

PETITIONER:
FAGUNA KANTA NATH

Vs.

RESPONDENT:
THE STATE OF ASSAM

DATE OF JUDGMENT:
13/01/1959

BENCH:
KAPUR, J.L.
BENCH:
KAPUR, J.L.
WANCHOO, K.N.

CITATION:
1959 AIR 673 1959 SCR Supl. (2) 1
CITATOR INFO :
F 1967 SC 553 (7,9)
R 1970 SC 436 (14)
F 1990 SC1210 (5,6,8,9)

ACT:
Criminal Law-Abetment-Bribery-Conviction for bribery set aside-Maintenance of conviction for abetment-Legality-Indian Penal Code (Act XLV of 1860), ss.107,161, 165A.

HEADNOTE:

The appellant was tried for an offence under s. 165A of the Indian Penal Code for having abetted K, an Inspector in charge of checking paddy, in the commission of an offence by the latter under s. 161 of the Code. The prosecution case was that while the complainant was taking paddy for sale K demanded Rs. 200/as bribe and threatened him that unless the money was paid the paddy would be seized, that at the instance of K the complainant handed over the bribe money to the appellant for being counted and that the latter after checking the money paid it to K. The Special judge who tried the case accepted the prosecution story and convicted K under s. 161 of the Indian Penal Code and the appellant for abetment of the offence. On appeal, the High Court was of the opinion that the evidence was not strong enough to prove payment to K, and set aside his conviction, but confirmed that of the appellant on the ground that money was taken by him for payment to K as illegal gratification and whether he actually paid it to him or not the offence fell under s. 165A.

Held, that the conviction of the appellant for abetment under s. 165A of the Indian Penal Code must under the circumstances be set aside. On the facts found, the appellant received the money in the presence of and for and on behalf of K and if K was acquitted on the ground that no offence under s. 161 was committed, then no question of intentionally aiding by any act or omission the commission of the offence arose. Consequently, the appellant's conviction for the offence of abetment was not maintainable. Dalip Singh v. State of Punjab, [1954] S.C.R. 145, distinguished.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 203 of 1956.

Appeal by special leave from the judgment and order dated December 14, 1955, of the Assam High Court at Gauhati in Criminal Appeal No. 54 of 1955, arising out of the judgment and order dated May 23,

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1955, of the Court of the Special Judge, Lower Assam Districts at Dhubri in Special Case No. 2 of 1954.

Nur-ud-Din Ahmad and K. R. Chaudhury, for the appellant.

Naunit Lal, for the respondent.

1959. January 13. The Judgment of the Court was delivered by

KAPUR, J.-This appeal by special leave is directed against the judgment and order of the High Court of Assam. The appellant before us was tried for an offence under s. 165A of the Indian Penal Code for having abetted one Khalilur Rahman in the commission of an offence by the latter under s. 161, Indian Penal Code. Both the appellant and Khalilur Rahman were convicted of the offences with which they were charged and sentenced to one year's rigorous imprisonment. On appeal the High Court acquitted Khalilur Rahman but maintained the conviction and sentence of the appellant.

The facts of this appeal are that on May 9, 1952, the complainant Narendra Nath Brahma was taking two carts carrying 25 Mds. of paddy for sale to Billashiparabazar along the path which runs by the side of the river Gauranga. When he had gone only a short distance he was stopped by the paddy-checking Inspector, Khalilur Rahman, who was accompanied by the appellant and three others. Khalilur Rahman demanded Rs. 200 as bribe and threatened the complainant that unless the amount demanded was paid his cart and paddy would be seized. In this he was supported by the appellant and three others. The complainant expressed his inability to give that much amount but ultimately he agreed to pay Rs. 150. He borrowed Rs. 100 from one Surajmal Oswal out of which he offered Rs. 80 to Khalilur Rahman who asked him to hand them over to the appellant who counted the money and made it over to Khalilur Rahman. The complainant was also forced to execute a promissory note for a sum of Rs. 70 in favour of the appellant and he promised that the money would be paid the following day after the paddy was sold. The

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complainant learnt in the bazar that another person Happarai Rai had been similarly treated but he had only paid Rs. 15. On May 11, 1952, the complainant approached the appellant for the refund of his money and the return of his pronote and although the appellant promised he did not do so. The same day there was a meeting at Futkibari Middle English School where the Deputy Commissioner was present. The complainant presented to him a written complaint describing how he was forced to pay Rs. 80 and made to execute a pronote for Rs. 70. Thereupon both Khalilur Rahman and the appellant were prosecuted, the former under s. 161, Indian Penal Code, read with s. 5(2) of the Prevention of Corruption Act, 1947 (2 of 1947) and the latter under s. 165A and they were convicted and sentenced by the Special Judge as already stated.

The evidence of the complainant was that before Rs. 200 was demanded from him, the appellant and Khalilur Rahman " went aside and had some talks and coming together accused

Khalilur Rahman demanded Rs. 200 ". He also stated " I told them that I managed to procure Rs. 80 somehow and I wanted to hand over to accused Khalilur Rahman who directed me to hand over to accused Faguna, saying he would take counting, accused Faguna counted the money and then made over the entire money to accused Khalilur Rahman saying that Rs. 80 would not do and I should execute a handnote for the balance of Rs. 70 promising to pay on the following Saturday ". According to the complainant it was Khalilur Rahman who tore out a page from his note book and handed over the same to the complainant and also lent him his fountain pen and after the pronote was executed both the pen and the pronote were handed over to Khalilur Rahman. The Special Judge found:- "I am fully convinced that a sum of Rs. 80 was realised from the complainant for forbearing from seizing of the paddy by the accused Khalilur Rahman, being helped and abetted by the accused Faguna Kanta Nath."

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He therefore convicted Khalilur Rahman under s. 161, Indian Penal Code, but acquitted him of an offence under s. 5(2) of the Prevention of Corruption Act, 1947, and convicted the appellant for abetment of that offence. On appeal Deka, J., held that from the complaint made by the complainant it was not clear that any payment was made to Khalilur Rahman. He said:

It may be that Khalilur Rahman was a party to squeezing out some money from a dealer in paddy who tried to evade the law, but that falls far short of proving that he had accepted the money through Fagunakanta Nath as alleged now in Court ".

The learned Judge accepted the complainant's story that money was paid to the appellant but he was of the opinion that the evidence was not strong enough to prove payment to Khalilur Rahman and therefore he was "prepared to give the benefit of doubt to Khalilur Rahman and direct that his conviction under s. 161, Indian Penal Code be set aside ". As to the appellant he was of the opinion that money was taken by him for payment to Khalilur Rahman as illegal gratification and whether he actually paid it to him or not the offence fell under s. 165A and therefore he held the appellant guilty under that section. Thus according to the learned Judge the case against Khalilur Rahman was not proved and as money had been paid to the appellant he was guilty of abetment under s. 165A, Indian Penal Code. The appellant has come to this Court by special leave.

The main argument raised on behalf of the appellant is that as Khalilur Rahman has been acquitted, on the facts and circumstances of this case the conviction of the appellant for abetment cannot be sustained. The evidence of the complainant on which the conviction is based was that the money was demanded by Khalilur Rahman and at his instance it was made over to the appellant who counted the money and handed it over to Khalilur Rahman. The pronote was also written at the instance of Khalilur Rahman and was handed over to him. The part played by the appellant according to the story of the

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complainant was that before the demand of bribe both Khalilur Rahman and the appellant "went aside" and held a conference and Khalilur Rahman then demanded Rs. 200. Rs. 80 was brought by the complainant and paid to the appellant at the instance of Khalilur Rahman for the purpose of counting and he in turn gave it to Khalilur Rahman who put it in his trouser's pocket. About this portion of the evidence the trial Court said " it may not be fully true "

and the finding of the High Court was that the money remained with him and was not paid to Khalilur Rahman; the question is whether in these circumstances the offence of abetment can be held to have been made out.

Under the Indian law for an offence of abetment it is not necessary that the offence should have been committed. A man may be guilty as an abettor whether the offence is committed or not. Section 165A is as follows:

S. 165A "Whoever, abets any offence punishable under section 161 or section 165, whether or not that offence is committed in consequence of the abetment, shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both".

Therefore for a person to be guilty of abetment of an offence under s. 161, it is not necessary that the offence should have been committed. Abetment is defined in s. 107 and a person abets the doing of a thing when (1) he instigates any person to do that thing or (2) engages with one or more other person or persons in any conspiracy for the doing of that thing..... or (3) intentionally aids, by any act or illegal omission the doing of that thing.

Explanation (2) to s. 107 is as follows:-

"Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act." It is not suggested that there was any instigation by the appellant for the commission of the offence.

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Further the circumstances proved against the appellant did not bring the case under the second part of s. 107 because it is not alleged that there was any conspiracy and a charge of conspiracy must necessarily fail if the other alleged conspirator is acquitted: See *The King v. Plummer* (1) which has received the approval of this Court in *Topandas v. State of Bombay* (2). In either of these cases it is immaterial whether the person instigated commits the offence or not or the persons conspiring together actually carry out the object of conspiracy.

There then remains the third part of s. 107 that is abetment by aid. A person abets by aiding when by the commission of an act he intends to facilitate and does facilitate the commission thereof. By the acquittal of Khalilur Rahman the High Court must be deemed to have held that there was no offence under s. 161. But it was contended on behalf of the respondent that the acquittal of Khalilur Rahman was wrong and this Court should hold that a wrong acquittal does not prevent the conviction of the appellant for the offence of abetment. Counsel for the respondent referred to *Dalip Singh v. State of Punjab* (3) where at p. 156 Bose, J., said:

"We have taken into consideration the fact that the High Court considers that the portion of Mst. Punnan's story regarding the lambardars has been falsely introduced by the police, also that both courts have rejected the evidence about the dying declaration. Despite that, we agree with the learned Sessions Judge that Mst. Punnan and Mst. Charni are to be believed regarding the main facts and that they correctly named all seven accused as the assailants. On that finding the conviction under section 302 read with section 149 can be sustained. We accordingly uphold these convictions. The acquittals in the other three cases will of course stand but the mere fact that these persons have, in our opinion, been wrongly acquitted cannot affect the conviction in other cases".

In that case although the High Court had acquitted three accused persons of an offence under s. 302 read

- (1) [1902] 2 K.B. 339. (2) [1955] 2 S.C.R. 881.
(3) [1954] S.C.R. 145.

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with s. 149, Indian Penal Code, yet as in the opinion of this Court the acquittal was wrong s. 149 was held applicable in the case of four others who had been convicted by the High Court of s. 302 read with s. 149. The decision in that case must be circumscribed to the peculiar circumstances of that case. In the present case the person who demanded the illegal gratification for allowing the carts to proceed was Khalilur Rahman who had the authority to do or not to do a particular act and all that the appellant is alleged to have done was to receive the money at the instance of Khalilur Rahman for counting and then paid the money to him. It is not the prosecution case that the appellant abetted the offence by instigating Khalilur Rahman to demand the illegal ratification; nor has the prosecution set up or proved a case of conspiracy between the appellant and Khalilur Rahman for the commission of an offence under s. 161. On the findings of the Court the appellant received the money for and on behalf of Khalilur Rahman and the evidence of the complainant is that Khalilur Rahman had asked him to hand over the money to the appellant. If Khalilur Rahman is acquitted and therefore the offence under s. 161 is held not to have been committed, then in this case no question of intentionally aiding by any act or omission the commission of the offence arises. It may be as counsel for the respondent contended that the acquittal of Khalilur Rahman is wrong and it appears and we say so with respect that the findings of the High Court are inconsistent but as the matter of Khalilur Rahman is not before us by way of appeal against acquittal we do not express any opinion on that question.

We are of the opinion that on the facts found and circumstances established in this case and as Khalilur Rahman has been acquitted the appellant's conviction cannot be upheld. We therefore allow this appeal and set aside the order of conviction. The bail bonds shall also stand discharged.

Appeal allowed.

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