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Court : Kolkata

Decided On : Oct-18-2012

Judge : Toufique Uddin

Appeal No. : C.R.A. No. 323 of 1999

Judgement :

1. This appeal arose out of the judgment and order of conviction dated 20.8.99 passed by the learned Special Judge, Special Court, Berhampore, Murshidabad in special court case No. 2/97 convicting thereby the appellant under Section 409 of the IPC and sentencing him to suffer rigorous imprisonment for two years and to pay a fine of Rs. 10000/- in default R.I. for one year.

2. In the background of this appeal the fact in a nutshell is that one Shibani Ruj was posted as a clerk in the Pension Section of Treasury Office at Kandi, Murshidabad. She was entrusted with the job of preparing pension bills of the pension holders. As per the Treasury Rules the appellant prepared the bills and after preparing the bills the same were forwarded by her before the Clerk-in-charge and thereafter the same were checked and forwarded to the Accountant who after scrutiny forwarded the same to the Additional Treasury Officer and lastly after final scrutiny, cheques were prepared and signed by the Treasury Officer. She was posted there from 1993 to 1995 January. In February, 1995, she was withdrawn from the said Pension Section. After joining of the new Assistant to the Post of Clerk, he detected anomalies in the bills and found that the bills in May and June, 1995 of accused Kalpana Ghosh was enhanced to Rs. 1400/- though her

actual pension was Rs. 400/-. The amount of pension was changed from time to time and it was raised upto Rs. 2400/- in place of Rs. 400/- only. The amount of pension bills of Narayani Mondal was also raised upto Rs. 1000/- though her actual pension was Rs. 517/- p.m. The accused Shibani Ruj misappropriated an amount of Rs. 43820/- from the treasury by way of various mala fide activities. The matter was brought to the notice of the SDO, Kandi and he directed Mr. B.C.Patra, WBCS Executive to enquire into the matter. He personally enquired into the matter and found anomalies in the pension bills. After perusal of the report of Sri Patra, the SDO, Kandi was pleased to hold from the report that a sum to the tune of Rs. 43820/- has been taken by mala fide activities of the accused persons.

3. Accordingly, he lodged an FIR before the O.C., Kandi P.S. On receipt of FIR, O.C. Kandi P.S. started Kandi P.S. Case No. 180/95 under Section 409/477A IPC. The accused Kalpana Ghosh admitted that the amount of Rs. 10000/- was overdrawn by her and she wanted to deposit Rs. 6000/-. Her prayer was allowed and she deposited Rs. 6000/- before the SBI, Kandi. After the completion of investigation, the Police submitted charge-sheet under Section 409/403/109 IPC against both the accused persons.

4. On hearing of both sides and on perusal of materials on record, charge under Section 409/420 IPC was framed against the accused Shibani Ruj. The contents of the charges were read over and explained to her and she claimed to be tried.

5. A separate charge was framed against the accused Kalpana Ghosh under Section 409/420/109 IPC. The charge was read over and explained to her and she claimed to be tried.

6. Needless to mention that accused Kalpana Ghosh was acquitted. To prove the case the prosecution examined 5 witnesses while none was examined on behalf of the defence side. However, the present appellant was examined under Section 313 of the Code of Criminal Procedure. The defence case as appeared from the trend of cross-examination of witnesses was denial of offence with a plea of false implication.

7. On hearing of both sides and considering the materials on record, the learned Judge, Special Court convicted the accused Shibani Ruj under 409 IPC and sentenced her to suffer R.I. for two years and to pay a fine of Rs. 10000/- with default clause.

8. Now the point for consideration is if the impugned judgment calls for any interference or not.

9. The appellant was convicted for commission of offence under Section 409 IPC. The ingredients of Section 409 IPC are as follows:

i) the accused must be a public servant; ii) he must have been entrusted in such capacity with property; iii) he must have committed breach of trust in respect of such property. To be more exhaustive, it means (i) entrusting any person with property or with any dominion over property. (ii) The person entrusted (a) dishonestly misappropriating or converting to his own use that property or (b) dishonestly using or disposing of that property or willfully suffering any other person so as to do in violation - (i) of any direction of law prescribing the mode in which such trust is to be discharged or (ii) of any legal contract made touching the discharge of trust - Anwar Chand vs. State of Karnataka [2004 SCC (Cri) 929].

10. Without reproducing the evidence in toto, salient features of evidence may be looked into. PW 1 was the Additional Treasury Officer who stated that at the relevant point of time, the appellant being posted as clerk in the Pension Section of Treasury Officer, Kandi was in the charge of preparing monthly pension bills. According to him, he detected that in connivance with another accused, Kalpana Ghosh, a Group D Staff of the same Office, the present appellant prepared monthly pension bills, but after the transfer of the present appellant, in new incumbent stepped into her shoes and detected some mistake which was brought to the notice of PW 1 who stated that the pension amount of one Kalpana Ghosh and one Narayani Mondal was enhanced. PW 2 was a Deputy Magistrate. He held the enquiry about the defalcation of public money in terms of direction given to him and he submitted his reported to the SDO, Kandi (Ext.1).

11. The report shows inter alia that there were tampering overwritings in the entries of bills and malpractice. Also it was reported by Enquiry Officer that there was lack of supervision on the part of clerk in charge and A.T.O. However, the Enquiry Officer recommended for fixing up responsibilities on the present appellant. Also it was reported therein that in some cases (Sl. No. 3 to 8 of Ext. 1), payment was made through oversight and it appeared to be bona fide mistake. So, what was bona fide mistake and what was mala fide was not verified by any superior authority.

12. It was the case of the prosecution that there was defalcation to the extent of Rs. 43820/- and it was alleged that she misappropriated a sum of Rs. 43820/- by enhancing pension bills of some of the pension holders.

13. The SDO, Kandi was PW 3 at the relevant point of time. He lodged the complaint against the present appellant and other.

14. PW 4 is a pension holder. Now, it also transpires in the evidence that PW 4 stated to the Police that the appellant filled up withdrawals slips in respect of the pension of Rs. 517/- as per her entitlement but sometimes such amount was enhanced to Rs. 1000/- and then to Rs. 1300/- and then to Rs. 2000/- and the enhanced amount was taken by the appellant after giving her only Rs. 517/- as pension.

15. It is settled principle of law that the evidence does not include only evidence-in-chief but also the cross-examination. A careful scrutiny of the cross-examination shows that PW 1 did not state to the Investigating Officer what he has stated in the evidence after about more than 4 years. This fact cannot be overlooked.

16. It was argued by the learned counsel for the appellant that there was no official document supporting the factum of vestment/entrustment of duty upon the appellant to prepare bills and it was duly admitted by some of the prosecution witnesses. So, entrustment of responsibilities (duties) does not appear to have been proved by cogent documentary evidence though it is expected that in the Office of the Sub-divisional officer, Kandi, there must be maintenance of duty Cards. Needless to mention that PW 1 has stated in cross-examination that there

was overdrawn in cases of six bill of Maya Roy, Jibon Sarkar, Shukla Chakraborty, Aloka Mondal, Annapurna Mondal and Kapilmuni Sarkar but neither of them was cited as witness to throw a better ray of light nor PW 1 submitted any report connecting them in the so-called irregularities. The learned counsel for the appellant, in this regard, cited before me a decision as reported in AIR 1954 SC 51 wherein inference for non-examination of material witnesses was drawn under Section 114(g) of the Evidence Act against the prosecution case resulting in doubt in fairness of trial.

17. It further appears from the cross-examination of PW 1 as well as from the evidence of PW 2 the Enquiry Officer that one Satyabrata Chatterjee was the Accountant at that time and one Brojogopal Roy was the clerk-in-charge to check up the bills and one Sunil Sinha was the Deputy Accountant to check the bills second time. Further, it reveals that they were duty bound to check the bills at least once by any of them but none of them was brought by the prosecution to clear the doubt nor they have been made accused or cited as witness. Their liability cannot be shirked away by the prosecution. Rather prosecution pointed out the needle of attack to the present appellant only. The SDO, Kandi, PW 3 lodging the complaint stated that in the matter of preparation of cheque and checking the cheques and sending it to the Treasury, the persons have got definite responsibilities but their names have not been incorporated in the FIR. What for has not been properly explained.

18. It was further contended by PW 2 that straightway the bills prepared by the appellant used to be cleared by him but he is a responsible Officer and it is not expected from him that he will simply base on the work done by the appellant, a clerk and presented to him. He ought to have been looked before he had lept.

19. The enquiry report (Ext. 1) was not handed over to the I.O., PW 5. This appears to be an irregularity to my estimation. It was contended by the learned counsel for the appellant that the writings of the present appellant for drawing inflated amount of pension bills by filling up withdrawal slips in the bank or the preparation of the bills have not been submitted in court to mark exhibit. The appellant Shibani’s handwriting was challenged by the defence side. But it was not

sent to handwriting expert for verification of her signatures or writing on the pension bills.

20. PW 4 stated in her cross-examination that the payments were made to her at the SBI, Kandi after withdrawal by the appellant but none from the Bank was examined. Moreover, when PW 4 claims that inflated amount was withdrawn so many times vis--vis payment of actual amount of Rs. 517/- to her, what prompted her not to divulge this factum to anybody else, is not clear. Had she been in receipt of only the actual amount of Rs. 517/- and the extra money was taken by the appellant what prompted her to remain silent for so many years is not known. So, her evidence has to be taken with a grain of salt.

21. The evidence of PWs 1 and 2 do not, in any way, make out that any sum of money far less than Rs. 43820/- has been entrusted to the appellant by the Government. The appellant is a mere clerk allegedly, put in charge of preparing monthly pension bills. So, her ‘say’ is not final in respect of money because above her, there are other Officers and finally the Treasury Officer who cannot avoid his responsibility. Shifting of evidence cautiously leads to give an impression that there is sufficient doubt to hold that the present appellant is responsible for such alleged misappropriation. Pension was admittedly enhanced by Government orders from time to time but no explanation was given by the prosecution to show when such increase took place during the period in question.

22. The other accused, Kalpana Ghosh is reported to have connivance with the appellant and she got some enhanced money of Rs. 10000/- but on her own accord she is reported to have deposited Rs. 6000/- out of Rs. 10000/-. This does not go to prove the culpability of the present appellant in absence of any concrete authority of entrustment or cogent evidence.

23. When two options are available, one favouring the prosecution to get a man convicted and the other giving indication for acquittal of the accused with reference to the materials on record, in that event, the benefit should go to the accused vide AIR 2003 Supreme Court 165.

24. In the decision as reported in (2004) Supreme Court Cases (Cri) 1893, it was propounded that there is a long distance between ‘may be’ and ‘must be’ in reference to the Evidence Act, 1972. In legal parlance, surmise and conjecture have no place and the court cannot be swayed by any emotion. Further, the decision as reported in (2010) 1 SCC (Cri) 1247 shows that there is a vast difference between ‘could have been’, ‘must have been’ and ‘has been’. In the absence of any concrete material, the conviction is impermissible.

25. Here, in this case, I think that the benefit of doubt should be enjoyed by the appellant.

26. Accordingly, the appeal stands allowed.

27. The impugned judgment is set aside.

28. The appellant be acquitted and released from bail bonds at once, if not wanted in any other case.

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