

State Vs. Subramanian (A-1)

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SooperKanoon Citation : sooperkanoon.com/789684

Court : Chennai

Decided On : Mar-11-1987

Reported in : 1988CriLJ1403

Judge : Padmini Jesudurai, J.

Appellant : State

Respondent : Subramanian (A-1)

Judgement :

Padmini Jesudurai, J.

1. The above appeal by the State is directed against the judgment of the Judicial First Class Magistrate, Myladuthurai in C.C. 180 of 1981 convicting the respondent herein for an offence under Section 406, I.P.C. instead of under Section 409, I.P.C. holding that the respondent, who is the President of the Co-operative Agricultural Credit Society, is not a Public Servant under the I.P.C.

2. The respondent and another were tried by the above court for an offence under Section 409, I.P.C. in that the respondent, being the President and his co-accused since acquitted, being the Secretary to the Anathandavapuram Co-operative Agricultural Credit Society and being public servants and being entrusted in that capacity with the sum of Rs. 8826-40 criminally misappropriated the same.

3. During trial, on behalf of the prosecution P.Ws. 1 to 6 were examined and Exs. P. 1 to P. 20 were marked. The respondent and his co-accused denied the occurrence. They had no evidence to offer.

4. The trial court, finding that the entrustment of the amount was only with the respondent, acquitted the second accused. The trial Court also found that the respondent could not be described as a public servant within the definition of Section 21, I.P.C. and hence there could be no conviction for an offence under Section 409, I.P.C. and convicted the respondent for an offence under Section 406, I.P.C. and sentenced him to pay a fine of Rs. 200, in default to undergo rigorous imprisonment for a period of one month. The State aggrieved with the finding that the respondent would not come under Section 409, I.P.C. has preferred the present appeal.

5. In the grounds of appeal, it is stated that the respondent is an agent within the meaning of Section 409, I.P.C. and that, therefore, the respondent ought to have been convicted for an offence under Section 409, I.P.C. Learned Public Prosecutor appearing for the appellant, reiterated the same point.

6. Per contra, Thiru Jayaseelan, learned Counsel for the respondent, contended that the charge as framed by the trial Court, was to the effect that the respondent was a public servant and in that capacity had been entrusted with the funds of the Society and since the trial Court had found that the respondent was not a public servant it would not be open to the prosecution to shift the stand and contend that the respondent is an agent and hence would come under Section 409, I.P.C, Learned Counsel submitted that to do so would cause substantial prejudice to the respondent who had not been given any opportunity to meet this new case put forth by the prosecution.

7. The question that arises for consideration is whether it would be open to the appellant to put forth this new stand and contend that the respondent is an agent coming under Section 409, I.P.C.

8. As rightly contended by the learned Counsel for the respondent, the charge reads that the respondent, as President and the co-accused (second accused) as

Secretary, were entrusted with cash as a public servant and had misappropriated the same. The prosecution, therefore, ought to have substantiated the ground that the respondent was a public servant within the meaning of Section 21, I.P.C. That stand has now been given up by the appellant. Instead, it is stated that the respondent is an agent. The question as to whether there is relationship of agent and principal between the two persons is a question of fact. That has to be established by evidence and an inference drawn and a finding given on the basis of the legal principles connected therewith. In the instant case, it is stated by P.W. 5, who was the Cooperative Sub Registrar, Mayuram during the relevant period, that the respondent was responsible for the cash and the property of the Society and that it was the duty of the Secretary-second accused to collect the amounts paid to the Society, after issuing receipts, and to deposit the same in the Bank. He has also stated that for the cash on hand, the respondent and the second accused are jointly responsible. It is these questions that have been put to the respondent when questioned under Section 313, Cr.P.C. The respondent has answered that he is not so responsible. Apart from this evidence, I am unable to see anything in the evidence of any witness to indicate that the respondent was the agent of the Society. Whatever that be, as already stated, by me earlier, the question whether one is an agent or not is a question of fact. The accused has to be put on notice and an opportunity must be given to him to rebut the evidence or any inference to be drawn from any such evidence. The respondent had been merely made to face the case that he is a public servant. It would not be open to the prosecution now in the stage of appeal to shift the stand and contend that the respondent is an agent within the meaning of Section 409, I.P.C. Prejudice is bound to be caused to the respondent. In the absence of a charge describing the respondent as an agent and in the absence of any evidence to indicate that the respondent is an agent of the Society, I am unable to accept the contention of the appellant that the respondent ought to be brought within the definition of an agent under Section 409, I.P.C. On the evidence available, the conviction of the respondent for an offence under Section 406, I.P.C. alone could be sustained.

9. In the result, the State appeal fails and is dismissed

