

Krishna Dayal Vs. Emperor

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SooperKanoon Citation : sooperkanoon.com/452339

Court : Allahabad

Decided On : Jun-13-1945

Reported in : AIR1946All227

Appellant : Krishna Dayal

Respondent : Emperor

Judgement :

ORDER

Sinha, J.

1. Krishna Dayal, the applicant, has come before me against an order of the learned Sessions Judge of Cawnpore, by which he affirmed the judgment of a Magistrate of the first class, who held him guilty under Section 409, Penal Code, and sentenced, him to undergo rigorous imprisonment for a period of eighteen months and to pay a fine of Rs. 300 and in default, to a further period of six months' rigorous imprisonment. There was a further order that out of the fine realized a sum of Rs. 250 should be paid to the Post Master General. The case is a complicated, one and covers a vast field. It is, besides, a case of a novel character. Its complexity and novelty have presented considerable difficulty. I have, however, had the advantage of hearing the learned Counsel for the accused and the learned Government Advocate, assisted by an official of the Department concerned, at great length. I have with their assistance gone into the whole record

myself, inasmuch as the main contention of the learned Counsel for the applicant was that the learned Sessions Judge has relied upon inadmissible evidence, placed the burden of proof, in several material particulars, upon the accused and has drawn wrong inferences from the admitted and proved facts.

2. The learned Counsel for the applicant invited my attention to a number of authorities of this Court, as also of the other High Courts, in support of his contention. To those authorities I shall advert at the proper time and place. The accused worked as a clerk in the Head Post Office, Cawnpore, from February 1941 to January 1942 during which period he performed the duties of the Broadcasting Receiver Licence Clerk and issued and renewed licences. The charge against him was that, in this capacity he embezzled the amount of surcharge of Rs. 20 paid by each of the following licensees:

(1) Jagdish Prasad Gupta, who made the payment on 80th May 1941,

(2) Govind Ram on 28th June 1941,

(3) Nand Lal Misra on 13th August 1941,

(4) Syed Nawab Ali on 20th August 1941,

(5) Ganpat Prasad Verma on 2nd January 1942. The case of the prosecution, so far as Govind Ram is concerned, has failed and it might be dismissed from consideration. According to Sub-rule

(3) of Rule 38 of the Posts and Telegraph Manual, vol. VI, every first class head office is, at least should be, inspected twice a year by the Supervising Inspector. There are some other inspections provided by the Post Master. In order to appreciate the case in all its ramifications' the procedure provided by the rules of the Department might be followed. A licence is secured on payment of Rs.

10. This licence is renewed every year on a further payment of the same amount. In default of a proper application within time for the renewal, the Post Master General of Lucknow has several options open to him. He may either start a prosecution or impose a penalty of Rs. 20 or grant exemption. There is a further

course open to Mm, which will play a very important part and that is that, even after the payment has been made, he can grant a remission or refund. According to the evidence of Raghubir Sahai, P.W. 3, and a clerk in the office of the Post Master General, Lucknow, which is to be found at page 10 of the paper book, the practice is like this. I shall allow him to mention it in his own words:

A register for entering recovery of surcharge money from B.R. licensees is maintained in my office. A note is made in the register as soon as the Post Master General orders levy of surcharge. The order is sent to the Post Master concerned. After the surcharge has been realized by the Post Office intimation is sent to my office and relevant entries are made in the register accordingly. A report is sent by my office every month to the Director General, showing recoveries of surcharge money. If the surcharge is cancelled by the Post Master General, the entry is scored out and a reference to the Post Master General's order is entered against the entry in the register. Cancellation is duly intimated to the Post Master concerned.

3. This is what he has said in his examination-in-chief and this indicates the procedure and the various places where the registers and other necessary papers are kept. In his cross-examination he says that a separate file of each case of non-renewal in which surcharge is levied, is 'compiled in the Post Master General's office...' He then gives the relevant numbers:

The file numbers in the case in dispute are: Nawab Ali W.L. III/1143 Ganpat Prasad W.L. III/1228 Nand Lal Misra W.L. III/973 Govind Earn W.L. III/549 Jagdish Prasad Gupta W.L. III/829

and claims to have made this statement on the basis of the surcharge register maintained under the orders of the Post Master General. This witness and Qazi Hikmat Husain, the inspector, P.W. 1, make out the following: (a) The Cawnpore office sends intimation to Lucknow both as regards the realization of the surcharge and the remission or the refund, (b) On the basis of this, a surcharge list is maintained at Lucknow. (c) A note is made in the register as soon as the Post Master General orders the levy of surcharge, and an intimation is sent, (d) If the surcharge is cancelled, there is an entry to that effect.

4. They have admitted that all the records, barring that of Ganpat Prasad Verma, have been weeded out; in the case of Ganpat Prasad Verma the record has been misplaced and cannot be traced. Besides the above, a few other special features may be noticed. A licence book consists of three parts: (a) counterfoil-to be retained by the office issuing, (b) licence which is granted to the licensee, and (c) counterpart which is sent to the Delhi office-Director General. This counterpart is sent on the first date of the succeeding month. A surcharge is received in stamps and on a separate piece of paper. The stamp is defaced. The above makes it clear that if the original licensing fee and the surcharge are received simultaneously, there may be or will be a common entry in the counterpart. If, however, the surcharge is received after the lapse of some time, the stamps of the value of the surcharge will be affixed on a separate piece of paper and will not generally find a place in the counterpart. That this is so will be borne out by the ruling file to be found at p. 58 of the book.

5. The case for the prosecution is that the accused received surcharge of the value of Rs. 20 in all the cases but did not remit it to the department concerned. The defence is not common in all the cases; there is a slight variation with respect to one. There is, however, a common defence that this prosecution is the result of a feeling of hostility entertained by some people against the accused. That this defence is not purely imaginary will be clear from some of the observations of the learned Sessions Judge himself. He says that he received some anonymous reports against the accused even when the case was proceeding before him. I, however, do not propose to express any opinion on the point. It may be that the case against the accused is not proved; it may even be that it is false, but this will not necessarily imply that the prosecution was launched, with a dishonest motive. The department concerned might have been inspired by the best of intentions and yet they might have been misled into thinking that there was any case against the accused. The learned Counsel for the applicant lays stress on the great delay which has taken place in the launching of the prosecution. The offences were alleged to have been committed in 1941 and the prosecution was not started before 1944. This is an aspect of the matter which does certainly require explanation, but I am not prepared to put it higher than that Reliance has been placed on *Kali Prasad Singh v. Srikrishun Chaturvedi* ('38) 25 A.I.R. 1938 Pat. 543

at p. 545 where a learned Judge held that:

Prosecution launched against a public servant after inordinate delay rouses suspicion that it has been done to serve some other end either of the complainant or some other person, who is interested in disgracing such officer.

6. This conclusion presupposes two premises: the first is that the delay has been caused 'to serve some other end;' the second that someone 'is interested in disgracing the accused.' As I have said above, I am not prepared to assume that this prosecution is the result, of any animus against the accused. The delay, as such, cannot raise a presumption against the prosecution, although the accused is, in the words of their Lordships of the Privy Council used in a well-known case, entitled to say that, in construing the evidence, presumptions are permissible to fill in, in his favour, the details obliterated by time. Before dealing with the case itself, I must, at the outset, say something about some of the handicaps under which the accused laboured at the trial. A grievance was made by him before the learned Magistrate, and that grievance has been repeated before me, that he did not have access to all the papers which he considered necessary for his proper defence. I find a large number of applications made by the accused either for the summoning of the necessary papers from proper custody or for the inspection of the record. To mention only two of them: There is an application dated 18th September 1944 praying for the inspection, with the counsel, of certain papers. The learned Magistrate practically rejected the prayer with the following order:

I do not consider it safe to give the accused access to the record. The counsel had a detailed and prolonged inspection the other day. He can inspect the record again in the presence of the Court clerk on payment of the prescribed fee.

This was followed by another application of 12th October 1944. The fate of this application was almost the same. Says the learned Magistrate:

I cannot allow access to the accused as it is not safe. His counsel has inspected the documents more than once at great length. He can inspect the documents again but only those documents which have been relied on by the prosecution.... The diaries of the Inspector (Wireless) were summoned but these are privileged

documents and cannot be made public.

7. In order to appreciate the prayers contained in these applications and the orders passed on them, it is necessary to bear in mind the nature of the case. It was a case of a highly technical character, which it was not possible for a counsel to follow without the assistance of someone familiar with the papers. It required knowledge of a highly technical character. That knowledge the counsel was not expected to possess. That knowledge could come to the counsel for the defence only through proper instructions from the accused and those instructions should have been available to him at every stage when, either studying the case or inspecting the record, he was trying, step by step, to disentangle the skein of intricacies. As against, this the Crown counsel had at his service the entire machinery of the department. The learned Magistrate says that inspection had been granted to the counsel more than once. I take it that the inspection had been made twice or even thrice. Even inspections on three different occasions might not have been enough. The accused was, to my mind, not making an exaggerated request when he prayed for yet another opportunity for inspection. The denial to him of an opportunity to inspect certain documents on the ground of privilege has been another case of handicap to the accused: 'Admissibility of a document is the rule and not the exception:' *Queen-Empress v. Monapuna* ('92) 16 Bom. 661 at p. 668. Every document, particularly in a criminal trial, must be admitted in evidence to throw light on the obscure corners of the case. That light should always be welcome, unless its entry in the Court is shut out for very special reasons, because, 'the object of a trial in every case is to ascertain the truth in respect of the charge made:' *Reg. v. Uttam Chand* ('74) 11 Bom. H.C.R. 120.

8. As an instance of the reasons assigned by him may be mentioned one when the learned Magistrate says that those documents were not referred to by the Crown counsel. He forgot that it was one of the axioms of law that a cross-examining counsel is entitled to cover a much wider field and refer to many more documents than the counsel who has (conducted the examination-in-chief, if for nothing else, to test the voracity of the witness. With these preliminary remarks I address myself to the case itself. The charge against the accused was that

being entrusted with property or with dominion over property, he dishonestly misappropriated or converted to his own use that property or dishonestly used or disposed of that property in violation of any direction of law prescribing the mode in which such trust was to be discharged....

9. Dishonesty is, therefore, a pre-requisite. In proving its case, the prosecution will have to place before the Court materials or circumstances from which an inference compatible with the innocence of the accused is not possible. Not only that, the prosecution will have to further establish that the circumstances are 'incapable of explanation upon any other reasonable hypothesis than that of his guilt : ' Mt. Jahura Bibi v. Emperor : AIR1931 Cal11 .

10. I might also emphasize that if there are certain lacuna in the case, the benefit cannot go to the prosecution. It has been held in Robert Stuart Wauchope v. Emperor : AIR1933 Cal800 that in criminal cases 'the onus of proving the general issue never shifts.' It always lies on the prosecution to prove beyond reasonable doubt the guilt of the accused. I have sought to notice these cases and emphasize this especially because there are certain gaps in the case and I read the judgment of the learned Sessions Judge as though the prosecution, and not the accused is entitled to the benefit of those gaps. The case for the prosecution, barring that of Jagdish Prasad, rests largely on Ex. P-35, While that of Jagdish Prasad rests on Ex. P-36. Exhibit P-35 purports to be a certificate from one R.R. Mathur, Assistant Accounts Officer, Posts and Telegraph, Delhi. It is dated Delhi 1st June 1941 and reads thus:

Certified that the amount of surcharge has not been received in respect of the following B.R. licences as per records in the audit office. The surcharge has not also been received separately in the forms of stamps. All the records have been thoroughly overhauled in the presence of the Superintendent in charge and the Wireless Investigating Inspector, United Provinces Circle.

11. Exhibit P-3G purports to be a document of an almost similar character and is dated 16th August 1944, signed by Mr. S.N. Ayer, Assistant Accounts Officer, Posts and Telegraph, Delhi. Sir Wazir Hasan's contention is that these two documents are inadmissible in evidence and he takes his stand on Section 65(g),

Evidence Act, which provides that secondary evidence may be given of the existence, condition or contents of a document:

When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

How this could t5e done is provided later and is in these terms:

in case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

12. As said above, Ram Rachpal Mathur is the person purporting to have signed Ex. P-35. He has come into the witness-box and he might be allowed to give his own version of the part that he played in the examination of the record concerned. At pp. 9 and 32 of the paper book is to be found his evidence. He says that Exs. P-35 and P-36 are the certificates regarding non-receipt of the surcharge. He also says that the former bears his signature while the latter that of Mr. S.N. Ayer about whoso handwriting and signature ho claims to have knowledge. He admits in the course of his cross-examination that the search was not made by him. It was, on the other hand, one Mr. V. Parathasarthi who had the search carried out under his supervision. He also admits that ho cannot name the clerks who were employed in the search. He, therefore, does not answer the test laid down by Section G5 of the Act in that he had not examined the documents. S.N. Ayer has not come into the witness-box at all. The insistence by the Legislature on the presence in the witness-box of a person who had examined the documents or of someone 'who is skilled in the examination of the documents' is intended I to afford an opportunity to the opposite party to find out the truth by means of the cross-examination of such a witness. I have]no doubt, therefore, that the contention of [the learned Counsel for the accused is sound and by far the most important pieces of evidence, on which the prosecution mainly rests its case, disappear.

13. He is also right when ho says that the entries in the Lucknow surcharge register are of no value, inasmuch as they do not bear anyone's initials and the

accused cannot be held responsible for them. Besides, in the absence of the primary evidence, secondary evidence is not admissible unless the necessary foundations for the same have been laid. This has not been done. But I do not propose to decide this case merely on legal technicalities. Indeed, Sir Wazir Hasan has himself invited, me to consider the judgment of the learned Sessions Judge in the light of the settled rules of law and examine the evidence too, if necessary, where there has been a departure from these rules, in order to find out where lies the truth. The learned Government Advocate contends that I am not entitled, sitting in my revisional jurisdiction, to go behind the findings of fact recorded by the learned Sessions Judge. It was held so far back as the year 1923 by a learned Judge of this Court that it is open to this Court in revision,

'to dissent from a finding of fact which is either perverse or has been arrived at contrary to well established principles of law.' *Umed Singh v. Emperor* ('24) 11 A.I.R. 1924 All. 299.

14. I find that in the present case the learned Counsel for the applicant is on surer ground. As I read the judgment of the learned Sessions Judge, I find that either some of the premises are wrong or his conclusions from those premises are unsound. I also find that the judgment is vitiated by another error of the law and that error I have indicated in the earlier part of my judgment. The learned Sessions Judge seems to be under the impression that if some of the facts have been established by the prosecution, it lies upon the defence to establish the negative that he is not guilty. That this is contrary to the well known rule of law laid down by Viscount Sankey in *Woolmington v. Director of Public Prosecution* (1935) 1935 A.C. 462 is manifest from the following observations of His Lordship:

(a) Indeed a consideration of such special verdicts shows that it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cast a doubt as to his guilt. In either case he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden

laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

(b) Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception.

15. On the strength of these authorities it has been contended by the learned Counsel for the applicant that if at the end of the entire evidence of the case it appears to the Court that the prosecution has failed to prove its case, the verdict must be a verdict of not guilty. With the above observations in mind, I shall now try to deal with the individual cases. The first case dealt with by the learned Sessions Judge is the case of Nawab Ali. The entry about his licence is on p. 21 of Vol. 2 of the B.R. Registers. His licence expired on 31st May 1941 and was capable of renewal up to 14th June 1941. Instead of that he received a renewed licence on 4th August 1941. The payment of Rupees 20 on account of surcharge on 20th August 1941 could have been made only on a separate piece of paper. The learned Sessions Judge says:

However, the point here is that the appellant should have put all the stamps on the counterpart (Ex. P-21) whereas in fact there was only a single stamp of Rs. 10 there, and there was no reason why he should put a stamp of Rs. 10 on the counterpart and a stamp of Rs. 20 on a separate piece of paper. Even had he done so, the piece of paper ought to have been sent to the D.A.G. in the same envelope as the counterpart, and, as the counterpart was not lost, the other piece of paper should not have been lost either. The D.A.G.'s certificate (Ex. P-35) shows that the surcharge money did not reach him.

16. The learned Sessions Judge has, to my mind, strayed into several fallacies. He has assumed that the stamp of Rs. 10 and the stamp of Rs. 20 should be on the same piece of paper, that is the counterpart. I have already quoted the rule and also from the evidence of the witnesses who belong to the Department, who have deposed that if a surcharge is paid, the payment must be made by means of a stamp on a separate piece of paper. He has also made a mistake in holding that

because the counterpart was not lost, there was no reason why the other piece of paper should have been lost. This again, pre-supposes that the despatch of both was made on one and the same date. If there was an interval of time between the payment of Rs. 10 and the payment of Rs. 20 the despatch of both could not be made simultaneously. The applicant, however, is on surer ground when he relies upon the statement of P.W. 6, Irtiza Husain. This Irtiza Husain is the general agent of Nawab Ali and is the man who paid the money. His statement on this point may be quoted:

I paid Rs. 20 in cash to the accused who asked a packer to bring a stamp. He brought two stamps of Rs. 10 each. These were pasted by the accused on a piece of paper and post marked. He wrote something on the paper. After that he gave the receipt and I departed.

17. This establishes that the stamps were post marked or, to use the technical expression, defaced. Once they were post marked or defaced, they ceased to have any market-value and it is impossible to accept the prosecution case that the applicant did not send it to the department concerned or dishonestly misappropriated or converted it to his own use. The learned Judge has dismissed his evidence on the ground that the witness was either persuaded to tell a lie or was deceived by the appellant. This was nobody's case and he was not right in spelling out a new case for the prosecution. On the evidence, particularly on the statement of Irtiza Husain the prosecution with regard to this charge must fail. I now come to the case of Ganpat Prasad Verma. His licence was issued on 30th August 1940. It was to expire on 31st July 1941. The time for renewal extended up to 14th August 1941. On 2nd January 1942 the application for renewed licence was made. The position with regard to this case is this : In the B.R. Register maintained at Cawnpore is entered Ganpat Prasad Verma, serial No. 935, Registered No. of licence 479185. The date of expiry is 31st July 1941. The date of issue is 2nd January 1942. What was sent to Delhi was-merely this: 'This licence expires on the last day of the month of December 1942' and below it we find 'Dated 2nd January 1942.'

18. The case for the prosecution is that this was done deliberately to mislead the authorities at Delhi that it was a case, not of renewed licence, but of a fresh licence. The accused, on the other hand, says that it was a case of an honest mistake, as, in the register which was maintained at Cawnpore, he has also given the date of expiry as '81st. July 1941,' which makes it clear that it was not a case of a fresh licence but of a renewed licence. This answer of the accused the prosecution meets with a rejoinder that the figure '7' in the column is an erasion, the original figure was '12.' I have examined the entry with a magnifying glass and also with the assistance of the learned Government Advocate and of Qazi Hikmat Husain the official of the Department. To me the erasion is not clear. The accused, however, has invited my attention to the internal evidence furnished by the register, which will negative the theory of erasion. It is said that all cases of renewal are tick marked. If all the tick marks are added, we arrive at the figure given at the end, viz., 76. At the end of this portion of the register we find the aggregate of new licences as 53 and that of the old renewals 76, total 129. This figure of 76 can be arrived at only if the case of Ganpat Prasad is also included, not otherwise. It is, no doubt, true that there are some promiscuous tick marks in the register, ' but the learned Counsel for the defence says that this has been done in the course of the prosecution by someone to damage the defence. There are some materials on the record which indicate that the accused had apprehensions about the conduct of certain officials of the Department and he requested the authorities to take proper care of these records. It is, however, not necessary to deal with this matter, inasmuch as I find that the original entries which aggregated 76 are entries in the handwriting of the accused and are much more distinct than the other entries about which the allegation is that they have been made later. There can thus-be no doubt that the theory of erasion propounded by the prosecution fails. There can equally be no doubt that what was sent to Delhi was a result of pure mistake or inadvertence. I shall now come to the judgment of the learned Sessions Judge on this part of the case. Ganpat Prasad says that he paid Rupees 30 to the applicant but he admitted that he had prayed for an exemption that is to say refund. It was, no doubt, a case of surcharge but the accused pleaded that refund or exemption was claimed. It is not established that exemption or refund was generally not granted or that it was the exception and not rule. If this

was so, it was the duty of the prosecution to prove that this exemption or refund was not allowed; not of the accused to prove the otherwise. That particular file, it has been conceded, was before the Court - the case for the prosecution was that it was not traceable - and of the absence of that evidence it is not the prosecution which should take advantage but the accused. The learned Sessions Judge, therefore, was not right in drawing an inference adverse to the accused from the absence of certain materials which it was the duty of the prosecution to place before the Court. I, therefore, think that this charge fails.

19. I now come to Jagdish Prasad Gupta's case. On the question of exemption, which was the common feature between him and Ganpat Prasad Verma, the judgment of the learned Sessions Judge is open to the same criticism which I have made while dealing with his case with this difference that in the case of Ganpat Prasad Verma the story is that the record is not traceable, whereas in this case the story is that it has been weeded out. Whether the record is not traceable or has been weeded out, the legal effect is the same, viz, the absence of certain material documents. As said above, it is the accused and not the prosecution that is entitled to the benefit of the gap. The oral evidence led by the prosecution is also far from satisfactory. The defence, inter alia, was that the sum of RS. 20 alleged to have been paid by this man, was never paid. No account-book has been produced by Jagdish Prasad Gupta, His name indicates that he is a Vaish gentleman. It does not stand to reason that he will not have account-books in his possession, particularly when he carries on a fairly substantial business and pays an income-tax of Rs. 3500. The Court is entitled to draw its own conclusion from, the absence of this very material evidence. Besides, the definite version which he gave in support of the payment of this amount does not stand examination. He cannot mention the name of the servant through whom he sent the money; he admits that two of his servants, Soney Lal and Bindbasni Prasad, were prosecuted for embezzlement. The burden of proving the payment of the amount to the accused rested upon the prosecution and, in this case, I feel constrained to say that almost every link in the chain of the evidence which it was their duty to prove is missing. Although the learned Judge has not put it in so many words, I read Ms-judgment to mean that he thought that there was some inconsistency between the two pleas taken by the accused. An alternative plea is permissible even in a civil case. I

know of no rule of law which forbids such a plea in a criminal case: Yusuf Husain v. Emperor ('18) 5 A.I.R. 1918 All. 189.

20. I now come to the last case, viz., that of Nand Lal Misra. In common with the cases of Jagdish Prasad and Ganpat Prasad the prosecution suffers from the same infirmity, viz., that it has not produced the exemption list maintained at Lucknow. Here it is not a case of the list not being traceable but of being actually weeded out. The result, as I have said, is the same. The learned Sessions Judge has relied upon Ex. P-35 in holding that it is not a case of exemption. I have' already held that Ex. P-35 and Ex. P-36 are not admissible in evidence. Even if they are, they do not fill up the gap created by the absence of the exemption list. The learned Sessions Judge has held that the counterpart was not lost, which will lead to a presumption that the surcharge stamps were not sent. In this case the payment of the surcharge was made six months later and he is, therefore, not right in holding that they were sent in the same envelope and the one necessarily shared the fate of the other.

21. From the above it is clear that the prosecution has failed to prove the case against the accused. Part of the oral evidence I have definitely disbelieved; part of the evidence I have held to be inadmissible; another part which should have been brought to the Court was never so brought. The result is that the prosecution has entirely failed to prove the guilt of the accused and I hold him not-guilty. I, therefore, allow this application and set aside the conviction and sentence. The accused need not surrender to his bail. Before parting with the case I must acknowledge the great assistance which I have received from Qazi Hikmat Husain the official of the Department, but for whose co-operation and help it would not have been possible for me to follow this difficult case.