
(1955) 10 AP CK 0016
In the Andhra Pradesh High Court

Mohammed Pasha and Others

APPELLANT

Vs

State of Hyderabad

RESPONDENT

Date of Decision : 21-10-1955

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 197, 222, 342
Penal Code, 1860 (IPC) — Section 197, 21, 342, 409

Citation : (1956) CriLJ 1320

Hon'ble Judges : Srinivasachari, J

Bench : Single Bench

Judgement

Srinivasachari, J.—These are second appeals, on behalf of the three accused in a criminal case. The second appeal was competent under the Hyderabad Criminal P.C. The charge was laid against three persons of an offence u/s 342, Indian Penal Code corresponding to Section 409, Indian Penal Code. The prosecution alleged that there was a Local Unit established under the Commercial Corporation, Supply Department of the Hyderabad State in Chartana, Jithur Taluq, Parbhani District. This was established on 6th Khurdad 1353 F and it is stated that this Local Unit was to receive the levy of grain supplied by cultivators and dispose it of as per the instructions of the Govt. It is further stated that the District Commercial Officer of the Corporation received an anonymous report that grain in the godown of this Unit was sold by the members of the Local Unit. The D.C.O. directed the Tehsildar to make enquiries & he also went to the spot, inspected the godowns and affixed seal on them. Panchanama was made.

It is stated that the D.C.O. who is the President of the Commercial Corporation made a report of the deficiency in the grain in the Unit to the Heads Department who reported the matter to the Police. On this report the F.I.R. was issued on 12th Dai 1355 F against Shankerbua, accused 1, and Ibrahim accused 2. Subsequently on 29th Dai 1355F another person's name also was included amongst the accused viz., Mia Jan Alias Mohd. Pasha as an abettor. The chalan was filed on 10th Isfandar 1355 P under Sections 342, 66, 77-B and 347,

Hyderabad Penal Code. The defence was one of denial. The prosecution examined 38 witnesses and the defence 16. On the evidence the trial

Court as well as the lower appellate Court held¹ accused 1 to 3 guilty of the offence u/s 77-B and awarded the sentence, while with regard to accused 1 and 2 they held them guilty under 8. 342, while accused 3 was held guilty u/s 339, Hyd. Penal Code. All the three accused have now preferred these appeals to the High Court.

2. Before going into the merits of the appeal it was argued by the learned advocate for the appellants that the trial was vitiated for the reason that there was no proper sanction as required by 8. 201, Hyd. Criminal P.C. (S. 197 (1) of the-Indian Code). He argued that although no sanction was necessary in so far as accused 3 was concerned accused 1 and 2 came within the definitions, of "Public Servants" within the meaning of Section 5,. Sub-section (5-7) of the Hyd, Penal Code (S. 21, Sub-section (9) of the Indian Code. It was further argued that the necessary sanction was not obtained and what was on record was only a report made by the Officer to the Police which could not be regarded as a proper sanction as required by law. The State Prosecutor contended that having regard to the agreement executed by these accused in favour of the Government they could not be regarded as public servants and even on the assumption that they were public servants, the offence committed by them could not be regarded as having been done in the discharge of their official duties, and therefore, sanction was not necessary.

3. In so far as the question of sanction is concerned the matter has been the subject of discussion by the Federal Court, the Privy Council and the Supreme Court. The first case that could be referred to in this connection is the case decided by the Federal Court in *Hori Ram Singh v. Emperor* 1939 FC 43 (AIR V 26) (A). It was in this case that the test was laid down as to in what cases sanction was necessary u/s 197, Cr. P.C., where a public servant is charged for committing an offence. The test laid by Varadachariar, J. was that in order that Section 197 may be made applicable to the case it is necessary that it should": be shown that the public servant did the act in his official capacity in execution of his duty. Emphasis was laid on the words "purporting to be-done". In this case it was argued that the act of appellants 1 and 2 was in their capacity as public servants and hence sanction was necessary. It was urged that the object was to collect grain from the ryots quickly and it was with this object that the Local Units were started and the appellants 1 and 2 were put in charge of the same. The scope and duty of the appellants, it was contended, was to assist the Govt. in the collection of the levy from the ryots. In this connection the deposition of P.W. 5, the District Commercial Officer was relied upon to show that the functions of the appellants was to assist the Government in the collection of the levy; they were, therefore, the nominees of the Government, if they acted as agents of the Government they would necessarily be regarded as public servants It would be necessary in order to arrive at a conclusion as to whether the appellants could be

regarded as public servants within the definition of Clause (7) Sub-section (5) of Section 5 of the Asafia Penal Code corresponding to Section 21(9) of the Indian Penal Code to refer to-Ex. 30 which is an agreement between the Hyd. Commercial Corporation Ltd. and Shanker Buwa and Syed Ibrahim appellants 1 and 2 with regard to the opening of a Local Unit at Chartana. The agreement says that inasmuch as the local saukars and business-men have agreed to act as nominees of the Government and to render public service-and in order to make the scheme of the Government as regards the proper supply of food supplies successful it had been arranged that units should be formed for the collection of grain in every area sand to store them in godowns and to distribute the grain as per the directions of the Corporation. It is stated therein that members have agreed to Join this Unit & have consented to do voluntary service. In the agreement are contained the terms and conditions under which the members constituting the unit are expected to function. It is further stated that they would be entitled to a certain commission on the amount realised by the sale of the grain. This document is signed by the appellants "1 and 2. It has been admitted by the appellants. I may straightway point out that the document -does not mention appellant 3's name. If at all, therefore, the question of Section 197, Criminal P.C. could be agitated it could only be with regard to appellants 1 and 2.

4. Section 21 of the Indian Penal Code defines a public servant and my attention was drawn to Clause (9) of the above section to say that it not only referred to Government servants but that it included an officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty. The Legislature has by local and special acts declared some function arises to be public servants for the purposes of Indian Penal Code. It would not be enough if a person is in the pay or service of Government to constitute him a public servant within the meaning of Section 21, I.P.C. As was observed by West J.

an officer is one to whom is delegated by the Supreme authority some portion of its regulating and coercive powers or who is appointed to represent the State in his relation to individual subjects. In short he must be a person who exercises certain functions delegated by the Government.

Beg. v. Ramaji Ray 12 Bom HCR 1 (B). I might advert to certain cases which arose before the Indian High Courts wherein this question as to who would be regarded as public servant came up for consideration.

5. In Sridhar Mahadev v. Emperor AIR 1935 Bom 36 (C) the Chairman of a Co-operative Society was challaned for misappropriating sums which he received from the constituents. The learned Judges held that he could not be regarded as a public servant coming within the definition of Section 21(10), I.P.C., because Clause (10) stated that his duty was to take, receive and keep and expend any property ...for any secular and common purpose of the village and that it was for a public purpose and as such he was not a public servant.

6. In a case decided by the Punjab Chief Court it was held that for the purposes of Section 21(9), Penal Code, it would not be enough if a person is in the pay or service of the Government to constitute him a public servant. He must also be an officer, for the clause begins with the words "every officer" and an officer would connote a functionary or a holder of some "official" or office. It may be one of dignity or importance or it may equally be humble. But it is essential that the person should be an officer to whom certain functions of the Government have been delegated and in this case the learned Judges held that a quarter master's clerk merely as such was not a public servant within the meaning of Section 21, Penal Code - *Ahad Shah v. Emperor* AIR 1918 Lah 152 (D).

7. It was urged by the State Prosecutor that the appellants 1 and 2 could under no sense of the term be regarded as public servants. They were at the most adatiyas acting on behalf of the Government who were entitled to commission, the mere fact that they entered into an agreement -with the Government and were asked to discharge certain duties under the agreement would not make them public servants. Further it was urged that under a Notification issued under the Defence of Hyderabad Regulation only certain persons were declared to be public servants for the purposes of the Supply Dept. The Notification referred to above states that those functioning under the Supply Department would be regarded as public servants only in respect of crimes which are triable by the Special Tribunal: Vide Notification No. 26 dated 21st Dai 1355 F. published in Jarida 1355 Part I page 612. This is entirely besides the point. The Notification has no relevancy whatsoever. The learned State Prosecutor argued that even if it be assumed for the sake of argument that appellants 1 and 2 could be regarded as public servants then Section 197 would have application only if it could be established that the act was done by them in the discharge of their official duties. As regards this question the matter has been the subject of judicial discussion and pronouncement by the Indian High Courts and by the Supreme Court. In this connection I would again refer to the decision of the Federal Court in *Hori Ram Singh v. Emperor* (A) where Varadachariar J. put it succinctly by giving illustrations. His Lordship observed:

If a medical officer on duty of hospital is alleged to have raped one of the patients or to have stolen a jewel from the patients person, it is difficult to believe that it was the intention of the Legislature that he could not be prosecuted for such offence except with the sanction of the Local Government.

The test therefore that has been laid down is whether this act could be regarded as one in the course of his duty and what the Court would have to consider is whether the act can be reasonably related to the official character of the person who did it - AIR 1939 43 (Federal Court)

8. I might also refer to a case decided by the Madras High Court, no doubt before the Federal Court decided the case of *Hori Ram Singh* (A). This was a case where on some objection being raised by a person against whom a judgment was pronounced by the President of a Panchayat Court the president slapped the

person on his cheek. On further protest he unlaced his shoe and shouted "I will beat you with my shoe". In this case admittedly the President of the Panchayat Court was an officer and public servant and because he was till the moment he brandished his shoe acting as a Judge of the Court it was held that he must be considered to have committed the offence (using abusive language) in the discharge of his official duties and therefore sanction of the Local Government was necessary. Vide Subbayya v. Ramacharulu reported in M. Subbiah Vs. T. Ramacharlu, .

9. A Full Bench of this Court in the case of Husain Ali v. The State of Hyderabad reported in AIR 1952 Hyd 91 (AIR V 39) (F) held that where a driver driving a Government lorry was charged for rash and negligent driving resulting in an accident and the allegation was that he was under the effect of drink at the time of the incident, the act of driving fell within the scope of his official duty and sanction for his prosecution was necessary. This was a majority judgment of the Chief Justice and Shripat Rau J., while Ansari J. dissented and held that the driver could not have reasonably claimed that his being drunk and negligent were within the scope of his official duty and as such no sanction for his prosecution was necessary. The question about the necessity for sanction and what would be regarded as being the discharge of official duty came up for consideration before the Supreme Court in two cases.

10. The first case is the case of Shreekantiah Ramayya Munipalli Vs. The State of Bombay, . In this case the Officer Commanding the Military Engineering Stores Depot, Dehu Road, near Poona was charged for misappropriation u/s 409, I.P.C. Accused 2, 3 were under him. The facts show that this Depot was maintained by the Central Government and Government Stores worth lakhs of rupees were kept there. It was alleged by the prosecution that stores worth Rs. 4,000/- were illegally passed out of the Depot to a person and the money that was received is said to have been pocketed by three accused. Bose, J. who delivered the judgment of the Court while repelling the argument of the Attorney General that no sanction was necessary because the accused could not be said to have been acting or purporting to act in the discharge of their official duty observed as follows:

Now it is evident that the entrustment and or dominion here were in an official capacity and it is equally evident that there could in this case be no disposal lawful or otherwise save by an act done or purporting to be done in an official capacity.

It was further observed:

The act was official because accused No. 2 could not dispose of the goods save by the doing of official act, namely, the officially permitting their disposal and that he did.

Once it was an official act whether it was done innocently or dishonestly it would be regarded as an act done in the discharge of official duties and therefore

Section 197 Cr. P.C. was held to apply.

11. The next case decided by the Supreme Court was the case of Amrik Singh Vs. The State of Pepsu, . In this case the person who was charged was a Sub-Divisional Officer in the P.W.D. Pepsu. It was part of his duty to disburse wages to the workmen. The procedure followed was that the amount required was drawn from the Treasury and paid to the employees and their thumb impressions taken in the monthly Acquaintance Roll. The prosecution alleged that this officer falsely mentioned the name of one Harma as a Khalasi working while there was no such one existing, drew the amount from the Treasury, forged the thumb impression and appropriated the amount to himself. The charge therefore was u/s 409, I.P.C., for criminally misappropriating. Venkatrama Iyer, J. who delivered the judgment in the case followed the observations of Lord Simonds in the case of Gill v. The King 1948 PC 128 AIR, V 25 (I) wherein Lord Simonds laid the test as follows:

The test may well be whether the public servant if challenged can reasonably claim that what he does in virtue of his office". The Supreme Court, therefore, laid down in this case that if the acts complained of are integrally connected with the duties attached to the office as to be inseparable from them, then sanction u/s 197(1), Cr. P.C., would be necessary. But if there was no necessary connection between them and the performance of the duties then no sanction is necessary. This therefore is the law in so far as we are concerned.

12. Therefore the question whether a criminal breach of trust has been committed while purporting to act in the execution to his duty is not a question which could be necessarily hypothetical in the abstract. It has to be determined with reference to the particular facts of the case. The sum and substance of the decision of the Supreme Court in Amrit Singh v. State of Pepsu (H) referred to above is that if the act complained of, hinges upon his duty as a public servant then sanction would be necessary. But if the act is not connected with the duties as an officer then sanction would not be necessary. Applying the above test| to the facts of the case before me, in my opinion if appellants 1 and 2 are regarded as public servants within the definition of Section 21, Penal Code, then sanction is necessary. In my opinion the selling of the grain by the two persons who were entrusted with the grain and who were expected to disburse as per the directions of the Government should certainly be regarded as an act done by the appellants while discharging their duties as an public servants. But I am of opinion that the appellants could not be regarded as public servants as their appointment was in pursuance of an agreement entered into by them with the Government. It was a contract between the appellants and the Government and it was not part of official duty. From the agreement itself it is clear the appellants were acting as adatiyas. An adatiya can never be regarded as a person to whom official duty had been delegated. Just as an adatia would be an agent of an individual businessman the appellants in this case happen to be the agents Of the Government. I, therefore, hold that in this case no sanction was necessary for

prosecuting the appellants.

13. The next point urged by the learned advocate was that no entrustment has been proved in this case which is an essential ingredient for an offence u/s 409, I.P.C. He pointed out to me that in this case there was only a defalcation of grain and Section 409 speaks of entrustment of property and therefore the charge is bad. I should say that the learned advocate is making a distinction without a difference. Under the agreement signed by appellants 1 and 2 their duty is to sell to persons the grain stored in the Unit and to keep the sale proceeds or pay over the sale proceeds to the Government. The charge therefore is that the appellants sold the grain and misappropriated the sale proceeds thereof. Therefore the charge must be deemed to be a charge for misappropriation of the sale proceeds. Therefore the argument is of no avail.

14. Another argument which was advanced by the learned advocate was that the alleged defalcation according to the prosecution covered a period of more than 12 months and as such there ought to be separate charges, there not having been. separate charges, the trial is vitiated. In my opinion this argument also has no force. For even if there are particular items of misappropriation which go beyond a period of one year then such of those items which are beyond the period of one year could be excluded. On that account the trial could not be set aside. This has been the view of this Court. I might in this connection refer to the case decided by this Court in 39 Deccan LR 161 (J).

15. Having disposed of the legal arguments I would now proceed to consider the evidence in the case in order to determine whether the guilt of the accused has been established.

16. The evidence led by the prosecution in this case falls under two categories, (1) with regard to the entrustment of the grain to appellants 1 and 2, the prosecution has produced certain registers which are said to be maintained by the persons in charge of Local Units and (2) in order to prove misappropriation the prosecution has examined a number of witnesses to whom it is stated the appellants sold the grain in the godowns and the prosecution has relied upon the statement of the accused which they gave in answer to certain interrogatories served on them by the District Commercial Officer and also the entry in the Register showing a deficit in the grain after the audit of the accounts by the Government auditors. Before going into the evidence in detail it has to be observed that the case of accused 3 is based upon abetment, for the persons who were connected with the Government are appellants 1, 2. The case of the prosecution is that appellants 1 and 2 were nominal figureheads and the real person who was actually running the Unit was appellant 3 and for this purpose it has examined certain witnesses to show the very important part played by accused 3.

17. Exs. 35, 36 and 37 are the Registers which are said to contain the record of grain supposed to have been received by the Units. The most important witness

in this connection is P. W. 5 who is the District Commercial Officer. At the outset I may state that these Registers have not been seized under a proper seizure. They were not produced with the chalan. P. W. 5 says that he got the Registers from Shanker Buwa accused 1 and these Registers were in his possession i.e., P. W. 5's possession till 9-6-1355 P. when he produced them while giving evidence in the case. That would show that they were not seized from the accused as should have been done. P. W. 1 in this case who is the investigating officer also says that the D.C.O. got them and "gave them to me and there was no punchanama made. It has to be pointed out that the mere production of account books is not enough to fasten liability. There ought to be independent evidence. The proper procedure would have been to examine the person who wrote the account books and it is an evidence in the case that one Haribhaw wrote these Registers. He has not been called by the prosecution.

18. The procedure that was to be followed in these Units with regard to the receipt of grain has been mentioned in Clause 6 of the agreement Ex. 30. It says that the person in charge of the Unit used to receive the grain and pass receipts for grain received. These receipts have not been produced. If these receipts had been produced they could show the quantity of the grain received and if there was grain found deficient the person in charge of the Unit should be held liable. The Investigating Officer says that he got some Registers from the father of accused 1. These Registers have not been produced and one does not know where those Registers are and what they relate to. Much stress was laid upon this by the State Prosecutor that the accused admitted in answer to the interrogatories that were served upon them that the grain was found to be, wanting and it was argued that the statement recorded by P. W. 5, the D.C.O, of accused 1 clearly indicated that the grain was much less than what was received in the Unit. It was also urged that the statement recorded in the course of a Departmental examination could be relied upon by the prosecution in a criminal case against the same person. It has to be observed that this has not been proved. If it is sought to be relied upon as a confession of the guilt of the accused it must be read as a whole as observed by the Supreme Court in *Palvinder Kaur Vs. The State of Punjab (Rup Singh-Caveator)*, . I am, therefore, of the opinion that the Registers have not been properly seized and have not been proved according to law and therefore the Registers by themselves cannot fasten any liability upon the accused. Further the answers given by the accused also to the interrogatories served upon them could not be enough to bring home the guilt of the accused. In cases of criminal misappropriation the prosecution must always prove misappropriation. It is not enough if it merely establishes that the accused had received money. Now in order to prove misappropriation by the accused the prosecution has examined a number of witnesses who are said to speak to the fact of their having purchased from these accused grain and to prove this prosecution has examined 18 witnesses. I have carefully gone through the statements of these witnesses.

19. With regard to some of these it must be stated that their statements could

not be taken into account because they relate to a period off more than one year and are, therefore, hit by Section 222: (2), Criminal P.C. These witnesses are P. Ws. 13, 14, 16 and 26. As regards some of the witnesses the learned advocate for the accused brought it to my notice that these witnesses are on inimical terms with the accused and they are not independent witnesses and these are P. Ws. 6 and 10. That there was enmity between the accused and P. Ws. 3 and 10 is also clear from the observations of the learned Judge in a case which related to these parties alone and reported in 6 Dominion Law Reporter (Hyderabad) 65 at 67. Some of the witnesses say that they took grain instead of money for work done while others say that their purchases were stray purchases, one before 4 years and another before 2 years. On the whole in my opinion the evidence led by the prosecution with regard to the sale by accused 3 of the grain to the witnesses mentioned above is not satisfactory and does not lead to the irresistible conclusion that there were sales by these accused persons.

20. While with regard to the accused 1 and 2 it may be said that they were actually in charge of the Unit having entered into agreement with the Government being Ex. 30, the accused 3 has been brought in stating that he was the factotum, accused 1 and 2 being the underlings. It must be stated that the F.I.R. when it was first issued did not contain the name of accused 3; although the charge was for conspiracy there was no evidence of conspiracy. P. W. 1 the Investigating Officer himself admits in his deposition that there was no evidence with regard to conspiracy and he has nothing to do with the Registers. The two circumstances relied upon by the lower Court to implicate accused 3 is his having gone to P. W. 5 the D.C.O. recommending to him that accused 1 and 2 want to have the Unit and they want him to-become surety. It would appear from the statement of P. W. 5 himself that accused 3 never made any attempts to have any Unit. In my opinion no-acts of accused 3 have been proved as should have been proved that he was responsible for the sale of the grain, to the various individuals as alleged by the prosecution. It was urged on behalf of the State that accused 3 represented to the authorities that he would be responsible for the grain. Even if he had stated so to the authorities concerned, so long as he had nothing to do with the Units as one of the executants to the agreement there could be no liability. If it is sought to implicate him as having abetted the sale of the grain stealthily, there ought to be evidence of the fact. No doubt witnesses say that accused 3 gave them some grain but they also say that accused 3 also was in possession of a lot of grain being an agriculturist himself and he gave it from his house. There is no direct proof of the grain in the godown having been taken out and given by accused 3. It was sought to implicate accused 3, because accused 3's brother appears to have taken an active part in the establishment of the local unit. It may be so. An indirect action or a relationship with a person who actively took part in the establishment of a Unit cannot go any further than that accused 3 also was interested in the running of the Unit. That would not be enough to fasten criminal liability. There is evidence no doubt of arranging for godowns etc. by accused 3 and his brother because P. Ws. 6 to 9 and 22 say that

it was accused 3 got godowns from them. As I have observed above, the interest evinced by accused 3 in getting the godowns for the establishment of a unit is not by itself enough to rope him in. It must also be established that he actively participated in the sale of the grain to others along with accused 1 and 2. This link is wanting in the case and therefore there could be no case of abetment in so far as accused 3 is concerned.

21. One other point was raised and that is as to whether this could at best be civil liability in so far as accused 1 and 2 are concerned. The terms of Ex. 30 speak of accused 1 and 2 as pucca adatiyas for the words there are "they would discharge their duties as pucca adatiyas would do." vide para 1 of the agreement. On the strength of this it was argued by the learned Counsel for the accused that the relationship between accused 1 and 2 on the one hand and the Government on the other was by virtue of a contract between them as embodied in Ex. 30 and, therefore, there could be no criminal complaint against them for criminal misappropriation. It was urged that coming into possession of property by virtue of a contract would not be entertained u/s 409, I.P.C. and for this purpose the learned Counsel relied upon *In re Gangaram Shionna* 1943 Nag 168 AIR V 30 (L). To my mind the word "pucca adatiya" cannot apply to the accused having regard to the terms and conditions contained in the agreement. Pucca Adatiya is a person who has been entrusted with the goods of his principal to dispose of to the best advantage. He has a general power to deal with them without reference to his principal. In this case accused 1 and 2 had no power to dispose of the grain as they liked but they had to do it under the specific instructions and directions of the authorities. The case relied upon by the learned Counsel cannot apply because that was a case where the adatiyas under the Berar Cotton Market Rules were entitled to buy and sell which is not the case here.

22. The other argument was advanced by the learned Counsel and that was that the Court below did not conform strictly to the provisions of Section 342, Cr. P.C. corresponding to Section 273 Hyd. Cr Procedure Code. He urged that no question was put to the accused bringing it to his notice the fact that the Registers showed that there was to be a particular quantity of grain and that it was found less subsequently. I find from the record that questions have been put with reference to the agreement but no specific questions have been put with reference to the Registers that were recovered.

My attention was drawn to the series of decisions of the Supreme Court with regard to the importance of bringing all the circumstances appearing against the accused to the notice of the accused by putting him question and eliciting answers. The S. C. has only stated that if from the record it could be stated that prejudice has been caused to the accused by reason of these questions not being put, then alone would the trial be vitiated, otherwise not. Vide in this connection the decision of the Supreme Court in *Ajmer Singh Vs. The State of Punjab*, where their Lordships held that every error or omission not in compliance with the

provisions of Section 342 does not vitiate the trial and as to whether the trial is vitiated or not or whether prejudice has been caused to the accused or not will depend on the degree of the error.

In my opinion not putting a specific question with regard to the Registers has not caused prejudice to the accused so as to declare the trial to be vitiated. Accused 1 and 2 were aware of the fact that there were Registers maintained and interrogatories were served on them about the quantity of grain having been reduced and therefore it could not be said that that circumstance was not brought to their notice.

23. Certain well established principles of criminal law cannot be forgotten such as that it is not for the accused to prove honest dealing with the property but it is for the prosecution to prove the reverse. The main burden to prove, that is to say, to prove beyond reasonable doubt rests throughout upon the prosecution. In this case I am of opinion that the prosecution has not discharged the onus that lay upon it.

I am, therefore, of the opinion that these appeals should be allowed. The appeals of the three accused are allowed the conviction and the sentence set aside. This judgment would be without prejudice to the right of the Department if it so chooses to proceed against the second civilly on the basis of the agreement entered into by them. This judgment will govern the appeals of all the three accused. Copy of this judgment be made part of the record in all the appeals.