State vs Tirath Das on 30 November, 1953

Equivalent citations: AIR1954ALL583, AIR 1954 ALLAHABAD 583

JUDGMENT

Agarwala, J.

1. This is a reference by the learned Assistant Sessions Judge of Kanpur in a jury trial. The facts of the case briefly stated are as follows:

2. The complainant Inder Singh, formerly resided at Lyailpur in West Punjab (Pakistan) and carried on business in cloth. He used to purchase cloth through the agency of a firm called Jhangiram Hukumchand carrying on business of 'pukka Arhatiyas' at Bombay. The firm of Jhangi-ram Hukumchand was owned by three persons, namely, Hukumchand, now deceased, Tirathdas, opposite party, and one Ram Chandra. The firm as 'pukka Arhatiyas' used to buy goods for their constituents from merchants at Bombay and used to make payment to the sellers for the purchases made by them. Sometimes the constituents would deposit money with the firm in advance to be accounted for later on and set off against future purchases. Once the complainant Inder Singh had deposited a sum of Rs. 14,000/- with this firm, and interest was paid by this firm on this amount. After the partition of India the complainant settled down at Kanpur.

On 22nd July 1949 the complainant entrusted a sum of Rs. 10,000/- to Tirathdas, opposite party, to be sent to Bombay for being deposited in the said firm. An entry relating to this transaction was made by Tirath Das in the books of the complainant and it was to the following effect:

> "Lekha Jhangiram Hukumchand Bombaywale Sambat 2006, 10,000/- Sahi Jhangiram Hukumchand Akhri Das Hazar Kanpur men tumne Dia Miti Sawan Badi 12 Bombay Pathan Waste."

This entry did not mention specifically for what purpose this money was handed over to Tirathdas. It was only mentioned that the money was handed over to him to be sent to the Bombay firm Jhangiram Hukumchand. The allegation of the complainant was that certain goods were intended to be purchased by the complainant through the agency of the firm Jhangiram Hukumchand, and this money was given so that it might be utilised for the said purchase.

The money was no doubt sent by Tirathdas to his firm at Bombay. There is an entry of the amount in the books of the firm. Certain rates had been quoted to the complainant by Tirathdas while he was at Kanpur, but the rates having meanwhile gone up the complainant considered that the purchase of the goods would not be profitable, and so he directed the firm Jhangiram Hukumchand not to purchase those goods but to keep the amount of Rs. 10,000/- in deposit with them till the complainant was able to obtain a licence for the sale of whole-sale cloth. The complainant obtained a

licence for the sale of wholesale cloth in the month of December 1949, and sent his younger brother to Bombay to make purchases through the agency of the firm of the opposite party. Five bales of cloth were purchased.

The opposite party, Tirathdas and the deceased Hukumchand were asked to arrange for the payment out of the amount in deposit with them. But they did not do so with the result that the complainant had to pay the amount himself. The complainant then, so the prosecution story ran, went to Bombay and asked Tirathdas and Hukumchand why they did not make the payment as arranged and asked them to return the deposit money. Tirathdas and Hukumchand, according to the prosecution, asked the complainant to wait for ten days when the entire deposit money would be returned.

The complainant waited for ten days. But the deposit money was not returned, and so the complainant lodged a complaint in the Court of the City Magistrate at Kanpur for criminal breach of trust under Section 409, Penal Code against Tirathdas and Hukum Chand. The offence was tried by a jury. During the pendency of the proceedings Hukumchand died. The Magistrate committed Tirathdas, the opposite party, to the Court of session.

3. Tirathdas's defence was that the financing partner was Hukumchand and that Ram Chandra and he were working partners. The profits and losses were to be in the ratio of ten annas for Hukum Chand, three annas for Ram Chandra and three annas for Tirath Das. The amount of Rs. 10,000/- which was handed over to Tirath Das at Kanpur was duly sent by him to his Bombay firm and credited to the complainant's account in the firm. The amount was deposited by the complainant because the money was lying idle with him and he wanted to earn interest on it, and that it was not trust money, that since Dewali of the year 1949 Tirathdas ceased to be a partner of the firm, and in January 1950 he joined another firm by the name of Lachmandas Asandas and that at the time when the demand is said to have been made in March 1950, he had ceased to be a member of the firm of Jhangiram Hukumchand.

Tirath Das did not give any explanation as to why the firm Jhangiram Hukumchand had failed to return the sum of Rs. 10,000/-. The charge against Tirathdas was that he having been entrusted with Rs. 10,000/- "as agent of the complainant's firm" by the complainant and in the way of his business committed criminal breach of trust in respect of the said sum by conversion thereof on 1-3-1950 by denying the receipt of it.

4. In support of the prosecution case one Motan Das was examined. He deposed that in his presence Inder Singh is said to have made a demand for the return of Rs. 10,000/- which was refused by Hukum Chand and also Tirathdas. Himmat Singh, a cloth dealer, at Kanpur said that the amount of Rs. 10,000/- was entrusted to Tirathdas Tor the purchase of the goods ordered'. Certain documents were also produced in evidence. These were the entries from the account books of the complainant and the account books of the firm Jhangiram Hukumchand. The entries about the advance of Rs. 14,000/-prior to the advance of Rs. 10,000/- in dispute were also proved, and they showed that interest had been paid on the amount of Rs. 14,000/-. No interest was, however, paid on the sum of Rs. 10,000/-. But it was explained that interest was paid when the amount was returned, and as the

amount was not returned no interest was shown to have been paid in the account books,

5. In defence, besides some formal witnesses, one Panna Lal, a servant of the firm Jhangiram Hukum Chand, was produced. He swore that the rate of interest paid by his firm on outstandings was 6 per cent, per annum, that Hukumchand operated the accounts, that Tirathdas lefts the firm Jhangiram Hukumchand in Dewali of the year 1949, that money to the extent of Rs. 1,50,000/- was owed by people to the firm Jhangiram Hukumchand, while the firm itself had not to pay more than Rs. 20,000/- to others. In other words, he proved that the firm Jhangiram Hukumchand was an insolvent firm. He also admitted that the amount of Rs. 10,000/- was not paid back to Inder Singh, complainant, nor were the goods supplied to him. The firm Jhangiram Hukumchand ceased to exist about two months before he gave evidence in Court, that is to say, much after the supposed demand was made for the refund of Rs. 10,000/-.

6. The jury returned a verdict of guilty by a majority of 3 to 2. The learned Judge disagreed with the verdict and made the reference. The opinion of the learned Additional Sessions Judge was that the amount of Rs. 10,000/- which was handed over by the complainant to Tirathdas, opposite party, was not trust money within the meaning of Section 409 of the Indian Penal Code, and that it was merely a loan to the firm of the opposite party to be accounted for and adjusted as and when purchases were made by the complainant through them and that on outstandings customary interest was payable as had been done on a previous occasion when a sum of Rs. 14,000/-was deposited. He was further of opinion that no reasonable body of men could have come to the conclusion that this was trust money.

7. There is dispute between the parties whether interest was to be paid on the sum of Rs. 10,000/-so long as it was not used by the opposite party's firm Jhangiram Hukumchand in the purchases made on account of the complainant. Further, there is- difference between, the parties as to whether the opposite party refused to pay the amount when demanded by the complainant, or denied the receipt of Rs. 10,000/- by the opposite party. The complainant himself denied the receipt of the interest and he led evidence to show that Rs. 10,000/- was demanded, and its payment, even its receipt was denied. If we were to decide for ourselves the disputed points in the case we will have no hesitation in holding that the amount of Rs. 10,000/- was advanced in the usual course of business by the complainant under an expressed or implied agreement that interest as usual, which is shown to be 6 per cent, per annum, was payable on outstandings, and that the amount was to be utilised in the purchase of goods.

We would also hold that the amount was not paid by the Bombay firm, and as the demand was made in March 1950 we would hold that demand was probably made from Hukumchand as Tirathdas had ceased to be a partner by that time, and it was Hukumchand who had refused to make the payment. We would further hold that the strings of the finances of the firm Jhangiram Hukumchand were in the hands of Hukumchand, and Tirathdas having ceased to be a partner was not in a position to return the amount out of the funds of the firm.

But the question that has been argued is whether we should not, before we come to our own conclusions, take into account, the verdict of the jury and hold contrary to what has been held that

no reasonable set of persons could have come to that conclusion. In fairness to the jury it is possible to say that the jury could have, on the evidence on the record come to its own conclusions, namely, that interest was not payable on the sum of Rs. 10,000/- because it was never paid, that a demand was made from Hukumcloand and Tirathdas as deposed to by the witness, Motan Das, and that the very receipt of Rs. 10,000/- was denied by them.

8. Before the Privy Council decision in --'Ramanugraha Singh, v. Emperor', AIR 1946 PC 151 (A), there used to be difference of opinion amongst the various High Courts in India as to the sanctity to be attached to the verdict of a jury which has not been accepted by the Sessions Judge in a jury trial. One line of cases--('Emperor v. Ramchandra Roy', AIR 1928 Cal 732 (B); -- 'Emperor v. Lyall, 29 Cal 128 (C) and --'Crown v. C. Barwill', AIR 1932 Lah 345 (D)) was to the effect that once the verdict of jury was not accepted by the Sessions Judge and he made the reference to the High Court under Section 307, Criminal P. C., the High Court was absolutely free and untrammelled by the opinion of the jury, to come to its own conclusion on facts and to decide the case accordingly.

The other view was that even though the High Court has power to decide according to its own views, this power should be exercised only when the verdict of the jury is found to be perverse, or in other words, when the High Court considers that upon the evidence no reasonable body of men could have reached the conclusion arrived at by the jury. It was also said that the High Court would not interfere unless the verdict was manifestly wrong, or clearly against the weight of evidence; -- 'Queen v. Sham Bagdi', 13 Beng LR. App 19 (E); -- 'Queen Empress v. Dada Ana', 15 Bom 452 (P); -- 'Emperor v. Harmohan Das', AIR 1927 Cal 848 (G); -- 'Veerappa Goundan v. Emperor', AIR 1928 Mad 1186 (HJ and -- 'Emperor v. Bailali', 34 Bom LR 896 (I).

The Privy Council set at rest the controversy in the cases already mentioned. They held that.

> "The Legislature no doubt realised that the introduction of trial by jury in the Mofussil would be experimental, and might lead to miscarriages of justice through jurors, in their ignorance and inexperience, returning erroneous verdicts. Section 307 was intended to guard against this danger and not to enable the Sessions Judge and the High Court to deprive the jurors, acting properly within their powers, of the right to determine the facts conferred upon, them by the Code.
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> If the jury have reached a conclusion upon the evidence which a reasonable body of men. might reach, it is not necessary for the ends of justice that the Sessions Judge should refer the case to the High Court merely because he himself would have reached a different conclusion upon the facts, since he is not the tribunal to determine the facts. He must go further than that & be of opinion that the verdict is one which no reasonable body of men could have reached upon the evidence."

Their Lordships further observed--

> "The powers of the High Court in dealing with, the reference are contained in Sub-section (3) of Section 307. It may exercise any of the powers which it might

> exercise upon an appeal, and this includes the power to call fresh evidence conferred by Section 428. The court must consider the whole case and give due weight to the opinions of the Sessions Judge & jury, and then acquit or convict the accused. In their Lordships' view the paramount consideration in the High Court must be whether the ends of justice require that the verdict of the jury should be set aside. In general, if the evidence is such that it can properly support a verdict either of guilty or not guilty, according to the view taken of it by the trial court, and if the jury take one view of the evidence and the Judge thinks that they should have taken the other, the view of the jury must prevail, since they are the Judges of the fact. In such a case a reference is not justified, and it is only by accepting their view that the High Court can give due weight to the opinion of the jury. If, however, the High Court considers that upon the evidence no reasonable body of men could have reached the conclusion arrived at by the jury, then reference was justified and the ends of justice require that the verdict be disregarded."

We think that there can be no doubt about the meaning of their Lordships. They have clearly laid down that the verdict of the jury is to be disregarded only when it can be said that upon the evidence ho reasonable body of men could have reached the conclusion arrived at by it, & it is in this light that the expressions 'perverse' or 'manilestly wrong' or 'against the weight of evidence', Which had been used by the Indian Courts in the line of cases approved of by the Privy Council, should be interpreted. When, however, the High Court calls for further evidence in the case the High Court was not restricted to take the view taken by the jury upon the evidence before it, even though it could not be said that the view was such as no reasonable body of men could have arrived at.

The reason is that the fresh evidence taken by the High Court not being before the jury its verdict suffers from an infirmity and could not be given that weight to which it would otherwise be entitled, and in such a case the High Court is directed to do what in its opinion the ends of justice required to be done. Again, no doubt the opinion of the Sessions Judge is also to be given due weight. But we have to remember that his opinion is entitled to weight only when he himself has done his duty, namely, of making a reference not merely because he thought that a different conclusion upon the facts should have been reached, but because the verdict of the jury was one which no reasonable body of men could have reached upon the evidence.

Therefore it comes to this that when it could not be said that the verdict of the jury was such as no reasonable body of men could have reached upon the evidence, the opinion of the learned Sessions Judge is of little weight, and it is the verdict of the jury that ought to prevail. Difference has to be made, no doubt between a verdict of jury which is unanimous, and a verdict which is upon a bare majority. An unanimous verdict will undoubtedly carry more weight with this Court, and though due weight must be given even to majority verdict, it is not entitled to that amount of weight which will be given to an unanimous verdict.

9. It is also urged by the learned counsel that a difference between a verdict of guilty and a verdict of 'not guilty' must also be made and that when the verdict is of 'not guilty' it should be given more weight than, when it is of 'guilty'. We are, however, unable to accept this view. The Code makes no

distinction between the two verdicts and their Lordships of the Privy Council in the above case made no such distinction. On the other hand, they clearly stated that "if the evidence is such that it can properly support a verdict either of guilty or not guilty, according to the view taken of it by the trial court, and if the jury take one view of the evidence and the Judge thinks that they should have taken the other, the view of the jury must prevail, since they are the judges of fact."

The court makes no distinction between the parties coming before it. It treats them on equal footing, be it the state or be it a private individual.

No doubt, in a criminal case the court convicts an accused only if the prosecution has proved, its case to the satisfaction of the court, and there is no reasonable doubt in the mind of the court as to the guilt of the accused. But once this has been done, and the jury has given a verdict either of guilty or not guilty, the scales are even between the State and the private individual, namely, the weight that has to be attached to the verdict of jury whether of guilty or not guilty must be the same and cannot differ merely because it is of 'not guilty' rather than of 'guilty'.

10. In the present case, therefore, we would proceed on the assumption that the facts were that the amount of Rs. 10,000/- was handed over to the opposite party to be sent to his firm in the first instance, and as the prosecution evidence itself discloses, to be held by the firm for' the purchase of the goods, that no interest may be payable and that the receipt of the amount was denied when it was demanded. This handing over of the money may be termed as a deposit or may be termed as an advance. It is, however, clear that, it was not to be returned in specie, and the depositee was entitled to use the amount in his own business, but was bound to return the equivalent amount according to the directions of the complainant. The question still remains whether on these facts there was an entrustment of money in respect of which there was breach of trust within the meaning of Section 409, Penal Code. After giving due consideration to the contentions of the parties we have come to the conclusion that this was not a case of entrustment of money in respect of which the opposite party is supposed to have committed any breach of trust within the meaning of Section 409, Penal Code.

11. Section 405, Penal Code which defines the offences of criminal breach of trust, runs as follows:

> "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust."

The one underlying idea in Section 405 is undoubtedly this that the property which is the subject-matter of entrustment, or in respect of which dominion is passed over to the accused, does not even for the time being, become the property of the accused which he could use for his own purposes. The creation of the trust or the passing of dominion over certain property implies that the person to whom, property is handed over does not become the beneficial owner thereof even for the

time that the property is not to be used according to the directions given at the time of entrustment of the property. Thus the section does not cover the case of a loan or of an advance of money when the borrower or the depositee intends to use or utilise that money, for the time being, till he is in possession of it, although he may have to return an equivalent amount later on to the person making the advance with or without interest, or compensation for the use thereof.

When a loan is advanced the relation of a creditor or a debtor is created. In the case of a deposit also the relationship between the parties is toothing else but that of a debtor and a creditor, vide -- 'Mahomad Akbar Khan v. Attar Singh', AIR 1936 PC 171 (J) and -- 'Lakshmanier and Sons v. Commissioner of Income-tax and Excess Profits Tax, Madras', AIR 1953 SC 145 (K). The money deposited is to be utilised by the depositee, and though an equivalent amount has to be returned with or without interest, it is not intended that the identical amount in specie has to be returned. If, however, the terms of the contract be that the identical amount in specie has to be returned, it is a case which would be covered, by Section 405, Penal Code. That undoubtedly was not the case Here. In the present instance, the direction how the money advanced was to be utilised did not apply to the property which was entrusted but to its equivalent.

Again, the breach of the direction must be done not because the person is forced by circumstances beyond his control to act in violation of the directions, but because he dishonestly or, in other words, with the intention of causing wrongful gain to one person or wrongful loss to another person, violates those directions. The facts of the case in -- 'Raushan Rai v. Emperor', 32 Pun Re Cr 1901 p. 93 (L), were very similar to the facts of the present case. Certain Afghans of Kandhar used to deposit the proceeds of their stray transactions with the accused who struck balances in favour of the Afghans individually in their book every year, but they refused to pay the sums when the moneys were demanded of them pretending that they were ruined and were unable to pay the debts. It was held that a relation of debtor and creditor was created and that the deposit was a mere deposit, as that of a deposit of money not to be returned in specie, and therefore not a trust and that no criminal liability was incurred.

12. In -- 'Hock Chang & Co. v. Ka Do', 14 Cri LJ 145 (LB) (M), money was advanced to an accused on the undertaking that he should buy paddy at what rate he could and should sell to the advancing firm at the market rate on the day of delivery. It was held that the property in the money passed to the accused and his contract to use the money in a particular way did not operate to create a constructive trust, and that in the circumstances no criminal liability for criminal breach of trust was incurred.

13. In -- 'Queen Empress v. Moss', 16 All 88 (N), the directors of a bank had paid dividends to the share-holders not out of the profits which the bank had earned but out of the depositors' money in the hands of the bank. In a charge to the jury Sir John Edge pointed out that if the jury found that the directors had dishonestly, that is, knowingly and intentionally, paid over the dividends out of the deposits when there were no profits, intending to cause gain to themselves or other shareholders to which they were not entitled, or to cause wrongful loss to the depositors, the directors were guilty under Section 409, Penal Code.

But this was a case in which the directors merely had dominion over the assets of the bank. It was not a case in which the assets of the bank were transferred to the directors to be used by them in their own business with a condition that the same shall be returned as and when required by the depositors. The offence of the criminal breach of trust was committed 'by the directors', qua moneys of the bank over which they had dominion, and not 'by the bank' qua the moneys which had been deposited with them by the depositors.

Sir John Edge clearly pointed out the distinction between the two classes of cases. Said his Lordship:

> "It was doubtful whether the moneys deposited in the bank were 'property' within the meaning of the section 'so far as the depositors were' concerned, When a depositor paid money on deposit, that money was not ear-marked so as to entitle him to receive the specific rupees he paid in, and consequently, after the deposit, the money deposited was not his property. The moneys so deposited might, however, be within the meaning of the section the "property" of the Bank."

When a relation of debtor and creditor alone is created by the bailment of money a civil liability is created. The criminal liability arises in addition to the civil liability when, the beneficial ownership in the property is not transferred to the accused and he is placed under an obligation, contractual or otherwise, to utilise the money for the specific purpose for which it was handed over to him. In the present case upon the facts as they appear from the record and as the jury must, have found them, a relation of debtor and creditor was created between the parties. The beneficial ownership in the money so advanced to the opposite party was intended to be transferred to the opposite party and his partners in the firm, and it could not be said that it was intended that he was to keep the money intact in his possession and make no use of it at all whether or not interest was paid on it.

14. In our opinion, the opposite party could not be said to have committed any offence. We, therefore, accept the reference and acquit the opposite party. He is on bail. He need not surrender. His bail bonds are cancelled.