

**State Vs. Kishan Dayal**

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**Court :** Himachal Pradesh

**Decided On :** Jan-15-1952

**Reported in :** AIR1952HP46

**Judge :** Chowdhry, J.C.

**Acts :** [Evidence Act, 1872](#) - Sections 34 and 45; ;[Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 170(1), 423(1) and 540

**Appeal No. :** Criminal Appeal Nos. 2 and 3 of 1951

**Appellant :** State

**Respondent :** Kishan Dayal

**Advocate for Def. :** Harish Chandar, Adv.

**Advocate for Pet/Ap. :** N.D. Gupta, Govt. Adv.

**Judgement :**

Chowdhry, J.C.

1. These are two Government appeals under Section 417, Criminal P. C., against the acquittal of Kishan Dayal by a first class Magistrate of Bilaspur of offences punishable under Sections 409 and 477A, I. P. C.

2. The administration of Bilaspur State was taken over by the Central Government on 13-10-1948, under the Bilaspur State (Administration) Order, 1948. Kishan Dayal held the post of civil Nazir since before that, i.e., since 21 'Katik' 2003 B., (corresponding to 6-11-1946), to 8-3-1949, on which latter date he made over charge of that post to his Naib-Nazir, Paras Ram, and was appointed Reader to the then Deputy Chief Commissioner. About six months later, i.e., on 1-9-1949, the District Judge ordered Paras Ram to deposit into the treasury all sums lying with him in the 'Amanat' account. These were sums lying to the credit of various litigants.

Paras Ram made a report on 2-9-1949, that he had checked the registers but found a deficit of Rs. 3,000/- odd, and that this related to the tenure of Kishan Dayal as civil Nazir. On the same date the District Judge recorded the statement of Kishan Dayal, which has been characterised as his confession by the prosecution, and made a report to the Chief Commissioner supporting the aforesaid allegations in Paras Ram's report of the previous date.

The Chief Commissioner suspended Kishan Dayal on 3-9-1949 and directed that the papers be sent to the Superintendent of Police for registration of a case against him, and that the conduct of Paras Ram be also enquired into. This order appears to have been complied with by the Registrar of the Chief Commissioner only in part, since in the letter addressed by him to the Superintendent of Police the latter was directed to register a case against Kishan Dayal but nothing was mentioned about Paras Ram. The police registered a case against Kishan Dayal on the basis of that communication on 8-9-1949, and on the same date he was arrested.

3. After investigation two charge-sheets were submitted by the police against Kishan Dayal on 31-12-1949 for offences under the said sections, one relating to six items of the 'Amanat' register from 3-5-1947 to 9-3-1948 and the other to four items of the same register from 21-10-1948 to 3-1-1949. The Magistrate tried Kishan Dayal separately under the two charge-sheets but found him not guilty of the said offences and acquitted him on 26-2-1951. The present appeals have been filed against those acquittals.

4. In order to bring the guilt home to the respondent under Section 409, I. P. C., it was necessary for the prosecution to establish, 'inter alia', firstly that there was a shortage in the cash in hand, and secondly that the shortage was attributable at least in part to the said ten items on the disbursement side of the 'Amanat' register. For establishing the second of these two ingredients one of the things which necessitated proof was that the said entries had been made by the respondent. And as the making of these entries is said to have amounted to falsification of accounts, its proof was further necessary for establishing the other offence under Section 477A, I. P. C.

5. So far as the question of the alleged shortage of cash in hand is concerned, the prosecution relied merely on the entries in the relevant books of account. This was, however, far from having proved the shortage. Had the books of account been regularly kept in the course of business, formal proof of the entries serving to make out the allegation would not have been necessary in view of the provisions of Section 34, Evidence Act. Even then those entries would not alone have been sufficient evidence to charge any person with liability. In order to fix the liability upon the respondent it was necessary for the prosecution to prove the alleged shortage by independent evidence, and the entries in the books of account could then have been used as a piece of corroborative evidence. 'EMPEROR v. NARBADA PRASAD', AIR 1930 All 38 and T. N. S. FIRM v. V.P.S. MUHAMMAD HUSSAIN', AIR 1933 Mad 756.

In the present case the books of account relied upon do not appear to have been regularly kept in the course of business. (After referring to the evidence on the point his Lordship proceeded:) That being so, even formal proof of the entries could not be dispensed with under Section 34 of the Evidence Act.

All that the prosecution did in this case was to produce Paras Ram who repeated the deductions contained in his report. His testimony did not, however, constitute independent evidence since he did not speak from personal knowledge of the transactions to which the entries in question related. Nor did he or any other prosecution witness prove the specific entries from which the said deductions were alleged to have been made, which, as already seen, was necessary in this case

on account of the books of account containing those entries not having been regularly kept in the course of business.

It is manifest, therefore, that the prosecution in this case was conducted by a lawyer who appears to have been ignorant of some of the elementary rules of procedure relating to proof of entries in books of account. The consequence is that I have no evidence truly so-called before me from which I could draw an inference one way or the other as to the truth or falsity of the first of the aforesaid two ingredients which the prosecution had to establish in this case, namely, that there was a shortage in cash in hand. Another mistake committed in this connection was that the shortage that was attempted to be established was that on 1-9-1949, when in pursuance of the District Judge's order Paras Ram made his report, while the correct date on which the shortage, if any, should have been established was 8-3-1949 when the respondent handed over charge to Paras Ram.

6. When one comes to the second of the above mentioned ingredients, the case does the same tale repeat. As adverted to above, in order to establish both the charges it was necessary for the prosecution to prove that the entries in question had been made by the respondent. Five of the six entries which were the subject-matter of one trial needed proof that they were in the handwriting of the respondent in their entirety, for the respondent admitted only one of them to be so. In each of the four entries which were the subject-matter of the other trial it had to be proved that the figures added thereto to inflate the amounts were in the handwriting of the respondent, for, while he admitted the rest of the entries, the respondent attributed the addition of the figures in question to Paras Ram.

In order to prove that the said entries and figures were in the handwriting of the respondent, and not in that of Paras Ram, it was therefore necessary for the prosecution to call a handwriting expert and witnesses acquainted with the handwriting of both the persons. No expert witness was, however, produced, and the witnesses who were produced were not acquainted with the handwriting of the respondent.

As a result, presumably, of the defence putting certain questions to S. I. Sukh Ram (P. W. 12), it dawned upon the prosecution that it was necessary to summon a

handwriting expert, and thereupon an application in that behalf was filed on 4-1-1951, but the learned Magistrate rejected it on 10-1-1951, on the ground that it was not pressed. Irrespective of whether the prosecution did really not press the application, it should have been patent to the Magistrate that the examination, of a handwriting expert in a case like this was absolutely necessary. That being so, it was his bounden duty, even without any suggestion emanating from the prosecution, to have summoned such a witness under Section 540, Criminal P.C. 'RAM BHAROSEY v. EMPEROR', AIR 1936 All 269. And there was no stage in the trial of the case which should have been considered by him too late for taking that action, the only safeguards necessitated in that case would have been a re-examination of the accused with reference to the new evidence and the affording to him an opportunity to give such further evidence in rebuttal as he liked. 'CHANNU LAL v. REX', AIR 1949 All 692.

The learned counsel for the respondent cited 'AMBIKA CHARAN v. NARESWARI DAS', AIR 1925 Cal 145, in which a comparison of handwriting was referred to as a hazardous mode of proof, but that was when made by one not conversant with the subject. The trial dragged its slow length along for two protracted years before the Magistrate. There were numerous unnecessary adjournments, and on certain dates nothing more was done than to examine a witness in part. The only occasion, however, on which the learned Magistrate appears to have been galvanised into activity (with negative effect, though) was when moved to summon a handwriting expert. (His Lordship discussed the evidence and proceeded:)

7-9. From all that has been stated above it is manifest that by reason alike of the inaptitude of the person in charge of the prosecution and of the apathy of the learned trying Magistrate, there was no proper trial in the present case. It has been said that a trial under the Criminal Procedure Code implied proceedings 'in which a person stood before a Court empowered to convict him of some offence alleged against him. 'VENKATACHENNAYA v. EMPEROR', AIR 1920 Mad 337 (at P. 341).

There is no doubt that offences were alleged against the respondent and the learned Magistrate was empowered to convict him, but those entrusted with the

task of substantiating the offences and of exercising the said powers brought such capacities, or incapacities, to bear on the parts respectively played by them that the proceedings were reduced to a mere travesty of trial. Not only is it not clear, in the circumstance, whether the prosecution has failed to bring the charges home to the respondent, but also whether the respondent has been justly acquitted. This is not a case of all available evidence having failed to prove the alleged guilt, but of its not having been produced. The only proper course which the ends of justice demand in the present case, therefore, is to order a retrial.

The learned counsel for the respondent argued that after such a protracted trial a retrial will lead to a harassment of his client. To my mind, however, a retrial should not be refused merely on the ground of harassment to the accused where the circumstances of the case render it otherwise desirable.

10. I am not oblivious of the alternative of directing additional evidence to be taken under Section 428, Criminal P. C. There are, however, two reasons why I am not adopting that course. In the first place, the acts of omission on the part of the prosecution are so many and varied that it is not possible to issue definite directions on the question of additional evidence. The omissions pointed out by me were not exhaustive but merely illustrative.

In the next place, a retrial would make it possible for the authorities that be to consider the desirability or otherwise of prosecuting Paras Ram as a co-accused with the respondent. Indeed, I am surprised at the Registrar having ignored the specific direction of the Chief Commissioner regarding the conduct of Paras Ram also being enquired into, and at his having moved the police to investigate the case against the present respondent alone.

It was strongly urged by the learned counsel for the respondent that the real culprit was Paras Ram. In a case like the present where the offence is likely to have been committed by one or the other of the two persons, or by both, but only one of them has been prosecuted, there are bound to be accusations and counter-accusations without the Court being sometimes able, as here, to decide who the guilty person was. It is but elementary practice in such cases for the police to submit a charge-sheet against both, whether as principal offenders, or as one of them being an

abettor or a conspirator, as the case may be.

Of course, it is not for a Court to entrench upon the exclusive jurisdiction which the police have in the matter of investigation under the relevant provisions of the Criminal Procedure Code 'EMPEROR v. NAZIR AHMAD', AIR 1945 P C 18, or which the Government have in the matter of sanctioning or not sanctioning the prosecution of a Government employee, 'GOKULCHAND DWARKADAS v. THE KING', AIR 1948 P C 82, but to point out that the desirability or otherwise of a possible action be looked into is not to direct that the action be necessarily taken.

11. The appeals are allowed, the orders of acquittal of the respondent are set aside and it is hereby directed that he be retried. Before commencing the retrial the trying Magistrate will wait for a month after the receipt of the record from this Court to see whether Paras Ram is also sent up for trial before him by the police, or at least the Magistrate is moved that such action against Paras Ram was contemplated. A copy of this judgment will be sent to the Government.

12. The respondent shall be taken into custody but shall be released on his furnishing security to the satisfaction of the District Magistrate, Bilaspur.

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