

Sudhir Kumar Dutt Vs. the King

Sudhir Kumar Dutt Vs. the King

SooperKanoon Citation : sooperkanoon.com/334900

Court : Mumbai

Decided On : Apr-23-1948

Reported in : (1949)51BOMLR21

Judge : Harilal J. Kania, Kt., C.J.,; Fazl Ali and; Patanjali Sastri, JJ.

Appeal No. : Criminal Appeal Nos. 8, 9 and 10 of 1947

Appellant : Sudhir Kumar Dutt

Respondent : The King

Disposition : Appeal allowed

Judgement :

Fazl Ali, J.

1. These are appeals under Section 205(1) of the Government of India Act by three persons who along with one Captain Mathams were tried by a Special Tribunal constituted under Ordinance XXIX of 1943 on a number of charges which have been summarised in the judgment under appeal as follows :-

(a) Against all: that they were parties to a criminal conspiracy to cheat the Government of India (s. 120B read with Section 420 of the Indian Penal Code, 1860).

(b) Against S.K. Dutt (appellant No. 1) and J.K. Bose (appellant No. 2): that they had attempted to cheat the Government of India; and against R.W. Mathams and P.C. Ghosh (appellant No. 3): that they had abetted S.K. Dutt and J.K. Bose (Section 420 read with Section 511 of the Code);

(c) Against R.W. Mathams and P.C. Ghosh: that they had accepted bribes of Rs. 18,000 and Rs. 12,000 respectively; and against S.K. Dutt and J.K. Bose : that they had paid these bribes (Section 420 read with Section 109 and Section 161 and 101/109 of the Code).

2. The Tribunal acquitted all the accused persons of the charges of conspiracy and. the charges of attempting to cheat and abetment. They, however, convicted Mathams and P.C. Ghosh of bribery and S.K. Dutt and J.K. Bose of having given bribes of Rs. 18,000 and Rs. 12,000 to Mathams and Ghosh respectively and sentenced them to various terms of imprisonment ranging from three years to 18 months and payment of certain fines.

3. Thereafter the appellants as well as Mathams appealed to the High Court against their conviction and sentence on the charges relating to bribery and the Government appealed against the order of acquittal by the Tribunal on the charge of conspiracy. The Pligh Court dismissed the appellants' appeals but allowed the Government appeal and convicted the appellants as well as Mathams under Section 120B read with Section 420 and sentenced them to the same terms of imprisonment as had been awarded by the Tribunal, but made the two sentences concurrent. The High Court, however, granted a certificate under Section 205(1) of the Government of India Act. The appellants have thereupon appealed to this Court.

4. Briefly the facts of the case are these : Captain Mathams and P.C. Ghosh belonged to the Military Engineering Service (M.E.S.) and were the Garrison Engineer and Subdivisional Officer respectively in the Asansol division from June 1, 1942, until August 15, 1942. The appellant S.K. Dutt was the proprietor of a firm of contractors which carried on business under the name and style of British India Construction Company (B.I.C. C). The head office of this firm was at Calcutta, but it had also an office at Asansol under J.K. Bose to manage the execution of the

contract works there. In 1942 the British India Construction Company was given in the Asansol division amongst others contract No. ASN/19 for the construction of two types of huts. The contract was not signed until August 12, 1942, but as shown by a letter of the Garrison Engineer dated May 10, 1942, the contractor was instructed to commence work forthwith. The estimated cost of the work under contract was Rs. 2,50,281 odd, but shortly after the work was started a part of the proposed construction work was abandoned and the value of the contract was reduced to nearly half the amount. During the progress of the work Rs. 1,74,000 were paid to the contractor on running account bills which, it is not disputed, exceeded the contract prices of all the buildings which had been constructed under the contract by about Rs. 56,000.

5. The prosecution case was that the contractor used to pay from time to time various amounts as illegal gratification to Mathams and other Military Engineering Service employees at Asansol under certain assumed names, and when it was realised that there had been excess payments, attempts were made by his men at Asansol to make an arrangement with Mathams to get a Deviation Order (which presumably means an order sanctioning certain alterations in the original contract) to support the execution of additional work in order that the excess payments might be adjusted. On January 23, 1943, S.K. Dutt, who, it is suggested, did not know that any arrangement had been arrived at at Asansol between his men and Mathams and P.C. Ghosh, wrote a letter to the Deputy Chief Engineer at Patna admitting that an excess payment had been made in respect of contract No. ASN/19 and asked for some fresh work to neutralise the same. According to the prosecution, when Mathams and J.K. Bose came to know of this letter, they were perturbed and decided that it should be immediately withdrawn and S.K. Dutt was persuaded to write another letter to the Deputy Chief Engineer at Patna withdrawing the previous letter and stating that in fact other works, besides those mentioned in the contract, had already been done at the site. Subsequently in accordance with the alleged arrangement between J. K Bose and Mathams, P.C. Ghosh (appellant. No. 3) was deputed to take measurements of certain roads alleged to have been constructed by the contractor in the area and he included them in the final bill of the contractor though in fact these roads had, according to the prosecution, been constructed by the troops. Subsequently a final bill was

drawn up in the office of the Military Engineering Service bearing the date March 15, 1943, for a total sum of Rs. 1,89,458 in which the said road work was included and shown as having cost Rs. 71,000 odd. This bill bears the signature of P.C. Ghosh as well. as. Mathams and Bose, but the date March 15, 1943, appears opposite the signature, of P. C, Ghosh only. The prosecution case is that in consideration of Mathams and P.C. Ghosh certifying this false bill, a sum of Rs. 30,000 was paid to them as illegal gratification on March 17, 1943.

6. The appellant S.K. Dutt admittedly sent this sum on March 16, 1943, by a draft on a bank at Asansol to J.K. Bose, who withdrew the sum late in the afternoon of March 17. According to the prosecution case, on the very same evening J.K. Bose accompanied by witness Souren Dutt went to Mathams and paid Rs. 18,000 to him and shortly afterwards he paid Rs. 12,000 to P.C. Ghosh in the presence of Souren Dutt. After this a number of false vouchers (exhibit 27 series] were prepared showing payments to certain parties (who according to the prosecution case were mere fictitious names) for road construction in order to account for the sum of Rs. 30,000 and these payments were also entered in an account book kept in the contractor's office at Asansol. Subsequently a Deviation Order for the construction of the road was issued by Mathams, which, according to the prosecution, was antedated as July 7, 1942, in order to show that the contractor had been directed to take up the construction of the road at that time. Before, however, the Deviation Order could be pass ed the police got information of the case and started investigation in October 1943 and ultimately sent up a charge-sheet against the appellants as well as Mathams.

7. The appellants denied the charges made against them and asserted that the Deviation Order was in fact issued on July 7, 1942, and the road for which the bill was prepared was in fact made by the contractor and not by any Military Unit. The common case of S.K. Dutt and J.K. Bose is that the latter in order to make a personal profit as a middle man did not inform his master about the order for the additional work but carried out the work himself through some contractors. In January 1943, however, when S.K. Dutt wrote to the Deputy Chief Engineer admitting excess payment, J.K. Bose had to inform him about the road construction and he also wanted money from him to make payments to the sub-

contractors who had done the work. It is also stated that some of these sub-contractors pressed S.K. Dutt personally for payment when he visited Asansol some days prior to March 17. S.K. Dutt therefore sent a draft for Rs. 30,000 for paying the subcontractors their legitimate dues and not for bribing Mathams or P.C. Ghosh. The appellants also repudiated the allegation that they used to employ code names to describe Mathams, Ghosh and other employees of the Military Engineering Service and that a number of vouchers had been prepared in the names of fictitious persons.

8. It may be stated here that the two Courts below have differed on a very material question, namely, whether the roads which were charged for in the bill of March 15 by the contractor, were made by the contractor or by the troops. The Tribunal while acquitting the appellants of the charge of cheating substantially accepted the case for the defence on the point and held that the road work as mentioned in the bill was done by the contractor and not by the troops. As regards the charge of bribery they observed as follows :-

We have found that the motive set out in those charges for accepting the money, namely certifying as true the false final bill for contract ASN/19 has not been proved in the sense of which notice was given to the accused, that is, false on account of dishonest inclusion of the road work, but we do find that the two sums were paid by S.K. Dutt through J.K. Bose to Captain Mathams and P.C. Ghosh respectively as a gratification other than legal remuneration. That being so, 1 here being no proof to the contrary we are compelled by the special rule of evidence laid down in Sub-section 2 of Section 0 of Ordinance XXIX of 1943 to presume that these sums were accepted as a motive or reward such as is mentioned in Section 101 of the Indian Penal Code.

These observations, however, must be read with another passage in the judgment which we think ought to be quoted here. It runs as follows :-

We know that the road work done under this contract was not up to specification.... We have already mentioned that Inspector Mukherji says that he found no road metal and when the Members of the Tribunal went to the spot to look at the road for themselves, they also found no sign of road metal. It may well be that these

bribes were paid for passing such road, or other bad work, Captain Mathams says that he made the Company re-do parts of the road, so bad that he disallowed 40,000 square feet of them and other work, but there is no evidence of it-On the other hand, the long correspondence between J.K. Bose and S.K. Dutt about the measuring up of the work by P.C. Ghosh and the discrepancies on this point and the frequent references to (lie squaring up of the Burnpur affair are not, we think, entirely explained by the defence case. Section (2) relieves us from the necessity of finding the precise motive for the acceptance the bribes, but we are satisfied on the evidence that there was every indication that such a motive existed.

9. It seems clear, therefore, that though the Tribunal did rely on Section 9(2) of Ordinance XXIX of 1043 in deciding the ease, they also found that apart from the presumption which the it provision enabled them to draw, there was sufficient evidence of a circumstantial nature to prove a motive for the alleged bribe. The High Court went further than the Tribunal on this point and held that the precise motive which is stated in the charge of bribery and which according to the Tribunal had not been made out had been established. On this finding Section 9(2) of the Ordinance need not have been invoked. That section provides among other things that where in any trial before a Special Tribunal of an offence punishable under Section 161 it is proved that an accused person has accepted or obtained any gratification other than legal remuneration or any valuable thing from a certain class of persons specified in that section, it shall be presumed, unless the contrary is proved, that he accepted that gratification or that valuable thing as a motive or reward such as is mentioned in Section 161 without consideration or for a consideration which he knows to be inadequate.

10. The findings of the Tribunal as well as the High Court on the question of the motive for bribe have a direct bearing on the only so-called 'constitutional point' which was raised by the appellants in the High Court, which was that Section 9(2) of the Ordinance, on which the Tribunal had relied, was ultra vires. The ground urged in support of this contention was that since an accused person cannot be examined on oath, the onus of proving any part of the prosecution case cannot be placed upon him and that to the extent that such a course is contemplated by Section 9(2) of the Ordinance it is ultra vires. The High Court had no difficulty in

disposing of this contention as being without merit and pointed out in a few words that the defence argument merely amounted to saying 'that the provision referred to was one which ought not to have found a place in the Ordinance-not that its introduction was ultra vires,' The High Court did not state in so many words that the point did not arise upon the findings of the Tribunal as well as the High Court as both the Courts had held that there was some legal evidence apart from the presumption to be drawn under Section 9(2) to prove a motive or consideration for the alleged bribe. But the point was apparent on the face of the two judgments and did not need elaboration. In these circumstances it seems somewhat surprising that the High Court was persuaded to grant a certificate under Section 205 of the Government of India Act. Such a certificate might well have been refused because the question raised was not a 'substantial' question and also because strictly speaking it did not arise on the finding of either Court.

11. In this Court the learned Counsel appearing for the appellants did not press the point. As the only point on which the High Court granted a certificate under Section 205 is without merit and was not pressed, these appeals should have ordinarily been dismissed, but after hearing counsel for the appellants at some length on their application to urge other grounds we find that one of them requires serious consideration.

12. As will appear from what has been stated before, one of the crucial points in the case was whether the sum of Rs. 80,000 which was sent by S.K. Dutt to J.K. Bose on March 15 was spent by the latter in paying bribes to Mathams and Ghosh or it was spent in paying certain sub-contractors who had made the roads in question in Eurnpur. On this point there were two conflicting versions before the Court and there can be no doubt that if the appellant could have succeeded in establishing that the payments were actually made to the sub-contractors that would have materially affected the decision of the Court not only on the charge of bribery but also on the charge of conspiracy to cheat, which, it is not disputed, turned to a large extent on the question of whether the roads in question had been made on behalf of S.K. Dutt or by any army units as alleged by the prosecution. In order to establish his case J.K. Bose applied on March 27, 1946, for the examination of 15 witnesses most of whom are persons mentioned in the

vouchers (exhibit 27 series), that is to say, persons who, according to the appellants, were recipients of various sums of money out of the sura of Rs. 30,000 received by J.K. Bose from S.K. Dutt. This application was put up before the Tribunal on March 29 in the absence of the accused and their lawyers and the following order was made :-

The accused and his lawyers are not present, so that the Court is not in a position to ascertain whether it is necessary in the interest of justice to examine all these witnesses. In the circumstances let summonses issue on all of them on the understanding that the question whether their examination is necessary is left undecided. Summon for April 8, 1946.

Section 68 of the Code of Criminal Procedure provides among other things that every summons issued by a Court shall be in duplicate and such summons shall be served by a police officer or subject to such rules as the Provincial Government may prescribe by an officer of the Court issuing it or other public servant. Section 69 provides that the summons shall, if practicable, be served personally on the person summoned by delivering or tendering to him one of the duplicates of the summons and such person shall, if so required, by the serving officer, sign a receipt there for on the back of the duplicate copy. These sections ensure a twofold safeguard for proper service; firstly, by providing that the service should be effected by a police officer or an officer of the Court who should see that the summons is served in the manner provided in the Code and who should be able to report to the Court as to the manner in which the summons was actually served, and secondly, by authorizing the serving officer to obtain a signed acknowledgement of the service which should ordinarily be treated as very cogent evidence of service. These salutary provisions were, however, entirely overlooked by the Tribunal who directed the summons to be sent by post-not even by registered post in which case some evidence would have been forthcoming as to who actually received the summons if it was received by any person. As a result of this irregular procedure a very unsatisfactory situation arose. On April 8 when the parties appeared before the Court it was found that two of the envelopes containing summons had come back from the Dead Letter Office and with regard to the rest there was nothing to show whether they had been received by any of

the addressees or by whom they were received. On that date the examination of the accused was also concluded and thereafter J.K. Bose made a fresh application for summoning the witnesses mentioned in his list of March 27 but the Tribunal declined to summon them and recorded the following order :-

He (Bose) asked for summons on 15 persons of whom the first 14 were said to be the persons in whose names the vouchers exhibit 26 series were (this should be exhibit 27 series). Summonses were issued on all of them by post, only the name of the post office being given not the police station. Not one of them has appeared or communicated with the Court. It is the prosecution case that they are non-existent and that these vouchers were all forged to account for money paid as bribes. If the defence could have produced the persons to whom they say those payments were made they could have proved the prosecution false in a very important particular. Yet they have made no attempt to get into touch with these persons and the addresses which they have given are on their own admission addresses which they had in 1942. The accused S.K. Dutt who is equally interested is a contractor on his showing handling hundreds of contracts valued at over a crore of rupees and of 'unlimited financial resources. 'We cannot believe that if these persons who, he says, were suppliers of his firm could prove his innocence, he would not have taken steps to trace them as soon as he knew the prosecution case on the point more than six months ago. Not one out of 14 has answered the summons. This fact speaks volumes. We will not adjourn the case to enable further process to issue.

13. It seems quite clear from this order that the Tribunal fully realised that the question as to whether the vouchers, exhibit 27 series, were genuine or otherwise was a very material one. From this it must naturally follow that the persons in whose names the vouchers had been prepared were prima facie very material witnesses. Whether they were genuine payees or fictitious persons was clearly a question to be determined on evidence and could not be disposed of in the summary way in which the Tribunal has disposed of it. The question which now arises is whether the order made by the Tribunal can under the circumstances be supported in law.

14. Section 6 of Ordinance XXIX of 1943 provides that a Special Tribunal constituted under the Ordinance shall follow the procedure prescribed by the Code of Criminal Procedure for the trial of warrant cases by Magistrates. Section 257 is one of the sections applicable to the trial of warrant cases and its first sub-section which is directly relevant to the present discussion runs as follows :-

If the accused after he has entered upon the defence applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination or the production of any document or other thing, the Magistrate shall issue such process, unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing.

15. It is to be noted that the language of the section is imperative and the trial Court has no discretion under it to refuse to issue process to compel the attendance of any witness cited by the accused after he has entered upon his defence, unless it is of the opinion that the application should be refused for any of the reasons which are specified in the section and which it is bound to record. Section 0 of the Ordinance which also may be read in this connection does not take us much further. It provides that a Special Tribunal may refuse to summon any witness if satisfied after examination of the accused that the evidence of such witness will not be material and shall not be bound to adjourn any trial for the purpose unless such adjournment is in its opinion necessary in the interest of justice. This provision was hardly applicable to the present case, because it could not be said with any justification that the evidence of the witnesses for whom summons was applied for was not material, nor could it be said that any adjournment that might be necessary for the examination of the witnesses whose evidence was material was not in the interest of justice. The order-sheet in the case shows that the examination of the prosecution witnesses began on September 6, 1945, and was concluded on March 26, 1946, and a number of adjournments were granted during the interval. In these circumstances it would have been unreasonable to object to such adjournment as might have been necessary for calling the defence witnesses. The question then to be decided is

whether there were any prima facie grounds for holding that the application made by the accused on April 8 for summoning his witnesses was made for the purpose of vexation or delay or for defeating the ends of justice. In the order of the Tribunal which has been quoted, there is no express statement to that effect. What the Tribunal seem to lay stress on is, firstly, that in spite of the fact that the evidence of these witnesses was so material to the defence the accused made no attempt to get into touch with them; and secondly, that none of the witnesses on whose evidence the accused proposed to rely had answered the summonses issued on March 29. What conclusion the Tribunal wanted to draw from these facts is not clear from the order, but it seems that they were strongly inclined to accept the view pressed on them on behalf of the prosecution that the persons cited as witnesses by J.K. Bose were fictitious persons. This becomes clear on reading the following statement in paragraph 69 of their judgment.

The fact that not a single one of these witnesses produced an answer of any sort is a strong indication that the names were in truth fictitious.

16. All that we wish to say at this stage is that the conclusion arrived at by the Tribunal was premature and it was unfair to draw it without giving a reasonable opportunity to the accused to produce his evidence. It may be that the view which has been expressed by the Tribunal may ultimately turn out to be correct, but at the stage with which we are concerned, their refusal to give the necessary aid to the accused in procuring the attendance of his witnesses was a contravention of the clear provisions of Section 257 of the Code of Criminal Procedure and amounted to denial of a valuable right which the law has conferred on an accused person. In view of the serious irregularity in sending the summonses by post instead of sending them out as provided in Section 68 of the Code of Criminal Procedure no inference could be legitimately drawn against the accused from the fact that there was no response from any of the witnesses to whom summons had been sent.

17. Our attention has been drawn to ground No. 9 of the memorandum of appeal filed by the appellants in the High Court which directly deals with the point under discussion and we are also informed by Mr. P. 11. Das, counsel for S.K. Dutt, that

this ground was strongly pressed by him in support of the appeal. The High Court has unfortunately not expressly dealt with it, but it has generally expressed its agreement with the findings of the Tribunal which, it is urged before us, include the finding that the vouchers exhibit 27 series are not genuine. It seems to us that before finally disposing of the appeal the High Court should have given a reasonable opportunity to the appellant J.K. Bose to produce his witnesses, and if any of the witnesses appeared in Court, it should have directed their evidence to be recorded as contemplated under Section 428 of the Code of Criminal Procedure.

18. It was contended before us on behalf of the prosecution that Section 257 has given a discretion to the trial Court to refuse to summon witnesses in certain cases, and if in the exercise of that discretion the Court has refused to summon witnesses, its order cannot be reviewed by an appellate Court. The point does not need an elaborate answer because it has been considered and ruled out in many cases. As the Bombay High Court pointed out in a recent case *Hubli Electricity Co. v. Province of Bombay* (1946) 49 Bom. L.R. 92.

If there is an appeal from a decision of a Judge no opinion that he forms and no judicial discretion that he exercises can ever be final. It is always subject to review by the Court of Appeal.

19. In the result we allow the appeals and set aside the order of the High Court in so far as it concerns the appellants and direct that in place of the order of the High Court there shall be substituted an order directing that the appeal be reheard and finally determined after giving a reasonable opportunity to appellant No. 2 to take such steps as he may be entitled to take in law for enforcing the attendance of the witnesses mentioned in his list of March 27 and after considering the evidence of such of these witnesses as may appear before the Court.