(1919) 08 CAL CK 0041

Calcutta High Court

Case No: App. No. 322 of 1919

Surjya Kanta Bhattacharjee		APPELLANT
	Vs	
King-Emperor		RESPONDENT

Date of Decision: Aug. 7, 1919

Judgement

Newbould, J.

This is an appeal by Surya Kanta Bhattacharjee, who has been convicted on the charge of having committed breach of trust as a servant and has been sentenced to three years'' rigorous imprisonment under sec. 408 of the Indian Penal Code. The Appellant was tried jointly with one Ananda Kishore De, before the Sessions Judge of the Assam Valley Districts and a Jury. Both accused were charged with having committed criminal breach of trust as servants, Ananda Kishore De was charged with having made false entries in certain documents and thereby committed an offence punishable under sec. 477A of the Indian Penal Code and the Appellant Surjya, Kanta Bhattacharjee was charged with abetment of this offence. The Jury unanimously found Ananda Kishore De not guilty of both charges and by a majority of three to two found the Appellant Surjya Kanta Bhattacharji guilty of the charge under sec. 408, I.P.C. only. The case for the prosecution so far as it relates to the charge on which the Appellant has been convicted is as follows :--

In October last Surjya Kanta Bhattacharji was station master and Ananda Kishore De was goods clerk at Dumduma Station on the Dibru-Sadiya Railway. On the 18th October, Golap Rai (P. W. 3) loaded a consignment of 135 bags of rice at Dumduma Station to be sent to Rupai Siding on the same Railway. For the freight and other charges on this consignment Golap Rai paid Rs. 10-4 to the station master, the Appellant, but he credited Rs. 8-4 only to the Railway Company and misappropriated the difference rupees two.

2. The case for the prosecution depends very largely on the evidence of this Golap Rai. The verdict of the majority of the Jury shows that they accepted his evidence and the learned Sessions Judge in commenting on this verdict has stated that he

sees no reason to distrust the evidence of Golap Rai. Whether Golap Rai should be believed or not was for the Jury to decide and we must accept their decision unless we are satisfied that there has been a misdirection in the Judge''s charge to the Jury which has in fact occasioned a failure of justice. It is contended on behalf of the Appellant that there has been such misdirection. The point that was most strongly urged was that Golap Rai was an accomplice and the Judge omitted to give the necessary directions to the Jury as to the danger of convicting on the evidence of an accomplice unless it was corroborated in material particulars. In my opinion this contention fails for the reason that Golap Rai was not an accomplice in the meaning of that word as used in secs. 114 (b) and 133 of the Indian Evidence Act. It is not suggested that Golap Rai was an accomplice in the offence for which the Appellant has been convicted nor in the other offence punishable under sec. 477A, I.P.C., with which he and his co-accused were charged. What is alleged is that Golap Rai was an accomplice in a different fraud which was not the subject-matter of the trial. This accusation against Golap Rai is based on the following facts. The 135 bags of rice sent from Dumduma on the 18th October, weighed 254 maunds. It was charged for as a consignment of 60 bags weighing 100 maunds, the result being that Golap Rai has to pay less than half the amount he would have had to pay if the correct charges had been levied. From this we are asked to infer that Golap Rai was conspiring with the persons responsible for the booking of the goods to defraud the Railway Company of the difference between the amount paid and the amount payable as freight. The Appellant alleges a conspiracy between Golap Rai and the co-accused but so far as the argument that Golap Rai was an accomplice is concerned, it is immaterial whether he conspired with the Appellant or the other accused. The first answer to this argument is as stated by the learned Sessions Judge, that there is no evidence to support this allegation of a conspiracy between Golap Rai and either of the accused. There are suspicious facts but this accusation was not investigated at the trial and Golap Rai was not given an opportunity of explaining these facts. An examination of his evidence shows that instead of it being suggested to him that he was paying too little, he was asked if he did not suspect that the station master was charging him more than the rate allowed. Secondly, I would hold that even if the inference were drawn that Golap Rai was a party to a conspiracy to defraud the Company, he would not be an accomplice within the meaning of that term as used in the Evidence Act and the case law on the duty of a Judge when charging a Jury as to the value of an accomplice''s evidence. The word accomplice is not defined in the Evidence Act or any other Indian Statute. An indication of its meaning may be found in sec. 337 of the Criminal Procedure Code. There the word accomplice is used in the marginal note and the section itself refers to any person supposed to have been directly or indirectly concerned in the offence under enquiry." Golap Rai was not concerned in the offence under enquiry. It was clearly put to the Jury that they must find that the sum of Rs. 10-4 was paid by him as freight before they would convict the Appellant on the charge under sec. 408, I.P.C. If, as the Jury have found, Golap Rai paid this sum as freight, he was not even indirectly concerned with the offence

under enquiry. The meaning of the word accomplice was considered by Sir Subramania Ayyar, Officiating Chief Justice of the Madras High Court, in the case of Ramaswami Gounden v. Emperor I. L. R. (1903) Mad. 271 at p. 2771. In that case it was held that a witness, who was alleged to have assisted in the removal of the dead body of a murdered person from the place of murder to the pit in which it was buried and delayed to report the murder, was not an accomplice and the rule of practice as to corroboration had no application to the case. So far as I am aware it has never been held that a witness who is alleged to have taken part jointly with the accused in an offence different from that for which the accused is being tried should be regarded as an accomplice, so that the Jury must be told that it is unsafe to convict on his uncorroborated evidence. In the present case I hold that the learned Sessions Judge did not misdirect the Jury when he told them they should hold the Appellant to be guilty of misappropriation, if Golap Rai''s evidence be believed, without warning them that it was unsafe to convict on his evidence unless it was corroborated in material particulars. I should add that there would be no difficulty in the case if Golap Rai were an accomplice in the offence under enquiry since in that case his evidence would be obviously false and the charge would have failed not on the ground that the principal witness required corroboration but because there was no evidence to support the charge at all if he were disbelieved. For the same reason the case would fail if the Jury held that Golap Rai paid the sum of Rs. 2 as a bribe and not as freight.

3. The other points urged on behalf of the Appellant can be dealt with more shortly. It was said that the Jury should not have been told that the evidence of Golap Rai was corroborated. In my opinion the learned Sessions Judge was right in saying, "If it is believed that it is necessary to apply to the station master when a whole wagon is required, this would be good corroboration of Golap Rai''s evidence." If the station master was the person to whom the application should have been made, the Jury would be justified in thinking it probable that Golap Rai did apply to the station master himself as he says he did.

4. Then it is said that the Jury ought not to have been told that they had to decide whether to believe the prosecution witnesses Benoy Bhusan and Khetra Nath who tried to throw the responsibility on to the assistant goods clerk, the other accused. Had not the Jury''s attention been drawn to the question of the credibility of these witnesses there would have been a serious misdirection. Each accused threw the blame on the other and the Jury could not properly decide as to the guilt or innocence of the assistant goods clerk without considering the credibility of this evidence.

5. Another point taken is that the defence of the Appellant was not properly put to the Jury. The main defence of the Appellant was an attempt to throw the blame on his co-accused and this was clearly stated. It was contended that the defence that the assistant goods clerk and Golap Rai were acting in collusion to defraud the

Company in the manner mentioned above in relation to the point of Golap Rai being accomplice, was not properly put. But the learned Sessions Judge drew attention to the difference between the number of bags and their weight shown in the documents and their actual number and weight and said that this could not be a mere mistake and must have been intentionally misstated with the object of showing favour to the consignor and defrauding the Railway, or, in the alternative, the officer responsible must have accepted the word of the consignor. At another part of his charge he told the Jury that it was argued that Golap Rai must have bribed the accused or one of them to charge less than the full amount of freight and that they should consider whether if this were so Golap Rai should be disbelieved on this account. This shows that the attention of the Jury was drawn to the line of defence.

6. There is one misdirection. The Jury should not have been told that the statement of one accused should have been taken for what it was worth against the other. As however the learned Sessions Judge was careful to point out that these statements were of practically no value as evidence, I cannot hold that this misdirection has occasioned a failure of justice.

7. A point was made on the basis of a remark in the charge that certain evidence was wholly irrelevant. It is not quite clear whether the learned Sessions Judge used this word in the special sense in which it is used in the Evidence Act or in its ordinary sense. The use of the qualifying adverb suggests that he did not mean to use it as a term of law. It may be that the evidence was relevant to prove facts that it was necessary for the prosecution to establish at the commencement of the trial but that owing to those facts being undisputed this evidence did not require the Jury''s consideration. However that may be, it does not appear that this evidence could have had any influence on the decision of the Jury.

8. The learned Sessions Judge in his charge to the Jury has expressed his opinion on the evidence. But he did not do more than he was authorised to do by cl. (2) of sec. 298 of the Code of Criminal Procedure. He was careful throughout his charge to impress on the Jury that the decision of all questions of fact rested with them.

9. The sentence passed is not too severe.

10. I would therefore dismiss this appeal.

11. As my learned brother is of a different opinion, the case will be laid before another Judge of the Court under the provisions of sec. 429 of the Criminal Procedure Code.

Shamsul Huda, J.

12. The facts as disclosed by the evidence for the prosecution are shortly these : Golap Rai, the gomasta of a Marwari firm, on the 11th of October 1918, brought 135 bags containing about 258 maunds of rice to the Dumduma Railway Station and

loaded them in wagon No. 2858 for being carried to Rupai Siding, the consignee being the Rupai Tea Estate. Again on the 18th October, he brought and loaded in wagon No. 1396 another 135 bags containing about 254 maunds of rice. There is no entry regarding the first consignment in the books of the Railway, but as regards the second consignment the entry shows a consignment of 60 bags weighing 100 maunds and Rs. 8-4 as paid as freight. For the quantity shown in the books this was admittedly the correct charge. But the account book of the Marwari''s firm shows that the actual amount paid for the second consignment was Rs. 10-4, i.e., two rupees more than the amount entered in the books of the Railway. The charge under sec. 408 relates to this sum. At the time of making these consignments the accused No. 1, Ananda Kishore De, was the assistant goods clerk and the accused No. 2, Surja Kanta Bhattacharjee, the Appellant before us, was the station master. All the entries relating to the second consignment in the papers and registers of the Railway are in the handwriting of the first accused Ananda Kishore. If the correct quantity had been entered the correct charge would have been Rs. 20-4 as. The consignee thus paid Rs. 10 less for freight on the second consignment but calculated upon the weight falsely entered, he made an excess payment of Rs. 2. These facts are undisputed. These irregularities having come to the notice of the Traffic Manager, Mr. Anderson, there was an investigation by a Criminal Investigation Department Officer as the result of which the two accused were placed on their trial on a charge under sec. 408 against both of them. There was also a charge under sec. 477A against the first accused Ananda, and a charge for abetting the said offence against the second accused Surjya Kanta.

13. The defence of Ananda Kishore was that he had nothing to do with the transaction except that he made certain entries under the direction of Surjya Kanta. In the same way Surjya Kanta''s defence was that he left these matters to the assistant goods clerk and that he had no knowledge of the fraud committed by Ananda Kishore. Under the rules the responsibility rested with the station master but as the learned Judge pointed out this theoretic responsibility must be distinguished from criminal liability.

14. On these facts and apart from the evidence of Golap Rai to which I shall refer later, the offence disclosed against the person who received the money was either that he received the extra Rs. 2 as bribe or that he committed criminal breach of trust in respect of that sum. The case was one of receiving a bribe if it is assumed that Golap Rai knew that he was paying more than the proper charge from which it may be reasonably inferred that the excess amount was paid by way of bribe to escape liability for the extra Rs. 10 that was chargeable for the whole consignment but it was criminal breach of trust if the whole amount was paid as freight, and a part of it, viz., Rs. 2 was misappropriated. From the facts, as I have stated them, it is difficult to imagine that Golap Rai was an honest consignor and that he was no privy to the fraud that was committed on the Railway. It appears that to constitute an accomplice there need only be the intention of assisting in the commission of a

crime, but he need not know exactly what crime is being committed. This was the view taken by Lord Chief Justice Isaacs in the case of Charles Cratchley 9 Cr. App. Rep. 232 (1913) in which reference was made to the case of Rex v. Lord Baltimore 4 Burr. 2179: s. c. 1 Bl. 648 (1768). Even if Golap Rai was not an accomplice in the technical sense of the term, his evidence was no better than that of an accomplice and should have been dealt with on that footing. The Queen v. Chando Chandalinee 24 W. R. (Cr.) 55 (1875), Alimuddin v. Queen-Empress I. L. R. (1895) Cal. 361 and Ishan Chandra Chandra v. Queen-Empress I. L. R. (1893) Cal. 328. Golap Rai admits being in the service of the Marwari firm for the last eight or nine years. He says that for the first consignment he was charged only Rs. 7 and that when an excess amount of Rs. 3-4 as. was charged for the second consignment he grumbled but Surjya Kanta told him it was all right. Subsequently, he modified this statement and said he did not ask the station master why the amount charged for was in excess of the amount charged on the 11th. Whilst Golap Rai or his employer saved about Rs. 10 the Railway official, whoever he was gained only Rs. 2. It is inconceivable that the Railway officials charged Golap Rai Rs. 10 less for his benefit or for the benefit of his employers without his complicity. However, it is not for me to find the facts. The Jury have acquitted Ananda and have convicted Surjya Kanta only. The case against Surya Kanta as pointed out by the learned Sessions Judge depends entirely on the statement of Golap Rai to the effect that he transacted the business with the station master alone and paid him the money. It seems to me that upon the facts, as I have stated them, the Jury had ample materials upon which to hold that Golap Rai was an accomplice and that the extra Rs. 2 was paid as bribe either to the first or the second accused. It was due to the Appellant that the learned Judge should have explained to the Jury what an accomplice was, should have asked them to say upon the facts before them whether Golap Rai was or was not an accomplice. The Jury should then have been told that if Golap Rai was a party to the conspiracy to cheat the Railway Company he was an accomplice, it was not safe or proper to convict upon his evidence without corroboration on material particulars. He should have also explained to the Jury what was the nature of corroboration necessary in such cases, Jamiruddi Masalli v. Emperor I. L. R. Cal. 782 : 6 C. W. N. 553 (1902). Instead of that the learned Judge told the Jury that Golap Rai was an independent witness, that he was not connected with the Railway and that he had no interest in the success of the prosecution. With reference to the argument that Golap Rai was an accomplice, the learned Judge observed as follows :--"It is however argued that he must have bribed the accused or one of them to charge less than the correct amount of freight. This is possible but there is no evidence to show that he did so and the accused are not being charged with accepting a bribe in consideration of showing favour to Golap Rai. The Jury should therefore consider whether Golap Rai can be considered as an accomplice in this case, and also whether if he did give a bribe to either of the accused he should be regarded as a person of less than average morality and on that account to be disbelieved." These observations are open to serious objections. First, if Golap Rai was in the conspiracy, he was an accomplice and it made no

difference that the advisers of the Crown instead of charging Surjya Kanta for receiving a bribe charged him with criminal breach of trust; secondly, the Judge should have distinctly told the Jury that it was not enough to find that Golap Rai paid Rs. 10-4 as. and the amount credited was Rs. 8-4 but they must be satisfied that the whole amount was paid as freight and if the extra Rs. 2 was paid as bribe the charge under sec. 408 could not stand. But instead of saying this the learned Judge told the Jury that there was no evidence to show that Golap Rai had paid a bribe. There was no direct evidence but the circumstantial evidence was ample to justify the Jury in coming to the conclusion that the extra Rs. 2 was paid by way of bribe and not as freight. By this expression of opinion the learned Judge shut out the Jury from holding that Golap Rai had really paid a bribe so that the charge under sec. 408 was not established ; thirdly, it was not enough assuming that Golap Rai was an accomplice that he should be regarded as a person of less than average morality and on that account to be disbelieved. There is nothing to prevent a man of low morality being believed by a Jury but if that person is an accomplice the law says that it is unsafe to convict on his uncorroborated testimony and casts upon the Judge the duty of warning the Jury against acting on such testimony. This duty has not been discharged in the present case.

15. Again referring to the rules and actual practice and to the evidence of Golap Rai that he applied to the station master for a whole carriage, the learned Judge said, "If it is believed that it is necessary to apply to the station master when a whole wagon is required, this would be a good corroboration of Golap Rai''s evidence." Although at the same time the learned Judge pointed out that the evidence of Mr. Anderson and others showed that this duty was generally performed by the assistant goods clerk and that the station master would not, in ordinary cases, even know about it, he ought to have told the Jury that the corroboration required must be something that connected the accused with the crime. If Golap Rai was an accomplice, his statement that he applied to the station master would not in my opinion be corroborated by the mere circumstance that the rules required such application to be made to that officer. The corroboration must be by evidence sufficient to connect the accused with the offence charged. The mere existence of the rules is not such corroboration.

16. On these grounds I think that the verdict of the Jury in this case is vitiated by misdirection and want of proper direction and that a fresh trial should be ordered. If the Jury had been properly directed, it is likely that they would have brought a verdict of not guilty against the Appellant and such a verdict would have been amply justified by the evidence.

17. I regret I have to differ in this case from the decision of my learned brother.

[Owing to this difference of opinion the case was laid before Chaudhuri, J., who delivered the following judgment.]

Chaudhuri, J.

18. The Appellant, a station master, was tried jointly with another, a goods clerk, before the Sessions Judge of the Assam Valley Districts and a Jury under sec. 408, I.P.C., for criminal breach of trust as Railway servants. The goods clerk was also charged under sec. 477A for fabrication of certain entries and the Appellant with abetment thereof.

19. The Jury unanimously found the goods clerk not guilty of both charges, the majority however (3 to 2) found the Appellant guilty under sec. 408. The Judge agreeing with the majority has sentenced him to three years'' rigorous imprisonment. Hence this appeal. It was heard by the Criminal Bench, but owing to a difference of opinion it has come before me under sec. 429, Cr. P. C.

20. The facts are shortly these. One Golap Rai (P. W. 3), the gomasta of a Marwari firm, on the 18th October 1918, loaded 135 bags of rice weighing about 254 maunds in a wagon at the Dumduma Station to be sent to Rupai Siding and they were so sent. The proper charge for the consignment was Rs. 20-11. The Railway books show an entry of Rs. 8-4 against this item which is put down as 60 bags weighing 100 maunds. The entry in the rokar of the Marwari firm shows a debit of Rs. 10-4, namely, Rs. 2 more. The actual quantity proved to have been sent was 254 maunds and the Railway books at Dumduma contained untrue entries. Rs. 8-4 is the proper charge for 100 maunds but having regard to the quantity the Railway should have been paid Rs. 12-7 more. Golap Rai''s statement is that the station master asked Rs. 10-4 from him as freight and he paid that sum. The entries in the Railway books were made by the goods clerk and his statement is that he made them under the directions of the station master, accused. The station master said he had left these matters to the goods clerk and knew nothing about them. Under the rules the responsibility rested with the station master and applications for wagons are to be made to him. Two Railway witnesses, namely, Binoy Bhusan Das Gupta, booking clerk and signaller (P. W. 13) and Kheter Nath Biswas, trains clerk (P. W. 14), deposed that the practice at that Railway station was that applications for wagons were made to the goods clerk, and that he was in charge of booking and loading consignments of goods, but the station master received the total amount of the day''s receipts in the evening from the goods clerk.

21. I agree with Shamsul Huda, J., that the offence in respect of the sum of Rs. 2 was either receiving a bribe, or that of criminal breach of trust. The consignor says that he paid Rs. 10-4 altogether. He benefited to the extent of Rs. 10-7, the Railway lost Rs. 12-7 and Rs. 2 went into the pockets of the officer who received the freight, as in the Railway books Rs. 8-4 only was entered. It is difficult to believe that the gomasta of a Marwari firm who has done business there for eight or nine years did not know or try to find out the correct freight. Either the consignor had to bear the costs or the consignee, but the consignor had to pay it in the first instance. The Railway receipt or invoice would have shown the amount actually paid. It is not for the

coming. Golap Rai says he did not ask for a receipt as it did not occur to him that it was necessary. How did he think the consignee was going to get delivery without a receipt or invoice. He said he had no experience of Railway receipts, but had seen other people using them. Being pressed in cross-examination he said he did not ask for a Railway receipt, but the station master said of his own accord that as the goods were going to a siding there was no need for one. He had on a previous occasion sent a similar quantity of rice from the same station to the same siding and says he paid Rs. 7 then. He says he grumbled when he was asked to pay Rs. 10-4 on this occasion and was told that was the right amount. Then he varied the statement and said he did not ask the station master why the amount charged was larger on this occasion. I agree with Shamsul Huda, J., that it is difficult to conceive that he was an honest consignor and that he was no privy to the fraud committed on the Railway. His story is that he was asked to pay Rs. 10-4 as. freight and paid it and reliance is placed on the entry in his book, which stands thus "Rs. 10-4 in cash for Railway freight, Railway receipt for 135 bags." The mention of Railway receipt in it is noticeable. It does not mention the weight although other entries in his book such as Exs. 20 (5), 20 (1), 20 (2), 20 (4) mention both the number of bags and weight. He is paid by the weight. These facts do not appear to have been put before the Jury in connection with the credibility of Golap Rai. No doubt the charge is under sec. 408 and that depends upon the truth of the statement of the witness Golap Rai that he paid Rs. 10-4 as freight, but if he paid Rs. 2 as a bribe to charge him less than the actual freight payable, he was clearly an accomplice, in respect of an offence under sec. 161, I.P.C., which is clearly an alternative case practically upon the same facts. I think it was incumbent upon the Judge to direct the mind of the Jury to this aspect of the case and his failure to do so is a serious misdirection as the case practically depends upon the evidence of Golap Rai. The learned Judge merely said this " It is however argued that he must have bribed the accused or one of them to charge less than the correct amount of freight. This is possible but there is no evidence to show that he did so and the accused are not being charged with accepting a bribe in consideration of showing favour to Golap Rai. The Jury should therefore consider whether Golap Rai can be considered as an accomplice in this case, and also whether, if he did give a bribe to either of the accused, he should be regarded as a person of less than average morality and on that account to be disbelieved." I agree with Mr. Justice Shamsul Huda, that "these observations are open to serious objection : First, if Golap Rai was in the conspiracy, he was an accomplice and it made no difference that the advisers of the Crown instead of charging Surjya Kanta for receiving a bribe charged him with criminal breach of trust; secondly, the Judge should have distinctly told the Jury that it was not enough to find that Golap Rai paid Rs. 10-4 and the amount credited was Rs. 8-4, but they must be satisfied that the whole amount was paid as freight and if the extra Rs. 2 was paid as bribe the charge under sec. 408 could not stand. But instead of saying this the learned Judge told the Jury that there was no evidence to show that Golap Rai had paid a bribe. There was no direct evidence but the circumstantial evidence was ample to justify the Jury in

coming to the conclusion that the extra Rs. 2 was paid by way of bribe and not as freight. By this expression of opinion the learned Judge shut out the Jury from holding that Golap Rai had really paid a bribe so that the charge under sec. 408 was not established." Newbould, J., also says that if Golap Rai paid Rs. 2 as bribe and not as freight the case failed. The evidence of Gopal Rai about the payment stands uncorroborated. He said he asked the station master for a wagon and was told the freight to be paid. That also is not corroborated by any other evidence. It seems to me also that sufficient attention was not called to the evidence relating to the practice said to have been followed at this Railway station about the consignment of goods and applications for wagons. If the general rule about applications for wagons can be treated as corroborating the statement of Golap Rai that he applied to the station master, it is clear that if the practice as stated by the two witnesses was true it went against it.

22. I agree with Mr. Justice Newbould, that the Judge misdirected when he told the Jury that the statement of one accused might be taken for what it was worth against the other. The Judge no doubt added that it was practically of no value as evidence, but in a case where there is so little evidence on the main point, considerable value may have been attached to these statements.

23. I think on the whole the misdirections above referred to were serious and have occasioned a failure of justice and the conviction ought to be and is accord it set aside and the accused discharged. I have been told that the whole of the evidence available has been given in this case, and as it depends upon the evidence of one man who may have been a participator in the fraud on the Railway and the accused has already been in jail for some, months, I do not think that in the circumstances a retrial should be ordered.