

Major J. Phillips Vs. the State

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Court : Kolkata

Decided On : Aug-31-1955

Reported in : AIR1957Cal25,1957CriLJ54

Judge : Debabrata Mookerjee, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 197, 230 and 439;
;Indian Penal Code (IPC) - Sections 116, 120B, 161, 409 and 420; ;West Bengal
Criminal Law Amendment (Special Court) Act, 1949 - Section 2(2), 2(3) and 4(2);
;West Bengal Criminal Law Amendment (Special Court) (Amendment) Act, 1952; ;
[Bengal General Clauses Act, 1899](#) - Section 22

Appeal No. : Criminal Revn. Case No. 608 of 1955

Appellant : Major J. Phillips

Respondent : The State

Advocate for Def. : J.K. Mukherjee and ;Amaresh Chandra Roy, Advs.

Advocate for Pet/Ap. : J.P. Mitter, ;A.K. Dutta and ;Kanak Kanti Ghosh, Advs.

Judgement :

ORDER

Debabrata Mookerjee, J.

1. This is a Rule to show cause why certain proceedings pending against the petitioner Major J. Phillips before the 1st Special Court, Alipore constituted under the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 as amended by Act 12 of 1952, should not be quashed or why such other or further orders should not be made as to this Court may see fit and proper.

2. It appears that the petitioner Phillips along with four other persons, named, Captain A. J. Rodrigues, Jagat Bhusan Biswas, Edward Ezra and Nandalal Dey have been summoned to take their trial before the 1st Special Court, Alipore under Section 120B/409, Penal Code. There are besides allegations against Phillips under Section 409, and under Section 409/109, Penal Code against the rest. The petitioner and his co-accused have appeared before the Special Court in obedience to the processes issued and it was after the examination in part of one witness for the prosecution that Phillips alone moved this Court and obtained the present Rule.

3. The case has a chequered history which requires to be recounted in brief outline even for the limited purpose of this Rule.

4. Major J. Phillips was the Controller of Government Telegraph Stores at Alipore during the relevant period (April 1942 to December 1944) to which the allegations appear to relate. He was a public servant employed by the Government of, India. Captain A. J. Rodrigues and Biswas were also Government servants working under Phillips. Edward Ezra and Nandalal De were contractors who supplied various materials to the Telegraph Stores and figured in purchases made of such stores by or through Phillips.

5. Certain irregularities having been detected in the affairs of the Telegraph Stores at Alipore in the year 1943 by the Accounts Officer, a departmental enquiry followed which according to the prosecution revealed a fraud of considerable magnitude in connection with what are described as illegal purchases of stores resulting in loss to Government to the tune of lacs. The matter was made over for investigation to the Special Police Establishment. The investigation extended over a pretty long time and revealed that the fraudulent transactions related to purchase of Mc. Intyre sleeves, copper strips, bolts, nuts, G. I. Pipes etc. Contracts for

supply of huge quantities of these stores were said to have been given to particular groups of favoured contractors who formed a sort of ring and in order that the transactions might, be imparted the appearance of regularity, the deals were so manipulated as to keep the purchases within the financial competence of the petitioner Phillips in matters of sanctioning local purchases. The allegation seems to be that the employees of the Alipore Telegraph Stores received illegal gratifications from the contractors who were thus given orders to supply the articles mentioned. In the course of the investigation it appeared that two other employees of the Telegraph Stores were concerned in the commission of the offences. They were Dasarathi Mukherjee and Dhruva Chandra Banerji; the former died after the commencement of the trial and the latter turned an approver and gave evidence in the case.

6. The investigation having revealed that a fraud of considerable magnitude had been perpetrated on the Government as the result of a conspiracy as between the employees of the Telegraph. Stores, and the contractors in pursuance of which other offences were also committed, a complaint was filed by one K. L. Mukherjee, Superintendent of Police in the Court of the 1st Special Tribunal at Alipore which was constituted under Ordinance 29 of 1943.

7. The employees of the Telegraph Stores being public servants concerned in the commission of the offences, sanctions were obtained for their prosecution both under Section 197, Criminal P. C. and under Section 270, Government of India Act, 1935; the former dated 26-7-1946 was accorded by the Governor-General in Council and the latter dated 30-7-1946 by the Governor-General in his discretion. The two sanctions read thus :

'In pursuance of Sub-section (1) of Section 197, Criminal P. C., the Governor General-in-Council is pleased to sanction the institution of criminal proceedings against Major J. Phillips, Controller of Telegraph Stores, Captain A. J. Rodrigues, Retd. Deputy Assistant Engineer, Purchase, Dasarathi Mu-kherji, Sub-Store Keeper, and Jagat Bhusan thi Mukherji, Sub-Store Keeper, and Jagat Bhusan Biswas. Stock Holder, all of the Telegraph Store Yard, Alipore, Calcutta, who are alleged to have, during the period 1942 to 1944 or thereabouts in league with each

other, attempted to cheat or actually cheated the Government in purchasing copper strips, Mc-Intyre Sleeves, Bolts and Nuts, G. I. Pipes, and other stores, thereby causing a loss of about thirty lacs of rupees to Government and also to have accepted illegal gratification in circumstances constituting offences punishable under Section 120B read with Section 420, Sections 420, 161/116, and Section 161, Penal Code, and/or other provisions of law.'

'The Governor-General in his discretion has been pleased to grant his consent under Sub-section (1) of Section 270, Government of India Act, 1935, to the Institution of criminal proceedings against Major J. Phillips Controller of Telegraph Stores, Captain A. J. Roderigues, Deputy Assistant Engineer, Purchase, Dasarathi Mukherji, Sub-Store Keeper, and Jagat Bhusan Biswas, Stock Holder, all of the Telegraph Store Yard, Alipore, Calcutta, who are alleged to have, during the period 1942 to 1944 or thereabouts, in league with each other, attempted to cheat or actually cheated the Government in purchasing copper strips, McIntyre Sleeves, Bolts and Nuts, G. I. Pipes, and other stores, thereby causing a loss of about thirty lacs of rupees to Government, and also to have accepted illegal gratification, in circumstances constituting offences punishable under Section 120B read with Section 420, Sections 420, 161/116, and Section 161, Penal Code, and/or other provisions of law.'

8. The complaint that was filed before the 1st Special Tribunal constituted under Ordinance 29 of 1943 was thus preceded by the two sanctions which have been set out above.

9. The trial thus commenced before the 1st Special Tribunal under Ordinance 29 of 1943 lasted for a considerable time at which a mass of materials was produced in support of the allegations which the prosecution made against the accused persons. A large number of witnesses was examined and a volume of documentary evidence was adduced in support of the charges that were framed in the case.

10. All the accused persons were charged under Section 120B/409/161, Penal Code for having been, between April 1942 to December 1944, parties to a conspiracy to commit criminal breach of trust and to give and receive bribes by

dishonestly allowing inflated rates to the contractors in respect of supply of stores etc. petitioner Phillips was charged in addition under Section 409 on two counts and also under Section 161, Penal Code. There were other charges framed against the other accused persons at the trial which it is not necessary to set out for the purpose of this Rule; amongst others these latter charges included the charge of abetting Phillips in the commission of the offences under Section 409, Penal Code.

11. The petitioner and his co-accused pleaded not guilty to the charges; but the 1st Special Tribunal rejected the plea and convicted and sentenced petitioner Phillips and his co-accused on several of the charges framed against them. The petitioner was convicted under Section 120B/409/161, Penal Code along with the other accused persons. He was also convicted under Section 409, Penal Code in respect of both the counts. He was, however, acquitted in respect of the charge under Section 161, Penal Code. The other co-accused of the petitioner having been found guilty of several of the charges framed against them including the charge of conspiracy, the Special Tribunal sentenced the petitioner and his co-accused to suffer various terms of rigorous imprisonment and also to pay fines.

12. Upon being convicted and sentenced the petitioner and his co-accused appealed. The appeals which they separately preferred were heard and disposed of together by a Bench of this Court presided over by Chakravarti J. (as he then was) on 29-4-1952 (since reported in 'Edward Ezra v. State', : AIR1953 Cal263). The appeals succeeded. The convictions and sentences in the case of each of the appellants were set aside and the petitioner Phillips and his co-accused were all directed to be retried according to law by a Court of competent jurisdiction.

13. The grounds on which the appeals were allowed were that the 1st Special Tribunal which tried the petitioner and his co-accused had not been legally constituted and that some of the provisions of Ordinance 29 of 1943 under which that Tribunal had been constituted were repugnant to Article 14 of the Constitution of India in that they were obnoxious to the equal protection clause embodied in that Article.

14. Meanwhile the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 as amended by Act 12 of 1952 had come into operation. By a Notification issued in October 1952 the State Government distributed the case against the petitioner and his co-accused to the 2nd Special Court at Alipore constituted under the Criminal Law Amendment (Special-Courts) Act, 1949. On 12-11-1952 a petition of complaint was filed before the 2nd Special Court on behalf of the Central Government charging the petitioner and his co-accused under Section 120B/409, 409, Penal Code. The 2nd Special Court took cognizance of the offences and summoned the petitioner and the other accused persons to take their trial before it.

15. After the processes were Issued by the Second Special Court the petitioner and his co-accused applied to this Court for quashing the proceedings that were then pending against them before the Second Special Court at Alipore. The application for quashing the proceedings was based as several grounds none of which fall to be considered in the context of the present Rule excepting one, namely, that it was urged on behalf of the petitioner Phillips that there was no valid sanction accorded to his prosecution. The matter was dealt with by Chunder J. who by an order dated 5-6-1953 negatived all the contentions raised on behalf of the petitioners before him including the contention that in the absence of sanction required by law, the proceedings against the petitioner Phillips were liable to be quashed. The learned Judge held that the so-called petition of complaint which had been filed before the Second Special Court was not the real petition of complaint but that the petitioner and the other accused were being tried upon the allegations contained in the petition of complaint which had been filed before the 1st Special Tribunal, Calcutta. The prosecution before the Tribunal having been preceded by sanctions duly accorded, the learned Judge held that once a sanction had been granted it took away the bar to the prosecution of the-public servant concerned and it was then open to the Court to charge him with having committed any offence which the evidence might disclose against him. The learned Judge further observed that it was really the old case which was being retried under orders of this Court and consequently the question of a fresh sanction did not arise.

16. It does not appear that the petitioner Phillips pursued the matter further; rather he preferred to allow the matter to rest there although two of his co-accused appealed by special leave to the Supreme Court against the order of Chunder J. The point that was raised before the Supreme Court by the petitioner's co-accused did not relate in any way to the question of sanction, but it was confined to the question of jurisdiction of the Special Court to try the case in view of the provisions of Section 12 of the Amending Act 12 of 1952. The Supreme Court negated that contention and the appeal was dismissed on 30-11-1954.

17. The proceedings against the petitioner and his co-accused before the Second Special Court at Alipore which were thus interrupted were now resumed; but nothing effective appears to have been done before that Court till about 18-3-1955. It then transpired that the case against the petitioner and the other accused persons was to be begun anew before the 1st Special Court at Alipore. It appears that the Judge of the Second Special Court made an order on 18-3-1955 noting that he had received a certain communication from the State Government showing that the order by which the distribution of the case had been made to the Second Special Court had been deleted and a fresh order made distributing the case to the 1st Special Court at Alipore.

18. On 15-3-1955 two Notifications were issued respectively numbered 1418-J. and 1420-J. The first notification was in these terms :

'In exercise of the power conferred by Sub-section (2) of Section 4, West Bengal Criminal Law Amendment (Special Courts) Act, 1949 (West Bengal Act 21 of 1949), the Governor is pleased to make the following amendment in this Department notification No. 5554-J, dated 8-10-1952, distributing cases to the West Bengal Second Special Court, namely :

AMENDMENT

From the list of cases in the said notification 'delete' the following :

'5. The State versus (i) Major J. Phillips, Controller, Telegraph Stores, Alipore.

(ii). Captain A. J. Roderigues, Deputy Assistant Engineer, Purchase-Section, Telegraph Stores. Alipore.

(iii) Jagat Bhusan Biswas, Stock Holder, Hire-Godown, Telegraph Stores, Alipore.

(iv) Edward Ezra, Contractor to Telegraph Stores, Alipore and

(v) Nanda Lal Dey, Contractor to Telegraph Stores, Alipore .

under Sections 120B/409, Penal Code and Sections 109/409, Penal Code.'

By order of the Governor,

Sd./- K. K. Hajra

Secy, to the Govt. of West

Bengal.

19. Notification No. 1420-J. by which the case against the petitioner was distributed was as follows:

'In exercise of the power conferred by Sub-section (2) of Section 4, West Bengal Criminal Law Amendment (Special Courts) Act, 1949 (West Bengal Act 21 of 1949), the Governor is pleased to distribute to the West Bengal First Special Court constituted by notification No. 4632-J, dated 22-8-1952, under Section 2 of the Act, the following case involving offences specified in the schedule to the said Act, to be tried by the said Special Court :

CASE

'i. The State versus (i) Major J. Phillips, Controller, Telegraph Stores, Alipore.

(ii) Captain A. J. Roderigues, Deputy Assistant Engineer, Purchase Section, Telegraph Stores, Alipore,

(iii) Jagat Bhusan Biswas Stock Holder, Hire Godown, Telegraph Stores, Alipore,

(iv) Edward Ezra, Contractor to Telegraph Stores, Alipore and

(v) Nanda Lal Dey, contractor to Telegraph Stores, Alipore

under Section 120B/409, Penal Code and Sections 109/409, Penal Code.

By Order of the Governor,

Sd./- K. K. Hajara,

Secy, to the Govt. of

West Bengal.'

Thus the notification by which the case had been distributed to the Second Special Court was amended by 'deleting' from it the case against the petitioner and his co-accused; the case was thereafter distributed to the First Special Court to be tried by it.

20. On 24-3-1955 the Public Prosecutor filed a petition before the First Special Court for taking cognizance of the case after calling for the records from the Second Special Court, Alipore. The records were called for and when received along with original complaint etc., the First Special Court took cognizance of the case against the petitioner and others on 30-3-1955. The First Special Court presided over by Sri J. C. Lodh directed the issue of processes against the petitioner and the other accused persons. The petitioner was thus summoned under Section 120B read with Section 409, Penal Code as also under Section 409 of the Code. The other accused persons were similarly summoned under Section 120B read with Section 409 and under Section 409 read with Section 109, Penal Code.

21. The petitioner and the other accused persons then appeared before the First Special Court at Alipore; and after some intermediate dates of hearing which were mostly occupied with the opening address of counsel for the prosecution, the Court commenced hearing of evidence on 28-4-1955. The examination of the first witness continued for several days and before the close of evidence-in-chief of this witness, the petitioner Phillips applied to this Court and obtained this Rule on 9-5-1955.

22. Several points have been made by Mr. Mitter, learned counsel on behalf of the petitioner, in support of this Rule. In the first place it has been argued that the present proceedings against the petitioner are not maintainable in the absence of a valid sanction. It is said that the sanctions accorded in 1949 which have been set out above do not permit prosecution of the petitioner under Section 409, Penal Code. Those sanctions relate to offences of conspiracy to commit an offence of cheating under Section 420, bribery under Section 161 read with Section 116 etc., but the summons now issued by the Judge of the First Special Court mentions Section 120B read with Section 409 and. Section 409, Penal Code so far as the petitioner is concerned. Presumably the trial will take place, according to the petitioner, for charges of offences of conspiracy to commit criminal breach of trust and criminal breach of trust. It has been further argued that the original complaint which is still the complaint today contains no reference to Section 409, Penal Code. There was no case of entrustment made; the petitioner had nothing to do with funds; it was only a part of his duty to procure the stores. That being so, the projected prosecution of the petitioner for criminal breach of trust or of conspiracy to commit criminal breach or trust- as a public servant involves allegations for which no sanction exists. Mr. Mitter further invited attention to para 6 of the original petition of complaint which according to him contained the gravamen of the offences charged against the petitioner. In these circumstances it is argued that the present prosecution cannot possibly be permitted to go on in the absence of a valid sanction from the authority concerned.

23. On behalf of the State, learned counsel Mr. Mukherjee has argued that although it is the old case against the petitioner and the other accused persons that is being retried, the question of absence of a valid sanction was never raised before. In any event the question was once raised before Chunder J. and the findings of that learned Judge are conclusive in the matter and the question of absence of sanction cannot be reagitated. It has been further argued that if the evidence in the case establishes the offence of criminal breach of trust or of conspiracy to commit it by a Government servant, the prosecution cannot be precluded from proving such charges. In other words, the existing sanctions cannot be too rigidly or mechanically interpreted.

24. It is to be observed that the charges before the First Special Tribunal constituted under Ordinance 29 of 1943 were, so far as the petitioner was concerned, under Section 120B/409/161; he was also substantively charged under Section 409 on two counts. The charges against the rest, without going into details, also related to the charge of conspiracy is framed against the petitioner as also of abetment of the charge of criminal breach of trust by a public servant, that is to say, under Section 409 read with Section 109. The whole trial before the Special Tribunal proceeded on the footing that prosecution case was that there was a conspiracy to commit criminal breach of trust etc., that the petitioner Phillips was alleged to have committed the offence of criminal breach of trust, that the other accused persons were members of the conspiracy charged and that they abetted the petitioner Phillips in the commission of the offence of criminal breach of trust. The convictions and sentences that followed were also in respect of these charges. Appeals were then taken to this Court; but it does not appear that any objection was taken in the appeals on the ground of alleged invalidity or inadequacy of the sanctions. It must be said that the want of valid sanction being a matter of fundamental importance going to the root of the case, normally that should have been one of the principal grounds of challenge to the convictions made and sentences passed.

25. Before Chunder J. It must be said the point of invalidity of the sanction was specifically raised. Although the decision of the learned Judge had gone against the petitioner, the point does not appear to have been pursued further.

26. It is however clear that although the petitioner does not appear to have raised specifically the point of want of legal and proper sanction before the appeal Court and the point when raised before Chunder J. having been negatived, was not pursued, I do not think the petitioner can be precluded from raising the point in this Rule. The decision of Chunder J. was rendered by a learned Judge sitting singly and despite the fact that it was not challenged in a superior Court, want of sanction being a matter, of fundamental importance going to the root of the proceedings, I do not think it would be right to hold that the petitioner cannot canvass the point before me. I do not agree therefore that the observations of Chunder J. conclude the matter. Although the fact remains that the decision of the learned Judge was

not questioned then, nevertheless I think it is still open to the petitioner to canvass the point.

27. It is therefore necessary to consider the petitioner's objection on the merits as respects the want of a valid sanction to his prosecution under Section 120B read with Section 409 and Section 409, Penal Code. Section 197, Criminal P. C. provides that when any public servant, who is not removable from his office save by or with the sanction of a State Government or of some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the appropriate authority. In this instance the appropriate authority is without doubt, the Government of India and under the provision of Sub-section (3) of Section 197 the Governor-General was the proper authority to accord sanction to the prosecution of the petitioner. That sanction was accordingly given. There was a further sanction under Section 270, Government of India Act, 1935, the terms of which it is not necessary to refer at this stage. It is therefore clear that the bar to prosecution of the petitioner was lifted. Question arises whether the sanction that was accorded and which the prosecution proposes to prove bears a real relation to the facts sought to be proved or whether the sanction is wholly unrelated to the allegations which form the foundation of the present charges.

28. It is to be observed that the sanctions to which I have referred and which preceded the prosecution of the petitioner and other accused persons before the Special Tribunal do not in terms refer to Section 409, Penal Code nor even in the charge of conspiracy for which sanction was obtained, Section 409 expressly enters as an element. On the face of them the sanctions appear to proceed on the footing that the petitioner and the other accused persons were engaged in a fraud which in the language of the law amounted to cheating the Government of India and in pursuance of that they committed offences of cheating and other offences. It is therefore necessary to see whether the present prosecution should in these circumstances be limited to the strict form of the sanctions as they stand or it would be open to the prosecution to give evidence of facts and circumstances which might prove a charge of conspiracy to commit criminal, breach of trust and

the charge of actual commission of offences of breach of trust. I respectfully agree with Chunder J. when he says that when the bar to prosecution is lifted, the prosecutor or the Court cannot be limited to the exact words of the sanction. Section 197, Criminal P. C. is just one of the devices adopted by the Legislature to prevent prosecution of officers and servants of Government upon frivolous accusations. Consequently this is a safeguard against harassing prosecutions which have no foundation in facts. That being the real object of Section 197, Criminal P. C., it would be wrong, in my view, to limit the prosecution to the strict formal phrases appearing in the body of the sanction itself. In my opinion, it is the duty of the Court to look at the substance of the matter; and if upon such examination it appears that the prosecution has set out to prove facts and circumstances which have a real relation to the facts stated in or suggested by the sanction itself, the mere absence of mention of a particular section of the law from the body of the sanction would not matter at all. Speaking in an abstract manner, there may be an element of deception in allegations which may amount to proof of criminal breach of trust; and this is essentially a matter of evidence. I can quite conceive of a set of facts which, if believed, will support either a charge under Section 420 or under Section 409, Penal Code. I therefore do not consider that the mere fact that a particular section of the law does not find mention in the body of the sanction itself, would preclude the prosecution from proving facts and circumstances possessing a real relation to the basic facts mentioned in or suggested by the sanction actually accorded.

29. The validity of a sanction, I think, depends on the substantial question whether the essential facts were present to the mind of the sanctioning authority before it decided to lift the bar to the prosecution of the public servant concerned. I cannot agree that a sanction has to be literally read so as to limit the prosecution to such allegations as might only be compressed within the four corners of the sections of the, offences which find mention in the body of the sanction accorded. This appears to be a wholly unrealistic approach which neither the law compels nor justice requires. Just as the prosecution cannot be permitted to wander from the sanction and institute a roving inquisition under cover of a sanction it would, in my view, defeat the law if the prosecution has to be mechanically limited to proof of only such facts as support or feed the charges of offences expressly mentioned in

the sanction. As far as I can see sanction is never accorded or intended to be accorded to the bare sections defining or punishing offences, but to facts alleged which constitute breaches of the law. This aspect of the matter was emphasised in the case of 'Gokulchand Dwarkadas v. The King', 52 Cal WN 325 : (AIR 1943 PC 82) (B), in which the Judicial Committee of the Privy Council observed that

'the charge need not follow the exact terms of the sanction, though it must not relate to an offence essentially different from that to which the sanction relates.'

Their Lordships were construing Clause 23, Cotton Cloth and Yarn Control Order, 1943 and further observed :

'in their Lordships' view in order to comply with the provisions of Clause 23 it must be proved that the sanction was given in respect of the facts constituting the offence charged. It is plainly desirable that the facts should be referred to on the face of the sanction, but this is not essential, since Clause 23 does not require the sanction to be in any particular form, nor even to be in writing. But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority.'

Again

'A person could not be charged merely with the breach of a particular provision of the Order; he must be, charged with the commission of certain acts which constitute a breach, and it is to that prosecution -- that is, for having done acts which constitute, a breach of the order -- that the sanction is required.'

Their Lordships then referred to Section 230, Criminal P. C.,

'It may be observed that Section 230 of the Code provides that if the offence stated in a new or altered charge is one for the prosecution of which previous sanction is necessary the case shall not be proceeded with until such sanction is obtained,

'unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded.'

The latter words indicate that the Legislature contemplated that sanctions under the Code would be given in respect of the facts constituting the offence charged.'

Thus there cannot be any doubt that the mere fact that the sanction does not mention Section 409 or a conspiracy to commit an offence under Section 409 will not invalidate the prosecution. As has been observed by the Judicial Committee, sanction is not accorded to the section, but to the facts constituting the offence. The facts of the present case are to be found in the original petition of complaint and the evidence of the witness who has been partly examined in chief. Looking at the petition of complaint such' as it is, it is impossible to hold that they do not contain the kernels of the offence of criminal breach of trust or of conspiracy to commit that offence. As I have already indicated allegations which may quite properly support a charge of cheating might equally in certain cases support a charge of criminal breach of trust. Mr. Mitter has argued that the petitioner Phillips was never entrusted with funds. His only duty was to procure the stores and in the performance of that duty he took the assistance of his subordinates and others. The allegation against him in the petition of complaint is that he was a party to a conspiracy which aimed at perpetrating a huge fraud on the Government, that he had the power to dispose of or to sanction payment of funds within certain specified limits, and that certain goods were acquired in pursuance of the plan or preconcert between the petitioner and his co-accused. It would entirely be a matter of evidence, which the prosecution will be obliged to adduce at the trial and show that the kernels of a case of breach of trust have grown into sizeable magnitude and proportion clearly establishing that the petitioner was party to a conspiracy to commit criminal breach of trust and in pursuance of it actually committed criminal breach of trust. Judged by the test which I proposed to myself in the earlier part of this order that if the allegations in the complaint bear a real relation to the facts which find mention in the sanction I am bound to hold that the essential elements in a germinal state are there and consequently it cannot be said that the sanctions go one way and the case goes a different way. If such relation is established or even indicated it matters little whether the allegations or most of them contained in

the petition of complaint are as well found to support a charge of cheating. As I indicated above, there may very well be cases where the elements of cheating and of criminal breach of trust overlap. The mere fact that allegations of cheating have extensively been made in the petition of complaint will be no ground for holding that there, cannot be a charge of or conviction for criminal breach of trust since the sanction relates to offences of cheating and of conspiracy to cheat. In one sense the objection is premature; the prosecution has to call evidence to fill in the details of the picture which is very far from complete. If further authority on the point is needed it may perhaps be found in the case of *H. H. B. Gill v. The King* , in which the Judicial Committee of the Privy Council observed as follows :

'Where a complaint refers to facts which may equally support charges either under Section 120B read with Section 420 or under Section 120B read with Section 161 and sanction is given for a prosecution under the former charge, an alteration of the charge into the latter one does not necessitate a fresh sanction. In such circumstances Section 230, Criminal P. C. becomes operative and the original sanction given justifies the Court in taking cognizance of the altered charges.'

It is undoubtedly true that there is no case of alteration of charge in the present case; but Section 230, Criminal P. C. is to my mind a clear pointer even in a case where a sanction has been given for one charge and facts proved establish another. The Legislature has thought it prudent to lay down that to an altered charge or amended charge there need be no fresh sanction at all provided of course sanction has already been obtained for a prosecution on the same facts as those on which the altered charge is founded. This, to my mind, declares the intention of the Legislature even in cases such as this. The mere fact that a charge different from the one alleged is proved will not require a fresh sanction provided the altered charge is founded on the same facts, Similarly, in the present case where allegations of complaint bear a genuine relation to the sanction that has been obtained the mere fact that a different section is mentioned in the sanction will not entitle the accused to say that the sanction is bad. In the present case the summons issued on the petitioner mentions charges of offences which do not find mention in the sanctions that were obtained. That can be no ground for quashing the present proceedings. Taking the complaint as a whole the facts bear a real

relation to allegations which, if believed, might establish a case of conspiracy to commit criminal breach of trust and criminal breach of trust. In these circumstances, I think no just exception can be taken to the sanctions only on the ground that they do not specifically mention Section 409 and Section 409/120B, 5, Penal Code. In my view there is no substance in the contention that in the circumstances of this case no evidence as to criminal breach of trust or of conspiracy to commit that offence can be given or that in the absence of an express sanction no case under Section 409 and/or Section 120B/409 can be built up on the basis of the sanctions which have been accorded. As long as the substance of the sanction is not in essence departed from, as long as the sanction bears a real relation to the complaint and the evidence brought, it is a matter of little consequence that the charge of offence sought to be proved is not identical with the charge of offence mentioned in, the sanction obtained.

29a. In these circumstances I am bound to hold that there is no substance in the contention raised by Mr. Mitter that the sanctions being the old ones can be of no assistance to the prosecution in the present case.

30. Mr. Mitter has further argued that in view of the recent decision of the Supreme Court in the case of *Shreekantiah Bamayya Munipalli v. State of Bombay*, : 1955 CriLJ857 it is incumbent upon the prosecution to prove that they have a valid sanction before the petitioner can be put to the peril of further proceedings before the Special Court. It is argued that the decision in this case makes it obligatory that there must be a sanction expressly given for charges of offence on which a person is being prosecuted. In that case there were three accused persons put on trial. All the three were jointly charged with an offence punishable under Section 5(2), Prevention of Corruption Act, 1949 and they were further jointly charged with having committed criminal breach of trust in furtherance of the common intention of all under Section 409 read with Section 34. There were a number of alternative charges in which each of the three persons was separately charged with having committed criminal breach of trust under Section 409, etc. All the three persons were public servants and consequently sanction was required. Their Lordships observed as follows:

'Now it will be observed that the accused are all public servants and they contend that as, according to the prosecution they purported to act in the discharge of their official duties, sanction was necessary under Section 197, Criminal P. C. There is sanction so far as the first accused is concerned but the second accused contends that there is none in his case to justify the present trial; so his trial, conviction and sentence are bad.

The position about this is as follows : On 27-10-1949 the Governor-General, acting under Section 197. Criminal P. C., sanctioned the prosecution of the first accused for offences under Sections 120-B, 409. 109 and so forth, for having conspired with the other two to commit criminal breach of trust in respect of the properties with which this case is concerned and thus for having abetted the commission of that offence, and also for having committed it. Similar sanction could easily have been given against the other two accused but it was not. The sanction for these offences was limited to the first accused. On the same date sanction was also given for the prosecution of the first accused under Section 5(2). Prevention of Corruption Act and a similar sanction was given against the second accused. The question is whether this sanction against the second accused can be extended to cover his prosecution under Section 409, I. P. C. In our opinion, it cannot.'

Their Lordships then referred to the unamended Prevention of Corruption Act (2 of 1947) and held that

'trials under Section 5(2), Prevention of Corruption Act must be before a Special Court and a special procedure must be followed. There, the position which these various Acts created was this First, a choice was conferred on some authority to choose whether any given accused, should be tried in a Special Court with a special procedure and be subject to a lesser punishment under Section 5(2) or whether he should be tried in the ordinary way under Section 409. I. P. C. with the risk of a higher punishment. '

Then their Lordships considered the question as to the authority who is to do the choosing as respects the giving of sanction--whether it was the Central Government or the Governor-General. Then their Lordships observed:

'There is a choice, not only of forum, but also of procedure and the extent of the maximum penalty. If two separate authorities are given the right to choose and neither can encroach upon the preserve of the other, then the Governor-General has not sanctioned the present prosecution against the second accused & no other authority has the power to do so. Therefore, in that event, the sanction given to prosecute under Section 5(2), cannot be used to cover the present trial because it is given by another authority not competent to give it.'

The excerpts which I have set out above from the decision of the Supreme Court clearly indicate the reason why it was held that the absence of a sanction in the circumstances of that case was held to be fatal. This decision, in my view, is no authority for the proposition that the allegations in the case although bearing a real relation to the sanctions cannot be entertained simply because the sanctions do not contain, on the face of them, reference to charges of offences which are now sought to be made out.

30a. I therefore consider that the objection raised by Mr. Mitter that in the absence of a sanction specifically permitting prosecution of the petitioner under Section 120-B read with Section 409 and Section 409; the present proceedings are not maintainable, has no substance.

31. I have already referred to the fact that the petition of complaint against the petitioner upon a close examination does disclose the elements of a case of breach of trust and of conspiracy to commit the offence. These facts are there in, bare outline and I do not think that absence of express and elaborate description of the offences of criminal breach of trust or of conspiracy to commit criminal breach of trust will preclude the prosecution from proceeding with the present trial. Mr. Mukherjee, learned counsel for the State has argued that in any event the petitioner had dominion over the goods purchased and also over funds. All that I am concerned with at the present moment is to see whether the petition of complaint such as it is, does or does not contain the essence of the case of conspiracy to commit and of committing criminal breach of trust. I am not prepared to say that it does not contain that essence,

32. A complaint was incidentally made that the sanctions have not been produced and proved at the trial. I find the sanctions are there on the record and the petitioner came up to this Court when the prosecution had examined and that partly only one witness. There can be no gainsaying the fact that the old sanctions are there and that they had been obtained prior to the proceedings commenced against the petitioner and the others before the First Special Tribunal, Indeed the prosecution will have to prove the sanctions in due course which form part of the record.

33. The next point which has been made by Mr. Mitter is that the present proceedings against the petitioner and his co-accused cannot in law continue before the First Special Court. The objection seems to be that under the Amending Act 12 of 1952 the State Government has no power to transfer a proceeding from one Special Court to another. In this case the proceedings were originally before the Second Special Court, but thereafter as a result of certain notifications they were, according to Mr. Mitter, transferred to the First Special Court before which they are pending at the moment. It has also been argued that the manner of taking cognizance of offences in the present proceedings is of doubtful legality and it is open to question whether cognizance can be taken of offences in the way in which it purports to have been taken by the First Special Court. No fresh complaint was filed before that Court and Mr. Mitter has argued that cognizance has still been taken. These objections require to be examined by reference to the different provisions of Act 21 of 1949 as amended by the Amending Act 12 of 1952. Section 4 of the unamended West Bengal Criminal Law Amendment (Special Courts) Act, 1949 is in these words:

'(I) The Provincial Government may, from time to time by notification in the Official Gazette, allot cases for trial to a Special Judge, and may also from time to time by like notification transfer any case from one Special Judge to another and withdraw any case from the jurisdiction of a Special Judge or make such notifications in the description of a case (whether in the name of the ac-cused or in the charges preferred or in any other manner) as may be considered necessary.

(b) The Special Judge shall have jurisdiction to try the cases for the time being allotted to him under Sub-section (1) in respect of such of the charges for the offences specified in the Schedule as may be preferred against the several accused, and any such case which is at the commencement of this Act or at the time of such allotment pending before any Court or another Special Judge shall be deemed to be transferred to the Special Judge to Whom it is allotted.'

This section was substituted by Section 5 of the Amending Act 12 of 1952. Mr. Mitter's argument is that as a result of the Amending Act the power of transfer which was given to the State Government under the unamended provisions of the West Bengal Criminal Law Amendment Act having been taken away it was not open to the State Government to 'transfer' the present proceedings from the 2nd Special Court to the 1st Special Court.

34. It is to be observed that the Act (Act 21 of 1949) was considerably amended by the Amending Act 12 of 1952. One of the principal amendments that was made related to the fact that the power of the State Government to allot cases to the Special Court was taken away. The unamended Act gave the power to the State Government to decide which cases were to be transferred to the Special Judge for trial. That was indeed calculated to produce an invidious distinction between case and case, accused and accused which was certainly obnoxious to the equal protection clause contained in Article 14 of the Constitution. The result was that certain specified offences were made exclusively triable by Special Courts and the Amending Act of 1952 made the following provisions in place of Section 4 of the unamended Act. The amendment reads as follows:

'4(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, or in any other law, the offences specified in the schedule shall be triable by Special Courts only:

Provided that when trying any case, a Special Court may also try any offence other than an offence specified in the Schedule, with which the accused may under the Code of Criminal Procedure, 1898, be charged at the same trial.

(2) The distribution amongst Special Courts of case involving offences specified in the Schedule, to be tried by them, shall be made by the State Government.'

35. It is thus clear there is no question now of allotment of particular cases to a Special Judge by the State Government. All cases mentioned in the schedule to the Amending Act are triable by the Special Court only and there is no question of allotting particular cases to a particular Special Judge. Section 2 of the unamended Act has been amended by Act 12 of 1952 in these terms :

'2(1) The State Government shall from time to time, as it deems necessary, constitute by notification in the Official Gazette one or more Special Courts and may by like notification abolish any such Court, if it deems such Court to be no longer necessary.'

Sub-section (2) does not fall to be considered in the present context and is therefore left out of account. Sub-section (3) runs thus :

'Every Special Court shall have jurisdiction throughout the whole of West Bengal and shall sit at such place or places as the State Govt. may by notification in the Official Gazette, specify in this, behalf.'

36. Pausing here for a moment it is quite clear that the State Government has been given the power to constitute by notification in the official gazette one or more Special Courts and also the power to abolish such Courts. What is more important, by Sub-section (3) of Section 2 every Special Court has been given jurisdiction as respects the whole of the State of West Bengal. There is no question of allotment under the provisions introduced by Act 12 of 1952. There is now only the question of distribution. If I may say so, the concept of 'transfer' does not enter into the present amended Act. As a matter of fact, there are no Special Judges now, the Amending Act has established only Special Courts; under its provisions there is no necessity for allotment of cases. The amendment has made it clear that all offences which find mention in the schedule are triable by Special Courts only and furthermore every Special Court has been given a specially extended jurisdiction throughout the State of West Bengal. The only thing that remains to be done to complete the picture is to provide the machinery for

'distribution' of cases exclusively triable by the Special Court. In this context the only question that arises is the question of distribution and not of transfer. I am not prepared to hold that there was a transfer of the proceedings from the Second Special Court to the First Special Court when the case was distributed by the State Government to the latter Court. The idea of transfer which was familiar under the unamended Act has been completely abrogated under the amended provisions introduced by Act 12 of 1952.

37. It is therefore to be seen whether in the present case the new procedure has correctly been followed and whether the proceedings are at the moment properly before the first Special Court at Alipore.

38. I have already set out in the earlier part of this order the two notifications made by the Government. The first one related to an amendment by way of deleting a certain case, namely, the present case from a list of cases made over for trial to the Second Special Court. Government Notification No. 1418-J relates to such deletion. The notification that followed distributed the present case to the First Special Court. Therefore it is not correct to say that the proceedings against the petitioner and his co-accused were 'transferred' from the Second to the First Special Court.

39. Question might arise whether the power of distributing a case given to the State Government under Sub-section (2) of Section 4 introduced by the Amending Act includes the power of deleting or cancelling such distribution. The distribution is made by means of a notification which records an act of State. This is obviously done under Sub-section 1(2) of Section 4. I am inclined to think that the power of distributing a case necessarily carries with it the power to cancel a distribution already made. Attention may be called to Section 22, Bengal General Clauses Act which says :

'Where, by any Bengal Act, a power to make orders, rules, by-laws or notifications is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any orders, rules, by-laws or notifications so made.'

The order of distribution is made by means of a notification. Under Section 22, Bengal General Clauses Act which I have just read I think the State Government has power to cancel a notification which it has made in pursuance of the power given to it under Sub-section (2) of Section 4. In my opinion it has been quite regular on the part of the State Government to cancel the distribution originally made to the Second Special Court and then to 'distribute' the case to the First special Court, Alipore. In his view of the matter I do not think there is any substance in this contention raised on behalf of the petitioner on the cognate contention that the power of distribution once exercised exhausts itself ; no such limitation can be read into the plain words of the section.

40. If in these circumstances to which I have just adverted, the First Special Court has been in seisin of the case, that seisin must be held to be lawful seisin and the criticism made by Mr. Mitter of the manner in which Jurisdiction was assumed by that Court does not appear to be Bound either. A reference to the order-sheet of the First Special Court shows that the Judge presiding over that Court was moved by a petition to take cognizance after putting himself in possession of the records of the case. The records, arrived and the Judge presiding over the First Special Court applied his mind to the facts of the case appearing in the complaint and then took cognizance whereafter he directed the issue of processes. I do not think there is anything irregular or illegal in the proceedings so far.

41. The result therefore is that all the grounds urged by Mr. Mitter in support of this Rule fail and the Rule is accordingly discharged.

42. Let the records be sent down as early as possible.