Charanjeet Singh Sial Vs The State of Maharashtra

Court: Bombay High Court (Nagpur Bench)

Date of Decision: Sept. 7, 1970

Acts Referred: Penal Code, 1860 (IPC) â€" Section 403, 406

Citation: (1972) 74 BOMLR 599 : (1971) MhLj 311

Hon'ble Judges: Bhole, J

Bench: Single Bench

Judgement

Bhole, J.
Being aggrieved by the order passed by the Sessions Judge, Nagpur, in. a criminal revision application dismissing his application,

the original complainant has coma hero in revision, A complaint was filed by him against the non-applicant under Sections 403 and 406 of the

Indian Penal Code. His complaint is that he was a duly constituted attorney of a partnership firm M/s. Sial Ghogri Group with its head office at

Nagpur. This firm runs a colliery within the district of Chhindwara in Madhya Pradesh. The non-applicant was the general manager and later on

was a duly constituted attorney of the said firm. He was, therefore, representing the firm in all its affairs. The grievance of the complainant is that the

non-applicant received a bearer cheque for a sum of Rs. 25,000 issued by M/s. S.D. Sethia and Company, Private, Ltd., Bombay, in the name of

the firm Sial Ghogri Group. The non-applicant is said to have cashed that cheque at Bombay but did not credit it in the account of the firm.

According to the complainant, ho had misappropriated this sum by using it for himself. Ho has again another grievance that the non-applicant had

cash in hand of Rs. 30,881.12. According to him, the non-applicant had also committed broach of trust of this sum. The case was registered after

his complaint in the Court of the Judicial Magistrate, First Class, Nagpur, and some witnesses were cited. These witnesses were from Bombay.

According to the complainant, he had cited these witnesses for the purpose of establishing that a sum of Rs. 25,000 by cheque was received by

the non-applicant, and that the said cheque was encashed by him and that the cash was retained by him. He also wanted to establish his case in so

far as the other sum of Rs. 30,881.12 is concerned by examining other witnesses from Bombay, who were maintaining account books there in the

firm. The complainant, therefore, prayed for an order of commission. The learned Magistrate is of the view that until he was convinced, by

recording the evidence of the complainant that there was a prima facie case against the non-applicant, he will not be able to summon witnesses

from Bombay. According to him, at that stage, there was no necessity for him to issue a commission for examining witnesses from Bombay.

Therefore, that application was rejected.

2. The complainant, thereupon, filed a revision to the Court of Session, Nagpur. The learned Sessions Judge rejected the application. Therefore,

the complainant has come here in revision. The only point, therefore, that arises here for consideration is to see whether the order passed by the

learned Sessions Judge, confirming the order of the trial Court that the complainant should first be examined and that after he was convinced that

there was a prima facie case against the non-applicant, a commission would be issued for the Bombay witnesses, is legal and proper.

3. The learned advocate for the applicant contends there that it is for the complainant to choose what way he wants to lead evidence in support of

his case. The non-applicant or even the Court in this case cannot compel him to examine himself first and his witnesses later. On the other hand, the

learned Assistant Government Pleader says that in so far as this case is concerned, it is necessary that the complainant should first examine himself

to establish a prima facie case against the non-applicant. It is, therefore, contended on behalf of the State that in the circumstance of the case, the

complainant should first examine himself. Now, u/s 252, Criminal Procedure Code, ""in any case instituted otherwise than on a police report, when

the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as

may be produced in support of the prosecution"". The section, plainly, therefore, provides that the Magistrate shall proceed to hear the complainant,

if any. It also provides that the Magistrate shall take all such evidence as may be produced by the complainant in support of the prosecution. The

Legislature advisedly used the words ""shall proceed to hoar the complainant"" in one case and the words ""take all such evidence"" in the other case.

Evidently, therefore, the Legislature used these words to convey their intention. The Legislature could not have intended to convey the same

meaning by the words ""hear the complainant"" as also by the words ""take all such evidence"". Otherwise, the Legislature would have said that the

Magistrate ""shall proceed to take the evidence of the complainant and also to take all such evidence as may be produced in support of the

prosecution."" This difference in the use of language by the Legislature in Section 252, Criminal Procedure Code, therefore, clearly conveys an

intention that the Magistrate need not take the evidence of the complainant but shall take the evidence as may be produced by him. The Magistrate

in that case has only to hear the complainant and if the complainant takes other evidence, then he should take all such evidence.

4. Therefore, the plain moaning of the words used in Section 252, Criminal Procedure Code shows that there need not be any examination of the

complainant. The hearing of the'' complainant does not, necessarily, mean his examination and his giving evidence. It may at the most perhaps mean

a granting of audience. This conclusion is also supported by the language used in the next Section 253, Criminal Procedure Code. u/s 253, ""if,

upon, taking all the evidence referred to in Section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he

finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

Therefore, the Magistrate can discharge him if there is no case against the accused upon taking all the evidence referred to in Section 252, Criminal

Procedure Code. Now, we have seen that u/s 252, Criminal Procedure Code, the Magistrate need not proceed to take the evidence of the

complainant but shall proceed to take such evidence as may be produced by the complainant in support of his case. Therefore, oven after

construing the language used in Section 253, Criminal Procedure Code, we have no other alternative but to come to the conclusion that the

Legislature never intended that the Magistrate shall also take the evidence of the complainant.

5. But the learned Assistant Government Pleader invites my attention to Darya Singh and Others Vs. State of Punjab, , and says that the

observations made by the Supreme Court there will help him in this case. This case was with reference to a trial for murder and the evidence of

eye-witnesses. Even there, the Supreme Court has observed as follows (p. 332):

...It is well settled that in a murder case, it is primarily for the prosecutor to decide which witnesses lie should examine iii order to unfold his

story...a prosecutor must act fairly and honestly and must never adopt the device of keeping back from the Court eye-witnesses only because their

evidence is likely to go against the prosecution case. The duty of the prosecutor is to assist the Court in reaching a proper conclusion in regard to

the case which is brought before it for trial. It is no doubt open to the prosecutor not to examine witnesses who, in his opinion, have not witnessed

the incident, but, normally lie ought to examine all the eye-witnesses in support of his case.

Therefore, even in a murder case the prosecution have a choice to choose the way they want to examine their witnesses. It is true that the

complainant should act fairly and honestly. But in so far as the facts and circumstances of our case are concerned, there is nothing on record to

show that the complainant is not acting fairly and honestly. He has some complaint against the non-applicant. He wants to establish his case by first

examining certain witnesses who would establish, according to him, the misappropriation of the two aforesaid sums. He has also given a pursis that

he did not propose to examine himself before charge. Therefore, if lie is not able to establish a prima facie case against the non-applicant, lie will

suffer. It is neither for the accused nor for the Court in the facts and circumstances of the case to demand from the complainant that he should

examine himself first and then examine others. It is well settled that it is primarily for the complainant to choose his own witnesses in the way he

likes and to examine them in the way he thinks best for the purpose of unfolding his complaint against the non-applicant.

6. In State v. Nandlal [1957] N.L.J. 293 this Court was considering Sections 350 and 252 of the Criminal Procedure Code, In that case, the

complainant had already gone into the witness-box and part of his evidence was also recorded when the Magistrate was transferred. Then came

another Magistrate and the complainant did not want to examine himself in the de novo trial which had taken place. A point, therefore, arose

whether the complainant could refuse to go into the witness-box and exercise his choice that way. It was held in the circumstances of that case that

the accused cannot insist that the complainant shall go into the witness-box and be summoned as a witness when he is unwilling to do so in support

of his own case. Therefore, this Court had also taken a similar view as I am now taking here.

7. The learned Sessions Judge relied on Gajadhar Singh Vs. Emperor, as well as on Matilal v. The King AIR [1949] Cal. 586. I do not think the

observations in those cases are relevant for the purpose of our case. In fact in the Patna case it was held that it was open to the prosecution to

examine their witnesses in any order they choose. The Calcutta case also shows that a case can only be appreciated if it is presented properly and

the proper way to present facts in most cases is to present the facts chronologically; that if the complainant had been cheated and the other

evidence is wholly unintelligible without the evidence of the complainant, it is undesirable for the Magistrate to allow the prosecution to keep back

the complainant until the very end of the examination of the prosecution witnesses. Surely, these circumstances do not arise hero at all. In my view,

therefore, the learned Sessions Judge relied on cases which are neither relevant to the facts and circumstances nor to the point that arises here.

8. The order passed by the learned Sessions Judge, therefore, is neither legal nor proper. I, therefore, set aside the order of the learned Sessions

Judge confirming the order of the trial Court and hereby direct that he should summon the witnesses cited by the complainant and shall proceed to

take their evidence according to law.