
(1965) 12 GAU CK 0001

Gauhati High Court (Agartala Bench)

Case No: None

Aswini Kumar Bhowmick

APPELLANT

Vs

Dwijen Dey

RESPONDENT

Date of Decision: Dec. 8, 1965

Acts Referred:

- Penal Code, 1860 (IPC) - Section 406

Citation: AIR 1966 Guw 20 : (1966) CriLJ 1483

Hon'ble Judges: Rajvi Roop Singh, J.C.

Bench: Single Bench

Judgement

Rajvi Roop Singh, J.C.

1. Shri Aswin Kumar Bhowmick has filed this appeal against the order of learned Magistrate First Class, Sadar, dated 27.12.1963, whereby he acquitted the opposite party from the charge u/s 406, I.P.C., in C.R. Case No. 340 of 1959.

2. The relevant facts are as follows:

Shri Aswini Kumar Bhowmick, as the Secretary of the School Ishanchandranagar Pargana, filed a complaint u/s 406, I.P.C., against the opposite party in the Court of S.D.M., Sadar. The learned S.D.M., after taking cognizance of the case transferred it to the file of Shri B.C. Deb Varma. He examined 4 witnesses and on 7.7.1960 framed a charge u/s 406 I.P.C., against the opposite party. Thereafter this Magistrate retired from service. On 9.12.1960, the S.D.M., Sadar withdrew the case to his own file and transferred it to the file of Shri W.U. Mullah Magistrate First Class, Sadar. This case remained pending in his Court from 24.12.1960 to 27.12.1963. On 27.12.1963, the prosecution witnesses were not present for cross-examination, therefore, the learned Magistrate passed the following order:

The accused absent No P. Ws. present today. No tadbir from the prosecution. The case has long been pending for the cross-examination of the P. Ws. after charges.

The prosecution had been allowed a good number of adjournments for producing the P. Ws. for cross-examination by the defence. Only the complainant and one witness have been available till to day. Even proceedings u/s 485-A Cr.P.C., ordered to be drawn up against the P.Ws. It is no meaning to drag the case in this way for an unlimited time and drag the accused before the Court. So I do hereby expunge the evidence of all the P. Ws. remaining to be cross-examined by the defence.

The prosecution has examined four witnesses in this case. P.Ws. 1 and 2 cross-examined by the defence after charge. The evident of P.Ws. 3 and 4 is hereby expunged.

Discussed the evidence of P.Ws. 1 and 2, The charge u/s 406, I.P.C., against the accused not found by the evidence of P.Ws. 1 and 2. So the accused cannot be held liable for this offence and he cannot therefore, be found guilty u/s 406, I.P.C. So the accused Dwijen Dey is acquitted and set at liberty.

3. Being aggrieved with this order of the learned Magistrate, the appellant has filed that appeal.

4. The learned Counsel for the appellant contended that in a warrant case after the charge is framed, it is the duty of the Magistrate u/s 256 to recall the prosecution witnesses so as to enable the accused to cross-examine them He further pointed out that where the offence is a cognizable one the complainant is not bound to pay the process fee for summoning the witnesses. Where the complainant requests the Court to summon the witnesses for cross-examination, it is Court's look out to issue coercive process to secure their attendance as permitted by law. In the case of official witnesses, the Court Should realise that it would not be possible for the complainant to secure their attendance and should issue summons on them through official channel, for their appearance in Court on the date fixed for their cross-examination. Where the Court does not take steps to enforce the attendance of the prosecution witnesses for cross-examination and the witnesses are not present for the date fixed for cross-examination, expunging of their evidence from the record on the ground that the complainant was not vigilant in prosecuting the case is not justified. He pointed out that in the instant case the absence of the witnesses was due to no steps being taken by the trial Court to secure their attendance on the date of hearing, therefore, the acquittal order passed by, the learned Magistrate is illegal and it must be set aside.

5. The learned Counsel for the respondent on the other hand frankly conceded that the learned Magistrate has committed illegality in acquitting the opposite party. On the perusal of the record I too find that the order of learned Magistrate is palpably erroneous. In a warrant case, after a charge is framed the complainant will be out of the picture and it is the duty of the Court to secure such of the witnesses for the prosecution as are required by the accused for further cross-examination. Under such circumstances, no duty is cast upon the complainant to secure the witnesses

for the prosecution unless he had undertaken to produce them. The proper procedure to be adopted by a Magistrate under such circumstances is to make an effort to secure the attendance of the witnesses, if so required by issue of coercive process, It is illegal to acquit the accused on account of the absence of the complainant as that procedure in such cases is not contemplated u/s 259 of the Criminal Procedure Code or on account of the absence of the prosecution witnesses without taking adequate steps to secure their attendance In support of my view I may refer the cases reported in [Bharata Rona Vs. Rama Nahak,](#) and [Kunj Behari Yadav Vs. Basdeo Yadav and Others,](#) In the instant case, the learned Magistrate did not take any steps to secure the attendance of the prosecution witnesses. When the witnesses were not present he ought to have adjourned the case. In view of the facts of the case, I am constrained to remark that the acquittal of the respondent is illegal and must be set aside.

6. I, therefore, allow this appeal and set aside the order of acquittal dated 27.12.1963 and remand the case for re-trial from the stage of the charge.