State Vs. Marcel Carvalhe

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SooperKanoon Citation : sooperkanoon.com/358177

Court : Mumbai

Decided On : Jun-20-1988

Reported in : 1988(3)BomCR627

Judge : G.F. Couto and ;G.D. Kamat, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 409

Appeal No. : Criminal Appeal No. 9 of 1988

Appellant : State

Respondent : Marcel Carvalhe

Advocate for Def. : J. Dias, Sr. Adv. ;and B.F. D'souza, Adv.

Advocate for Pet/Ap. : G.U. Bhobe, P.P.

Disposition : Appeal dismissed

Judgement :

G.F. Couto, J.

1. This appeal by the leave of the Court is directed against the judgement dated 27th April, 1987, whereby the learned Judicial Magistrate, First Class, Penda, acquitted the respondent therein, from the charge of having committed an offence punishable under section 409 of the Indian Penal Code. The respondent had been

working as Superintendent (Eserivae) in the Vasce Court and in the discharge of his duties, he got some bonds executed before him by four accused. The said accused instead of getting bonds with securities, deposited each of them Rs. 500/-. The said accused had been duly tried and convicted was set aside in appeal and the decision observation Appellate Court was confirmed by this Court. After their acquittal, the said accused applied for the refund of the money deposited in Court, but they did not succeed in getting that money back. A complaint was made on their behalf and the learned Judicial Commissioner directed the Judicial Magistrate, First Class, to look into the matter and report to him. The Magistrate, accordingly, held an enquiry and submitted a report, according to which, a total amount of Rs. 4000/- had been received by the respondent from the said accused and, apparently, has been misappropriated by him. This happened some where in the year 1972, and no action apparently was taken for a long period of time, for only in 1984, a criminal complaint was filed against the respondent on the aforesaid misappropriation of the said amount of Rs. 4,000/-.

2. The respondent pleaded not guilty to the charge and, ultimately, was acquitted by the impugned judgement dated 27th April, 1987. The learned Magistrate observed that there was no evidence on record to prove that, in the year 1965, a cash book was written as regards the monies received in the Court. He further observed that it, was not known who had the duty to receive the monies and, in any case, what were the duties of the respondent. He also observed that there was no evidence at all that the amount of Rs. 4000/- had been entrusted to the respondent and the whole case of the prosecution was based in a statement made by the accused which was not bearing the signature of the Judge. For these reasons, he acquitted the respondent.

3. Now, it is the case of the learned Public Prosecutor that the learned Judge has not applied his mind to the evidence on record, for, otherwise, he could never have recorded a finding that the prosecution has failed to prove that the accused/respondent herein had been entrusted with the aforesaid amount of Rs. 4,000/-. This, otherwise, had been admitted by the respondent himself in an extra-judicial confession and it has been recorded in his statement given before the Magistrate of Vasco, while the latter conducted an enquiry in the matter Mr. Bhobe

urged that the circumstance that the said statement was not bearing the signature of the aforesaid Magistrate is irrelevant, for, on one hand, the said statement is duly signed by the Respondent, and on the other the Magistrate Shri Rege had been examined in the Court of the trial and he specifically stated that the respondent has made the aforesaid admission in the course of the enquiry. That apart, the learned Public Prosecution invited our attention to the cross-examination of the witness Gajanan Naik, P.W. 7, made by the respondent. Inter alia, it was put to the said witness that the respondent had handed over the keys of the safe and an envelope containing Rs. 4000/- in the presence of the witness Fideles Pereira. This suggestion by implication shows that it was the case of the respondent himself that he has handed over the envelope with Rs. 4000/- to the said Gajanan, and therefore, it embodies an admission that he had been entrusted with the said amount of money. It was further urged that, once this entrustment has been proved by the prosecution, it was for the respondent to account for the said amount and if he took the stand that he has handed over the said money to Gajanan Naik, the burden of proving it was entirely lying on him. This burden was not discharged, and therefore, according to the learned Prosecutor, the learned Magistrate ought to have convicted the respondent for an offence punishable under section 409 of Indian Penal Code.

4. There is no doubt, great force in the submission of the learned Prosecutor that the learned Magistrate was wrong in recording a finding that the prosecution has filed to prove that the respondent had been entrusted with the amount Rs. 4,000/-. As rightly pointed out by him, the said entrustment has been established beyond any reasonable doubt and is otherwise admitted throughout by the respondent. In the first instance, the prosecution brought on record a statement duly signed by him and which was recorded in the course of the enquiry held by the learned Magistrate. In the said statement, the respondent has specifically admitted that he had received in hand the aforesaid amount of Rs. 4,000/-, but he added that he handed over the said amount of his successor Gajanan Naik. It is true that the said statement is not signed by the learned Magistrate but that circumstance, in no manner, vitiates the admission made in the said statement. In fact, the authenticity of the said statement has not been challenged in the course of the trial and in assertion Mr. Rege, the learned Magistrate who recorded the said statement, has

stated in the course of his evidence that the said statement had been recorded by him and the respondent has admitted that he had received in hand, from the aforesaid accused, the said amount of money. That apart, as can be seen from the cross-examination of Gajanan Naik, most particularly from the suggestion made to him that the respondent had handed over the keys and the envelope containing Rs. 4,000/- to the said Gajanan in the presence of Fideles Pereira, the respondent's case had been always that although he had received the said amount, he had handed it over to the said Gajanan.

5. But, if the learned Prosecutor is correct in the above submission, we find it rather difficult to accept his submission that the prosecution has proved the misappropriation of money and an offence punishable under section 409 of the Indian Penal Code. Section 105 defines criminal breach of trust and lays down that whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the made in which such trust is to be discharged, or of any legal contract, express or implied, which he has mode touching the discharge of such trust, or wilfully suffers any other person to do so, commits criminal breach of trust. It becomes, thus clear that two conditions are to be proved in order to hold a person as having committed the said offence namely, (a) that the said person has been entrusted with property or with dominion over the said property; and (b) that he has dishonestly misappropriated or converted to his own use, or dishonestly had used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or has wilfully suffered any other person to do so. We have already seen that the prosecution has succeeded in proving the first ingredient of the offence. However, in our view, the prosecution has failed to discharge its burden as regards the second ingredient. In fact, the prosecution has not proved that the respondent has dishonestly misappropriated or converted to his own use the aforesaid Rs. 4,000/-. We may mention that the prosecution examined a few witnesses in order to prove the offence and, inter alia, P.W. 7 Gajanan Naik. Now, Gajanan Naik is, according to the respondent. The employee of the Court who was the successor of the respondent as Escrivae. The respondent has taken the stand that he handed over

the charge of Escrivae along with all the files and articles in his possession to the said Gajanan Naik. In his examination in-chief, the said Gajanan Naik stated that the said amount of money had been received when he was not working in the Vasco Court and he was the successor of the respondent. In cross-examination, he stated that the respondent Marcel Carvalhe was looking after the Office, including the receipt of the amounts and that when the respondent handed over the charge to him, he did not check all the records. He went further and said that the keys of the safe were handed over to him only after the arrest of the respondent. The said keys were still in possession of the latter and had been brought from the jail. This evidence of Gajanan Naik is bound to create serious doubts and suspicion. First of all, it is rather difficult to believe that he would have taken charge from the respondent without checking the articles which were supposed to have been handed over, especially when, amongst such articles, there were amounts of money and other valuables. Secondly, if the keys of the safe were handed over to him after the arrest of the respondent, one fails to understand how the said Gajanan Naik had not made the inventory of the contents of the safe in the presence of independent witnesses. The omission in doing so indicates that the statement of Gajanan is made mainly to escape any liability that would be accrued to him on account of his having held the post of Escrivao soon after the respondent. The aforesaid statement of Gajanan Naik in the course of his cross examination contributes also to create a doubt as to whether the stand taken by the respondent when he handed over the envolode with Rs. 4,000/- to Gajanan, is true. This doubt, obviously, benefits the accused/respondent and, consequently, leads us to the finding that the prosecution has failed to prove the second ingredient of the offence of the breach of trust. We may also mention here that in addition to the evidence of the Magistrate Bevani Rege and the statement given by the respondent in the course of the enquiry, there is also the evidence of the witness Fideles Pereira to corroborate that, in fact, the said amount of Rs. 4,000/- had been handed over and received by the respondent. But the prosecution having failed to prove the second ingredient of the aforesaid offence, manifestly, there is no reason for interference with the acquittal of the respondent although the reasons given by the learned trial Magistrate are not sustainable.

6. The result, therefore, is that this appeal fails and is consequently dismissed.