

K. Ganesh Vs. the State

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Court : Kolkata

Decided On : Mar-08-2004

Reported in : (2004)2CALLT85(HC),2004(3)CHN78

Judge : Asit Kumar Bisi, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 120B and 409; ;[Prevention of Corruption Act, 1947](#) - Section 5(1C) and 5(2); ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Section 313

Appeal No. : C.R.A. No. 4 of 1987

Appellant : K. Ganesh

Respondent : The State

Advocate for Def. : R.R. Biswas, Adv.

Advocate for Pet/Ap. : Dipak Kr. Sengupta and ;Amitabha Ganguly, Adv.

Disposition : Appeal allowed

Judgement :

Asit Kumar Bisi, J.

1. This appeal is by the appellant and it arises out of the judgment and order of conviction and sentence passed by Sri A.B. Mukherjee the learned Judge, Second

Special Court, Alipore, 24-Parganas on 28.11.86 in Special Case No. 2A of 1983. By the judgment and order impugned the learned Judge, Second Special Court, Alipore found the accused K. Ganesh presently the appellant guilty of the offence under Section 409 of Indian Penal Code and also under Section 5(1C) read with Section 5(2) of the Prevention of Corruption Act, convicted him and sentenced him to rigorous imprisonment for three years and fine of Rs. 2,000/- in default to further rigorous imprisonment for two months for the offence under Section 409 of Indian Penal Code and further sentenced him to rigorous imprisonment for one year and fine of Rs. 500/- in default to rigorous imprisonment for fifteen days for the offence under Section 5(1C) read with Section 5(2) of the Prevention of Corruption Act. The learned trial Judge further directed that substantive part of the sentences would run concurrently.

2. The facts unfolded in the FIR made by Sri N.K. Mukherjee, Inspector of Police, CBI Special Police Establishment Division, Calcutta on 30.8.82 is that the accused K. Ganesh, Traffic Assistant attached to Air India at Calcutta Air Port misappropriated a sum of Rs. 2896/- in the matter of issue of Air Way Bill No. 098/3030814 dated 30.12.80. The gravamen of the allegation is that on 30.12.80 the said Air Way Bill was issued by the accused K. Ganesh for Rs. 2896/- for despatch of five pieces of personal effects weighing 42.5 kg. from Calcutta to Free Town in the name of Mr. A. Jabbie. The said amount of Rs. 2896/- which was collected as freight for despatch of the said consignment had not been deposited by the said accused K. Ganesh in the Government account and the same was misappropriated by him.

3. The information was received from reliable source and on its basis a regular case was started as per order of the Superintendent of Police, CBI, Special Police Establishment, Calcutta. The case was investigated by Sri N.K. Mukherjee, Inspector of Police, CBI, SPE, Calcutta who submitted charge-sheet under Section 409/120B of Indian Penal Code and Section 5(1C) read with Section 5(2) of the [Prevention of Corruption Act, 1947](#) against both the accused Subhasis Chowdhury and K. Ganesh who were attached to Air India at Calcutta Airport at the relevant time.

4. On the basis of the charge-sheet cognizance of the offence was taken and summons had been issued to the accused. Charges under Section 409 read with Section 120B of the Indian Penal Code and under Section 5(1C) read with Section 5(2) of the [Prevention of Corruption Act, 1947](#) were framed against both the accused K. Ganesh and Subhasis Chowdhury who pleaded not guilty to the charges. Both the accused raised plea of innocence in their defence and alleged that they became victims of a conspiracy. Further defence case was that the accused Subhasis Chowdhury was a Trainee Officer and not a Duty Officer at the relevant time.

5. The learned Judge, Second Special Court, Alipore who tried the case ultimately found the accused Subhasis Chowdhury not guilty and acquitted him of the charges. The learned Judge, however, found the accused K. Ganesh guilty of the above offences, convicted and sentenced him in the manner as already indicated.

6. Aggrieved by the impugned judgment and order of conviction and sentence the appellant K. Ganesh has preferred he instant appeal alleging inter alia that the impugned judgment and order of conviction being against the weight of the legal evidence on record cannot be sustained in law, that the prosecution having failed to establish ingredients necessary to constitute the offences under Section 409 of the Indian Penal Code and under Section 5(1C) read with Section 5(2) of the [Prevention of Corruption Act, 1947](#), the impugned judgment and order of conviction and sentence are liable to be set aside, that the learned Judge erred in law in misappropriating the evidence and common defence of the accused and treating the stance of accused No. 1 on a differential footing and giving him the benefit of doubt, that the learned Judge erred in law in misappreciating the statements made by the present appellant during his examination under Section 313 of the Code of Criminal Procedure treating the same as admission of guilt, that the learned Judge has erred in not considering the inherent improbabilities and weakness in the prosecution case, that the impugned order of conviction and sentence having been based on surmises and conjectures and not on legal evidence cannot be sustained in law, that the appellant has not been properly examined under Section 313 of the Code of Criminal Procedure and this has caused a failure of justice and that on the materials on record and in the facts and

circumstances of the case the learned Judge ought to have given the benefit of doubt to the appellant.

7. The sole point arising for decision in the instant appeal is whether or not the findings of the learned trial Judge resulting in conviction and sentence of the present appellant are legally sustainable in the face of the materials on record.

8. The appellant K. Ganesh Traffic Assistant attached to Air India at Calcutta Airport at the relevant time was arraigned as accused along with the co-accused Subhasis Chowdhury, Duty Officer, Air India, Calcutta Airport at the relevant time and charged under Section 409 read with Section 120B of the Indian Penal Code and under Section 5(1)(C) of the [Prevention of Corruption Act, 1947](#) read with Section 5(2) of the said Act were framed against both of them. As stated hereinbefore, on conclusion of the trial the learned trial Judge acquitted the accused Subhasis Chowdhury of the charges framed against him. The learned trial Judge convicted the present appellant of the offences under Section 409 of Indian Penal Code and under Section 5(1C) read with Section 5(2) of the [Prevention of Corruption Act, 1947](#) and sentenced him in the manner as already indicated.

9. The allegation contained in the FIR marked as Ext. 12 is that the present appellant Traffic Assistant while working in Cargo section of Air India at Calcutta Airport during December, 1980 misappropriated a sum of Rs. 2896/- in the matter of issue of Air Way Bill No. 098/3020814 dated 30.12.80. It has been alleged further that on 30.12.80 the said Air Way Bill for Rs. 2896/- was issued by the appellant for despatch of five pieces of personal effects weighing 42.5 kg. from Calcutta to Free Town in the name of A. Jabbie and the said amount of Rs. 2896/- which was collected as freight for despatch of the consignment had not been deposited by the appellant in the Government account. On the basis of the said FIR the case was started against the appellant.

10. Mr. Sengupta the learned senior advocate for the appellant has drawn my pointed attention to the fact that though the number of Air Way Bill is mentioned as 098/3020814 in the FIR (Ext. 12) the Air Way Bill which has been marked as Ext. 1 bears the number 098/30208146 098/30208146 . Mr. Sengupta has further

pointed out that the occurrence is alleged to have taken place on 30.12.80 whereas the FIR was lodged by N.K. Mukherjee, Inspector of Police, CBI, SPE, Calcutta on 30.8.82 which goes to show that the FIR was drawn up after about two years from the date of the alleged occurrence.

11. From the judgment under appeal it transpires, that the learned trial Judge has disbelieved the prosecution case so far as the accused Subhasis Chowdhury is concerned and acquitted him of the charge. It has been urged by Mr. Sengupta that the case was started on the basis of the FIR after the said accused who was admittedly Duty Officer, Air India, Calcutta Air Port at the relevant time was transferred and after transfer of the said accused the allegations saw the light of the day. It has been further urged by Mr. Sengupta that though identical evidence was adduced by the prosecution to prove the case against both the accused benefit of doubt was given to the accused Subhasis Chowdhury whereas no such benefit of doubt was given to the present appellant who was convicted of the same offence.

12. Relying on the evidence of PW 3, PW 5, PW 6, PW 7 and PW 8 and the statement made by the accused in the course of his examination under Section 313 of the Code of Criminal Procedure, the learned trial Judge has come to the finding that the present appellant issued the Air Way Bill after collecting the freight charge of Rs. 2896/-. It has further been observed by the learned trial Judge that the present appellant in his capacity as Traffic Assistant was entrusted with a sum of Rs. 2896/- and the evidence of PW 4 Manager, State Bank of India, Air India Branch together with Ext. 6 clearly shows that the sum of Rs. 2896/- was not deposited to the credit of Air India in the State Bank upto 14.1.81. From the above materials on record the learned trial Judge has arrived at the conclusion that the sum was misappropriated by the present appellant. Furthermore, it transpires from the findings of the learned trial Judge that since it is not the case of the present appellant that he made over the sum to the officer from whom he got the Air Way Bill in question, the said money which was lying with him and which was not deposited to the credit of Air India must have been misappropriated by him.

13. Let me now advert to the materials on record to judge how far the findings with regard to guilt of the present appellant which have been arrived at by the learned trial Judge are sustainable. It transpires from the evidence of PW 1 that some personal effects belonging to Mr. A. Jabbie a seaman attached to M.V. Strider Diamond were with the customs authority as the seaman suddenly fell ill and had to be sent to Free Town by M/s. Indian Steamship Co. as agent through Air India and freight charge to the extent of Rs. 2800/- and odd was paid by the Steamship Co, PW 1 was attached to M/s. Indian Steamship Co. at the relevant time. In cross-examination he stated that ledger book was maintained in his office and the Police seized the voucher and not the ledger book. He further stated in cross-examination that on 30.12.80 he deposited freight charge in the office of Air India and booked the personal effects. PW 2 who was posted as Personnel Officer, Air India in the Calcutta Office deposed that as Duty Officer he maintained the list showing allotment of duties to different persons on the relevant day i.e. on 30.12.80. In cross-examination he stated that the duty register was prepared generally on monthly basis and copies of such roster were sent to the Manager, Deputy Manager, Personnel Manager and Transport Supervisor. It is gathered from his testimony that the Duty Officer at Dum Dum Airport used to maintain the log book which was handed over by the Duty Officer to the relieving Officer. It is to be noted in this context that no such list of allotment of duties to different persons on 30.12.80 stated to have been maintained by PW 2 was produced by the prosecution in the course of trial nor any explanation worthy of credit is forthcoming for its non-production.

14. PW 3 was posted as Deputy Accounts Manager, Air India, Calcutta from whose evidence it transpires that the amount which had been realised by issuing the particular Air Way Bill had not been received by Air India. He proved the Air Ways Bills Control Register maintained in the usual course of business and marked as Ext. 5. On perusal of the said register he stated that the particular Air Way Bill was not accounted for. The number of the bill as mentioned by him in his deposition was 3020814 which obviously does not tally with the number of the Air Way Bill 098/30208146 098/30208146 (Ext. 1). In cross-examination PW 3 stated that they received three letters from Bombay Office with regard to this particular bill which was not accounted for and they replied to those letters. As stated by him

the letters issued from Bombay office were in their office and they could produce those letters. But no such letters were produced by the prosecution in the course of trial nor any plausible explanation was offered for non-production of the same. It further appears from the testimony of PW 3 that in course of checking as per normal practice it was detected on 12.2.81 that the aforesaid bill was not accounted for. His cross-examination, however, reveals that he did not send any information to Bombay Office immediately after detection on 12.2.81 that the bill was not accounted for. He stated in his cross-examination that in March, 1981 he informed the Bombay Office about the said bill which was not accounted for but he could not say if there was any investigation regarding the said bill before 1982. Cross-examination of PW 3 further indicates that the Traffic Officer issued the Air Way Bill and received the amount for the bill and made over the same to the office from whom he received the bill. In the concluding part of his cross examination he stated that it was the duty of the traffic staff to send copies of the Air Way Bills to different persons and hand over the money to the Duty Officer and if the traffic staff did not return the bill with money, the Duty Officer would immediately know of it.

15. PW 5 was the Commercial Director, Air India who issued the sanction order for prosecution. He proved the sanction order marked Ext. 7. His cross-examination indicates that he did not know that inspite of reminder by Bombay Office in case of missing Air Way Bill the same was not replied to by Calcutta Office nor did he ask for reason for delay in detecting the mistake. He did not ask for Air Port log book. It was suggested to him that he did not apply his mind before according sanction. However, he denied it. PW 6 was posted in Calcutta as Manager, Eastern India, Air India in December, 1982. He proved the letter dated 9.12.82 marked as Ext. 8 which reveals that he furnished the information to the Superintendent of Police, CBI/ SPE, Calcutta to the effect that Subhasis Chowdhury was the Duty Officer in the morning shift at Calcutta Airport on 30.12.80 and the present appellant Mr. K. Ganesh, Traffic Assistant was on duty at Calcutta Airport on the same date i.e. on 30.12.80. His cross-examination indicates that he did not give any paper along with the said letter to the CBI to substantiate that those persons were posted at the relevant time. He was provided with a copy of the monthly duty roster as Manager but he was not sure whether he supplied copy of duty roster to CBI either before or

after the said letter. He stated in his cross-examination that he had gone through log book of the Airport and found that the page for the relevant date was missing. No such log book was seized by the Investigating Officer (PW 12).

16. PW 7 was posted as Accounts Manager, Air India, Calcutta in 1982. He proved the signature of the appellant in the Air Way Bill which was marked as Ext. 1/3. He stated that the appellant signed in his presence. But it is curious to note that in cross-examination PW 7 candidly admitted that on 30.12.80 he was posted at Bangkok and he joined Calcutta Airport in May 1981. It is really inconceivable how in such event he could see the appellant signing the particular Air Way Bill on 30.12.80.

17. PW 8 was posted as Assistant Airport Manager, Dum Dum at the relevant time. His cross-examination reveals that he did not inform Bombay Office about irregularity in any Air Way Bill. He specifically stated in his cross-examination that audit copy of the Air Way Bill should reach the duty officer within one hour from the time of issue of such bill by the Traffic Assistant and in case it was not received within reasonable time the Duty Officer had to inform the Airport Manager and the Duty Officer could issue such bill to the Traffic Assistant pending an enquiry in case of missing of audit copy. On being asked by the learned trial Judge he specifically stated in the concluding part of his evidence that the fact of missing of audit copy could not go unnoticed for a year as the accounts department checked the same every month.

18. Mr. Sengupta the learned senior advocate for the appellant has argued that though the occurrence is alleged to have taken place on 30.12.80 it was not detected prior to 12.2.81 as alleged and no action was taken prior to lodging of the FIR on 30.8.82 and no explanation was called for within a reasonable time nor any departmental action was taken against the appellant. He has further argued that to protect or camouflage the whole thing the log book had not been seized by the Investigating Officer and in the span of the entire evidence there is no whisper that at any point of time there was any report to the effect that any Air Way Bill was stolen or found missing. As argued by Mr. Sengupta, the conclusion which can logically be deduced is that the appellant as Traffic Assistant must have

discharged his duty as per the prescribed procedure.

19. Mr. Biswas the learned advocate for the State/Respondent has admitted that there are some infirmities in the prosecution case. He has, however, argued that the materials on record have proved beyond doubt that the appellant himself collected the amount of Rs. 2896/- as freight for despatch of the aforesaid consignment on 30.12.80. The inherent weakness of the prosecution case and infirmities discernible in the evidence on record have already been pointed out by me. Mr. Biswas the learned advocate for the State Respondent has placed much reliance on the statement made by the accused in course of his examination under Section 313 of Code of Criminal Procedure. He has drawn my attention to the answers given by the appellant in reply to the relevant questions put to him and contended that on 30.12.80 the appellant himself issued that Air Way Bill and collected the freight charge amounting to Rs. 2896/-. He has further urged that failure to deposit the money with the authority concerned is manifestly clear from the materials on record. The learned trial Judge has also observed in his judgment that apart from the evidence of PW 3 and PW 7 it is also the clear admission of the accused in the course of his examination under Section 313 of Code of Criminal Procedure that he issued the relevant Air Ways Bill after collecting the freight charge of Rs. 2896/-. From the statements made by the accused in his examination under Section 313 of Code of Criminal Procedure it appears that the appellant admitted that it was his duty to issue Air Way Bill only and not to deposit the said sum in Bank. It further appears from his statement that it was his duty to issue Air Way Bill after collecting Air Way Bill from the Airport Manager on duty or the Officer on duty and then to deposit the cash or document with the aforesaid Officer. From the materials on record it transpires that PW 3 is the only witness who mentioned the bill No. 3020814 in his evidence. The evidence of other witnesses does not indicate the number of the particular bill. As already stated, the number of Air Way Bill was mentioned in the FIR (Ext. 12) as Air Way Bill No. 098/3020814. The Air Way Bill which has been marked as Ext. 1 bears the number 098-30208146. Because of such discrepancy in the evidence with regard to number of the Air Way Bill which forms the basis of the prosecution case and other infirmities from which the prosecution case suffers it was hardly possible for the appellant to get sufficient opportunity to explain the circumstances which were

not property put to him in the course of his examination under Section 313 of Code of Criminal Procedure. It is settled law that it is the duty of the Court to question the accused properly and fairly in his examination under Section 313 of Code of Criminal Procedure so that the exact case that the accused will have to meet is brought home to him in clear words and thereby an opportunity is required to be given to the accused to explain any point. Unless the circumstances appearing against an accused is put to him in his examination under Section 313 of Code of Criminal Procedure, the same cannot be used against him. Reference can be made in this context to Sharad Birdhichand Sarda v. State of Maharashtra, : 1984 CriLJ1738 . In the case of Sharad Birdhichand Sarda (supra) the Supreme Court has relied on an earlier decision in Shamu Bala Chaugule v. State of Maharashtra, : 1976 CriLJ492 .

20. From all that has been stated above I am of the view that no reliable and unimpeachable evidence has been adduced by the prosecution to prove charges against the appellant beyond reasonable doubt. As held by the Supreme Court in Sarwan Singh v. State of Punjab, : 1957 CriLJ1014 , the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by legal, reliable and unimpeachable evidence. This has not been done in the instant case for which the appellant is entitled to get an order of acquittal.

21. The appeal is accordingly allowed. The impugned order of conviction and sentence passed by Sri A.B. Mukherjee the learned Judge, Second Special Court, Alipore 24-Parganas on 28.11.86 in Special case No. 2A of 1983 is set aside. The appellant be discharged from the bail bond and set at liberty forthwith if not wanted in connection with any other case.

Let a copy of this judgment along with Lower Court Records be sent down to the learned Court below forthwith.

Xerox certified copy of this judgment, if applied for be given to the parties after observing the required formalities as expeditiously as possible.

