

Shiam Sunder Vs. Emperor

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Court : Allahabad

Decided On : Mar-04-1922

Reported in : AIR1923All469; 66Ind.Cas.177

Judge : Ryves, J.

Appellant : Shiam Sunder

Respondent : Emperor

Judgement :

1. Sham Sunder, a sonar, was convicted of an offense under Section 406 of the Indian Penal Code by a Magistrate of the First Class, and his appeal was rejected by the learned Sessions Judge of Farrukhabad. He comes here in revision. The only ground taken is, that the judgment of the Appellate Court itself contains sufficient grounds for holding that there is a reasonable doubt in the case. The practice of this Court has long been not to interfere in criminal revision on facts found by the lower Appellate Court, but the rule is not an absolute one. The revision has been admitted by a very experienced Judge of this Court and the record is before me, and I have to satisfy myself as to 'the propriety of the finding.'

2. To put it very briefly, the case for the prosecution was that Mul Chand, who keeps a medicine shop in the Bazar of Farrukhabad, was anxious to have some jewellery repaired for a ceremony which was to take place on the 30th of November last at his house, and, therefore, sent for Sham Sunder, sonar, whose

shop was not far off, and on his arrival made over to him three articles of jewellery, valued at about Rs. 800 or a little more, for repairs, The artistes were to be returned the same evening. That evening the complainant sent his servant to get the articles. He came back and said that Sham Sander could not be found. Next day the complainant went to Sham Sunder's shop and asked for return of the ornaments, whereupon Sham Sander denied that he had received any ornaments or that he knew the complainant. That afternoon the complainant made his report at the Police Station. It is said that when the jewellery was handed at the complainant's shop to the accused, there were present five persons who saw the transaction.

3. The story itself seems to me highly improbable. It would be very improbable if the scene were laid in Bond Street or Piccadilly, but it becomes even more improbable in the Bazar of an Indian city. The shop faces the street and passers by can see and hear what was going on. At that hour of the day, between 12 and 1, there must have been a large number of persons in the street. Now, it is strange that the following criticism can be made against the five persons who say they saw the occurrence. One is the complainant's servant, another is a close relation, the third is a member of his biradari, the fourth has proved himself unworthy of credit, and the fifth is a next door neighbour and a man of no weight. Now, the learned Magistrate who tried the case has frankly admitted that the accused's story is not less believable than the complainant's, After saying that he cannot conceive any explanation for the divergence between the complainant's statement and that of one of his witnesses, he goes on to say: 'All I can say is that the discrepancies and weakness in the defense story are infinitely greater.' Later on he adds: 'Very strong evidence was required to prove the line taken up by the accused. By taking this line the burden of proof was shifted to his shoulders,' and he convicted the accused, The learned Sessions Judge has written a very long judgment most of which, however, is taken up with repeating arguments on both sides. He, too, it seems to me, has adopted more or less the same line as the learned Magistrate. After pointing out that the accused had a good record, and a priori it was very unlikely that he would damage his professional career in the way alleged by the complainant, he goes on to say that the temptation was not small and the accused might have been in immediate want of money. This is a mere

assumption. There is no evidence of it. He concludes his judgment by saying, 'it seems to me that the complainant's story is the in ore probable of tie two and (sic) dismissed the appeal, It seems to me that this is not Quite a fair way of trying the case. It is scarecly much to say that the burden of proof is never on the accused to prove his innocence, and before he can be called on for his defence the Court must be satisfied that therein a strong case for him to meet. It is not right, in my opinion, to say that, because the story told by the defense is more improbable than the very improbable story told by the complainant that, therefore, the accused should be convicted. I cannot believe the complainant when he gays that when he demanded back the ornaments from the accused, the accused replied that he did not even know the complainant, It is proved that there were dealings, in the past between them. Apart from this, there is the initial improbability that the accused, if he tock the ornaments in the way he is said to have done, when he must have known that at least five persons at the shop saw it and there might have been other independent persons in the street who might have seen it, would have the audacity the very next day to deny the whole thing. Now, examining the transaction a little more closely, I find that, although the ornaments worth Rs. 800 were made over on the occasion, no receipt was taken and no writing of any kind was recorded. It is proved that when gold of much less value was given to the accused by the complainant a memorandum was made or it. The witness, Ram Swap Agarwala, who might be called an independent witness, says that's he was present on the occasion, having come back from Delhi with some drags which he had purchased for the complainant. Unfortunately, this is the witness whose statement is be discrepant to that of the complainant that the Magistrate frankly says: 'I cannot conceive any explanation for this divergence in their statements', and it is still more unfortunate that, although the complainant keeps bahi khata, there is no entry in it about these drugs. Ail the other witnesses who professed to have seen the occurrence are very closely connected with the complainant. The only other witness who seems to me to be independent is Kali Charan and I was to a considerable extent impressed with what he said. He said that on the 30th of November, that is, the day after the goods were said to have been made over to the accused, the complainant came to him and asked him to use his influences over the accused to get back the ornament. He is the clerk of a Vakil and prima

facie there is no reason to disbelieve his story, but at the same time, he had money dealing with the complainant and the actual statement which he makes is really very vague. Now, the occasion for the handing over of these ornaments to the accused is said to be a ceremony on the accused is said to be a ceremony on the following day at the complainant's house. In fact, the complainant's case is that he was very busy making arrangements for the next day for the ceremony. On this point he is completely contradicted by his own servant, who says that's the complainant and his brother remained the whole of that day at the shop. There is really no other evidence that the ceremony was to take place the very next day, and if the servant is to be believed it is improbable. It seems to me that the story of the defense, which may or may not be true, at any rate establishes this much that there had been previous dealings between the parties and that there was some sort of dispute between them. I am far from saying that the accused has established his story, but that, in my opinion, does not prove that he was guilty. The complainant himself apparently owes money but this, again, I think is not very important. The accused had admittedly borne a good character previously. He seems to have a fairly good business and has been up to this generally considered quite honest. The temptation, under the circumstances, considering that misappropriation, if made, must inevitably have been detested because the goods were given to him must openly before many witnesses, does not seem to me sufficiently overpowering. Nemo repens turpissimus fit, On the whole, I am not satisfied beyond a reasonable doubt of the guilt of the accused. He is, in my opinion, entitled on that ground to an acquittal. I, therefore, allow this application, set aside the conviction and sentence of Sham Sunder and direct that he be released.