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In the Patna High Court

S. Satyanarayana APPELLANT

Vs

Emperor RESPONDENT

Date of Decision : 31-08-1943

Acts Referred:
Criminal Procedure Code, 1898 (CrPC) — Section 162, 342

Citation : AIR 1944 Patna 67

Hon'ble Judges : Brough, J;Agarwala, J

Bench : Full Bench

Judgement

Brough, J.—I confess that this case is to my mind apt to nip any budding affection which one might have had for the Code of Criminal Procedure. It arose out of a scheme to defraud the Bengal Nagpur Railway in connexion with the sale of used sleepers, the sale took place just four years ago and the fraud was discovered almost immediately after. The trial involved taking the evidence of some 50 witnesses and the consideration of a number of documents, but the volume of evidence, oral and documentary was not more than would be usual for the sort of fraud which is unfortunately not uncommon in a well-developed commercial community.

2. Nevertheless the trial took nearly two years and proceeded before three different Magistrates so that no Magistrate had the advantage of seeing all the witnesses and the Magistrate who actually delivered the judgment saw none of them. There is a division of the Bengal Nagpur Railway with its headquarters at Adra in charge of a District Engineer (D. E.) Mr. Morrison. His staff consists of two assistants, Mr. Bell, who acted as his personal assistant, and Mr. Baxter, the Assistant Engineer (A.E.) Lines; his department also includes a considerable office which is in charge of N.V. Ratnam, the Head Accountant, who was accused in this case but has been acquitted and to it belonged the accused Satyanarayana, the stores clerk, and an Assistant Stores clerk Muhammad Shariff. The division in charge of the D.E. is divided into a number of sections each in charge of a Permanent Way Inspector (P.W. I.). One such section is based

on Adra and was in charge of the accused Mr. Woodhouse as P.W.I. His duties were principally executive but he had an office in charge of a clerk who was called the "Time Keeper" Asif Hussain. Under Mr. Woodhouse were two subordinates known as Section P.W. I. or S.E.P., one of whom Mr. Simpson had charge of the Adra yard and sidings and is the principal witness in the case.

3. The materials of the permanent way have. to be constantly and regularly renewed and this is the principal duty of the P.W. Is. and their subordinates. When a section of the line is re-sleepered with new sleepers all the old ones are replaced irrespective of their condition. They are classified according to their condition and taken back to some yard. The worst are classified as unserviceable and are either used as fuel or for rough purposes on the railway under the authority of the P.W.I. or are sold to railway employees or the public on the authority of the D.E. For the purposes of sale, an unserviceable sleeper is assumed to weigh one maund although in fact it weighs 10 or 15 seers more. The better sleepers described as second hand are classified in three categories A, B and 0 according to their quality and are used for patch repairs on main lines or on sidings or branch lines or are converted into narrow gauge sleepers. The weight of a second hand sleeper in reasonable condition is approximately twice that of an unserviceable one and the value, at any rate, to the railway company is very much more. Patch repairs arc carried out on the authority of the P.W.I. and it will be seen that every second hand sleeper employed in patch repairs releases a sleeper which would be classified as unserviceable. It is the practice of the B.N. Railway to mark second hand sleepers with two letters, one of them indicating the section of the line from which they were taken and the other category in which they were classified.

On 20th of every month each P.W.I., has to prepare a return described as unserviceable released material account, which shows in various forms all dealings with unserviceable or released materials during the preceding month. This return is prepared in triplicate by carbon process and the original is kept by the P.W. L, one copy is sent to the D. E. and the other copy to the A.E. Lines.

4. At the end of 1938 and beginning of 1939, a section of the line under the control of the P.W.I. Adra was re-sleepered and the sleepers released were marked with the letter G. On 8th February 1939, the accused Ramlakhan Singh in the name of his son Sheodewan Singh, who was accused but acquitted, submitted a tender to the D.E. Adra for 5000 maunds of unserviceable sleepers at 4 annas a maund. On 29th March that tender was accepted and on 1st April he deposited Rs. 600, being the price of 2400 maunds of the sleepers applied for. It is said that the scheme to defraud the railway company was to supply to Ramlakhan second hand instead of unserviceable sleepers and to conceal the fraud by showing in the monthly return fictitious patch repairs which would account for the number of second hand sleepers supplied and produce on paper a corresponding number of unserviceable sleepers. There is no clear evidence on this second point but it is obvious that it is the essence of the scheme that the

fraud should be concealed and it is not easy to see how otherwise that could be managed. The successful operation of the scheme would involve the co-operation of some persons dealing with the executive side of the work and others dealing with the monthly returns and other records.

5. In pursuance of the accepted tenders above referred to, on 15th and 16th August 1939, four wagons of sleepers were loaded in the Adra yard and delivered to Ramlakhan at Digha Ghat. For the purposes of freight, and this is an important point, those wagons were found to contain 1945 maunds of timber. It appears the wagons contained 800 second hand sleepers made up of 300 A Glass, 300 B class and 200 C class and this fact is not disputed. In September 1939, in consequence of information received the Dinapur Police searched Ramlakhan''s timber yard at Dinapur and being suspicious that some of the five or six thousand sleepers they found there had not been honestly acquired, circularised the railway companies. One of those circulars addressed to the D.E. Adra arrived in his absence and was opened by Ratnam and handed over to Satyanarayana for report. On the D.E. return on 20th September, Satyanarayan placed that letter before the D.E. with his report which is an important document and is Ex. 39. The D.E. was not, however, satisfied and on 25th September he sent his personal assistant Mr. Bell with Satyanarayan to Dinapur to inspect the sleepers and they returned on the 28th, on which day Satyanarayana took leave, and Mr. Bell reported that about 500 of the sleepers were undoubtedly A, B and C class sleepers belonging to the company and released by the re-sleep ring, to which I have referred, which was carried out on a section of the line under the h control of Mr. Woodhouse. On 29th September, Sub-Inspector Kulli of the Dinapur Police Station arrived at Adra and the D.E. instructed Mr. Bell and Mr. Baxter to conduct a formal departmental enquiry which they did, Sub-Inspector Kulli being present throughout the enquiry. They examined material records and a number of witnesses. Among other things, they discovered on the file two orders from the D.E. for the supply of unserviceable sleepers to Ramlakhan in the name of his son Sheo Dewan, one dated 10th July for 700 maunds and the other dated 25th July for 1000 maunds. They also found that the carbon copy of the P.W. I. Adra''s monthly return for August on the D.E.''s file a was materially different from the carbon copy of the same return on the A.E.''s file.

6. Simpson who was the person actually in-charge of the Adra yard from which the sleepers had been despatched was the first witness to be examined and on 30th September, he made a statement which was wholly non-commital except that it referred only to the order of 10th July for 700 maunds. Woodhouse was also examined and made a statement which threw the blame for any irregularity on Simpson. Simpson was told by someone what Woodhouse has said and on the night of 1st October he went to Mr. Bell and in con sequence of that interview he made a written report and subsequently made a long oral statement before the departmental enquiry in which he purported to expose the whole scheme. In consequence of Simpson''s statement, a first information was lodged on 30th October 1939 and on 11th November 1940, Woodhouse, Ratnam,

Satyanarayana, Ramla-khan and his son Shewdewan were put on trial on a joint rsharge of conspiracy and separate charges of falsifying documents and receiving stolen goods, and the trial commenced. On 13th June 1942, judgment was delivered acquitting all the accused on the charge of conspiracy but convicting Woodhouse, Satyanarayana and Ramlakhan on the separate charges against them: Ratnam and Shewdewan were acquitted altogether. On 29th August 1942, that judgment was affirmed on appeal and Satyanarayana applied to this Court in revision but when the ease came up for hearing before the Criminal Bench consisting of the then Chief Justice and myself on 19th November 1942, we directed notices to be issued on all the three convicted accused to show cause why the sentences passed on them should not be enhanced.

7. The foundation of the prosecution case is the evidence of Simpson corroborated in part by that of Asif Hussain and it was first submitted that Simpson was an accomplice and his evidence should not be accepted unless corroborated. Much of the cross-examination of Simpson was directed to show that he was an accomplice: to what extent he was morally involved may be a matter of dispute but that he was legally an accomplice appears from every line of his statement and every word of his oral evidence. It is clear, therefore, that his evidence must be treated as the evidence of an accomplice. Asif Hussain is also an accomplice and, therefore, his evidence can have no corroborative value. The considerations affecting the evidence of an accomplice (or an approver) are conveniently and authoritatively stated in the judgment of Sir e Courtney-Terrell C.J., in Rattan Dhanuk v. Emperor AIR 1928 Pat. 630 as follows:

(a) The evidence of an approver does not differ from the evidence of any other witness save in one particular respect, namely, (b) that the evidence of an accomplice is regarded ab initio as open to grave suspicion. Accordingly, (c) if the suspicion which attaches to the evidence of an accomplice be not removed, that evidence should not be acted upon, unless corroborated in some material particular, and (d) if the suspicion attaching to the accomplice''s evidence be removed, then that evidence may be acted upon even though uncorroborated, and the guilt of the accused may be established upon that evidence alone.

8. It is, of course, not necessary in any ease that every statement in such evidence should be corroborated; and in a case like the present if there is corroboration not only of the general fact of the existence of a conspiracy but also of the participation in it of any particular accused it would not be necessary that there should be corroboration of all the specific acts in the conspiracy said to have been done by that accused unless the evidence of the accomplice on the point was intrinsically open to suspicion.

9. The Crown have sought to use as a corroboration of Simpson''s evidence against Woodhouse and Satyanarayana the statements made by them before the departmental enquiry. But the counsel for these two accused have submitted that these statements are not admissible in evidence by virtue of Section 162, Criminal P.C. In my view, however, that submission is not well-founded. The

object of the section was to ensure that it should not be open to the police in a criminal prosecution to give evidence of admissions which were either not in fact made or obtained by improper means. In this case the fact of the making of the statements is proved not by a policeman but by two responsible railway officials Mr. Baxter and Mr. Bell; it is also clear from their evidence that no improper means were used to obtain the statements. The mere fact that Sub-Inspector Kulli was present when the statements were made is in my judgment quite insufficient to bring in Section 162, Criminal P.C. The statements were not made to him but in his presence to the board of enquiry consisting of Mr. Baxter and Mr. Bell. Accordingly I hold that these statements are admissible.

10. It is next said on behalf of these two accused that no inference ought to be drawn against them from these statements and certain other documents relied on by the Crown because they were not specifically put to them in their examination u/s 342, Criminal P.C. This is a point of very considerable importance affecting the general administration of justice in this province. I am bound to say that it does illustrate the inconvenience of the rule existing in India that the accused cannot give evidence. That rule has been abrogated in England for 45 years and I understand the general view is that the abrogation has been favourable to the administration of justice. The English practice leaves it to the accused to give evidence or not as he likes and if he elects to give evidence it is I for his legal advisers to elicit such facts as they consider material; his explanations are liable to be tested by cross-examination but this is no disadvantage to an innocent accused. The position of the Court u/s 342 is very invidious; if it fails to ask proper questions, no inference may be drawn against a prisoner from his failure to give a satisfactory explanation, which may result in the quashing of a conviction [see the judgment of the Privy Council in AIR 1933 124 (Privy Council) which was the case relied upon by counsel for Satyanarayana for his submission); if on the other hand, the Court presses the witnesses too hard it is charged with cross-examining the accused which is equally not permitted. The examination of the accused Woodhouse and Satyanarayana in this case was as follows. After the evidence for the prosecution was concluded, the Magistrate asked them: "You have heard the evidence against you; what is your statement?" Both of them replied "I have committed no offence. I am filing a written statement," and they both did file written statements which unfortunately did not deal in any way with their previous admissions, or in the case of Satyanarayana with any other specific point.

11. I understand from my brother Agarwala J., whose experience on this point is most extensive, that it is the invariable practice in this province that if upon examination u/s 342 the accused says he will file and does file a written statement the Magistrate puts no further questions to him, and this practice is based on the general knowledge of the fact that many accused prefer to refrain from making unguarded answers which might contain some admission and to leave it to their legal advisers to draw up at leisure such a statement of their defence as they think proper. Nevertheless it was submitted to us that it was the

duty of the Magistrate to go on, after the accused had intimated that they would file a written statement, by putting to them questions on the particular points in the evidence to which he attached importance. We were referred to an unreported case Zalim Singh v. Emperor Cri. Rev. No. 672 of 1942 decided last year by a Criminal Bench consisting of the then Chief Justice and myself. I have re-examined the record in that case and I can find no trace of any written statement being filed and the examination of the accused fully justifies the comment of the learned Chief Justice that it was a most perfunctory one. That case, therefore, is of no assistance. We have also examined the record in AIR 1933 124 (Privy Council) and it appears that in that case too no written statement was filed at any stage of the proceedings. Counsel for Satyanarayana also referred us to other cases in support of his contention but in none of them had any written statement been filed after the close of the prosecution case. They are, therefore, no authority on the point which arises in this case; that is to say, what is the proper course when having heard all the evidence the accused in answer to the first question put to them in their examination u/s 342 intimate that they propose to file a written statement.

12. The question was considered by this Court in Bhagwat Singh v. Emperor AIR 1925 Pat. 378 in which the facts appear to be on all fours with this; that is to say, after the prosecution case was closed the accused were asked whether they would make a statement after hearing the case which had been brought against them by the prosecution anil the answer of each of the accused was "No, I shall file a written statement," and thereupon a written statement on the same day was filed by the petitioners meeting the charges put forth by the prosecution. It was argued that nevertheless it was the duty of the Court h to go on and ask specific questions, and the observations of Adami J., on that point on page 243 are as follows:

It is quite true that the filing of a written statement cannot take the place of the examination of an accused as required by Section 342; but in the present case the accused petitioners filed their written statement in answer to the Magistrate''s question, and when asked to make a statement they said ''here is my written statement.

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Now, experience shows that, when a written statement has been drawn up for an accused, he will commonly refuse to answer questions orally; he is a very often instructed, by his pleader not to answer questions; and where an accused has refused to answer questions and puts forward a written statement, it would be useless for the Magistrate to go on questioning him, knowing that the only reply he will get is a refusal to answer questions.

The learned Government-Advocate has shown that in the present case the written statement put forward by the petitioners covered all the points in the case. It is very difficult to lay down a rule as to the minimum number of questions which should be put to an accused. If numerous questions are put, there is generally an allegation that the Court has attempted to cross-examine the accused.

While agreeing that it is the duty of the Magistrate to question the accused generally on the case, after the close of the prosecution, we are not prepared to hold that where the accused refuses to answer a question, the Magistrate is bound to go on asking questions especially where a written statement is put in at the time, meeting the points of the prosecution.

I can see no reason to hold that in the present case the trial has been vitiated by the fact that the Magistrate did not continue asking questions after the accused had refused to answer.

Some guidance on the question can also be obtained from another case, Mohiuddin v. Emperor AIR 1925 Pat. 414 in which Mullick J. said on page 494:

If an accused slates that he will file a written statement, the writing, in my opinion, is to be accepted in lieu of his oral statement.

Bucknill J. concurred saying that

provided the accused has in fact had a reasonable and substantial opportunity of exercising the privilege accorded to him by the provisions of Section 342, that is of either orally or in writing saying what he wishes to say in explanation of what has been alleged against him, a technical failure or omission in the procedure ought not to be regarded as rendering a trial wholly nugatory.

13. In my view the decision in Bhagwat Singh v. Emperor AIR 1925 Pat. 378 is perfectly correct and one which we ought to follow. But I would go further and say positively that when, as in this case, the accused having heard the evidence for the prosecution and on being questioned by the Court in compliance with the provisions of Section 342 in general terms indicates his intention of leaving his defence to his legal adviser by filing a written statement, the Court is neither bound nor entitled to question him further. Different considerations would arise if the accused were not legally represented or the Court thought for any reason that the accused or his legal adviser did not properly appreciate the case that had to be met. If the Court addresses any observations to the defence lawyers on this point it would be highly desirable to record such observations and the replies.

14. In this case it is quite clear that the accused were represented throughout by competent lawyers who were fully capable of appreciating all the points that had been made and on whose advice. the accused were relying, I hold, therefore, that the statements of Woodhouse and Satyanarayana made before the departmental enquiry and the other documents referred to are admissible and that the Crown is entitled to make use of their contents against each accused. In order to determine what the Crown have to prove to justify a conviction of the accused now before the Court, it is necessary to examine the charges in detail.

The general charge against all the accused was that between 1st February and 30th September 1939, at Adra and Dinapur they agreed to do and caused to be done several illegal acts to wit theft, dishonest retention of stolen articles, criminal breach of trust, forgery and falsification of account and thereby committed an offence punishable u/s 120B, Penal Code. That charge was apparently abandoned by the prosecution for some reason against Ramlakhan and in any case the trying Magistrate recorded an acquittal on that charge in favour of all the accused. His conduct in so doing was unfavourably commented upon by the lower appellate Court but I do not think that that comment was justified; there is authority for the view that Section 120B was only intended for cases in which no actual concrete offence had been committed. The existence of the charge is not however without importance; it is not necessary to go into the matter at length but it is quite clear that Simpson''s evidence, if it be believed, fully establishes the charge of conspiracy against all the accused and it was convenient in the charges to draw attention to the existence of facts which formed a connecting link between what might otherwise have appeared to be a series of different individual offences. It was contended in the Courts below that a joint trial was improper, but the contention was obviously ill-founded and was not pressed in this Court.

15. With regard to the individual charges, Woodhouse was charged firstly, with criminal breach of trust u/s 408 of which he was found not guilty, and secondly, that he between 20th and 30th of September at Adra being a servant in the employment of Bengal Nagpur Railway Company wilfully and with intent to defraud altered, mutilated and falsified the original return of unserviceable materials for the month of August 1939 which belonged to Bengal Nagpur Railway Company by making Exs. 26, 27 and 28 and causing the same to be substituted in place of a portion of return (original) of August 1939 and thereby committed an offence punishable u/s 477A, Penal Code. Satyanarayana, was charged firstly that between 20th and 30th September 1939, at Adra he forged a letter (the order dated 25th July 1939 for the supply of 1000 maunds), EX. 11, and a copy of the same letter, Ex. n with intent to cause damage or injury to the Bengal Nagpur Railway Company and with intent to commit fraud and thereby committed an offence punishable u/s 465, Penal Code; and secondly, that between 20th and 30th September 1939, at Adra he aided and abetted Woodhouse in the commission of an offence of falsification of account u/s 477A, Penal Code, by substituting Exs. 26, 27 and 28 in the file of the District Engineer of Adra marked A and thereby committed an offence punishable u/s 477A read with Section 109, Penal Code. The charges against Ramlakhan Singh was firstly, a charge of theft of four wagons'' load of sleepers u/s 379, Penal Code, on which he was acquitted, and secondly, of dishonestly retaining some of the sleepers which were the property of the Bengal Nagpur Bail-way Company knowing or having reason to believe the same to be stolen property thereby committing an offence u/s 411, Penal Code. On those charges certain submissions were made on behalf of Woodhouse and Satyanarayan. Section 177A, Penal Code, reads as

follows:

Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the, possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security or account shall be punished with imprisonment of either description for a term which may extend to seven years, or with line, or with both.

16. On behalf of Woodhouse it was submitted that it contains nothing about causing an act to be done by other persons. That is perfectly correct; the section relates only to the acts of the accused himself, but the facts put forward by the prosecution as the basis of the charge in this case are these: a complete return for August 1939 had been properly submitted to the D.E. on the due date; thereafter with intent to defraud the company Simpson and Asif Hussain on Woodhouse''s direction prepared a different and fraudulent return; Woodhouse signed it on 25th or 26th September 1939, and Satyanarayan took the return and substituted it for the original return in the D.E.''s file which he removed and tore up; all the persons concerned were servants of the railway company. In my judgment the offence u/s 477A was only complete by e virtue of the acts of all the persons involved, and both accused should, therefore, properly have been directly charged under that section and would have been liable by virtue of Section 34, Penal Code. If the prosecution case is true, this case is within the literal meaning of Section 34 and it is not necessary to rely on the extended meaning given to it by the Privy Council in the well-known Post Office case, Barendra Kumar v. Emperor to include a criminal act done by one or more of several persons in furtherance of the common intention of all. So far as Woodhouse is concerned, although he was charged alone with having committed the whole offence it f is quite clear that he can be convicted, even though Section 34 is not specifically mentioned, with having done one of the acts which make up the offence committed in furtherance of the common intention of himself and his co-actors.

17. However as regards Satyanarayana it was contended that as he had been charged with abetment u/s 109 he could not be convicted as a principal u/s 34. The soundness of that contention depends, in my judgment, upon the particular facts of the case. Stated in broad terms it is too wide. Sections 236 and 237, Criminal P.C. read as follows:

236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative

with having committed some one of the said offences.

237. If, in the case mentioned in Section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it.

18. The effect of these sections was considered by the Privy Council in Barendra Kumar v. Emperor and Lord Haldane in delivering the judgment of the ft Board after quoting the sections proceeded as follows:

The illustration makes the meaning of these words quite plain. A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made.

An examination of the charges against Woodhouse and Satyanarayana shows that the acts alleged against Satyanarana as constituting an abetment in fact constitute the commission of the actual offence u/s 34. If therefore the evidence before the Court was held to prove the acts alleged against Satyanarayana on the charge laid he might have been convicted of any other offence which those acts really constituted, that is of the principal offence u/s 34. It is also clear that if the trial Court under circumstances such as these has found the facts proved but recorded a conviction under the wrong section it is open to an appellate Court to alter the conviction to one under the section under which the accused ought properly to have been convicted. If, therefore, the evidence establishes the facts alleged against Wood house and Satyanarayana they may both be properly convicted u/s 477A read with Section 34. (His Lordship then discussed the evidence and concluded.) There remains the question of sentence. I cannot see any reason to distinguish between the three accused. The lower appellate Court thought that Satyanarayana was the ring leader but I am not satisfied as to that. As I have already said, this conspiracy definitely required the cooperation of throe people--a man in the timber trade to buy the sleepers and to provide money to the other conspirators, a man on the executive side to see about the supply of sleepers and a man on the accounts side to cook the books. I cannot see that any one member of the conspiracy carries with him less responsibility than any of the others. Of the three people involved and now before the Court, Satyanarayana was possibly in the lowest position but he was the confidential and trusted clerk of his D.E. and his assistants. "Woodhouse was an executive officer who had long been in the employ of the railway company and was in charge of substantial quantities of stores on their behalf. Ramlakhan was a timber merchant in a considerable way of business posing as a respectable citizen of Dinapur.

19. It was urged before us on behalf of Woodhouse that he had lost his pension and other benefits through his crime. It was urged on behalf of Ramlakhan that his speculation in B.N. Ry. sleepers had proved unprofitable, on this point I am

not prepared to express any opinion one way or the other, and also that he had been put to great trouble and expenses by those protracted proceedings. I do not however think those pleas ought to be allowed to avail of the accused. The sum involved in this case may not have been very large but this was an elaborate conspiracy for the purpose of defrauding a corporation carrying on an important public utility undertaking and in my view a deterrent sentence in a case of this kind is called for. I consider that a sentence of imprisonment is required in the public interest in the case of each of the accused and I think the minimum period that would meet the ends of justice would be three years'' rigorous imprisonment. In the circumstances, however, I consider that an additional sentence of fine is unnecessary and I would therefore remit the sentences of fine imposed by the trial Court.

20. In the result, therefore, the conviction of Satyanarayana u/s 465, Penal Code, is upheld as is his conviction u/s 477A but it will be recorded as being read with Section 84 and not Section 109, Penal Code. The conviction of Woodhouse u/s 477A will be upheld but will be recorded as being read with Section 84, Penal Code, and the conviction of Ramlakhan u/s 411, Penal Code, will be upheld. All these accused will be sentenced under the respective sections of which they are convicted (the sentences on Satyanarayana under the two sections being ordered to run concurrently) to three years'' rigorous imprisonment. The sentences of fine will be remitted and the fines, if paid, are ordered to be repaid.

Agarwala J.

21. I agree.