

**Abdul Hakim Vs. the State**

**Abdul Hakim Vs. the State**

**SooperKanoon Citation :** [sooperkanoon.com/472737](http://sooperkanoon.com/472737)

**Court :** Allahabad

**Decided On :** Aug-24-1956

**Reported in :** 1957CriLJ117

**Judge :** Mulla, J.

**Appellant :** Abdul Hakim

**Respondent :** The State

**Judgement :**

**Mulla, J.**

1. Appellant Abdul Hakim, a police constable posted at the Civil Lines Chauki Rae Bareli, has been convicted under Section 5(a)(d) of the Prevention of Corruption Act and sentenced to one year's rigorous imprisonment by the Sessions Judge, Rae Bareli. In the alternative he was found guilty under Section 384 I. p. Code, but no sentence has been awarded to him under this section.

2. The prosecution story is that P.W. 1 Lala tthosi, the complainant in this case, resided to Mohalla Chhota Ghosiana which is about a mile from the city and lies within the police circle Chauki. It is alleged that about 3 or 4 days after the Diwali day in October, 1954, Lala was irrigating his field in his village Malikmau. which is also within Civil Lines Chauki.

The appellant along with another constable known as Pandit came to him and asked him to accompany them as the Kotwal wanted him & was present near the railway crossing. The complainant went with the two constables asked Allahdin. also to accompany them as he too was wanted by the Kotwal. Allahdin did not agree to accompany them, but the two constables compelled Allahdin to come with them and as the way passed through the village of complainant, three other Ghos went with the party so that the complainant may not be beaten. Further on, this party met Akbar and Moti Ghosis and they also joined this group and all of them together went to the Kotwali.

3. When the Ghosis were brought before the Kotwal, the appellant told the Kotwal they were caught gambling in a field, upon which the Ghosis were searched and only a few annas were recovered from their personal search. The Kotwal thereupon asked the Ghosis to speak the truth and the Ghosis offered to abide by the oath of the appellant on the Quran.

They were kept at the Kotwali for some time and meanwhile Sri Debi Charan Pande (P. W. 3). who is the President of the City Congress Committee and is also known as Sadhu, came to intervene on their behalf. Sri Pande was approached by some other Ghosis, who had informed him that Lala has been arrested on a false accusation. Apart from Sri Debi Charan Pande, one Ram Kirpal, who is the owner of a sweets shop and was a customer of the complainant, also came to the Kotwali, when he came to know about the arrest of the complainant. As a result of this intercession the Ghosis were released. The complainant then came back at about 6 P. M. to his home.

4. Later the same night the appellant again came to the house of Lala and told him that he had spoken in his favour and thus got his release from the Kotwal, He, however, demanded Rs. 10/-/- from the complainant and while doing so, he showed him a bottle of liquor and threatened to have him locked up if the money was not paid, at the shop of Ram Kirpal at about 3 P.M. the following day. The appellant then went away. Immediately afterwards, Lala went to the City Congress Office and contacted Sri R. S. Dwivedi, M.L.A., and related the whole story to him. As It was night, Sri Dwivedi asked Lala to come to him the next morning.

5. The following morning which was 1-11-1954, the complainant went to deliver milk as usual to Ram Kirpal's shop which is close to the Congress Office and there he met Sri Dwivedi. Sri Dwivedi then took the complainant to the house of Sri R. C. Muir, who was Sub-Divisional Magistrate Sadar, and told the whole story to him. Sri Muir then called Lala to his court, When Sri Muir reached the court, he called the complainant and recorded his statement.

He then drafted a report and sent it to the Deputy Commissioner, Sri' Bhattacharya. In this report Sri Muir suggested that as he was well known to the policemen of his circle, he should not be deputed to lay the trap as he would be recognized.

6. The Deputy Commissioner by his order deputed Sri Mewo Ram, Sub-Divisional Magistrate, Salon, to do the needful and investigate the matter. Sri Mewa Ram again recorded the statement of the complainant and then asked him to bring a ten rupee note. Lala borrowed this note from the shop of Ram Kirpal and went back to Sri Mewa Ram. Sri Mewa Ram then initialled the note and noted its number. He gave instructions to Lala to hand this note over to the appellant at Ram Kirpal's shop. When the statement of Lala was recorded, Sri Dalel Singh, the Deputy Superintendent of Police, was also present and instructions were given to Lala by both these officers.

7. At about 2 or 2.30 P.M., Sri Mewa Ram sent Lala complainant to find out if the appellant was present at Ram Kirpal's shop. The complainant went there and saw the appellant sitting on the road in front of the shop. On seeing the complainant, the appellant demanded the money, but the complainant, prayed for time and told the appellant that he was on his way to the cattle pound to have his cattle released and would pay him after his return from the pound. Lala complainant then came back to Sri Mema Ram and informed him that the appellant was sitting near Ram Kirpal's shop.

The Deputy Superintendent of Police and the Magistrate instructed Lala to keep his appointment with the appellant and to take him away from shop for a shortwhile and then bring him round. Lala was also instructed to hand over the marked note when he brought the appellant back to Ram Kirpal's shop. This was

presumably suggested in order to give the Magistrate and the Deputy Superintendent of Police an opportunity to secretly lay the trap at Ram Kirpal's shop.

8. Lala then came to Ram Kirpal's shop at about 3 P.M. and found him still standing at a short distance from it. Lala again in order to delay the matter told the appellant that he will pay the money after borrowing it from Ram Kirpal. He then asked the appellant to come with him to the Post Office, as he had to make some purchases and as Ram Kirpal was not at his shop at the moment.

The appellant went with Lala to a betel shop & after some time both of them came back to Ram Kirpal's shop. Ram Kirpal was not present at his shop, but his servant Hari Kishan alias Guru was sitting at the counter. There is a Bargad tree in front of Ram Kirpal's shop and it was here that Lala handed over the marked note to the appellant.

9. In the meanwhile Sri Mewa Ram accompanied by the Deputy Superintendent of Police had reached the shop of Ram Kirpal and were sitting in a back room. They had come in the car of Sri Muir, which was driven by P.W. 9 Sidhnath Tewari, who is employed as a peon in the Tehsil. When the two officers had gone inside the shop of Ram Kirpal, they had posted Sidhnath Tewari on the road in front of the shop and had instructed him to give a signal when the money was passed to the appellant.

As soon as the money was handed over by Lala to the appellant, it is alleged that the appellant asked Lala to come and have some sweets with him at Ram Kirpal's shop. Sidhnath Tewari had immediately gone to the back room and informed the two officers that Lala and the appellant had come to the shop of Ram Kirpal and they were purchasing sweets. Both the officers immediately rushed out of the shop and on seeing them the appellant ran away on a cycle.

The two officers as well as Lala pursued the appellant and the Deputy Superintendent of Police ordered the appellant to stop in a loud voice. The appellant then stopped and he was searched at a distance of about 50 paces from the shop. Nothing was recovered from his person and then lie was brought back to

the shop of Bam Kirpal. When the two officers came back to the shop of Ram Kirpal, they asked Hari Kishan to hand over the marked currency note to them. This note was lying on the board of the counter.

The Magistrate then recorded the statements of Hari Kishan and another boy servant Bhawani Din on oath. He also asked the appellant to give a statement, but the appellant was not willing to give a statement and only said that a case has been fabricated against him and he has committed no mistake. A recovery memo of the note was also prepared by the Magistrate. The appellant was not arrested at the spot and was permitted to leave.

10. The Magistrate then submitted his re-port to the Deputy Commissioner and a sanction to prosecute the appellant was given by the appropriate authority, Sri Malkhan Singh, Circle Inspector, (P.W. 10) was deputed to investigate the case. After completing the investigation, Sri Malkhan Singh prosecuted the appellant.

11. The appellant has given two statements in this case. He was first examined under Section 342 Cr. P. C. as an accused person and then under the provisions of the Prevention of Corruption Act, he made a statement on oath and was cross-examined. In his statement as an accused, he alleged that Lala Ghosi was a bad character, who had been caught several times for gambling and other bad characters collected at his house.

It was the duty of the appellant to watch the movements of Lala Ghosi, as he resided in his beat and on an earlier occasion in connection with a theft case the house of Lala was searched and he had beaten him on that occasion. Regarding the incident he stated that he was going from his house at about 3.30 P.M. on the 1st of November to the Civil Lines Chauki on a cycle, when he was stopped by the Deputy Superintendent of Police near the shop of an oil dealer.

He was accused of having purchased sweets from Ram Kirpal's shop and of giving a ten rupee note, which he denied. He was then brought to the shop where the Magistrate and the complainant were present and he denied the charge again in their presence. Three days later he was arrested by Sub-Inspector Shaukat Hussain on the 4th, of November, When the appellant came in the witness box, he

made a more detailed statement.

He stated that on the morning of the incident, Lala complainant had come to him at the Chauki at about 9.30 A.M. and had informed him that some gamblers can be arrested if he accompanied him. The appellant then told Lala to meet him at 3 P.M. at his house. Lala did not come to his house and as it was the 1st of the month, the appellant went to the Kotwali at about 2.30 P.M. to secure his pay. Unfortunately the money had not arrived and then the appellant was returning on the road that passes in front of the Post Office,

Lala then told him that gambling was going on at kiln nearby and so both of them proceeded towards the kiln. They were hardly on their way towards the kiln when Lala seeing two passers-by said that two of the gamblers are going away and so the idea of going to the kiln was dropped. Both of them then came to Ram Kirpal's shop to have some refreshment and it was Lala complainant who had handed over the ten rupee note to Hari Kishan and asked him to give sweets for one rupee.

One Uma Shankar Constable was also purchasing sweets at the time and Hari Kishan kept this note on the Patra, Just then the Magistrate and the Deputy Superintendent of Police came out of a room at the back and Uma Shankar was caught and searched. The appellant apprehending some trouble picked up his cycle and left the place, but he was stopped near the kerosene oil shop by the Deputy Superintendent of Police, He was questioned at Ram Kirpal's shop, but he denied that he had given any note.

12. In defence police constable Uma Shanker has been examined and he supports the story 'given by the appellant. Uma Shanker further stated that at the time when he was being search- ed Lala pointed towards the appellant who had left on his cycle and then the two officers pursued him.

13. The trial court after considering the evidence came to the conclusion that it has been satisfactorily established that it was the appellant who uttered the marked note and handed it Over to Hari Kishan. It, therefore, convicted the appellant, as mentioned above.

14. The only question which needs decision in this case is whether the prosecution has succeeded in establishing that the marked note came into the possession of the appellant. The prosecution relies on the following pieces of evidence to prove its case. Firstly, there is the statement of Lala. Secondly, there are the statements of P.W. 2 Hari Kishan and P.W. 4 Bhawani Din made immediately after the incident and which were recorded by the Magistrate at the shop of Ram Kirpal.

In these statements both these witnesses had stated that the note was handed over by the appellant. Thirdly, there are three other circumstances which can be said to corroborate the statement of Lala. These three circumstances are:

1. That the sweets were ordered by the appellant and not by Lala.
2. That the appellant, when he was questioned at Ram Kirpal's shop, did not make a specific denial and refused to give a statement, and
3. That the appellant ran away on his cycle as soon as he saw the two officers coming out from the back room.

15. The trial court has held the statement of Lala to be that of an accomplice and, therefore, it accepted the contention of the defence that Lala's testimony alone would be insufficient to prove the handing over of the note by the appellant unless it was corroborated by some other, evidence. It, however, considered the three circumstances mentioned above as sufficient corroboration of Lala's statement. As regards the statements of Hari Kishan and Bhawani Din, the trial court observed:

Learned counsel (prosecution) argued that the previous statements of Hari Kishan and Bhawani Din could be used to corroborate them under Section 157 Evidence Act, as in this Court even after the statements were read out to them, they could not remember whether the accused had given the note or not. Reliance was placed upon the decisions reported in *Sanika Munda v. Emperor* 36 Cri LJ 195 : AIR 1935 Pat 19 (A) and *Samser Ali v. Emperor* : AIR 1947 Cal 342 and to Munir's Law of Evidence page 1188.

These authorities undoubtedly show that it is doubtful whether the previous statements would be admissible to corroborate their testimony, but even if those

statements are rejected, it will be observed that both of them are unanimous that it was the accused who had ordered the sweets which in itself corroborates the complainant's testimony that it is he who has given the ten rupee note at the shop.

It would appear from the extract quoted above that the trial court gave no clear finding whether these two statements could be used in evidence or not. Ostensibly the trial court did not use them, but a perusal of the decision indicates that the mind of the trial court was greatly affected by these two statements.

16. When Sri Mewa Ram was cross-examined, he stated that he did not know under what section he had recorded the statements of Hari Kishan and Bhawani Din. The only provision of law under which these statements could be recorded is Section 164 of the Code of Criminal Procedure. The very fact that the Magistrate did not even know under which section he was acting seems to indicate that he was not acting on his own, but was acting under the advice of Sri Dalel Singh, who was present. However, as these statements were taken on oath, they can only be treated as statements under Section 164 Cr. P. C.

17. It is settled law that statements under Section 164 Cr. P. C. can be used only either to impeach the credit of a witness or to corroborate his subsequent statement made in court. In no circumstances can a statement under Section 164 Cr. P. C. be substituted as the evidence of a witness. The only provision of law by which a statement not made before the trial court can be used as substantive evidence is Section 288 of the Code of Criminal Procedure. Section 288 Cr. P. C. runs as follows:

The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may in the discretion of Presiding Judge, if such a witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872.

18. It would thus appear that the only statement which can be treated as substantive evidence at a later stage of the trial is the evidence of a witness made before the committing Magistrate. The reason for this rule is very obvious. When a witness makes a statement in the Magistrate's court, he makes it in the presence

of the accused and the accused has an opportunity of cross-examining the witness.

In such circumstances if a witness subsequently resiles from his earlier statement and the court feels that he has been won over by the accused it can rely upon his earlier statement and bring it on record under Section 288 Cr. P. C. This section, however, does not apply to statements recorded under Section 164 Cr. P. C. The statements under Section 164 Cr. P. C. are not made in the presence of an accused person and there is no right or opportunity of cross-examining the witnesses at that stage.

They can, therefore, be used only for a very limited purpose. That purpose is either to impeach his credit, if he makes a different statement subsequently, or to corroborate his statement if he makes a similar statement. Where such a statement is used for the purposes of corroboration, it only strengthens the value of the statement made in court.

If on the other hand, it is used for impeaching the credit of a witness, it discredits his testimony but it cannot be substituted for the statement which the witness makes in court. The word 'corroboration' by itself denotes that a statement to that effect exists on the record of the case. Where no such statement exists on the record of the case, a statement which is different to that statement cannot be said to corroborate the statement made in court.

The authorities are very clear on this point. As early as the year 1915, Lindsey J., while sitting as a Judge in the Judicial Commissioner's Court of Oudh, observed with reference to statements under Section 164 Cr. P. C. in *Puttu v. Emperor* 17 Oudh Cas 363 : AIR 1914 Oudh 388 (C):

They were it is true admissible under the provisions of Sections 145 and 155 of the Indian Evidence Act for the purposes of contradicting the statements made by these witnesses in court, but they were not admissible for any other purpose. They were statements which were made behind the back of the accused and which he had no opportunity of cross-examining.

They were not statements to which the provisions of Section 288 Code of Criminal Procedure applied. That section enacts a special provision for the admission against an accused at a Sessions trial of a statement made by a witness in the court of the committing Magistrate after the accused has had a proper opportunity for cross-examination.

This decision was followed by a Bench of the Allahabad High Court in *Bishen Dutt v. Emperor* : AIR1927 All705 . The learned Judges observed:

If it is to be used (statement under Section 164 Cr. P. C.) as the learned Sessions Judge has used it, then it is adding something to what the witness had not said at Sessions and it is not merely impeaching his testimony, but supplementing it.

The Allahabad decision was in its turn approved by a Bench of the Patna High Court in 36 Cr LJ 195 : AIR 1935 Pat 19 (A). The learned Judges held:

That a statement under Section 164 Cr. P. C. can only be used to corroborate the statement of a witness. Where, therefore it is sought to contradict the witness by his former statement and he stands contradicted thereby, then the former statement cannot be used as substantive evidence against the accused.

There are two Privy Council decisions also which also stress the same point. In *Bhuboni Sahu v. The King* , their Lordships of the Privy Council observed:

A statement made under Section 164 of the Code of Criminal Procedure can never 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.

In the other Privy Council case '*Brij Bhushan Singh v. Emperor* ' their Lordships observed:

In reaching this conclusion, however, the Chief Court used statements made by the Ayah Haliman and the Chauffeur Mahabir under Section 164 of the Cr. P. C. as substantive evidence of the truth of the facts stated. It is true that in their judgment the learned Judges say, 'We may add the statements under Section 164 cannot be and have not been used as substantive pieces of evidence, but only for

such purposes as the law permits.'

A perusal, however, of the whole judgment makes it apparent in their Lordships' view that the statements were used as substantive evidence... A statement under Section 164 can be used to cross-examine the person who made it and the result may be to show that the evidence of the witness is false. But that does not establish that what he stated out of Court under Section 164 is true.

19. It seems to me that the learned trial court also, while considering the statements of Hari Kishan and Bhawani Din as Of doubtful value, really placed reliance upon them and this vitiated its findings. Hari Kishan and Bhawani Din, when they were examined in court, stated that Lala and the appellant came together to the shop of Ram Kirpal and one of them threw a note on the Patra. They did not remember who threw this note.

The earlier statements of Hari Kishan and Bhawani Din instead of corroborating this statement amounted to contradiction. In those statements Hari Kishan and Bhawani Din stated that the note was uttered by the appellant. These earlier statements could, therefore be used to impeach the credit of Hari Kishan and Bhawani Din, but they could not be substituted in place of the evidence which they gave in court.

20. Once these two statements are eliminated from consideration, the evidence against the appellant becomes quite inadequate and conviction cannot be based upon it. I have already mentioned above that the trial court was not willing to accept the statement of Lala alone, unless it was corroborated by some other evidence. The only pieces of corroborative evidence are the three circumstances mentioned above.

The trial court came to the conclusion that because the sweets were ordered by Abdul Hakim, therefore, it is sufficient to prove that the tainted note came from his possession. In my opinion this conclusion is not warranted. It frequently happens that when two persons go together to any shop, where refreshments are provided, any one of the two persons gives the order and it is not possible to conclude that the person who gave the order must be presumed to be the person who handed

over the money.

There can be no corroboration by means of a presumption. Even if it is accepted that it was the appellant who ordered the sweets, it is not fit circumstance from which it could be inferred that he handed over the tainted money.

21. No corroboration can be sought from the other two circumstances either. That the appellant did not give a detailed statement at the spot when he was accused of a crime could hardly be a circumstance from which a presumption of guilt can be drawn. The appellant wanted to give a considered statement and if he did not give a detailed statement immediately after the accusation was levelled against him, it is not possible to draw any inference adverse to the appellant from his silence.

Sri Mewa Ram admitted in cross-examination that the appellant stated that the case had been fabricated against him. This amounts to a denial and I fail to understand how the trial court came to the conclusion that the appellant did not deny his guilt.

22. The third circumstance that he ran away on the cycle merely indicates his nervousness at the moment, which does not necessarily point to his guilt. He finds a constable being searched at the spot and so he tries to move away from the place. These circumstances are not of that character which would warrant their being treated as corroborative pieces of evidence. They do not add any weight to the statement of Lala that it was the appellant who uttered the marked note,

23. The result is that only the evidence of Lala remains against the appellant. It is not possible to find the appellant guilty on the basis of this uncorroborated evidence alone. On the evidence as it stands the appellant must be acquitted.

24. Before parting with this case I find it necessary to observe that the investigating agency did not put its heart in prosecuting this case. Lala did not get a fair deal from the very beginning. To start with, the trap laid was an extremely clumsy trap. Sri Muir had written in his note to the Deputy Commissioner that as he was known to the appellant, some other officer should be appointed to lay the trap and yet I find that Sri Mewa Ram and Sri Dalel Singh came on the car of Sri

Muir to the shop of Ram Kirpal.

The car could have been equally well known to She appellant who was posted at the Civil Lines, Rae Bareli. A tahsil peon was picked up as the driver of this car. This tahsil peon could also be known to the appellant. The peon was posted outside the shop of Ram Kirpal in full view of the appellant, if an example was to be picked out to demonstrate how a trap should not be laid, this case would provide an admirable instance. It seems that instead of keeping the appellant off his guard, every attempt was made to warn him.

25. Again after the money had changed hands, the officers concerned came out too late from the back-room. They were again caught napping and in the meanwhile the appellant had succeeded in removing the tainted money from his person. Either the tahsil peon made a belated signal or the two officers were lingering over a cup of tea. The most charitable view that can be taken of the whole episode is that the appellant was more intelligent than the officers concerned. Sri Mewa Ram cannot be blamed for the clumsiness of this trap because in my opinion he was acting under the Instructions of Sri Dalel Singh.

26. Even after the trap had failed the officers acted in a strange manner. There was a delay of about 45 minutes in recovering the tainted money. The evidence shows that the marked note was handed over to the appellant at about 3.30 P.M. and yet the recovery note was prepared at 4.15 P.M. During all this time this note remained on the counter of the shop. It is difficult to place any reliance on such a belated recovery, as the identity of the note coming from the pocket of the appellant cannot be established in these circumstances.

27. The statements of Hari Kishan and Bhawani Din were recorded in the presence of Sri Dalel Singh. Statements recorded under such circumstances are hardly better than the statements recorded by the police in the course of investigation.

28. Subsequently when Sri Malkhan Singh investigated the case he did not try to collect any evidence to corroborate the statement of Lala on material points. Lala had stated that when he was released by the Kotwal, the appellant came to his

house the same night. The investigating agency could have found evidence to support Lala on this point. Similarly the prosecution case is that the appellant was waiting outside the shop of Ram Kirpal since about 2 O' clock in the afternoon.

This allegation could have been corroborated and a corroboration on this point would have materially strengthened the statement of Lala. Even when Ram Kirpal was examined as a witness in the case, no attempt was made to elicit from him that a ten rupee note was given to Lala earlier in the day from his shop. Again Allahdin, Akbar and Moti Ghosis were not examined to corroborate the statement of Lala that they were wrongfully taken to the Kotwali, although they were not gambling in any field and only a few annas were recovered from their persons.

Sri Chandrapal Singh, the Kotwal, was permitted to get away with a false statement, which he obviously made in the interests of the appellant. Sri Chandrapal Singh stated that he released the Ghosis because they were found gambling only a few days after Diwali at the intervention of Sri Debi Charan Pande and Ram Kirpal.

I have no hesitation in preferring the statement of Lala to the statement of Sri Chandrapal Singh. The appellant could not have brought the Ghosis in this manner to the Kotwali, unless Sri Chandrapal Singh had also stakes in the game and was willing to back the play of the appellant. It was only the intervention of Sri Pande that saved the Ghosis and the incident could not be turned into a profitable proposition.

29. When the case came in court, the most Important witnesses Hari Kishan and Bhawani Din resiled from their earlier statements made under Section 164 Cr. P. C. The tahsil peon who was instructed to note the passing of money from the hands of Lala to the hands of the appellant and to give a signal when the money changed hands conveniently failed to notice it, although this money was paid under the Bargad tree which was only a few paces away from him.

It is difficult to accept that this land slide was the result of the unaided efforts of the appellant. It seems far more probable that the higher police officers concerned gave their secret approval to this change of front and the witnesses encouraged by

this attitude resiled from their further statements. Again it is difficult to accept that Uma Shanker constable who appeared as a defence witness would have come forward to support the defence version of Lala throwing the marked note on the counter, unless he knew that the higher police officers will not visit their displeasure on him for giving false evidence.

For all these reasons I cannot help suspecting that it was not a mere accident that the evidence against the appellant became insufficient and unsatisfactory. I cannot help feeling that the case was deliberately spoilt by the prosecuting agency & it has not entrapped little boy who succeeded in breaking through the net by his own unaided efforts but it was his fairy God-mother who quietly loosened it in order to save him.

30. On the record as it stands, there is no statement to prove that the appellant ever came into possession of the marked note, except the statement of Lala. On the other hand there is the statement of Uma Shankar that it was Lala who threw the note on the counter of the shop. The statement of Lala rings true, but an accused person cannot be held guilty on moral conviction alone.

31. I, therefore, reluctantly allow the appeal, set aside the order of conviction in this case and acquit the appellant. The appellant is on bail. He need not surrender. His bail bonds are cancelled.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**