

Parbati Devi Vs. State of U.P. and Ram Narain

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Court : Allahabad

Decided On : Oct-11-1971

Reported in : 1972CriLJ1644

Judge : Gulati, J.

Appellant : Parbati Devi

Respondent : State of U.P. and Ram Narain

Judgement :

Gulati, J.

1. This is an appeal against the order of acquittal of the respondent of a charge under Section 427, I. P.C. passed by Sri S. N. Misra Magistrate First Class, Mirzapur.

2. The appellant Parbati Devi and the respondent Ram Narain were the complainant and the accused respectively in the lower Court. The appellant had filed a complaint against the respondent on September 25, 1968 relating to an occurrence which took place on November 10, 1967. It was alleged in the complaint that the respondent had demolished a latrine which was situated in a corner outside her house and was in the use of her family members since long. It was further alleged that as a result of the demolition of the latrine, she had suffered loss of about Rs. 200/-. She had also alleged some Marpit and exchange

of hot words. Two witnesses were examined by her. The Magistrate framed a charge under Section 427, I. P.C. against the respondent. Subsequently 28th June, 1969 was fixed for further examination of the witnesses and probably for the production of some witnesses of the complainant. But on that date neither the complainant was present nor her witnesses. The accused respondent namely Ram Narain was also absent. In these circumstances the learned Magistrate acquitted the respondent under Section 258(1). Cr. P.C. without recording the statement of the accused under Section 342 Cr. P.C. The learned Magistrate has stated in his order that there was no evidence on the side of the prosecution and therefore no conviction could be recorded hence in his opinion, the only course open to him was to acquit the accused.

3. There can be no two opinions that the view taken by the learned Magistrate is erroneous. In a warrant case where a charge has been framed it is the duty of the court to enforce the attendance of such of the prosecution witnesses as are required for re-cross-examination by the accused. This has to be done by the issue of the processes if necessary coercive the complainant in such a circumstance is clearly out of the picture. He cannot be made responsible for the presence of the witnesses whom the accused wants to re-cross-examine unless the complainant himself has undertaken to produce them. There is no such allegation in the present case that the complainant had undertaken to produce the prosecution witnesses. The acquittal of the accused in such circumstances was clearly unwarranted. The observation of the trial Court that there was no evidence on behalf of the prosecution is obviously incorrect, because admittedly two witnesses had already been examined.

4. This view is supported directly by a decision of a Division Bench of this Court in *Saghir Uddin v. Mt. Munni* : AIR1949 All428 . It was held in that case that a duty is cast on the Magistrate to recall the prosecution witnesses for cross-examination as required by Section 256. Cr. P.C. The duty of procuring their attendance cannot be laid on the shoulders of complainant. In such a case when the complainant is also absent, the proper course for the Magistrate is to adjourn the case and ask the accused which of the prosecution witnesses he wishes to cross-examine and to summon them. His order acquitting the accused would be illegal and liable to be

set aside. To the same effect are the judgments of the Patna High Court in Kuni Behari Yadav v. Basdeo Yadav : AIR1958 Pat104 and the Tripura High Court in Aswini Kumar Bhowmick v. Dwijen Dev AIR 1966 Tripura 20 1966 Cri L.J. 20. There is thus no doubt that this appeal must technically succeed and the order of acquittal must be set aside.

5. The question however arises as to whether this is a fit case in which retrial of the accused should be ordered, From a perusal of the complaint and the evidence on the record it appears that the matter which the appellant tried to take up is an old one. The occurrence took place in November. 1967 and the complaint was lodged nearly ten months after in September 1968. The first information report was lodged after about an year in November 1968. The dispute appears to be trivial. It is in evidence that after the demolition of the latrine, the appellant had set up another latrine in her house and the respondent had likewise opened a door towards the side where the old latrine existed. There was a civil litigation between the parties also in which the appellant lost. Then there were proceedings under Section 145 Cr. P.C. which have also terminated. In the circumstances it would not be advisable to reopen such a stale matter. There appears to become dispute between the parties about the land on which the latrine stood. The land was claimed by the respondent as belonging to him. To me it appears to be a dispute of a civil nature.

6. For all these reasons I am of opinion that a retrial of the respondent would amount to unnecessary harassment and would not serve any useful purpose. It would be enough if in this appeal the erroneous view taken by the trial Court is set right. I accordingly hold that it was the duty of the learned Magistrate to have issued the necessary processes to enforce the attendance of the witnesses whom the respondent wanted to cross-examine and on the failure of the complainant to be present on the date of the hearing and on the failure of the witnesses to be present on that date, the Magistrate was not justified in ordering the acquittal of the complainant. However having regard to all the facts and circumstances of 'the case as set out above this is not a fit case in which a retrial of the respondent should be ordered.

7. This view is supported directly by a decision of the Mysore High Court in N. R. Murthy v. P. D. Narayan AIR 1957 Mys 18 : 1957 Cri. L.J. 209. The facts of that case were also identical to the facts of the present case. There also the Mysore High Court held that the order of acquittal was illegal and was liable to be set aside but the Court refused to order retrial in view of the trivial nature of the offence attributed to the accused and the long lapse of time A somewhat similar view has been taken by this Court in State v. Rava Chand : AIR1961 All352 .

8. In the result the appeal fails and is dismissed.

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