

Emperor on the prosecution of Hurjee Mull Vs Imam Ali Sircar

Court: Calcutta High Court

Date of Decision: Dec. 18, 1903

Judgement

Maclean, C.J.

I have read the judgment of Mr. Justice Hill, and as I agree generally with his reasoning, and entirely with his conclusions, I

propose to say but little. As regards the charge of forgery I do not think, looking at the circumstances under which the endorsement on the bill was

made, that there was evidence to show that the accused made a false document within the definition of sec. 464 of the Penal Code, or in other

words, that he dishonestly or fraudulently made it with the intention of causing it to be believed that such endorsement was made at a time at which

he knew that it was not made. In his charge to the jury the learned Judge has somewhat paraphrased rather than followed the actual language of

the section. Looking to the publicity with which the endorsement was made, can it be said that there was any evidence of the intention which the

section requires. In so many words the question of intention was apparently not left to the jury, but what was left to them was the interpretation of

the endorsement, which does not seem to me to be the real question. I do not under these circumstances see how the conviction for forgery can

stand and this also disposes of the second count in the indictment.

2. As regards the charge of attempting to commit cheating, the case, upon the evidence, does not seem to fall within the definition of cheating in

sec. 415 of the Penal Code. The bill was snatched away from the accused before he had any opportunity of showing what he meant to do with it. I

think it would be straining the law to say that here there was an attempt to commit cheating.

3. The conviction must be quashed and the accused released from custody.

HILL, J.

In my opinion the conviction of the accused Imam Ali in respect of all the charges upon which he has been found guilty was wrong and I think

accordingly that he ought to be acquitted.

4. The charges against him were threefold--firstly, of forgery, pure and simple, under sec. 465 of the Penal Code. Secondly of forgery for the

purpose of cheating under sec. 468, and, thirdly, of an attempt to cheat under sec. 417 read with sec. 511.

5. I do not, I may say, now propose to consider the first branch of the argument addressed to us on behalf of the accused, which related to the

frame of the indictment. There was indeed much force in some of the contentions advanced by Mr. Garth on this head; but since, in my opinion, the

accused is entitled to an acquittal on other and more substantial grounds, I do not think it would serve any very useful purpose were I to occupy

myself upon a question which touches the merits of the case only indirectly nor do I think that I need deal with the question of misdirection

otherwise than incidentally as a specific ground, that is to say, for interfering with the verdict of the jury, for as I may say at once the conclusion at

which I have arrived is that there was no evidence to go to the jury either of forgery or of an attempt to cheat.

6. The case for the prosecution was that on the 23rd May (10th Jaista) 1903 the firm of Bhairo Bux Bogla (the complainants) sold to one Mosahib

Sircar who is a dealer in tobacco carrying on business at Juggernath Ghat in Calcutta and the father of the accused, 50 bags of tobacco for Rs.

910. The purchase was conducted on behalf of Mosahib Sircar by one of his servants named Megnath and two brokers and when concluded, a

bill was drawn up by the sellers which besides containing the usual particulars of such a transaction had, on the face of it, a memorandum or

stipulation printed in Bengali of which the following is a translation:-- ""Any money paid on account of this bill should be endorsed on back hereof. I

am not responsible for the amount not so endorsed, any money paid on account of the bill should be endorsed on back hereof; without such

endorsement the said payment should not be admitted."" This memorandum was signed by Kedar one of the brokers who represented Mosahib

Sircar and thereafter and until the 8th June the bill remained in the possession of the sellers. It was further, it is said, agreed orally that the price of

the tobacco was to be paid in three equal instalments at intervals of 15 days. And the first instalment accordingly fell due on 7th June (24th Jaista).

7. On the 8th June (25th Jaista) a servant of the firm of Bhairo Bux Bogla named Bungshidhar went to the shop of Mosahib Sircar at Juggernath

Ghat to obtain payment of the bill or of such portion of it as was then due. When he got to the shop he asked who would pay the bill and the

accused who was present and who, it appears, looks after the business for his father said ""I will pay the money,"" and asked for the bill. It was then

handed to him by Bungshidhar and he began to write upon it. Bungshidhar asked him what he was writing and he answered that he was entering

payment of the money. Bungshidhar then protested that he would not let him write until the money had been paid but the accused went on writing

and then began to "blot" what he had written. Whereupon Bungshidhar snatched the bill from him and as he did so the bill got torn into two parts,

one of which for the moment remained with the accused. But Bungshidhar immediately afterwards took it from him.

8. The following is a translation of what the accused wrote on the back of the bill. "17th Jaista--Through Bungshidhar Marwari Co."s . . . Rs.

501.

9. When Bungshidhar saw what had been written he said to the accused "you have entered payment of the money on the bill, let me have the

money." But the only answer he received from the accused was "go away I have paid." Then he went away and there, for all material purposes, the

incident may be said to have closed. The defence I may here add was that the payment of the Rs. 501 was in fact made to Bungshidhar on the

17th Jaista (30th May) and was entered accordingly in the books of Mosahib Sircar, that Bungshidhar came on the 25th Jaista with the bill which

he had not brought with him on the occasion of the payment, that the bill was then (on the 25th) endorsed by the accused in the manner mentioned

and that Bungshidhar took it away with him without protest or altercation of any kind.

10. It is in respect of what he wrote on the back of the bill that the accused has been convicted both of forgery and of an attempt to cheat.

11. Now in order to justify the conviction for forgery it lay on the prosecution to establish that the accused made this endorsement either with the

intention, putting it broadly, of causing it to be believed that it was made by a person other than himself or with the intention of causing it to be

believed that it was made at a time at which he knew that it was not made. With the other elements which enter into the offence of forgery we are

not now concerned. It was upon the former hypothesis apparently that the prosecution started, but as the case developed that position was

abandoned and the latter hypothesis was adopted, and in the end the point upon which the jury was required to pronounce its verdict was whether

or not the accused made the endorsement intending it to be believed that he made it on the 17th and not, as in fact was the case, on the 25th Jaista.

12. With regard to the charge of attempting to cheat it was necessary to prove that the accused attempted by means of the endorsement on the bill

to deceive someone and thereby to induce the person so deceived either to do or omit to do something which but for the deception he would not

have done or omitted. Here, as in the case of the forgery charges, I notice only the particular element in the offence which is now material. The

formal charge on this head, it is to be observed, was silent both as to the person upon whom the alleged attempt to cheat was made and also as to

the manner in which it was intended by the accused to influence the conduct of that person, and these omissions were not remedied until the close

of the case for the prosecution. This was, I think, in the circumstances of the present case a somewhat serious defect, and placed the accused at a

considerable disadvantage in the conduct of his defence. But I do not dwell on the point now for the reason that I have already mentioned.

Ultimately the suggestion of the prosecution was that the accused made the endorsement in the attempt to deceive one Hurji Mull, the munib

gomastha of the firm of Bhairu Bux Bogla into the belief that he (the accused) had paid Bungshidhar the sum of Rs. 501 on the 17th Jaista as part

of the price of the tobacco, and thereby to induce Hurji Mull to refrain from demanding payment of so much of the price. And it was on this footing

that the case was left to the jury.

13. Turning now to the evidence in support of the forgery charges, What evidence is there to show that the accused intended it to be believed that

the endorsement on the bill was made on the 17th Jaista? On such a question, direct evidence no doubt is hardly to be expected, and it would

suffice to bring home to the accused the intention imputed to him had any facts been proved by the prosecution from which such an intention might

reasonably have been inferred. But here I would observe that while the concurrence of several separate facts all of which point to the game

conclusion may, though the probative force of each be slight, be quite sufficient in their cumulative effect to produce conviction, a mere aggregation

of separate facts all of which are inconclusive in the sense that they are quite as consistent with the innocence as with the guilt of an accused

person, cannot in my opinion have any probative force, and after a careful consideration of the evidence in the present case I do not think that it

can be put on a higher level than that. And I may observe also--I say it with very great deference--that the learned Judge in placing the case before

the jury appears to me to have failed to apply the principle, which, so far as I know, is a fundamental one and of universal application in cases

dependent on circumstantial evidence that in order to justify the inference of guilt the incriminating facts must be incompatible with the innocence of

the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

14. The facts bearing on this question and which were placed by the learned Judge before the jury as suggestive of a guilty intention on the part of

the accused are to be derived from the following passage taken from his notes of his summing up:--"If the jury come to the conclusion that the

money was paid on the 17th Jaista then accused should be acquitted. If it was not so paid they should consider whether he has been guilty of

forgery and of an attempt to cheat. On this point they should regard the endorsement. The date is written at the top. The fact of payment down

below. Did accused intend to represent that this endorsement was made on the 17th Jaista? This would be consistent with his books and the terms

of the bill as to entering of payment on the back. If, as argued, he only meant to record on the 25th that he had paid the Rs. 501 to Bungshidhar on

the 17th, why did he not date it 8th June 1903? Why did he not ask Bungshidhar to sign it and why did he not give him the balance?" Beyond these

circumstances I am unaware that there are any others in the case which might be claimed as suggestive of an inference adverse to the accused and

certainly the learned counsel, who appeared before us in support of the prosecution, was not in a position to point out any other, so that these may

properly be taken, I think, as exhausting the case against the accused, so far as the forgery charges are concerned. Though I may observe

parenthetically that to the extent to which they have been derived from the evidence adduced by the accused in support of his defence they ought

not, I think, to have been before the Court at all, since the prosecution in my opinion fails to make out a case which the accused could properly be

called upon to consider.

15. Now assuming that the payment of Rs. 501 was not in fact made, I fail, in the first place, to perceive how the position of the date 17th Jaista

on the back of the bill, relatively to the statement that payment had been made through Bungshidhar can throw any light whatever on the question

of the intention of the accused respecting the time at which he wished it to be believed the endorsement was written. The date is obviously intended

to represent the date of the alleged payment. Is it to be inferred merely because the accused recorded the fact of the payment with its date that he

intended it to be believed that the record was made on the same date as the payment? It appears to me that there is here no necessary or real

connection whatever between the factum probandum and the fact adduced in proof of it and that the latter fact is quite as, if not more, consistent

with the contrary supposition. More especially when it is remembered that the accused was seen by several persons making the endorsement on

the 25th Jaista, and that it was well-known that the endorsement was not upon the bill when it left the possession of Hurji Mull on that date. Then

as to the account books of the accused what the learned Judge in effect puts to the jury is, if I understand him aright, that inasmuch as these books

showed entries of the payment of the Rs. 501 under date the 17th Jaista the jury might justly infer from that circumstance that when the accused on

the 25th Jaista wrote the endorsement he intended it to be believed that he did so on the same date as that under which the entries in the books

appeared. But here again it appears to me that there is no necessary connection between the facts relied upon and the conclusion which it is sought

to establish by means of them. It may be that the entries in the account books are not inconsistent with the intention imputed to the accused but on

the other hand they are not inconsistent with the supposition that he intended nothing more than to record the date of payment in the bill in a manner

corresponding with the entries contained in his account books. And so again its, I think, with regard to the terms of the bill as to the entering of

payment on the back. The bill does not require either that the endorsement should be dated or that it should be made contemporaneously with the

payment. A debtor would no doubt for his own protection--where there is such a stipulation as the present--ordinarily see that any payment made

by him was recorded at once. But is the fact that in the present instance the record of the payment was made by the debtor at a later date than the

payment itself inconsistent with the supposition that he was either indifferent as to what belief was entertained with respect to the date of making the

record or that he intended it to be believed that it was made when in fact it was made? I certainly do not think it is and if it be consistent with an

innocent intention, is it a fact from which a guilty intention ought to have been inferred Again the facts that the accused did not date the

endorsement ""8th June 1903"" and that he did not procure the signature to it of Bungshidhar are to my mind equally inconclusive. I will not now

pause to discuss them more minutely but to my thinking they are, having regard to all the surrounding circumstances like the or hers upon which I

have commented, quite as consistent with the innocence of the accused as with his guilt and indeed the absence of Bungahidhar's signature would

seem, if anything, to suggest an inference contrary to that which has been deduced from it With respect to the final fact upon which the learned

Judge laid stress that the accused did not pay Bungshidhar the balance of his debt, I must confess that I am unable to perceive what bearing it has

upon the question at issue--how, that is if the accused had paid the balance, it would help one towards the solution of the question whether he

intended it to be believed that he wrote the endorsement on the 17th or the 25th Jaista.

16. In the result it appears to me that all these facts, whether taken individually or collectively as I have already indicated, are, to put them at their

highest, equivocal--being, as I think they are, quite as consistent with the innocence as with the guilt of the accused and I am therefore of opinion

that they are insufficient to support the charges of forgery in respect of which he has been found guilty. Then as to the charge of attempting to

cheat, the question is whether in the facts as stated above there was what amounted in law to an attempt and I do not think there was. I may

observe before going further that only by a straining of the law could the case in my opinion be brought within the definition of cheating contained in

the Penal Code. But conceding that it satisfies the definition and conceding that the accused intended to make the attempt to cheat Hurji Mull and

further that he had made all his preparations for embarking on the attempt, it was necessary nevertheless for the prosecution to carry the case a

step further to show that the actual transaction, to use the words of Lord Blackburn in *Reg. v. Cheeseman Lee and Cave* at pp. 142, 145 (1862),

had commenced which would, if not interrupted, have ended in the crime. If, for example, the accused had handed back the bill with the

endorsement upon it to Bungshidhar that might have been sufficient to constitute an attempt. But Bungshidhar deprived him of the bill before he had

given any indication of what he intended to do with it after he had written the endorsement upon it and it was not I think within the province of the

jury to speculate as to what he would have done with it if Bungshidhar had not taken it away from him. An attempt to deceive by a false

representation of fact seems to me at least to involve that the person charged should have taken some step towards the communication of the

representation to the person whom it was his intention to deceive, but however probable it may be that the accused would have taken such a step

if the bill had not been taken away from him, he did not in fact take it and a man is punishable not in respect of what he may have intended to do

but in respect of what he does.

17. For these reasons I think that the charge of attempting to cheat is also unsustainable and consequently that the conviction upon that charge

should be set aside.

18. Prinsep, J., authorises me to say that he concurs in the judgment I have just read.

Harington, J.

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19. In my opinion the conviction should be quashed.

20. To sustain a conviction for forgery in the present case there must be evidence that the prisoner dishonestly made the endorsement with the

intention of causing it to be believed that it was made by the authority of a person by whose authority he knew it was not made, or that it was made

at a time at which he knew it was not made.

21. It is contended that the date appended to the endorsement was placed there with the intention of causing it to be believed that the endorsement

was made on the document on the 17th Jaista or that at any rate it was open to the jury to find that it was placed with that intention. I do not think

it was open to them. Prima facie the important date to record is that on which the part payment is made as from the date of the payment the statute

of limitation runs. The date when the endorsement is made is of comparatively small importance, and without some evidence to show that the date

was intended to refer to the making of the endorsement I do not think the jury were entitled to say that the endorsement was anything more than a

statement by the maker of the endorsement that part payment was made on 17th Jaista.

22. It may possibly have been the intention of the prisoner that it should be believed that the endorsement was made under the authority of

Bungshidhar but there is no evidence from which that intention can be inferred.

23. The endorsement is in my opinion just what it purports to be, i.e., a statement by the prisoner that he had on 17th Jaista made a part payment

and as such is not a "false document" under sec. 464.

24. The other question is whether there was any evidence of an attempt to cheat. On the whole I do not think there was. The prisoner certainly had

a locus penitentiae for the evidence is that he never voluntarily parted with the document. What he would have done if Bungshidhar had not

snatched the document away from him is purely a matter of speculation. He was in the position of a man who had committed to writing a statement

which was untrue. We may suspect that it was done because he wished to evade payment, but how he intended to utilize the document there is no

evidence to shew. He had only got as far as the stage of preparation when he was deprived of the paper. I do not think his conduct after the paper

had been taken away can be relied on to turn preparation into an attempt.

25. I need only add that I have read the judgment delivered by Hill, J., and with that I entirely agree.

Rampini, J.

26. The facts of this case are as follows :--On the 23rd May last, the firm of Moashib Sircar, i.e., the accused's firm, purchased through their

servant Megh Nath Dholta, 50 bags of tobacco for Rs. 911 from the firm of the complainant. According to the prosecution, the price was to be

paid in three instalments at intervals of 15 days. An endorsement was made on the bill for the tobacco that any money paid on account of that bill

was to be endorsed on the back thereof, and any payment not so endorsed was not to be admitted. There was no provision as to by whom the

endorsement of payment was to be made. It apparently might be made by an agent of either firm. This endorsement was signed by the

complainant's broker Kader. According to the prosecution, the complainant's servant Bungshidhar went on the 25th Jaista, or 8th June, and

presented the bill for payment. The accused, Imam Ali, the son of the proprietor and the manager of the firm of Mosahib Sircar, then wrote an

endorsement on the back of the bill, that Rs. 501 had been paid on account of the tobacco on the 17th Jaista, or 30th May. The witness

Bungshidhar tried to stop the writing of this endorsement, and in trying to recover possession of the bill, tore it into two pieces. He thus got

possession of one half and afterwards took from the accused the other half. He then demanded an explanation, to which the accused replied ""go

away--I have paid."" Bungshidhar sent infortion to his master, Hurji Mull, who came and was told by the accused to go away. Hurji Mull then

complained to the Police. He went again the same evening with some friends, but the accused charged them with coming to loot his shop.

27. The defence of the accused was that the Rs. 501 had been paid on the 17th Jaista, that Bungshidhar had not then the bill with him, so he

brought it on the 25th Jaista, had the bill endorsed, that there was no altercation, and that he was paid nothing more and went away. The charges

framed against the accused were under sec. 465 (forgery), sec. 468 (forgery for the purpose of cheating) and sec. 417 read with sec. 511

(attempt to cheat).

28. The accused was found guilty of all three charges by the unanimous verdict of the jury.

29. The present application is made on the ground (1) that the facts found do not amount to any offence; (2) that the charges under secs. 468 and

417 and 511 are bad, because the name of the person whom it was intended to cheat are not mentioned in the charges; (3) that my charge to the

jury contained certain misdirections.

30. I do not propose to say anything on the third of these pleas.

31. I would, however, observe that in my opinion, on the facts as found by the jury, offences of forgery with intent to cheat and of attempting to

cheat have been committed as also that the charges as drawn are not illegal.

32. In the first place, as to the charge of forgery, according to sec. 463, ""whoever makes a false document or part of a document, with intent to

cause damage or injury to any person, or with intent to commit fraud or that fraud may be committed, commits forgery."" Sec. 464 lays down that a

person is said to make a false document, ""who dishonestly or fraudulently, makes, signs, seals or executes a document or part of a document""--

with the intention of causing it to be believed that such document or part of a document was made, signed, sealed or executed--at a time at which

he knows that it was not made, signed, sealed or executed."" Sec 465, under which the accused was charged, prescribes the punishment for an

offence which comes within the provisions of secs. 463 and 464. Now, the jury have found in this case that the accused did not pay the sum of Rs.

501 to Bungshidhar on the 17th Jaista, that the accused made the endorsement on the back of the bill, which indeed he admitted that he had made

and that he intentionally made it in such a way as to appear that he had made it on the 17th Jaista, i.e., the day of the alleged payment of the Rs.

501. Hence, it would seem to me his act amounted to forgery, because he made part of a document in such a way as to make it appear as if it had

been made at a time, when it had not been so made. He therefore made a false document, and as he made it as evidence in support of his alleged

payment of Rs. 501 on the 17th Jaista, which he did not make, he made it with intent to cause damage or injury to Hurji Mull and to commit fraud

or that fraud might be committed.

33. Then the accused committed this act, intending that the endorsement should be used for the purpose of cheating. He evidently made the

endorsement, because the bill contained a warning that no payment not endorsed on the back of the bill would be admitted. He intended that the

endorsement should support his allegation of the payment of the 17th Jaista. If his allegation of this payment had been believed, when no such

payment had really been made, this could not fail to deceive Hurji Mull or the proprietor of his firm and induce Hurji Mull, or the proprietor of the

firm, to refrain from demanding the sum of Rs. 501 so alleged to have been paid. This would certainly cause damage to one or other of them in

property.

34. It has been said that it was not likely that the accused would do this, knowing that the bill for the tobacco was all the time in the possession of

the complainant and he could never expect Hurji Mull to believe that the endorsement had been made on the 17th Jaista. This does not affect the

question whether the act of the accused amounted to a legal offence. But I might here point out that the bill in nowhere alleged or proved to have

been all the time in the personal custody of Hurji Mull. The bill was drawn up without reference to Hurji Mull and it may have been kept merely in

his office. In any case the accused may have intended to induce Hurji Mull, or some one to believe that the bill had been withdrawn from his office

on the 17th Jaista and that the payment and the endorsement on it of the payment of Rs. 501 had been made simultaneously. Hence it would seem

to me, on the facts as found by the jury, an offence punishable under sec. 468, as well as one punishable under sec. 465 was committed by the

accused.

35. There remains the charge under secs. 417 and 511, viz., of an attempt to cheat. I understand the contention of the applicant on this point to be

that on the facts found the accused's offence amounts merely to a preparation to commit an attempt to commit an act of cheating, but did not

amount to an actual attempt. There would seem to me to be no doubt that if he the accused knowingly wrote a false endorsement of payment on

the back of the bill, as on the facts found by the jury he must be held to have done, and delivered it to Bungshidhar to be taken and shown to his

employer, he would have committed an attempt at cheating. There can also be no doubt that on the facts found that he made the endorsement with

this motive. Then, did he not deliver it to Bungshidhar ? I think he did. His own case is that he did so deliver the bill and that Bungshidhar took it

quietly and went away with it. But even from the evidence of Bungshidhar I think it may be seen that there was a delivery of the endorsed bill.

Bungshidhar tried to stop his writing the endorsement and took one-half from him. He then took the other half. The accused then said "go away I

have paid." This meant that the endorsement was a true one, that Bungshidhar was to take it to his master and show it to him as evidence on behalf

of the accused that the Rs. 501 had been paid. If he did not mean all this, he would not have said:-- "Go away I have paid." He would rather have

said "give me back the bill. The endorsement is not correct and I will cancel it." There was therefore on his part an intention to deliver, an

acquiescence in the taking of the bill and a representation as to its correctness. Hence, I think, there was a delivery on the part of the accused of

the bill with the false endorsement on it and so there was an attempt at cheating punishable under secs. 417 and 511 on his part. As for the alleged

defect in the charges, I can only repeat what I observed in my address to the jury that charges according to the Penal Code need not be drawn

with all the technicalities required by English law, and that no authority has been shown us, nor as far as I am aware is there any authority, for the

contention that charges under secs. 468 and 417 coupled with 511 are illegal, simply because the name of the person whom it was intended or

attempted to cheat is not expressly stated in them. Something has been said at the bar as to the practice. But no authoritative information as to the

practice has been given us. The charges were signed by the clerk of the Crown, who is no doubt well informed as to the practice in such matters.

And a practice does not constitute a law. Non-observance of a convenient, and it may be even a usual, practice cannot amount to an illegality.