Sailendra Nath Chatterjee Vs. the State

LegalCrystal Citation : legalcrystal.com/881534

Court : Kolkata

Decided On : Jan-12-1984

Reported in : 1984CriLJ1036

Judge : B.C. Chakrabarti and ;Sankari Prasad Das Ghosh, JJ.

Appellant : Sailendra Nath Chatterjee

Respondent : The State

Judgement :

B.C. Chakrabarti, J.

1. This is a revisional application at the instance of the accused and is directed against an appellate order directing retrial of the petitioner on a charge under Section 406. I.P.C.

2. The petitioner was found guilty by the trial Court and convicted under Section 406, I.P.C. and sentenced to suffer S.I. for, three months and to pay a fine of Rs. 5,000/-, in default to S.I. for two years.

3. The petitioner was the Secretary of Benimadhab Higher Secondary School at Sheakhala during 1971 and for a part of 1972. The said school had a savings Bank account with the United Bank of India and the appellant, as the Secretary of the school used to operate the said accounts. The allegation against the petitioner was that on 20.9.1971 he had withdrawn a sum of Rs. 8,500/- from the savings Bank account of the school by issuing a cheque and misappropriated the amount. It was the further allegation that on 17.1.1972 the petitioner was entrusted with Rs. 27,600/- being a portion of the Government grant to the school but that on 18.1.1972 the petitioner deposited a sum of Rs. 25,600/- only into the account of the school with the United Bank of India and, thus misappropriated a sum of Rs. 2,000/-.

4. The learned Magistrate trying the case found the petitioner guilty and sentenced him in the manner aforesaid. The petitioner preferred an appeal. The learned court of appeal below has found that the prosecution allegation with regard to both these charges could not be said to have been proved on the evidence on record beyond doubt. Precisely he observed that the cheque by which the sum of Rs. 8,500/ was alleged to have been withdrawn was not even proved. He further found that the signature appearing on the cheque and purportedly of the petitioner was also not proved to be of the petitioner himself. The possibility of the signature being a forgery could not be ruled out in view of the evidence of court witness No. 2 who was on staff of the Bank. The liability for the alleged misappropriation was sought to be fixed upon the petitioner on the, ground that the withdrawal of the sum of Rs. 8,500/- was not

entered in the cash book of the school. It was, therefore, complained by the prosecution that the appellant himself had misappropriated the money. The learned lower appellate Court observed that the clerk of the school Sailendra Nath Bhattacharjee who was responsible for writing the cash book was a very material witness but has not been examined during trial. He was a charge-sheet witness but no explanation was given why he was not examined. After considering all these the learned lower appellate Court concluded 'In my opinion, the evidence on record does not prove beyond doubt that the appellant had, withdrawn Rs. 8,500/-from the savings bank account of the school on 20.9.1971 and misappropriated the same'.

5. In regard to the other charge also the learned lower appellate Court after considering the evidence held; 'I am of the view that it has not been proved beyond doubt that the appellant was entrusted with Rs. 27,600/- on 17.1.1972 and he misappropriated Rs. 2,000/- therefrom.' The prosecution case that a sum of Rs. 27,600/- was in fact given to the petitioner could, be proved by examining Sailendra Nath Bhattacharjee but he was not examined. The Investigating Officer also was not examined at the trial.

6. Having, however, found that it had not been proved beyond doubt that the petitioner had misappropriated either Rs. 8,500/- or Rs. 2,000/- as alleged the lower appellate court sent the case, for retrial after setting aside the order of conviction and sentence. Reasons assigned for the order of retrial is that the charge was grave and therefore, in the opinion of the learned lower appellate Court the ends of justice demanded that there should be a retrial.

7. It is against this order the present Rule was obtained.

8. It is clear upon a perusal of the judgment of the lower appellate Court that the prosecution did not adduce proper evidence at the trial. It is also clear that no explanation was offered why such evidence could not be adduced. In the case of Ramanlal Rathi v. The State : AIR1951Cal305 it has been observed as follows:

If at the end of a criminal prosecution the evidence leaves the court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witnesses who should have been heard. But retrial cannot be ordered on the ground that the prosecution did not produce the proper evidence and did not know how to prove their case.

9. Approving the observation made in this case the Supreme Court in the case of Ukha Kolhe v. State of Maharashtra AIR 1963 SC 1531 : 1963 (2) CriLJ 418 observed that an order for retrial of a criminal case is made in exceptional cases and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge. The Supreme Court further observed that an order of retrial is not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead.

10. In the case before us it is clear upon reading the judgment of the appellate Court that the evidence adduced at the trial was deficient and could not prove the charge as against the petitioner. It further appears that material evidence was wanting and even a charge-sheet witness who was very material to the prosecution case was not examined and no explanation for his non-examination was forthcoming. In such a situation the order for retrial it seems was made only to afford opportunity to the prosecution to fill in the lacuna in evidence and other infirmities in the prosecution case. That however is no reason why a retrial can be ordered. If the lower appellate Court felt that for a proper decision of the case it was necessary that additional evidence should be brought on record, it should have, instead of directing a retrial and re-opening the entire proceedings, resorted to the procedure prescribed in the Criminal Procedure Code in that behalf. That being the position in law the order for retrial in the facts and circumstances of the case cannot be supported. The order passed by the learned Court of appeal below as also the order of the trial Court are set aside. It having been found that the prosecution had failed to prove either of the allegations against the petitioner, the petitioner is found not guilty and acquitted of the charge under Section 406, I.P.C.

11. The Rule is thus made absolute. Revision allowed.