P.E. Billinghurst and ors. Vs. Emperor

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Court : Kolkata

Decided On : May-31-1923

Reported in : 82Ind.Cas.545

Judge : Lancelot Sanderson, C.J. and ;Thomas Richardson, J.

Appellant : P.E. Billinghurst and ors.

Respondent : Emperor

Judgement :

1. Nos. 646 and 649 of 1922 are appeals by Billinghurst and Michael against conviction by the Chief Presidency Magistrate who found them guilty on each of the two charges and sentenced them to one year's imprisonment. Blackburn and Stoddart were charged with the same offences but were acquitted by the Magistrate.

2. The first charge is as follows: 'That, you, J. Stoddart, H.P. Blackburn, P.E. Billinghurst, and P.H. Michael, during; the period from June 1918 to July 1919, in Calcutta conspired with each other and with C.S. Waite and other persons unknown to commit an offence punishable under Section 420, Indian Penal Code, to wit, to cheat the Government of India of large sums of money in respect of the supply of linseed oil, turpentine, and water-soluble oil by Messrs. Spalding & Co., to the Munitions Board, Calcutta, and you thereby committed an offence punishable under Sections 120B and 420, Indian Penal Code, and within the

cognizance of my Court.'

3. Objection was taken by learned Counsel on behalf of Billinghurst to the first charge on the ground that it contained allegations amounting to charges of three different conspiracies and that consequently it was a bad charge.

4. The learned Advocate-General admitted that the first charge might have been framed in a better and clearer manner but he contended that it was intended to allege one general conspiracy to commit an offence or offences under Section 420 of the Indian Penal Code by cheating the Government of India of large sums of money and that the transactions in linseed oil, turpentine, and water-soluble oil were overt acts from which the conspiracy might be inferred.

5. It is clear from the judgment of the learned Magistrate that this was explained to the Counsel, who appeared for the accused at different periods of the trial. The petition of Billinghurst, dated the 31st August 1921, paragraph No. 38, stated as follows: 'That the charge against your petitioner is one of conspiracy to cheat and three overt acts are alleged in proof of that conspiracy--(1) in case of an order for linseed oil your petitioner supplied short measure; (2) in case of turpentine the price charged was excessive and that your petitioner had not the quantity of turpentine required in stock while representing that they had; (3) in case of an order for water-soluble oil the price was excessive and the quality was not up to sample. No money was paid in respect of this and is put forward as a case of an attempt to cheat.'

6. The petition of all the accused dated' the 8th December 1921, paragraph 20, was as follows: 'That in so far as the first count of the charges is concerned your petitioners have been advised and beg to submit that regard being had to the nature of the charge, which is one of a general conspiracy entered into by the said Mr. C.S. Waite and your petitioners to cheat the Government of India during the period of one year from June 1918 to July 1919, of large sums of money, and to the importance and magnitude of the same in which the Crown has engaged the services of the learned Advocate-General of Bengal from its very inception, it is desirable that the case should be tried by a Jury.'

7. It is clear, therefore, that the accused fully understood the nature of the charge- In our judgment the first charge is capable of the meaning which was placed upon' it by the prosecution and which every one connected with the trial thoroughly understood and consequently the objection raised by the learned Counsel cannot be sustained.

8. The next objection to the first charge was taken both by the learned Counsel appearing for Billinghurst and the learned Vakil appealing for Michael.

9. It was urged that, assuming the first charge to be a charge of one general conspiracy, the prosecution had not proved it, but that if they had proved any conspiracy at all, they had proved three conspiracies, and consequently the first charge must fail.

10. This objection must depend upon the evidence and the inference to be drawn from the proved facts, and we will state our conclusion on this point after dealing with the facts of the case.

11. Another objection was taken by the learned Vakil that the charge alleged a conspiracy to commit an offence punishable under Section 420 of the Indian Penal Code, to wit, to cheat the Government of India of large sums of money in respect of the linseed oil, turpentine, and water-soluble oil.

12. It was urged that in order to substantiate this charge it must be proved that there was an agreement to commit the offence of cheating under Section 420, Indian Penal Code, in respect of each of the three transactions; that the facts proved in respect of the turpentine and water-soluble oil cases did not constitute cheating within the meaning of that section. In other words, that it was not proved that what the alleged conspirators intended was cheating within the meaning of the above-mentioned Section 420, Indian Penal Code.

13. On behalf of the prosecution it was argued that it had been proved that such of the transactions alleged as overt acts, if completed, would have constituted an offence under Section 420 of the Indian. Penal Code.

14. But it was further argued by the learned Advocate-General that in order to sustain the first charge, it was not necessary to prove that each, or indeed any of the above-mentioned transactions if completed, would have constituted an offence under Section 420, but that it would be sufficient if the facts which had been proved and materials which had been placed before the Court showed that there was a criminal conspiracy between Waite and the two appellants to commit an offence or offences under Section 420, Indian Penal Code, by cheating the Government of India of large sums of money.

15. There is no doubt that as regards the first charge the gist of the alleged offence, viz., a criminal conspiracy to commit an offence or offences under Section 420, Indian Penal Code, lies in the agreement; or common intention of Waite and the two appellants, and in our judgment, the question whether such an agreement or common intention existed, is a matter of inference to be deduced from the facts of the case and the acts of the parties which have been proved in evidence, and which are alleged to have been done by them in pursuance of such agreement or common intention.

16. It is necessary, therefore, to examine the facts of the case which are relied upon by the prosecution, and the explanations and defences put forward by the two appellants respectively.

17. We do not think it necessary to deal in detail with the numerous documents which have been referred to in this case. This has been done at great length by the learned Magistrate who tried the case, and our attention has been drawn to them many times during the hearing of the appeal by the learned Counsel and the learned Vakil, who appeared for the appellants, and the learned Advocate-General on behalf of the Crown.

18. On the 2nd November 1917, Waite was appointed Deputy Controller of Inspection in connection with the Munitions Board at Calcutta.

19. His duties were to assist the Controller of Munitions at Calcutta, to apply an independent check on the quality of stores and materials procured under the Munitions Board's orders for various intending officers and to scrutinize and advise

on the suitability of rates paid for them,

20. On the 2nd May 1918, in addition to the other duties, he was appointed purchasing officer as regards oils and manufactured metals. In such capacity it was his duty, on receiving an indent from the Indian Munitions Board, Simla, to purchase the materials required. It was his duty to get the materials at the cheapest rate possible, as long as they were in accordance with the indent or specification. If firms asked too high a price it was open to Waite to ask the Controller to commandeer the materials, the price to be settled later by arbitration.

21. Waite went on leave on 23rd January 1919 and his service tinder the Munitions Board terminated on or about 23rd February 1919.

22. Michael was alleged to be a broker. From the evidence it appears that he was on intimate terms with Waite, he was frequently, almost daily, in Waite's office, and sometimes was seen at Waite's house. It was Michael who negotiated the business with which this case is concerned, all the orders from the Munitions Board having passed through Michael.. He was also frequently in the office of Messrs. Spalding & Co., and he was largely interested in the transactions which took place between the Munitions Board and Spalding & Co.

23. The total value of the orders given to Spalding & Co., was a little less than three lakhs and Michael's bills, according to his own statement, for excess rates and commission, amounted to no less than Rs. 49,777. We are satisfied on the evidence that in the transactions in question the position of Michael cannot be correctly described as that of a mere broker. The part taken by him in the various transactions will be dealt with when they are separately considered.

24. Billinghurst was a member and head of the firm of Messrs, Spalding & Co., and it was through the instrumentality of Michael that the firm obtained orders to the extent of about Rs. three lakhs from the Munitions Board, which orders were given by Waite.

25. The first order in point of date was given to Spalding & Co., on the 15th June 1918, for 600 gallons of raw linseed oil and 1,000 gallons of double boiled linseed

oil. On the day prior to that, viz., on the 14th June 1918, an agreement was entered into between Spalding & Co. and Michael to the following effect:

Letter, dated 14th, June 1918, from

Messrs. Spalding & Co. to Mr. Michael.

Dear Sir.

We confirm the arrangements made with you to-day and agreed upon, whereby we appoint you exclusively to represent us for the sale of boiled and raw linseed oils for which we have the sole selling rights, and also for the sale of varnishes and bithulithic paint manufactured by us and for any other paints, varnishes, and oils that we may be interested in hereafter upon the following terms:

'1. That we agree to pay you a commission of 1 per cent. on orders for linseed oils on prices as per list handed you.

2. We agree to pay you a commission of 2 1/2 (two and-a-half) per cent. on all orders for varnishes and bithulithic paints on prices as per list handed you. That we agree to pay you the above commissions on all repeat orders for linseed oils, varnishes, and paints directly or indirectly received by us.

3. That we further agree to pay you in addition to the commissions as stated above on linseed oils, varnishes, and bithulithic paints any extra amount you may fix with the buyer and consumers on the prices quoted to you by us as per list.,

4. That all orders to be secured in the name of the firm of Messrs. Spalding & Co.

5. That the agreement stands good for a period of 12 months from date provided we get reasonable orders.

6. In the event should you be unable to secure orders owing to illness or any other unforeseen circumstances, this agreement becomes null and void, but you shall continue to receive your commission and excess prices on all repeat orders.

Yours faithfully,

Spalding & Co.

26. It was urged on behalf of the prosecution that there was no evidence to show that Messrs. Spalding & Co. had any sole selling rights in respect of any linseed oils, and it was to be noted that the agreement referred not only to linseed oils but also to any other paints, varnishes, and oils that Spalding & Co. mights thereafter be interested in.

27. It is not unreasonable to infer from this as was urged by the prosecution, that Michael must have been in communication with Waite before the date of the agreement, inasmuch as on the 15th June 1918, in addition to the two orders already mentioned. Messrs. Spalding & Co. obtained orders from the. Munitions Board for 50 gallons raw linseed oil, 80 gallons double boiled linseed oil, and 600 gallons Copal varnish.

28. On the 17th June 1918 Waite received an indent dated the 12th June 1918, from the Indian Munitions Board, Simla, for 150 tons of oil, linseed, genuine boiled. It was marked 'Very urgent.' The oil was to be shipped to the Deputy Controller. Transit for Munitions Board, Bombay. On the 20th June 1918 Waite gave an order for 50 tons of the oil to Messrs. Spalding & Co. at the rate of Rs. 3-12-0 per gallon and with & note in 'cask of 40 gallons.'

29. A suggestion apparently was made on behalf of the defence in the Trial Court that the words 'in cask of 40 gallons' were not in the order when it was sent to Spalding and Co. and that they had been added after the documents were seized by the Police in order to support the case for the prosecution.

30. The evidence of J.N. Bhattacharjee, in our judgment, shows that the suggestion is without foundation, and that the words were placed on the order by him at the time the order was given and in consequence of the note appearing on Exhibit 42.

31. On the 27th June 1918 a further order of 100 tons of linseed oil was given by Waite to Messrs. Spalding & Co. at the same rate, Rs. 3-12-0 per gallon.

32. Messrs. Spalding and Co. had to purchase the oil in order to comply with these two orders. They got six consignments of oil from the firm of Mohin & Co. ranging from the 2nd July 1918 to 12th July 1918. The remainder of the oil was purchased from Messrs. Birla Brothers, the deliveries ranging from 4th July 1918 to 5th September 1918. Spalding & Co. paid for the oil purchased by them at a rate less than Rs. 3-12-0. vis., at about Rs. 3-8-0 or Rs. 3-8-9.

33. The net amount of oil received by Spalding & Co. and paid for by Spalding Co. was 32,038 gallons or 32,029, it is not quite clear which is the correct figure. The oil was delivered in cask by Mohin & Co. and Birla Brothers direct to the Railway in Calcutta for transit to Bombay.

34. Spalding & Co. presented bills to the Munitions Board in Calcutta in respect of 'this soil for 39,975 gallons. In other words, taking the measure of about 9 lbs. to the gallon; which was the rate at which Spalding & Co. purchased from Mohin & Co. and Birla Brothers, they charged the Munitions Board for about 7,937 gallons of oil more than they purchased from Mohin & Co. and Birla Brothers. It is to be noted that this extra charge was made in respect of the identical casks of oil delivered by Spalding & Co.'s sellers to the Railway in Calcutta for transit to Bombay.

35. The prosecution case is that Spalding & Co. took the gross weight of the casks and the oil, reduced such gross weight to lbs., and then divided the total number of lbs. by 9, and thereby ascertained the number of gallons. The prosecution urged that by so doing Spalding & Co. were charging the Munitions Board for 7,937 gallons of oil which they had not delivered, and that such additional weight was represented by the weight of the casks for which Spalding & Co. charged, as if it were oil.

36. It was pointed out by the prosecution that if the gross weight of the various consignments is divided by 9, the resultant in gallons is the same as the number of gallons charged for by Spalding & Co., in their bills with a variation of a fraction in some instances.

37. The defence of Billinghurst in this respect is that Messrs. Spalding & Co. did, not charge for the weight of the casks at the price of oil. It was stated that the number of gallons in each bill presented by Spalding & Co. was ascertained by taking the gallon to represent 7 1/2 lbs. and not 9 lbs. or thereabouts. It was contended that this measure was known in Calcutta, and that although Spalding & Co. bought the oil at the rate of about 9 lbs. to the gallon, they were entitled to sell at the rate of 7 1/2 lbs. to the gallon, especially as Spalding & Co. were to take the risk of the oil in transit to Bombay.

38. In support of Billinghurst's case in this respect some documents which have been called EEEE were put in on behalf of Billinghurst at the trial for the purpose of showing how the number of gallons charged for was ascertained. The documents were put in cross-examination by the learned Counsel for Billinghurst to a witness Ashutosh Dutt, who had been an Accountant in the firm of Messrs. Spalding & Co. They were not found by the Police when the search' for documents was made at Spalding & Co.'s premises.

39. It appeared from Dutt's evidence that when Spalding & Co. were purchasing oil from Mohin & Co. and Birla Brothers, one of Spalding & Co.'s sircars used to be present at the weighing. He used to bring the difference of the tare weight on slips of paper and before bills were made out calculation used to be made on sheets of paper. The slips were alleged to represent the actual weight of the casks before they were filled with oil and the calculations were alleged to have been made in the handwriting of a lady typist. Neither the sircar nor the typist was called as a witness by the defence. Ashutosh Dutt, however, said he had no doubt that the slips were brought to him by the sircar and he knew the handwriting of the lady typist.

40. The learned Magistrate came to the conclusion that the documents marked EEEE were not genuine and were fabricated for the purpose of the defence. He gave his reasons in full and we need not repeat them here.

41. The evidence of the witness Ashutosh Dutt was described as untrustworthy both by the learned Advocate-General and by the learned Vakil for Michael and in our judgment there are some valid reasons for that conclusion.

42. Mohin & Co.'s bills were not produced but Messrs. Birla Brothers in delivering the accounts to Spalding & Co. deducted the tare weight of the casks, the tare weight being given on each bill. Spalding & Co. accepted these tore weights as correct. Yet it is to be noticed that in the calculations and documents known as the EEEE, Spalding & Co. allowed for the tore weight of the casks in every instance less than the tare weights given by Birla Brothers. Birla Brothers' tare weights were arrived at by weighing the casks before they were filled with oil, and it is not reasonable to suppose that they would allow Spalding & Co. more than the actual tare weight. It is, therefore, surprising to find that in the calculations EEEE, Spalding & Co. give the tore weights in all cases as less than those given by Birla Brothers. If this matter had been an honest and straightforward transaction and if Billinghurst honestly thought they were entitled to charge the Munitions Board at the rate of 7 1/2 lbs. per gallon instead of about 9 lbs. per gallon, we are at a loss to understand why Spalding & Co. did not take net weights of oil given by Birla Brothers arrived at after the deduction of the tare weights and divide the net weight by 7 1/2 in order to obtain the number of gallons.

43. If the matter was an ordinary business transaction there does not seem to have been any good or valid reason or necessity for the elaborate calculations contained in the Exhibit EEEE. But apart from this, we are of opinion that these documents contain in themselves evidence (as was pointed out by the learned Advocate-General) which goes to show that they were not genuine documents.

44. We, therefore, come to the conclusion that they were made for the purpose of the defence in this case.;

45. In this connection it is necessary to notice an argument put forward by the learned Counsel for Billinghurst; he argued that, if we come to the conclusion that the Exhibits EEEE were not genuine documents, the Court should still hold on the evidence that Billinghurst was not aware of the extra number of gallons charged for, and was innocent of any misrepresentation.

46. It is difficult to follow the argument; for if Billinghurst was in fact innocent of any misrepresentation, as alleged, we do not understand why it was thought necessary to put forward documents which were not genuine, to support the method, upon

which, it was alleged, the bills were made out.

47. In our judgment the reason alleged for Spalding & Co. selling at the rate of 7 1/2 lbs. to the gallon, when they bought at the rate of about 9 lbs. to the gallon, viz., that Spalding & Co. were to take the risk of transit to Bombay, has no substance in it.

48. The 23 bills in respect of the supply of linseed oil were signed in the name of Spalding & Co. by Billinghurst find were submitted by Spalding & Co. to Waite. The first twelve bills were sent direct by Waite to the Deputy Controller, of War Accounts (Munitions Branch), Simla, the remainder were forwarded by Waite to Simla through the Deputy Controller of War Accounts (Munitions Branch), Calcutta.

49. Inasmuch as the order for the linseed oil was placed before the 1st August 1918, these bills were passed on by the Deputy Controller, War Accounts, Calcutta, without any audit or check in accordance with the practice then prevailing as to orders placed before August 1918.

50. In the office of the Deputy Controller of War Accounts, Simla, the audit officers passed the bills, the evidence of J.P. Dutt lying that his only concern was to see that the bills were duly countersigned by the purchasing officer, who in this Case was Waite, and that they were arithmetically correct.

51. The audit officers being thus satisfied endorsed the bills and passed the amounts of the bills and another officer relying on the audit officer's endorsement, drew cheques for the bills. The bills were paid before the duplicate bills were received from Bombay.

52. It was urged on behalf of the appellants that the authorities at Bombay must have realized that the casks contained about 50 gallons each, according to the bills, which showed that the gallon must have been taken to be 1/2 lbs. and that they accepted these as a correct rate.

53. We are not prepared to accept this suggestion. The evidence shows that the Bombay authorities did not check the contents of the barrels, nor did they weigh

them, unless there was something out of the ordinary, such as bad leakage.

54. Ordinarily the barrels were not weighed before being put into the ship, if there was no leakage.

55. If there was a leakage they checked the portion of the consignment in which the leakage occurred and in respect of the leakage only the weight. The goods were checked as regards number of packages with the Railway Receipts and vouchers. In view of this evidence, it is not possible to hold that the authorities at Bombay accepted the weight of the oil as correct.

56. There are two entries in Spalding & Co.'s journal showing how the profits made in respect of the 23 bills for linseed oil were dealt with.

57. The first entry under date 29th October was cancelled and another entry under the same, date appears on a subsequent page after another entry dated 13th November.

58. The second entry contains the words 'being 23 bills made out by Mr. Michael' and 'now considered as part of profits' which were not in the first entry.

59. Ashutosh Dutt said in his evidence that both entries were made by him and that the second entry [Exhibit 85 (3)] was made by him because Michael asked him to write the entry.

60. Michael now disputes this: but he does not seem to have disputed it at the trial.

61. We do not understand, however, why Michael should be anxious to have it noted in the journal of Spalding & Co., that he had made out the bills.

62. The entry 'now considered as part of profits' is applied to the 'difference realized on excess measurement' and it is relied upon as supporting Michael's case that he was not aware of the excess measurement being made by Messrs. Spalding & Co. until after the bills were sent to Waite by Spalding & Co. and that when he did ascertain this he claimed half the difference realized by reason of the excess measurement.

63 The entry is to this effect:

[Exhibit 85 (3)--Entry in Exhibit 85.]

Entry in Spalding's Journal page 29.

Journal entries 1918.

Rs. A. P. Rs. A. P.

October 29th:

Stock purchase account Dr. 24 ... ... 10,953 1 10 1/2

To P.H. Michael commission account 84 ... ... 10,953 1 10 1/2

For statement of linseed oil supplied to Indian

Munitions Board as per bills Nos. 106 to 117, 124, 125

and 129 to 137 being 23 bills made out by Mr. Michael

for as under:

Total amount billed on 39,975 7/12 gallons ... 1,49,908 7 0

Total paid for purchasing 32,0291/4 gallons ... 1,13,240 2 3

Hence difference realised on excess measurement between

39,975'7/12 and 32,029 1/4 gallons now considered as

part of profits as per his statement, dated 1st

October 1918 ... ... 36,668 4 9

Less amount of excess rates credited as per his

statements, dated 9th October 1918, up to 12th

September 1918, and B. 137 ... 8,673 0 3

Amount of commission on same 1,589 0 9

This is the total amount for commission and

rates 10,262 1 0

Then leaves a balance of 26,406 3 9

Less amount payable to him as arranged as per his

statement, dated 9th October 1918 ... ... 4,500 0 0

Rs. 21,906 3 9

Half of which is to be his share now transferred

to his credit as per his statement, dated 9th

October 1918 ... ... 10,953 1 10 1/2

October 29th:

Stock purchase account Dr. 24 ... ... 4,500 0 0

To P.H. Michael commission account 84 ... ... 4,500 0 0

For amount Rs. 4,500 debited to former account in order

to adjust the latter account as per particulars given

in Mr. Michael's statement dated 9th October 1918.

64. These entries show that in respect of the linseed oil transaction Michael was either paid or credited with Rs. 8,673-0-3 in respect of the extra price which he obtained from the Munitions Board.

65. He obtained Rs. 1,589-0-9 for commission, Rs. 4,500 as per his statement of 9th October 1918, and Rs. 10,953-1-10 1/2, which represented his half share of

the difference realized by reason of excess measurement or a total of about Rs. 25,715.

66. The statement of 9th October 1918, referred to, has not been produced and no explanation has been given in respect of what the Rs. 4,500 was recognised as payable to him. Spalding & Co. received in respect of these transactions a commission from the sellers of the oil and half the excess profits realized in respect of the excess measurement.

67. Michael gave a receipt on the 6th September 1918 to Spalding & Co. for Rs. 10,000, being payment in part, viz., about 75 per cent. of his share of the excess profit as arranged on linseed oil supplied to the Indian Munitions Board exclusive of the excess rate of three annas three pies per gallon and commission of one per cent. due and payable to him.

68. It was pointed out on behalf of the prosecution that this receipt of 6th September 1918, was given at or about the time of the last delivery of linseed oil in respect of the 150 tons and a considerable time before the Government of India made the final payment and that Michael then knew how much he was entitled to in respect of the excess profits by reason of the difference in measurement, inasmuch as, on the figures being ascertained, it appears that Rs. 10,000 was only Rs. 143 less than 75 per cent. of Michael's share.

69. Another receipt, dated the 19th December 1918, for Rs. 2,500 was given by Michael to Spalding & Co. being further payment on account of certain bills for commission, difference in rates, and division of excess profits on double boiled linseed oil as per statement, and this was debited to his account and paid by cheque.

70. This transaction, even when considered by itself, is an extraordinary one and having regard to the above-mentioned facts, it is not possible to accept the suggestion put forward by Michael that he was a mere broker, and that the sums which he received were in respect of the services which he rendered as broker.

71. It is true that Ashutosh Dutt said that he posted these entries' to the credit of Michael's 'Commission Account'--which apparently is correct, inasmuch as the account to which these sums were credited was called 'Commission. Account.'

72. In this case, however, the name under which the account was carried, conveys little indication of the real character of the transaction.

73. The question inevitably arises why Spalding & Co. were willing to pay such large sums to Michael in respect of the transaction of linseed oil. No broker in the ordinary sense could possibly be entitled to such remuneration: he received 1 per cent. commission, but over and above that commission he was allowed to receive the sum realized by the difference between the price quoted by Spalding & Co. and the price paid by the Munitions Board for the oil and half the excess profits realized by the difference in measurement. In addition to these sums, the amount of Rs. 4,500, in respect of which no explanation is forthcoming, was either paid or credited to him. The allegation of the prosecution is that this can only be explained by the fact that Michael was as much a principal as Billinghurst.

74. The prosecution further point to the fact that Michael took part in the correction of some of the bills which were initialled by him, that he was constantly in Spalding & Co.'s office, and that in other transactions he had taken an active part in Spalding & Co.'s business, as for instance, the water-soluble oil case in which Michael had arranged with Grandage, Moir & Co., for the supply of 50 gallons of water-soluble oil to Spalding & Co.

75. We are satisfied that Michael was not a mere broker but that he was acting with Billinghurst and that he knew as much as, if not more, than Billinghurst as to the details and nature of the transaction in linseed oil.

76. There was no evidence of any of the money received by Michael in respect of this linseed oil transaction passing into the hands of Waite; and the learned Advocate-General admitted that if the case of linseed oil stood by itself it would not be sufficient to prove that Waits was involved in the conspiracy alleged by the prosecution, though he argued there was much ground for suspicion, having regard to Michael's intimacy with Waite, the large sums of money received by or

credited to Michael, and the entire absence of explanation as to the reason why the Rs. 4,500 was paid to Michael, the suggestion being that some of the money must have been paid to Waite.

77. The evidence, however, goes to show-that the checking of the bills in Waite's office was of a meagre kind.

78. The Accountant merely took the figures from the bill, satisfied himself that the rate was correct and then multiplied the number of gallons given in the bills by the rate and saw that the arithmetical calculation in the bills was correct.

79. The bills were then laid before Waite for signature and he signed them and the forwarding letter as well, relying on the clerks who placed them before him, and without making any calculation or check on his own account.

80. If the bills had been checked in Waite's office in a proper way, especially having regard to the note on the order that the casks were to be 40 gallons, the real nature of the transaction would probably have been discovered. There is, however, no evidence that they were properly checked and we agree, therefore, with the learned Advocate-General that, if the linseed oil case stood by itself, it would not be sufficient to prove that Waite was involved in the alleged conspiracy.

81. Turpentine.--As regards the turpentine transaction, on the 26th June 1918, the Board of Munitions at Simla despatched a telegram in the following terms which was received by the Controller of Munitions, Calcutta, on the 27th June and referred to Waite as Deputy Controller, Inspection, 'for favour of disposal and report within 10 days':

Require 5,000 gallons genuine turpentine. What quantity can you obtain and at what price? Also say whether Indian or imported. Must know rate. Difficulty in obtaining full requirements from Forest Department.

82. Then follows, in the official file, a note in Waite's handwriting of quotations given to him by Mr. Pratt, a dealer in the article:

American, 200 gallons, price (20 cases)--per case Rs. 50.; Rs. 5 per gallon.

Government, 25 to 30 gallons--Rs. 26 per 5 gallon drum.

Yellow, No. 1, containing 250 gallons--5 gallon drum at Rs. 4-12-0 per gallon.

Habbock's 500 gallons--Rs. 13-12-0 per gallon.

83. There is also a note in Stoddart's handwriting of Messrs. Spalding & Co's. quotation:

Rs.

Black Japan, as per specification

sent (2,500 gallons) ... 20

Turpentine, Java, No. 1 (5,000

to 10,000 gallons) ... 9

Turpentine, Java, No. 2 (5,000 to

10,000 gallons) ... 8

Turpentine, special, imported,

2,000 gallons ... 13

Immediate delivery.

84. On 1st July, Waite telegraphed to Simla Spalding & Co's. quotations for Java, Nos. 1 and 2, and Special American (2,000 gallons at Rs. 13). He also mentioned Pratt's quotation for Habbock's No. 1. Simla inquired whether he considered Java, No. 2, quite suitable and suggested that he should consult Director of Ordinance Factories. Waite or Stoddart, the latter being Waite's personal assistant, and under his immediate orders then telephoned to Spalding & Co. for samples and received three bottles of Java, No. 1, Java No. 2 and best American. These were sent to the Director who replied on 6th August that Java, No. 1 and No. 2 were not correct to specification and that the American sample was correct. Copies of the Director's

letter were sent to Spalding & Co. and Pratt with an inquiry as to the quantity of turpentine available in stock. There is a reply from Pratt, dated 23rd August, stating that he could supply immediately. 20 cases American turpentine and 2,500 gallons in November. It will be remembered that the price given by Pratt to Waite for American turpentine was Rs. 5 a gallon. There is no reply from Spalding & Co. on the record and no further reference was made by Waite to Simla, His next step, taken on the 31st August, was to place an order with Spalding & Co. for 3,500 gallons at Rs. 13 a gallon to be delivered at once.

85. It is not clear why he ordered that quantity. The original inquiry from Simla mentioned 5,000 gallons. In his own telegram to Simla he had given the quantity of American turpentine available as 2,000 gallons. We can only suppose that the order was the result of personal communications between Waite and Michael.

86. It is now, however, clear beyond dispute that Spalding & Co. could have had nothing approaching 3,500 gallons available for immediate delivery at the time. In any case, Waite's action was precipitate to the point of recklessness and it is difficult to accept the suggestion that he was under a double mis-apprehension both as to Spalding & Co's. ability to supply so large a quantity and as to the instructions which he had received from Simla. Simla had in fact given him no final instructions to buy turpentine and in the state of the market ought to have had the opportunity of considering Pratt's offer of 2,500 gallon in November at Rs. 5 a gallon.

87. Having secured this order., on the 3rd September, Spalding & Co., in a letter to Michael, confirmed their quotations to him for the supply of turpentine to Munitions. 'Any rate,' they added, 'that you have quoted or may quote over and above the prices quoted you the excess or difference in rates are payable to you as remuneration for services rendered.' The rate given to Michael for English or American turpentine was Rs. 8 per gallon.

88. It may be assumed that in the usual course a copy of the order of 31st August was sent to Simla and on the 12th September Waite telegraphed to Simla referring to the inquiry of 26th June as 'your telegraphic indent of 26th July (apparently a mistake for June) for 5,000 gallons turpentine' and asking for despatching

instructions. The Controller, Indian Indents, replied by letter dated 17th: September, that 'no further quantities are wanted at present as arrangements have already been made to secure our requirements from elsewhere.' Waite did nothing on this letter. It is said that by the words 'no further quantities' he understood Simla to mean that no more was required beyond the 3,500 gallons already ordered. But, if so, why were no despatching instructions given in respect of that quantity? After a delay of more than a month Waite again telegraphed to Simla referring to the telegraphic;, indent of 26th July (meaning June) and said that 3,500 gallons were 'waiting despatching instructions.' These words are misleading. In the order of 31st August, Spalding & Co. had been direct-; ed to deliver the turpentine to the Munitions Stores Depot at Narculdanga. Waite was moved to obtain despatching instructions not by Messrs. Spalding & Co. but, in anticipation of delivery by the depot, to which a copy of the order had been sent. Up to the 29th October not a single gallon of the turpentine had actually been delivered. On the 9th November Simla replied through the post, merely enclosing a copy of their previous letter of 17th September. Then on the 15th November Waite wrote to Spalding & Co. and asked them to treat the order of 31st August as cancelled.

89. Here again the suggestion can hardly be resisted that the delay which occurred after receipt of the Simla letter of 17th September was deliberate in order to give Spalding & Co. more time in which to deliver the turpentine. The order was not cancelled till Waite felt that he could delay no longer.

90. Spalding & Co., however, did not accept the cancellation of the order. On the 21st November, Michael called on Mr. Peterson, then Controller of Munitions, who noted that he had-told Spalding & Co. 'that they should reply to us stating that they do not see their way to cancel the contract and request us to take delivery.' He added: 'I think we will have to take the material. For the present their letter may be awaited.'

91. Spalding & Co.'s letter 22nd November illustrates the firm's methods. 'Our Mr. Michael,' it says, 'called on you yesterday and explained our position that we are unable to sell this stock, when you were good enough to inform him that you will stand by the order. Kindly have the letter cancelling the order withdrawn. We also

await your instructions to deliver the quantity ordered.' Mr. Peterson was thus asked to believe that the firm had the whole quantity ordered in stock. But it was as true in the months of November and December 1918 and January 1919, as at the time of the order that Messrs. Spalding & Co. had nothing like 3,500 gallons available for delivery.

92. Mr. Peterson did not at once reply to Messrs. Spalding & Co's. letter Mr. R.D. Bell, Controller of Oils and Paints, had been sent from Simla to inspect Waite's office. On the 28th November he recorded a note, to which both sides have referred, stating among other things that 'the rate Rs. 13 per gallon charged by Spalding seems exorbitant' but that he did not see how the order could be cancelled. Acting on this note, Mr. Peterson on the 29th November called on Waite for an explanation which was received later on the 14th January:

93. At this stage of the negotiations, Billinghurst, on behalf of Spalding & Co. addressed a letter, dated 16th December, to Michael which we had better give in full, as Billiughurt's learned Counsel placed considerable reliance upon it on his client's behalf. The letter runs:

16th December 1918.

P.H. Michael, Esq., Calcutta.

Dear Sir,

Against the Munitions Department order for 3,500 gallons of turpentine which was purchased and which we delayed sending on your advice till the full consignment had been collected and which is now left in our hands owing to cancellation of order, we would ask you what we are to do with this large expensive stock on which heavy interest charges are accruing. We understand that while we quoted you Rs. 8 per gallon leaving us a bare 10 per cent. difference to cover leakage, cartage and profit, you quoted, Rs. 13 per gallon to the Munitions Department, which extortionate price probably caused the cancellation of the order, that is, while Messrs. Spalding & Co. would have cleared a legitimate profit of about Re. 0-8-0 to Re. 0-12-0 per gallon, you would have bled the department to the tune of

Rs. 5, and this without risk to yourself of any business losses. As the appointed receiver of this firm I am naturally anxious to prevent any loss and, therefore, ask you what is to be done with this stock and write to you to learn if you have any prospects of selling this.

Yours faithfully,

(Sd.) Spalding & Co.

94. Learned Counsel argued that this letter showed that Billinghurst was not responsible for any guilty dealings Michael may have had with Waite. But in the first place the letter is not ingenuous. As it begins and ends, it merely follows the line which had been taken at and after Michael's interview with Mr. Peterson on the 21st November and regard being had to Michael's relations with Spalding & Co. we cannot suppose that it was not as well known to him as it was to Billinghurst that the full consignment had not been collected. Then as to the price, Spalding & Co. had adopted the price quoted by Michael to Waite and the letter shows that they knew perfectly well that the department was being bled. We regard the letter merely as a hint to Michael that he was to do his best to obtain the restoration of the order on the lines already agreed upon between him and the firm. We may add that the exhibit is not the original letter but the copy taken from Spalding & Co's. press copy book. No answer to the letter from Michael is forthcoming.

95. On the 9th January Spalding & Co. wrote again to Mr. Peterson: 'We beg to inform you' they said, 'that storage charges and interest on the above (the 3,500 gallons) are accumulating. We were asked to store the turpentine on your account in September last as there was no accommodation at Narculdanga Depot pending despatching instructions. We regret we cannot undertake any further responsibility as we are unable to insure the goods; moreover, we are suffering loss on account of interest on heavy outlay of capital, and cannot continue it any longer.' They were bold enough to continue: 'We have, therefore, to request you to arrange to store it elsewhere, and release the space for our own use which we are in urgent need of.'

96. Waite's explanation was, as we have said, received on 14th January. As regards the giving of the order of 31st August and the price agreed to, the explanation, in view of all the facts, is insufficient and unconvincing. But in his concluding paragraph, Waite said this: 'If the Controller desires that the order should be cancelled on the firm, there should, in my opinion, be no difficulty. As the firm did not make any attempt at delivering the turpentine. I am rather inclined to stand by my letter of cancellation owing to the reason of their failure or non-compliance of the order.' Waite must, therefore, be acquitted of being a party to the representation made by Spalding & Co. to procure the withdrawal of the letter of cancellation. It must be remembered that Waite's conduct of his office had come under examination and it was incumbent on him at this stage to be circumspect. The main question, moreover, is not whether the re-instatement was procured by mis-representation but whether the original order was or was not collusive and dishonest.

97. Mr. Peterson then had before him Mr. Bell's opinion and Waite's explanation. Neither Mr. Bell nor Mr. Peterson, however, was aware of the arrangement under which Michael was to receive Rs. 5 on every gallon of turpentine sold to Munitions, so that Spalding & Co. must have expected to make a profit on their share of Rs. 8 a gallon. Mr. Peterson may, perhaps, have noticed that Waite's statement that Spalding & Co. had made no attempt at delivering the turpentine was inconsistent with the case they were making that they had been asked to store the turpentine. On the 15th January he replied to Spalding & Co's. letters of 22nd November and 9th January in a letter from which the following paragraphs are taken:

2. If you can prove to me that you have contracted for the supply of this turpentine on our account before receipt of Mr. Waite's letter No. 5535-P--292, dated the 15th November 1918, cancelling the order, I should be obliged if you send your representative to me with the papers giving evidence of this.

3. You state in your letter, dated the 9th January, that you were requested to store the turpentine on our account' in September last, pending despatching instructions. I should be obliged if you would let me know whether this was a verbal arrangement or whether you have any document to this effect as the order

for supply was for immediate supply and was not apparently complied with.

4. If you can satisfy me on the above points, I am prepared to take delivery of the turpentine in accordance' with the order.

98. On the same date, 13th January, Mr. Peterson wrote to Simla that he had been endeavouring to cancel the turpentine order but was doubtful whether he would be able to do so as the firm insisted on delivery being taken.

99. On the 29th January Spalding & Co. replied in a letter of some length headed 'without prejudice' in the course of which they said:

On the 1st September we received Deputy Controller, Inspection, Demand No. 3379-P--292, dated 31st August 1918, for 3,500 gallons of turpentine. About the 9th September our Mr. Michael approached the Deputy Controller, Inspection, for instructions for making the cases which had been omitted on the order, when he was asked to await his instructions which would be given in a few days.

A week later, we again asked for instructions to mark the packages to enable us to proceed with the delivery when we were informed not to deliver the turpentine at Narculdanga, as there was no room to store combustible goods under cover, all the space there being urgently required for other valuable stores, and we were instructed to store the turpentine until we received despatching orders.

Our representative informed the Deputy Controller, Inspection, that we would store the turpentine, but we could not accept any responsibility for damages or loss by fire, and at the same time we would charge a nominal rent for storage; this was accepted by the Deputy Controller, Inspection, which we had confirmed, vide our letter, dated 18th September 1918.

Since then we did not trouble the. Deputy Controller, Inspection, any further and awaited his instructions for despatching. On 17th November last we received Deputy Controller, Inspection, letter No. 5535-P--292, dated the 15th, which was most surprising and inexplicable, to us. At that time our Mr. Michael, who had this matter in his hands was away at Simla and on his return he called on the Deputy Controller, Inspection, when he was informed that he was ill, not attending office, Mr. Michael then called on your goodself and explained the position when you assured him that you would stand by the order.

Under the circumstances you will see that there was no delay or want of attention on our part; we had to the best of our endeavours and at a loss of interest on the outlay, gone much out of our way to assist the Deputy Controller, Inspection, in agreeing to store the turpentine and it is matter of deep regret to us that we should now be placed in such a position, which we least expected, more particularly in view of the fact that on all occasions we were very prompt in supplying and despatching all indents placed with us.

We request that you will be good enough to take delivery of the turpentine without further delay, as it is impossible for us to suffer the loss of interest and run any further risks. You are, no doubt, aware that the bank rate of interest has increased and our loss in this direction alone will be great.

As regards your request to produce the correspondence in connection with this order, we shall be glad to comply with same if you will kindly appoint a day when it will be convenient for you to see them.

100. The comments we have already made apply to this letter for which Billinghurst was undoubtedly responsible. It is only necessary to add as regards the reference to a letter of 18th September, that no such letter is forth-coming and there is no copy of it in Spalding & Co's. press copy book. Mr. Peterson has left Calcutta and has not been called as a witness. There is no evidence that he accepted Spalding & Co.'s offer to show him their correspondence or that he made any further enquiry. Spalding & Co.'s reiterated statements that they had been storing the turpentine, which we regard as wholly false, were certainly calculated to mislead.

101. On the 11th February, Mr. Peterson, wrote to Spalding & Co., directing them to deliver the 3,500 gallons after test and inspection by the Deputy, Controller, Oils and Paints. There was, some further correspondence as to the samples which Spalding & Co. submitted. But in the result a sample was approved. Spalding & Co. delivered 3,499 gallons and their bills, dated 30th April 1919, for Rs. 45,487,

signed by Billinghurst in the name, of, Spalding & Co., was duly paid.

102. It must be emphasized that an examination of Spalding & Co.'s books shows, and that it is not now denied, that the firm could never have supplied anything like this quantity of turpentine from their own stock. Their books show that their stock increased from 8 gallons in June to 168 gallons in November 1918, and dwindled to 90 gallons, on the 14th March 1919,

103. It is proved that of the 3,499 gallons ultimately supplied, 3,026 gallons were purchased from the Standard Oil Company, on various dates, ranging from the 17th to the 28th April, at the rate of Rs. 34 per 5 gallon drum or just over Rs. 6-12-9 a gallon.

104. Michael's share of the Rs. 45,487 paid to Spalding & Co. came to Rs. 17, 495 for which he submitted a bill and received payment.

105. As regards this transaction, we conclude that when. Waite sent a copy of his order of 31st August to Simla, he must be taken to have presented that he had done his duty and that the order was a proper order at a reasonable price. It may be that at the time there was a scarcity of turpentine with a consequent rise in price, but it is evident that Spalding & Co. were in no position to fulfil the order till the market was replenished when the price would fall and in that state of things, the price charged was preposterous. No tenders were called for from such firms as the Standard Oil Company and in the circumstances it is not surprising that the transactions seemed to the authorities to demand inquiry and examination. The whole of the facts were not then elicited. Regard being had to the close relations which existed between Waite and Michael and to other facts which have now come to light, the transaction, even if it stood alone, would arouse a strong suspicion that an unlawful agreement existed between Waite and Michael to which Billinghurst, on behalf of Spalding & Co., and possibly other members of the firm, were willing parties. But the transaction does not stand alone and it must be considered along with the other two transactions which are in question.

106. On the evidence as a whole, we are forced to the conclusion that this was a dishonest transaction. In our opinion it was engineered by Michael in conspiracy

with Waite and there is equally no doubt as to Billinghurst's complicity. There is the arrangement between the firm, and Michael and, there is the fact that Billinghurst was responsible for the letters and representations by which the restoration of the order was induced. -Michael was too closely associated with the firm to' make it possible to accept the suggestion that he acted, independently and the undertaking involved in the acceptance of an order for the immediate delivery of 3,500 gallons could not have been honest. We must accept the conclusions arrived at by the learned Magistrate.

107. Water-soluble oil.--We turn to the transaction relating to water-soluble oil. The indent from Simla for this oil is dated 19th August, 1918, and was registered in Waite's office on the 23rd August. The indent was for 1,800 gallons, 800 to be supplied at once' and the remainder at the rate of 200 gallons a month. It appears that this oil is used in the Ichapur Rifle Factory in connection with machines for the cutting of component parts of metal fittings and the indent stated in its column 2 that the oil was required 'for cutting compounds.' In the same column Waite was instructed that, 'particulars of any substitute other than those proposed should be communicated for acceptance before the order is placed' and that 'samples should be sent through the Superintendent, Rifle Factory, Ichapur.' Then still in the same column, the statement is made that 'the Asiatic Petroleum Company has an oil and the Barma Oil Company a composition which is suitable'. It is clear that this oil and this composition are referred to in the antecedent phrase 'particulars of any substitute other than those proposed.

108. In the remarks column, opposite the entry in column 2 referring to the Asiatic and Burma Companies, the note occurs.

109. 'Sample is being sent separately by parcel post registered.' It does not appear of what oil the sample consisted or what became of the sample, but it is clear that Waite's attention was expressly drawn to the fact that the Asiatic Petroleum Company had an oil which was suitable, It is further beyond dispute that in August, 1918, the Company had an ample and immediately available stock of a water-soluble oil which they called 'turnol' and which they were selling at Rs. 2-14 a gallon, If Waite be credited with nothing more than ordinary intelligence,

there was no room for mistake on his part. He had only to apply to the Company and he would have obtained at the price stated an oil which would have satisfied the urgent needs of the Ichapur Factory.

110. He did not, however, take that simple course. In the first place, he was dilatory. He did nothing till he received a reminder from the Director of Ordinance Factories, Bengal, referring to the Simla indent, upon which he noted that 'samples of this and home oil have been promised by Spalding & Co.' Then comes a letter, dated 20th September signed by P.H. Michael 'for Spalding & Co.,' informing Waite that they were in a position to supply him with his requirements and forwarding a sample in a pint bottle of an oil which they were prepared to deliver at Rs. 12 per gallon packed in one gallon tins. For the present we pass by the question of what oil the sample consisted.

111. On the same date, the 20th September, Spalding & Co. wrote to Michael to confirm their quotations to him 'for water-soluble oil as per sample handed to you for the Indian Munitions Board at Rs. 8 per gallon packed in one-gallon tins.' They continued: 'You are at liberty to cover yourself with any extra price. Such difference or excess price obtained by you will be payable to you as your remuneration for services rendered.'

112. The sample in the pint bottle was sent on the 21st September, under Waite's order given on the 20th to the Ichapur Factory with a statement that it had been received from Messrs. Spalding & Co.

113. Another reminder, dated 20th September, this time from Simla, requesting the very early supply and despatch of the oil required, did not lead Waite to make further inquiries or change his line of conduct.

114. By a letter, dated 5th October, the Superintendent informed Waite that the sample had been 'tested and found suit able' and asked him 'to arrange for a supply as soon as possible.' On the 10th October Spalding & Co. were informed by letter of the result of the test and that an order would be placed for the supply and that deliveries must be made immediately. Nevertheless, the formal order was not issued till the 23rd October. The order was for the immediate delivery of 1,800

gallons of 'oil water-soluble as per sample approved' at the rate, including all charges, of Rs. 12 per gallon. By a foot-note Spalding & Co. were directed to despatch the oil direct to the Ichapur Factory.

115. Thus there was a delay of two months in placing an order which might have been placed at once and much more advantageously if Waite had made proper inquiries in the quarters indicated on the face of the Government indent.

116. Learned Counsel for Billinghurst suggested that Waite was concerned to obtain 'real' water-soluble oil. But the term is merely descriptive. The evidence shows that there are various preparations in the market which come within the description. They differ in their qualities and composition, some having a basis of vegetable oil and some a basis of mineral oil. Under his instructions it was Waite's clear duty to obtain as quickly and cheaply as possible an oil which would serve the purposes of the Ichapur Factory. It was not a question of academic chemistry but a practical question and there is no room for doubt that the Asiatic Company's oil at Rs. 2-14-0 or Rs. 3 a gallon would have been a very much better bargain than the oil supplied by Spalding & Co. at Rs. 12 a gallon.

117. The delay did not end with the issue of the order of the 23rd October. Another reminder, dated 31st October, was addressed to Waite by the Director of Ordinance Factories which led to Spalding & Co. being told that 'if no intimation is received' of the despatch of the oil ordered, 'before the 13th instant, the demand will be cancelled on you,' This letter bears date the 14th November, though the sentence quoted shows that the, draft must have been prepared before the 13th. The office copy exhibited is not initialled but is issued the letter must have been signed by or for Waite and a copy was sent to the Director. Replying on the 15th November Spalding & Co. informed Waite that 240 gallons of water-soluble oil had been despatched on the 14th November and that they expected to forward the balance during the ensuing week. As a -matter of fact the Railway Receipt shows that the first consignment of 6 barrels was despatched on the 16th November.

118. What appears is that when Spalding & Co. stated as far back as; the 20th September that they were in a position to supply water-soluble oil, they were promising more than they could then perform.

119. Towards the middle or end of October they addressed some forty firms in Calcutta, including Messrs. Shaw, Wallace & Co., (agents for the Burmah Oil Company), Messrs. Heatly & Gresham, and the Asiatic Petroleum Company asking for quotations for water-soluble oil.

120. These inquiries were for the most part infructuous and at the hearing of the appeal learned Counsel for Billinghurst obtained leave to prove a letter, dated 26th October, received from Mr. Edwin William Harlow of Messrs. Gillanders, Arbuthnot & Company, the agents of the Asiatic Petroleum Company. Mr. Harlow was accordingly examined in this Court. He proved his signature on the letter which stated inability to supply the quotations asked for. In cross-examination, however, by the learned Advocate-General, he explained that he had water-soluble oil at the time but he understood that the inquiries were made on behalf of the Government and he or his firm wished to keep all Government business in their own hands with a view to supplying the Government direct.

121. In this case at any rate refusal to furnish Spalding & Co., with the quotations for which they asked did not mean that Waite could not have obtained water-soluble oil if he had himself made the inquiries made by Spalding & Co. On the contrary, this evidence shows that if Waite had done what he ought to have done, vis., inquired of the Asiatic: Petroleum Company, he would have obtained the oil at a reasonable price.

122. The oil which Spalding & Co. eventually supplied was obtained as to two barrels from Messrs. Healty & Gresham and as to the remaining 38 barrels from Messrs. Grandage, Moir & Co.

123. The transactions with the two firms named are on record. To begin with there is a bill, dated 26th October of Messrs. Grandage, Moir, against Michael for Rs. 20 on account of five gallons, of their oil, called 'koolkut' at Rs. 4 a gallon. The receipt on the bill shows that it was paid by cheque on the same date.

124. There was some dispute at the trial whether Messrs. Healty & Gresham supplied one or two barrels of their oil called 'thresol.' Before us the learned Advocate-General did not press the point and it seems to us on the evidence that

as contended for the defence, Spalding & Co. received two barrels from this -source, the first on the 29th October and the second on the 14th November.

125. On the 9th November, Messrs. Spalding & Co. gave an order to Messrs. Grandage, Moir & Co., for 500 gallons at Rs. 4 a gallon as arranged by Michael and understood, that 'you will deliver us at the rate of 80 gallons or two casks, each containing 40 gallons from next week.' On the 21st November Messrs. Grandage, Moir & Co., were asked for a further 500 gallons and were told that 'it is very important that we should have further quantities delivered to us daily.'

126. A book called Spalding's Factory Stock Book, relating to their depot at Entally, shows the following receipts of Messrs. Grandage, Moir & Company's Oil (koolkut):

15th November 1918 ... 4 barrels.

21st do. ... 4 do.

28th do. ... 6 do.

4th December 1918 ... 10 do.

2nd January 1919 ... 6 do.

6th do. ... 5 do.

9th do. ... 3 do.

127. It is very pertinent to compare the dates on which Spalding & Co. were negotiating for obtaining their supplies with the delay on Waite's part in placing the order and with the date--14th November--on which Spalding & Co. were threatened with the cancellation of the order. It is difficult to resist the inference that the order was delayed to enable Spalding & Co. to feel their way and that the threat to cancel was held back till Spalding & Co. had some prospect of obtaining supplies on a sufficient scale. In other words, the principal parties to the transaction were acting in concert.

128. On the 29th November the Ichapur Factory wrote to Spalding & Co. acknowledging the receipt (through the Gun and Shell Factory where they had been miscarried) of the six barrels despatched on the 16th. The case for the defence is that the six casks included the two casks supplied by Messrs. Healty & Gresham, and the first four casks supplied by Messrs. Grandage, Moir & Co. The Factory complained that all the barrels were not equally full. They added: 'Please also note that the barrels do not appear to contain the same quality of oil; it is, however, all soluble.'

129. By the 20th December the Factory had received 25 barrels and by a bill of that date Spalding & Co. claimed payment of Rs. 14,340, the equivalent of 1,195 gallons as Rs. 12 a gallon. The bill was sent to the Factory for verification under cover of a letter, dated 8th January 1919. By a letter also of 8th January signed by Meek for the Deputy Controller, Inspection, (Waite was at the time absent from the office), Spalding & Co. were requested to consider the order cancelled in respect of the balance of the 1,800 gallons, namely, 605 gallons. On the 9th January, Spalding & Co. replied that they had already complied with the demand in full, and on the 23rd January they submitted a further bill for Rs. 7,752 as for 646 gallons.

130. The position taken by Spalding & Co., therefore, was that they had supplied 1,195 gallons in 26 barrels before the 20th December and 646 gallons in 14 barrels thereafter, The last three of the 14 barrels were received by the Factory on the 10th January. By computation the 26 barrels contained an average of just under 46 gallons a barrel and the 14 barrels an average of just over 46 gallons a barrel.

131. It had to be conceded in argument that the total of 1,841 gallons was from. 80 to 100 gallons in excess of the whole quantity of oil originally supplied by Messrs. Heatly & Gresham and Messrs. Grandage, Moir & Co. The excess may have been more but it was certainly not; less than from 70 to 80 gallons.

132. We have said that Spalding & Company's bill was sent to the Factory for verification. It drew from the Superintendent, Captain Kinloch, a letter, dated 14th January 1919, of which some part must be quoted. Captain Kinloch began by regretting that he could not certify the bill as correct in respect of the quantity or

condition of the goods supplied.

133. As regards quantity he said: 'Had the barrels sent all been full, the quantity would have been correct, but 10' of them were not, and as my reducing a bill without reference to the firm causes annoyance I wrote to them under my No. 393, dated 29th November 1918, pointing out that the oil was not all of the same quality, and asking them to say what the measurement of the doubtful barrels was, but up to now they have not answered and I have accordingly not completed the measurement. Could you kindly ask them to send some one along to see to this?'

134. As regards conditions he said this: 'As far as condition goes, No. 3 barrels seem to be alike. Out of the whole consignment, only two appear to be really-soluble oil. The others are slightly emulsified and they vary each from the other. I send you three samples marked A, B and C. I had two of them analysed. The sample marked 'A' had a specific gravity of-925, that marked 'B' 1-001, and the latter was reported to be in a semiemulsified condition. It is evident they are not the same, and if one of them is according to the sample supplied by the firm the other cannot be.'

135. Then he turned to the price and said: 'I notice from the bill that the price charged is Rs. 12 per gallon; surely this is an error. I purchased a really good soluble oil from the Asiatic Petroleum Company during 1917 at Rs. 2-6-9 per gallon, and I notice that on the D.O.F. No. 14638-8., dated 13th August 1918, transferring the order to the Indian Munitions Board, a note to the effect that the Asiatic. Petroleum Company supply a suitable oil, is mentioned.'

135. He continued: 'For example, if the whole quantity invoiced had been received from Messrs. Spalding & Co., i.e., 1,195 gallons, as each gallon as supplied makes 11 gallons for use at the machines, the total quantity of lubricants produced would have been 13,145 gallons, and the cost Rs. 14,340--17'44 per gallon. Of the Asiatic Petroleum Company's compound only 215 1/2 gallons would have been required to make the same quantity of lubricant and the cost would have been Rs. 598-10-0--62 per gallon'.

I recognize that the price has been agreed upon with Messrs. Spalding & Co. and had the oil supplied all been the same and up to sample, I should have had no legal ground for complaint, but as it is not all the same and is mostly very inferior, and as these costs are all debited to the rifles produced, here, I should be glad if you could see your way to obtain a reduction of the rate.

136. He concluded by asking that a representative of the firm might be sent out to discuss the matter with him and see the supply in bulk.

137. A copy of this letter was sent to Spalding & Co. and acknowledged by them in a letter, dated 30th January. 'In reply.' they said, we beg to state that we were not asked to supply water-soluble oil to any specified specific gravity, nor had we undertaken to do so. The indent placed with us distinctly stated 'water-soluble oil only and in accordance with this indent we have supplied the required quantity commencing from November last, and it was not till our bill was presented in January that for the first time the question of price and specific gravity have been raised by the Superintendent, Rifle Factory, Ichapur.'

138. They went on to say that 'when the enquiry for water-soluble oil was placed with us for the required quantity, there was no contractor who was in a position to comply with this order.' That shows how little they knew of the market. 'We are, however,' they added, 'quite prepared to meet the Superintendent as desired by you.'

139. In answer, Meek, on the 26th February drew the attention of Spalding & Co. to the fact that the order of 23rd October distinctly stated 'oil water-soluble as per sample approved,' and to the further fact that the result of the test of their sample had been communicated to them.

140. Spalding & Co. did not write again till the 29th April, when in a letter headed 'without prejudice' they maintained their position. 'We supplied the oil,' they then said, 'according to the sample approved in November 1918, and it was not until end of the January 1919 after our bill had been presented for payment, that the question of specific gravity and price was raised by the Superintendent, Rifle Factory. We were never asked to, replace any of the oil and were, therefore

satisfied that the soluble oil supplied by us must have been approved. As regards the rate, we were asked to tender our rate for the oil by the Deputy Controller, Inspection, the same had been accepted; vide your office demand * * *; dated 23rd October 1918. Under the circumstances we see no justification for reducing 'the value of the oil supplied and delivered by us. We trust you will be pleased to, pass our bills for same as these had been considerably overdue. Bank interest is accruing on the amount and we cannot afford to suffer further loss.'

141. In speaking of 'the sample approved in. November 1918,' Spalding & Co. were apparently referring to the Factory's letter of 29th November in which it was said that while the oil supplied was not all of the same quality, it was all soluble. That letter was in the nature of a complaint rather than an approval and what the firm had contracted to do was to supply oil according to the sample in the pint bottle. On the 30th April, Meek, acting under instructions from the Controller, Oils and Paints, Simla, with whom he had been in communication, finally refused to pass Spalding & Co.'s bills, which he returned. At the same time, he requested them to remove the rejected materials.

142. This last request was also made under a direction from the Controller, Oils and Paints, to the effect that so much of the oil as had not been used should be returned. A word must be said as to what followed.

143. According to the Factory, they had used the contents of 26 barrels of Spalding & Co.'s oil amounting to 1,040 gallons (or an average of 40 gallons per barrel). They proposed to return the balance of 14 barrels. This appears from a letter dated 16th May, addressed by Capt. Kinloch to the Controller of Munitions. Michael had visited the Factory on behalf of Spalding & Co., before the letter was written and Capt. Kinloch begins his letter as follows: 'The 14 barrels of oil which it is proposed to return to Spalding & Co. have not been measured, 10 of them were not correct when received and a representative of the firm recently called here and satisfied himself that the quantity was not correct.'

144. Further on Capt. Kinloch says: 'The statement of the representative of the firm that the oil was correct to the sample, cannot be admitted. He called here, saw the oil and had to admit that no two barrels were alike except two which

contained an oil utterly different to any of the others.'

145. Capt. Kinloch then referred to the analysis which had been made of samples taken from three different barrels.

146. Further details as to Michael's visit were given in the witness-box by Mr. Fitzpatrick who was in 1919 Head Overseer of Stores of the Rifle Factory. In reference to Capt. Kinloch's letter he corroborated the statements therein made and said that Michael was the representative of Spalding's firm. He also said: 'With regard to there being only two barrels alike Michael explained the Spalding's chemist had been carrying out experiments and that probably accounted for the two barrels being utterly different from any other. In my opinion the sample sent to us had been made of oil of the quality in the two barrels which were alike.'

147. On the 5th June a copy of Capt. Kinloch's letter was forwarded by Mr. Meek to Spalding & Co. with the request that they would submit a revised bill for the 1,040; gallons actually used and remove the remainder from the Factory.

148. Spalding & Co. replied in a letter, dated 8th July, the signature of which 'Spalding & Co.' is in Billinghurst's handwriting. The firm did not dispute the fact of Michael's visit nor did they challenge the statement that at the time of the visit there were at the Factory 14 barrels of their oil unused. They addressed themselves to the quality of the oil and stated their reasons for refusing to take, back the 14 barrels.

149. Before we deal with the quality of the oil, it may be mentioned that, ultimately the Factory sent away 14 barrels. Spalding & Co. refused to take delivery and the oil was sold. There, has been some dispute whether 12 of these 14 barrels contained Spalding & Co.'s oil, but the point is really immaterial. There is some confusion and obscurity in the evidence and some mistake may have been made as regards the barrels sent away. We will take it that at one time or another the Factory consumed the contents of 38 of the barrels received from Spalding & Co.

150. As to the quality of the oil it is common ground that two different kinds of oil were supplied, namely, the oil in the two barrels probably those obtained by

Spalding & Co. from Messrs. Heatly & Gresham, and the oil in the 38 barrels, all of which probably come from Messrs. Grandage Moir & Co. We gather from Capt. Kinloch's letter of 16th May that the two barrels contained an oil of identical kind and quality, utterly different from the oil in the 38 barrels. As to the latter oil it was all similar in kind though chemical analysis showed that it might vary somewhat in quality or composition from barrel to barrel. The oil or preparation in the two barrels had mineral oil as a basis while the basis of the preparation in the 38 barrels was a vegetable oil, probably castor oil.

151. Now we have said that according to the defence the sample in the pint bottle, which was found satisfactory was a sample of the oil in the two barrels. The matter is not free from doubt but the contention is sup ported to some extent by the evidence of Mr. Fitzpatcrick to which we have referred. But if the contention be accepted, it is obvious that the oil in the 38 barrels was not in accordance with sample. On the other hand, on the footing that the contract for the supply of the oil was a valid mercantile contract, untainted by fraud, Spalding & Co. might well have said that the Factory had not taken either of the two courses indicated in Section 118 of the Contract Act. They had not within a reasonable time rejected the oil altogether as not being up to sample nor had they within a reasonable time given notice that they would accept the oil but intended to claim compensation or damages. If the letter of 29th November was in the nature of a complaint as regards the first consignment, it was hardly a sufficient notice that damages would be claimed in respect of the oil taken into use.

152. The Factory apparently did not use the oil in the two barrels which Mr. Fitzpatrick considered was according to sample and it is not disputed that these two barrels at any rate were among the 14 ultimately sent away. The explanation probably is that the quantity in the two barrels was insufficient to meet the Factory's needs for any length of time, and that the best had to be made of the bulk of the oil supplied of which at least 26 barrels were used. Referring to the quantity used in his letter of 16th May, Captain Kinloch said: 'The reason why this large quantity (1,040 gallons) had to be used was that I had nothing else available and the quality was so poor that large quantities had to be used to make the correct emulsion for use at the machines.'

153. But on the footing that the contract was valid, it was quite unnecessary for Michael to invent imaginary experiments by an imaginary chemist or for Billinghurst to make the statement which follows in the firm's letter of 8th July: 'At the time when the enquiry for the oil was placed with us there was no such oil available in the market, and as this demand was a pressing one, we were asked to manufacture the oil. In this connection, we had to go very much out of our way to prepare this oil in order to meet the demand; in doing so we felt that we were assisting the Munitions Board at a needful time.'...:

154. Such explanations of the variations in the kind and quality of the oil supplied were wholly disingenuous and dishonest.. The suggestions made in argument before us, that Spalding &. Co. wished to conceal the fact that they were mere middlemen, because they were afraid of losing Government custom, cannot be entertained. In July 1919 Spalding & Co. could have had no prospect of receiving: any further orders from Government in any of its departments. The desire to conceal the fact that they were middlemen must have been the product of other motives. Doubtless, they were unwilling that discovery should be made of the price at which they had purchased the oil from Messrs Heatly & Gresham and Messrs. Grandage Moir & Co.

155. But before we come to the bearing of the quality of the oil or the price charged or the bona fides of the transaction, there is another matter to be mentioned. We have said that according to their bills, Spalding & Co. supplied more oil than they obtained from their sources of supply. It has been suggested for the prosecution that in order to make up the excess, some of the oil obtained from Messrs. Grandage, Moir & Co., was in some way diluted or adulterated. We are not satisfied that this is established. In respect of the first consignment the Factory complained in their letter of 29th November that all the barrels were not equally full and in his letter of 16th May Capt. Kinloch stated that 10 of the 14 barrels were not correct in quantity. It may, therefore, be that Messrs, Spalding & Co. charged in their bill for a larger number of gallons than were actually supplied. The prosecution, however, have not complained of the bills, on this ground and we shall, therefore, assume that if an excess charge of this kind was made, it was due not to design but to some mistake of calculation.

156. There remains the question whether the order given by Waite for this oil was an honest order. In this case, as in the other cases, it is clear that in forwarding a copy of the order to Simla, Waite represented that it was in fact an honest order and that the price to be paid was a fair market price. If the order was the result of an unlawful arrangement between Waite and Michael and Billinghurst acting on behalf of Spalding & Co. it follows at the least that an attempt was made by those privy to that arrangement to cheat the responsible authorities at Simla. It is scarcely disputed--it cannot be seriously disputed--that the price charged was exorbitant. If Waite had made the most cursory inquires, inquiries which it might almost be said he was directed to make, he could have purchased, at something under Rs. 3 a gallon, ample supplies of an oil which would not only have served the Factory's purpose but would have gone much further than the oil supplied. The point as to the difference between the Asiatic Company's oil and the oil supplied is well brought out in the Superintendent's letter of 14th January, 1919, from which we have already quoted. But the poor quality of the oil is not really important factor in this case. As the learned Magistrate said, the price was 'exorbitant even for good oil.' If we assume that neither Waite nor Spalding & Co. were aware that water-soluble oil is mixed with water before use and that some of these oils will mix with a larger proportion of water than others, there still remains the fact that Waite himself made no inquiries of the Asiatic Petroleum Company and did not call in the ordinary way for tenders. From observations already made it is apparent that we cannot accept Waite's statement made in a letter, dated 30th May 1919, written from Ootacamund that he made personal inquiries from certain firms including the Asiatic Petroleum Company. It is no violent presumption to suppose that on the 20th September when Spalding & Co. sent in the sample in the pint bottle (obtained as it is said from Messrs. Heatly & Gresham) and put in writing their agreement with Michael that he should retain any excess over Rs. 8 a gallon, the firm knew that the market price for such oil would not be more than Rs. 4 or 5 a gallon--the prices at which they subsequently purchased. If the bills for the oil had been paid by Government, Spalding & Co. would have received somewhat less than twice the price they themselves paid an additional Rs. 4 per each gallon would have gone, in the first instance at any rate, into Michael's pocket. Indeed, Michael submitted a bill to Spalding & Co. for Rs. 7,200 (equivalent to Rs. 4 a

gallon for 1,800 gallons) and was paid Rs. 2,500 on account though Spalding & Co. had not received and in the result did not receive anything from the Government. Waite, it must be remembered, was throughout in close communication with Michael while the latter took a large share in the conduct of Messrs. Spalding & Co.'s business. The price to which Waite agreed was so extravagant that Capt. Kinloch thought it must be a mistake. We are not surprised that he was dismayed when Spalding & Co.'s, bill was sent to him or that the transaction attracted attention at Simla and apparently was instrumental in leading the authorities there to depute Mr. R.D. Bell, the Controller of Oils and Paints, to Calcutta for the purpose of examining Waite's office.

157. Regard being had to all the circumstances we have detailed we can come to no other conclusion than that this transaction was the result of a corrupt and dishonest bargain to which Waite and Michael and Billinghurst were parties.

158. The above statement of facts relates to the three specific instances relied upon by the prosecution as showing the existence of a general conspiracy between the appellants and Waite.

159. It was argued on behalf of the appellants that the fact that there were three letters from Spalding & Co. to Michael relating to these three matters, proved that there could not have been one general conspiracy and that a separate agreement was entered into with respect to each of the three transactions, viz., linseed oil, turpentine, and water-soluble Oil.

160. On the other hand, it was argued on behalf of the prosecution that the conspiracy to cheat the Government of India was arrived at some time about the 14th June 1918, and that the subsequent agreements were merely supplemental to the original agreement. The dates of the three letters from Messrs. Spalding & Co. to Michael were 14th June 1918, 3rd. September 1918, and 20th September 1918.

161. It was pointed out on behalf of the prosecution that the letter of 14th June 1918, referred to other oils in which Spalding & Co. might be interested, as well as to linseed oil, to which special reference was made--that letter of 3rd September

1'918 expressly referred to the previous letter of the 4th June 1918, and that with regard to the letter of the 20th September 1918, which dealt with water-soluble oil, Michael's bill to Spalding & Co. for Rs. 7,200, in respect of the difference in rate for water-soluble oil, referred not only to the letter of 20th September 1918, but also to the letter of 14th June 1918.

162. In our judgment the mere fact of there being these three letters in respect of the three articles is not inconsistent with the existence of one general conspiracy. The letters of the 3rd and 20th September 1918 appear to have been supplemental to the letter of the 14th June, 191.8.

163. The large order for turpentine had been given by Waite to Michael on 3.1st August 1918 and it may not unreasonably be concluded that Michael desired to have it definitely stated, that the terms with respect thereto should be on the lines of the letter of the 14th June 1918.

164. The amount of Spalding. & Co.'s bill against the Munitions Board in respect of the order for turpentine was Rs. 45,487 and Michael's bill against Spalding & Co. was no less than Rs. 17,495.

165. It was, therefore, an important matter both for Michael and Spalding & Co.

166. It is to be noted that Michael received no commission in respect of that transaction but his remuneration was based on the excess rate charged to the Munitions Board, whereas in respect of the linseed oil he received commission as well as the other sums already mentioned.

167. It is further to be noted that this was not the first transaction in turpentine It appears that on the 2nd July Spalding & Co. received an order for 20 gallons of turpentine, Java, No. 2. Spalding & Co.'s account against the Munitions Board was Rs. 160, Michael's bill against Spalding & Co. was Rs. 80 in respect of the excess rate.

168. On the 11th July 1918 Spalding & Co. received a further order for 600 gallons of turpentine, Java, No. 2. Spalding & Co.'s bill against Munitions Board was Rs. 3,900 and Michael's bill against Messrs. Spalding & Co. was no less than Rs.

2,400.

169. On the 9th August there was a further order for 25 gallons of turpentine, Java, No. 2, which was supplied at the rate Rs. 25 per gallon--a most extortionate charge.

170. Spalding & Co.'s bill against the Munitions Board was Rs. 625 and Michael's bill against Spalding & Co. was no less a sum than Rs. 500 out of a total of Rs. 625. It is difficult to find any justification for such transactions.

171. These bills of Michael's against Spalding & Co. were based an the excess rates obtained by him from the Munitions Board over and above the rates quoted to him by Spalding & Co.

172. These items are to be found entered in Spalding & Co.'s journal at page 21 under the heading of 'Michael's Commission Account.'

173. The number of bills, the excess rates and the amounts due to Michael are set out in the entries.

174. The learned Counsel for Billinghurst said that Billinghurst was unaware of these entries or transactions. We find it difficult to accept such a statement.

175. It is clear, therefore, that the arrangement set out in the letter of the 3rd September 1918, which related to turpentine, was in force and was being acted upon before the letter of The 3rd September 1918 was written and, in our opinion, that letter came into existence because of the large order which had been obtained on the 31st August 1918, in order that there should be no doubt as to the excess profits which Michael was to put into his pocket in respect thereof,

176. It was on the 20th September. 1918 that in answer to an enquiry from Waite Spalding & Co., wrote saying they could supply the water-soluble oil and they were sending a sample; on the same day Spalding & Co. wrote the letter confirming their quotations to Michael and agreeing to allow him the difference or excess price obtained by him as remuneration for his services. 'No commission was payable in respect of this matter; but as already pointed out, Michael's bill in

respect of water-soluble oil referred not only to the 20th September letter, but also to the letter of 14th June 1918, showing that it was treated as being part and parcel of the original arrangement, with a variation as to the terms. Having regard to these facts, we are of opinion that the argument based on the three letters, to the effect that there could not have been one general conspiracy, fails.

177. It was further urged on behalf of the appellants that the fact that there were many transactions intervening between the dates of the three matters alleged as overt acts by the prosecution and that it was not proved that such transactions were fraudulent or dishonest was inconsistent with the existence of one general conspiracy.

178. We are not prepared to accept that contention. Assuming for the sake of argument that all such other transactions were honest, but that the three which have been investigated were not honest, these facts are not inconsistent with a criminal conspiracy to defraud the Government of India as and when opportunity occurred.

179. Reference was made to Waite's banking account which showed the payment into his account of various large 'sums of money, some of them in cash, the result being that there was an accretion of about a lakh of rupees in the course of a year over and above his salary.

180. We are of opinion that no reliance can be placed upon this matter, as showing that Waite was a party to the conspiracy alleged in this prosecution, for no proof has been given that any of such sums were in connection with the transactions now under consideration.

181. Having regard to the facts which have been proved in this case, we are constrained to come to the conclusion that Michael and Billinghurst entered into a' criminal conspiracy, as charged by the prosecution, to cheat the Government of India of sums of money in connection with supplies by Spalding & Co. to the, Munitions Board, and that the facts point to there having been one general conspiracy to carry out such cheating as and when opportunity occurred.

182. We are further of opinion that such cheating could not have been carried out except with the connivance, assistance and knowledge of Waite, and that Waite himself was a party to the criminal conspiracy alleged.

183. The result of our conclusion, arrived at after a prolonged hearing of the appeal, is that the decision of the learned Magistrate in respect of the first charge must be upheld.

184. The second charge was as follows: 'That between the 26th August 1918, and the 10th December 1918, in Calcutta, you (1) J. Stoddart, (2) H.P. Balackburn, (3), P.E. Billinghurst, and (4) P.H. Michael cheated the Government of India by dishonestly inducing them to deliver cheque No. 53,258 for the sum of Rs. 59,265, the property of the Government of India, for credit of Messrs. Spalding & Co. in payment of fraudulent bills Nos. 133 to 137 for linseed oil and thereby committed, an offence punishable under Section 420, Indian Penal Code, and within the cognizance of my Court.'

185. The charge refers to the five bills Nos. 133 to 137, Volume II of the Paper Book, pages 143 to 153. Objection was taken to the form of the charge on the, ground that it did not state the person or persons who were deceived by the alleged fraudulent bills Nos., 133 to 137, and who were thereby induced to deliver the cheque for Rs. 59,265.

186. It was alleged that, although the Government of India might be said to be a person within the meaning of Section 420 of the Indian Penal Code, there was no suggestion that the persons constituting the Government of India as defined by Section 16 of the Indian Penal Code, were deceived or induced, to issue the cheque and that the defence were entitled to know the person or persons upon whose mind or minds the fraudulent bills were alleged to have operated.

187. In our judgment, the charge should have contained an allegation of the person or persons who were alleged to have been deceived and induced to issue the cheque.

188. We are of opinion, however, that the omission should not be regarded as a fatal defect in the charge, inasmuch as the accused were not misled and there was no failure of justice by reason of the omission of the above-named particulars from the charge.

189. Another objection was taken to the second charge. It was alleged that the five bills, therein referred to, were presented at different dates, and that if any offence was committed by the appellants in respect of the bills, there were five separate offences of cheating and five separate offences could not be included in one charge.

190. In our judgment this contention cannot be, accepted.

191. The offence charged under Section 420, Indian Penal Code, would not be complete until the Government of India, being induced thereto by the alleged fraudulent bills, delivered the cheque for Rs. 59,265. Until the last of the five bills was delivered the inducement was not complete, and until the cheque was issued the offence under Section 420, Indian, Penal Code, was not complete.

192. In our judgment, therefore, the charge did not include five separate offences as alleged, but one offence only.

193. A further objection, however, was raised on the ground that the prosecution have not proved that any person or persons representing the Government of India was or were deceived by the alleged false and fraudulent representations contained in the bills or were induced to issue the cheque by reason thereof.

194. The material facts in this respect are as follows: The bills Nos. 133 to 137 were sent by Spalding & Co. to Waite: Waite, on the 10th October 1918, sent them to the Deputy Controller of War Accounts, Calcutta, with a covering letter of that date, addressed to Deputy Controller, War Accounts, Munitions Board, Simla.

195. The Deputy Controller, War Accounts (Munitions Board), Calcutta, forwarded the bills with Waite's letter to Simla.

196. He made an endorsement on the letter as follows: 'Not checked: order is prior to August, 1918.'

197. In his evidence S.K. Dutta Gupta, the Deputy Controller, War Accounts, Calcutta, explained that, with regard to bills relating to orders placed before 1st August 1918, he passed them from Calcutta to Delhi or Simla without audit or check which he left to the Delhi or Simla office.

198. In pursuance of this practice the above-mentioned endorsement was made.

199. The bills in question were dealt with in the audit office at Simla by an Official, N.K. Ayer. The cheque for Rs. 59,265 was signed by another Official, C.P.A. Aiyar. C.P.A. Aiyar, who signed the cheque, said that before issuing a cheque he saw that the bills had been properly signed and passed by tie audit officer, viz., Mr. I.P. Dutt in 12 cases arid by the other audit officer, N.K. Ayer, as regards the rest of the bills in respect of linseed oil. The bills in question bear endorsement 'Passed for Rs. _______,' the endorsement in each case mentioning the amount of the bill and being initialled by N.K. Ayer.

200. N.K. Ayer, however, was not called as a witness.

201. The prosecution allege that the two persons deceived by the alleged fraudulent bills were S.K. Dutta Gupta, the Deputy Controller, War Accounts, at Calcutta, and N.K. Ayer, the audit officer, at; Simla; and that C.P.A. Aiyar was the person induced by the alleged fraudulent bills to issue the cheque.

202. In our judgment, however, it is clear from the evidence that C.P.A. Aiyar relied solely upon the endorsement and initials of the audit officer, N.K. Ayer, which authorized him to pay the bills, and not upon any statements contained in the bills.

203. N.K. Ayer, the audit officer, should have been called as a witness, as is now admitted, by the prosecution.

204. S.K. Dutta Gupta, the Deputy Controller, War Accounts, Calcutta, said in his evidence that if he had been informed that the proper quantity of linseed oil had

not been supplied, he would not have allowed the bills to be forwarded to Simla.

205. He went on, however, to say that his instructions to his Superintendent were that before forwarding the bills for payment he was to see that they were countersigned by the Deputy Controller, Inspection, i.e., Waite.

206. It has already been stated that the bills were not checked in the office of the. Deputy Controller, War Accounts, Calcutta, and it is clear that all that was done with regard to the bills in question in that office was to see that the bills were countersigned by Waite and the bills were then forwarded to Simla.

207. As far as the office of the Deputy Controller, War Accounts, Calcutta, was concerned, the officials relied upon the signature of Waite. It was his signature which induced them to forward the bills to Simla.

208. It has been admitted that unless it can be shown that Waite was a party to the conspiracy alleged in the first charge, the second charge must fail. It is clear that this must be so, for if Waite was not a party to the conspiracy, he would be one of the persons deceived by the alleged false and fraudulent representations in the bills and he has not been called as a witness to prove this.

209. The case, therefore, appears as follows:

210. C P.A. Aiyar issued the cheque relying on the endorsement on the bills initialled by the audit officer, N.K. Ayer, which authorized him to pay them.

211. N.K. Ayer has not been called to prove what it was which induced him to pass the bills.

212. The other audit officer, I.P. Dutt, who did not pass the five bills in question was called as a witness and he said that as regards the bills with which he dealt, he was only concerned to see that the bills were duly countersigned by the purchasing officer (in this case Waite) and that they were arithmetically correct.

213. It is probable that N.K. Ayer did no more than I.P. Dutt; but, on the other hand, it is possible that he did more, and that he did not rely solely on the signature of Waite.

214. In a criminal case, such as this, it is not permissible to speculate on such a question and the audit actually applied by N.K. Ayer to the bills in question should have been proved by the prosecution.

215. S.K. Dutta Gupta, the Deputy Controller, War Accounts, Calcutta, was little more than a forwarding agent in respect of the bills in question: he did not check them, and all he did was to see that they were countersigned by Waite.

216. In our judgment, the prosecution have not proved that any official of the Government of India was deceived by the alleged false and fraudulent representations contained in the bills, and they have not proved that any official of the Government of India was induced by the false representations, alleged to have been made by Michael and Billinghurst in the bills, to issue the cheque for Rs. 59, 265.

217. Assuming that Waite was a party to the conspiracy with the two appellants to cheat the Government, the prosecution, in our judgment, have failed to prove the elements necessary to constitute the' charge under section, 420. Indian Penal Code, in respect of the five bills Nos. 133 to 137.

218. Although the prosecution in our judgment have, for the reasons already stated, failed to prove at least one and perhaps two of the elements necessary to substantiate the offence contained in the second charge, viz., under section, 420, Indian Penal Code, we are of opinion that the evidence produced in support of that charge is sufficient to support a charge of an attempt or attempts on the part of the appellants to commit the offence involved in the second charge.

219. In our judgment, the appellants presented the bills, referred to in the second charge, knowing that they contained false representations as regards the number of gallons of linseed oil by Spalding & Go.

220. The presentation of each of the bills was an application for the payment of money under false pretences. It was done dishonestly and with the object of deceiving the officials of the Government of India and inducing the Government of India to issue a cheque or cheques for the amounts of the bills.

221. As soon as each of the bills was presented the offence of attempt was committed.

222. The appellants might have been convicted of the attempt although it was not charged (see Section 237 of the Criminal Procedure Code).

223. The Magistrate, however, did not take this course, as in his view the offence charged had been proved. Nor was it suggested in argument that the appellants should now be convicted of the attempt and we do not propose to take that course in appeal. We are of opinion, however, that the evidence in respect of the charge, so far as the appellants are concerned, is material on the question of the conspiracy alleged in the first charge.

224. It is necessary in this connection to notice an argument which was urged by the learned. Counsel on behalf of Billinghurst, viz., that even assuming he knew that the bills presented by Spalding & Co. contained false representations as regards the number of gallons of linseed oil supplied by Messrs. Spalding & Co. his action in presenting the bills could not be regarded as dishonest, as he expected and believed that the bills would be checked by the Government of India officials and that if they did check the bills and passed them, after such checking, Spalding & Co. would legitimately be entitled to receive the amounts of the bills.

225. We cannot for a moment accept such an argument. If we were to give any sanction to such conduct, as being legitimate, it would entail a serious inroad upon the principles of common honesty and commercial integrity.

226. The result of our judgment is that the Magistrate's decision as to the first charge must be upheld, and that the conviction under the second charge should be set aside.

227. We have now to consider the question of sentence. The premises of Messrs. Spalding & Co. were searched on the 23rd December 1919, and at other times between that date and the 22nd August 1920, when the complaint in this case was lodged.

228. Billinghurst was arrested in September 1920, and released on bail on the 9th September 1920. Extradition proceedings were instituted with regard to Waite, Balckburn and Michael who were in England. Waite was seriously ill and was not extradited but in pursuance of the extradition proceedings Blackburn and Michael were brought before the Court in April 1921 under arrest.

229. On the 24th May 1921 on the application of Billinghurst the High Court made an order that the trial of the case should proceed, though the presence of Waite could not be obtained, and gave a direction that the proceedings before the learned Magistrate should be continued as far as possible from day to day and completed with all possible despatch.

230. The trial began on the 7th June 1921 the hearing was not finished until 22nd August 1922, and judgment was delivered, on the 28th November 1922.

231. In our judgment it is necessary to draw attention to these dates and to express our grave concern at the length of time occupied by the trial of this case.

232. From whatever point of view the matter is approached, it is equally serious. However, guilty an accused person may be, it is most undesirable that he should be subjected to the strain and anxiety of such prolonged proceedings unless it is absolutely unavoidable.

233. From the other point of view it must be obvious that the costs of proceedings, such as these, must be increased proportionately as the proceedings are prolonged.

234. From the materials before us it is clear that adjournments were at various times granted on the application of one or other of the accused, sometimes on the ground of illness, and that they were responsible for some of the delay. On the other hand, they certainly were not responsible for anything like all the delay, as, for instance, on one occasion the Magistrate was unable to proceed with the case for a whole month owing to! his being deputed to other work, viz., enquiry into a disturbance at the Jail.

235. What amount of unnecessary repetition and additional labour was entailed by such an interference with the proceedings, only those engaged in the trial and conduct of the case can say: it was a case full of details with many exhibits and the extra work and time involved by reason of such an interference must have been very considerable.

236. We recognize that the case was by no means an easy one; there were many documents and accounts to be examined and materials had to be collected from various places: but, making all allowances for these matters, we see no real justification for so long a time being occupied in the disposal of this case, and we have felt bound to draw attention to this matter in the public interest.

237. There is, another reason for referring to the length of the proceedings and that is that we consider it material on the question of sentence.

238. As already mentioned, Billinghurst was arrested in September 1920, subsequently released on bail, and convicted in November 1922.

239. Michael was brought from England and placed before the Court in April 1.921, and convicted in November 1922.

240. The strain, anxiety and mental suffering, to which the appellants must have been subject during this long time, must have been severe, and that is a matter which, in our judgment, may legitimately be taken into consideration in passing sentence.

241. For these reasons we reduce the sentence of one year to one of nine calendar months.

242. With regard to the appeal of the Crown against the acquittal of Blackburn, viz., No. 1 of 1923, in our judgment the prosecution have not shown sufficient reasons for interference on our part with the decision of the learned Magistrate and consequently the appeal in this case must be dismissed. -i

243. During the course of the argument a statement was made by the learned Counsel, appearing for Billinghurst, to the effect that an offer had been made on

behalf of the Government of India to withdraw the case on certain terms. We thought it necessary to ask the learned Advocate-General to ascertain precisely what occurred and he said he was not instructed with respect to this matter.

244. He afterwards made the following statement: 'Government never offered to release Billinghurst on any terms at all. On... August 1921, the case against Sukhlal Kernani was withdrawn.

245. By a letter, dated the 9th August 1921, Mr. Armstrong, the investigating officer, reported to Government that Blackburn had called that morning at the Munitions Office and that the question of withdrawing the prosecution against Spalding & Co., which arose as a possible consequence of the withdrawal of Kernani's case, was discussed. Blackburn was told very clearly that the withdrawal could not be recommended, if there was any chance of Government being subsequently harassed with claims by the accused; he was told that the accused might submit for consideration a petition that if the case against Spalding were withdrawn, the accused undertook to bring no claim for damages or costs against Government in respect of it, that the circumstances of the case justified the extradition and the case being put in Court and that they withdrew all imputations made in a petition presented to Court on the 12th July. He was further told that if he put in such a petition it would be forwarded to Simla.

246. By letter, dated 10th August 1921, Mr. Armstrong reported to Government that Billinghurst did not intend to apply for withdrawal unless Government were prepared to pay him compensation.

247. On the 15th the Government issued orders that 'Spalding's case should not be withdrawn but should be prosecuted to a conclusion,'

248. In our judgment this matter is outside the scope of this appeal, and it is not necessary for us to express any opinion with respect thereto.

249. The appellants must surrender to their bail at once.

250. With regard to what the two learned Vakils have just urged, namely, for dealing with the accused Billinghurst under the First Offenders Act or for further

reduction of the sentence of the accused, we desire to say that we considered this matter fully and carefully before we delivered our judgment and we regret that we can see no reason for altering the decision at which we have arrived.

251. The application for granting compensation to Mr. Blackburn is rejected.