

**Jagadamba Prasad Vs. the State**

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**Court :** Madhya Pradesh

**Decided On :** Aug-06-1956

**Reported in :** 1957CriLJ179

**Judge :** Dixit, J.

**Appellant :** Jagadamba Prasad

**Respondent :** The State

**Advocate for Pet/Ap. :** Mr. Inamdar

**Judgement :**

ORDER

**Dixit, J.**

1. The applicant Jagadamba Prasad was convicted by the Additional City Magistrate, Lashkar under Section 409 I. P. C. and sentenced to six months rigorous imprisonment. His conviction was confirmed by the Additional Sessions Judge of Gwalior on appeal. The sentence of six months rigorous imprisonment was however, reduced by the learned Sessions Judge to one already undergone by the accused. The applicant has now come up in revision to this Court.

2. The prosecution case was that in 1949 the applicant was a cashier in Scindia State Railways and that in that capacity he was entrusted with the duty of

withdrawing for disbursements and of crediting various amounts in the treasury and to maintain accounts thereof. Some time in September 1949, the General Manager of the Railways Guha came to know that several amounts had, not been properly adjusted and appropriated in the accounts office. He, therefore, directed the Deputy Manager Mr. Kawada P. W. 3 to check the accounts and accordingly Mr. Ka-wade was to check the accounts on 26-9-1949 which was a Monday. At the close of the day on 24-9-1949 Harimohan P.W.14, a pay clerk in the accounts office kept in his safe some amount which was in his possession.

The applicant Jagadamba Prasad kept some money in a small cash box instead of in a safe. Harimohan and the applicant used to work in one and the same room and their safes and cash boxes were also in the same room, While leaving the office on the evening of 24-9-1949 Harimohan locked the room where the safes and cash box had been kept. He affixed to the lock a signed label. Both Harimohan & Jagadamba Prasad had key each of the lock. On 26-9-1949 Harimohan had to proceed on Shivpuri line for payment of salaries to the railway staff.

He, therefore, went to the office in the morning and when the office was opened by the Chaprasi, he found that the lock bearing his signed label was missing and the cash room was open. On entering the room Harimohan found in fact the cash kept by him in his safe. But he did not find the small cash box which was in the charge of the applicant. Harimohan then made attempts to inform his superior officers of what he had seen. He also gave information about the incident to the railway staff whom he met at Jiwaji Ganj Station, while he was going to Shivpuri.

Accordingly Gajanan, a clerk of the accounts section P.W. 4 went to the house of the applicant and informed him that his cash box was missing. The applicant came to the office at the usual time on 26-9-1949. Mr. Kawade, Deputy General Manager also came for checking the accounts. According to the account kept by the applicant a sum of Rs. 17,211/10/- should have been with him on 26-9-1949. When Mr. Kawade questioned the applicant, he admitted this amount as the 'cash in hand' and said that on 24-9-1949 he had kept this amount in a small cash box and that the cash box was missing. Mr. Kawade then addressed a letter Ex. P. 1 to

the Sub-Inspector Police of the Scindia State saying that an iron box containing about Rs. 17,000 was missing from the cash office of the Railways.

The amount of Rs. 17,211, 10/- Included unpaid wages, deductions from the salaries of the members : of the stall on account of house-rent, sanitation, etc. and the proceeds of the sale of Certain stores amounting to some thousands which the applicant had received from the Stores Department. This amount had been sent by the Store, Department to the applicant in several hundred rupees notes, the numbers of which had been noted in the Stores Department. Immediately after seeding the letter Ex. P, 1, Mr. Kawade contact d the Stores Department and noted the numbers of these hundred rupee notes in the presence of the applicant.

A list of these notes was prepared and on 27-9-1949 Mr. Kawade forwarded a typed list of the numbers of the notes to the police with a covering letter Ex. P. 3. During the course of investigation the police recovered at the instance of Hint Khalasi a lock and some currency notes of small denominations. On 14-10-1949 the accused was taken by the police first to Mathura and then to Lalitpur. It is said that on reaching Lalitpur, the applicant recovered from his brother-in-law Raghunath Prasad thirty-seven notes of hundred rupee each. A memo Ex. P. 4 of the recovery of these notes was prepared. The numbers of the recovered notes tallied with some hundred rupee notes by which the amount of the proceeds of the sale of the stores had been remitted by the stores Department to the applicant.

3. Jagadamba Prasad was first tried along with Hira, Khalasi and one Bhagirath on a charge under Section 379, I. P. C. Bhagirath was discharged by the trying Magistrate. The applicant and Hira were, however, convicted under Section 380 I. P. C. In appeal the learned Sessions Judge of Gwalior acquitted Hira & upheld the conviction of Jagadamba Prasad. The applicant then came up in revision to this Court. This Court set aside the conviction of Jagadamba Prasad under Section 380 I, P. C. and ordered his retrial on a charge under Section 409 I. P. C., on the view that as Jagadamba Prasad was a cashier and was entrusted with certain moneys, then if he appropriated the money to his own use, then he could not be said to have committed any theft and that he could only be charged under Section 409 I. P. C. for the act of misappropriation. Jagadamba Prasad was accordingly

retried and convicted under Section 409 I. P. C.

4. The applicant admitted that he was a cashier in the Railway and that as such was responsible for crediting in the treasury and for withdrawal therefrom of moneys belonging to the Railways, its distribution and for maintaining proper accounts of the moneys. He also admitted that according to the accounts kept by him, an amount of Rs. 17,211/10/- should have been with him. He sought to explain his failure to produce the amount by saying that the cash box in which it had been kept, had been stolen by someone.

In his examination under Section 342 Cr. P. C., the applicant suggested that the General Manager Mr. Guha had a third key of the lock of the cash room and that Hira Khalasi somehow managed to obtain the key from Mr. Guha and removed the cash box. Both the Courts below rejected this explanation.

They found the defence false and improbable and the dishonest intention of the applicant established by the circumstances, (1) that the accused Jagadamba Prasad failed to credit into the treasury the amount of unpaid wages and of certain pay deductions and retained it with him for several months; (2) that departing from the usual practice he kept a large amount of cash in a small cash box instead of in the safe on 24-9-1949; (3) that he visited the office on the morning of 25-9-1949 which was a Sunday; (4) that he was in possession of a key of the lock put on the cash room; (5) and that he recovered from his brother-in-law at Lalitpur thirty-seven notes of hundred rupee each.

The trial Magistrate found that the list of the numbers of the hundred rupee notes which Mr. Kawade had sent to the police on 27-9-1949 was admissible in evidence and held that the notes recovered at the instance of the accused at Lalitpur were identical with those which he had received from the stores Department. The learned Additional Sessions Judge thought that the list was inadmissible and that there was no other evidence to establish the identity of the recovered notes with those entrusted with the accused. He, however, took the view that the recovery of thirty-seven hundred rupee notes at the instance of the accused from his brother-in-law was in itself a circumstance against him.

5. Before me Mr. Inamdar learned Counsel for the applicant first urged that the applicant could not be said to have been entrusted with any moneys inasmuch as from the evening of 24-9-1949 until the morning of 26-9-1949 he had not the exclusive custody of the cash and that on the other hand Hari mohan and the Chowkidar of the office were in possession of keys of the room and had access to it. There is no force in this contention. The word 'entrusted' when used with respect to money means that the money has been transferred to the accused in circumstances which show that notwithstanding its delivery to the accused, the property in it continues to vest in the prosecutor and the money remains in the possession or control of the accused as a bailee to be restored to the bailor or applied in accordance with his instructions.

Here the property in the moneys which the applicant received from the Stores Department and in the amount of unpaid wages and deductions from the salaries of the staff which the accused kept with him, clearly vested in the Railways. The applicant did not deny the retention and receipt of these amounts. As a cashier he was under an obligation to appropriate them in accordance with the standing accounts instructions and those given to him from time to time by his superior officers. The applicant alone was in charge of the keys of his safe and the cash box where according to him the amounts in question had been kept.

It cannot, therefore, be maintained that he was not entrusted with any moneys. No doubt the applicant was not the only person who had access to the cash room and for that reason from the mere circumstances that he was in possession of the keys of the cash room, it cannot be inferred that he alone and no one else could have been responsible for the disappearance of the cash box. The fact that Harimohan or someone else, as the applicant said, also possessed keys of the cash room, would at the most suggest that the other persons who were in possession of the cash room keys had also an opportunity of removing the cash box. But this cannot alter the fact of entrustment of the moneys with the applicant. In my opinion on the material on record there can be no doubt the applicant was entrusted with the moneys for the misappropriation of which he was charged.

6. It was then said that the evidence about the recovery of 'thirty-seven' notes at the instance of the accused was suspicious and unreliable and that the list Ex. P. 3 containing the numbers of the notes received by the applicant from the Stores Department which Mr. Kawade forwarded to the police was inadmissible and that if the evidence of the recovery of the notes and their identity is excluded, then there is no evidence to show that the defence put forward by the accused was false or improbable. I am unable to accept this contention. Both the Courts below have found the fact of the recovery established and there does not seem to me any reason to disagree with this finding.

The recovery of the notes at Lalitpur Railway station at the instance of the accused and from his brother-in-law has been deposed to by Nilkanth Nagarkar C. I. D. Inspector P. W. 13, Raghuvar Dayal P. W. 10, Nathuram Kale P. W. 11 and Vilas More P. W. 16. From the statements of Nagarkar and Raghuvar Dayal it is clear that when the applicant was brought to Lalitpur, he took the police to his brother-in-law's place and obtained from him thirty-seven notes of hundred rupees each and a memo Ex. P. 11 of the recovery was made. Nathuram Kale and Vilas More also attested the recovery memo.

There is no doubt some difference between the statements of Raghuvar Dayal and Nathuram Kale as to the time when the memo was prepared and as to whether Nathuram came first or Raghuvar Dayal came first to witness the recovery. Nathuram said that he appeared on the scene for the first time when the memo was being prepared and the numbers of the notes were being tallied and that Raghuvar Dayal came subsequently. The evidence of Raghuvar Dayal is that he was present when the accused handed over the 'thirty-seven' notes to the police. There is nothing in the statement of Nathuram to indicate that Raghuvar Dayal was not present at the time when the accused handed over the notes to the police.

The possibility remains that after the handing over of the notes to the police by the applicant, Raghuvar Dayal may have left the party and joined them again when Nathuram was present. Nathuram's statement does not, therefore, in any way destroy the value of the statement of Nagarkar or Raghuvar Dayal that the applicant handed over the notes to the police after obtaining them from his

brother-in-law. Both Nagarkar and Nathuram said that the recovery was sometime in the evening of 14-10-1949, Raghuvar Dayal said that it was in the morning. This difference in the time can easily be explained by the fact that it was nearly five years after the incident that Raghuvar Dayal gave his evidence in the trial. Vilas More no doubt said that he did not notice from where the notes had been brought. But when the witness was declared hostile and cross-examined and confronted with his previous statement where he had said that the applicant Jagadamba Prasad obtained the notes from his brother-in-law and kept them in his pocket, the witness replied that he did not remember these details five years after the incident. Raghunath Prasad, a brother-in-law of the applicant while giving evidence as a defence witness denied having handed over any currency notes to Jagadamba Prasad at Lalitpur.

He said that on the evening of 14-10-1949 a cabinrnan came to his house and told him that he was wanted at the station; that thereupon he went to the station and found some ten or twelve persons in the waiting room noting down the numbers of some currency notes; that he saw Jagadamba Prasad for the first time in the waiting room that when someone in the waiting room inquired who he was the police learnt that he was a brother-in-law of the accused and that thereupon the police asked him to sign the recovery memo which he refused.

This statement of this witness can only be accepted on the untenable assumption that the police planted the currency notes on to the accused and took him to Lalitpur Railway station expecting that by some luck or chance they would meet at Lalitpur, a relation of the accused. The applicant himself in his examination under Section 342 Cr. P, C. has not said that the hundred rupee currency notes said to have been produced by him at Lalitpur were implanted on him and that the police forced him to go to Lalitpur Just for the purpose of making a show of the recovery of the notes.

He simply denied that he did not give any notes to the police. It is worthy of note that the accused is an intelligent man able to read and write. He signed the recovery memo Ex. P. 11 which contains the statement that the applicant obtained the notes from Raghunath Prasad and then handed them over to the police. If,

therefore, this statement in Ex. P. 11, the recovery memo, was according to the applicant, false, the applicant should have declined to sign the memo or should have while signing it, made an endorsement as regards the falsity of the statement. But he did nothing of this kind.

Vilas More P. W. 12 made the statement that he told to the accused that he would get the matter squared up were he to produce the money and that agreeing to this suggestion the applicant took the police first to Mathura and then to Lalitpur. Relying on this statement it was suggested in the lower appellate Court that inasmuch as the production of the money by the accused was on account of inducement, the evidence of the accused's conduct in producing the money was not admissible under Section 8, Evidence Act. This argument was rightly rejected by the learned Sessions Judge.

Under Section 8, Evidence Act, conduct is admissible irrespective of the fact whether the conduct was or was not the result of inducement offered by the police (See *Mt. Misri v. King Emperor* ILR 31 All 592 (A) ). On the evidence on record there can be no doubt that the recovery of the notes mentioned in Ex. P. 11 was at the instance of the accused who obtained the notes from his brother-in-law and gave them to the police at Lalitpur.

7. The evidence as to the identity of the notes recovered with those which the applicant had received from the Stores Department is furnished by Mr. Kawade P. W. 3. His evidence is that immediately after informing the police on 26-9-1949 of the disappearance of the cash box, he contacted the Stores Department and from their record prepared a list of the numbers of the currency notes which had been sent to the accused. In his cross-examination, the witness further said that this was done in the presence of the accused and that on 27-9-1949 he forwarded to the police a typed list Ex. P. 3 of the numbers of the currency notes.

The applicant was questioned with regard to a list Ex. P. 5 which he gave to Mr. Kawade containing the details of the amount of notes and the cash that was in the cash box and along with it he was also questioned about Ex. P. 3 which Mr. Kawade forwarded to the police. In his answer the applicant admitted having given the list Ex. P. 5 to Mr. Kawade but offered no explanation whatsoever about the list



Ex. P. 3.

If the list Ex. P. 3 is held to be admissible in evidence, as I think it must be, then there can be no doubt that the notes which the accused obtained from his brother-in-law and handed over to the police at Lalitpur were some of those which he had received from the Stores Department.

8. The learned Sessions Judge took the view that the list Ex. P.' 3 fell within the purview of Section 162 Cr. P. C. and was, therefore, inadmissible in evidence. In taking this view, he was, in my opinion, wrong. Under Section 162 Cr. P. C., it is only after an investigation has started that a statement made by a person to a police officer in the course of investigation that is not admissible in evidence except to the extent mentioned in that section. What happened in this case was that Mr. Kawade sent the First Information Report on 26-9-1949 and immediately thereafter he began preparing a list of the numbers of the missing notes for the benefit of the railway office.

A copy of this list Ex. P. 3 was sent to the police on 27-9-1949 with a letter which was expressly stated to be one in continuation of the letter dated 26-9-1949 which Mr. Kawade had addressed to the police about the disappearance of the cash box. The investigation Officer Zanda Singh arrived on the scene on 26-9-1949 but on that date he did nothing except viewing the scene of the occurrence. He did not commence any investigation on 26th September or 27th September 1949. It is not that an investigation by the police begins always immediately after the case is registered. It commences not with the mere arrival of the investigating Officer on the scene of the occurrence after the making of the first information report but when the police take the first concrete step for ascertaining the offence and the culprits thereof.

Very often the First Information Report lodged with the police is not a complete document and during the interval between the First Information Report and taking of some step in the nature of investigation further information is furnished to the police. Such further information is merely supplemental to the First Information Report and cannot be considered to be a statement made to the police during the course of investigation. The words 'in the course of investigation' which occur in

Section 162 are not without significance.

In the context of that section they mean that the statement which is hit by Section 162 must be one made as a step in a pending investigation to be used in that investigation. Here the list Ex. P. 3 was sent to the police to complete the first report. It was given to the police before the investigation began. It cannot, therefore, be excluded from the evidence under 8. 162 as a statement made to the police in the course of investigation. I am fortified in this view by a decision of a Division Bench of the Allahabad High Court in *Bhondu v. Hex* AIR 1949 All 364 (B).

In that case which was a case of theft, the first information report did not give any list of stolen articles, the complainant, however, handed over a list of the stolen articles to the Sub-Inspector soon after he arrived on the spot for investigation. It was held that such a list was not covered by Section 162 Cr. P. C., but was a part of the First Information Report under Section 154 Cr. P. C. and was admissible in evidence.

After pointing out that Section 162 Cr. P.C. prohibits the use of statements made by any person to, a police officer 'in the course of investigation' and that, therefore, once an investigation has actually started all statements to the police would naturally fall within the purview of Section 162, Cr. P.C. and would not be admissible in evidence except to the extent mentioned in that section, the learned Judges of the Allahabad High Court proceeded to say:

The question is, when does an investigation start. In our opinion it does not start by the mere fact that a first information has been lodged with the police. The police may choose to investigate into the offence either immediately or after sometime, or may wait for further information before it makes up its mind to investigate into it. It cannot, therefore, be said that an investigation starts as soon as a first information has been made to the police. An investigation must be said to have commenced only when a step in the ascertainment of the actual offence and of the culprits thereof is taken.

The mere fact that an investigating officer starts from the police station to the scene of occurrence is not commencement of the investigation. The first information lodged with the police may not be a complete document as will be the case when in the case of robbery or dacoity the list of the stolen goods is not mentioned therein. Such a list supplementing the first information report would be merely a part of that report and not a part of the investigation.

A similar view has been taken in *Autar v. Emperor* AIR 1931 Oudh 74 (C) and *Emperor v. Narain* AIR 1931 Oudh 83 (D). In *Kalia v. Emperor* AIR 1925 Cal 959 (E); *Fulbash Sheikh v. Emperor* AIR 1925 Cal 448 (F) & *Sucha Singh v. Emperor* AIR 1932 Lah 488 (G) lists of stolen property given after the first information report were held to be inadmissible in evidence. The judgments in those cases, however do not indicate whether the lists were given to the police officer before the commencement of the investigation. There is also a decision of the East Punjab High Court in *Amar Singh v. The Crown* AIR 1949 E.P. 315 (H) where a list of stolen articles was held to be inadmissible in evidence as being one subsequent to the commencement of the investigation.

The question as to when an investigation starts was not considered in that case and it is not clear from the judgment at what stage the list which was held to be inadmissible was given by the complainant to the police. At one place *Harnam Singh*, said that the complainant lodged the first information report with the Sub-Inspector who visited Ghatora on 31-8-1947 and while, making the first information report he gave a list of his articles which were stolen in the dacoity and that the investigation did not start till the month of December.

Later on the learned Judge observed that the complainant after he had made the first information report gave a list of the stolen articles to the Sub-Inspector. It does not appear whether the complainant gave one list of stolen property or two lists, namely one while making the report and another after the investigation started in December 1947. If there was no other list than the one he gave to the police while making the first information report, then clearly it was admissible in evidence inasmuch as the first information report was made in August 1947 and the investigation did not start till the month of December 1947.

In my judgment in the present case the list Ex. P. 3 is admissible in evidence. That list establishes the identity of the notes recovered with some of those which the applicant had received from the stores department and this circumstance leads to the conclusion that the cash box was removed from the cash room with the connivance and knowledge of the applicant and makes his dishonest intention manifest.

9. There are other circumstances which point to the dishonest intention of the applicant. The applicant failed to credit the amounts of unpaid wages and deductions from the pay of the staff for several months and retained the amount with him. His explanation that on account of pressure of work he could not credit this amount promptly was rightly rejected by the lower Courts as unconvincing. A Cashier is expected to credit the amounts with him promptly and I cannot imagine any other work or duty of greater urgency for him. The applicant was also seen in the office on 25-9-1949 which was a Sunday.

The applicant was seen by Gangasharan, coming out of the office on the afternoon of 25-9-1949, The accused denied this. There is no reason to disbelieve the statement of Gangasharan, It is also significant that the cash box disappeared just a day before the accounts were to be checked by Mr. Kawade. The circumstance that the accused had kept on 24-9-1949 whatever amount was with him in a cash box instead of a safe cannot be taken into consideration for the simple reason that the trial Magistrate omitted to question him as to why he had not kept the amount in the safe. Be that as it may, the other circumstances proved leave no doubt that the applicant's defence that the cash box was stolen by someone is false and improbable,

10. As to the applicant's suggestion that somehow Hira obtained the keys from Mr. Guha and stole the cash box, it is sufficient to say that there is not material on record to show that Hira approached Mr. Guha for the key and Mr. Guha gave it to him. Mr. Guha was not asked any question in cross-examination on this point. He has denied that he was in a possession of a third key of the cash room. The applicant did not produce any evidence to support his suggestion that Hira did obtain the keys from Mr. Guha.

Some stress was laid by the learned Counsel for the applicant on the acquittal of Hira of the offence of theft of the cash box as weakening the prosecution. case against the applicant. I fail to see how Hira's acquittal has any bearing on the question of the guilt of the applicant. Him was acquitted not on the ground that neither he nor the applicant had any hand in the disappearance of the cash box but because the evidence of recovery at his instance of the lock of the case room and of his having purchased some gold, a gramophone and other articles after the incident was found to be insufficient to sustain his conviction for theft.

As to whether Hira was rightly or wrongly charged for the offence of theft need not now be considered. But there is nothing inconsistent in Hira's acquittal and the finding that the cash box could not have been removed without the knowledge and connivance of the, applicant.

11. For all these reasons I am of the view that the applicant was rightly convicted under Section 409 I.P.C. This revision petition is, therefore, dismissed.

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