

Birendra Chandra De and ors. Vs. the State

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SooperKanoon Citation : sooperkanoon.com/137048

Court : Guwahati

Decided On : Jun-14-1957

Judge : Sarjoo Prosad C.J. and Deka J.

Appellant : Birendra Chandra De and ors.

Respondent : The State

Judgement :

Deka, J.

1. These are two connected appeals one being Criminal Appeal No. 8/55 filed on behalf of Birendra Chandra De and the other Criminal Appeal No. 12/55 filed on behalf of Sultan Khan and Khalil Mea. All these three accused appellants were tried jointly with some other accused persons by the Additional Sessions Judge, Lower Assam Districts at Tezpur of various charges, with the help of a jury and the verdict of the jury was unanimous. The Judge accepted the verdict and agreeing with the same found Birendra Chandra De guilty under Sections 457 and 380. Indian Penal Code. Sultan Khan was also found guilty of the two charges under Sections 457 and 380, Indian Penal Code.

Khalil Mea was found guilty under Section 411 of the Indian Penal Code, The other accused persons viz., Peali Alias Abdul Majid, Nur Ali, Dil Muhmad and Safi Sheikh who were charged under Section 414, Indian Penal Code were found not guilty and they were acquitted. Birendra Chandra De and Sultan Khan were both

sentenced to ten years' rigorous imprisonment under Section 457, Indian Penal Code and to five years' rigorous imprisonment under Section 380, Indian Penal Code and the sentences were directed to run concurrently, Khalil Mea who was found : guilty under Section 411, Indian Penal Code was sentenced to two years' rigorous imprisonment by the learned Additional Sessions Judge.

2. The prosecution case was that on the night of 14th December 1951, there was a theft of Rs. 51,527/- in currency notes belonging to the Sootea Sub-Post-Office from the iron safe that was imbedded on the floor of the office room of the Sootea Thana. The practice was for the Post Master of the Sootea Sub-Post-Office to keep all the days' collection and remittances in the safe after the close of the days' work. The Post Master and a postal clerk used to go to the thana at the close of the working day and put the postal money in the iron safe, to which two different locks were attached. Both the Post Master and the clerk had to go to open or lock the box as they both carried separately some keys by combination of which alone the opening or locking up of the iron safe was possible.

It was as well the usual practice for the thana sentry on duty to examine the locks after the safe was locked up by the Post Master and the clerk and on every shift the constable or sentry on duty had to examine the locks while making over or taking charge of the sentry duty after every two hours of the night. On the night of occurrence i.e., on 14th December 1951 accused Birendra Chandra De who was attached to the Sootea Thana as a police A. S. I. was seen working till late hours at night in the thana. It was discovered on the early morning of 15th December 1951 by the Jamadar Bam Singh Panika (P. W. 2) that somebody had broken open the postal iron safe and removed its contents.

On seeing the same he at once ran to the quarters of the Thana Officer and reported to him what the witness saw. On getting the information, the officer-in-charge of the thana Nabin Chandra Sarma (P. W. 38) at once proceeded to the thana office and raised alarm. He found the lid of the postal iron safe kept open, the sides of the pacca bed where the iron safe was imbedded broken and the two padlocks of the iron safe missing.

There was no trace of any money kept but two of the Thana books were lying nearby. He searched for the general diary for making relevant entries and was told by somebody that Birendra Chandra De had removed the same. However, he had it brought and made relevant entries therein and lodged a first information himself which is Ext. 41. The Post Master came with his books of account and found on calculation that on the night of occurrence there was Rs. 51,527/- in the safe - all of which had been stolen. A case was registered on the basis of that information under Section 457/380, I. P. C. and investigation was started.

The work did not progress speedily because of getting no immediate clue though on suspicion several persons were arrested, interrogated and released. On 25-12-51 the house of accused Sultan at Charali was searched and he was put under arrest but nothing incriminating was found with him and for a time he was released. On getting some fresh information accused Sultan was again put under arrest on 18-2-52 and he was taken to the Sootea thana on 19-2-52. On 19-2-52 Sultan was remanded to Custody on being presented before the Magistrate, Gulwar Khan (P. W. 35) of Charali was arrested on suspicion along with some other accused persons on 20-2-52.

On that very day it is alleged Sultan led the investigating officer to Baghmari to the house of accused Khalil Mea and there he pointed out a place near the oven of the bakery of the accused Khalil from where a jar was unearthed covered with gunny bag. The jar (Ext. IX) was found to contain several bundles of G. C. notes along with lac seals over three packets of hundred rupee half notes. The three packets of half hundred rupee notes were for Rs, 23,000/-. These currency notes and packets with the postal seals were identified to be stolen articles, which were duly seized by seizure lists prepared on the spot.

On the following day, that is on 21-2-52) some more accused persons were arrested and Sultan led the investigating officer to a place known as Disiri to the compound of one Paras Ali and there he produced the two locks Exts. I and II from under a bamboo grove. These locks were identified to be the locks that were attached to the postal iron safe on the night of occurrence. He further produced the iron clippers on 21-2-52 from the compound of Khalil Mea by digging them out.

These clippers Ext. XI were alleged to be used for the purpose of breaking open the iron safe. There were some other currency notes amounting to about ten thousand rupees recovered and seized on being pointed out by some other accused persons, but they being acquitted or discharged and not having claimed the money which was identified to be a part of the stolen amount, it is unnecessary for us to examine that part of the case.

3. Gulwar Khan (P. W. 35) who is alleged to have worked as a whole-time or part-time servant of accused Sultan Khan, made certain statements before the Magistrate on three different dates which were by way of confessions and they were recorded accordingly on 22nd and 25th February, 1952 and 8th May, 1952. Gulwar Khan stated before the District Magistrate that he would make a clean breast of the affair and would disclose every detail of the occurrence, in which he was present. The District Magistrate accordingly granted him pardon under Section 337 of the Criminal Procedure Code.

The case as stated by him was that he was a servant under accused Sultan Khan from his boyhood and at the time he was deposing he was about forty-five. He stated that he knew accused Birendra Chandra De who was an A. S. I. of the Sootea thana because of his close association with his master Sultan Khan to whose residence he made long and frequent visits. One day in the early part of December 1951 he was sent by accused Sultan Khan to the house of a fitter of Monabari T. E. to bring a pair of clippers used for cutting iron rods, with a letter of request to lend him the same.

Muhammad Hussain (P. W. 14), the fitter gave the clipper and it was identified by him at the trial. After a week thereafter, Sultan asked Gulwar Khan to accompany him to Sootea thana at about 11 at night and both of them proceeded to the Sootea thana on two bicycles from Charali. On reaching the thana compound Sultan asked Gulwar to remain on the road and accused Sultan went to the quarters of accused Birendra Chandra De, A. S. I., who lived in the thana quarters. Gulwar was asked to stand and watch, which he did. About an hour or so thereafter, both accused Sultan and Birendra Chandra De entered the thana house and closed the entrance door.

About an hour thereafter both of them emerged from the thana office room with a bundle in their hands. Then both of them proceeded to the house of Birendra Chandra De where it appeared he lived singly, that is without his family. Gulwar went to the door of the house and could see accused Sultan putting bundles of G. C. notes into a jar marked Ext. IX, After putting the notes into the said jar it was wrapped with a gunny bag. Both Biren and Sultan then came out of the house and Sultan tied the jar covered with the gunny bag to his bicycle and gave the clipper Ex. XI to Gulwar which he tied in his bicycle and then both proceeded in the course of the night to Charali and there both he and Sultan buried the jar with the contents along with the gunny bag in a pond where there was no water, within accused Sultan's compound and kept the clipper hidden at a separate place.

He further discovered the two locks Exts. I and II in the bag of his bicycle which were similarly hidden. Gulwar gives the story of the jar with its contents being moved from place to place and hidden at the advice of and with the assistance of Sultan and the last he knew of these articles was that he took them out from the bari of one Troyodhor Sarma and made over the same to Sultan.

After that what accused did with the jar or the clippers or the locks he did not know. On these allegations the accused were tried and committed to the Court of Session. The trial took an unusually long time because of some interceptions in the proceedings to which we need not refer, except to say that the matter had at one stage gone to the Supreme Court on some interim matters.

4. All the three accused persons pleaded not guilty. Accused Siren's case inter alia was that he was implicated only out of some grudge or malice and he had as a matter of fact taken no part in the theft as alleged. Sultan Khan also pleaded not guilty and he denied that he pointed out the incriminating articles to the investigating officer on 20th and 21st February, 1952 and that they were seized at his instance. Accused Khalil made a confession which he subsequently retracted and his case at the trial stage was that he did not know of the stolen articles being hidden at his place, alternatively that he was not the man from whose house the jar with the incriminating articles were seized.

5. I would like to deal with the cases of the accused persons separately. We might say at the start that the identity of the stolen articles contained in the jar Ext. IX was not questioned, Therefore the only consideration about Khalil is whether they were recovered from his house and whether he knew or had reasons to believe that they were stolen property. In the retracted confession that Khalil made he stated that the jar with the currency notes were found from his house where he had his bakery oven.

He pleaded however, that accused Sultan took them there and after threatening him he buried the jar there without obtaining his consent. Does it stand to reason that Khalil behaved that way? He was not a consenting party, he says. In that case even after the jar was imbedded, he could have informed the police or some other responsible person that Sultan had behaved in the manner he alleged. There is little or nothing in the other objection he has taken that the house from which the jar was recovered was not his.

The learned Counsel for Khalil drew our attention to the statements of two of the prosecution witnesses, P. W. 18 Thaneswar Das and P. W. 22 Kendra Mura who deposed in the cross examination that there was another Khalil who was the baker, and that accused Khalil was a butcher and he was not in possession of the house. This of course goes counter to what they deposed in the examination-in-chief and what another witness P. W. 20 Mahtoo Maricla, another garden labourer deposed. He stated that accused Khalil was first a butcher, but later on started a bakery at Baghmari T. E. from where the stolen articles were recovered.

This has further the support from the two responsible officers, the investigating officer Nabin Chandra Sarma and Lakheswar Gogoi (P. W. 31) who was another police officer accompanying the search party. Accused Khalil further did not take up this position before the committing Magistrate, where he admitted that the jar Ext. IX with the currency notes was found and recovered from his house. There is no material omission in the direction that the learned Additional Sessions Judge gave in regard to the charge against this accused and his defence were properly put before the jury.

In the circumstances of the case there were sufficient corroboration on material details to the confession as made by him which was subsequently retracted. It was argued on his behalf by the learned Counsel that what Sultan told this accused was that the jar contained opium. It is very doubtful that the accused did not really know what the jar contained and since he stood guard over the same for a period exceeding one month, it can be well presumed that he knew what the jar contained and he was a consenting party to its retention and had knowledge as to the nature of the property. In these circumstances there is no reason for our interference with his conviction or with the sentence passed on him.

6. There is much in common in the cases of accused Sultan Khan and Birendra Chandra De. Once we start by saying that Sultan had committed the offence, it might prejudice the accused Birendra De. Therefore let me first examine the case of Birendra De and then proceed to the case of Sultan.

7. What has been contended by Mr. Ghose on behalf of Birendra Chandra De was that in the admitted facts and circumstances of the case, no case was made out under Section 457 of the Indian Penal Code, assuming for argument's sake that there was a theft as alleged by both Birendra De and Sultan, since Birendra was in charge of the thana office at the material time and his access thereto was legitimate. There could be no question of his commission of the offence of lurking house-trespass or house-breaking by night even though he allowed theft to be committed or became a participant in the theft itself, as is alleged. I must say at the outset that this contention is not sound,

The reasons that I give for this view shortly put, are as follows : Section 441 of the Indian Penal Code which defines criminal trespass provides that "whoever enters into or upon property in the possession of another ... or having lawfully entered into Or upon such property, unlawfully remains there with the intent thereby to...commit an offence is said to commit 'criminal trespass'."

Assuming Birendra De had a right to enter upon the thana premises or had entered lawfully into the same, but remained unlawfully to commit the theft as alleged, that would amount to criminal trespass. Section 442, Indian Penal Code says that whoever commits criminal trespass by entering into or remaining in any

building is said to commit 'house-trespass'. This 'remaining' undoubtedly refers to 'unlawful remaining' after a lawful entry. Section 443, Indian Penal Code which defines 'lurking house-trespass' provides that whoever commits house-trespass having taken precaution to conceal such house-trespass is said to commit 'lurking house-trespass'.

Getting into, the office in the darkness of the night in an unearthly hour with or without the door closed will surely amount to 'lurking house-trespass' in case the criminal trespass was there. Here of course the evidence was that the door was also closed. What is really material is whether there was precaution taken by the accused to conceal the entry, which there was in abundance if the prosecution evidence is believed.

Therefore if we take the prosecution case to be true that Birendra had entered into the office room of the thana at night and had participated in the commission of the offence of theft, it would clearly come within the scope of Section 457, Indian Penal Code, which deals with lurking house trespass or house breaking by right in order to commit an offence punishable with imprisonment or with intent to commit theft, where higher sentence is provided.

What Mr. Ghose has argued was that the first essential of the house-trespass was not there, since the property (meaning the office room of the thana) was not in the possession of another but was in the possession of the accused himself. It is very hard to accept this contention, because the thana house was a public property and the officer-in-charge must be presumed to have the over-all charge of possession and the entry of the accused was only a legalised act only for the purpose of carrying out official duties and riot for perpetration of an illegal act

8. Mr. R. K. Goswami, Junior Govt. Advocate has drawn our attention to certain English cases and more particularly he relied on "The Six Carpenters' case" (1610) 1 Smith LC 11th Ed 132 (A), and what was held therein was that if an officer after a lawful entry abuses his authority, his action will be considered to be that of a trespasser ab initio. That principle finds support in several of the English cases to which our attention had been drawn. Mr. Ghose contends that the principle of English cases has no application to the facts of the present case which is covered

by the provisions of the Indian Penal Code.

This argument may be correct, but the principle can surely be examined. As I have already indicated, even under the provisions of the Indian Penal Code the action of the accused amounts to an offence under Section 457 and his conviction under Section 457 cannot be considered to be illegal on this count,

9. The next point to be considered is really whether there was any misdirection in the charge or any material omission or illegality in the procedure which prejudiced the accused person. The materials on which the conviction of the accused is sought to be based, may be divided into the following classes:

1. The deposition of P. W. 35 (Gulwar Khan) who was an accomplice in the matter.
2. His friendship and intimacy with accused Sultan Khan as alleged, and
3. His connection with the jar Ext. IX in which a part of the stolen articles were traced.

Mr. Ghose contended that his client was greatly prejudiced for the three confessional statements of Gulwar Khan made before the Magistrates on 22nd February, on 25th February and 8th May, 1952 not being allowed to be used for the purpose of cross-examination of that witness. He draws our attention to the order of the learned Additional Sessions Judge passed on 27th May, 1954 prohibiting the use of these statements for the purpose of cross examination of the approver. Strictly speaking this order of the learned Additional Judge was not correct when he held that these statements could not be so used.

Mr. Goswami for the prosecution had to concede that the order could not be said to be strictly correct in view of several authoritative decisions. One of those decisions is by the Judicial Committee of the Privy Council reported in *Bhuboni Sahu v. The King* AIR 1949 PC 257 (B). There it was held that a statement made under Section 164, Criminal Procedure Code cannot be used as substantive evidence of the facts stated, but it can be used to support or challenge evidence given in Court by the person who made the statement.

The same view was held in one of the Calcutta decisions reported in *Manik Gazi v. Emperor* AIR 1942 Cal 36 (C), where it was held that the statement made under Section 164 of the Criminal Procedure Code is not inadmissible in evidence and may be used to corroborate or contradict a statement made in Court in the manner provided by Sections 145 and 157, Evidence Act. Really the principles emanate from the Sections 145 and 157 of the Evidence Act. Though Mr. Goswami wanted to argue that it was Section 24 of the Evidence Act that was applicable and it barred the use of the confessional statements made by the accused who was at a later stage made an approver, I must say that this contention is not of much efficacy.

We have therefore examined the three statements made by Gulwar Khan before the Magistrates to see how far the accused was wronged because of the order refusing their use for the purpose of cross-examination of the maker. We find on a perusal thereof that on 22nd February, 1952, this witness did not speak of the currency notes but said that Sultan stated that the jar Ext. IX contained opium, but on 25th February, 1952 he admits that he knew and saw that the jar in question contained the currency notes.

In the statement made on 8th May, 1952 he gives the complete story as it stood at the trial. The only insinuation therefore that could be made against this witness was that at an initial stage, namely on the first day of his making the statement he was less communicative and was not prepared to give an exactly true picture of what had happened. That is only natural in case of an accomplice or a man who himself was a participant in the offence. Assuming this variation in the statement would have gone to the jury, we do not think it would have shaken his credit very much since it is essential from the point of caution that the statement of an accomplice or approver should find support on material particulars as to the offence and the offender from other evidence on record.

The latest pronouncement of the Supreme Court in this regard finds a place in *Swamirathnam v. State of Madras* : 1957 CriLJ422 , where his Lordship Imam J. observes : 'The corroboration need not be of any kind which proves the offence against the accused. It is sufficient if it connects the accused with the crime.'

Therefore the point that had to be examined and placed before the jury was whether Gulwar Khan could have been believed as to the story given by him implicating both Sultan and Biren De with the offence of theft committed in the course of the night of 14th December 1951 in the Sootea thana office.

The material facts that found support from other deposition on the record were that the incriminating notes were found in a jar as Gulwar Khan had deposed. It was further alleged to be traced at the instance of Sultan Khan the co-accused. If that story is believed, it will lend a great support to the reliability of the statement of this witness. Thirdly, the story of the clipper which Gulwar Khan alleged was used in the course of the dacoity for the purpose of breaking open the box or the locks Exts. I and II finds support from the deposition of P. W. 14, the fitter of Monabari T. E. He identified that clipper to have belonged to his garden and to have lent it to Gulwar Khan at the request of Sultan Khan.

10. P. W. 35 Gulwar speaks about the intimacy between Sultan Khan and accused Birendra who even spent nights at Sultan's house at Charali apart from frequent visits thereto. This story of close association between the two accused is supported by another responsible witness P. W. 30 Sonapati Sarma, who was one of the A. S. Is. of the Sootea thana at the material time. What he deposed was that he did not know accused Sultan Khan from before but he came to know him when he was on frequent visiting terms when accused Birendra Chandra De was residing at the Sootea thana quarters. Sonapati Sarma also lived in one of the police quarters near the thana.

11. As to the identity of the jar Ext. IX also there is some evidence on record and once the connection of Birendra De is established with the jar from which some of the stolen currency notes were recovered, it goes a great length to support the prosecution story as given by Gulwar Khan. There seems to be at least four witnesses who spoke about the identity of die jar, P. W. 2 - the sweeper - who constantly used to attend and clean Birendra De's residential quarters and P. W. 16 Bepari Ranghhai an ex-constable who was at the material time occupying a part of the house in which Birendra De used to live. There is further the deposition of P. W. 3 (Abdul Sattar) who spoke about giving of this identical jar to accused

Birendra De sometime before the occurrence.

Of course the deposition of P. W. 4 (Jaman Nessa) his wife at a point is a little shaky and the deposition of P. W. 8 (Gojendra Chandra Hazarika) is also of the casual character. But there is no good reason to disbelieve the deposition of the sweeper P. W. 2 Ram Singh and P. W. 16 Bepari Rangbhhai who had no axe to grind against the accused Birendra Chandra De. Their deposition was that they saw this jar Ext. IX under the bedstead of Birendra in his quarters till a few days before the occurrence. If the jury found reasons to believe these supporting materials, they could treat them as substantial corroboration of the deposition of P. W. 35 (Gulwar Khan) who admitted himself to be a participant in the offence.

12. Mr. Ghose for Birendra Chandra De had raised an objection to a certain passage occurring in the charge to the jury. The learned Judge after having warned the jury that the Court or the jury should not readily accept the evidence given by the approver without looking for any corroboration and other circumstances stated as follows:

The evidence of an accused person's conduct may be used as corroboration of an approver's story. The production of the stolen article by an accused person from a place even not known to the approver may be accepted as material corroboration of the evidence of the accomplice who has deposed that accused has committed the theft of those stolen articles found on search from a place pointed out by one of the accused.

12a. What Mr. Ghose contended was that this passage relates absolutely to Sultan Khan since he was the accused who is alleged to have pointed out the place from where the jar of the stolen money was unearthed and therefore this passage as it occurs was highly prejudicial to the case of Birendra De whose case was presented along with that of Sultan Khan and the jury might have construed the conduct of Sultan to be identical with that of Birendra De in the matter, I do not think this contention of Mr. Ghose is sound, as in the immediate passage that followed, the learned Judge has made it clear that such corroboration can be used only 'if it tends to connect the accused with the crime'.

There is no imputation either on the charge or in the evidence that Birendra De either induced Sultan to point out the articles or that he had any hand in the matter of leading the police to the place from where the money was recovered. Therefore the passage objected to by Mr. Ghose was evidently used for the purpose of explaining the conduct of Sultan and not of Birendra De though in most part of the charge the cases of Birendra De and Sultan Khan were discussed together. We therefore do not consider this to be a material misdirection which prejudiced the accused in any form or shape.

13. There is nothing very material that has been omitted from the charge which would go to the benefit of the accused and the charge taken as a whole appears to be exhaustive in its character. Therefore in our opinion the conviction of the accused Birendra De was on sufficient materials and an a charge properly delivered. Therefore we see no reason to interfere with his conviction both under Sections 457 and 380, Indian Penal Code,

14. Coming to the case of accused Sultan Khan we find that evidence of his pointing out the stolen articles, namely the jar with the money and the clipper is overwhelming. What more, he is alleged to have pointed out the two locks which were attached to the lid of the broken iron safe from which the money was removed. Mr. Choudhuri for this accused Sultan Khan had strenuously argued that on the evidence as it stands, there could have been no conviction of accused Sultan Khan. It is admitted however, by him that Section 27 of the Evidence Act has application to the circumstances of the case, namely as to the fact of the discovery of the stolen articles which were recovered not only at the information furnished by Sultan Khan but on being pointed out by him.

He actually led the police to the house of Khalil Men, from where the money was recovered on 20th February 1952 and on the subsequent day the clipper and the locks too were recovered at his instance, they being pointed out by him. It is immaterial whether he dug the places himself or he was assisted by the police constable in this matter. That is a very minor discrepancy if at all, though Mr. Choudhury led some stress on it. It was open to the jury to believe Gulwar Khan if they felt that there was sufficient corroboration of the story given by him implicating

this accused.

He stated definitely that it was at the instance of Sultan Khan that he brought the clipper from P. W. 14 (Muhammad Huesain) and it was with him that he started on the night of occurrence to Sootea thana where both Sultan Khan and Birendra De burgled into the thana office and came with the money as stated by him in detail. Mr. Choudhuri had argued on behalf of this accused that if the discovery of the stolen articles is the only thing found to be proved against accused Sultan Khan, he would be liable to be convicted only under Section 411 of the Indian Penal Code and not under Section 380 or Section 457 of the Indian Penal Code.

Of course the fact of the accused leading the police to Khalil Mea's house not only proves that he knew where the incriminating articles were but that would materially support the story given by P, W. 35 (Gulwar Khan) who alleged that the accused took part in the offence of theft committed on the night of 14-12-51. The learned Judge dealt very exhaustively with the evidence relating to the lease of this accused and we find no misdirection in the charge, which might be said to have prejudiced the accused. In our opinion the conviction of the accused both under Section 457 and Section 380, Indian Penal Code are perfectly justified.

15. As regards the sentence passed against accused Birendra Chandra De and Sultan Khan, we consider that the sentence under Section 457, Indian Penal Code has been a little heavy and in our opinion a sentence of five years' rigorous imprisonment with a fine of Rs. 1000/- each in default six months' rigorous imprisonment would meet the ends of justice, We accordingly reduce the sentence under the aforesaid section in case of both the accused to five years' rigorous imprisonment and a fine of Rs. 1000/- in default six months' rigorous imprisonment and the sentence passed under Section 380, Indian Penal Code will remain unaltered. The sentences as directed by the Sessions Court would run concurrently.

16. We might observe in passing that accused Biren's conduct was extremely unbecoming as a police officer and the police constables Haider Ali P. W. 10 and others who were to be on duty on the night of occurrence miserably failed in the discharge of their duties,

17. The result is that the appeal filed by Birendra De is dismissed with the modification in the sentence as indicated above. In the case of appeal filed by Sultan Khan and Khalil Mea, the sentence passed against Sultan Khan under Section 457, Indian Penal Code is reduced to the extent indicated above and the appeal is otherwise dismissed. The appeal filed by Khalil Mea fails completely and is dismissed. This judgment will cover both the appeals indicated above, which, had a joint hearing and were treated as analogous,

Sabjoo Prosad, C.J.

18. I had my doubts about the legality of the conviction of appellant Birendra Chandra De under Section 457 of the Indian Penal Code. The evidence of the Officer-in-charge of the Police Station clearly shows that the malkhana and the portion of the Thana where the burgled safe was kept was in the charge of the accused and that it was within his lawful authority to enter the same at any hour of the day and night. It was, therefore, argued with some cogency that an act of trespass, which is an offence against the person in possession, could not apply to him; he being himself in possession of the malkhana could not commit lurking house trespass against himself.

But the words "having lawfully entered into or upon such property unlawfully remains there with the intent thereby to commit an offence" in Section 441 of the Indian Penal Code are very significant. These words would fully cover the case of the appellant Birendra and his act would constitute 'criminal trespass' within the meaning of this section, This element having been found to exist, his conviction under Section 457 of the Code must stand and is in the circumstances justified. In other respects, I have nothing to add to the judgment of my learned brother with which I quite agree.

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