

(2003) 06 OHC CK 0031

In the Orissa High Court

Case No : Criminal Appeal No. 147 of 1986

Sadasiv Mohapatra and Another

APPELLANT

Vs

Prafulla Kumar Das

RESPONDENT

Date of Decision : 18-06-2003

Acts Referred:

Penal Code, 1860 (IPC) — Section 406

Citation : (2003) CLT 787 (Suppl CrI) : (2003) CriLJ 3947 : (2003) 25 OCR 606 : (2003) 2 OLR 122

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Advocate : K.N. Jena and B. Mishra, for the Appellant; G.N. Mohapatra and S. Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

A.S. Naidu, J.—This is an appeal u/s 378 of the Code of Criminal Procedure against the order of acquittal dated April 3rd, 1986 passed by the learned Sessions Judge, Puri in Criminal Appeal No. 146 of 1983 setting aside the order of conviction dated September 2nd, 1983 passed by the learned J.M.F.C., Bhubaneswar in I.C.C. Case No. 60 of 1982.

2. The criminal action was set in motion on filing of a complaint by appellant No. 1 who at the relevant time was working as the Secretary of Khurda Central Co-operative Bank Ltd. on May 6th, 1982 against the respondent u/s 406, I.P.C. in the Court of the J.M.F.C., Bhubaneswar. It was alleged that the respondent was the President of Itipur Service Co-operative Society Ltd. and, he was also the Treasurer of appellant No. 2-Co-operative Society. He was authorized by the Board of Directors to draw a sum Rs. 28,250/- from the Bhubaneswar Branch of the Khurda Central Co-operative Bank Ltd. on behalf of the Society. He was also entrusted with the work of disbursing the said amount amongst the fifteen members of the Society towards the second instalment of dug-well loans. It was alleged that the respondent drew and received the cash on 6- 5-1982 from the

Bank, but he failed to distribute the cash amongst the loanee members and misappropriated the same. In spite of repeated approaches and notices issued by the Society, the respondent neither deposited the cash with the Society nor disbursed the same in favour of the loanee members. Consequently a complaint case was filed.

The accused-respondent admitted the entrustment. He also admitted the fact that he could not distribute the money to the 15 members of the Society. His specific plea was that on 6-5-1982, after withdrawing the amount while he was returning from the Bank with cash, four persons robbed the cash from him by giving intoxicating drinks. Hence he could not discharge the trust.

3. Before the trial Court the prosecution examined three witnesses to prove the entrustment as well as non-disbursement of the amount and commission of breach of trust by the accused-respondent. At the other hand, to prove the case of robbery, the accused-respondent examined as many as 8 witnesses. On behalf of the prosecution 11 documents were exhibited and on behalf of the defence two documents were exhibited.

4. Admittedly on the basis of the F.I.R. lodged by the respondent alleging robbery of the amount from him, G.R. Case No. 963 of 1982 was initiated and the accused persons have been charge-sheeted. The charge-sheet as well as the written F.I.R. were marked as Exts. A and B.

5. The trial Court after discussing the evidence both oral and documentary arrived at a conclusion that the amount was entrusted to the accused-respondent and that the accused failed to disburse the amount in favour of 15 loanees. Thus, according to the trial Court, he has committed breach of trust. The trial Court disbelieved the plea taken by the accused that while returning from the Bank, the amount was robbed from him and hence, he has not deliberately committed any breach of trust. The trial Court highlighting the discrepancies came to the conclusion that the plea taken by the defence suffers from improbabilities and cannot be accepted. On the basis of such finding, the trial Court found the respondent guilty u/s 406, I.P.C. and convicted him thereunder and sentenced him to undergo rigorous imprisonment for two years and to pay a fine of Rs. 2,000/- and in default of payment of fine, to undergo S.I. for a period of six months.

6. The respondent preferred an appeal against the said order of conviction and sentence before the learned Sessions Judge, Puri which was registered as Criminal Appeal No. 146 of 1983. The learned Sessions Judge once again discussed the evidence both oral and documentary and agreed with the finding arrived at by the trial Court that the accused was entrusted with the money and that there was no denial of non-disbursement of the amount to the members of the Society. The only question according to the lower appellate Court was whether non-disbursement of the amount was due to the robbery as alleged by the accused or whether the accused committed any breach of trust. The lower

appellate Court discussed the evidence in extenso. It was also observed that on the basis of the F.I.R. filed by the accused G.R. Case No. 963 of 1982 has been initiated against four accused persons being Birasen Jena, Trilochan Das, Dibakar Pradhan and Udayanath Pradhan, under Sections 379/34, I.P.C. The aforesaid G.R. case was still subjudice. The lower appellate Court also observed that in the meanwhile the entire amount of Rs. 28,250/- has been recovered from the accused through due process of law. On the basis of the aforesaid observations, the lower appellate Court relying upon the principle of preponderance of probability, held that the evidence led by the accused should not be weighed in the same scale in which the testimonies of witnesses for prosecution are to be weighed and that the explanation by the accused much appeals to the reasoning though not substantiated by evidence and safely be accepted to quell the prosecution case. After a vivid discussion of the evidence of D.Ws., the appellate Court came to the conclusion that there was no reason to disbelieve the evidence of D.Ws. 7, 8 and other defence witnesses, and that the defence case has invited investigation which ended in charge-sheet which reveals that a prima facie case was found against the accused persons. The lower appellate Court accepted the explanation and/ or plea taken by the defence as the same appeared to be acceptable to a reasonable man though not substantiated by evidence. The lower appellate Court arrived at a conclusion that the prosecution has failed to prove beyond doubt that the conduct of the accused was dishonest and held that the accused did not gain wrongfully nor did the accused caused wrongful loss to any person and that the aforesaid order of conviction and sentence for the offence u/ s 406, I.P.C. is not sustainable both on facts and law. The complainant-Bank being aggrieved by the order of acquittal has approached this Court.

7. Learned counsel for the appellants forcefully submitted that the lower appellate Court acted illegally and with material irregularity in not properly appreciating the facts and has acquitted the accused-respondent though the respondent failed to substantiate the plea taken by him by adducing cogent evidence. At the other hand, learned counsel for the respondent supported the order of acquittal and submitted that the prosecution has totally failed to substantiate its case and in view of the fact that the criminal case is still in progress against the accused persons who are alleged to have committed theft of the amount from the respondent and the last but not the least the entire amount said to have been misappropriated by the respondent having been recovered by the complainant-Society, the lower appellate Court rightly acquitted the respondent.

8. To appreciate the facts, the plea advanced by the defence needs to be discussed. In the present case the accused-respondent has admitted withdrawal of Rs. 28,250/-from the Bank. Thus, there is no denial of entrustment of the said amount. Further, the accused also admitted that he could not disburse the amount to 15 members of the Society as the same was stolen from him on his way back to the Society from the Bank. It was stated that while returning from the Bank after withdrawing the amount, Birasen Jena and Trilochan Das accosted

and enquired from him whether he had withdrawn the amount. Said Trilochan Das had to get Rs. 2,250/- out of that amount being one of the members of the Society. Being requested by both the aforesaid persons, he accompanied them to a tea-stall of Dibaker Pradhan and all the three took tea. After taking tea he was served with some beverage and after consuming the same, he became senseless and was bodily removed to a school verandah by a Luna. Trilochan Das also accompanied him. When he regained sense it was 3 to 4 a.m. and he found himself lying on the verandah of the school. He found that the bag in which he had kept the cash, was lying empty. He reported the matter to the Bank next morning and made search of the culprits and ultimately lodged an F.I.R. on 13-5-1982. On the basis of the said F.I.R. G.R. Case No. 963 of 1982 was registered against four persons under Sections 379/34, I.P.C. To substantiate his case, the defence has examined 8 witnesses who more or less supported the case of the accused-respondent. The accused also after obtaining permission from the Court examined himself as D.W. 8. The prosecution had opportunity of cross-examining all the witnesses, but nothing could be elicited from the said witnesses to disbelieve the witnesses except minor discrepancies here and there.

9. In a criminal trial the degree of proof is stricter than what is required in a civil proceeding. For criminal trial, however, intriguing may be the facts and circumstance of the case, charges made against the accused must be proved beyond all reasonable doubts. The requirement of proof cannot lie in the realm of doubt, surmises and conjectures. Court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the implicit of the accused in respect of the offence alleged to have been committed. It should be borne in mind that there is no absolute standard of proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubts depend upon the facts and circumstance of the case and quality of evidence adduced in the case and the materials placed on record. Lord Denning in a case of *Bater v. Bater* (1950) 2 All ER 458, has observed that the doubt must be of a reasonable and the standard adopted must be a standard adopted by a reasonable and just man for coming to a conclusion considering a particular subject-matter.

In the case of *Gurbachan Singh Vs. Satpal Singh and others*, it has been held that the conscience of a Court can never be bound by any rule, but that itself dictate the conscience and prudent exercise of power. Reasonable doubt is simply that degree of a doubt which would prompt a reasonable and just man to come to a conclusion. Reasonableness of the doubt must commensurate with the nature of the offence to be investigated. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts and lingering suspicion and thereby social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilties escape than convicting an innocent. Letting a guilty escape is not doing justice according to law.

Fundamental principle of criminal jurisprudence is that the onus of proving

everything essential to the establishment of the charge against the accused lies upon the prosecution which must prove the charge substantially as led i.e. to prove to the guilt and beyond all reasonable doubt. That onus neither shifts nor changes. Every man is to be regarded as innocent until the contrary is proved. Criminality is never to be presumed unless and otherwise it is proved beyond reasonable doubts. The prosecution must always stand on its own or fall and cannot take advantage of the possible weakness of the defence, if any. The evidence adduced by the defence has to be examined with a view to see if it rebuts the case of the prosecution. If there is a reasonable doubt of guilt of the accused, he is entitled as of right to be acquitted.

10. Considering the facts and circumstance of the present case on the touchstone of the observations made above, I am satisfied that the accused-respondent has succeeded in raising enough doubts on the prosecution case. At the other hand, the prosecution has also failed to prove the case beyond all reasonable doubts against the respondent. The lower appellate Court has rightly accepted the plea of the defence. Added to it, the entire amount alleged to have been misappropriated, has already been recovered. A case was also initiated on the basis of an F.I.R. lodged by the respondent alleging that four accused persons committed robbery.

In view of the aforesaid facts and circumstances, I confirm the order of acquittal passed by the appellate Court and consequently dismiss this appeal.