

Ashutosh Roy Vs. the State

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Court : Orissa

Decided On : Dec-09-1958

Reported in : AIR1959Ori159; 1959CriLJ1197

Judge : R.L. Narasimham, C.J.

Acts : [Evidence Act, 1872](#) - Sections 24 and 133; [Indian Penal Code \(IPC\), 1860](#) - Sections 405 and 409; [Code of Criminal Procedure \(CrPC\), 1898](#) - Sections 197

Appeal No. : Criminal Revn. Nos. 229 and 269 of 1957

Appellant : Ashutosh Roy

Respondent : The State

Advocate for Def. : Ashok Das, Adv. (in No. 269/57) and ;Govt. Adv. (in No. 229/57)

Advocate for Pet/Ap. : Ashok Das, Adv. (in No. 229/57) and ;Govt. Adv. (in No. 269/57)

Judgement :

R.L. Narasimham, C.J.

1. Criminal Revision No. 229 of 1957 arises out of the appellate judgment of the Additional Sessions Judge of Balasore, maintaining the conviction of the petitioner Ahutosh Rai (hereinafter referred to as the petitioner) under Section 409, I.P.C.,

but reducing the sentence passed on him by a First Class Magistrate of Balasore, from two years' rigorous imprisonment to three months' simple imprisonment. The learned Magistrate further sentenced him to pay a fine of Rs. 1,000/- but the learned Sessions Judge enhanced it to Rs. 3000/-.

Criminal Revision No. 269 of 1957 was filed by the State of Orissa for enhancement of the sentence on the ground that the reduction of the sentence by the Additional Sessions Judge was not justified. These two revision petitions were heard together and will be disposed of in one judgment. In view of the notice for enhancement of the sentence, the petitioner was allowed to argue against his conviction also and the revision petitions were heard like a regular criminal appeal.

2. The petitioner was one of the prominent Congress Workers of Balasore District since the year 1937. He went to jail during the 1942 movement and was for some time a member of the Balasore District Congress Committee. He was the Chairman of the Balasore Sadar Local Board from the 26th March 1946 to the 28th June 1952. During the said period, the Vice-Chairman of the Board was one Sri Baidyanath Rout (P. W. 7) who was also a prominent worker of Balasore district and who also went to jail during the year 1942 movement. Sri Baidyanath Rout's evidence is to the effect that he considered himself to be the political chela of the petitioner and used to look up to him for advice and guidance.

Another prominent Congressman of the District (who is also a practising lawyer) named Sri Satyanarayan Das (P. W. 1) was the Vice-Chairman of the District Board of Balasore from 1947 till April 1952 and thereafter he became the Chairman of the District Board. The said Sri Satyanarayan Das was also a member of the Education Committee of Balasore District Board. The petitioner was elected Vice-Chairman of the District Board on the 25th April 1952 and continued in that office in addition to his duties as Chairman of the Sadar Local Board till the 28th of June 1952 when he handed over charge of his office as Chairman Sadar Local Board to Sri Baidyanath Rout (P. W. 7).

He continued thereafter as Vice-Chairman of the District Board till he was relieved of that office some time in November 1952. It was alleged that during his regime as Chairman Sadar Local Board, he drew large sums of money from the Treasury for

the purpose of paying stipends to primary school teachers serving under the Sadar Local Board, but committed criminal breach of trust in respect of a Substantial portion of the same to the extent of about Rs. 38,119-13-0. In the charge it was mentioned that the said offence was committed during the period 2nd November, 1951 to 28th June 1952. It was alleged that on the 28th June, 1952 when the petitioner handed over charge to his political chela Sri Baidyanath Rout (P. W. 7) he did not hand over any cash.

But with a view to allay the fears of P. W. 7 the petitioner was said to have sent him a letter on the 28th June 1952 (Ext. 43) in his own handwriting, admitting frankly that out of the total sums drawn from the local treasury a sum of about Rs. 34,000/- remained with him being the undisbursed balance of the stipends of the teachers and that he was solely responsible for the same. In view of that letter Sri Baidyanath Rout (P. W. 7) thought that no risk was involved and did not report this fact to the Chairman of the District Board Sri Satyanarayan Das (P. W. 1) for some months. But both the petitioner and Sri Baidyanath Rout realised that unless the teachers were paid their stipends, there would be a general clamour and all the facts would come to light.

Thereafter, at the suggestion of the petitioner made in his letter (Ext. 43) Sri Baidyanath Rout adopted the practice of withdrawing large sums of money from the treasury for payment of current stipends to the teachers and utilising the same for payment of arrear stipends to them. With a view to conceal this fraud the teachers were persuaded not to give the dates while signing stamped receipts.

Even if through mistake some of them had put the dates on the vouchers they were subsequently erased. P.W. 7, adopted this irregular practice in the hope that within a short time the petitioner would be able to refund to him the sum admitted to have been kept with him and that adjustments could be made subsequently. But it was alleged that notwithstanding the desperate efforts of the petitioner he was not able to raise that sum. In the meantime the irregularity came to the notice of the Chairman of the District Board Sri Satyanarayan Das (P. W. 1) who got the accounts of the Sadar Local Board audited by the Head Clerk of the District Board Office, Sri Sailesh Chandra Das Mohapatra (P.W. 3). From that audit report 'Ext. 7'

dated the 16th October 1952 it appears that a sum of Rs. 34,432-6-0 remained unaccounted for.

The Chairman of the District Board grew genuinely alarmed and immediately reported the matter to the District Magistrate and the Revenue Commissioner and also asked the Government auditors to audit the accounts of the Sadar Local Board thoroughly. He then withdrew the powers of the petitioner and subsequently got him removed from his post as Vice-Chairman of the District Board. P.W. 7 Baidyanath Rout was also asked to hand over charge to his successor. P. W. 1 then sent information to the Police on the 4th November 1952 (Ext. 25) charging (1) the petitioner (2) Sri Baidyanath Rout (P.W. 7) and (3) one Mohammad Noor Khan Head Clerk of the Office of the Sadar Local Board (P. W. 8) with criminal breach of trust in respect of a sum of Rs. 34604-13-6 on the basis of which, after due investigation, charge sheet was submitted against the petitioner. The other two accused persons however figured as prominent prosecution witnesses.

3. The defalcation of such a large sum was facilitated mainly because of the peculiar practice then adopted by the Sadar Local Board for paying the monthly stipends of the primary teachers within its jurisdiction. Under the rules, the monthly bills of these teachers are first prepared by the Sub-Inspector of Schools and the Assistant Sub-Inspector of Schools who are regular Government servants and submitted to the Local Board and then the Board's payment orders are issued by its Chairman. On the basis of these payment orders self-drawn cheques on the District Treasury were made for the sums due and cash was received by the Chairman of the Local Board.

There was no arrangement for keeping such large sums of money in safe custody in the office of the Sadar Local Board. The amount, therefore, remained with the Chairman and during his tours in the sub-division he used to make payments personally to the teachers concerned and obtained their stamped receipts either on the bills themselves or on separate vouchers which were pasted on the bills at appropriate places. Though according to the rules there should be no delay between the date of receipt of cash from the treasury and the date of payment to the teachers, some delay was unavoidable because the Chairman's tours in the

interior parts could not be arranged at a moment's notice.

The result was that large sums remained in the hands of the Chairman and 'thereby gave him a temptation to appropriate the same for his own use in the hope that he may be able to refund the same when necessary. Moreover with a view to conceal the delay in making payment to the teachers concerned, a systematic practice was adopted of asking the teachers not to put the dates while giving their stamped receipt and where such dates were given by inadvertence they were erased. Hence the Inspecting Authorities could not, by merely looking at the bills or the vouchers, know whether there was undue delay in making payments to the teachers. This practice was mainly responsible for the delay in detecting the misappropriation of such a large sum.

4. On the other hand, in the neighbouring Local Board of Bhadrak the Chairman of that Board adopted the practice of remitting stipends to the teachers by money-order as soon as the money was drawn from the local treasury thereby keeping no cash with him. If the petitioner as Chairman of the Sadar Local Board had insisted on this practice being followed in that Local Board also, defalcation of such a large sum of money could have been avoided.

In fact, in May, 1950, P. W. 1, as the then Vice-Chairman of the District Board, raised the question of remitting stipends of primary teachers by money order (see Ext. 19) and sought the opinion of the Chairman, Sadar Local Board and of the Bhadrak Local Board. The Chairman of Bhadrak Local Board in his letter dated the 17th June, 1950 (Ext. 20) expressed strong preference for payment by money order but the petitioner who was then Chairman of the Sadar Local Board in his reply dated the 13th July, 1950 wanted the existing practice of personal disbursement by the Chairman to continue (see Ext. 21) though he recognised that it was really risky and troublesome.

His only justification for continuing that practice was that the District Board was not placing sufficient funds at the disposal of the Local Board according to its requirements. This question was fully discussed by the Education Committee of the District Board at its meeting held on the 12th September 1950 (Ext. 22) in which the petitioner as Chairman of the Sadar Local Board and P. W. 1 as the

Vice-Chairman of the Sadar Local Board were present and it was ultimately decided to allow the existing practice of personal disbursement by the Chairman of the Sadar Local Board to continue, at his risk.

The learned lower appellate Court has drawn an adverse inference against the petitioner on account of his advocating this system, as it facilitated the commission of the offence of defalcation. But so far as the criminal case is concerned I do not think any such adverse inference could be drawn from this circumstance alone. P. W. 1 was as much responsible as the petitioner, for allowing this practice to continue. If he had firmly advocated the Bhadrak practice of payment to the teachers by money order, at that time and had placed sufficient money at the disposal of the Sadar Local Board the unfortunate result would not have happened.

5. But as regards the practice of not obtaining dates under the signatures of the teachers when they signed the receipts at the time of receiving their monthly stipends, the petitioner cannot escape responsibility. A peon of the Local Board, named Purna Chandra Singh (P. W. 2) who used to accompany the petitioner at the time of making payments of stipends has spoken about this practice and stated that he was instructed to tell the teachers not to give the dates under the signatures and that even if, by inadvertence, dates were given, the petitioner used to find fault with them. He is supported on this point by a number of teachers who have figured as witnesses for the prosecution, namely P.Ws. 13 to 17, 23, 24, 25, 27, 28, 29, 34, 36, 37, 45, 50 and 52. P. W. 29 further stated that when he put the date under the signature by inadvertence, it was scored out later on.

Even though the peon's evidence may be open to some suspicion there is absolutely no reason to disbelieve the testimony of so many teachers. There was very little cross-examination of those teachers and some of them (P. Ws. 24, 29 and 50) were not cross-examined at all. It may thus be taken as well established that during the petitioner's regime as the Chairman of the Sadar Local Board he invariably followed the practice of persuading the teachers not to give the dates below their signatures and also to get the dates erased wherever they were given by inadvertence. His intention in insisting on this practice, is obvious. He wanted to

conceal the actual date of payment so that the delay between the date of obtaining the money from the Treasury and the date of actual payment may not be noticed by anyone.

6. In the charge the sum defalcated was shown as Rs. 33119-13-0. The trial Court has shown that this sum included three items:--(i) Rs. 1562-2-0 being the amount drawn from the treasury by the petitioner but not paid to the teachers either by him or by his successor P. W. 7; (ii) Rs. 47-5-6 representing excess drawal from the Treasury due to incorrect preparation of the bills. This sum was not refunded into the Treasury; and (iii) Rs. 31,510-5-8 actually drawn by the petitioner from the Treasury but not paid to the teachers during his time. This sum was actually paid by his successor (P. W. 7) out of huge sums drawn from the Treasury for payment of current bills.

The trial Court has given a complete list of vouchers (Exhibits 53 series) which show the receipt of sums covered by items (i) and (ii) by the petitioner. As regards item (iii) also the cheques actually signed by the petitioner for the amount have been proved. The petitioner clearly admitted the drawal of these sums from the treasury by him and consequently it is unnecessary to discuss in detail the various documents exhibited in this case to prove that the amount in question was actually entrusted with the petitioner. This may be taken as an admitted fact.

7. The petitioner's explanation is as follows: As regards item (i) amounting to Rs. 1562-2-0 he stated that he actually paid the amounts to the teachers and that their vouchers were obtained on separate slips of papers. These slips were kept in the Office. His suggestion seems to be that they were not pasted properly on the bills for which the office staff was responsible. As regards item (iii) amounting to Rs. 31,510-5-6, his explanation is that payments were made during his time, by his subordinate staff, in his presence. In support of this explanation his Advocate Sri Asoka Das relied on the fact that the signatures of the teachers duly stamped, are found on the bills though they do not bear any dates. As regards item (ii) in respect of Rs. 42-5-6 Mr. Das urged that it was a matter of mere accounting and the petitioner was always ready and willing to pay the money if, after due audit and accounting it was found due from him.

8. In view of this specific plea of payment of practically the whole of the amount covered by the charge (excluding the small sum of Rs. 42-5-6) the main question for consideration is whether the prosecution has established beyond reasonable doubt that these sums were not paid to the teachers after they were drawn from the Treasury.

9. The prosecution has set forth a specific case to the effect that item (iii) mentioned above representing Rs. 31,510-5-6 was actually paid by the petitioner's successor namely P. W. 7 sometime between July and September 1952. As regards (item i) it is alleged that no payment was made at all. The principal witnesses to prove this part of the prosecution case are undoubtedly P. W. 7 and P. W. 8, the Head Clerk of the Sadar Local Board Office. They have both stated that when there was a clamour from the teachers for payment of stipends due to them, the sums drawn from the treasury for payment of their current dues were utilised for the purpose of paying the arrear stipends. P. W. 8 has further stated that some of the cheques in respect of these sums were drawn irregularly inasmuch as in some instances, they were drawn even though the bills relating to them had not been received from the Sub-Inspector of Schools.

It is true that these two witnesses are no better than accomplices and their evidence should not be accepted without corroboration. They had been named as co-accused in the F.I.R. and on their own admission knowing that the petitioner had defalcated a huge sum they tried to screen him by committing these irregularities first By drawing large sums of money from the Treasury without proper bills in some cases and then utilising the money drawn for current stipends, towards payment of arrear stipends of teachers. They also continued the practice of insisting on the teachers not to put the dates while signing the stamped receipts. They are clearly 'accessories after the fact', and a court must insist on adequate corroboration of their testimony before it can sustain the conviction.

10. Such corroboration is found in an ample measure from the following pieces of evidence:

(i) Two letters (Exhibits 43 and 9) written by the petitioner in his own hand contain a clear admission of the facts as stated by P. Ws. 7 and 8.

(ii) Many of the teachers concerned, as mentioned above and the Sub-Inspector of Schools P. W. 66 and the A. Section 1 of Schools (P. W. 68) have spoken about the fact that the arrear stipends of the teachers payable when the petitioner was the Chairman of the Sadar Local Board were actually paid sometime in July to September 1952 by P. W. 7 after he succeeded the petitioner as Chairman.

11. Exhibit 43 which is a letter written to P. W. 7 by the petitioner on 28-6-52 may be quoted in full.

Balasore,

28-6-52

My dear Baidyanath,

The accounts of the Sadar Local Board, Balasore have not been properly maintained between 1951 April and today, due to incompetency of the clerk in charge (Muhammad Nur Khan). The above clerk who had the responsibility to maintain accounts systematically according to rules, has neglected his duties. I have asked him to make the accounts up-to-date and show them to you. That out of the amounts drawn by me from 1-4-51 till this day about Rs. 34,000/- could not be paid by me during my time. I am fully responsible for the above amount of Rs. 34,000/- (Rupees thirtyfour thousands) or whatever amounts that will be found by the Auditor. I shall deposit the amount in the Treasury as soon as accounts of the Sadar Local Board are made up-to-date and audit is complete and correct amounts lying with me undisbursed are ascertained, and by the 15th December 1952 at the latest.

I would request you to pay up the arrear stipends of teachers out of current bill amounts who could not be paid during my period and whose bill amounts have been drawn by me.

Yours sincerely,

Ashutosh Roy.

To

Baidyanath Rout,

Congress Office, Balasore.'

This letter contains an unambiguous admission of the following three incriminating facts:

(a) A sum of Rs. 34,000/- drawn by the petitioner from the Treasury was not paid to the teachers till the date on which he handed over charge to P. W. 7 viz., the 28th June 1952.

(b) He undertook full responsibility for the aforesaid sum or for any other sum that may be found to be due from him by the auditors and he promised to deposit the amount into the treasury as soon as the accounts were made upto date.

(c) He requested his successor to pay up the arrear stipends out of the current bill amounts.

12. Exhibit 9 is a letter written by the petitioner to the Chairman of the District Board, P. W. 1 on 20th October, 1952. That may also be quoted in full:

'To

The Chairman, District Board,

Balasore.

Sir,

On the date when I handed over charge of the Sadar Local Board, the account was not upto date due to the incompetency of the Head-Clerk and also I handed over charge with a request to the Chairman, Local Board that he should look to the accounts of my period and further I requested him that I shall pay off any amount that will be found due from me after audit.

Further I beg to mention that the amount I drew from the Treasury for payment of stipends to the teachers could not be done due to various reasons for which I asked the Chairman, Local Board, to pay off their arrears by drawing money from

the current accounts and he has accordingly paid in order to put a stop to the clamour of the teachers. I am only responsible for the amount that will be found in deficit after auditing the accounts of the Local Board, and for which I am going to deposit the amount within a short time.

Kindly allow me time to do the same, Ashutosh Roy,

Vice-Chairman, District Board,

Balasore, 20-10-52.'

... ..

Here also he admits (a) that due to various reasons he did not disburse to the teachers stipends from the amounts drawn by him from the Treasury, (b) that he directed his successor in office to pay off the arrear dues of stipends from the current accounts (c) that in pursuance of his request the successor paid the teachers out of the current account with a view to stop clamour and (d) that he is solely responsible for the amount and that he would refund the same.

13. If these two letters be taken to be genuine the prosecution is practically relieved of the burden of proving the essential part of the case. Mr. Ashok Das, therefore, urged that the letters were obtained from the petitioner under undue influence on the 18th October 1952 that Ext. 43 was deliberately ante-dated and that in any case, they are inadmissible as they amount to confessions obtained by threats. In support of this argument he relied on a letter written by the petitioner on the 29th October 1952 to P. W. 1, Chairman of the District Board (Ext. 15) in which he alleged that a conspiracy had been started against him, that on the 18th October, 1952 when he was ill he was prevailed upon by some prominent Congressmen of Balasore, namely Raghabananda Panigrahi, Karunakar Panigrahi and P. W. 1 to write those two letters (Exts. 43 and 9) and that he completely repudiated the contents of those letters.

To that letter, however, the Chairman (P. W. 1) sent an immediate reply (Ext. 18 dated the 31st October 1952) emphatically denying the suggestion that the two letters were obtained from the petitioner under threat of undue influence and

further stating that on the 18th October 1952 P. W. 1 was not in Balasore at all. P. W. 1 in his evidence in court also has completely repudiated the suggestion contained in Ext. 15. Doubtless his mere denial or the support given to that denial by P. W. 7 may not have much value, but there are other circumstances to show that the plea of undue influence put forward by the petitioner cannot be accepted. First, it should be remembered that the petitioner is a seasoned Congressman and a politician who has been engaged in public affairs since 1937.

He is not likely to be coerced by threats. Every line of the aforesaid two letters (Exts. 43 and 9) has been written by him in his own hand in English of which he is fairly conversant. It is difficult to believe that he would make an admission acknowledging liability for such a large sum of as Rs. 34,000/- however strong the pressure may be from influential persons in the Congress Party, if really such a liability did not exist in truth. Some reliance was placed on a draft (Ext. E) of Ext. 9 which was produced by the petitioner and it was said to have been written by one Raghabanand Panigrahi.

But that would not necessarily show that coercion or undue influence was practised on him. As rightly pointed out by the two lower courts it may be that some persuasion was made to him to write Ext. 9 to the Chairman of the District Board. More-over, the circumstances under which Ext. 43 was written by the petitioner to Sri Baidyanath Rout (P. W. 7) on the 28th June, 1952 should be carefully considered.

The charge-report 'Ext. 41' shows that no cash was handed over to P. W. 7 by the petitioner. Though as a political Chela of the petitioner, P. W. 7 may have been ready to accede to his request and screen him from exposure for sometime, he would not undertake to act as suggested by the petitioner without getting some document in writing so as to save himself if further trouble arose in future. It was with a view to persuade P. W. 7 to utilise the sums drawn from the Treasury against current bills, for payment of arrears of stipends due to the primary teachers, that Ext. 43 was written in the evening of the day he handed over charge to him.

That letter, was sent in a sealed cover (Ext. 43 (b)) and the peon Judhistir Jena who took the sealed cover and handed it over to Sri Baidyanath Rout (P.W. 7) has been examined as P.W. 9. The peon's evidence was to the effect that he took the letter 'on the day Baidyanath Babu became the Chairman' (viz., 28th June, 1952) and it affords the strongest corroboration of the genuineness of the date given on Ext. 43, viz., 28th June 1952.

14. Similarly, as regards the genuineness of Ext. 9 P.W. 4, a peon of the District Board Office, Balasore, has corroborated the testimony of P. W. 7. According to this witness the letter was written in English on the 20th October 1952 and he took it and handed it over to P.W. 1. He was able to identify Ext. 9. The District Board was under supersession when that peon's evidence was given and it cannot be said that P. W. 1 could influence the peon to perjure against the petitioner.

The evidence of P. W. 4 is of further significance inasmuch as, according to him, the petitioner was hale and hearty on the 20th October, 1952 and he actually left Balasore for Cuttack that after-noon by train. This would render improbable the plea put forward by the petitioner in Ext. 15 that he was bed-ridden on the 18th October, 1952 and that, taking advantage of his helpless condition, the two letters were taken from him by P. W. 1 and other persons. If he had been really so ill on the 18th October, 1952 as alleged by him to his letter dated the 28th October, 1952 (Ext. 18), it is difficult to believe that within two days thereafter he got well to such an extent as to be able to undertake a train journey to Cuttack.

15. I am therefore satisfied that Exts. 43 and 9 were written by the petitioner on the dates shown to those letters, and though there might have been some persuasion prior to his agreeing to write them, there is absolutely nothing on the record to show that he wrote them under undue influence.

16. These letters however cannot amount to a confession of guilt so as to attract the provisions of Section 24 of the Indian Evidence Act. It is true that they contained admissions of certain facts which are found to be incriminating. But they do not contain any admission about the commission of an offence. The writer was merely acknowledging his liability for the sum of Rs. 34,000/- and agreeing to make good the same when the accounts were audited. As pointed out in the well-known case

of Narayanaswami v. Emperor, reported in AIR 1939 PC 47. :

'A confession must either admit, in terms, the offence or at any rate substantially all the facts which constitute the offence. The admission of a gravely incriminating fact is not of itself a confession. In my opinion, Section 24 of the Evidence Act has no application here. These two letters have great value as containing admissions of important incriminating facts which have been deposed to by P. Ws. 7 and 8 and to that extent they afford direct corroboration of the testimony of these two letters.

17. Apart from the aforesaid two letters, the evidence of the teacher and of the Sub-Inspector and the Assistant Sub-Inspector of Schools also corroborates the evidence of P. Ws. 7 and 8. P. Ws. 15 to 23, 26, 27, 28, 30, 31, 33 to 37, 39 to 46, 48 to 54 are some of the teachers of the Sadar Local Board who have deposed to the effect that stipends due to them for some of the months when the petitioner was the Chairman of the Board had not yet been paid. Similarly, P. Ws. 13, 19, 22, 23, 24, 25, 34, 35, 38, 39, 41 to 48 and 50 have proved the receipt from P. W. 7 after June 1952 of the arrear stipends due to them for the period when the petitioner was the Chairman of the Sadar Local Board.

Apart from the absence of any adequate reason for disbelieving these witnesses, there was practically no cross-examination of most of them. The Sub-Inspector of Schools (P. W. 65) who is a Government servant wholly unconnected with the District Board has also supported them by saying that P. W. 7 paid the stipends of the teachers for the months of May and June, in July and August 1952. He further stated that once at Amarda Road disbursement camp one teacher insisted on putting the date under his signature but the Chairman refused to allow him to do so. Similarly, the Assistant Sub-Inspector of Schools (P. W. 68) who used to attend the payments made to the teachers stated that Baidyanath Babu (after he became Chairman) paid the bills due for the months of April and May.

There is absolutely no reason to disbelieve these two Government servants who cannot be said to be under the influence of P. W. 1. Thus the evidence of P. Ws. 7 and 8 to the effect that the petitioner drew large sums of money from the Treasury for payment of stipends to teachers and that he did not hand over cash to P. W. 7

on 28-6-1952 and that the sum of Rs. 31,510-5-6 was disbursed by P. W. 7 after he took over charge as Chairman from the money drawn against current bills has been fully corroborated. The retention of the aforesaid sum with the petitioner has been established beyond reasonable doubt.

18. Mr. A. Das on behalf of the petitioner placed great reliance on the report of the Government auditor (Ext. A) which was admitted in evidence at the appellate stage, in support of argument that item (iii) amounting to Rs. 31,510-5-6 was in fact paid by the petitioner himself to the teachers. The Government auditor in his report fixed the liability for most of the money defalcated on P. W. 7, P. W. 8 and P. W. 1 and recommended they should be surcharged jointly. The auditor held that the petitioner, P. W. 7 and P. W. 8 were jointly and severally responsible for a sum of Rs. 2663-11-0 only.

The auditor was not examined as a witness, however, he was mainly concerned with fixing the civil liability bearing in mind the relevant rules on the subject and the existence or otherwise of proper vouchers for the money paid to the teachers. He was not concerned with the further question about the dates on which the money was actually paid to them. It does not appear that he ever went to the various places and examined the teachers. He merely scrutinised the bills in the Office of the Local Board and when he found that in respect of most of the bills the signatures of the teachers were taken on duly stamped receipts without of course noting the date of payment, he had no further responsibility to find out when and by whom the payment was made.

This result was brought about by the clever tactics adopted by the petitioner in persuading his political chela Sri Baidyanath Rout (P. W. 7) to utilise the sums drawn on current bills for paying arrear stipends to the teachers.

This could not be detected in audit and hence the Auditor's report (Ex. A) cannot be taken as throwing doubt on the prosecution case that the stipends of the teachers which had accrued during the period of the petitioner's regime as Chairman of the Sadar Local Board were, in fact, paid by his successor (P. W. 7) in July -- September, 1952. On this point I have already observed that apart from the testimony of P. Ws. 7 and 8 the clear admission in the petitioner's own hand-

writing in Exts. 43 and 9 coupled with the evidence of the teachers and the Sub-Inspector and the Assistant Sub-Inspector of Schools (P. Ws. 65 and 68) are decisive.

19. The next question for consideration is whether the retention of such a large sum can, in the circumstances of this case be held to be dishonest so as to amount to an offence. On behalf of the petitioner it was strenuously contended that in view of the unambiguous undertaking given by the petitioner in exts. 43 and 9 to pay back the sums that may be found to be due from him after audit of accounts, only civil liability is established and that a criminal charge under section 409 I. P. C. must fail.

But it should be noted in this connection that though the petitioner has admitted his liability in Exts. 43 and 9 he never cared to deposit any portion of the sum admitted to have been kept by him, by way of evidence of his good faith. Out of the total sum of Rs. 33119-13-0 of the Sadar Local Board which had been proved to have been kept with him on 28-6-1952, nothing has been paid till now. On the other hand it is established that during the relevant period the petitioner was living beyond his means.

According to P. W. 7 the petitioner is a comparatively poor man with hardly three acres of land and has a family of seven members to look after. He was however living in high style at that time. He bought a Press known as 'Bharat Press' from the Amrita Bazar Patrika on 19-12-1951 (see the evidence of P, W. 60) and published a Oriya Weekly known as 'Hitabarta' in the early part of 1952. Fresh elections to the Orissa Legislative Assembly took place and the petitioner, as a prominent Congressman of the district, appears to have taken part in doing propaganda on behalf of that party with the aid of the Press.

Furthermore, the evidence of P. Ws. 63, 66, 67, 69 and 70 shows that in connection with the Press and the Oriya Weekly he had paid more than Rs. 4000/- during the period August 1951 to June 1953. He had no other source of income except his meagre landed property and his travelling expenses as Chairman of the Sadar Local Board. There is also evidence to show that he was making desperate efforts to raise money as soon as he handed over charge on 28-6-1952 to P. W. 7.

Thus P. W. 24 has proved a letter written by the petitioner to one Sri Nanda Kishore Das the then Speaker of the Legislative Assembly on 31-7-1952 (Ext. 107) making anxious enquiries as to when he would be able to get a loan. P. W. 55 who is a distant relation of the petitioner has also stated that the petitioner requested him to arrange a loan of Rs. 3000/- to Rs. 4000/-. The petitioner had applied to the Industries Department for a loan of Rs. 12,000/- for purchasing a printing press as early as August 1951 but it was turned down. He again applied for a loan on 10-1-1953 for a loan for manufacture of paper and in that application he offered his press as security. But that application also was rejected.

20. It is thus well established that the petitioner retained Rs. 33,000/- and odd belonging to the Sadar Local Board when he handed over charge to P. W. 7 on 28-6-1952 and did not refund any portion of the same at any time. It is also clearly established that considering his assets he was living beyond his means, installed a Press and was publishing an Oriya weekly and incurred considerable expenditure on the same during the period when he was the Chairman of the Sadar Local Board. As soon as he vacated his office as Chairman of that Board on 28-6-1952 he made desperate efforts to raise money but his efforts did not prove successful.

21. In a prosecution for criminal breach of trust direct evidence of dishonest conversion, to the accused's own use, of the money entrusted with him, can seldom be found, and such dishonest intention and conversion have to be inferred from the proved facts and circumstances of each case. Considering the means of the petitioner the expenses that he was incurring when he was Chairman of the Sadar Local Board, and his inability to raise even a portion of the money admitted by him to have been retained with him at the time of his handing over charge, to P. W. 7 on the 28th of June, 1952 notwithstanding his desperate efforts to raise loans, the reasonable inference must be that the money was appropriated by him for his own use. His dishonest intention is thus obvious.

Mr. Das relied on the case reported in *Harakrishna Mahatab v. Emperor*, 31 Cri LJ 249 : (AIR 1930 Pat 209) and urged that dishonest intention on the part of the petitioner could not be conclusively inferred. But the facts of the two cases are different. In that case the amount that was alleged to have been misappropriated

was actually refunded soon after the trouble arose, and there was nothing on record to show that the accused was living beyond his means during the relevant period.

22. One of the points taken in lower Courts was that cognizance of the offence was illegally taken by the Magistrate inasmuch as Government sanction was not obtained under Section 197, Cr. P. Code. It is true that as Chairman of the Sadar Local Board, Balasore, or as Vice-Chairman of the District Board, the petitioner can be removed from office only by the State Government, but the petitioner resigned his office as Chairman of the Local Board on 28-8-1952 and was removed from membership of the District Board on 6-5-1953 (vide notification No. 4297 L. S. G. Department) -- (Ext. 33). Cognizance in this case was taken by the Magistrate only on receipt of Police Charge sheet on 14-12-1953 nine months later. It is now well settled by the recent decision of the Supreme Court reported in S.A. Venkataraman v. State, AIR 1958 SC 107, that the protection given to a public servant under Section 197, Cr. P. Code is not available if, on the date on which cognizance was taken, he was not a public servant.

23. I am satisfied that the charge has been fully brought home against the petitioner.

24. As regards the sentence, the reasons given by the learned Additional Sessions Judge for reducing the sentence of imprisonment passed by the trying Magistrate are not at all convincing. The petitioner was not an immature person but a seasoned politician with years of public work to his credit. He deliberately permitted the pernicious practice of personal payment (instead of payment by money order) to the primary school teachers under the jurisdiction of the Sadar Local Board to continue, and defalcated such a large sum as Rs. 33,000/-and odd. Public Workers who misuse their official position and misappropriate large sum of public money should be dealt with severely, and I think the sentence passed by the learned trying Magistrate was quite appropriate.

25. While therefore, dismissing criminal revision No. 229 of 1957 filed by the petitioner. I would allow criminal revision No. 269 of 1957 filed by the State, restore the sentence of two years' imprisonment and fine of Rs. 1000/- (Rupees one

thousand) passed on the petitioner by the trying Magistrate; in default of the payment of this fine the petitioner shall undergo rigorous imprisonment for six months more, The learned Sessions Judge should note that he cannot enhance the sentence of fine to Rs. 3,000/-when the maximum fine that the Magistrate could impose is only Rs. 2000/-.

26. Steps should be taken immediately to recommit the petitioner to jail to serve out the sentence.

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