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**(1929) 02 CAL CK 0053**

**Calcutta High Court**

**Case No:** None

Radha Krishna Gupta

APPELLANT

Vs

Jamunadas Fatepuria

RESPONDENT

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**Date of Decision:** Feb. 8, 1929

**Citation:** 120 Ind. Cas. 250

**Hon'ble Judges:** Mukerji, J; Graham, J; Buckland, J

**Bench:** Full Bench

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### **Judgement**

Mukerji, J.

(January 7, 1929).

1. The petitioner Radha Krishna Gupta alias Radha Krishna Byas was tried by the 3rd Presidency Magistrate of Calcutta along with another person for offences under Sections 381 and 411, Indian Penal Code. The learned Magistrate acquitted him of the said offences but convicted him u/s 54-A. of the Calcutta Police Act IV (B. C.) of 1866 and sentenced him to undergo rigorous imprisonment for 3 months. He has also made an order that a fixed deposit receipt and a cash certificate which were found in the possession of the petitioner be made over to the complainant.

2. The prosecution case was that the petitioner was a writer of accounts in the complainant's firm, that the petitioner had abstracted a blank but signed cheque form from the cheque book of the firm, filled it up for Rs. 9,500, and cashed it and misappropriated the money. The charges frame against the petitioner were the following:

First. A charge u/s 381, Indian Penal Code, in respect of a blank signed cheque form No. CX 350718; and 2nd. A charge u/s 411, Indian Penal Code in respect of Rs. 800 and Rs. 4,000 covered respectively by a Postal certificate and a fixed deposit receipt.

3. The learned Magistrate held as regards the first charge that all that had been found was that the petitioner had an opportunity to abstract the cheque form but

that there was no legal evidence on which it could be held that he did so, and that although there was a confession made by the petitioner it could not be taken into consideration as it had not been voluntarily made. The first charge, therefore, in the opinion of the learned Magistrate failed.

4. As regards the second charge, the learned Magistrate was of opinion that it had not been established that the monies covered by the Postal cash certificate and the fixed deposit receipt were the proceeds of the cheque. He held, therefore, that the second charge was not proved.

5. Being of opinion, however, that the purchase of a cash certificate for Rs. 800 and the deposit of Rs. 4,000 in the Bank on the 6th February 1928, "the eventful day" was highly suspicious, the learned Magistrate proceeded to convict the petitioner u/s 54-A of the Calcutta Police Act and sentenced him and made the order of disposal in complainant's favour as above mentioned.

6. For one thing, the judgment of the learned Magistrate is highly inconsistent. If he was unable to convict the petitioner u/s 411, Indian Penal Code on the ground that no connection had been established between the monies covered by the Postal certificate and the fixed deposit receipt it is difficult to see on what footing the said documents were to be made over to the complainant.

7. In no view of the case can this order of the learned Magistrate be supported.

8. As regards the conviction u/s 54-A, the learned Magistrate was not satisfied with the explanation which the petitioner has given as to how he came by such a large sum of money as he had put into the Bank and for which he had purchased the cash certificate. But the question is, Is Section 51 A of the Calcutta Police Act applicable to a case of this nature and is the conviction a proper one?

9. In challenging the validity of the conviction it has been urged on behalf of the petitioner that inasmuch as there had been no charge framed for an offence u/s 54-A the conviction is bad in law. Now, it is true that Section 54-A is an offence triable as a summons case, and for a trial of this offence no charge is necessary (vide Section 242, Criminal Procedure Code, but if it was intended that the petitioner was to stand his trial for this offence along with offences under Sections 381 and 411, Indian Penal Code, which are triable as a warrant case it was necessary to give the petitioner notice of that fact, and consequently a charge was also necessary to be framed for the offence u/s 54-A [Hossein Sardar v. Kalu Sardar 29 C. 481 : 6 C.W.N. 599]. It is true that the petitioner has in fact adduced some evidence in support of the explanation that he gave for his transaction of the day, but it cannot be said that he was not misled or that it may be assumed that he had no further defence to make. Omission to frame the charge was, in my opinion, a serious irregularity which must be held to have vitiated the trial much more serious than a mere omission to frame a charge in a warrant case in which the petitioner knows what he is being tried for. But it has been held by this Court in the case of *Tulsi Tolini v. Emperor* 72 I

C. 372 : 50 C. 564 : 24 Cri.L.J. 372 : A.R. 1923 Cal. 596 that when an accused has been tried on a charge u/s 379, Indian Penal Code, he may be convicted of an offence u/s 54-A of the Calcutta Police Act though not separately charged with it. Whether I agree with the principle of that decision or not I feel bound by it and I must hold that this contention should be overruled.

10. But a more serious illegality in this conviction in my opinion is the application of Section 54-A to the case. The judgment of the learned Magistrate is not very clear on the question as to what it was that formed the subject-matter of this charge. The learned Advocate appearing on behalf of the Crown seemed to argue that it was the two sums of Rs. 800 and Rs. 4,000 which was the subject-matter, while the learned Advocate for the complainant while not disapproving of that contention urged that it was the Postal cash certificate and the fixed deposit receipt which were the subject-matter. In my opinion neither of these two Bets could possibly form the subject matter of a case u/s 54-A.

11. As regards the Postal cash certificate and the fixed deposit receipt they are property belonging to the petitioner himself and standing in his own name and the contention that they were fraudulently obtained from the Post Office and the Bank by the fraudulent concealment of the fact that the money was not the accused's money need not be seriously considered.

12. The sums of money Rs. 800 and Rs. 4,000 had already been parted with by the petitioner, even if at one time they were in his possession. The first part of Section 54-A is drawn almost word by word from the Metropolitan Police Court Act, 2 and 3 Vic., Chap. 75 Section 24. The limited meaning which the words of that section of the Statute have been held to bear has not been adopted in this, country. It is noticeable nevertheless that the provision, contained in Section 54-A is revolutionary in its character, relieving as it does the prosecution of its ordinary burden of proof in a criminal case beyond what is necessary to create a reasonable suspicion, and throwing the entire onus on the accused of removing that suspicion. A penal provision of this character should, in my opinion, be strictly construed.

13. The section is divided into two subsections. In Sub-section (1) the word used is "has," as contra-distinguished from the word "had" in Sub-section (2), and the said word used with reference to "possession" implies present possession. While, therefore, a person may be proceeded against under Sub-section (1) if he is in possession at the time when the proceedings are taken, proceedings may be taken under Sub-section (2) against a person who had possession in the past and from whom the former may have received the thing. The word "possession" should be understood in a sense ejusdem generis with the words "conveys," and "offers, etc." and in the sense of actual physical possession: the object of Sub-section (1) being to oblige a person to explain how he came by some article which he has with him. There is a difference between the two sub-sections in this way that under Sub-section (1) it is the failure to explain which attracts that sub-section, while for a

conviction under Sub-section (2) it must be shown that the person had reasonable cause to believe that the thing was stolen or fraudulently obtained, but this is a matter which need not be considered here. The word "thing" appears in the section, in Sub-section (1) as "anything," and in Sub-section (2) as "the thing" and must necessarily mean tangible moveable property having a corporeal existence and capable of being handled. In my opinion it is the suspected thing itself in some shape or form that can form the subjectmatter of a case under this section. If a man was in possession of stolen gold ornaments and had got it melted or converted into gold, the gold is still the thing itself in a different shape or form. If instead of having the gold in his hand he keeps it in his house or with a friend or a goldsmith, the gold is still in his possession. To such a case the section will apply, as was the case in *Tulsi Tolini v. Emperor* 72 I. C 372 : 50 C. 564 : 24 Cri.L.J. 372 : A.R. 1923 Cal. 596. If a man deposits money in a Bank, or purchases a cash certificate with it, the money loses all its identity and I cannot conceive how it can be said that he is still in actual physical possession of the money as a tangible piece of moveable property. The cash certificate or the fixed deposit receipt may represent the money for certain purposes but it is not the money itself as a "thing" in another shape or form of such thing, I am, therefore, of opinion that this conviction is entirely misconceived. Section 54 A has already been extended to cases to which, in my opinion, it was never intended to apply, but to extend it to a case like this and to authorise a Magistrate to call upon a person to explain his wealth or prosperity would be far too dangerous.

14. I would accordingly make the Rule absolute and set aside the conviction of the petitioner u/s 54-A of the Calcutta Police Act and the sentence passed on him under that section. The order of delivery of the Postal cash certificate and the fixed deposit receipt cannot stand and must also be set aside. If the above orders are passed it will be necessary to pass some order for the disposal of the said two documents. I must say without hesitation that I feel somewhat doubtful about the correctness of the acquittal of the petitioner on the charge u/s 411, Indian Penal Code. I would, therefore, order that the said documents should be detained in Court for a period of three months from to-day within which time the complainant may, if he be so advised, take measure to get his rights declared to the documents or obtain such other or further orders in his favour which would entitle him to them or would justify their further detention, and in the event of his failing to do so within that time the said documents should be returned to the petitioner from whose possession they were taken.

Graham, J.

(January 7, 1929).

15. I have the misfortune to differ from my learned brother in this case. The facts out of which this Rule has arisen are shortly as follows:

The petitioner Radha Krishna Gupta alias Radha Kissen Byas was put on his trial along with another person before the Third Presidency Magistrate, Calcutta, the charges framed against the petitioner being

1. First, that on or about the 5th February, 1928, he committed theft of a blank cheque on the Central Bank of India from a cheque book belonging to the complainant Jamunadas Fatepuria already signed by him, and thereby committed an offence u/s 381 of the Indian Penal Code, and

2. Secondly, that on or about the 6th February 1928 he dishonestly received or retained stolen property to wit R9. 800 covered by a Postal cash certificate, and RS. 4,000 covered by a fixed deposit receipt of the P. and O. Banking Corporation knowing or having reason to believe the same to be stolen property being a portion of the money obtained by cashing a cheque filled up for Rs. 9,500, and that he thereby committed an offence u/s 411 of the Indian Penal Code.

3. The Magistrate found that the charge u/s 381, Indian Penal Code failed as the evidence fell short of actual proof that the accused stole the cheque form, though there was evidence that he had the opportunity to do so. It was further held that the charge u/s 411, Indian Penal Code also failed inasmuch as there was nothing to show that the monies found with the accused were the actual proceeds of the cheque in question.

4. Having recorded those findings the Magistrate then went on to hold that the accused was guilty of an offence u/s 54-A of the Calcutta Police Act in respect of the said monies and sentenced him to three months" rigorous imprisonment, directing at the same time that the fixed deposit receipt for Rs. 4,000 and the cash certificate of Rs. 1,000 found with the accused should be made over to the complainant.

16. The legality of the conviction has been assailed mainly on two grounds:

1. Firstly, that the elements necessary to constitute an offence u/s 54-A of the Calcutta Police Act were not made out against the accused, and that that section has no application in a case like the present, and,

2. Secondly, that no charge having been, framed against the accused u/s 54-A of the Calcutta Police Act the conviction is bad in law and cannot be sustained. The first of these seems to be a point of some importance. Section 54-A of the Culcutta Police Act reads as follows: "Whoever has in his possession, or conveys in any manner, anything which there is reason to be lieve to have been stolen or fraudulently obtained, shall, if he fails to account for such possession or act to the satisfaction of the Magistrate, be liable to fine which may extend to one hundred rupees, or to imprisonment, with or without hard labour, for a term which may extend to three months.

17. The language of the section is in the widest terms and the question so far as this case is concerned, is whether on the 6th February, the accused had in his possession

the sums of E9. ₹00 and Rs. 4,000 which there was reason to believe to have been stolen or fraudulently obtained. It has been argued on behalf of the petitioner that the section applies only in the case of a person who is in possession of properties actually stolen, or reasonably believed to be stolen, and has no application where an accused is found in possession merely of documents entitling him to possession of sums of money as in this case. The argument appears to be that in such circumstances it cannot be definitely concluded that the money so deposited is the money stolen, or suspected to be stolen or fraudulently obtained. This contention seems to me to be without any real substance. The word "possession" in the section cannot, I think, be limited or restricted to actual physical possession but must include what may be termed potential, possession such as arises when money is deposited in a Bank or Post Office. In this instance the accused, though not in actual physical possession of the cash, was to all intents and purposes in possession within the ordinary meaning of the word by reason of the fact that he had in his possession the cash certificate and deposit receipt entitling him to the monies. Such possession it seems to me is just as much possession as if the money were on the person of the accused or in his house.

18. It has been urged that Section 54-A was never meant to apply to a case of this description and that it is applicable only in the case of persons found in the streets, or at the jetties or such places in possession of properties suspected to be stolen. It may be that the Act was not designed to meet cases of this description. But I can find nothing in the language of the section, which as I have said is as wide as it can be, to limit or restrict its operation to cases of actual physical possession, nor does there seem to be any reason why it should not apply in a case like the present where it is alleged that the accused was found in possession, albeit potential possession, of considerable sums of money suspected to be stolen for which he was unable to give any satisfactory explanation.

19. The prosecution relied upon the circumstances taken as a whole for the purpose of establishing that the accused was in possession of these stolen monies, or a part thereof, and those circumstances are without doubt very strong. The blank signed cheque was found to be missing on the 6th February, and is said to have been stolen either on that day, or the previous day. On the same date the 6th February, the accused deposited Rs. 4,000 at the P. and O. Bank, and bought the cash certificate for Rs. 800. It was not disputed at the trial that these deposits were made by the accused, and the onus being u/s 54-A upon him to account for his possession, he adduced evidence to prove that they were made with a sum of Rs. 5,000 received by him on the 6th February from a firm styled Nayasook Das Gopi Kissen. A witness named Gangadas said to be cashier of the firm in question was examined for the defence but the Magistrate rejected his testimony for reasons which he has given. The Magistrate finally held that the circumstances as a whole established that the accused, who was a servant of the complainant on a small salary, was guilty of being in possession of the moneys in question, and convicted him as already stated.

20. We have not been referred to any decided case in which it has been held that the section is applicable only in the case of actual physical possession of property, as distinguished from potential possession derived from the possession of documents entitling the holder to possession. To my mind the distinction sought to be drawn is a distinction without any real difference, for a person may surely be just as much in possession by holding a deposit receipt or a cash certificate, as if he had the money deposited in his safe in his house. He merely keeps it in a Bank for greater security, and it seems to me that it would be adopting a dangerous principle to hold that moneys suspected or proved to be stolen cease to be in possession of the thief so soon as he has been able to deposit them in a Bank or Post Office.

21. As regards the second contention that the conviction is illegal because no charge was framed u/s 54-A of the Calcutta Police Act it may be observed that the offence being summarily triable the framing of a formal charge was not necessary (vide, Section 242, Criminal Procedure Code). Apart from this u/s 362 (4) Criminal Procedure Code the case not being one in which an appeal lies the Magistrate was not bound to frame a charge. The point also seems to be covered by Section 237, Criminal Procedure Code. [Tulsi Talini v. Emperor 72 I. C 372 : 50 C. 564 : 24 Cri.L.J. 372 : A.R. 1923 Cal. 596].

22. For the reasons stated I am of opinion that the Rule in this case should be discharged.

23. [The case was heard by Mr. Justice Buck-land.]

Buckland, J.

24. The facts of this case sufficiently appear from the judgments of my learned brothers Mukerji and Graham," JJ., who have had the misfortune to differ so that the case has been laid before me u/s 429, Criminal Procedure Code.

25. The learned Advocate who has appeared for the complainant whose argument has been adopted by the learned Advocate for the Crown, has informed me that his case is that the property, the subject-matter of the conviction, is the sum of Rs. 4,000 deposited in the Bank and the sum of Rs. 800 paid by the accused for the postal cash certificate. I will take that to be correct though the judgment of the Magistrate is anything but clear as to this. The point to be decided is whether these sums of money are in the possession of the petitioner within the meaning of Section 54-A of the Calcutta Police Act.

26. The cash Postal certificate and the fixed deposit receipt were found, on the 7th February, 1928 in the possession of the petitioner. If he is to be held as being in possession of the money which those documents represent and is now in the Bank and with the Postal Departments, such possession must have begun at the time when he paid in the money and received the documents in exchange. Whatever may have since become of the documents there must have been a period of time, long or

short, it makes no difference, when, if the view urged is correct he must have been in possession of both the documents and the money. Such a result to my mind proves the fallacy of the argument advanced, which appears to involve a confusion between actual possession and such right to possession as these documents may confer. Such right may, I conceive, be or become qualified, and, in the case of the Bank must depend upon the terms of the contract under which the deposit was made. These cannot be matters to be considered u/s 54-A of the Calcutta Police Act in determining the meaning of possession. Substantially the same considerations apply to the money represented by the cash Postal certificate.

27. Without attempting to lay down any general rule as to the meaning of the word "possession" in the section, it is sufficient to say that in my judgment the petitioner cannot be held to be in possession of the money represented by the documents in question and the Rule must be made absolute.

28. As regards the cash Postal certificate and the fixed deposit receipt, I set aside the order of the Magistrate directing that they be made over to the complainant, and direct that they be detained in Court for three months from to-day, and held meantime subject to any order that may be made by this Court in its Original Civil Jurisdiction. If no such order shall have been made within the period stated they may be returned to the petitioner.