Zwinglee Ariel vs State Of Madhya Pradesh on 3 December, 1952

Equivalent citations: AIR1954SC15, AIR 1954 SUPREME COURT 15

JUDGMENT

S.R. Das, J.

1.This is an appeal against the decision of the High Court of Judicature at Nagpur dated 20-9-1950, setting aside the order of acquittal passed by the Additional Sessions Judge, Nimar-Khandwa, on 9-1-1950 and convicting the appellant of an offence under Section 161, Penal Code and sentencing him to 9 months' rigorous imprisonment and a fine of Rs. 200 or, in default of payment of fine, to a further term of the three months' rigorous imprisonment.

2. One Shri Digvijay Singh, a minor, is the Malguzar and Muafidar of several villages including Amba, Selda and Balabad which have extensive forest areas appertaining thereto. His mother Shrimati Rajendra Kumaribai is his guardian and manages his estate on his behalf "with the assistance of one Radhakrishna, who gets a salary of Rs. 600 per annum. The estate owns a bungalow known as Bedia Bungalow at Khandwa, half of which is occupied by Dr. S. M. A. Rahman, Civil Surgeon, and the other half by Shri Durga Narain Singh (husband of the Sister of the minor's deceased father). Shrimati Rajendra Kumaribai used to stay with Durga Narain Singh at Bedia Bungalow whenever she used to go to Khandwa.

3. On 23-7-1946 four applications were made on behalf of the minor under Section 202, Central Provinces Land Revenue Act -- three of them being for permission to cut the forest growth in those three villages and the fourth one for permission to cultivate the forest area of village Amba. These applications were sent by the Deputy Commissioner to the Divisional Forest Officer, Khandwa, for report. Between August 6 and August 13, 1947 the Divisional Forest officer in his turn forwarded the said applications for report to the appellant who was then the Range Officer.

4. The prosecution case is that on 26-10-1947 the appellant came to Bedia for inspecting the forests at Amba which he did in the company of one Pratab Singh the brother of Shrimati Rajendra Kumaribai. On 27-10-1947 he was invited to the house of the minor at Bedia and was given tea there. While taking tea the appellant told Radhakrishna that he would see the forest of Selda after a day. He also said that the area of the forest was large and that they would have to pay Rs. 500 to him. Radhakrishna informed Shrimati Rajendra Kumaribai about the talk and the later asked him to go to Khandwa, collect rent and pay something to the appellant. Radhakrishna accordingly went to Khandwa and on 5-11-1947 collected Rs. 200 in currency notes of Rs. 100 each from Dr. S. M. A. Rahman, the tenant of Bedia Bungalow at Khandwa, on account of rent and on the same day paid that amount to the appellant when the appellant put for ward his demand for the balance of Rs. 300. On 7-11-1947, Radhakrishna again saw the appellant and the latter again told him that Rs. 200 was not enough and asked him to send 8 reply on this point between November 9 and 18.

As Radhakrishna was leaving, the appellant asked him to send Durga Narain Singh as he wanted to talk to him. Later in the evening Radhakrishna informed Durga Narain Singh that the appellant had wanted to see him and also related to Durga Narain Singh about the payment of Rs. 200 and the talk relating to that matter. Radhakrishna returned to Bedia on 13-11-1947 and informed Shrimati Rajendra Kumaribai about what had transpired between him and the appellant at Khandwa. In the meantime Durga Narain Singh saw Shri Kekre, Sub-Divisional Officer of Khandwa, and revealed to him the whole position. Shri Kekre outlined a programme for entrapping the appellant. Durga Narain Singh accordingly wrote to Shrimati Rajendra Kumaribai and she eventually came to Khandwa on or about 25-11-1947 and stayed at the Bedia Bungalow with Durga Narain Singh.

She asked Radhakrishna to arrange for Rs. 300. Radhakrishna brought Rs. 300 in three hundred-rupee notes which were handed over to Durga Narain Singh. With these notes Durga Narain Singh saw Shri Kekre who took him to Shri Deo, the Additional District Magistrate, and the three of them went to Shri S. M. Seth, the Deputy Commissioner, and informed him that Rs. 200 had been paid to the appellant and that he had demanded Rs. 300 more. The Deputy Commissioner thereupon noted the numbers of the said currency notes in the memorandum Ex. P/4 and returned the notes to Durga Narain Singh and it was arranged that Durga Narain Singh would give the notes to Radhakrishna who would hand over the same to the appellant at his house on that very night. All these confabulations took place at about 6 P. M. on 26-11-1947.

On the same day Radhakrishna presented to Shri Kekre an application (Ex. P/6) bearing that date praying that the previous applications be considered and the necessary permission be granted early. In the evening Shri Kekre and Shri Deo went to the police station and collected Chakravarti, the Circle Inspector, and S. D. Pande, the Sub-Inspector, and on their way picked up Shri L. R. Joshi, a first Class Magistrate. The party then proceeded towards the Rest House. Durga Narain Singh was asked to send Radhakrishna with the notes to the appellant. The party waited at the Rest House for the return of Radhakrishna and when he failed to appear the party went out from the Rest House and met Radhakrishna on the way. Radhakrishna reported that there was no movement in the house of the appellant and that the inmates appeared to be asleep. The trap thus proved unsuccessful on that occasion.

Thereupon the party consisting of Shri Kekre, Deo, Joshi, Durga Narain Singh and Radhakrishna went to the bungalow of Shri Kekre and there it was decided that the appellant should be invited to tea on behalf of Shrimati Rajendra Kumaribai at Bedia Bungalow in the morning of the next day and there the amount of Rs. 300 in those three hundred-rupee notes would be given to him. It was arranged that after acceptance of the money by the appellant Radhakrishna would give the signal from the front side of the bungalow by taking off his cap and scratching his head. Next morning at about 6 or 6-30 a.m. Radhakrishna called at the house of the appellant and on behalf of Shrimati Rajendra Kumaribai invited him to tea at the Bedia Bungalow and told him that whatever was to be given to him would be given there. The appellant having accepted the invitation, Radhakrishna returned and informed Shrimati Rajendra Kumaribai that the appellant would come for tea at about 8 or 8-30 a.m. Thereafter Durga Narain Singh sent word to Shri Deo that the appellant was arriving for "tea at 8-30 or so. Shri Deo with L. R. Joshi and S. D. Pande went to the bungalow of one Shri Trivedi in the neighbourhood of Bedia Bungalow and took up their position in that bungalow and

saw the appellant coming to and entering the Bedia Bungalow. After a while the appellant emerged with Radhakrishna from the Bedia Bungalow when Radhakrishna gave the signal by taking off his cap and scratching his head. The appellant was followed by Shri Joshi, Deo and Pande. Shri Joshi called out to him to stop and on coming up to him told him that he was going to be searched because he had accepted an illegal gratification.

Shri Deo, who noticed that the appellant's shirt pocket contained an envelope, removed it and after opening it found that it contained the three notes in question. The appellant begged to be saved and implored for kindness as he was a family man with children. The envelope and the notes were duly seized and their numbers recorded on the back of the envelope by Shri Deo before the party went to the police station in a lorry. The appellant was thereafter formally arrested and subsequently let out on bail. On the above allegations the appellant was prosecuted for an offence punishable under Section 161, Penal Code, after the requisite sanction had been obtained.

5. The appellant in his defence admitted that the applications made on behalf of the minor for permission were sent to him for report and also that he had been to Bedim on 26-10-1947. He, however, denied that he went to the house of the minor at Bedim on 27-10-1947 or demanded Rs. 500 or that in the beginning of November 1947 he had received Rs. 200 from Radhakrishna or had pointed out that the amount was inadequate or insisted on the balance of Rs. 300 being paid to him. He admitted that on the morning of 27-11-1947 he had gone to the Bedim Bungalow for tea but he averred that in the early morning he had been informed by Radhakrishna that it was Durga Narain Singh who had invited him to tea. He denied that he had accepted any illegal gratification in the shape of three currency notes of Rs. 100 each from Radhakrishna at Bedim Bungalow.

He said that Durga Narain Singh opened the talk in the course of tea and asked him whether he had seen the instructions of the Chief Conservator of Forests in accordance with which he was to make his report. He told Durga Narain Singh that the said instructions had not been received by him from the office of the Divisional Forest Officer and that as soon as they would be received he would arrange his tour programme for Bedia Range. Durga Narain Singh asked him to personally go to the Office of the Divisional Forest Officer to see the instructions and oblige them. Shrimati Rajendra Kumaribai also requested him to expedite his report. In good faith, the appellant agreed to do so. As soon as he agreed to go to the Divisional Forest Officer's office Durga Narain Singh and Radhakrishna told him that if the Estate Pleader Shri R. K. Mandloi were also called from the Bar Room which was close by to see those instructions then they could promptly carry out those instructions so far as they required anything to be done by them. Radhakrishna thereupon brought from inside a letter and asked the appellant to hand it over to the pleader whom the appellant knew. The appellant, without any Suspicion, took the letter from him.

6. The trial Court, believing the prosecution story, held that the appellant knowingly accepted the three currency notes as illegal gratification and convicted him on 5-9-1949, of the offence with which he stood charged and sentenced him to 18 months' rigorous imprisonment and also to pay a fine of Rs. 300 and in default of payment of fine to undergo rigorous imprisonment for a further period of three months. The learned trial Magistrate, after broadly reciting the facts, commented on the delay on the part of the appellant in submitting his report on the four applications and considered that the

delay was clearly indicative of his mala fides and was quite deliberate to screw out money from Radhakrishna.

Taking into consideration the delay referred to above and the recovery of the three currency notes the Magistrate thought it was quite clear that the appellant must have asked for and received Rs. 300 as bribe from Radhakrishna. Although from the way Radhakrishna had deposed in his Court, and the way in which he had explained the various entries in the account books the Magistrate concluded that Radhakrishna could not be said to be an honest and straightforward man, he nevertheless, observed that that fact itself could not be a sufficient ground for disbelieving him in what he stated about the demand of Rs. 300 made by the appellant, especially when his statement in that respect was, according to the Magistrate, corroborated in material particulars by the circumstances which preceded and followed that demand. He held that the appellant was invited to tea on behalf of Shrimati Rajendra Kumaribai and that Rs. 300 were really paid to him as bribe for inducing him to submit a favourable report.

His view was that there was no reason to disbelieve the evidence of Shrimati Rajendra Kumaribai. While agreeing that the statements said to have been made by the appellant after the notes had been recovered from him did not amount to a confession of an offence, the Magistrate took the view that they, nevertheless, indicated his guilty mind in respect of these notes. We have carefully gone through the judgment of the learned Magistrate but we do not find that he at all applied his mind to the various discrepancies, divergencies and improbabilities disclosed in the evidence to which reference will be made hereafter in greater detail.

7. The appellant filed an appeal in the Court of Sessions Judge, Nimar-Khandwa, against the order of the trial Magistrate. The learned Additional Sessions Judge had to determine two questions, namely, (1) whether there was a demand for Rs. 500 by the appellant on 27-10-1947 and a payment of Rs. 200 on 5-11-1947, and (2) whether on 27-11-1947, there was a payment of Rs. 300 and a conscious acceptance of it by the appellant as bribe. The learned Additional Sessions Judge examined the evidence closely and in detail and pointed out the glaring discrepancies between the evidence of different prosecution witnesses on vital points and to diverse inconsistent and even contradictory statements made by the same witness at different stages of his or her evidence and the obvious improbabilities of some of those statements. On reading the evidence on record the learned Additional Sessions Judge also came to the conclusion that Radhakrishna was a wily man who was out to exploit the predicament to which Shrimati Rajendra Kumaribai was put by reason of the impending acquisition of the proprietary rights in the villages. In the opinion of the learned Additional Sessions Judge although the individual misappropriations on the part of Radhakrishna were trivial, they, nevertheless, Showed the man and it was not beyond the bounds of possibility that he was himself appropriating the money on the pretext of giving it to the appellant.

In the circumstances the Additional Sessions Judge could not rely upon the evidence of Radhakrishna on either of the two points. He pointed out that Brijraj Singh and Pratab Singh who were admittedly present at Bedia on 27-10-1947 when the demand of Rs. 500 is alleged to have been made had not been examined to corroborate the evidence of Radhakrishna and concluded that on the uncorroborated testimony of Radhakrishna the first question could not be held to have been

duly proved by the prosecution. He rejected as incredible the story of the appellant having made an admission of the receipt of Rs. 200 as bribe to Durga Narain Singh whom he met for the first time about the middle of November 1947 and who had introduced himself by Ex. D/6 as a probationer under training and had already seen the Divisional Forest Officer, who was the senior Officer of the appellant.

He also pointed out that if that story were true Durga Narain Singh would certainly have told the Magistrate about it and would also have complained to the Divisional Forest Officer himself which he admittedly did not do. The Additional Sessions Judge, therefore, in view of these obvious improbabilities, felt bound to reject the evidence of Durga Narain Singh also. Further, the evidence relating to the petition Ex. P/6 shows that the evidence of neither Radhakrishna nor Durga Narain Singh could be relied upon. Radhakrishna said that he submitted the petition (Ex. P/6) on 28-11-1947 but Durga Narain Singh said that the petition had been written and filed at his direction after the appellant had been arrested on 27-11-1947. The petition, on the face of it, was a clumsy attempt to manufacture evidence and persons who could stoop so low as to manufacture an antedated document cannot possibly be relied upon as witnesses of truth. Thus one important and integral part of the prosecution case was rejected by the Additional Sessions Judge for want of sufficient and convincing proof.

8. As regards the payment of Rs. 300 on 27-11-1947 as bribe the only evidence was that of Radhakrishna and Shrimati Rajendra Kumaribai. Here again the learned Additional Sessions Judge referred to the absence of any cogent explanation in the evidence as to why it was decided to pass on the three notes in an envelope. He pointed out the clear discrepancies as to the identity of the person who was responsible for suggesting this clandestine method and as to what talk actually took place at the time the envelope was handed over to the appellant.

He did not find Durga Narain Singh's explanation for his keeping away from the scene when the appellant came to tea on that date as at all convincing in view of the alleged perfect understanding between the appellant, Radhakrishna and Durga Narain Singh. He also commented on the fact that none of the Magistrates considered it necessary or right, in order to prevent any mistake, to remain concealed in an anteroom and overhear the exact talk that took place between the appellant and Radhakrishna. In a careful and well considered judgment the learned Additional Sessions Judge, for reasons which appeal to us to be quite cogent and convincing, held that the prosecution had not proved the case beyond reasonable doubt and accordingly set aside the conviction and sentence passed by the trial Magistrate and acquitted the appellant.

9. The State of Madhya Pradesh appealed against the above order of acquittal. The High Court by its judgment dated 20-9-1950 set aside the acquittal, and convicted the appellant as already mentioned. Although the learned Judges of the High Court fully endorsed the estimate formed by the trial Magistrate and the Additional Sessions Judge as to the character of Radhakrishna and found it "clear enough that he was neither honest nor straightforward", they did not discuss the evidence of the different witnesses at all or advert to any of the criticisms offered by the learned Additional Sessions Judge in his judgment on the strength of which he had disbelieved the prosecution story. For the purpose of coming to the conclusion they did, the learned Judges of the High Court relied

mainly, if not entirely, upon certain circumstances with regard to which, however, no opportunity of explanation had been given to the appellant in his examination under Section 342, Criminal P. C. The High Court, in our opinion, overlooked some of the well-known principles recognised in the administration of criminal justice as laid down by the Privy Council in -- 'Sheo Swarup v. Emperor, AIR 1934 PC 227 (2) (A), and' repeated by this Court for the guidance of appellate Courts in dealing with an appeal against acquittal. The learned Judges do not appear to have kept in view that the order of acquittal had strengthened the presumption of innocence in favour of the appellant and that he was entitled to the benefit of reasonable doubt.

10. The first circumstance relied on by the High Court is the delay on the part of the appellant in submitting his report on the cases referred to him. It appears that the appellant took charge of Khandwa Range only on or about 1-5-1947. He was quite new to this Range and had never toured in the sub-range. The cases came to him for report between August 6 to August 13, 1947. He says that in September 1947 he requested the Divisional Forest Officer to furnish him with a copy of the map of Khandwa Tahsil. On 26-10-1947 he inspected Lachora forest and Amba Forest. He requested Pratab Singh who had accompanied him on the inspection of Amba forest to send a section of teak tree marked in his presence. In fact this section was shown to the Range Assistant S. M. Qazi on 30-10-1947. In the meantime he had to go back to the headquarter in order to submit accounts to the Divisional Forest Officer. He made his report on Lachora on 3-11-1947.

It appears that the report was sent back with the remark that the report should be drawn up in accordance with the instructions of the Chief Conservator of Forests. There is no evidence at all that he was ever approached by Radhakrishna or Durga Narain Singh at any time before 26-10-1947 to expedite his enquiry or that he put it off. The appellant being new to this Range and as he had to familiarise himself with it and to attend to the Government forest coupes included in this Range we do not consider that there was in fact any unreasonable delay or that he had adopted any delaying tactics deliberately to screw out money from the minor's estate. It further appears from his examination under Section 342, Criminal P. C. that this case of delay was never put to him nor was he given any opportunity to explain the same. In the circumstances the alleged delay cannot be regarded as an incriminating circumstance.

11. In the second place the High Court made strong comments on the conduct of the appellant, a public officer, in acting in the manner he did vis-a-vis the legal representatives of the party concerning whose forests he had been directed to hold an enquiry. It is to be remembered that Durga Narain Singh was also a Public Officer stationed in the same town of Khandwa where the appellant also resided and further that Durga Narain Singh had approached the superior officer of the appellant. In the premises Durga Narain Singh could naturally be, considered by the appellant to be a person of some influence, status and responsibility. Durga Narain Singh had admittedly called at the place of the appellant twice and, if the appellant is to be believed, had tea with him at his bungalow. In these circumstances, there was nothing wrong if the appellant had, in return, called at Durga Narain Singh's place and accepted his invitation to tea.

At the interview Durga Narain Singh had with the appellant at latter's house the appellant had even showed him the Divisional Officer's remarks in the Lachora case, Ex. D-13. If, therefore, on the

morning of 27-11-1947, the appellant agreed to oblige Durga Narain Singh, a brother officer, and Shrimati Rajendra Kumaribai, the mother of the minor jaguar and mafia, by going to the office of the Divisional Forest Officer to have a look at the instructions of the Chief Conservator of Forest in order to expedite matters instead of waiting for those instructions officially coming to him and if he also agreed to take a letter to the pleader whom he knew so that the pleader also could go and inspect those instructions in order that if anything was required to be done by the estate it could be done immediately such conduct need not necessarily be looked upon with suspicion. In fact, Shri L. R. Joshi said that "if one of my friends invited me for tea I would readily accept his invitation. If during tea this friend were to hand me over a letter to be given to Shri R. S. Joshi, Pleader of Harsud, I will take it. I would not open the letter to know its contents." It is, therefore, not necessarily unbecoming of an officer to agree to carry a letter from a brother officer, particularly if requested after being entertained to tea.

12. The third point made by the High Court was that the appellant did not, in his examination by the trial court, say that the letter was to be delivered to Mandloi or that there was any suggestion that he should see the instructions of the Chief Conservator of Forests or that there was any allusion to such instructions and that reference to these matters first appeared in the written statement which was filed five months later. The High Court was clearly in error on this point.

The defence was clearly put to both the relevant witnesses, namely, Radhakrishna and Durga Narain Singh on 18-9-1948 and on 12-11-1948 respectively, that is to say, months before the examination of the appellant under Section 342, Criminal P. C. Even in his examination under Section 342 the appellant did say that the envelope was handed over to him on the pretext that it was a letter and that he had no knowledge that there were currency notes inside the envelope. This ground, therefore, was wholly untenable.

13. Finally, the High Court relied on the statements alleged to have been made by the appellant when he was halted after leaving the Bedia Bungalow. Extracts from the evidence given by Pande, Joshi and Deo have been set out in para 18 of the High "Court's judgment. The whole evidence of course was not quoted. It will be observed that the witness Pande tried to add a little embellishment to his statement by referring to the conduct of the accused, namely, that he started trembling and showed signs of being frightened, presumably to make it admissible in evidence as conduct of the appellant under Section 8, Evidence Act.

The two Magistrates, however, did not refer to any such conduct. The conduct being thus out of the way, it is clear that the appellant's statements in reply are not admissible at all under Section 8, Evidence Act. If these alleged statements are to be regarded as confessions then they will be hit by Section 25, Evidence Act. for they were made to Pande, the Police Officer, who was there. If they are sought to be brought in under Section 26 as confessions made in the immediate presence of the Magistrates, then also they will not be admissible in evidence in that they were not recorded by the Magistrates in the manner prescribed by Section 164, Criminal P. C. Apart from these legal difficulties, it appears to us that these statements do not necessarily amount to a confession by the appellant of having committed the offence with which he was charged. The mistake referred to may not necessarily be the mistake of taking a bribe. It may conceivably refer to this mistake in accepting

the invitation to tea and in agreeing to carry the letter. Indeed, the trial Magistrate in his judgment recognised that the statement did not amount to a confession of the offence but simply indicated a guilty mind.

14. Learned counsel appearing for the State of Madhya Pradesh has sought to support the conclusions of the High Court on the ground that as an honest man the appellant should; have indignantly repudiated the suggestion of his having taken a bribe and should have then and there explicitly stated that he was carrying to the pleader what was represented to be a letter. The fact that the appellant did not make that answer then and there is certainly a fact which goes to weaken his defence that he is putting forward. But it should be borne in mind that the prosecution was all the time making a case of guilt founded on the alleged confessional statements and not on the conduct of the appellant in not putting forward such a defence at the time the notes were found on his person. The omission to put up such a defence was never considered to be an incriminating circumstance until the matter came before the High Court. Indeed, if this failure to make a categorical statement of the nature indicated by learned counsel had been raised or even hinted at the trial one would have expected that the appellant would surely insert some explanation in his lengthy written statement.

In his examination under Section 342, Criminal P. C. this circumstance was never put to the appellant and the appellant had no chance of giving any explanation whatever. Joshi and Deo were never examined by the police under Section 162 and the appellants did not get an opportunity of testing their memory by reference to the statements of those witnesses made immediately after the occurrence. In the premises, very great weight ought not to be attached to this conduct of the appellant. At the highest, such conduct in not giving out his case when he was confronted with the notes in the envelope sticking out of his shirt pocket and carried openly may weaken his defence and may to some extent reinforce the positive evidence adduced by the prosecution, if such evidence is otherwise reliable at all.

If, however, the prosecution evidence as a whole is unreliable and cannot be accepted as correct as held by the learned Additional Sessions Judge for specific reasons given by him, the conduct of the appellant can be of no avail to the prosecution, for such conduct of silence can never be permitted to become a substitute for proof by the prosecution. The substantive prosecution evidence being rejected as unworthy of credit, the alleged conduct must be referable to some innocent reason. Different persons react in different ways in similar circumstances and in the absence of satisfactory evidence the court ought not to treat the case as positively proved beyond reasonable doubt only by reason of the appellant's failure to put up his defence immediately when he was confronted with the three notes. Taking all the surrounding circumstances into consideration and in view of the unsatisfactory evidence adduced by the prosecution we think that the learned Additional Sessions Judge rightly extended the benefit of doubt to the appellant.

15. In the view we have taken as to the facts, it is not necessary for us to discuss the question of the validity of the sanction to prosecute the appellant. For reasons stated above, this appeal must be allowed and the conviction and sentence passed by the High Court must be set aside and the accused must be set at liberty. We order accordingly.