

In Re: Basawarajaswami

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Court : Karnataka

Decided On : Feb-10-1967

Reported in : AIR1967Mys210; 1967CriLJ1536

Judge : Ahmed Ali Khan, J.

Acts : [Evidence Act, 1872](#) - Sections 45, 47, 106 and 114; [Indian Penal Code \(IPC\), 1860](#) - Sections 409 and 467; Indian Post Offices Act - Sections 52; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 342

Appeal No. : Criminal Appeal No. 361 of 1965

Appellant : In Re: Basawarajaswami

Advocate for Def. : G. Dayanand for State Public Prosecutor

Advocate for Pet/Ap. : U. Cholayya, Adv.

Judgement :

1. The accused Basavarajaswamy who has been tried in Sessions Case No. 70/8/1964 in the Court of the Sessions Judge, Gulbarga, is convicted for the offences under Sections 467 and 409 of the Indian Penal Code, and also under Section 52 of the Indian Post Offices Act. He was sentenced for the offences of forgery and criminal misappropriation under Sections 467 and 409 of the Indian Penal Code, to suffer rigorous imprisonment for a term of one year and to pay a fine of Rs 1,000 in default to undergo it further term of rigorous imprisonment for

three months under each count The Sessions Judge did not award any sentence under Section 52 of the Indian Post Office Act. The substantive sentences awarded were ordered to run concurrently.

2. Briefly stated, the prosecution case is that the Basavarajaswamy was the Branch post Master of the Chintapally Branch Post Office in October. 1959 Mallikarjunappa (P.W. 1) got a money order of an amount of Rs. 98 from Harsur Branch Post Office October 16, 1958. to his cousin brother. Amrutha Rao. who has been examined in the case as P.W. 2, resident of Rayakodi village which is under the branch post office of Chintapally in which the accused was the Branch Post Master. It was the case of the prosecution that the money order was transmitted from Harsur Post Office to Mahagaon Branch Post Office and from Mahagaon Branch Post Office to Sedum Head Post Office from where it had been transmitted to Chintapally Branch Post Office. The accused who was the Branch Post Master at Chintapally received the same on October 21, 1959. It was further the case of the prosecution that the accused made entries in the Branch Post Office Journal. Exhibit P-8 to the effect that the amount of the money order has been paid by him to the payee and has forged the documents which have been marked as Exs P-7, P-5, P-6 and P-8 in the case The prosecution further stated that Malkajappa. P W 1 when went to Raikodi on his personal work, contacted Amrita-rama. P.W. 2. and enquired him about the receipt of the money order which he had sent to him from Harsur. P.W 2 told him that he did not receive it. On this both of them went to Chintapalli Post Office. where the accused was working as Branch Post Master. When enquired the accused told them that he did receive the money order but as it did not bear the postal number, he sent it back to the Head Post Office (Sedum) which he was expecting within 2 or 3 days and asked them to come after 2 or 3 days P.W. 1 stated that when they went to Chintapalli Post Office after 2 or 3 days, they found that the accused was not there in the Post Office and instead of him, one Gurupadappa who has been examined as P.W 3 in the case was in the Post Office. He told him that the accused had proceeded on leave So P.W 1, Malkajappa went back to his village He found money order receipt, Ex. P-3, in his house, bearing the date on it 29-10-69 and the signature of the payee Amritappa, P.W 2 On seeing the receipt, he suspected that the signature on the same was not of Amritaraya He then made a complaint. Ex, P-4. to the Superintendent of Post

Offices who sent the papers to the Postal Inspector P W 8, Shankaranna. for enquiry After due enquiry, the Postal Inspector lodged a complaint (Ex P-9) to the Police Sub-Inspector. Sulepet. who is examined as P.W 9 in the case After completion of the investigation the Police filed charge-sheet against the accused before the Magistrate at Chincholi on 11-3-1962 The Magistrate conducted the preliminary enquiry and after completion of the same committed the case to the Sessions Court, Gulbarga. The accused has been charged with having committed offences punishable under Sections 467, 409. I.P.C., and also under Section 52 of the Indian Post Office Act. The accused pleaded not guilty He also pleaded alibi He stated in his statement under Section 342 of the Code of Criminal Procedure that he went away from Chintapally on 27th October. 1959. handing over charge of the Branch Post Office at Chintapalli to Gurupadappa and he did not know what happened after 27th October. 1959, in his absence The Sessions Judge, on the material placed before him, came to the conclusion that the offences charged had been brought home to the accused and convicted the accused for the offences of forgery punishable under Section 467 and criminal breach of trust punishable under Section 409 of the Indian Penal Code and also under Section 52 of the Indian Post Office Act. He sentenced the accused to undergo rigorous imprisonment for one year and to pay a fine of Rs 1,000 and In default to further undergo rigorous imprisonment for a period of 3 months for each of the 2 offences under Sections 467 and 409 of Indian Penal Code He did not pass any sentence under Section 52 of the Indian Post Office Act because according to him the offence under Section 52 was the same as that of the offence under Section 409 of the Indian Penal Code The substantive sentences awarded under both the counts were ordered to run concurrently It is against these convictions and sentences that the accused has preferred this appeal

3. In this appeal, the prosecution case is that the accused had committed criminal breach of trust in respect of the amount of Money Order (No. 3288) and that he had committed forgery of m valuable security and fraudulently and dishonestly used the disputed documents Ex. P-S and Ex P-6 as genuine and he had thereby committed offences ntmi-sliable under Sections 467 and 409 of the Indian Penal Code and under Section 52 of the Indian post Office Act. The prosecution tried to establish this case on the basis of circumstantial evidence. Kirstlv they have

proved that the M.O. of Rs 98 was sent by Malkajappa. P.W. 1 to his cousin brother, Amritayya, P.W 2, who is a resident of Royakodi, from Harsur P.O PW I. Malkajappa, has deposed that he sent the M.O.'of Us 98 to Amritayya. P.W 2. on 15-10-1959 from Harsur Post Office His evidence is corroborated by P.W 4, Revanasiddavaya. who was the Branch Post Master. Hargur. at the relevant time. He gives evidence that Malkajappa. P.W 1. had sent a M O. for Rs 98 from Harsur Post Office and gave money and M.O. commlston to him. After receiving the same, he passed on receipt, Ex. P-2, and has identified his signature, Ex. P-2(a). on it. He deposed that he transmitted the money order from his Post Office to Mahagaon Post Office on 15 10-1969. It ii in the evidence of P W. 5, Hasnappa, that in October, 1959, he was working as a Sub-Post Master, Mahagaon, and that he had received the money order for Rs. 98 from Harsur for being sent to Chintapalli. He sent It to Sedam Head post Office by giving M.O. No. 3283 He has identified the endorsement. Ex. P-6(c), on that money order coupon, Ex. P-6. P.W. it who was working as the Post Master of the Sedam Post Office at the relevant rime, gives evidence that he received the money order No. 3283 from Mahagaon Post Office on 21 10-1959; and he sent It on the same day to Chintapalli with the Branch Office Slip (B.O. Slip). He further deposed that it was received by the accused on 21-10-1969 and that Ex. P fl(a) Is the signature of the accused on B.O. slip. Both the Exhibits P-8 and P-5 bear th' seal of Harsur Post Office on them. It is not disputed that both these documents bear th' stamps of post Offices of Harsur. Mahagaon, Sedam and Chintapalif P.W. 6 has also Identified the handwriting of the accused marked as Exhibit P-8(a) which is dated 21-10-1959 on the Post Office Journal Ex. P-8. It is established beyond reasonable doubt by the evidence of these witnesses that the M.O. amount of Rs 98 was sent from Harsur P.O. by Malkajappa, P.W 1. and it was received in the Post Office of Chintapalli on 21-10-1959 Then there is the evidence of P.W 0 who has identified the handwriting and the signature of the accused on the disputed documents. He has identified the signature of the accused on M O receipt, Ex P-6, and said that he had received Ex P-5 on 30 10-1959 He has also identified the signature of the accused on Ex P-6, B.O. slip His further evidence was that the writing on Ex P-8 which has been marked ns Es P-8(al and Ex P-8(d) is that of the accused and has identified the tame. The writing on Ex. P-8(a) bears that date 21-10-1959 and that

of Ex. P-8(d) 29-10-1959. This witness claims to know the handwriting of the accused. It is not disputed that the accused had worked under P.W. 6 for quite some time. Therefore he had the opportunity to know his handwriting. Then we have the evidence of Amritayya, P.W. 2, payee and Shivarachappa, P.W. 7, the attesting witness. Amritayya's evidence was to the effect that he has not signed M.O. receipt, Ex. P-3, or Ex. P-5 and added that the signatures on them are not his signatures. Shivarachappa, P.W. 7 deposed that he has not attested the money order sent to Amritayya as identifying witness and has denied the signature on Ex. P-3, M.O. receipt and M.O. coupon Ex. P-5. P.W. 1 also has given evidence to the effect that the disputed signature on Ex. P-3 is not the signature of P.W. 2, Amritayya. Neither the evidence of P.W. 6, nor that of P.W. 2 or P.W. 7 has shaken in their cross-examination. The evidence of these witnesses shows that the signatures on Ex. P-3 and Ex. P-6 are not the signatures of P.W. 2 nor of Shivarachappa, P.W. 7. It also goes to prove that the handwriting and signature on the other disputed documents (Ex. P-5, Ex. P-6, Ex. P-7 and Ex. P-8) are of the accused. The learned Counsel appearing on behalf of the appellant laid strong emphasis on the fact that no reliance should be placed on the evidence of P.W. 6. He submitted that according to his own evidence, P.W. 6 was transferred to Chitradurga Post Office in 1960. He has been examined in this case on 9th August, 1965,--five years afterwards, hence no reliance should be placed on the evidence of the witnesses relating to the identification of the handwriting of the accused and the signature of the accused. The Sessions Judge has accepted the evidence of P.W. 6 as he (P.W. 6) was the person who was the immediate superior of the accused. He was the Post Master of the Head Post Office of Sedam at the relevant time and the accused was the Branch Post Master of Chintapalli which was under Sedam Head Post Office. Being the immediate superior he had occasion to see the handwriting and the signature of the accused and there is no reason why due weight should not be attached to his evidence. He has deposed that he well knows the handwriting of the accused very well. He has not been questioned in this regard in his cross-examination. Therefore his evidence in examination-in-chief remains unchallenged. Having regard to all these circumstances, I am unable to accept the contention urged on behalf of the appellant-accused that the Sessions Judge was wrong in having reached the conclusion that the disputed writing and

the signatures on these documents were of the accused It was contended on behalf of the appellant-accused that the handwriting expert should have been examined to prove the endorsement on the documents. It was submitted that in the absence of the opinion of an expert, uncorroborated evidence of P W 6 should not have been accepted by the lower Court. It is not necessary to examine the handwriting expert in every case of disputed writing. No question was put to the Investigating Officer to explain as to why the documents were not sent to the handwriting expert The circumstances established against the accused are:

(1) that he was in the Postal Department and at the relevant time he was working as Branch Post Master in the Chintapalli Post Office:

(2) that the writing and signatures on the Impugned documents are his;

(3) that the signature found on the documents Exhibits P-3 and P-6 are neither of P.W 2 nor of P W 7; and

(4) that the accused was absconding till October 17 1964. when he himself effected his appearance in the Court, which has been proved by the judicial record itself

4. These circumstances go in support of the prosecution case P.W. 6, Ahmed Buran, has stated that he was accustomed to see the handwriting and the signature of the accused and nothing has been brought out during the course of his cross-examination to impeach his veracity. He has stated in definite terms that he knew the handwriting of the accused very well further no question was put to the investigating officer for his explanation for not sending the documents to the expert. Hence, there can be no occasion for any adverse inference either Adverse inference against the prosecution can be drawn only if it withholds certain evidence and not merely on account of its failure to obtain certain evidence. When no such evidence has been obtained, it cannot be said what that evidence would have been, and therefore, no question of not presenting that evidence arises in the case, and no adverse inference can be drawn under Section 114, illustration (g) of the Evidence Act

5. It was contended by the learned Counsel for the appellant that the lower Court was wrong in its application of the provision of Section 106 of the Evidence Act to the case and placing the burden upon the accused. I think the learned Advocate is right in contending that the facts and circumstances of the case do not attract the provisions of Section 108 of the Evidence Act and that the lower Court was not right in holding that the burden was upon the accused. The reasons given by the Sessions Judge for the applicability of Section 106 of the Evidence Act are found in para 10 of the judgment he stated:

'It is, therefore, clear in this case that there is positive evidence to hold that the accused received this money order and did not pay it to the payee Amrutaraya. The accused who according to the documentary evidence in this case as well as from the evidence of P.W. 5. Sedam Post Master has reported that this was paid to Amrutaraya had got it duly attested. It must be within the special knowledge of the accused as to who put these signatures of Amrutaraya and Shivacha-rappa. And so far as that is concerned, the special knowledge of the accused has got to be proved by him.'

Section 106 of the Evidence Act is not intended to be used to place upon the accused the burden of proving his innocence. Section 106 is not a proviso to the rule that the burden of proving the guilt of the accused is upon the prosecution. But, on the contrary, the section is subject to that rule. The burden of proving a particular fact or a particular defence is a different matter. Section 106 does not enable a Judge to say that the accused must explain this or that. Further, the plea of the accused in this case of an alibi and his statement under Section 342 of the Code of Criminal Procedure was that he was not in the village (Chintapally) subsequent to October 27, 1959. The paid voucher Ex P-5(d) is of October 29, 1959. The document Ex. P-S which is a money order receipt is also of the same date, viz., October 29, 1959. Therefore in view of the plea taken by the accused it cannot be said that the facts referred to by the Sessions Judge were within the special knowledge of the accused which he was bound to place before the Court. But as observed above the offences charged have been established beyond reasonable doubt against the accused by the prosecution evidence. Therefore the error committed by the Sessions Judge cannot have any materiality on the

conclusion reached on the basis of the evidence adduced in the case

6. It has been contended on behalf of the appellant that the accused had given explanation for his absence which ought to have been accepted by the trial Judge. It is not disputed that the accused effected his appearance before the Magistrate, Chincholi on October 17, 1964, and that he was absent from the month of October, 1959 till then. His explanation is as his mother was suffering from cancer he had gone to Hyderabad that he was unable to rejoin his duty and that he was ignorant of the proceeding which had been taken against him. On behalf of the State it is argued by the learned Public Prosecutor that it is fully established by the evidence of P.Ws. 3, 8 and 9 and also from the proceeding taken in the Magistrate's Court, Chincholi, that the accused was absconding till 1964 and in spite of all possible efforts he could not be traced. P.W. 3 gave evidence that the accused had absconded and his whereabouts were not known for five years. The evidence of P.W. 8 is to the effect that during his enquiry he came to know that the accused had absconded. He tried to trace him but he failed. The Investigating Officer, P.W. 9 deposed that during his investigation he made enquiries about the accused and that he found him absconding. But further down in his statement he stated:

'During the investigation I did depute my subordinates to trace the accused. I have made due entries in regard to this in my police diaries. I had deputed police constable Bhogappa and Head Constable Wamanrao to trace the accused. This record is not placed before the Court.'

To establish that the accused was absconding the prosecution should prove by examining those persons who had made attempts to trace him and were not successful. The police constables who had been deputed to trace the accused have not been examined in the case and according to the investigating officer himself the relevant papers have not been produced in the Court. Therefore, no reliance can be placed on the oral testimony of these witnesses.

7. But Mr Public Prosecutor submitted that proceedings were pending against the accused and when he could not be traced order of attachment had actually been given by the Court. He submitted that from these judicial proceedings which form

part of the record ascendance of the accused will have to be concluded It appears that in Case No 40/2/ 1960 proceedings were taken against the accused on December 12. 1960 before the Magistrate of Chincholi anil at one time viz., on July 13. 1961 attachment order was sent to the Tahsildar concerned It is seen from the order sheet, dated February 1, 1962. that the order of attachment was slaved on the basis of an application submitted by the father of the accused. The accused effected his appearance on October 17, 1964. before the Magistrate of Chincholi It is thus clearly established by the judicial record that the accused had been absconding till he himself appeared before the Magistrate of Chincholi

8. It was then argued on behalf of the appellant that the presence of the accused has not been satisfactorily established after October 28. 1959. in Chinlapally village He maintained that according to P.W 1 he had gone to the post office on October 27. 1959. and when he made enquiries about the money order the accused told him that he had sent the money order to the head post office as it did not bear the head office number and that it might be received after a couple of days and when P W. 1 went lo the post office two days after he did not find the accused there, and instead he found Gurupadappa P W 3 who told him that the accused had gone away. The evidence of P W. 3 is to the effect that the accused requested him on 27th or 28th October. 1969, to look after his work saying that he is proceeding on leave for three or four days. He submitted that it is established by the evidence of these witnesses that the accused was not present in Chintapally subsequent lo 27th or 28th October. 1959. The argument of the learned Public Prosecutor has been that the evidence of these witnesses is not definite with regard to the point of time He also submitted that it is proved by the evidence of P.W 6 that the documents Exhibits P-5. P-6 and P 8, contain the signature of the accused and these documents are dated 29th October. 1959. it is thus clearly established that the accused was present in his village on that day The trial Judge has accepted the evidence of P W 6 and held that the signatures on the documents, Exhibits P-5, P-6 and P 8, are proved to bethose of the accused. There does not appear to be any justification whatsoever to discard the conclusion reached by the trial Judge If the evidence of P.W 6 is accepted, the arguments that the presence of the accused is not established subsequent to 27th or 28th October. 1959, loses its force

9. The conclusion reached by the trial Judge that the endorsement on the receipts and other disputed documents were made fraudulently and with the aid of the forged documents and that the accused dishonestly misappropriated the amount is based on a proper appreciation of the evidence and I have absolutely no doubt that the accused is guilty of the offences for which he has been convicted.

10. The accused has abused the trust and confidence reposed in him I do not think that the sentence or rigorous imprisonment for one year and the fine of Rs. 1.000 in default rigorous imprisonment for a further period of three months on each count is by any means severe. I do not find any good ground to interfere with either the conviction or the sentence in this appeal. The accused is said to have been on bail He shall surrender forthwith to his bail and undergo the remaining portion of the sentence imposed upon him by the trial Court. In the result, this appeal fails and the same is dismissed.

11. Appeal dismissed

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