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case ; but notwithstanding this I have every confidence that the award as to interest was as right in law as it was just in substance.

The Rule is discharged with costs.

N. G.

Attorneys for the petitioner : *N. C. Bural & Pyne.*

Attorney for the respondent : *S. C. Mitter.*

APPELLATE CRIMINAL.

Before Teunon and Cuming JJ.

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 Aug. 26.

LEGAL REMEMBRANCER, BENGAL

v.

TULARAM BARODIA.*

Public Prosecutor—Appeal against acquittal presented by Legal Remembrancer—Legal Remembrancer, whether a Public Prosecutor—Criminal Procedure Code (Act V of 1898), s. 417—Admissibility of evidence of a similar but unconnected transaction to prove the presence of the accused at a certain place and to rebut an alibi.

The Legal Remembrancer is a "Public Prosecutor" within the meaning of s. 417 of the Criminal Procedure Code.

Where the accused was charged with cheating a firm in Calcutta, under s. 420 of the Penal Code, and it was alleged that he had, on a certain date, sent a telegram to the firm from Cooch Behar, purporting to come from their agents there, evidence that he had sent a similar telegram, on the same date, to another firm in Calcutta, purporting to come from their branch establishment in Cooch Behar, is admissible to disprove the case of the accused that he was in Calcutta on such date and to corroborate the evidence of the witnesses connecting him with the despatch of the first mentioned telegram.

The facts of the case were as follows. There is a firm, named Hukum Chand Ullas Chand, carrying on

*Government Appeal No. 3 of 1918, against the order of S. P. Sarbadhikary, Honorary Presidency Magistrate of Calcutta, dated March 21, 1918.

the business of commission agents and bankers at No. 4 Doyahatta Street. A firm in Cooch Behar, styled Khuman Chand Bhairab Daw, are their agents. On 10th September 1917 the *munib gomasta* of the Calcutta firm received a telegram purporting to come from their said agents, but which was alleged to have been really despatched by the accused, advising payment of Rs. 5,000 to one Hira Lal Agarwalla. The next day, at about 8 P.M., the accused called at No. 4 Doyahatta Street and, representing himself to be Hira Lal Agarwalla, stated that he had deposited the sum claimed with the Cooch Behar firm, and induced the *gomasta* to pay him Rs. 4,000, on account. It appeared that no such money had been deposited, nor any telegram sent by the agents in Cooch Behar. On the 19th October proceedings were taken against the accused, and he was placed on trial before Mr. S. P. Sarbadhikary, Honorary Presidency Magistrate, on a charge of cheating under s. 420 of the Penal Code. Evidence was given that, on the 10th September, another local firm, Chunni Ram Jaswant Mull, of 46 Strand Road, had received a similar telegram, purporting to have been sent by their branch firm, Hukum Chand Chuniram, in Cooch Behar, but really, it was said, by the accused himself, containing instructions to pay Rs. 4,000 to one Ram Lal Agarwalla, and that on the 11th, at about 2 or 3 P.M., the accused had called for payment but was told to come again.

The Magistrate acquitted the accused by his order dated the 21st March 1918. An appeal was filed against the order on behalf of Government by the Superintendent and Remembrancer of Legal Affairs.

The office of the Superintendent and Remembrancer of Legal Affairs, mentioned in Reg. IX of 1793, section (1), was formally created by section (2) of Reg. VIII of 1816 and vested in a covenanted servant of

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the East India Company. The office was abolished by section (2) of Reg. XIII of 1829 which was repealed in turn by Act VIII of 1868. It was revived by a Resolution of Government in 1845, and has been continued since. By a *Government Notification* of 24th June 1886, published in the *Calcutta Gazette*, 30th June 1886, Part I, p. 783, the Legal Remembrancer was appointed *ex officio* Public Prosecutor in all cases before the High Court on its Appellate Side, not coming from Presidency or other Magistrates in Calcutta. In supersession of the above he was appointed, by *Notification No. 125 J. D.*, dated the 7th May 1915, published in the *Calcutta Gazette*, 19th May 1915, Part I, p. 934, *ex officio* Public Prosecutor in all cases coming before the Calcutta High Court on its Appellate Side.

At the hearing of the appeal, an objection was taken by the counsel for the accused that the Legal Remembrancer was not a Public Prosecutor within section 417 of the Criminal Procedure Code.

The Advocate General (Mr. T. C. P. Gibbons, K.C.), Mr. Jacob and Babu Manindra Nath Banerjee, for the Crown.

Mr. Gregory, Babu Prabodh Chandra Rai, Babu Debendra Nath Kumar and Babu Dhirendra Nath Bose, for the accused.

Cur. adv. vult.

TEUNON AND CUMING JJ. This is an appeal against an acquittal. A preliminary objection is taken that the appeal has not been presented by a Public Prosecutor within the meaning of section 417 of the Code of Criminal Procedure.

The appeal was presented by the Superintendent and Remembrancer of Legal Affairs, Bengal, the officer, who by notification of date the 19th May of 1915,

has been appointed by the Local Government to be, by virtue of his office, Public Prosecutor in all cases heard by this Court in the exercise of its Appellate Jurisdiction. The objection is founded on the fact that the office of Legal Remembrancer, which received legislative sanction in Regulation VIII of 1816, was abolished by Regulation XIII of 1829, and appears to pre-suppose that there is no office or officer properly so-called. From the official papers placed before us we find, however, that the office of Legal Remembrancer was revived in 1844 or 1845, and the fact that the office is now the creation of executive or administrative order in no way obscures the identity of the officer. We, therefore, reject the preliminary objection.

The appeal is against an order of Mr. S. P. Sarbadhikary, an Honorary Presidency Magistrate, who by his order, dated the 21st March 1918, acquitted the accused, one Tularam Barodia, of the charge preferred against him under section 420 of the Indian Penal Code.

It appears that a firm called Khuman Chand, Bhairab Daw are agents in Cooch Behar for a Calcutta firm of commission agents and bankers styled Hukum Chand Ullas Chand, carrying on business at 4 Doyahatta Street, Calcutta. On the 10th September 1917 the *munib gomasta* of the latter firm received a telegram, purporting to be from their Cooch Behar agents, and containing instructions for the payment of Rs. 5,000 to one Hira Lal Agarwalla. It is then alleged that at about 8 P.M., on the 11th September, the present accused called at the place of business of Hukum Chand Ullas Chand, said that he had deposited money with the Cooch Behar firm, represented himself to be the Hira Lal of the telegram and so induced the *munib gomasta* to pay to him the sum of Rs. 4,000. The balance he was to take the following morning.

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He did not reappear, but was found about a month later in a jute market in Harrison Road. It had in the meanwhile been ascertained that the Cooch Behar firm had received no money, and had not sent the telegram in question, and when the accused failed to make good his promise to repay, criminal proceedings were taken against him on the 19th October 1917.

In the course of the trial, evidence was also given that on the 10th September a similar telegram was received by the firm of Chunni Ram Jaswant Mull of 46, Strand Road. This telegram purported to come from that firm's Cooch Behar branch, Hukum Chand Chuniram, and contained instructions for the payment of Rs. 4,000 to one Ram Lall Agarwalla. On the 11th of September, at about 2 to 3 P.M., accused. it is said, presented himself at 46 Strand Road, and requested payment but was invited to call again next day.

Now, there appears little reason to doubt that the telegrams referred to were handed in at Cooch Behar (Ex. 4 and Ex. 5) and were delivered Ex. 8, to Hukum Chand Ullas Chand, and another apparently not exhibited, to Chunni Ram Jaswant Mull. Amar Chand, the *munib gomasta* of Khuman Chand, Bhairab Daw has deposed that no telegram such as Ex. 4 was sent, and no such sum of money, as is therein referred to, was received by his firm.

From Ex. 10 the entry in the firm's *rokar* and the oral evidence, there appears no reason to doubt that the sum of Rs. 4,000 has been lost to the firm of Hukum Chand Ullas Chand. Thus the essential question is whether it was the accused Tularam Barodia who took away their money.

To establish the case against him the prosecution first examined three witnesses connected with the Cooch Behar Post and Telegraph Office. Two of these,

Sarban Das a postman on Rs. 13 a month, and Parmeswar Nunia, a telegraph messenger on the same pay, speak of the writing and despatch of Ex. 4, and say that the accused was the man who handed it in. Similarly Nripendra Kumar Chakravarty, a railway signaller on Rs. 28 a month, says that accused was the man for whom he wrote Ex. 5.

A fourth witness, Chuni Lal Golcha, a dealer in cloth in Cooch Behar, says that he started for Calcutta by the 6 P.M. train from Cooch Behar on the 10th September, and saw the accused, whom he had known as a broker in Calcutta two or three years before, enter a compartment in the same train.

The Honorary Magistrate has found himself unable to rely on the Cooch Behar Post Office witnesses, partly because they are men on small pay, and partly because they had no previous knowledge of the man who handed in the telegrams, and did not thereafter see the accused till they saw him in Court on the 6th December. He also comments on certain inconsistencies in their evidence, and on the fact that officers of higher standing, who had much the same opportunities of seeing the author of the telegrams, have not been called. With regard to Nripendra he further observes that the father of this witness is employed in the firm of Chunni Ram Jaswant Mull.

As to Chuni Lal Golcha, who was also proceeding to 46, Strand Road, where Chunni Ram Jaswant Mull and other firms carry on business, he points out that if, as he says, he did not arrive in Calcutta till the 12th or 13th, he must be making some mistake as to the 10th, and further that if accused travelled by a train starting at 6 P.M. he could not have been with Nripendra at 6-45 P.M. as that witness states. No doubt these matters are capable of explanation. Nripendra may have made a mistake as to the hour,

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or the train may have started late on that day, though of this the prosecution has adduced no evidence.

However that may be, we cannot possibly say that these Cooch Behar witnesses are clearly witnesses on whom the Honorary Magistrate should have relied.

The Magistrate next proceeds to consider the evidence of the Calcutta witnesses. He points out that the witnesses to the payment are not independent, and criticises the unbusiness-like conduct of the *munib gomasta*, Hira Lal Nath, in making payment of this large sum to a stranger merely on the faith of his statement that he was residing at the place of business of a firm named Ram Chand Kanai Lal. That firm had in fact ceased to exist some four or five years before, a fact which should have been known to Hira Lal as to others.

He next comments on such facts as the following, namely, (i) that this transaction by telegram is the first and only one of its kind; (ii) the appearance of the entry Ex. 10 in the *rokar*; (iii) the absence of any serious effort to trace the four Rs. 1,000 notes in which payment was made; (iv) the failure of the prosecution to compare by expert evidence the handwriting of Ex. 9, the receipt, with the signature "*Ram Lall Agarwalla*" on Ex. 5, or other writings of the accused, who (*vide* the evidence of Hazari Mull), has been working in the firm of Hup Mull Hanuman Das at 46, Strand Road, since the institution of the prosecution, and two or three years before (*vide* Chuni Lal Golcha) had worked at the firm of Narsing Das Tansukh Das; (v) the conduct of the prosecution in allowing the accused to go free on his discovery in Harrison Road; (vi) the delay in instituting proceedings, and in giving information to the police, and (vii) the failure of the prosecution to produce evidence as to the information then given.

Before us, in support of the appeal, stress is laid on the evidence of Hazari Mull, the *munib gomasta* of Chunni Ram Jaswant Mull. The defence on the other hand contends that his evidence, and also the evidence of Nripendra, *re* Ex. 5, is inadmissible. This contention cannot be acceded to. The accused's statement is that he was in Calcutta on the 10th September. If then, by the evidence of Hazari Mull and Nripendra, he could be connected with Ex. 5 and its despatch from Cooch Behar on the 10th, this evidence would go to corroborate the evidence of the witnesses connecting him with Ex. 4 and the payment in pursuance thereof. But, as pointed out by the Magistrate, Nripendra is connected with the firm of Chunni Ram Jaswant Mull and Hazari Mull, though Hira Lal denies it, is a co-villager with the latter.

In face of these considerations, it cannot be said that the prosecution has established its case beyond doubt. For the difficulties and omissions in the evidence the prosecution must be held responsible, and, while disassociating ourselves from the aspersions on or suggestions against the honesty of the *munib gomasta* Hira Lal, we are not of opinion that we should direct further enquiry in the present case. We, therefore, dismiss this appeal.

Lastly, we should say that, in our consideration of this case, we have been greatly embarrassed by the verbosity and bombast indulged in by the trying Magistrate. The use of such language can only throw doubt on the soundness of the Magistrate's judgment, and we trust that he will hereafter endeavour to express himself in plain terms and with becoming restraint.

E. H. M.

Appeal dismissed.

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