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was and are satisfied that it establishes the offences of murder and robbery against the appellant and not merely the minor offence of robbery or theft. It is impossible to accept the submission that the evidence does not establish any offence having been committed by the appellant.

Having regard to what is established in the case and the principles deducible from the cases cited, we are satisfied that the appellant has been rightly convicted of the offences of murder and robbery. The appeal is accordingly dismissed.

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[VIVIAN BOSE and CHANDRASEKHARA AIYAR JJ.]

Burden of proof—Proof of facts within especial knowledge—Facts equally within the knowledge of the prosecution and the accused, if "especially within the knowledge" of the accused—Illustration, Scope of—Indian Evidence Act (I of 1872), s. 106, Illustration (b).

The appellant was put up for trial under s. 420 of the Indian Penal Code and s. 5(2) of the Prevention of Corruption Act of 1947 for obtaining a total sum of Rs. 23-12-0 from the Government as T.A., being second class railway fares for two journeys, one from Ajmer to Abu Road and the other from Ajmer to Reengus, without having actually paid the said fares. The prosecution proved from the railway books and registers that no such second class tickets were issued at Ajmer on the relevant dates and the same witness who proved this also proved that tickets were not always issued and the passengers could pay the fare in the train and if the second class was fully booked, no further tickets were issued till the train arrived, in which case passengers sometimes bought third class or inter-class tickets and thereafter paid the difference to the guard of the train, if they could find second class accommodation on the arrival of the train. There was no proof that one or other of those courses were not followed by the appellant and the prosecution instead of proving the absence of any such payments, in the same way as it had proved the non-issue of second class tickets, relied on Illustration (b) to s. 106 of the Evidence Act and contended that it was for the appellant to prove that he had actually paid the second class fares.

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Held, that Illustration (b) to s. 106 of the Evidence Act had no application, the evidence adduced by the prosecution did not warrant a conviction and the accused should, having regard to the long lapse of time, be acquitted.

That s. 106 of the Evidence Act does not abrogate the well-established rule of criminal law that except in very exceptional classes of cases the burden that lies on the prosecution to prove its case never shifts and s. 106 is not intended to relieve the prosecution of that burden. On the contrary, it seeks to meet certain exceptional cases where it is impossible, or disproportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused and which can be proved by him without difficulty or inconvenience. But when knowledge of such facts is equally available to the prosecution if it chooses to exercise due diligence, they cannot be said to be especially within the knowledge of the accused and the section cannot apply.

Attygalle v. *Emperor*, (A.I.R. 1936 P.C. 169) and *Seneviratne* v. *R.*, ([1936] 3 All E.R. 36), referred to.

That illustrations to a section do not exhaust its full content even as they cannot curtail or expand its ambit, and in applying s. 106 the balance of convenience, the comparative labour involved in finding out and proving the facts and the ease with which the accused can prove them must be taken into consideration.

That cases coming under ss. 112 and 113 of the Indian Railways Act to which Illustration (b) to s. 106 has obvious application stand on a different footing.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 65 of 1954.

Appeal by special leave from the judgment and order dated the 2nd January 1953 of the Judicial Commissioner's Court at Ajmer in Criminal Appeal No. 3 of 1952 arising out of the judgment and order dated the 4th January, 1952 of the Court of Sessions Judge at Ajmer in Criminal Appeal No. 300 of 1951.

B. P. Berry and *B. P. Maheshwari*, for the appellant.

C. K. Daphtary, Solicitor-General of India (*Porus A. Mehta* and *P. G. Gokhale*, with him) for the respondent.

1956. March 12. The Judgment of the Court was delivered by

BOSE J.—The appellant, S.N. Mehra, a Camp Clerk

in the office of the Divisional Engineer Telegraphs, Ajmer, has been convicted of offences under section 420 of the Indian Penal Code and section 5(2) of the Prevention of Corruption Act, 1947 (Act II of 1947). He was sentenced to two years' rigorous imprisonment and a fine of Rs. 100 on each count. The substantive sentences are concurrent.

The substance of the offences for which he was convicted lay in obtaining sums totalling Rs. 23-12-0 from Government as T.A. for two journeys, one from Ajmer to Abu Road and the other from Ajmer to Reengus. The money represents the second class railway fare for these journeys. The allegation against him is that either he did not travel at all between those places on the relevant dates, or, if he did, that he did not pay the fare.

He appealed to the Sessions Judge at Ajmer and was acquitted. The State filed an appeal against the acquittal to the Judicial Commissioner of Ajmer. The learned Judicial Commissioner accepted the appeal and remanded the case for retrial before a Special Judge because, by reason of certain amendments in the law, only a Special Judge could try an offence under section 5(2) of the Prevention of Corruption Act at the date of the remand.

The appeal here raises certain questions about sanction which we do not intend to discuss because, in our opinion, the evidence adduced does not justify a retrial as no conviction for those two offences could be based on it.

It was first alleged that the appellant did not travel at all on the relevant dates and that the burden of proving that he did was on him.

We do not think this issue arises because the charge assumes that he did travel and there is no evidence before us to justify even a *prima facie* inference that he did not. The charge runs—

"That you, on or about etc.....cheated the Government .....by dishonestly inducing the Government to pay you Rs. 62-9-0 on account of T.A. for the journeys *performed* on the above-mentioned days....."

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There is no suggestion that the journeys were not performed and only *purported* to be; and it would be unfair to permit the State to go back on what it said in the charge at this stage, especially after the appellant has entered on his defence and virtually admitted that he did travel on those dates; in any case, he has not denied the fact and that would naturally operate to his disadvantage if the prosecution were to be allowed to change its position in this way. We must therefore accept the fact that he did travel as alleged on the relevant dates, and the only question that remains is whether he paid the second class fares which he later claimed, and obtained, from Government as T.A. for those journeys.

The only proof that is adduced in support of the allegation that he did not is that no second class tickets were issued at Ajmer on the relevant dates either for Abu Road or for Reengus. This is proved by the Booking Clerk Ram Dayal, P.W. 4. But the same witness proves that tickets are not always issued and that passengers can pay the fare on the train; also, if the second class is fully booked no further tickets are issued till the arrival of the train. In that case, passengers sometimes buy a third class or an inter-class ticket and then pay the difference to the conductor or guard of the train if they are able to find second class accommodation when the train arrives. There is no proof that one or other of these courses was not followed on the dates with which we are concerned. The railway registers and books would show whether or not any such payments were made on those dates and the State could have proved the absence of such payments as easily as it was able to prove, from the same sort of material, that no second class tickets were issued. Instead of doing that, the State contented itself with saying that no second class tickets were issued and, then relying on Illustration (b) to section 106 of the Evidence Act, it contended that the burden of proving that the accused did pay the second class fares was on him.

Illustration (b) runs thus:

"A is charged with travelling on a railway with-

out a ticket. The burden of proving that he had a ticket is on him".

But this is only an illustration and must be read subject to the section itself and cannot travel beyond it. The section runs—

"When any fact is *especially* within the knowledge of any person, the burden of proving that fact is on him".

The stress, in our opinion, is on the word "especially".

Section 106 is an exception to section 101. Section 101 lays down the general rule about the burden of proof.

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist".

Illustration (a) says—

"A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime".

This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are *pre-eminently* or *exceptionally* within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the

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burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are *Attygalle* v. *Emperor*(1) and *Seneviratne* v. *R.*(2).

Illustration (b) to section 106 has obvious reference to a very special type of case, namely to offences under sections 112 and 113 of the Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass, etc. Now if a passenger is seen in a railway carriage, or at the ticket barrier, and is unable to produce a ticket or explain his presence, it would obviously be impossible in most cases for the railway to prove, or even with due diligence to find out, where he came from and where he is going and whether or not he purchased a ticket. On the other hand, it would be comparatively simple for the passenger either to produce his pass or ticket or, in the case of loss or of some other valid explanation, to set it out; and so far as proof is concerned, it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.

We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused. This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts.

Now what is the position here? These journeys

(1) A.I.R. 1936 P.C. 169. (2) [1936] 3 All E.R. 36, 49.

were performed on 8-9-1948 and 15-9-1948. The prosecution was launched on 19-4-1950 and the appellant was called upon to answer the charge on 9-3-1951; and now that the case has been remanded we are in the year 1956. The appellant, very naturally, said on 27-4-1951, two and a half years after the alleged offences:

"It is humanly impossible to give accurate explanations for the journeys in question after such a lapse of time".

And what of the prosecution? They have their registers and books, both of the railway and of the department in which the appellant works. They are in a position to know and prove his official movements on the relevant dates. They are in a position to show that no vouchers or receipts were issued for a second class journey by the guard or conductor of the trains on those days. This information was as much within their "especial" knowledge as in that of the appellant; indeed it is difficult to see how, with all the relevant books and other material in the possession of the authorities, these facts can be said to be within the "especial" knowledge of the appellant after such a lapse of time however much it may once have been there. It would, we feel, be wrong to allow these proceedings to continue any longer. The appellant has been put upon his trial, the prosecution has had full and ample opportunity to prove its case and it can certainly not complain of want of time to search for and prepare its material. No conviction could validly rest on the material so far produced and it would savour of harassment to allow the continuance of such a trial without the slightest indication that there is additional evidence available which could not have been discovered and produced with the exercise of diligence at the earlier stages.

We set aside the order of the Judicial Commissioner and restore the order of the Sessions Judge acquitting the appellant on both counts of the charge framed against him.
