
(1999) 02 BOM CK 0071

In the Bombay High Court

Case No : Criminal Revision Application 29 of 1996

Dwarkadas Rameshwar Paldiwal

APPELLANT

Vs

Satyanarayan Makhanlal Gadodiya and Another

RESPONDENT

Date of Decision : 15-02-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397
Penal Code, 1860 (IPC) — Section 406, 408, 420, 465

Citation : (1999) CriLJ 4425 : (2000) 1 RCR(Criminal) 327

Hon'ble Judges : D.D. Sinha, J

Bench : Single Bench

Advocate : A.V. Bhide, for the Appellant; Anand Parchure and Deo, (for No. 1) and A.M. Badar, Assistant Public Prosecutor (for No. 2), for the Respondent

Final Decision : Dismissed

Judgement

D.D. Sinha, J.—Heard Shri Bhide, learned Counsel for the applicant. Shri Deo, learned Counsel for non-applicant No. 1 and Shri Badar, A.P.P. for non-applicant No. 2 State.

2. The present Criminal Revision Application is directed against the judgment and order dated 11-9-1995 passed by the Sessions Judge, Buldana in Criminal Appeal No. 19 of 1990 whereby the order of conviction and sentence dated 9-3-1990 passed by the Chief Judicial Magistrate, Buldana in Regular Criminal Case No. 5 of 1987 came to be set aside and the non-applicant No. 1-accused is acquitted for the offence punishable u/s 408 of the Indian Penal Code.

3. In order to understand the controversy in question, it will be appropriate at this stage to consider few relevant facts of the prosecution case which has resulted in prosecution of non-applicant No. 1 for the offences charged. Shri Dwarkadas Rameshwar Paldiwal (complainant) is a partner of firm M/s. Kewalram Rameshwar which deals in petrol, diesel and kerosene, having its petrol pump at Shegaon and Murtijapur. Non-applicant No. 1-accused along with two others were working at the relevant time with the same firm in the capacity of Cashier-

cum-Clerks. Non-applicant No. 1 in the capacity as a Cashier-cum-Accountant was receiving the sale proceeds from the various branches of the firm everyday. The accused was keeping its accounts. As per the practice of the firm, the accounts maintained by non-applicant No. 1 were checked at the end of the accounting year at about the time of Diwali. In the year 1983, it was noticed that non-applicant No. 1 had maintained false accounts and shown less amount on credit side by making a wrong total and misappropriated the difference of Rs. 1,15,363.18 ps. during the period from 16-11-1982 to 4-11-1983. During the same period it was also found that on some occasions, the accused had shown more amount than what was actually received, on making wrong totals, which was Rs. 18,967.61 ps. deducting the excess amount, which was wrongly shown as received from the total amount, which was actually received but not accounted for, on making wrong totals. It has been alleged that the accused has misappropriated the actual amount of Rs. 96,395.57 ps.

4. It is the case of the prosecution that non-applicant No. 1 had made an extra-judicial confession and same was reduced in writing in which non-applicant No. 1 has admitted that he had misappropriated the amount. He has also mentioned in the said statement that he would refund the amount which he had misappropriated within a period of two months and, therefore, he had requested the complainant, not to take immediate steps. However, non-appellant No. 1 did not repay the said amount and, therefore, the applicant-complainant lodged the report in the Police Station. On the basis of the said report, the offence came to be registered against non-applicant No. 1. After the completion of the investigation, the charge-sheet was filed and the charge was framed against non-applicant No. 1 for the offence punishable under Sections 406, 408, 420 and 465 of the Indian Penal Code, to which the accused pleaded not guilty.

5. The learned Counsel for the applicant Shri Bhide, submitted that the learned Sessions Judge was not right in discarding the evidence of confession only on the ground that the same was obtained by coercion. It is contended that the confession made by non-applicant No. 1 was neither under any threat nor was under any coercion but the same was voluntary. It is further contended that the conviction ought to have been awarded on the basis of the confession made by non-applicant No. 1 and law does not require any corroboration for the same. The learned Counsel contended that both the Courts below ought to have seen that the prosecution had proved and established the prosecution case against non-applicant No. 1 for the offences punishable under Sections 406, 408, 420 and 465 of the Indian Penal Code, particularly on the basis of the evidence of P.W.1-Dwarkadas and P.W.2-Chhaganlal. It is further contended that P.W.3-Rameshkumar is an independent witness examined by the prosecution in order to prove the confession made by non-applicant No. 1. It is submitted that the Sessions Judge did not properly take into consideration the evidence of this witness. In short, Shri Bhide, the learned Counsel submitted that the appreciation done and findings arrived at by the Sessions Judge are not just and proper and same are not sustainable in law.

6. Shri Deo, learned Counsel appearing for non-applicant No. 1 as well as Shri Badar, learned A.P.P. appearing for non-applicant No. 2 State, supported the impugned judgment and order passed by the Sessions Judge.

7. Before considering the contentions raised by the learned Counsel for the respective parties, it will be appropriate at this stage to express that this Court has a limited jurisdiction u/s 397 of the Criminal Procedure Code. Unless there is a legal lacuna which renders the impugned order unsustainable in law, the revisional jurisdiction normally is not expected to be exercised.

8. The prosecution has examined four witnesses in order to prove the prosecution case against non-applicant No. 1. P.W.1-Dwarkadas, P.W.2-Chhaganlal, P.W.3-Rameshkumar and P.W.4-Investigating Officer. The evidence of the above referred material witnesses would show that the prosecution has mainly relied on the accounts written by the accused and the confession in writing given by the accused. It is necessary to keep in mind that the entries in the account books must be proved to have been maintained regularly in the course of business and the entries alone are not sufficient to prove the charge. Though, the entries in the instant case are made by the accused himself, it is not disputed that the account books were always in the custody of the complainant and his other two clerks working in the firm. While going through the evidence of the above referred prosecution witnesses as well as defence of the accused, the prosecution has not succeeded in proving the fact that the relevant entries were maintained regularly in the course of business but were made all the relevant entries at the time of Diwali festival of the year 1983 for the purposes of final returns to be submitted to the Income Tax authorities. The learned Judicial Magistrate simply recorded the numerous entries which were disclosed by the complainant referring to the account books and came to the conclusion that the accused must have misappropriated the amount by making wrong totals and further showing the less amount received. The learned Sessions Judge on close scrutiny of the account books has held that the entries effected for the year 1982 have been erased and overwritten and the year "83" is changed to year "82". The Sessions Judge, therefore, held that these erasures, if read in the context to the defence raised by the accused that he was asked to write the entries at the time of Diwali of the year 1983, it gives rise to a probable story put forth by the accused. The Sessions Judge, therefore, held that the accounts on which the prosecution is relying, cannot be taken as a genuine account of the transaction. The complainant P.W.1-Dwarkadas and P.W.2-Chhaganlal also admitted that there are erasures and the amounts have been changed. The erasures are not few, of which the cognizance could not be taken but there are number of erasures. P. W.2-Chhaganlal has also admitted that on each page of the account book, there are erasures and overwritings. The learned Sessions Judge, therefore, has held that the account which is kept in such a manner can hardly be relied upon to hold that the amount mentioned thereon was entrusted to the accused. It was for the prosecution to prove that the amount of sale proceeds was entrusted in respect of the same to the accused on particular occasion when there is a

corresponding entry shown and described in the account book. The prosecution also ought to have produced the account book maintained by Chhaganlal to prove that he did not receive the amount actually collected by the accused. P.W.2-Chhaganlal was an experienced clerk of the firm and was also required to check the account every day. It is difficult to believe that he would accept the amount from the accused blindly and without verifying the same. The Sessions Court, after taking into consideration the totality of the prosecution evidence adduced by the prosecution, came to the conclusion that the accounts on which the prosecution is relying in order to prove the charge are not genuine.

9. The other piece of evidence relied on by the prosecution is of confession made by the accused in writing. P.W.I-complainant and P.W.2-Chhaganlal have alleged that the accused admitted his guilt and gave in writing a promise that he would pay the amount not accounted for by him. The prosecution has also examined P.W.3-Rameshkumar to prove the said confession. The accused subsequently retracted the said confession contending that it was obtained by complainant and P.W.2-Chhaganlal by coercion and inducement.

10. The evidence of these witnesses would show that the accused was working in the employment of P.W.I-Dwarkadas as a clerk at the relevant time. The accounts were in the handwriting of the accused. It was noticed that the wrong totals were made and the accused defalcated the amount. P.W.1-Dwarkadas informed the accused that if he fails to deposit the amount, the report would be lodged against him. At this stage, the accused agreed and executed Kararnama (confession). The peculiar circumstances in which the confession is made cannot said to be free and fair and will have to be held that the same was made under threat. The entire prosecution evidence in this regard is not sufficient to hold that the confession given by the accused is independent then that of the threats extended to him by P.W.I-complainant and the same is also voluntary. If the confession itself cannot be said to be voluntary, in that event, even the testimony of P.W.3-Rameshkumar also cannot assist the prosecution in this regard. It is no doubt true that in a appropriate case the extra-judicial confession, if it is voluntary, can be accepted by the Court and conviction also can be based on the testimony of confession provided the other circumstances which are proved by the prosecution supports drawing of such inference. In the instant case, I cannot ignore the fact that the accused being in employment of P.W. 1 and P.W. 1 at the relevant time confronted the accused and also informed him that in case he fails to refund the alleged appropriated amount he would lodge the report in the Police Station, that itself is sufficient in my opinion, to reject the evidence of confession since the same cannot said to be voluntary in nature. On the other hand, the circumstances indicate that it was made under threat which renders the same inadmissible in law.

11. The perusal of the impugned judgment and order passed by the Sessions Judge would show that the findings of acquittal recorded by the Sessions Judge, in my opinion, are supported by reasons which are sustainable in law and are

based on proper appreciation of prosecution evidence by the learned Sessions Judge and there is no legal infirmity in the findings recorded by the learned Sessions Judge.

12. In the circumstances, no case is made out for interference. The Criminal Revision application is dismissed.