

(1945) 03 CAL CK 0002**Calcutta High Court****Case No:** Criminal Revision Cases Nos. 1424 of 1944, 27 & 65 of 1945

Krishna Das Saha

APPELLANT

Vs

Emperor

RESPONDENT

Date of Decision: March 16, 1945**Judgement**

1. These Rules have been obtained by the accused who have been convicted under sec. 3 of Ordinance XXXIII of 1943. The prosecution case was that a case containing a tin of Wild Woodbine Cigarettes was stolen from a wagon at Dacca being part of a consignment which had been taken charge of by a Naik of what is referred to as the "C.B.I.D." The case in question was found missing at Bhairab Station on the following morning. At about the time when the train left Dacca there is evidence that the Petitioners Ram Swamp and Abdul Latif were seen carrying such a case and that they brought it to Kayettuli Outpost to which they were attached. There is evidence that Krishna Das Saha was seen to go to the outpost and that he took a tin and had it opened at a certain tea shop, some pieces of wood and packing have been found at the outpost and the tea shop and substantial quantity of Woodbine Cigarettes were found in the possession of Krishna Das. There is one curious feature that apparently earliest information that some unlawful acts were being performed came from, the accused Asmat Ali. However, when a search was made at the outpost, he was found in possession of 18 packets of cigarettes. Abdul Latif was found in possession of four packets, Ram Swamp had no packets of cigarettes but 36 five-rupee notes. The lower Courts have found that the prosecution case is substantially true. In other words, they have almost clearly found that the case had been stolen from the wagon either by Ram Swarup and Abdul Latif or by others, then received by them, taken to the outpost and most of the contents sold to Krishna Das Saha. The findings in the case are almost sufficient to amount to findings that Ram Swarup and Abdul Latif are either thieves or receivers and that Krishna Das himself bought the cigarettes from Ram Swarup knowing or having reason to believe that they were stolen, but it is open to argument that the issue has somewhat been clouded by the fact that the actual charge was under the Ordinance

and that the findings necessary for a conviction under that, are somewhat different from those necessary for a conviction under sec. 411 or sec. 380 of the Indian Penal Code. As regards the question whether the cigarettes are military stores coming within the provisions of the Ordinance, the evidence given by the Manager of the Imperial Tobacco Company of Dacca Branch is that these cigarettes are exclusively for the purposes of the military and not meant for sale in the bazar, that there are two price lists, one for the civil and one for the military. There is also the evidence of Naik V. Thomas (P.W. 14) who simply states that he took charge of 35 cases of Wild Woodbine Cigarettes, 8 cases of Wills" Navy Cut Cigarettes at Dacca Railway Station to escort them to Chittagong. He says he is a Naik of 16 C.B.I.D. There is no evidence as to what this signifies and no evidence as to the origin of these cigarettes, where they came from or where they were, going to. In our opinion, the evidence on the record is not enough to bring these cigarettes within the provisions of Ordinance XXXIII.

2. There is the further difficulty in the case in that if it is treated as solely one under the Ordinance, then there is an obvious misjoinder. The acts of possession of the different accused cannot be connected so far as we can see, in any way so as to justify a joint trial within the terms of sec. 239 of the Code of Criminal Procedure. Mr. Ahmed appearing for the Crown simply urged that as the evidence and the finding were that all the cigarettes were possessed at one original source, then on the analogy of the provisions in sec. 239 (e) and (f) of the Code of Criminal Procedure a joint trial was allowable. It is sufficient answer to this to point out that sec. 239 had to be amended in 1923 in order to make provision for joint trials of thieves and receivers.

3. The result is that the convictions cannot be supported. Had there been clear findings it might have been possible for us to alter the conviction under sec. 411 of the Indian Penal Code but for the reasons we have indicated we feel unable to do this. As regards the Petitioner Asmat Ali we think that, in view of the fact that he was the first to give information about the matter and that only a small quantity of the cigarettes was found with him, it is not necessary for us to direct a retrial in his case. He is accordingly acquitted of the charge under the Ordinance and discharged from his bail bond. The cases of the other accused will be remanded to the trial Court for retrial on charges under sec. 411 of the Indian Penal Code and, if the prosecution so think fit, under the Ordinance. We point out that under the provisions of sec. 236 of the Code of Criminal Procedure it is legal to charge the accused both under sec. 411 of the Indian Penal Code as also under the Ordinance and that if the charges are so framed, the objection to misjoinder vanishes. The prosecution will take note that if they wish to proceed on the charge under the Ordinance, it will be necessary to give further evidence as to the position with regard to these cigarettes. The case will proceed from the stage of charge, the prosecution being at liberty to call further evidence if so advised, and the accused will have the opportunity of cross-examining all or any of the witnesses already examined.

4. We set aside the convictions and direct the retrial accordingly. The Petitioners Krishna Das Saha and Abdul Latif are already on bail and will continue on the same bail pending the re-trial. The Petitioner Ram Swarup Singh will at once be released on bail to the satisfaction of the District Magistrate of Dacca pending the re-trial.