(1980) 07 PAT CK 0024

In the Patna High Court

Case No : Criminal Appeal No. 49 of 1972

Assistant Collector APPELLANT

Vs

M/s. Soni Moni Lal Brothers and Kanti Lal RESPONDENT

Date of Decision : 30-07-1980

Acts Referred:
Penal Code, 1860 (IPC) — Section 307, 326

Citation : (1980) PLJR 342

Hon'ble Judges : C.N. Tiwary, J

Bench : Single Bench

Advocate : K.P. Verma, for the Appellant; Keshari Kishore Sharan and Braj Kishore Gour, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Tiwary, J.—This appeal is directed against the order of the Munsif-Magistrate, Ist Class, Dhanbad, dated 17.4.72, by which he acquitted the respondents who stood charged under Rule 126P of the Defence of India Rules, 1963 (hereinafter referred to as the Rules). The prosecution case in brief is that on 7.10.63, Central Excise Preventive Staff raided the premises of the accused and on search 958.865 grams gold and gold ornaments were recovered from the possession of the accused. Out of this, 218.600 grams were gold ornaments, 600.915 grams were new ornaments and 139.350 grams were Primary gold. The book balance showed 372.601 grams of ornaments. There were some other discrepancies also. These ornaments and gold were undeclared. These ornaments were above 14 carats-mostly of 18 to 22 carats.

2. Notice was given to the accused by the authorities concerned to show cause against prosecution for violation of Rule 126(c), (f) and (g) of the Rules. Accused no. 2 showed cause which was found to be unsatisfactory. The Assistant Collector of Central Excise, Ranchi filed complaint against accused no. 1 Messrs Soni Moni Lal Brothers, Jewellers, and no. 2 Kanti Lal, Proprietor of Messrs Soni Moni Lal Brothers, Jewellers. Licence no. Gold 8/63 Jharia, P.S. Jharia (Dhanbad). The

learned Magistrate, after taking cognizance, transferred the case to the file of another Magistrate for disposal.

3. Charge under rule 126P of the Rules was framed against the accused persons. Accused Kanti Lal admitted in his statement u/s 342 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the old Code) that be is the Proprietor of Messrs Soni Moni Lal Brothers, Jewellers of Jharia, and his premises were searched and the said quantities of gold, ornaments-new and old--and primary gold were recovered. He further said that gold ornaments had come to him for polishing and free repairing and hence they were not shown in the registers of the shop.

4. Prosecution examined 5 witnesses, namely, Sudheshwar Prasad, Inspector, Central Excise (P.W. 1), Debbyas Singh, Inspector, Central Excise (P.W. 2), Dhirendra Kishore Bhattacharya, Deputy Superintendent of Central Excise (P.W. 3), Nawal Kishore Tiwary, Inspector, Central Excise (P.W. 4) and J.M. Ojha, Inspector, Central Excise (P.W. 5) and adduced documentary evidence.

5. On consideration of the evidence adduced on behalf of the prosecution, the learned Magistrate found that the requirements of rule 126Q of the Rules were not fulfilled in-as-much-as the Assistant Collector, Central Excise, who filed the complaint, was not the person authorised by the Administrator on the date the complaint was filed to do so and, therefore, the prosecution of the accused was had in law. He, therefore, acquitted the accused of the charge framed against them. Hence this appeal by the Assistant Collector Central Excise.

6. Mr. K.P. Verma, learned counsel appearing on behalf of the appellant Assistant Collector, Central Excise, has relied on a notification no. S.O. 130 dated 9.1.63, a plain copy of which is annexure 1 to the application for special leave to appeal, in support of his argument that long before 11.8.64, when the complaint was filed the Assistant Collector, Central Excise, had been authorised to accord sanction for prosecution of offences as required by rule 126Q of the Rules. No such notification was produced before the learned Magistrate. By this notification, which was issued under the signature of the Joint Secretary, Central Government, Assistant Collector had been authorised to accord sanction for prosecution of offences. Rule 126Q is as under:--

(1) No Prosecution for any offence punishable under this part shall be instituted against any person except by, or with the consent of, the administrator or any person authorised by the administrator in this behalf.

. . . .

Thus, prosecution could be instituted by or with the consent of the administrator or by any person authorised by the Administrator in this behalf. Therefore, the aforesaid notification no. 130 dated 9.1.63, a plain copy of which is Annexure 1 to the application for special leave to appeal, which was not issued by the Administrator, cannot legally authorise the Assistant Collector, Central Excise, to institute prosecution.

7. As a matter of fact, the prosecution had produced a gazette notification no. S.O. 183 before the learned Magistrate in this regard. Ext. 5 is extract from that gazette notification issued under the signature of Shri B.D. Pandey, Administrator. Under this notification, Assistant Collector, Central Excise, had been authorised to institute prosecution for any offence punishable under Part XIIA of the Rules. But this notification was published in the Gazette of India dated 18-1-65. Mr. Verma could not point out that this notification was in existence on 11-8-64 when the complaint was filed in the case by the Assistant Collector. In the circumstance, the learned Magistrate has rightly held that on the date on which the complaint was filed, the Assistant Collector had no authority to file the complaint.

8. Alternative argument of Mr. Verma is that if it is not proved that the Assistant Collector had authority to file complaint in this case, the whole proceeding was void and the only proper order that the Magistrate could have passed was to reject the complaint and drop the proceeding and discharge the accused. It is, thus, contended that the order of acquittal is liable to be altered to an order of discharge of the accused. In support of this argument, Mr. Verma has placed reliance of (1) Nagraj Vs. State of Mysore, . In Nagraj''s case reference had been made by the Sessions Judge recommending the quashing of the commitment order of the Magistrate committing the accused, Sub Inspector of Police, to the court of Session for trial of offences under Sections 307 and 326 of the Indian Penal Code on the ground that the Magistrate could not have taken cognizance of the offence without the sanction of the Government in view of the Provisions of Sections 132 and 197 of the Code. High Court rejected the reference and held that it was for the Sessions Judge to decide on facts established in the case whether Section 132 of the Code was applicable and if he came to the conclusion that the facts of the case brought within the purview of Section 132 of the Code, he (Sessions Judge) was at liberty to reject the complaint holding that it was barred u/s 132 of the Code. There was an appeal on special leave to Supreme Court. Supreme Court upheld the judgment of the High Court and dismissed the appeal. The observation of the Supreme Court made in that case, upon which reliance has been placed by Mr. Varma, runs thus:--

The last question to consider is that if the Court comes at any stage to the conclusion that the Prosecution could not have been instituted without the sanction of the Government, what should be the procedure to be followed by it, i.e., whether the Court should discharge the accused or acquit him of the charge if framed against him or just drop the proceeding and pass no formal order of discharge or acquittal as contemplated in the case of a prosecution under the Code. The High Court has said that when the Sessions Judge be satisfied that the facts proved bring the case within the mischief of Section 132 of the Code then he is at liberty to reject the complaint holding that it is barred by that section. We consider this to be the right order to be passed in these circumstances. It is not essential that the Court must pass a formal order discharging or acquitting the accused. In fact no such order can be passed. If Section 132 applies, the complaint could not have been instituted without the sanction of the Government and the proceedings on a complaint so instituted would be void, the Court having no jurisdiction to take those proceedings. When the proceeding be void, the Court is not competent to pass any order except an order that the proceedings be dropped and the complaint is rejected.

9. In view of what has been stated above, the learned Magistrate could have rejected the complaint and discharged the accused holding that the Assistant Collector, Central Excise, who filed the complaint, had no authority to do so. It, however, appears that the prosecution produced Ext. 5 and asserted that the Assistant Collector had authority to file complaint. Accused no. 2 was examined u/s 342 of the Code. Arguments were addressed on behalf of both the parties. In these circumstances, the learned Magistrate, on consideration of the evidence adduced, acquitted the accused.

10. The question is whether the order of acquittal of the accused passed by the learned Magistrate can legally be altered to an order of discharge of the accused in this appeal against the order of acquittal. Section 386 of the Code, which deals with the power of the appellate court, lays down, inter alia, that appellate court may. In an appeal from an order of acquittal, reverse such order and direct that further inquiry be made or that the accused be retried or committed for trial as the case may be or find him guilty and pass sentence on him according to law. Therefore, there is no provision to alter an order of acquittal to an order of discharge in an appeal against an order of acquittal.

11. The facts of Nagraj''s case are distinguishable in as such as no question regarding powers of the appellate court in deciding an appeal against order of acquittal arose in that case.

12. No other point was raised on behalf of the appellant.

13. Mr. K.K. Saran, learned counsel appearing on behalf of the respondents; referred to some documents, which were not exhibited in the court, in support of his argument that even on merit the prosecution had no case. It is unnecessary to enter into those points urged by Mr. Sharan. I do not find any merit in this appeal. The appeal is accordingly dismissed.

