

Nilamber Vs. State

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Court : Allahabad

Decided On : Dec-06-1956

Reported in : AIR1957All381; 1957CriLJ620

Judge : Chowdhary, J.

Acts : [Evidence Act, 1872](#) - Sections 106; [Indian Penal Code \(IPC\), 1860](#) - Sections 405 and 409

Appeal No. : Criminal Appeal No. 1219 of 1954

Appellant : Nilamber

Respondent : State

Advocate for Def. : T.N. Madan, Adv.

Advocate for Pet/Ap. : N.D. Pant, Adv.

Disposition : Appeal dismissed

Judgement :

Chowdhary, J.

1. This is an appeal by one Nilamber Joshi who has been convicted by the learned Sessions Judge of Kumaun for an offence punishable under Section 409, I. P. C., and sentenced to one year's R. I. and to a fine of Rs. 100/- or, in default of

payment of fine, to further rigorous imprisonment for 2 months. The appellant was a postman at the post office at Almora, and he has been convicted for having dishonestly misappropriated a sum of Rs. 30/- which is said to have been entrusted to him for disbursement under a money order, the remitter of the amount being one Uttam Singh and the payee Mohan Singh, a student of the Degree College at Almora.

2. The prosecution case was that two money orders were received at the post office on 10-6-1952, the payee of both of which was one and the same person, Mohan Singh. The amount under one was Rs. 20/- and that under the other Rs. 30/-. Both the money orders & the amount thereof were handed over to the appellant, but while he did pay the amount of Rs. 20/-, he failed to pay that of Rs. 30/-, to the payee Mohan Singh. When Mohan Singh failed to receive this amount of Rs. 30/-, he entered into correspondence with the remitter Uttam Singh, who is a onisin of his and was in military service. On coming to know from Uttam Singh that the amount in question had in fact been remitted by him to Mohan Singh, and that the signature of Mohan Singh on the acknowledgment receipt did not appear to be his, Mohan Singh made a complaint to the Post Master at Almora on 22-7-1952. This complaint led to a departmental enquiry being held by the Inspector of Post Offices, and, as a result of this enquiry, the Inspector of Post Offices lodged a report with the police on 3-8-1952. Police investigation followed and the appellant was thereupon prosecuted and convicted as aforesaid.

3. The appellant admitted not having delivered the amount in question to the payee Mohan Singh. The story set up by him in this connection was that though he did not really pay the amount to Mohan Singh and Mohan Singh did not append his signatures on the money order form in his presence, he gave the amount of the money order at the house of Mohan Singh to a boy whom, he did not know from before. The appellant went on to state that the boy took the money order form and the money inside a room and that he later came back with the money order form duly signed and told the appellant that the money had been paid to Mohan Singh.

The appellant stated further that he called out if the money had been received and somebody replied in the affirmative from inside the rooms, and thereupon the

appellant came away thinking that the amount of the money order had been paid to Mohan Singh. Mohan Singh denied receipt of the amount. He also denied his signatures on the money order form. Two other students, Sher Singh and Umed Singh, the former of whom lived in the same room with Mohan Singh and the latter in another room of the same tenement, were examined but they denied that they received, or handed over to Mohan Singh, the money order form or its amount. The appellant did not produce the boy through whom he professed to have sent the money order form and its amount into Mohan Singh's room nor any other evidence in support of his statement. The learned Sessions Judge did not accept the statement of the appellant and, on a consideration of the entire evidence and circumstances, and accepting the unanimous opinion of the assessors in that behalf, held that the appellant had dishonestly misappropriated the amount of the money order and so committed the offence of criminal breach of trust under Section 409, I. P. C.

4. The learned counsel for the appellant submitted that if the facts and circumstances of the case lent support to the defence version regarding payment having in fact been made to somebody, even though not to the payee himself, the conviction of the appellant under Section 409, I. P. C. should not stand. That is no doubt a correct enunciation of the legal position; but the facts and circumstances of this case lend no support to the defence version. The various points raised by the learned counsel in this connection may now be examined.

5. The first point urged by the learned counsel was that the conduct of the payee Mohan Singh himself was suspicious since there was inordinate delay on his part in making the complaint to the Post Master: the money order reached Almora on 10-6-1952, but it was only on 22-7-1952, a month and 12 days later, that the complaint was made. One point sought to be made out incidentally in this connection was that the complaint Exh. P-1 on record did not appear to be the complaint which Mohan Singh had actually made to the Post Master, but that it was some other complaint.

The learned counsel referred in this connection to the statement of the Post Master in cross-examination. That statement however merely shows that the Post

Master was in doubt as to whether Exh. P1 was the particular complaint that was made to him by Mohan Singh since the complaint did not however go so far as to say that Exh. P1 was not the complaint, but that there was some other complaint, that was made to him by Mohan Singh. There does not really seem to be any point in the argument since it is not suggested that the other complaint was in any material particular different from the complaint Ext. P 1, At least there was no cross-examination of the Post Master on that score.

6. Reverting now to the contention of the learned counsel that there was inordinate delay on the part of Mohan Singh in making a complaint to the postal authorities, there are two letters on record which totally negative the force of this contention. Both the letters purport to have been sent by Uttam Singh to Mohan Singh, one dated 22-6-1952 and. the other 22-7-1952. The authenticity of the first letter was challenged by the learned counsel for the appellant.

The statement of Mohan Singh however was clear on the point, namely, that it was a letter sent to him by Uttam Singh. Furthermore, there was no cross-examination of Mohan Singh on the score of the letter not being authentic in any manner. It should be taken therefore that both these letters were received by Mohan Singh from Uttam Singh. A perusal of these letters shows that, when Mohan Singh failed to receive his monthly allowance in the particular month, he entered into correspondence with his cousin Uttam Singh.

That explains the so-called delay in the lodging of a complaint by Mohan Singh with the postal authorities. One argument put forward by the learned counsel regarding the second letter was that it speaks of Uttam Singh also having taken, some steps with regard to the non-delivery of the money order in question, but the prosecution had failed to show what those steps were and what was the upshot of those steps. That is however a matter quite irrelevant for purposes of the present case since, so far as this case goes, we are only concerned with the complaint of Mohan Singh which set on foot the enquiry leading eventually to the prosecution and conviction of the appellant. The first ground of attack on the score of delay in making the complaint therefore has no force.

7. The next point urged by the learned counsel for the appellant was that although admittedly specimen signatures of the complaint Mohan Singh, Sher Singh and Umed Singh were taken by the investigating officer for comparison with the signatures on the money order form and the acknowledgment receipt, expert evidence on that point was not secured by the prosecution. It is to be noted, however, that the appellant himself admitted in his statement under Section 342, Cr. P. Code, that the signature in question on the money order form, including the one on the acknowledgment receipt portion of it, were not the signatures of any of these three persons.

Where there was the necessity of the prosecution proving a fact which stood admitted? There was no other point taken by the learned counsel for the appellant except that the sentence imposed upon the appellant was severe. Before coming to the question of sentence it may be stated that there are two circumstances which lend such support to the prosecution case as to establish it.

In the first place, the prosecution having proved, and the appellant having admitted that the payment was not made to, nor the money order signed by, Mohan Singh or by the only two other students, Sher Singh and Umed Singh, who lived in the same tenements with Umed Singh, it was for the appellant, to prove who that boy was through whom the appellant professes to have made the payment and obtained the signatures of Mohan Singh. The only possible boys known were produced by the prosecution. Who the other particular boy referred to by the appellant was, could only be known to the appellant.

That was a fact which was especially within the knowledge of the appellant, and burden of proving that fact therefore was upon the appellant, within the purview of Section 106, Evidence Act. The present case therefore belonged to that exceptional class of cases in which, in the words of their Lordships of the Supreme Court in *Shambhu Nath Mehra v. The State of Ajmer*, 1956 SCR 199: ((S) AIR 1956 SC 404) (A),

'It would be impossible, or at any rate disproportionately difficult, for the prosecution to, establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience.'

The burden which, in view of the evidence adduced by the prosecution, had shifted on to the defence in this case was not discharged. As adverted to already, the appellant produced no evidence as to whom actually he had made the payment. He did not say that he even made an attempt to search for the boy to whom he professes to have made the payment.

8. In the next place, the very story set up by the appellant was wholly unworthy of credence.

The appellant is admittedly a postman of 13 years standing. It is incredible therefore that he should have disbursed the money order in question in the manner in which he professes to have done. It does not stand to reason that he should not have personally made the payment to Mohan Singh, or that he should not have obtained the signatures of Mohan Singh on money order form in his presence, but that he should have sent the form and the amount of the money order to Mohan Singh by the hand of a boy, and that too a boy who admittedly was not known to the appellant from before.

The manner of disbursement adopted by the appellant was also clearly in conflict with the procedure which the appellant should have adopted under the rules where payment is actually made not to the payee but to somebody else since in such a case the appellant should have had the payment to and signatures of the stranger payee attested by a witness. The story set up in court by the appellant was also different from that he gave out at that earliest in the course of the departmental inquiry for his statement in that inquiry was that he had paid the amount personally to Mohan Singh and Mohan Singh had signed the money order form in his presence. When the appellant was confronted with that earlier statement of his, he was unable to offer any satisfactory explanation for the contradiction. There can be no doubt therefore that the story set up by the appellant was false.

9. For all the above reasons, I must agree with the learned Sessions Judge and hold that the appellant was guilty of the offence for which he had been convicted. As regards the sentence imposed upon the appellant, it cannot be said that the sentence of rigorous imprisonment for one year erred on the side of severity, considering that the maximum sentence provided by the law for this offence is

imprisonment for life. At the same time, the learned counsel was right in urging that a fine of Rs. 100/- in the case of a poorly paid person like the appellant was too severe. This fine may .therefore appropriately be reduced to a sum of Rs. 30, that being the amount which the appellant has been found to have misappropriated. There should also be a further direction in regard to this amount of fine that it should be paid to Mohan Singh by way of compensation.

10. In the result therefore the appeal is dismissed and the conviction and sentence of the appellant are maintained subject to the modification that the amount of fine is reduced from Rs. 100/- to Rs. 30/- and it is hereby directed that the fine, if realised, shall be paid to Mohan Singh by way of compensation. In default of payment of fine, the appellant shall suffer further rigorous imprisonment for 2 months. The appellant, who is on bail, shall surrender and serve out the sentence imposed upon him; his bail bonds are cancelled.

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