

S.C. Mitter Vs. the State

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Court : Kolkata

Decided On : Mar-03-1950

Reported in : AIR1950Cal435

Judge : G.N. Das and ; Das Gupta, JJ.

Acts : [Evidence Act, 1872](#) - Sections 18, 33 and 101 to 103; ; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Section 252

Appeal No. : Criminal Appeal No. 256 of 1949

Appellant : S.C. Mitter

Respondent : The State

Advocate for Def. : Walter Dutt and ; Abani Chatterji, Advs.

Advocate for Pet/Ap. : A.K. Basu, ; Bireswar Chatterji, ; B.K. Ghose, ; Dhiren Chakraverti and ; Gouri Prasad Mukherji, Advs.

Disposition : Appeal allowed

Judgement :

Das Gupta, J.

1. The appellant was convicted by the First Special Tribunal, Calcutta, of an offence under Section 120B read with Section 161, Penal Code, and for several

offences under Section 161 of the Code. He was sentenced to different periods of imprisonment for each of these offences and also to fines, in default of payment of which, he was directed to undergo further periods of imprisonment.

2. The prosecution case was that the appellant entered a conspiracy with one Sripati Mukherji to commit offences under Section 161, Penal Code by accepting illegal gratification from Sripati as a motive or reward for issuing contracts in favour of the Dalia Tailoring Company of which Sripati Mukherji was a contractor, and that in pursuance of the same, different sums of money, as mentioned in specific charges, were actually received by the appellant from Sripati Mukherji as illegal gratification. It is said that on paper, these payments were shown as having been made to one R. K. Roy as commission on profits, though in reality, these payments were for the appellant and were received by him.

3. The defence was a denial of any agreement to receive illegal gratification and a denial that any such gratification was received.

4. The success of the prosecution depended entirely on proving that the payments which on paper were shown to have been made to R. K. Roy were really made to the appellant. The only evidence on the record to prove this is the evidence of Sripati. It is contended on behalf of the appellant, however, that Sripati's evidence must be excluded from consideration as he did not get an opportunity of completing the cross-examination of Sripati.

5. It is necessary to decide first whether this contention should prevail. Sripati's examination-in-chief was concluded on 11th March 1948. There is a note on the record that on that date cross-examination was reserved. Charges were framed against him on 26th May 1948. The witness was recalled, and further examined in chief on 9th July 1948. Thereafter his cross examination commenced on 9th July 1948, but before the cross-examination could be concluded, Sripati ceased to be available for cross-examination.

6. The only way in which the evidence already recorded could be used as evidence in this case was by the application of the provisions of Section 33, Evidence Act. The first requirement for the application of those provisions is that

the prosecution must prove that Sripati was dead, or could not be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable. It is not the prosecution case that Sripati was dead, or that he could not be found, or he was kept away by the accused. It is said, however that Sripati was seriously ill, and so incapable of giving evidence; that further he was not likely to recover soon, so that his presence could not be secured without undue delay.

7. The strange thing, however, is that the prosecution did not make the slightest attempt to prove these allegations. Though the Tribunal asked two doctors to examine Sripati and a report was received from these doctors, neither of the doctors gave evidence in the case. Two medical certificates from two other doctors were also put into Court by the Public Prosecutor. Neither of these doctors were, however, examined. The Public Prosecutor from his position in the Bar made statements that the witness was seriously ill and was not likely to recover soon. He was, however, also not examined. There is, in fact, not one single line in evidence in support of the story of Sripati's illness.

8. The Tribunal appears to have relief on the fact that the learned defence counsel in the Court below did not contest the story of Sripati's illness. The law, however, makes no provision for an admission by counsel in a criminal case. No admission by counsel can relieve the prosecution of the duty of satisfying the Court by proper evidence, that Sripati was really seriously ill, Vide the decisions in the case of Ganeshdas Nimani in Cri. Appeal No. 70 of 1918, D/- 21-3-1249 and in the case of the Attorney General of New South Wales v. Henry Louis Bertrand, (1867) 36 L. J. P. C. 51 : (L. R 1. P. C. 520).

9. I find that the prosecution has not proved that Sripati was ill, and that no case has been made out for the application of Section 33, Evidence Act.

10. I may also point out in this case that the second requirement of the proviso to the section which requires that an adverse party has had the right and opportunity to cross examine the witness has also not been fulfilled. After charge had been framed, the accused had certainly the right to cross-examine the witness. He had

partial opportunity to exercise the right, but not full opportunity as the witness ceased to be available before cross-examination could be concluded.

11. In my opinion, what this proviso requires is that the accused must have a full opportunity of cross-examining the witness.

12. Before charge was framed, the accused had certainly the opportunity to cross-examine the witness; but at that stage, he had no right to cross-examine the witness. The reasons for the conclusion that the accused. In a warrant case has no right to cross-examine the witness before charge is framed within the meaning of Section 33, Evidence Act, were fully discussed in Appeal No. 236 of 1949, and need not be repeated here.

13. My conclusion, therefore, is that Sripati's evidence, as recorded is not admissible under Section 33, Evidence Act, and must be excluded from consideration. On such exclusion, the position is that there is no evidence on the record at all to show either that there was an agreement between the appellant and Sripati that the appellant would receive illegal gratifications, or that, in fact, any illegal gratification was ever received by the appellant. The prosecution, has, therefore, failed in my opinion, to prove the guilt of the accused of any of the offences with which he was charged.

14. I would, therefore, allow this appeal, set aside the order of conviction and sentence passed by the Tribunal, and order that the accused be acquitted of all the charges, and discharged from his bail bond.

Das, J.

I agree.

15. By the Court--Leave to appeal to the Supreme Court under Article 134(1)(c) of the Constitution is refused.