this Court.

4. The prosecution story was that P.W. 1 approached the appellant on 22nd May 1943, and asked to be allotted two wagons for the dispatch of sheep and goats from Jamalpur to Bally (a Calcutta suburban station). The appellant asked him to come two days later with the necessary forms. P.W. 1 returned on the 24th with the forms (Exs. 1 and 2) duly filled in and signed, whereupon the appellant cold him to wait while he telephoned to find out whether the wagons were available. After telephoning he asked him to bring the livestock for loading on the 25th. P.W. 1 said that he could not be ready on the 25th and so he was asked to come on the 26th and was told that the livestock would be dispatched only if be paid the appellant ₹ 20. On the 26th, P.W. 4 an Inspector of Police got in touch with P.W. 1, and having ascertained from him how the matter between P.W.

1 and the appellant stood, arranged with P.W. 1 that he should on visiting the appellant pay him the sum of ₹ 20 in the shape of currency notes which would be provided by P.W. 4. p.w. 4 then proceeded to Monghyr and obtained formal permission from P.W. 5, the Sub-Divisional Officer, to investigate the case. P.W. 5 further agreed to accompany P.W. 4 to Jamalpur. On arrival at Jamalpur they met P.W. 1, and P.W. 4 initialled two currency notes of the value of ₹ 10 each and gave them to P.W. 1 who went into the appellant's office. P.W. 4 and P.W. 5 waited outside on the platform at a little distance. A few minutes later, P.W. 1, came out of the office and made a sign to them indicating that he had done what was required of him. P.Ws. 4 and 5 then went into the office and recovered the notes from the appellant. The case of the prosecution was that the notes were received by the appellant for himself as illegal gratification for providing the wagons required by P.W. 1. The case of the appellant was that the money was "deposited with him by P.W. 1 on account of demurrage" (para. 15 of the complaint). The Tribunal hold that the prosecution case was established and that the offence with which the appellant was charged had been brought home to him.

5. No objection appears to have been taken before the Tribunal to the validity of Ordinance 29. Before the High Court the validity of the Ordinance was impugned and objection was also taken to the maintainability of the prosecution in the absence of (a) the consent of the Governor-General under Section 270 (1), Constitution Act, and (b) the sanction of the Governor-General in Council under Section 197, Criminal P.C. These objecti6ns were overruled by the High Court. The objection to the validity of the Ordinance was not pressed before us. It requires no further consideration. With reference to the objection based on lack of consent under Section 270 (1), Constitution Act, the learned Judges of the High Court were of the opinion that the Governor-General by promulgating the Ordinance constituting the Special Tribunals and specifying the case against the appellant as one of the cases which the Tribunals would have jurisdiction to try must be deemed to have given his consent to the initiation of the criminal proceedings against the appellant. As regards Section 197, Criminal P.C. one of the learned Judges held that the section was inapplicable as the appellant had failed to establish that he was within the category of public servants to whom that section was applicable, and the other was of the opinion that the operation of that section was excluded by Section 6 (2) of the Ordinance.

6. These two objections were repeated and pressed before us. In our judgment they are without force. Section 270 (1), Constitution Act, relates to proceedings instituted against a person "in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown." In 1939 F.C.R. 159l this Court laid down that to attract the provisions of this section it was not sufficient merely to establish that the person proceeded against was a public servant and that while acting as a public servant, or taking advantage of his position as a public servant, he did certain acts; it must be established that the act complained of was an official act. In this case the act complained of was the act of receiving illegal gratification. That surely could not be an act done or purporting to be done in the execution of duty. On *Hori Ram Singh V. Emperor*[1] Sulaiman J. observed:

> For instance, if a public servant accepts as a reward a bribe in his office while actually engaged in his official work, he is not accepting it even in his official capacity, much less in the execution of any official duty, although it is quite certain that he could never have been able to take the bribe unless he were the official in charge of some official work. He

does not even pretend to the person who offers the bribe that he is acting in the discharge of his official duty, but merely uses his official position to obtain the illegal gratification.

7. So far as the contention based on Section 197,Criminal P.C., is concerned, we consider that the ground stated by each of the learned Judges of the High Court to repel it, is adequate. The appellant has made no attempt to establish that he belongs to the class of officer who are entitled to the protection provided by that section. We are also of the view that Section 197 is not applicable to cases triable under ordinance 29. Section 1 (2), Criminal P.C. enacts that in the absence of any specific provision to the contrary, nothing contained in the Code shall affect any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force.

Section 6 (2) of the Ordinance makes the provisions of the Code, except Section 196A and chap. 33, applicable to proceedings of a Special Tribunal so far as they are not inconsistent with the Ordinance. This must be construed in the light of Section 1 (2) of the Code and when so construed operates in our judgment to exclude the applicability of Section 197 to these proceedings. It was argued that the express exclusion of Section 196A furnished an indication that Section 197 was not intended to be excluded. We are unable to take that view. The express exclusion of Section 196A was in our opinion by way of abundant caution and cannot affect the operation of Section 1 (2) of the Code, which expressly saves special jurisdiction and powers and special forms of procedure such as have been conferred and prescribed by the Ordinance.

8. On behalf of the Crown it was suggested that inasmuch as Section 197 relates to prosecutions in respect of offences alleged to have been committed by public servants when acting or purporting to act in the discharge of their official duty, the protection afforded by this section was limited to the kind of act contemplated in Section 270 (1), Constitution Act, and that therefore Section 197 was inapplicable to the present case for the same reason which rendered Section 270 (1) inapplicable. As we have held that the objection based on Section 197 fails on the grounds stated by us, it is unnecessary to decide whether the acts contemplated by Section 197 of the Code are the same as those covered by Section 270 (1), Constitution Act.

9. We were asked to grant leave for grounds on the merits to be urged before us. The learned Judges of the High Court did not record any finding on the merits as they considered the merits only incidentally to discover whether through any defect in procedure the accused had been deprived of the right of fair trial or whether the decision of the Tribunal was vitiated by some mistake of law. They were of the view that having regard to the practice of the Court, they were not entitled in the exercise of their revisional jurisdiction to interfere with the decision of the Tribunal, unless such a defect or mistake was shown to have occurred. In support of the prayer asking for leave, it was urged that the judgment of the Tribunal had proceeded upon erroneous principles and our attention was invited to certain portions of it which appeared to lend support to this contention. On consideration leave was granted by us and thereupon it was urged that the considerations upon which the conclusions of the Tribunal were based were not fully supported by the record. Before we proceed to consider this aspect of the case it is necessary to supplement the narration of facts set out earlier in the judgment with an account of what is alleged to have passed between the appellant and P.W. 1 on the afternoon of 26th May 1943. P.W. 1 has stated that on entering the appellant's office he made over Exs. 1 and 2 to him. The appellant said that he should be paid his ₹ 20 first. On this P.W. 1 made over the two initialledten.rupee notes to

him. The appellant then returned Exs. 1 and 2 to P.W. 1 and also gave him a slip (Ex. 3) and asked him to make over the papers to the Goods Clerk and to tell him that the goods were being dispatched for military purposes. Exhibit 3 states that an application should be taken from P.W. 1 to the effect that he was dispatching the goods on military account. Exhibits 1, 2 and 3 were handed over by P.W. 1.to P.W. 5 and never reached the Goods Clerk.

10. A charge under Section 161, Penal Code, is one which is easily and may often be lightly made, but is in the very nature of things difficult to establish, as direct evidence must in most cases be meagre and of a tainted nature These considerations cannot however be suffered to relieve the prosecution of any part of the burden which rests upon it to establjsh the charge beyond reasonable doubt. If after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that however strong the suspicion raised against the accused every reasonable possibility of innocence has not been excluded, he is entitled to an acquittal.

11. In this case, as in all cases of this kind, the direct evidence of the guilt of the appellant is that of an accomplice, namely that of P.W. 1. We have considered his testimony very carefully and find that on several matters with reference to which the truth of the story told by him could be tested, he has either prevaricated or contradicted himself. That he purported to be in negotiation with the appellant to secure the allotment of two wagons for the transport of livestock from Jamalpur to Bally, that he visited the appellant on 24th and 26th May 1943, filled in and signed Exs. 1 and 2, and handed over to the appellant on 26th May two tenrupees notes, are almost the only matters which have been established beyond doubt so far as his evidence is concerned. The Tribunal did notice some of the unsatisfactory features in the testimony of p.w. 1, but took the view that it was not necessary to decide how far his evidence could be believed with regard to its uncorroborated parts. The impression left on our minds after a careful consideration of his evidence is that he is not a very satisfactory witness. He certainly permitted his anxiety to support the prosecution case to overpower his regard for truth. He was not slow to invent details which, while giving a plausible colour to his story, were demonstrated in cross-examination to be false.

12. The story that he tried to make out was that he was a partner with one Makhdum in the sheep and goats business. According to him the livestock was being dispatched to Calcutta "in the ordinary course of trade as 1 had been doing all along." This was modified and the position was then stated to be that he was only a servant of Makhdum and had never tried to arrange for the transport of livestock before, this being the first occasion. In fact the cross-examination tended to show that Makhdum in all probability was a fictitious person and that the sheep and goats had no existence outside the imagination of P.W. 1. But of course the appellant had no reason to suspect this. When asked whether the livestock was ever dispatched at all, and if so, when, P.W. 1 professed ignorance and stated that he was discharged by Makhdum on the 26th after the incident at the railway station as he had bungled the business. He started by stating that P.W. 4, whom he did not know before, got in touch with him at his residence on the morning of the 26th. In cross-examination he stated "it is not a fact that Inspector Lahiri came to see me on the 26th morning at my residence." He stated in examination-in-chief that the appellant had asked him to visit him at 4 P.M. on the 26th. In cross-examination he stated:

> The Inspector asked me to come to the station at 4 P.M. If he had not, I should have gone earlier after finishing my meal.

As he was in the middle of his meal at 12-30 P.M. ho would if left to himself have gone to the station about 1-30 P.M. The following passages from his cross-examination are illustrative:

> When Inspector Lahiri offered to pay ₹ 20 for me it did not occur tome that in that ease I might not get the wagon. He told me that he was an Inspecfor of Police. He did not tell me why he was offering me ₹ 20 to pay the station master.

I got ₹ 20 from Mokdurn to pay to the station master when I left Monghyr. I asked the Inspector why I should take his money when I had brought it. He said that I could save my money by taking his.

13. The findings of the Tribunal were, however, not based solely on the testimony-of P.W. 1. In the view of the Tribunal that testimony was strengthened by the facts (a) that the appellant gaye no receipt for the ₹ 20 which he alleged he had received as deposit on account of demurrage; (b) that it was not the custom of railway officials to receive part-payment of any charge; (c) that there was no evidence on which any reliance could be placed that any demurrage would have become payable; and (d) that the appellant was prepared to have the goods dispatched as if they were on military account. We shall proceed to consider each of these factors in the order in which we have set them out.

14. The appellant's case being that the amount of ₹ 20 was "deposited with him on account of demurrage," his failure to give a receipt might well be explainable. Normally, a receipt would be given only when the amount of the charge to be levied had been definitely ascertained and paid in full, and in this ease that could not have been done till the wagons had been loaded and were ready for dispatch. Also p.w. 3 (General Assistant in the Goods Office at Jamalpur) began by stating in his examination-in-chief that a receipt is given only when it is insisted upon, though he soon corrected himself and added that a receipt is given in every case.

15. We have not been able to discover on the record any evidence to the effect that it is not the custom of railway officials to receive part-payment of any charge. No doubt p.w. 2 (Assistant Superintendent of Transportation) has stated that the appellant was not entitled to take any money as security for future demurrage and that demurrage cannot be deposited in advance, but apart from the fact that it would not be criminal to accept in advance money which had not yet legally become due, the appellant's case is not that the amount was received in advance, but that it was received in part-payment of a charge already incurred.

16. The question whether any demurrage would or would not have become payable has been approached by the Tribunal only from the point of view whether on the facts established any demurrage would have become legally chargeable. This in our judgment is not enough. If the circumstances were such that the appellant could honestly, though mistakenly, have believed that demurrage had or was likely to become chargeable, a payment received by him in respect of it would not render him guilty of an offence under Section 161. The entry, Ex. A (1) in the Placing Wagon Register shows that wagon B A 1022-was detained for sheep loading on 21th May. The Tribunal's criticism of this entry was that though p.w. 3 had proved it as being in the handwriting of a Shed Clerk named Dutt, the Shed Clerk was not called to state the circumstances in which it

was made. Exhibit A is an official register of the railway kept by a public servant in the course of his official duties and was produced from railway custody. If the prosecution did not accept the correctness of the entry upon which the appellant relied, it was for them to produce evidence which would explain the circumstances in which it was made. The further criticism of the Tribunal that the register in which the entry appears contained blank lines and that it was possible that the entry was inserted at a later date does not appear to us to be justified. We have examined the register ourselves and find that the page devoted to entries made on 24th May contains altogether 15 entries and that there is no blank space between the entries. This particular entry is right in the middle with seven entries above it and seven below. As a matter of fact as wagon B A 1022 was at Jamalpur on that date, it was the duty of the Shed Clerk to make an entry in the register regarding that wagon every day during which the wagon was detained at Jamalpur showing how it was being dealt with. If this entry had not been made on 24th May, there would on that date have been no entry regarding this wagon in the register, which would have amounted to a default of duty on the part of the Shed Clerk. The entry must have been made in the regular course of official duty and does not appear to us to be open to any suspicion. On behalf of the Crown it was frankly admitted before us that the entry was genuine and that the criticism to which it had been subjected by the Tribunal could not be supported. The entry does not indicate whether the wagon was placed in position for loading on the 24th, but it does show that it was detained for the purpose of sheep loading and to that extent lends support to the appellant's ease.

17. The Tribunal have observed that assuming that the appellant gave orders for this wagon to be detained for sheep loading, he had no authority to do so and consequently no authority to charge demurrage. The evidence doea not exclude the authority of the Station Master to detain a wagon pending receipt of sanction for allotment. On the other hand, there is a sentence in the evidence of P.W. 2 which throws some doubt on the correctness of the assumption made by the Tribunal. He stated it would be the easiest thing going for the Station Master to give a consignor two wagons though we had only allotted him one, as Jamalpur is a depot station.

18. P.W. 1 has stated that though he had said nothing to the appellant on the matter of the goods being required on military account, the appellant asked him to hand over Ex. 3 to the Goods Clerk and to say that the goods were being dispatched on military account. There is no other evidence on the point. The direction in Ex. 3 that an application should be taken from p.w. 1 to the effect that the goods were being dispatched on military account, tends to support the appellant rather than P.W. 1. As to the absence of a military credit note the appellant has stated that P.W. 1 told him that the credit note was with the man who was bringing the livestock from Monghyr. It may well be that P.W. 1 who has not scrupled to tell lies in his evidence when it suited him-did attempt to persuade the appellant that the goods were being dispatched on military account.

19. The appellant's contention was that he had detained one wagon for loading on 24th May in respect of which demurrage had become chargeable. The Tribunal considered this highly unlikely, as no forwarding notes had been received up to that time. Exhibits 1 and 2 are dated 24th May and were certainly taken by P.W. 1 to the appellant on that date. There is nothing beyond the statement of p.w. l that these exhibits were returned to him by the appellant, p. ws. 4 and 5 do not state that p.w. 1 had Exs. l and 2 with him when he went into the appellant's office on the 26th. But assuming that that was so, this would not exclude the possibility of P.W. 1 becoming liable for demurrage, p.w. 2 has stated in cross-examination that "it is necea-sary to give a forwarding note only when the goods are tendered, not before." It is clear that demurrage

would become legally chargeable after the lapse of nine hours of daylight from the moment of placing a wagon in position far loading. In some cases goods may not be tendered for loading till several hours or even days later. In such cases demurrage would begin to accrue though according to p.w. 2 no forwarding note would have been given.

20. The appellant's case was that he had on the morning of 24th May obtained sanction from Howrah over the control telephone for the allotment of a wagon to P.W. 1, and that on receipt of that sanction a wagon was placed in position for loading the same morning. The prosecution argue that this must be false as there was no possibility of the appellant communicating with Howrah by telephone on the 24th, the control telephone beyond Rampore Hat Station having been out of order since 21st May and continuing to be out of order till some date after 28th May. This has been sought to be established by the production of the control chart (EX. 8) relating to 24th May. The chart was produced by P.W. 2. Objection was taken before us to the admis-sibility of the control chart on the ground that it was not prepared by P.W. 2, and that P.W. 2 was not in charge of the Control Office. Assuming, however, that the chart does show that the control telephone was out of order beyond Rampur Hat, it has not been established that there was no other means open to the appellant to get through to Howrah on the telephone from 2lst May onwards. For instance, it has not been shown that Howrah could not have been reached by telephone via Kiul the junction nearest to Jamalpur on the main line. Jamalpur is an important station on the East Indian Railway system and it would be surprising if it had been permitted to remain beyond the reach of telephonic communication from Howrah for over a week and possibly much longer. P.W. 1 himself alleges some telephone conversation that the appellant purported to carry on with somebody on the morning of the 24th. The suggestion of the prosecution is that the conversation was with the Goods Yard at Jamalpur. P.W. 1 asserts that after the conversation, the appellant assured him that two wagons would be made available to him. The evidence indicates that only one wagon was available at Jamalpur. If that was so, the assurance given by the appellant to P.W. 1 seems rather to indicate that the appellant must have been in touch with Howrah. In any ease the matter has been left in doubt.

21. The prosecution have relied upon the endorsement Ex. 4 (2) which according to them shows that no wagon was allotted to Jamalpur on 24th May. The endorsement was admittedly made by P.W. 2 on 1st June 1943, five days after the receipt of Ex. 4, at Howrah and was not made in the regular course of duty. The suggestion is that it was made to counter or forestall any allegation on behalf of the appellant that a wagon had been allotted on 24th May. We can only observe that if the endorsement was made with that object, it must be condemned as an attempt to persuade the Court that might be called upon to try the case to accept a mere allegation made by P.W. 2 as evidence relevant in the case. All that Ex. 4 shows is that on 24th May sanction for two wagons was applied for. On the 26th, sanction for one wagon was granted and was communicated by means of the telegram of which Ex. 5 is a copy. It may well be that sanction for one wagon having already been given over the telephone on the 24th, sanction for only one more wagon was required on the 26th. Again, the matter is left in doubt, p.w. 2 no doubt stated at the trial that no allotment was made on the 24th, but as this is based on the endorsement Ex. 4 (2) (which is not evidence) and on the indication furnished by the control chart (Ex. 8) which by itself does not exclude the possibility of telephonic communication between Jamalpur and Howrah on the 24th, it does not, in our opinion, carry the matter any further.

22. P.W. 1 admits that after telephoning (whether to Howrah or to the Goods Yard), the appellant

asked him to be ready to load on the 25th. It was because p.w. 1 told the appellant that he could not be ready to load on the 25th that he was given time till the 26th. Prom this it would be a reasonable inference that after telephoning the appellant was in a position to arrange for a wagon to be loaded on the 25th and it was because P.W. 1 asked for further time that the loading was allowed to be postponed. This coupled with the entry Ex. A (1) shows that a wagon was detained on the 24th for the loading of livestock and that so far as the appellant was concerned could have been made available, and possibly was mabe available, for loading at the latest on the 25th. In these circumstances, whatever the legal position with regard to the liability of P.W. 1 for demurrage may have been, if the appellant honestly believed that demurrage had or might become chargeable, and on the 26th received ₹ 20 as a deposit on account of demurrage, he would not be guilty of an offence under Section 161, Penal Code. It must be remembered that even on the afternoon of the 26th, P.W. 1 did not profess to be ready to load as, according to him, the livestock was still on its way from Monghyr to Jamalpur, and demurrage would continue to accrue.

23. After giving the case our very careful consideration we are not satisfied that the possibility of the appellant having received the money on account o demurrage, which he honestly believed to be due @. likely to become due has been excluded beyond reasonable doubt. In coming to this conclusion, we have not been unmindful of the special rule of evidence enacted in Section 9 (2) of. the Ordinance but it has in our judgment not been proved that the appellant accepted any gratification for himself. We allow the appeal and direct that in place of the order of the High Court there shall be substituted an order acquitting the appellant and directing that the appellant shall be released from his bail, and that the fine, if paid by him, shall be refunded.

Cases Referred.

1('39) 26 A.I.R. 1939 F.C. 43