

Abdul Rahiman vs Nassar and Another

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Court : Kerala

Decided On : Apr-12-2024

Judge : Honourable Mr. Justice Johnson John

Appeal No. : CRL.A/827/2007

Appellant : Abdul Rahiman

Respondent : Nassar and Another

Judgement :

Crl. Appeal No. 827/2007 :1:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE JOHNSON JOHN FRIDAY, THE
12TH DAY OF APRIL 2024 / 23RD CHAITHRA, 1946 CRL.A NO. 827 OF 2007

**ORDER DATED 30.08.2006 IN ST NO.695 OF 2004 OF JUDICIAL
MAGISTRATE OF**

FIRST CLASS, PATTAMBI APPELLANT/COMPLAINANT: ABDUL RAHIMAN
PALLIYALIL VEEDU, PARAKKULAM, CHEKKODE DESOM,, KUMARANELLUR
AMSOM, OTTAPALAM TALUK,PALAKKAD DIST. BY ADV SRI.RAJESH
SIVARAMANKUTTY RESPONDENTS/ACCUSED/STATE: 1 NASSAR,

KULARIKUHIYIL VEEDU, UMMATHOOR DESOM,, ANAKKARA AMSOM, OTTAPPALAM TALUK, PALAKKAD DISTRICT. 2 STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR,, HIGH COURT OF KERALA, ERNAKULAM. BY ADVS. SRI.N.GOPINATHA PANICKER SRI.C.KHALID SRI.R.O.MUHAMED SHEMEEM SRI.T.P.SAJID SRI. VIPIN NARAYAN, SR. PUBLIC PROSECUTOR THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09.04.2024, THE COURT ON 12.04.2024 DELIVERED THE FOLLOWING: Crl. Appeal No. 827/2007 :2:

JOHNSON JOHN, J.

----- Crl. Appeal No. 827 of 2007
----- Dated this the 12th day of April, 2024.

JUDGMENT

This appeal is filed against the judgment dated 30.08.2006 in S.T. No. 695 of 2004 of the Judicial First Class Magistrate, Pattambi, whereby the accused was found not guilty of the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short NI Act) and acquitted under Section 255(1) Cr.P.C

2. The appellant is the complainant and the complaint was filed on

the allegation that the son-in-law of the complainant had entered into an agreement with the accused for the construction of the house of the son- in-law of the complainant and subsequently, the accused has withdrawn from the agreement and also agreed to pay the excess amount, Rs.38,000 and towards the discharge of the said liability, the accused

has issued Exhibit P1 cheque dated 15.03.2004 for a sum of Rs.38,000/-. It is alleged that when the complainant presented the cheque for collection, the same was dishonoured due to insufficiency of funds and in spite of issuance of statutory notice, the accused failed to pay the cheque amount. Crl. Appeal No. 827/2007 :3:

3. In the trial court, PWs 1 and 2 were examined and Exhibits P1 to P6 were marked from the side of the complainant and from the side of the accused, DW1

was examined and Exhibit D1 marked.

4. After considering the evidence on record, the trial court found

that the name of the payee is subsequently written in Exhibit P1 cheque in a different handwriting and ink and that the accused has succeeded in rebutting the statutory presumptions under Sections 118 and 139 of the NI Act in favour of the complainant and that there is no satisfactory evidence to show that the cheque was issued in discharge of a legally enforceable debt and therefore, the accused was found not guilty of the offence under Section 138 of the NI Act.

5. Heard Sri. Rajesh Sivaramankutty, the learned counsel for the appellant, Sri. T.P. Sajid, the learned counsel for the first respondent and Sri. Vipin Narayan, learned Senior Public Prosecutor.

6. The learned counsel for the appellant argued that the execution

of the cheque and the signature is not disputed and that the trial court ought to have found that it was PW1 who advanced money for the construction of the house as per Exhibit D1, agreement, and that the accused has agreed to return the excess amount and that Exhibit P1 cheque was issued in discharge of the said debt. It is also argued that

Crl. Appeal No. 827/2007 :4: the trial court ignored the statutory presumptions in favour of the complainant under Sections 118 and 139 of the NI Act.

7. But, the learned counsel for the first respondent argued that a

perusal of Exhibit D1 would clearly show that the transaction was between the accused and the son-in-law of the complainant and there is nothing in Exhibit D1 or in the complaint that the complainant advanced any amount to the accused in connection with the construction of the house. It is also pointed out that a perusal of Exhibit P1 cheque would show that the name of the payee is written in blue ink in a handwriting different from the writings regarding the amount, date and signature written with black ink in the cheque.

8. In cross examination, PW1 deposed as follows:

" . . . 38,000/- . cheque . 38,000/- . 38,000/- ".

9. The above evidence of PW1 in cross examination clearly shows that the complainant has no definite case as to whether the amount is due to the complainant or the son-in-law. PW1 denied the suggestion that he misused the cheque entrusted as security to the son-in-law. Crl. Appeal No. 827/2007 :5:

However, he admitted that the first party in Exhibit D1 agreement is his son-in-law and the second party is the accused. PW1 further admitted that there is nothing in Exhibit D1 to show that any amount is due to the complainant or that the complainant is authorised to receive any amount from the accused as per the said agreement.

10. The evidence of PW2, who is the son-in-law of the

complainant, shows that he went abroad on 09.03.2003 and returned only on 22.07.2005. The learned counsel for the first respondent pointed out that Exhibit P1 cheque is dated 15.03.2004 and therefore, it can be seen that PW2 was abroad during the validity of Exhibit P1 cheque and that will probabilise the case of the defence that Exhibit P1 cheque was originally entrusted as security in connection with Exhibit D1 transaction and that the complainant materially altered the said cheque by adding his name as payee without the knowledge and consent of the accused and therefore, there is no reason to interfere with the finding of the trial court in this regard.

11. In *Bharat Barrel & Drum Mfg. Co. v. Amin Chand Payrelal*

[(1999) 3 SCC 35], the Honourable Supreme Court held that the non existence of consideration for the cheque can be proved by raising a probable defence and if it is shown that the existence of consideration was improbable or doubtful or the same was illegal, the onus would shift Crl. Appeal No. 827/2007 :6:

to the complainant. In *Harbhajan Singh v. State of Punjab* (AIR 1966 SC 97), the Honourable Supreme Court held that the onus on an accused person might well be compared to the onus on a party in civil proceedings, and just as in civil proceedings the court trying an issue makes its decision by adopting the test of

probabilities

12. The Honourable Supreme Court considered the nature of the

standard of proof required for rebutting the presumption under Section 139 of the Negotiable Instruments Act in *M.S.Narayana Menon v. State of Kerala* (2006 (6) SCC 39), and it was held that if some material is brought on record consistent with the innocence of the accused, which may reasonably be true, even though it is not positively proved to be true, the accused would be entitled to acquittal.

13. The Honourable Supreme Court in *Basalingappa v. Mudibasappa* [(2019) 5 SCC 418] summarised the principles of law governing presumptions under Sections 118(a) and 139 of the NI Act in the following manner:

(i) Once the execution of cheque is admitted S.139 of the Act mandates a presumption that the cheque was for the discharge of any debt or other liability. Crl. Appeal No. 827/2007 :7:

(ii) The presumption under S.139 is a rebuttable presumption and the onus is on the accused to raise the probable defence. The standard of proof for rebutting the presumption is that of preponderance of probabilities.

(iii) To rebut the presumption, it is open for the accused to rely

on evidence led by him or accused can also rely on the materials submitted by the complainant in order to raise a probable defence. Inference of preponderance of probabilities can be drawn not only from the materials brought on record by the parties but also by reference to the circumstances upon which they rely.

(iv) That it is not necessary for the accused to come in the witness box in support of his defence, S.139 imposed an evidentiary burden and not a persuasive burden.

(v) It is not necessary for the accused to come in the witness box to support his defence.

14. The Honourable Supreme Court in *Chandrappa and others*

v. State of Karnataka [(2007 (4) SCC 415)] laid down the general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following manner: "(1) An appellate court has full power to review, re - appreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction

or condition on exercise of such power and an appellate court on the Crl. Appeal No. 827/2007 :8: evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons",

"good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc, are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasis the reluctance of an appellate court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of

acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the Trial Court.

15. It is well settled that the standard of proof which is required

from the accused to rebut the statutory presumption under Sections 118 and 139 of NI Act is preponderance of probabilities and that the accused is not required to prove his case beyond reasonable doubt. The standard of proof, in order to rebut the statutory presumption, can be inferred from the materials on record and circumstantial evidence.

16. The specific case of the accused/first respondent is that he has not issued any cheque to the complainant and no amount was due. Crl. Appeal No. 827/2007 :9:

from the accused to the complainant and that Exhibit P1 cheque was entrusted as security in connection with Exhibit D1 agreement to the son-in-law of the complainant and the same was misused by the complainant after materially altering the same by inserting the name of the complainant as payee in the cheque without the knowledge and consent of the accused. It is pertinent to note that the evidence of PW1 in cross examination would clearly show that he has no definite case as to whether the amount is due to the complainant or to his son-in-law and further, it is in evidence that PW2, the son in law of the complainant, was abroad from 09.03.2003 to 22.07.2005 and therefore, considering the facts and circumstances I find no reason to interfere with the finding in the impugned judgment that the accused has succeeded in rebutting the statutory presumptions in favour of the complainant and that there is no satisfactory evidence to show that Exhibit P1 cheque was issued in discharge of a legally enforceable debt from the side of the accused to the complainant and in that circumstance, I find that this appeal is liable to be dismissed.

In the result, this appeal is dismissed. Interlocutory applications, if any pending, shall stand closed. sd/- JOHNSON JOHN, JUDGE. Rv

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