

Emperor Vs. Shridhar Mahadeo Pathak

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Court : Mumbai

Decided On : Oct-04-1934

Reported in : (1934)36BOMLR1133

Judge : Murphy and ;Sen, JJ.

Appeal No. : Criminal Revision Application No. 341 of 1934

Appellant : Emperor

Respondent : Shridhar Mahadeo Pathak

Judgement :

Murphy, J.

1. This is an application in revision against an order of the learned Sessions Judge of West Khandesh, confirming the conviction of the applicant under Section 409 of the Indian Penal Code, but reducing the sentence of fine passed upon him to one of Rs. 385, while upholding the sentence of imprisonment.

2. The facts alleged against the accused were that, being chairman of the Nandane Co-operative Credit Society and having a sum of Rs. 385 paid to him by the complainant in the case in repayment of the loan which he had taken from the society, he criminally misappropriated this sum instead of crediting the amount in the society's books and remitting it to the society's bank. Both the Courts have

found the accused guilty of the offence, having believed the complainant's evidence that he paid the amount at the village of Songir after having borrowed it on the strength of a promissory note from one Rupchand Hirachand Marwadi of that place. The conviction is, however, challenged on the ground of its illegality.

3. The first argument urged on the applicant's behalf is that he was not a public servant and that, therefore, his conviction under Section 409 is illegal, and that in any case if he was really a public servant, sanction under Section 197, Criminal Procedure Code, was necessary, and that it has not been obtained. As to this point we think that the applicant's contention is correct. Both the Courts below have relied on the definition of ' officer' under the Bombay Co-operative Societies Act (Bom. VII of 1925). But this does not seem to carry us very much further. 'Officer' is defined to include ' a chairman, secretary, treasurer, member of committee or other person empowered under the rules or under the bye-laws of a Society to give direction in regard to the business of such Society.' The definition in Section 21 Clause (10) of the Indian Penal Code relied on is:

Every Officer, whose duty it is, as such officer, to take, receive, keep, or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpossof any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district.

4. Both the Magistrate and the Sessions Judge have, as it seems to us,. read this definition stopping in the middle of it and so including a chairman of a society in the category of ' Government servant'. But it includes the words 'whose duty it is, as such officer, to take, receive, keep, or expend' and the sentence goes on to qualify the clause ' for any secular common purpose of any village, town or district'. And it seems to us that this clause governs the section and that it must be for a public purpose that the money was received, or expended. This being so, the accused would not appear to have been a ' public servant'. We have recourse to the sections themselves as there is no authority on the point-If the accused is not a ' public servant', then the objection that sanction under Section 197, Criminal Procedure Code, was necessary to the prosecution obviously fails.

5. The next contention is that the prosecution should have been instituted under the Co-operative Societies Act itself, with the sanction of the Registrar, and that the case is not cognizable. It appears that the cognizance of this case was taken by the Deputy Superintendent of Police after inquiry by the Co-operative Credit Society or its officials. We think that on this point Mr. Gumaste's contention fails. He relies on Section 60 of the Act and the following section. It is clear that Section 60 refers not to all offences but to ' an offence under this Act', and these are enumerated in Sub-sections (a)(b)(c) and (d) which follow the opening sentence, and Section 63(2), which is the foundation of the argument, is:

Notwithstanding anything contained in the Code of Criminal Procedure of 1898 every offence under this Act shall, for the purpose of the Code, be deemed to be non-cognisable.

6. The offences referred to are those under the Act and not those under the Indian Penal Code. We think then that this contention is unsound and must fail.

7. The next is that the lower Courts illegally relied on the evidence of a witness, who at the time of his examination was hostile to the prosecution. This witness was the money-lender Rupchand, who it appears admitted the presence of the parties in his shop for the purpose of raising the money. He denied that he had seen the money being paid to the accused. It is an ordinary incident of the Courts for a witness to resile from some portion of his statement and to be allowed to be cross-examined by the prosecution, and we do not think that there is anything illegal in the lower Courts partly believing this witness and partly not. On the evidence it seems clear that the accused is guilty. There is the testimony, which has been believed, that Ragho the society's debtor says that he paid the sum of Rs. 385 to him, and that fact is corroborated by his son and other evidence in the case, while a faint effort to charge the secretary of the society with defalcation is obviously a false one.

8. We think that on the merits the accused is guilty but that the conviction under Section 409, Indian Penal Code, is wrong. Mr. Gumaste for the applicant submits that it would be a hardship on his client to be re-tried on the same facts, and it is not urged that the conviction under a wrong section has prejudiced his client in any

way. However, the accused is an elderly man and the offence was committed so far back as 1929, and in the circumstances of his having already suffered more than two months' rigorous imprisonment and being now on bail under the orders of this Court, we should reduce the sentence of imprisonment to the term already suffered. Since Government do not appear in the matter, we think we may do this on the ground just stated.

9. Under Section 423 of the Criminal Procedure Code, we alter the conviction under Section 409 to one under Section 406, Indian Penal Code, and reduce the sentence of substantive imprisonment imposed to the term already suffered, and maintain the fine at the sum at which it was fixed by the learned Sessions Judge.

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