

Sadasiva Jena Vs. State

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Court : Orissa

Decided On : May-15-1982

Reported in : 1983CriLJ521

Judge : B.K. Behera, J.

Appellant : Sadasiva Jena

Respondent : State

Judgement :

ORDER

B.K. Behera, J.

1. The petitioner, serving at the relevant time as the Branch Postmaster in the Branch Post Office at Chanrapur with the Head Post Office at Jagatsinghpur in 1973, stood prosecuted being charged under Sections 409 and 477A of the Penal Code (hereinafter referred to as the 'Code') for committing criminal breach of trust, by temporarily misappropriating a sum of Rs. 1,000/- deposited with him in the Savings Bank Past-Book account (Ext. 1) by purna Chandra Jena (P. W. 1), as per the entry, Ext. 1/1, made by the petitioner, on 7-11-1973 which deposit was shown in the accounts at 'he Branch Post Office 10 days thereafter on 17-11-1973, by temporarily misappropriating a sum of Rs, 600/- deposited by the same depositor in his Pass Book on 14-11-1973 as per the entry, Ext. 1/3. made by the petitioner, which deposit was shown in the accounts of the Branch Post Office on 24-11-

1973, and by committing misappropriation of Rs. 990/- deposited by the same depositor on 17-11-1973 with the petitioner for which also the petitioner had made entry in the Pass Book. The last deposit was not shown in the accounts maintained at the Branch Post Office. On receipt of information about the commission of the offences, the Inspector, C. B. I., Bhubaneswar (P. W. 9), drew up the first information report (Ext. 18) after obtaining orders of the Superintendent of Police, C. B. I., Bhubaneswar and took UP investigation of the case in the course of which he examined the witnesses, seized the relevant documents and on completion of investigation, placed a charge-sheet against the petitioner.

2. The petitioner's case was that believing in good faith that P.W. 1. a close relation of his, had actually deposited Rs. 1,000/- on 7-11-1973, he made the entry in the Pass Book, but later noticed that the amount was short by Rs. 200/- which was made good by P. W. 1 on 17-11-1973 and on that day, he showed the deposit in the accounts maintained at the Branch Post Office. Similarly, on receiving Rs. 600/- from p. W. 1 on 14-11-1973, he made the entry in the Pass Book, but later found out that one hundred-rupee currency note was torn and accordingly on his request, P. W. 1 exchanged the hundred-rupee currency note on 24-11-1973 on which day, the petitioner showed the deposit in the accounts of the Branch Post Office. According to the petitioner, he had not received Rs. 990/- from P. W. 1 on 17-11-1973. but P. W. 1. wanted to deposit that amount on that day. Although he had not come with the full money, he made the entry in the Pass Book showing deposit of this amount, because of his relationship with P. W. 1. The petitioner had asserted that he had not received Rs. 990/- from P. W. 1 and had not shown the deposit of this amount in the accounts maintained at the Branch Post Office He had denied to have made any extra-judicial confession before the Inspector of Post Offices (P. W. 8).

3. At the trial, the prosecution had examined nine witnesses to bring home the charges to the petitioner who had examined one witness (his father} in his defence.

4. On a consideration of the evidence, the trial court did not rely on the extra-judicial confession said to have been made by the petitioner before p. W. 8 and

the appellate court, too. did not rely-on it. As on his own showing, P. W. 1 had not deposited Rs. 990/- with the petitioner, it was held that the petitioner could not be held to be guilty of the charge of criminal breach of trust and falsification of accounts in respect of this deposit of Rs. 990/- as shown in the Pass Book. Both the trial and the appellate courts, however, found the petitioner guilty of both the charges in respect of the other two amounts of deposits, viz., Rs. 1,000/- on 7-11-1973 and Rs 600/- on 14-11-1973, on the basis of the evidence of P. W. 1 and the entries in the Pass Book. Regard being had to the fact that the petitioner had been suffering from paralysis and was unable to move on his own. the trial court sentenced him to suffer imprisonment till the rising of the court under Section 409 of the Code and to pay a fine of Rs. 500/- and in default of payment thereof, to suffer simple imprisonment for a further period of two months on each count. The petitioner unsuccessfully appealed to the Court of session against his order of conviction in respect of both the charges. ' The learned Additional Sessions Judge, while maintaining the order of conviction passed against the petitioner in respect of the two offences, reduced the sentences of fines and it was ordered that the petitioner would pay a fine of Rs. 250/- in respect of each of the offences, i. e., a total sum of Rs. 500/- and in default of payment thereof, would suffer simple imprisonment for 7 days.

5. Dr. S.C. Dash, the learned Counsel for the petitioner, has taken me through the evidence and has contended that there had been no proof of en-trustment of Rs. 1,000/- and Rs. 600/- with the petitioner on 7-11-1973 and 14-11-1973 respectively and the case of the petitioner that a short deposit had been made on 7-11-1973 and that on 14-11-1973. a torn hundred-rupee currency note had been given to him by P. W. 1 while depositing Rs. 600/- and that p. w. 1 made good the two amounts on 17-11-1973 and 24-11-1973 respectively on which dates the petitioner showed the deposits in the accounts maintained at the Branch post Office was reasonably true and would get assurance from the evidence of no other person than P. w. 1 and ought to have been accepted. It has also been submitted that the prosecution against the petitioner was bad in law for want of sanction. Mr. Nayak, the learned Additional Government Advocate, has submitted that both the charges against the petitioner had been established and none of the contentions raised on his behalf in this Court shall prevail. I have also heard the learned

Counsel for both the sides on the question of enhancement of the sentences for which a rule has been issued to the petitioner at the time of admission of this revision.

6. In a case of this nature, how the prosecution has to establish the charge has clearly and lucidly been laid down by the Supreme Court in the case of *Rabindra Kumar Dey v. State of Orissa* : 1977 CriLJ173 . It has been observed by the appellate court in the instant case that having made entries in the pass Book (Ext. 1), the petitioner has taken the plea that short deposit had been made on the first occasion on 7-11-1973 and one of the hundred rupee currency notes in respect of the deposit of Rs. 600/- on 14-11-1973 ' was a torn one for which P. W. 1 had replenished the deficit sum in respect of the first deposit and changed one hundred-rupee currency note subsequently on 17-11-1975 and 24-11-1973 respectively when these deposits were shown in the relevant accounts maintained at the Branch Post Office and therefore, these facts being within his special knowledge, the petitioner was to establish these facts. The appellate court had in mind the provisions of Section 106 of the Evidence Act, When the facts are within the special knowledge of an accused person, he is, no doubt, to place the circumstances on the record to Show that his plea is a reasonable and probable one. But he is not to prove his case beyond reasonable doubt as it is the duty of the prosecution to do. In the aforesaid case of the Supreme Court, their Lordships laid down thus:. In our opinion three cardinal principles of criminal jurisprudence are well-settled, namely;

(1) that the onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from weakness or falsity of the defence version while proving its case;

(2) that in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and

(3) that the onus of the prosecution never shifts.

It is true that under Section 105 of the Evidence Act the onus of proving exceptions mentioned in the Indian penal Code lies on the accused, but this

section does not at all indicate the nature and standard of proof required. The Evidence Act does not contemplate that the accused should prove his case with the same strictness and rigour as the prosecution is required to prove a criminal charge, in fact, from the cardinal principles referred to above, it follows that, it is sufficient if the accused is able to prove his case by the standard of preponderance of probabilities as envisaged by Section 5 of the Evidence Act as a result of which he succeeds not because he proves his case to the hilt but because probability of the version given by him throws doubt on the prosecution case and, therefore, the prosecution cannot be said to have established the charge beyond reasonable doubt. In other words, the mode of proof, by standard of benefit of doubt, is not applicable to the accused, where he is called upon to prove his case or to prove the exceptions of the Indian Penal Code on which he seeks to rely. It is sufficient for the defence to give a version which competes in probability with the prosecution version, for that would be sufficient to throw suspicion on the prosecution case entailing its rejection by the court.

7. It is admitted on all hands that the petitioner had made three entries in the pass Book (Ext. 1) of P. W. 1 showing deposits of Rs. 1,000/- on 7-11-1973. Rs. 600/- on 14-11-1973 and Rs. 990/- on 24-11-1973. It is also in evidence and the petitioner cannot legitimately claim ignorance about the postal rules to the effect that on the same day of deposits, the deposits are to be shown in the postal accounts which are required to be sent to the Sub-Post Office. The evidence would show that the petitioner had not shown the deposits in the accounts maintained at the Branch Post Office on the dates the entries had been made. There was in this regard, the evidence of P. W. 1 besides the entries in Ext. 1 and one can get the other facts from the evidence of P. W. 3, a Clerk in the Savings Bank Mail Section at the Alanahat Sub-Post Office, P. W. 4, the Sub-Postmaster of the Alanahat Sub-Post Office, P. W. 5, the Ledger Clerk in the Head Post Office at Jagatsinghpur, P. W. 6 who relieved the petitioner from the office of the Branch postmaster on 11-12-73 and P. Ws. 7 and 8. Inspectors of Post Offices at Jagatsinghpur. But the main question for consideration, in view of the cases put forward by both the sides, is as to whether P. W. 1 had, in fact, handed over Rs. 1,000 or Rs. 800 to the petitioner on 7-11-1973 and as to whether one hundred-rupee currency note out of the amount of Rs. 600/- handed over to the petitioner

on 14-11-1973 was a torn one and as to whether these amounts had been made good later, as sought to be shown by the defence.

8. It is, no doubt, true, as has been urged before me on behalf of the State, that the defence of the petitioner regarding the deposits of Rs. 1,000/- and Rs. 600/- had not been suggested to P. W. 1 in his cross-examination and in my view, these facts ought to have been suggested to p. W. 1, but from this fact alone, the plea of the petitioner was not to be rejected if the other evidence on record would show that his case was a reasonable and probable one.

9. It could not be said that the defence set up by the petitioner was the product of an afterthought at the stage his statement was recorded under Section 313 of the Criminal p. C. as suggestions in this regard had been made to P. W. 8, who had made the enquiry, although this witness had denied the suggestions made to him. P. W. 8 had stated in his cross-examination thus; It is not true that the accused told me that Purna Chandra Jena did not pay him the full amount Rs. 1000/- and Rs. 600/- on 7-11-1973 and 14-11-1973 respectively but paid the same on 17-11-1973 and 24-11-1973 when the entries were made in post office account.

As testified by P. W. 8 himself, the father of the petitioner was all along present with him during the enquiry made by him with regard to the three deposits.- Thus, the father of the petitioner, examined by the petitioner as D. W. 1. was a competent witness in this regard and he had testified in his evidence thus: On 11-12-1973 when my son was serving there Brajakishore Mohanty (P. W. 8) went there. P. W. 8 called my son to the post office and I accompanied my son thereto. In my presence p. W. 8 the Inspector enquired from my son as to what happened of the deposit of Rs. 1000/- made by Purna Chandra Jena on 7-11-1973, in that post office. He also enquired as to why he has not accounted that Rs. 1000/- on 7-11-73 though shown in the postal Savings pass Book on 7-11-73. My son also explained to the Inspector that the deposit of Purna Chandra Jena impressed upon him that the money which he made over to my son for deposit was Rs. 1,000 and after when my son counted the money, he found that it amounted to Rs. 800/- but not Rs. 1,000/-. My son also told that he counted the money after showing deposit of Rs. 1,000/- in the Pass Book of purna Chandra Jena My son also stated that

when shortage was found out, he immediately asked Sri Jena to give the full amount and on the statement of Ptirna Chandra Jena to make recoupment later and that he should be given back the incomplete amount of Rs. 1,000/- my son returned the amount Of Rs. 800/- to him and it was 17-11-73 when Purna Chandra Jena gave the complete amount of Rs. 1,000/-, he (my son) accounted for that amount, in the accounts of the Branch Post Office on 17-11-73.

The Inspector then asked my son in my presence as to why he did not account for another deposit, of Rs. 600/- shown in the S.B. Pass Book of the same pass book of Purna Chandra Jena on 14-11-73. To this, my son replied that Purna Chandra Jena delivered Rs. 600/- in six hundred rupee notes to which he simply counted but not verified, kept them in the table, shown deposit in the pass book and then verified its correctness when he found one of such notes to be torn and asked the depositor about it. My son also told that on the presentation of Purna Chandra Jena that he should give the six hundred towards complete deposit and for that he should take back the money which he deposited on that day, my son re-turned those 6 hundred rupee notes to the depositor and received back the complete amount from him on 24-11-73 when he could show the same in the accounts of the Branch Post Office. My son had told that he had shown the amount in deposit in the pass book of the depositor on 14-11-73....

This witness (D. W. 1) had also stated about the defence of the petitioner with regard to the deposit of Rs. 990/-. It is, however, not necessary to refer to that evidence as the petitioner had not been held guilty regarding that deposit. I have been taken through the cross-examination of D. W. 1 and I see no infirmity in his evidence. He would, no doubt, be interested for a successful termination of the trial in favour of the petitioner, his son, but as I have stated above, he was present at the time of enquiry made by P. W. 8 and was, therefore, competent to depose to these facts. The evidence of D. W. 1 about the statements made by the petitioner during the enquiry before P. W. 8 would render assurance to his defence.

10. As would be seen from the evidence of P. W. 1, the petitioner and he are cousin brothers. D. W. 1 had testified that the father of p. W. 1 was his first cousin and according to him, the grandfather of P. W. 1 and his (D. W. 1's) father were

brothers. It would thus be clear that P. W. 1 and the petitioner are closely related to each other. As regards the entry in respect of Rs. 990/- on 17-11-1973, it would be better to keep in mind the evidence of P. W. 1 himself and this witness had testified thus: On 17-11-73 I wanted to pay Rs. 990/- to the accused for depositing the same in the post office but as I had got Rs. 110/- less with me, I kept Rs. 790/- with me. The accused made the entries out of confidence in me as if I paid Rs. 990/-. Accused is related to me as agnatic cousin brother. On both the dates the accused made necessary entries in my pass book in my presence and put his initial in the last column. This is the relevant entry, marked as Ext. 1/3 containing the transactions of 14-11-1973 & 17-11-73. These are the initials of the accused put in my presence on the aforesaid two dates marked as Ext. 1/4...

Thus, on his own showing, although he had not deposited Rs. 990/-, the petitioner had regard being had to the relationship with P. W. 1, and evidently because of the confidence he had reposed in him, made the entry in respect of such a huge sum although this amount had not been deposited with the petitioner. This would tell its own tale and would lend assurance to the case put forward by the petitioner in respect of the other two transactions.

11. Further, the definite case of the defence was that P. W. 1 had handed over money in respect of which the entry showing deposit of Rs. 1000/- had been made on 7-11-1973, but later the petitioner found that it was short by Rs. 200/- for which P. W. 1 had been informed and he had made good the amount on 17-11-1973. This defence would find assurance from the fact that on 14-11-1973, P. W. 1 had come to the petitioner for another deposit of Rs. 600/- and it could reasonably be assumed that on that day, P. W. 1 had been informed about the shortage of cash in the deposit 'made by him on 7-11-1973 and from the fact that although P. W. 1 wanted deposit of Rs. 990/- on 17-11-1973, he kept back Rs. 790/- with him while the petitioner made an entry in respect of the deposit of Rs. 990/-. This would distinctly show, as submitted by Dr. Dash, that as on that day, P. W. 1 made good the deficit of Rs. 200/- regarding the deposit on 7-11-1973, he kept Rs. 790/- with him and paid Rs. 200/- to the petitioner and on the same day, the petitioner had shown in the accounts maintained at the Branch Post Office regarding the deposit of Rs. 1000/- in the Pass Book. The fact that without the deposit having really

been made on 17-11-1973, the petitioner made an entry with regard to a deposit of Rs. 990/- in the Pass Book (Ext. 1) and the circumstance clearly indicating that P. W. 1, out of Rs. 990/-, paid Rs. 200/- to the petitioner on 17-11-1973 would indicate that the case of the defence was not false. Regard being had to the relationship between the depositor and the petitioner and the other circumstances referred to above, his case as set, out before P.W. 8 during the enquiry, as deposed to by D. W. 1, that out of the currency notes deposited by P. W. 1 on 14-11-1973, one hundred-rupee currency note had been torn which was replaced on 24-11-1973, would appear to be a reasonable and probable one. Evidently, the petitioner had no mens rea and in view of what has been found above, it could not be said that he had either committed misappropriation in respect of the amounts or a part thereof deposited with him or had been guilty of the charge of falsification of accounts.

12. The evidence of P. W. 8 Inspector of Post Offices, who had conducted the enquiry, would show that he had not properly applied his mind to make a thorough enquiry into the matter especially because of the relationship between the petitioner and P. W. 1 and had not verified the truth of the statements made by the petitioner before him, as testified by D. W. 1, and on his own showing he appeared to be interested for the prosecution as he came out with a story that the petitioner had confessed before him with regard to the commission of the offences. In this regard, p. W. 8 had testified thus : . The accused confessed before me that he had spent away the amount of Rs. 990/- and had not accounted for. So saying, he paid me Rs. 994.60 including interest of Rs. 4.60 p.

The accused also told me that he had spent away the other 2 amounts of Rs. 1600/- and deposited them late and so he accounted for these 2 amounts on later dates.

In view of the statement of P. W. 1 himself that he had not deposited Rs. 990/- with the petitioner, the petitioner would never have confessed before P. W. 8 that he had spent away the amount of Rs. 990/- and had not accounted for it. That apart, although P. W. 8 had not made a statement before the Investigating Officer (P. W. 9) that the petitioner had confessed before him that he had spent away Rs.

1,000/- and Rs. 600/- on 7-11-1973 and 14-11-1973 respectively after the amounts were handed over by Puma Chandra Jena (P. W. 1) and that he had been paid Rs. 990/-, he had blurted out such statements in his examination-in-chief evidently to bolster up the case of the prosecution. The omissions of such statements especially with regard to extra-judicial confession said 10 have been made by the petitioner while P. W. 8 was under examination by the Investigating Officer could not be characterised as inconsequential omissions and would be taken as contradictions within the purview of the Explanation to Section 162 of the Criminal P. C. That apart, none of the persons said to be present at the time the petitioner allegedly made the extra-judicial confession before him had testified in this regard. Rightly, therefore, the courts below did not place reliance on the evidence of this witness with regard to the extra-judicial confession made by the petitioner,

13. No doubt, during the enquiry, a sum of Rupees 994,50 paise was deposited in respect of the deposit of Rupees 990/- shown in the Pass Book (Ext. 1), but the fact remains that P. W. 1 had not deposited Rs. 990/- and as the evidence of D. W. 1 would show, at the instance of P. W. 8 and owing to fear, this amount was arranged and deposited and this included interest on the sum of Rupees 990/- for some period.

14. P.W. 1 had stated in his evidence that on 5-12-1973, he made an application (Ext. 2) and submitted his pass Book (Ext. 1) to the Sub-Postmaster, Alanahat Sub-Post Office, for transferring the account from the Chanrapur Branch Post Office to Alanahat Sub-Post Office and at the time of handing over the Pass Book to him, the petitioner had told him to ascertain from the Sub-Postmaster as to how the entry of Rupees 990/- would be regularised as he (P. W. 1) had not paid this amount to the petitioner, but p. w. 1, who, on his own showing, had not deposited this amount for which an entry had been made, wanted to take advantage of the entry and the evidence would show that he claimed the entire amounts in respect of which deposits had been shown in the Pass Book without heeding to the advice of the petitioner and this would indicate that this witness had scant regard for truth. His evidence should have been approached with caution and should not have been accepted by the courts below. He is, no doubt a very close relation of the petitioner and it has not been shown as to how and why he would come forward

and depose against the petitioner, but mysterious is the working of the human mind and merely because it has not been shown as to how some one has come forward to depose against an accused person in a criminal trial, his evidence is not to be accepted if it is found to be untrue and unreliable. See : 1981 CriLJ325 Shankarlal Gyarsilal Dixit v. State of Maharashtra).

15. The aforesaid facts, evidence and circumstances would show that the version of the defence was a reasonable and probable one. It has been indicated earlier in this judgment and it may be stated at the cost of repetition that an accused person is not to prove his case beyond reasonable doubt and he is not to prove his case with the same strictness and rigour as the prosecution is required to prove a criminal charge. The petitioner had established his case as required by law. The trial and appellate courts did not carefully scrutinise the prosecution evidence and did not properly examine as to whether the defence of the petitioner was a reasonable and probable one and in my view, their findings against the petitioner were unreasonable calling for interference by this Court in revision.

16. At the stage of hearing this revision, Dr. Dash, on the basis of an affidavit, filed in this Court, has urged that after the petitioner was removed from service, P. W. 1 has been able to get employment in his place and that in order to get such employment, he had falsely implicated the petitioner. The affidavit filed in this Court cannot be treated as legal evidence and therefore, it would not be legal and proper for this Court to take notice of this submission made on behalf of the petitioner.

17. The learned Counsel for the petitioner has submitted before me that the prosecution against the petitioner was bad in law because of want of sanction of the appropriate authority. The learned Additional Government Advocate has, however, submitted that the petitioner was discharged from service on 11-12-1973 and by the time charge-sheet was placed in August, 1974, he was no more a public servant and therefore, no sanction was necessary. In the view I have taken, it is not necessary to go into this question.

18. In the result, I would allow the revision and set aside the order of conviction and sentences, passed against the petitioner under Sections 409 and 477A of the

Indian Penal Code. Consequent upon the revision being allowed, the rule for enhancement of the sentence is discharged.

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