

## RONALD WOOD MATHAMS

v.

## STATE OF WEST BENGAL

(With connected Appeals)

[MEHR CHAND MAHAJAN C.J., S. R. DAS, BHAGWATI,  
JAGANNADHADAS and VENKATARAMA AYYAR JJ.]

*Code of Criminal Procedure (Act V of 1898), s. 257—Absence of opportunity to produce defence evidence—Effect of—Court's duty in this respect.*

If for no fault of the accused reasonable opportunity has not been given to him to adduce his evidence under the imperative provisions of s. 257 of the Code of Criminal Procedure, 1898, there is no fair trial and the accused cannot be convicted, even though the prosecution evidence by itself may tend to establish a strong case against him.

Rules of procedure designed to ensure justice must be scrupulously observed and Courts should be jealous in seeing that there is no breach of them.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeals Nos. 9, 13, 14 and 15 of 1952.

Appeal on transfer after grant of Special Leave by Privy Council on the 13th November, 1947, from the Judgment and Order dated the 14th July, 1947, of the High Court of Judicature at Calcutta in Criminal Appeal No. 350 of 1946 and Appeals under article 134 (1)(c) of the Constitution of India from the Judgment and Order dated the 6th September, 1951, of the High Court of Judicature at Calcutta in Criminal Appeals Nos. 340, 341 and 351 of 1946 and Government Appeal No. 19 of 1946.

*N. C. Chakravarty, A. K. Mukherjea and Sukumar Ghose* for the appellant in Cr. A. No. 9.

*A. K. Basu, (Ganpat Rai, with him)* for the appellant in Cr. A. No. 13.

*A. K. Dutt and Ganpat Rai* for the appellant in Cr. A. No. 14.

*Sukumar Ghose* for the appellant in Cr. A. No. 15.

*B. Sen, A. M. Chatterji and P. K. Bose* for the respondents in all the appeals.

1954. April 22. The Judgment of the Court was delivered by

VENKATARAMA AYYAR J.—These are appeals against the judgments of the High Court of Calcutta convicting the appellants on charges of conspiracy to cheat the Government and of bribery. The facts, so far as they are material, may be briefly stated. The appellant, S. K. Dutt, carried on business as a building contractor under the name and style of British India Construction Company. This firm had a branch at Asansol which was, at the material dates, in charge of the appellant, J. K. Bose. In May, 1942, the military took up construction of dumps and roads in this area, and the appellant, R. W. Mathams, who was the Garrison Engineer at Asansol, was put in charge of it, and the appellant, P. C. Ghose, was functioning as overseer under him. On or about 10th May, 1942, an order was placed with S. K. Dutt for the construction of dumps at a place called Burnpur near Asansol. The works were executed in June and July 1942, and sums amounting to Rs. 1,74,000 were paid to S. K. Dutt on account therefor. The case for the prosecution is that this amount was in excess of what was due to him for works actually done, by about Rs. 56,000, and that with a view to avoid the refund of this excess, the appellants entered into a conspiracy, under which S. K. Dutt was to prefer a claim for construction of roads purported to have been carried out in execution of an order which R. W. Mathams was to issue; P. C. Ghose was to measure the road so claimed to have been constructed, and the bill was to be passed for an amount exceeding what had actually been paid. In accordance with this scheme, S. K. Dutt wrote Exhibit 19 on 28th January, 1943, claiming payment for “additional work within the store dump area”; R. W. Mathams passed an order bearing date 7th July, 1942, Exhibit 10, placing an order with S. K. Dutt for the construction of roads; P. C. Ghose prepared the final bill, Exhibit 6, for Rs. 1,89,458-14-0 on 15th March, 1943, and the same was passed by R. W. Mathams. It is stated for the prosecution that the roads alleged to have been constructed by the appellant, S. K. Dutt, were, in fact,

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constructed by the military, and that the order of R. W. Mathams bearing date 7th July, 1942, was, in fact, brought into existence sometime in March, 1943. It is further stated for the prosecution that as consideration for passing the above bill, a bribe of Rs. 30,000 was agreed to be paid to R. W. Mathams and to P. C. Ghose, that S. K. Dutt sent that amount by cheque to J. K. Bose on 16th March, 1943, and that on 17th March, 1943, R. W. Mathams was paid Rs. 18,000 and P. C. Ghose Rs. 12,000 as illegal gratification. The appellants were accordingly charged with conspiracy to cheat the Government and bribery.

The appellants denied the conspiracy. They stated that the roads had, in fact, been constructed by S. K. Dutt. With reference to the cheque for Rs. 30,000, the case of S. K. Dutt and P. C. Ghose was that the amount was required for payment to sub-contractors, who had constructed the roads under S. K. Dutt, and that it was, in fact, utilised for that purpose. They produced Exhibit 27 series, which are receipts purporting to have been signed by the several sub-contractors.

The Special Tribunal which tried the case, delivered its judgment on 9th May, 1946, acquitting the appellants on the charge of conspiracy but convicting them for the offence of bribery. Appeals against this judgment were taken to the High Court of Calcutta by the appellants against their conviction on the charge of bribery and by the Government against the acquittal on the charge of conspiracy. By their judgment dated 14th July, 1947, the learned Judges (Clough and Ellis JJ.) dismissed the appeals of the appellants, and allowed that of the Government. In the result, the appellants stood convicted on the charges both of conspiracy and bribery.

R. W. Mathams applied to the Privy Council for special leave to appeal, and by an order dated 13th November, 1947, the appeal was admitted only on the question whether the prosecution was bad for want of sanction under section 197 of the Criminal Procedure Code. The appellants, S. K. Dutt, J. K. Bose and P. C. Ghose, appealed to the Federal Court under a certificate under section 205 of the Government of

India Act, and as the order passed in their appeal forms the foundation of the argument in the present appeals, it becomes necessary to refer to it in some detail.

One of the grounds argued by the appellants in the Federal Court was that the requirements of section 257 of the Criminal Procedure Code had not been complied with, and that there was accordingly no fair trial. The facts on which this objection was based are these: The complaint was instituted on 7th June, 1945. The examination of witnesses on the side of the prosecution commenced on 6th September, 1945, and it was concluded after undergoing several adjournments on 29th March, 1946. On 27th March, 1946, the appellant, J. K. Bose, filed a list of 15 witnesses to be examined for the defence. Most of them were persons who are alleged to have given the receipts, Exhibit 27 series, acknowledging payment of money for construction of works done by them. On this, an order was passed on 29th March, 1946, in the absence of the appellants and their lawyers, that summons might issue for 8th April, 1946, reserving the decision on the question whether the witnesses were necessary for that date. Summons was not sent in the manner prescribed by sections 68 and 69 of the Code but by ordinary post. When the case was taken up on 8th April, 1946, it was found that two of the envelopes had returned from the Dead Letter Office, and as to the rest, there was nothing to show what had happened to them. In this situation, the Tribunal passed an order that no further process would issue, and the case was then decided on the evidence on record, and the appellants convicted on the charge of bribery.

On these facts, it was contended before the Federal Court that the procedure adopted by the Tribunal was in contravention of section 257 of the Code, and amounted to a serious irregularity. In upholding this objection, the Court observed that section 257 was imperative in its terms, that process could not be refused except for the reasons mentioned therein, that no such reasons existed, and that the order of the Tribunal, dated 8th April, 1946, refusing to issue process was accordingly illegal. It was further observed that

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the witnesses cited would be material, because their evidence, if accepted, would establish that Exhibit 27 series were genuine, and that this would militate against the case of the prosecution in respect of both the charges of conspiracy and bribery. The Court accordingly set aside the convictions, and directed that the appeal should be re-heard "after giving a reasonable opportunity to the appellant No. 2 (J. K. Bose) to take such steps as he may be entitled to take in law for enforcing the attendance of the witnesses mentioned in the list of the 27th March, and after considering the evidence of such of these witnesses as may appear before the Court."

This judgment was passed on 23rd April, 1948. When the matter went back to the High Court of Calcutta in pursuance of this judgment, an order was passed by that Court on 2nd August, 1948, adjourning the hearing of the appeals till the disposal of the appeal of R. W. Mathams by the Privy Council. Then came the Independence of India, and the appeal of R. W. Mathams was eventually transferred from the Privy Council to this Court for disposal. As information concerning the exact position of the appeal of R. W. Mathams was for some time lacking, and as the prospect of that appeal being heard appeared distant, the High Court passed an order on 9th April, 1951, that the remanded appeals would be taken up for hearing on 11th June, 1951, that the appellants should take the necessary steps for examination of the witnesses mentioned in the list, dated 27th March, 1946, and that the office should take steps to secure the attendance of those witnesses, except one who was in East Pakistan. The list was accordingly filed on 8th May, 1951. Therein, it was stated that out of the 15 persons whose names were mentioned in the list, dated 27th March, 1946, it was possible to get the address of only six persons, and that as for the rest, it was not possible to trace their whereabouts, as they had mostly migrated to Asansol at the time when the works were being executed and had since left that place. Out of the six persons whose addresses were given, B. C. Mukherjee and R. K. Paul, were served and examined in Court.

A third witness was given up, as he was a handwriting expert. The fourth witness Liakat Hossain, had migrated to East Pakistan, and no process could be issued against him. Another witness, Sanichar Mistry, had died in the hospital. As regards the sixth witness, Sashinath De, the endorsement on the summons was that he had left the place, and that it was not known to which place he had gone. The learned Judges who heard the appeal on remand held by their judgment, dated 6th September, 1951, that on the evidence both the charges of conspiracy and bribery had been established, and convicted the appellants, S. K. Dutt, J. K. Bose and P. C. Ghose, under the appropriate sections. The matter comes before us on special leave under a certificate of the High Court under article 134(c) of the Constitution.

The argument in support of these appeals is that the trial of the appellants had been vitiated by reason of the fact that they had no reasonable opportunity to examine their witnesses, and that their convictions were accordingly bad. We think that this complaint is well-founded. By its judgment, dated 23rd April, 1948, the Federal Court decided that the order of the Tribunal, dated 8th April, 1946, declining to issue process for the witnesses mentioned in the list, dated 27th March, 1946, was in contravention of section 257 of the Criminal Procedure Code, that the evidence of those witnesses would be material for refutation of the charges of both conspiracy and bribery, and that accordingly the appellants should be granted an opportunity to examine those witnesses. On this order, the only question that has to be decided is whether the appellants got such an opportunity when the appeal was re-heard in pursuance of the order of remand. The important point to be noted is that by reason of the order of the High Court, dated 2nd August, 1948, the appeal was not taken up for hearing immediately as it ought to have been, and that it was only on 8th May, 1951, that it was possible for the appellants to take steps in the matter. But by that time, the situation had undergone a radical change. In their application, the appellants stated that the whereabouts of most of

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the witnesses could not be traced, and this is not to be wondered at. Burnpur, where the works had to be executed, is a petty township situated in a corner of the State, and it sprang into prominence only owing to military activities. Contractors and sub-contractors flocked to that place from all sides for executing the military works, and there is nothing improbable in their having left the place when the situation changed, as it did on the conclusion of the war by the end of 1945. And there arose a further complication. In 1947, two Dominions came into being as a result of the Indian Independence Act, and there was a partition of Bengal. It is not unlikely that some of these contractors belonged to East Pakistan or had settled there.

That the list of witnesses given on 27th March, 1946, was not all fictitious is borne out by the fact that two of them actually gave evidence at the re-hearing and a third had died in the hospital. When some of the witnesses mentioned in the list are proved to be real persons, there are no materials on which it can be affirmed that the others are fictitious persons. Indeed, the evidence of the two witnesses, Mukherjee and Paul, is that they had seen some of those sub-contractors whose names appear in Exhibit 27 series, actually at work there. The learned Judges have rejected their evidence on the ground that they are not men of status; but on the question whether the appellants had made payments to the sub-contractors under Exhibit 27 series, the best evidence can only be of those persons. It may be that the two witnesses are not speaking the truth when they say that they saw the other persons mentioned in the list working on the roads, and it is possible that those persons are fictitious. But it is equally possible that they are real persons, whose whereabouts could not be traced in the exceptional circumstances which had intervened. As admittedly three of them are real, it would be unsafe to act on the view that the others must be fictitious, and if they are real persons who could not be examined for no fault of the appellants, grave injustice would result in the accused being condemned without the evidence of these witnesses having been taken. For this situation, the

appellants are not to blame. That was the result of the erroneous order passed by the Tribunal on 8th April, 1946, refusing to issue process and the order of the High Court, dated 2nd August, 1948, adjourning the appeal, till the disposal of the appeal of R. W. Mathams.

In coming to the conclusion that the guilt of the appellants had been established, the learned Judges were greatly influenced by the correspondence relating to the passing of the bill, in particular the letter of S. K. Dutt, dated 23rd January, 1943, Exhibit 18, by the long interval between the completion of the work which was in July, 1942, and the alleged payments under Exhibit 27 series which were after 17th March, 1943, and by various other circumstances, which probabilised the case for the prosecution. It must be conceded that the evidence on record tends to establish a strong case against the appellants. But then, that is a case which they are entitled to rebut, and if, as was held by the Federal Court, Exhibit 27 series would furnish good material for rebutting that case, the Court, by declining to issue process for the examination of the witnesses connected with those documents, has deprived the appellants of an opportunity of rebutting it. Whatever one may think of the merits of the appellants' contention, they cannot be convicted without an opportunity being given to them to present their evidence, and that having been denied to them, there has been no fair trial, and the conviction of the appellants, S. K. Dutt, J. K. Bose and P. C. Ghose, cannot stand. The result may be unfortunate. But it is essential that rules of procedure designed to ensure justice should be scrupulously followed, and Courts should be jealous in seeing that there is no breach of them. The appeals will be allowed, and the appellants acquitted.

Then there remains the appeal of R. W. Mathams. It has been already stated that by an order dated 13th November, 1947, the Privy Council gave him special leave to appeal, limited to the question whether the proceedings were bad for want of sanction under section 197 of the Criminal Procedure Code. By a further

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order dated 5th August, 1948, the Privy Council enlarged the scope of the appeal by permitting the appellant to raise the contention that there had been a contravention of section 257 of the Criminal Procedure Code. These are the two points that arise for determination in his appeal. The question whether sanction under section 197 was necessary for instituting proceedings against the appellant on charges of conspiracy and of bribery, is now concluded by the decisions of the Judicial Committee in *H. H. B. Gill v. The King*<sup>(1)</sup> and *Phanindra Chandra Neogy v. The King*<sup>(2)</sup>, and must be answered in the negative. The question whether there was contravention of section 257 of the Criminal Procedure Code and a denial or fair trial must, for the reasons already given, be answered in the affirmative, and the conviction of the appellant set aside on that ground. His appeal will also be allowed, and there will be an order of acquittal in his favour.

*Appeal allowed.*

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April 20.

## DHIRENDRA KUMAR MANDAL

v.

THE SUPERINTENDENT AND  
REMEMBRANCER OF LEGAL AFFAIRS TO  
THE GOVERNMENT OF WEST BENGAL,  
AND ANOTHER.

[MEHR CHAND MAHAJAN C.J., MUKHERJEA, VIVIAN  
BOSE BHAGWATI and VENKATARAMA AYYAR JJ.]

*Constitution of India, Art. 14—Scope and construction of—Meaning of reasonable classification—Criminal Procedure Code (Act V of 1898), ss. 269(1), 536—Notification under s. 269(1)—Validity of—Denial of the right to be tried by jury to certain individuals—Right retained in the case of other individuals committing the same or similar offences—Defect in trial—Whether cured by s. 536.*

Trial by jury is undoubtedly one of the most valuable rights which an accused can have but it has not been guaranteed by the Constitution. Section 269(1) of the Code of Criminal Procedure is an enabling section and empowers the State Government to direct

(1) 75 I.A. 41.

(2) 76 I.A. 10.