HARGUN SUNDER DAS GODEJA & ORS.

v.

STATE OF MAHARASHTRA

March 26, 1970

[A. N. RAY AND I. D. DUA, JJ.]

Constitution of India, 1950, *Art.* 136—*Criminal Appeal by special leave—Review of evidence by Supreme Court.*

The appellants were charged with the offences of criminal conspiracy and criminal breach of trust in respect of 80 bags of wheat. They were convicted by the High Court for various offences under the Penal Code and the Prevention of Corruption Act. The evidence disclosed that there were some irregularities in the matter of keeping the records relating to storage of stocks at the storage sheds. It was therefore contended in appeal by special leave, to this Court, that the evidence should be reviewed to see if the prosecution had established by unimpeachable evidence that the 80 bags were in fact not received at the storage shed and, that no presumption should be drawn against the appellants for their failure to give evidence as to where and to whom the bags were delivered.

HELD : Non-appearance of an accused as a witness in his own defence does not give rise to any presumption against him. [141 C]

HELD, also : Negative onus can also be discharged by circumstantial evidence if it is trustworthy and with unerring certainty establishes facts and circumstances, the combined effect of which leads to the only safe inference of guilt. The court has, however, to be watchful to ensure that conjectures or suspicions do not take the place of proof. The chain of circumstantial evidence must be complete and admit of no reasonable conclusion consistent with the innocence of the accused. [141 E-F]

HELD further : under Art. 136 this Court does not normally proceed to review the evidence in criminal cases unless the trial is vitiated by some illegality or material irregularity of procedure or the trial is held in violation of rules of natural justice resulting in unfairness to the accused or the judgment or order under appeal has resulted in grave miscarriage of justice. This Article reserves to this Court a special discretionary power to interfere in suitable cases when for special reasons it considers that interference is called for in the larger interests of justice. [145 A-C]

HELD further : This Article cannot be so construed as to confer on a party right of appeal where none exists under the law. [145 C]

In the present case there were irregularities in the storage records and the evidence was looked into see if the charge as framed was proved. [145 C-D]

[An examination of the entire evidence, oral and documentary, however, showed, that there was enough evidence to support the conviction and that the irregularities were unimportant.] [145 A]

Chidda Singh v. *State of Madhya Pradesh*, Cr. A. No. 125 of 1967 dt. 12-1-1968, referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeals Nos. 153, 155 and 172 of 1967.

A Appeals by special leave from the judgment and order dated April 3, 1967 of the Bombay High Court in Criminal Appeals Nos. 617, 621, 619 and 620 of 1965.

A. S. R. Chari, N. H. Hingorani and K. Hingorani, for appellant No. 1 (in Cr. A. No. 153 of 1967).

B *N. H. Hingorani* and *K. Hingorani,* for appellant No. 2 (in Cr. A. No. 153 of 1967).

A. S. R. Chari, and *N. N. Keswani,* for appellant (in Cr. A. No. 155 of 1967).

W. S. Barlingay and *A. G. Ratnaparkhi,* for the appellant (in C Cr. A. No. 172 of 1967).

M. S. K. Sastri and *S. P. Nayar,* for the respondent (in all the appeals).

The Judgment of the Court was delivered by

D **Dua, J.** The four appellants in these three appeals by special leave were tried in the court of the Special Judge for Greater Bombay on a charge of conspiracy punishable under s. 120-B, I.P.C. Accused No. 1 (Shiv Kumar Lokumal Bhatia) was a godown clerk; accused No. 2 (Hargun Sunderdas Godeja) was the Senior-Godown Keeper and accused No. 3 (Hundraj Harchomal Mangtani) was the Godown Superintendent at E the General Motors Godown at T-Shed, Sewri, Bombay, belonging to the Food Department of the Government of India. Accused No. 4 (Shankar Maruthi Phadtare) was a driver of Truck No. 2411. The allegation against them was that all these accused during the month of July, 1963 were parties to F criminal conspiracy to commit criminal breach of trust in respect of 1060 bags of red wheat which were released from the ship S. S. Hudson on July 7, 1963 at Bombay for storing them in the G-M.2 Godown at Sewri. In pursuance of this conspiracy, it was alleged, they had dishonestly and fraudulently misappropriated or converted to their own use 80 bags of red wheat out of 1060 bags released from the ship. Accused Nos. 1, 2 G and 3 were also charged under s. 409 read with s. 34, I.P.C., s. 5(2) read with s. 5(1)(d) of the Prevention of Corruption Act, 1947 read with s. 34, I.P.C., s. 5(2) read with s. 5(1)(c) of the Prevention of Corruption Act read with s. 34, I.P.C. and s. 477-A read with s. 34, I.P.C.

H The learned Special Judge on a consideration of the evidence on the record held that the prosecution has succeeded in proving the conspiracy on the part of all the four accused to commit

criminal breach of trust in respect of the 80 bags of red wheat. Accused Nos. 1, 2 and 3 were also held to have gained pecuniary advantage and further to have altered the records of the T Shed. Holding the offences to be serious in view of the general shortage of foodgrains in the country the court felt that the case called for deterrent sentences. Under s. 120-B I.P.C. all the accused were sentenced to rigorous imprisonment for four years. Accused Nos. 1, 2 and 3 were in addition held guilty under s. 409, I.P.C. read with s. 34, I.P.C. and under s. 5(2) read with s. 5(1)(c) of the Prevention of Corruption Act read with s. 34, I.P.C., under s. 5(2) read with s. 5(1)(d) of Prevention of Corruption Act read with s. 34, I.P.C. and also under s. 477-A read with s. 34, I.P.C. and sentenced to rigorous imprisonment for four years on each of these four counts, the sentences to be concurrent.

On appeal the High Court confirmed the order of the trial court as against accused No. 4 and dismissed his appeal. The conviction of accused No. 1 under s. 5(2) read with s. 5(1)(c) of the Prevention of Corruption Act read with s. 34, I.P.C. was set aside. But his conviction and sentence under s. 120-B, I.P.C. and under s. 5(2) read with s. 5(1)(d) of the Prevention of Corruption Act read with s. 34, I.P.C. as also under s. 477-A read with s. 34, I.P.C. was confirmed. His conviction under s. 409 read with s. 34, I.P.C. was altered to one under s. 409, I.P.C. but without altering the sentence. The convictions of accused Nos. 2 and 3 under s. 409, I.P.C. read with s. 34, I.P.C. as also under s. 5(2) read with s. 5(1)(c) of the Prevention of Corruption Act read with s. 34, I.P.C. were set aside but their conviction and sentence under s. 120-B, I.P.C. and under s. 5(2) read with s. 5(1)(d) of the Prevention of Corruption Act read with s. 34, I.P.C. was confirmed.

In this Court Shri Chari questioned the appellants conviction on the broad argument, which was indeed the main plank of his challenge against the impugned order, that there was great confusion in the matter of storage of stocks of the foodgrains in the T-Shed and there was complete want of regularity and considerable inefficiency in the matter of keeping the records of the arrivals and storage of the stocks with the result that it would be highly unsafe to rely on the evidence relating to the records of the stocks in the T-Shed, for holding the appellants guilty of the criminal offences charged. The learned counsel appearing on behalf of the other appellants, while generally adopting Shri Chari's arguments, supplemented them by reference to the distinguishing features of the case against their individual clients.

A The counsel in the course of their arguments emphasised that the prosecution, in order to prove the negative, has the difficult task of affirmatively establishing by unimpeachable evidence that 80 bags which were the subject matter of the charge were in fact not received in the T-Shed. The prosecution must, said the counsel, bring the charge home to every accused B person beyond reasonable doubt.

The submission as developed by all the counsel representing the appellants did seem on first impression to be attractive but on a deeper probe we consider it to be unacceptable. It is no doubt true that the onus on the prosecution is of a negative character and also that the failure on the part of the accused to C give evidence on the question as to when, where and to whom the controversial 80 bags were delivered at the point of unloading—a fact on which the driver of the truck and those whose duty it was to receive the goods at the T-Shed could give the best and the most direct information—cannot under our law give rise to any presumption against them. The criminal courts D holding trial under the Code of Criminal Procedure have accordingly to bear in mind the provisions of s. 342-A of the Code and to take anxious care that in appreciating the evidence on the record and the circumstances of the case, their mind is not influenced by such failure on the part of the accused. But that does not mean that such negative onus is not capable of being discharged by appropriate circumstantial evidence. If E the circumstantial evidence which is trustworthy and which with unerring certainty establishes facts and circumstances the combination of which, on reasonable hypothesis, does not admit of any safe inference other than that of the guilt of the accused then there can hardly be any escape for him and the Court can confidently record a verdict of guilty beyond reasonable doubt. The F court would, of course, be well-advised in case of circumstantial evidence to be watchful and to ensure that conjectures or suspicions do not take the place of legal proof. The chain of evidence to sustain a conviction must be complete and admit of no reasonable conclusion consistent with the innocence of the accused. In the present case it is fully proved and is indeed not disputed on G behalf of the accused that truck No. 2411 with the 80 bags of red wheat did leave the dock and did pass the yellow gate which is the check point where a register is kept by the Regional Director of Food. In this Register entries are made when a truck leaves the yellow gate. The truck in question left the yellow gate at 11.20 a.m. on the second trip as deposed by Parmar, (P.W.8). And this H is not disputed. According to the accused the 80 bags in question were actually delivered at the appropriate place at the T-Shed and the truck chits duly given to the truck driver in token of their receipt and indeed D.W. 1 was

produced by accused No. 4 to prove the actual delivery. The prosecution case, on the other hand, is that those bags were not delivered at the T-Shed but were misappropriated. There is no dispute about the procedure of delivery at the T-Shed of the goods brought from the dock. This procedure in regard to the wheat brought on February 7, 1963 may briefly be stated.

The foodgrains consisting of 1060 bags of red wheat had arrived by S. S. Hudson at the Alexandra docks. The trucks were loaded with the wheat bags to be taken to the T-Shed, Sewri. Four truck-chits were prepared at the docks for each truck out of which two were given to the truck driver concerned. The driver had to give the truck chits at the godown at the time of the delivery of the bags. One such chit would be returned to him after endorsing acknowledgment of the receipt of the bags, the other chit being retained at the godown. The one given to the driver was meant to authorise the receipt of hire charges from the food department. At the godown, according to the general procedure, the driver of the trucks had to give the truck chits to one of the godown clerks there. A batch of gangmen under a particular *Mukaddam* had generally to unload the goods from the truck allotted to him and no *Mukaddam* with his gangmen could unload the goods from a truck which was not allotted to him for the purpose. The gangmen had, therefore, to unload the goods as instructed by the clerk and the senior godown keeper. After unloading the bags cooly voucher was to be prepared and the daily diary maintained at the godown written: the *kutcha* chit was prepared by the godown keeper after the unloading and weighment of the goods. Only 10% of the bags were as a matter of practice to be actually weighed.

The truck movement chart Ex. 10 shows the order in which the various trucks left the dock for the T-Shed on July 7, 1963 as also their contents and the truck chit numbers. Truck No. 2411 with 80 bags of red wheat figures twice in this document but it is not disputed that the trip which concerns us is entered at sl. No. 9. Truck chit number of this trip is 69 and the truck left the dock at 11.15 hours. The truck at serial No. 8 (immediately preceding the trip in question) in this document is No. 2248 with 80 bags and its chit No. is 68. This truck left the dock at 11 a.m. The truck at sl. No. 10 (immediately next after the one in dispute) is 1477 with 65 bags of red wheat whose truck chit No. is 72. This truck left the dock at 11.45 hrs. There were in all 14 trips on July 7, and indeed, this is also established by oral evidence and is not denied on behalf of the accused. We may now turn to the tally sheet for July 7, 1963 Ex. 41. The first thing to be noticed in this document is that it only shows the arrival of 13 trucks. In other words accord-

A ing to this document there were only 13 trips of the trucks though the Truck Movement Order Ex. 10 clearly shows that there were 14 trips and on behalf of the accused also it was asserted that there were 14 trips. We find in Exhibit 41 that after sl. No. 8 which relates to truck No. 2488 with its chit No. 68 and which arrived at the T-Shed at 11.58 a.m. there is recorded at serial B No. 9 the arrival of truck No. 7866 with chit No. 70 and at sl. No. 10 the arrival of truck No. 1477 with chit No. 72 and at sl. No. 11 the arrival of truck No. 8769 with chit No. 71. These three trucks are shown to have arrived at the unloading point at 1.15 p.m. It was explained at the bar that from 12 noon to 1 p.m. no work was done, it being lunch interval. It has been so C stated by P. S. Shinde, Assistant Director, Vigilance Branch, as P.W. 18. Items at sl. nos. 12 and 13 relate to trucks Nos. 2752 and 1289 with their respective chit nos. 73 and 74. It is thus clear that chit No. 69 is missing in this sheet. Bapu T. Pingle produced as D.W. 1 claims to have been in truck No. 2411 as a warner with the driver, accused No. 4, on July 7, 1963. Accord- D ing to him this truck made two trips on that day between the dock and the T-Shed and on the second trip the other warner by name Yashwant had taken the truck chit from the clerk concerned after the same was duly signed. This witness has deposed about the procedure at the godown which is the same as was suggested on behalf of the prosecution. The man at the godown used to direct the drivers to the place of unloading the goods and, to quote E his own words, "unless an entry was made in this Book (Tally Book) we were not allowed to go ahead at all." So, according to his evidence, unless an entry is made in the Tally Book the truck could not proceed to the unloading point to deliver the goods brought from the dock. Exhibits 10 and 41 in our view affirmatively prove that 80 bags of red wheat carried by truck No. 2411 F on July 7, 1963 on the second trip did not reach the T-Shed at all. This finds support even from the testimony of D.W. 1. In view of this documentary evidence with which no fault has been found the evidence regarding irregularities in the record of stock at the T-Shed loses all importance. It may be pointed out that July 7, 1963 was a Sunday and as deposed by Parmeshwar D. Menon G (P.W. 1) on that day all gates were not opened. But this is not all. Though in the tally chits time of the arrival of the truck at the unloading point is given in the truck chit in question that time is not shown. According to the evidence of Roque (P.W. 6) on the reverse of all truck chits Exts. 15 to 26 and Exts. 11-A and 11-B entries are made in the handwriting of accused H No. 1. In Exhibits 15 to 26 in addition to the arrival and departure of the trucks, progressive totals at the back of each of them is also stated, but in Ex. 11-B there is no progressive total and in Ex. 11-A there is no signature of accused No. 1

though the progressive total is mentioned as 240. Exhibit 11-B, it may be pointed out, appertains to the trip by truck No. 2411 on July 7, 1963. A

Shri Shinde, (P.W. 18) who was Assistant Director, Vigilance Branch at the relevant time has deposed that according to the weighment register Ex. 69 only 98 bags of s.s. Hudson were weighed and this was 10% of 980 bags. This document bears the signatures of accused No. 1. Exhibit 41, carbon copy of the Arrival Tally sheet which was sent to the head office for showing if there was any detention of trucks in the godown, does not, as already noticed contain any entry in respect of the truck in question. The reverse of Ex. 41 is not printed in the printed paper book but we have checked up from the original record that witness Shinde is right. Non-inclusion of the entry of the truck in question in Ex. 41, is in our view, very material. In Ex. 53 the daily Arrival Tally book for July 7, 1963 the entry at sl. No. 68 shows departure of the truck in question at 12.15 afternoon whereas in Ex. 41 it is shown as at 1.15 p.m. and in Ex. 11-B at 12.15 afternoon. This, according to P.W. 18, was designed to show that the truck was unloaded during the recess period which, according to evidence on the record, was not done. The explanation of accused No. 1 is that on July 7, 1963 he was not feeling well though he attended the office. He had to get chits from the warners and count the number of bags in the truck and order the labourers to unload them from the trucks. The suggestion appears to be that due to these multifarious duties and due to his being unwell he had perforce to enter the truck chits in the tally books only when he could get time and meanwhile he had no other alternative but to put the unentered truck chits in his pocket. According to him, it was on July 10, 1963 when he was giving his clothes to the washerman that he discovered the solitary chit in question left by mistake in his pocket. The explanation is far from satisfactory and we are not impressed by it. It may in this connection be pointed out that July 7, 1963 was a Sunday and the three accused persons were specially called for receiving the grain that had arrived by the two steamers. The amount of work to be done on that day can thus scarcely be considered to be excessive. And then the fact that only one solitary truck chit relating to the 80 bags in question should happen to have remained in the pocket of accused No. 1 to be discovered only on July 10, 1963 is also not without some significance. We agree with the High Court in holding this explanation to be unconvincing and that the 80 bags in question were in fact not received at the T-Shed on July 7, 1963. In B C D E F G H

A our opinion, the material on the record to which our attention has been invited fully supports the conclusions of the High Court. We may appropriately repeat what has often been pointed out by this Court that under Art. 136 of the Constitution this Court does not normally proceed to review the evidence in criminal cases unless the trial is vitiated by some illeB gality or material irregularity of procedure or the trial is held in violation of rules of natural justice resulting in unfairness to the accused or the judgment or order under appeal has resulted in grave miscarriage of justice. This Article reserves to this Court a special discretionary power to interfere in suitable cases when for special reasons it considers that interference is C called for in the larger interests of justice. As observed by this Court in *Chidda Singh* v. *The State of Madhya Pradesh*(1) this Article cannot be so construed as to confer on a party a right of appeal where none exists under the law. We, however, undertook in this case to go through the evidence to which our attention was invited to see whether or not the conclusions of the High Court are insupportable. We are not persuaded to D hold that in this case there is any cogent ground for interference with those conclusions. These appeals according fail and are dismissed.

V.P.S. *Appeals dismissed.*

(1) Crl. A.No. 125 of 1967 decided on 12th January, 1968.