
(1950) 08 BOM CK 0020
In the Bombay High Court

State Government

APPELLANT

Vs

Jang Bahadur Singh and Others

RESPONDENT

Date of Decision : 03-08-1950

Acts Referred:

Penal Code, 1860 (IPC) — Section 109, 120B, 409

Citation : (1951) CriLJ 36

Hon'ble Judges : Mudholkar, J;Hidayatullah, J

Bench : Division Bench

Judgement

Hidayatullah, J.—This is an appeal by the State Government against the acquittal of the four respondents who were charged u/s 409, Penal Code, either substantively or as abettors. The four respondents belonged to the railway staff stationed at Bilaspur. Respondent I, Jang Bhadur Singh, was the Station Master at the time. Respondents S. G. Mule, M. G. Kelkat and H. E. Roy were goods, assistant goods and inward-shed clerks respectively,

2. A wagon of potatoes in 135 bags was received from Jhansi ,O. T. Railway, on 23-4-1918 and was unloaded and kept on the goods shed platform on 25-4-1918, It was consigned to Belt, and the consignor did not turn up till 28-1-1918. On that date, according to the prosecution, the consignment was examined by Dr. M M. Sinha Assistant Surgeon, Railway Hospital, Bilaspur,. and was declared to be offensive and unfit for human consumption. The Station Master there upon ordered the potatoes to be destroyed, and a communication was sent to the authorities concerned about it. The prosecution case is that the potatoes were not rotten and a fail quantity of them could be salvaged and sold. The accused are alleged to have conspired together and to have sold them for Rs. 800 to one Sulaiman Kachchi (p. w. 14) with a view to making a private gain for themselves.

3. The consignor''s agent Chedi (P.W. I) arrived on the scene on 29.1-1918, a little time after Sulaiman had removed the potatoes to his godown and other places. He produced an indemnity bond before respondent 4 H.K. Roy and

claimed the consignment. H. K. Roy endorsed on the indemnity bond that the consignment had been destroyed. Chedi thereupon made inquiries and found that the potatoes had not in fact been destroyed but had been sold to Sulaiman Kachchi. He made a report to the police, which is Ex. P-1 P-1A. The police thereupon visited the house of Sulaiman Kachchi and seized from him a register of accounts (Art. A) and the bags of potatoes which were found lying in three different places.

4. There can be no doubt that the potatoes instead of being destroyed were in fact sold for Rs. 800 to Sulaiman Kachchi. It may be mentioned here that the police had put up a case of criminal conspiracy against the four respondents as well as Dr. Sinha, but the learned Special Magistrate did not frame a charge u/s 120B, Penal Code and later Sinha was acquitted. No appeal has been tiled against his acquittal. It would, therefore, appear that the prosecution accept the position that a portion of the consignment was rotten and that the doctor's certificate about its being unfit for human consumption was not given out of any dishonest motive.

5. The respondents have no common cause and have chosen different stands. The case of the Station Master is that he ordered the destruction of these goods and goods clerks must have sold the potatoes on their own, behind his back. The case of Male and Kelkar (respondents 2 and 3) is that the Station Master had initially ordered the destruction of these potatoes but later revised his order and an auction was held in his presence publicly and the potatoes were sold to the highest bidder Sulaiman for Rs. 800. Boy's case is that he was not on duty on 29-4-1918 after 11 A.M. and that when Chedi arrived in the afternoon at about 3 or 3.30 P.M. the potatoes had already been taken away. He knew that an order for their destruction had been passed and he thought that the potatoes must have been destroyed. He, therefore, made the endorsement in good faith believing that the potatoes had been destroyed. He denies that he knows anything more about the matter.

6. It would, therefore, appear that whereas the Station Master stands by his order of destruction and puts the blame for the sale of the potatoes upon the two goods clerks, the goods clerks try to justify their action by showing that everything was regular and was ordered by the Station Master, who was present at the auction.

7. It is convenient to begin with the case of Boy. (His Lordship considered the evidence Against the accused and upheld his acquittal. His Lordship then proceeded :)

8-10. This brings me to the question of the guilt of the others. Here the station Master has one story to tell and Kelkar and Mule another. The gist of the defence of Mule and Kelkar is that the Station Master himself ordered the sale of the potatoes because in his opinion the potatoes were not so completely rotten as to be unsaleable. Kelkar and Mule rely upon certain documents to which I shall

come later. According to the Station Master he passed an order on 28-4-1948 after Dr. Sinha had certified that the consignment was offensive and unfit for human consumption, and that he did not thereafter concern himself about it. The next day, i.e. on 30-4-1948, Mule put before him a draft telegram reporting the destruction of the goods, and he signed it in good faith thinking that his orders had been carried out. According to him, he was not present at the station that day from 10 A. M. to 4 p. m., and when he learnt about this he looked into the matter and found that the records had been tampered with and, therefore, on 30-4-1948 he sent a telegram reporting to the authorities concerned that the potatoes had not been destroyed but had been privately sold and that investigation was going on.

11. I have thus to judge between these two stories and to find out which of them is true, if any. It is obvious that the accused have chosen different lines of defence, and it is also obvious that they certainly are not making a common cause. (His Lordship after discussing the evidence against the Station Master upheld his acquittal and proceeded:)

12-20. This brings me to the case of Kelkar and Mule. The learned Counsel for Kelkar and Mule argued that early that evening the account books of Sulaiman were seized by the police and an entry was found in it regarding the auction. They also argued that the money received from Sulaiman was seized from the safe of the goods clerk and appropriate entries were found in the books. The explanation for not transmitting the cash and passing a money receipt was that the money was brought in two installments and the second installment was brought after 5 p. m. Therefore, the money was kept in the safe, and as Sulaiman had not come to take the receipt the money receipt also remained to be issued.

21. There are, however, certain circumstances which go to show that all this was done to make out a case of auction at the instance of the Station Master. Unfortunately for Kelkar and Mule the Station Master was not amenable to signing the documents. (His Lordship considered the evidence against the accused and concluded).

22-23. In my judgment these two persons were responsible for privately selling the consignment instead of destroying it as ordered by the Station Master.

24. It was next argued by the learned Counsel for the accused Mule and Kelkar that even if the potatoes were privately sold after they had been ordered to be destroyed that would not amount to criminal breach of trust, and reliance was placed upon two cases of the Calcutta High Court: *Empress V. Wilkinson*, a C. W. N. 216 and *Emperor v. Preo Nath* 29 Cal. 489. The learned Counsel for the State relied upon *Moti v, Emperor* : 26 Cri. L.J. 189, in which the Calcutta view was not accepted.

25. Shortly stated, the A. I. R 1926 Sind 21 point of law is this. If an owner orders a thing to be destroyed, is it criminal breach of trust in those who have to

destroy the goods and to appropriate the goods to their own use and sell them for gain?

26. It was argued that inasmuch as the destruction of the potatoes was ordered the right of property in the potatoes came to an end and the consignment must be treated as *res nullius* and the persons selling it cannot be said to have committed any offence,

27. It is no doubt true that the two Calcutta cases support the accused Mule and Kelkar. These cases were dissented from in the Sind case, *Moti v. Grown* A.I.R 1925 Sind 21: 26 Or, L.J. 189. The position of railways as bailees or as carriers is different from that of an owner. The railways while in possession as carriers are not owners of the goods. The statute allows them within limits the power to dispose of perishable goods if such goods become offensive. In doing so, they can sell the goods or destroy them, but in either case they do so under the exercise of a limited power.

28. It is true that if an article is abandoned it becomes *res nullius*, and there can be no theft or breach of trust. But in the present case railway were accountable to the owner of the goods for their notion. If they sold the goods they had to hold the price for the benefit of the owner, subject, of course, to any legitimate deductions on account of freight, demurrage, and the like. If they destroyed the goods they had to satisfy the owner that destruction was necessary and bona fide. The railway had no middle course open. They could not abandon the goods without destroying them so that anybody could sell the goods for his own private gain.

29. Now the railway in their turn had merely appointed these clerks as custodians, and their powers were further limited. The consignment of potatoes ordered to be destroyed had to be destroyed by them. They could not treat the goods as abandoned or as *res nullius*. The two Bind cases, in my opinion, lay down law which is particularly applicable to the present case. In *-Moti v. Grown* A.I.R 1925 Sind 21: 26 Cri. L.J. 189, it was observed as follows:

A very clear distinction must be drawn between an intention to destroy and to abandon and an actual destruction and abandonment. The very fact that the owner of the property intends to destroy or abandon "that property and hands it over to some person to effect those purposes is in our opinion a clear indication that he still maintains his rights as the owner of that property and that those rights subsist until the abandonment or destruction is completed: vide *Pane M. Vas v. Emperor* 16S. L.R 197:83 L.C. 889: A.I.R 1921 Sind 57 : 26 Cc.L.J. 185 As long as the destruction or abandonment is not fulfilled and as long as it is still in the hand of the owner to countermand such destruction or abandonment the property is still the property of the owner and the taking it out of his possession is theft, and improper use of it is breach of trust." In the cited case a currency note was held up and partially destroyed. It was then made over for further destruction to A, who handed it to B who tried to get it changed. The argument

was that the currency note must be treated as *res nullius* or abandoned. This argument was repelled.

30. In *Pane M. Vaz v. Emperor* 16 S.I.R. 197 : 83 I.C. 889 : A.I.R 1921 Sind 57 : 26 Cri. L.J. 185, the charge against the accused was the theft of certain decoded telegrams called "flimsies" addressed to Ralli Brothers, which after the heads of departments had seen them were returned to an employee to destroy. The accused stole the "flimsies," and the argument was that the "flimsies" were not property as they were meant for destruction and the right of property in them was abandoned. Raymond A. J. C. observed as follows:

I cannot agree with this view. Though the heads of departments in Rallies after perusal of the flimsies had no further need of them, yet the firm of Ralli Brothers had not relinquished their right of property in them. The object of the destruction was that there may be no leakage of the contents. But Ralli Brothers right of property in them remained unimpaired." It was held that theft of flimsies was committed.

31. An English case reported in *Reg. v. Edwards and Stacey* (1877) 13 Cox. 0. 0. 884 : 36 L. T. 30 is very instructive. Three pigs, bitten by a mad dog, were shot and buried on the owner's land three feet below the surface of the soil. There was no intention of digging them up again or of making any use of them. The same evening the prisoners dug them up, carried them away, and afterwards sold them. The Chairman left the matter to the jury directing them that in his opinion there was no abandonment, as the owner's intention was to prevent the pigs being made any use of, but left it to the jury to decide whether there was abandonment. The jury found that there was no abandonment and convicted the accused of larceny. The Court of Criminal Appeal (Kelly, C. B. Mellor, Denman and Field JJ., and Huddleston B.) affirmed the conviction.

32. I am aware that in High Court Proceedings, 6th Feb. 1869 4 M. H. C. R. (App) 30 : 1 Weir 381, a somewhat contrary view was expressed and in *Queen-Empress v. Bandhu*, 5 ALL. 51 : 1885 A. W. N. 326; *Queen-Empress v. Nihal* 9 ALL, 348 : 1887 A.W N. 73; *Romesh Chunder v. Hiru Mondal* 17 Cal 852 and *Queen-Empress v. Sita* 18 Bom. 212, it has been held that there can be no criminal misappropriation of things which have been abandoned. It is also the view of some writers of jurisprudence that an express abandonment extinguishes a right of possession and property, The property must have an owner to render a person guilty of misappropriating it.

33. It is true that the railway in disposing of the goods can part not only with possession but also with ownership. But in the case of disposal by destruction there can be no fresh act of pretension till the reproduction of the *animus possidendi* is rendered impossible or there exists a contrary *animus* not to possess the thing. Possession thus continues so long as it is not negated by a new act of will opposed to that under which possession of the thing originally continued (*ita nulla amittatur, nisi in qua, utrumaque in contrarium actum est?*)

Digest L. 17. I): See Sir W. H. Rattigan, Science of Jurisprudence, p. 114. Once, of course, possession and ownership are destroyed and the goods go into the possession and ownership of another, there is no possibility of an animus revertendi. Till possession and ownership are so definitely destroyed, there would be theft, conversion, trover, trespass, and misappropriation of the goods, as the case may be.

34. It was argued that if a person asks his servant to throw away some food and he eats it, there would be criminal breach of trust. The Analogy is not apposite. Distinction must be made between cases where the owner orders the destruction of the goods, abandoning at the same time his original animus to possess. In such a case possession and ownership have come to an end by express abandonment. But a bailee is not in the same position as the owner. It is true that the railway in this case could order destruction of the goods, but possession of the railway continues till destruction was carried out as there was no general abandonment. Different consequences arise on whether the goods are sold or destroyed, and the railway must, therefore, be deemed to continue in possession till one or the other action was carried out. They could not, therefore, abandon the goods without the particular end being achieved.

35. That the goods clerks Mule and Kelkar had charge and custody of those goods cannot be questioned. I am quite clear that there was Entrustment. The goods were lying on the platform within the area of the railway station. I have shown above that the ownership of the owner of the goods was not destroyed and the goods were still in the possession of the railway. Thus, both possession and ownership were outstanding in the consignor and the railway taken together. The goods clerks, therefore, were clearly guilty of breach of trust, and being public servants they ought to have been convicted u/s 409,

Penal Code. I accordingly set aside their acquittal and convict them u/s 409, Penal Code. 36. As regards sentence, I would have been disposed to take a stern view of their action but for the fact that the law on the subject is somewhat obscure, and I have already shown above that there was a conflict of views between the Calcutta High Court and the Sind Judicial Commissioner's Court. It was easy to think that; since the potatoes were ordered to be destroyed they became ownerless and instead of destroying them the accused could sell them. In my judgment it is not necessary in this case to punish; Mule and Kelkar in a deterrent manner. The present case is not to be treated as a precedent in the matter of punishment, since the law will henceforward be clear.

37. Accordingly, I would order Mule and Kelkar to imprisonment till the rising of the Court and a sentence of fine of Rs. 500 each. In default of payment of fine the defaulter shall undergo rigorous imprisonment for four months.

38. Mudholkar J. I have had the advantage of perusing the order proposed by my learned brother and I agree that the acquittal of Mule and Kelkar be set aside, I also agree that Boy must be given the benefit of doubt. As regards the

Station Master, Singh, there are, in my opinion, certain circumstances which appear to raise something little more than suspicion. I refer to his sending the telegram regarding destruction; his visit to the goods shed thereafter while the consignment was still lying there as is practically admitted by him; his assertion before Chedi (P. w. 1) that the consignment had been: destroyed even though it had not been and his refusal to show to Chedi the spot where the goods had been destroyed. Further, as my learned brother has pointed out, the consignment "was a whole wagonful and it is monstrous that it could be sold in such a blatant manner in broad daylight." I therefore find it hard to believe that it could be sold without the knowledge and connivance of the Station Master, Even though that is so, I refrain from proposing that the acquittal of Singh be set aside because it is, I appreciate, possible to regard his conduct. as only negligent and not criminal. I therefore agree that the Government appeal should be dismissed against him.

39. On the question of law, I find myself in agreement with the view taken by my learned brother. I would, however, say a few words, particularly in regard to the two Calcutta decisions on which reliance has been placed on behalf of the respondents.

40. In *Empress v. Wilkinson* 2 C. W. N. 916, what had happened was that a certain consignment of rice, after being condemned by Port Commissioner, Calcutta, was seized by the officers of the Health Department of the Calcutta Corporation. Wilkinson, one of the Inspectors in the Department, instead of destroying the rice, sold it to a third party and retained the sale proceeds. On these facts, Hill J. who decided the case held that no offence had been committed.

41. The learned Judge has given no reasons for coming to this conclusion. It would, however, appear from two remarks passed by the learned Judge during the argument before him that) according to him, the condemned rice was not "property" within the meaning of the expression in Section 409, Penal Code and that appropriation by a person to his own use of an article cast away by another is not an offence u/s 109, Penal Code.

42. With great respect to the learned Judge, I may say that a movable does not cease to be "property" even if its value is reduced to almost nothing. This is clear from the decision of the Court of Criminal Appeal in *Beg. v. Edwards and Stacey* (1877) 13 C C.C. 384 : 36 L. T. 30.

43. Further, a distinction must be made between abandonment of a movable by the owner thereof and condemnation of that movable by a person or authority under a statutory power. As a result of being abandoned, a movable usually becomes *res nullius*. But it cannot become *res nullius* because someone, entitled to condemn it, condemns it. No doubt, upon the destruction of the movable after its condemnation, the property of the owner is put an end to but that is entirely another matter. The action of the Port Commissioner in *Empress Vs. Wilkinson* and another was only condemnation but in the illustration given by Hill J. of a

castaway hat being picked up from the, road by a Mehter there was an abandonment by the owner thereof. It consequently became res nullius after the owner abandoned it. The Port authorities could not "abandon" the rice and so it could not become res nullius after it was condemned and ordered to be destroyed.

44. The decision in Emperor v. Preo Nath 29 Cal. 489 merely follows Wilkinson's case, a C. W. N. 316 and is not an independent authority for the particular proposition. It is also possible to distinguish it on facts on the ground that there the order for destruction was given by the owners of the articles concerned who by their conduct had indicated that they had relinquished their right of property in them.

45. It is true that in the present case the railway authorities had the power to destroy the goods in certain circumstances or to sell them in certain other circumstances. They, however, had no power to abandon the goods and render them res nullius. The power to abandon vested only in the owner of the goods and he had, admittedly, not exercised it. His property, therefore, remained till the destruction of the goods. As the goods were not destroyed but instead sold by Mule and Kelkar and the price realised by the sale not credited to the railways (for the benefit of the owner), they must be held to have committed criminal misappropriation of the goods.

46. I agree with the sentences proposed by my learned brother to be awarded to the two respondents Male and Kelkar.

47. Order of the Court for the reasons given in our orders delivered to-day, we set aside the acquittal of respondents Male and Kelkar and sentence each of them to imprisonment till the rising of the Court and to fine of Rs. 500. In default of payment of fine, the defaulter shall undergo rigorous imprisonment for a period of four months. We direct these respondents to appear before the District Magistrate, Bilaspur, on 17-8-1950 for carrying out the sentence of imprisonment. The appeals are dismissed in so far as respondents Singh and Boy are concerned.