Francis Vs. Pradeep

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Court : Kerala

Decided On : Jul-13-2004

Reported in : 2005(1)ALD(Cri)17; IV(2004)BC320; 2004CriLJ3827; 2004(2)KLT1080

Judge : R. Basant, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 254(2); Negotiable Instruments Act, 1881 - Sections 138

Appeal No. : Crl. R.P. No. 854 of 2003

Appellant : Francis

Respondent : Pradeep

Advocate for Def. : Jobi Jose Kondody, Adv. and; Tresa Rani George, Public Prosecutor

Advocate for Pet/Ap. : Grashious Kuriakose, Adv.

Judgement :

R. Basant, J.

1. Does Section 254(2) Cr.P.C. oblige the Magistrate to accept every request to send a cheque to the handwriting expert, in a prosecution under Section 138 of the

N.I. Act? This question incidentally arises for consideration in this Revision Petition which is directed against a concurrent verdict of guilty, conviction and sentence in a prosecution under Section 138 of the N.I. Act.

2. The cheque is for an amount of Rs. 13,000/-. The complainant alleged that it was issued by the accused to him for the discharge of a liability arising from sale/purchase of banana bunches. Notice of demand, though received and acknowledged, did not evoke any response. The complainant examined himself as PW.2 and the Bank Manager as PW.1. Exts.P1 to P7 were marked. In the course of cross examination, there was no specific suggestion that the signature in the cheque is not that of the accused. But at the stage of 313 examination, a contention was raised that the cheque was not signed by him. When the complainant was in the witness stand, the suggestion was that the transaction was not between him and the accused, but between the complainant and the younger brother of the accused. At the defence stage, petitioner appears to have made an application under Section 254(2) Cr.P.C. to send the cheque to the expert. Notwithstanding the absence of reply to the notice of demand and notwithstanding the absence of a specific suggestion when PW.2 was in the witness stand that the signature in the cheque is not that of the accused, the learned Magistrate appears to have naively accepted the request of the petitioner to send the cheque to the expert. The expert, DW. 1 reported that he was not able to make any specific opinion about the authorship of the signature and the writings in the cheque. The expert was examined as DW.1. Exts.Dl to D3 were marked.

3. Courts below concurrently came to the conclusion that the complainant has succeeded in establishing all ingredients of the offence punishable under Section 138 of the N.I. Act. Accordingly, they proceeded to pass the impugned judgments.

4. Called upon to explain the nature of challenge which the petitioner wants to mount against the impugned concurrent judgments, the learned counsel for the petitioner submits that in view of the evidence of the expert, benefit of doubt must have been conceded to the petitioner. There is nothing to prove that the cheque was actually signed and issued by the accused to the complainant for the due discharge of any legally enforceable debt/liability, it is urged.

5. I find no merit in this contention. The evidence of PW.2, the complainant is a formidable circumstance against the accused. The fact that the notice of demand, though duly received and acknowledged, was not replied to, is again a very crucial circumstance against the accused. The accused kept silent on receipt of that notice threatening criminal prosecution. He has not offered any explanation for such strange conduct of his. That conduct is inconsistent with that of an ordinarily prudent person, if he were, in the circumstances of the accused, as contended by him. The eloquent silence/inaction of the accused on getting Ext.P6 notice goes a long way to support the evidence of PW.2 about the circumstances under which he came into possession of Ext.P1 cheque. It is also of crucial significance to note that the accused has no explanation to offer as to how a cheque leaf issued to him by his Bank to operate his account found its way to the possession of PW.2. While dishonouring the cheque, the Bank did not advance a reason that the signature in the cheque does not tally with the specimen signature. There was no cross examination of the Bank Manager/PW.1 on this aspect. The inability of the expert to authentically opine that the signature and the writings in the cheque are that of the accused in these circumstances cannot, advance the case of the accused, nor entitle him to the benefit of any nonexistent doubt. The challenge raised against the verdict of guilty and conviction, must, in these circumstances, fail.

6. The learned counsel for the petitioner submits that the sentence imposed is excessive. He prays that a lenient view may be taken and the deterrent substantive sentence of imprisonment may be avoided. The trial Court imposed a sentence of R.I. for six months. The learned Appellate Judge modified the sentence to one of simple imprisonment for three months. Both Courts surprisingly did not think it necessary to compensate the complainant. I am satisfied that the sentence requires modification, viewed from the angle of the accused, as also from the angle of the complainant.

7. I have already adverted to the principles governing imposition of sentence in a prosecution under Section 38 of the N.I Act in the decision reported in Anil Kumar v. Shammy (2002 (3) KLT 852). I am satisfied that a lenient view can be taken and the accused can be spared of a deterrent substantive sentence of imprisonment. At the same time, I am convinced that it must be zealously ensured that the

complainant, who has been compelled to fight three rounds of legal battle and to wait from the year 1994 for the redressal of his grievance, is adequately compensated. The challenge on this ground can succeed only to the above extent.

8. Before parting with this case, I must express the concern of this Court at the light hearted manner in which the trial Court has accepted the request of the petitioner to send the cheque to an expert. The easiest way to protract proceedings under Section 138 of the N.I. Act and thus stultify the spirit and object of the provisions of Section 138 of the N.I. Act is to request that the cheque be sent to the expert. The soul of the provision will be lost if there is no expeditious enforcement. On account of pressure of work at the Forensic Science Laboratory, it is common knowledge that the expert will not be able to give the report within a period of three to four years. Convenient protraction can be achieved by requesting that the cheque be forwarded to the expert for examination. It is for the trial Court to alertly consider the acceptability of such request and ensure that the cheque is forwarded to the expert only if satisfactory reasons are available. In the instant case, no such satisfactory reasons do at all exist. The notice of demand was not replied to. No acceptable explanation was offered for such silence/inaction. There was no denial of signature at early stages. When PW.1 and PW.2 were in the witness stand, there was no specific denial of signature. No explanation was offered as to how the cheque leaf issued to the accused by his Bank found its way to the possession of the complainant. In these circumstances, it must have been evident even for the blind that the request to forward the cheque to the expert was nothing but a clever ploy to play for time. The accused was able to succeed in that clever ploy. The attempt deserves to be frowned upon. The trial Court must, certainly have been more alert and cautious before such a request was accepted. It is not the law that every such application has to be allowed under Section 245(2) Cr.P.C. There is a real and effective discretion vested in the Court as seen from the language of Section 254(2), to turn down such unmerited requests made with the deliberate and only intention to protract the proceedings. That provision reads:

'The Magistrate may, if he thinks fit. On the application of the prosecution or the accused, issue a summons to any witness directing him to attend or to produce

any document or other thing'.

The expression 'may, if he thinks fit' must convey to the Magistrate the width and amplitude of the discretion vested in the Court.

9. In the result

(a) This Revision Petition is allowed in part

(b) The impugned verdict of guilty and conviction under Section 138 of the N.I. Act are upheld.

(c) But the sentence imposed is modified and reduced. In supersession of the sentence imposed on the petitioner by the Courts below, he is sentenced to undergo imprisonment till rising of Court. He is further directed to pay an amount of Rs. 22,000/- (Rupees Twenty two thousand only) as compensation under Section 357(3) Cr.P.C and in default, to undergo simple imprisonment for a period of 45 days. If realised, the entire amount shall be released to the complainant.

10. The learned Magistrate shall take necessary steps for execution of the modified sentence hereby imposed. The petitioner shall appear and his sureties shall produce him before the Court below on 31.8.2004 for execution of the sentence. Needless to say that the learned Magistrate shall be at liberty to take necessary action against the petitioner and his sureties under Section 446 Cr.P.C if the petitioner does not appear before the learned Magistrate as directed above.