RAJESWAR PROSAD MISRA

v.

STATE OF WEST BENGAL & ANR.

May 6, 1965

[A. K. SARKAR, M. HIDAYATULLAH AND V. RAMASWAMI, JJ.]

Code of Criminal Procedure (Act 5 of 1898) s. 428—Scope of.

The appellant was prosecuted for offences under s. 408 Indian Penal Code on the ground that he had misappropriated certain amounts. His defence was that he had deposited the money with the cashier of his employer, and he asked at the trial, for the production of certain documents which would show such deposit. The documents were not produced because of the vagueness of the demand. The Magistrate did not accept the oral evidence of the prosecution and acquitted the appellant, drawing a presumption against the complainant from his failure to produce the documents. On appeal by the complainant under s. 417(3), Criminal Procedure Code, the High Court ordered the production of those documents, under s. 428 of the Code, and ultimately convicted the appellant after considering the oral and documentary evidence.

In his appeal to the Supreme Court, the appellant contended that the High Court acted beyond the jurisdiction conferred by s. 428, in receiving additional evidence which had enabled the prosecution to improve its case.

HELD : The High Court rightly thought that, rather than take a different view of the oral evidence, the interests of justice and fair play demanded that the additional evidence, which the accused himself demanded to be produced at the trial, should be taken. [189 A-B]

Section 428 occurs in Chapter XXXI of the Code. It speaks of "any" appeal under that Chapter, and since s. 417(3) is in that Chapter, s. 428 applies to the appeal to the High Court against an order of acquittal. The Code does not differentiate between the ambit of an appeal from a conviction and that of an appeal from an order of acquittal. The procedure for dealing with the two kinds of appeals is identical and the powers of the appellate courts in disposing of the appeals, though indicated separately in s. 423, are in essence the same. The Code contemplates that a retrial may be ordered after setting aside the conviction or acquittal, under s. 423, if the trial already held is found to be unsatisfactory or leads to a failure of justice. In the same way, the Code gives a power to the appellate court to take additional evidence, under s. 428, which, for reasons to be recorded it considers necessary. The Code thus gives power to the appellate court to order one or the other, as the circumstances may require, leaving a wide discretion to it to deal appropriately with different cases. Since a wide discretion is conferred on the appellate court, the limits of that Court's jurisdiction must obviously be dictated by the exigency of the situation, and fair-play and good sense appear to be the only safe guides. The power must be exercised sparingly and only in suitable cases, when there would be failure of justice without such additional evidence. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused, as for example, it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not

A Availed of it, unless the requirements of justice dictate otherwise. [182 F-G; 186 B-C; 186H—187B; 187 E-F; 187H—188B]

Abinash Chandra Bose v. *Bimal Krishna Sen*, A.I.R. 1963 316 and *Ukha Kolhe* v. *State of Maharashtra*, A.I.R. 1963 S.C. 1531, explained.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 19 of 1963.

B Appeal by special leave from the judgment and order dated September 5, 1962, of the Calcutta High Court in Criminal Appeal No. 295 of 1960.

P. K. Chakravarty, for the appellant.

Sarjoo Prasad, E. Udayarathnam and *R. C. Prasad*, for respondent No. 2.

C

The Judgment of the court was delivered by

Hidayatullah, J. The appellant Rajeswar Prosad Misra, who has been convicted under s. 408 of the Indian Penal Code on three counts and sentenced in the aggregate to suffer rigorous D imprisonment for one year and to pay a fine of Rs. 2,000 (in default 6 months' further rigorous imprisonment), was a travelling salesman of Messrs. Dabur (Dr. S. K. Burman) Private Ltd. The area of his operation was the Suburbs of Calcutta and the Mill Area. His duty was to secure orders from Agents and to effect delivery of goods to them in the Company's vans. He E was required to receive payments from the agents and to deposit the money with the cashier of the Company. The three charges on which he was tried and convicted were : on 10th and 19th February, 1958 he received, on behalf of the Company, sums of Rs. 300 and Rs. 240 respectively, from a firm Isaq and Sons and on 3rd May, 1958 a sum of Rs. 1502 from Bombay F Fancy Stores, but failed to deposit these sums with the cashier. A complaint was accordingly filed against him in the Court of the Chief Presidency Magistrate, Calcutta on August 29, 1958. The charges were framed against him under s. 408 I.P.C. on July 16, 1959. The prosecution proved the receipt of the money by him and his failure to deposit it with the cashier. His defence G was that he had deposited the amount and that the case was started against him as a counter-blast to a dispute between him and V. D. Srivastava, sales supervisor, who had taken away certain documents from him and in respect of which he had filed a case against Srivastava, S. N. Mukerjea, General Manager, R. C. Burman, Managing Director and others before the Police H Magistrate, Alipore. On August 17, 1959 the appellant served through counsel on the complainant a notice to produce in court on August 20, 1959 the following documents :

(a) Sale Book (Mill Area) for 1958.

(b) Collection Register from 2nd January, 1958 upto 15th July, 1958.

(c) Challans for the year 1958 as per parcel no. etc. (entered in the related sale books) of Agent No. 1026, 1185, 296, 1021 and 181.

(d) Agency Ledger for the year 1958.

(e) Staff Security Deposit Register.

(f) Relevant register/statement showing accused's dues on account of commission earned on the basis of sales effected by him for the years 1957 and 1958.

The complainant's counsel replied to the notice as follows :—

"Your request to produce certain books cannot be complied with for the objections noted against the items separately.

(1) Sale Book—this book cannot be produced unless you specify either the agent or the parcel no. On furnishing particulars the relevant entries will be shown.

(2) Collection Register—We have objection to the other salesman's collection being shown to you. As far as your client's returns are concerned they have been filed, if anything more relating to your client is necessary we will produce that on getting particulars.

(3) Challans for the year 1958—We have no objection to produce them for your inspection.

(4) Agency Ledger for 1958—Please supply particulars—The number of agents must be furnished.

(5) Staff Security Deposit Register—This book cannot be produced for your inspection. Only an attested copy of the page showing security deposit by your client can be supplied.

(6) Accused's commission account—Will be produced. Please supply the particulars asked for so that the necessary papers may be produced for your inspection by 22nd August, 1959."

. . . . .
. . . . .

A The documents were not produced. In the cross-examination of some witnesses for the complainant a suggestion was made that these documents were withheld because they would have demonstrated that the appellant had deposited the money with the cashier. A. C. Burman (P.W. 7) was questioned and he replied as follows :—

B

> " . . . . I know that defence wanted the production of Sale Book, Agency Ledger and the Register containing the commission of accused. The documents were not produced as it was not possible to produce the same without particulars. There are 20 Sale
> C Books of 1958. It is not a fact that the books were not produced as they would show that the complaint is false . . . . . ".

The appellant produced no evidence in rebuttal of the prosecution case. The Presidency Magistrate recorded a judgment of
D acquittal on March 7, 1960. He was of opinion that the only question was whether the accused had deposited the amount with the cashier of the Company. He held that the complainant had not been able to disprove the claim of the accused (appellant) that he had made the deposit. The learned Magistrate pointed out that some of the documents which the accused (appellant)
E had asked for were not produced by the complainant and the benefit of the doubt ought to go to the accused (appellant).

The complainant then obtained special leave under s. 417(3) of the Code of Criminal Procedure from the High Court of Calcutta to appeal against the acquittal. The appeal was heard by
F S. K. Sen and A. C. Roy JJ. On June 28, 1962, the learned Judges ordered the production of the documents in question and the taking of additional oral evidence to prove the documents. The order is brief and it may be conveniently set out here :

> "After hearing the arguments on both sides it appears to be necessary to take certain additional documentary evidence for arriving at a just decision in the
> G case. The documents in question are the agency ledgers for 1958 relating to the selling agents Md. Isaq and Sons and Bombay Fancy Stores; and the collection book Part I of 1958 which supplements the collection book Part II which was marked as Ext. 19. The Presi-
> H dency Magistrate S. N. Sanyal or his successor-Magistrate will please take the necessary evidence so that the above documents and registers are formally proved and allow

the accused an opportunity to cross-examine the witnesses proving the documents, and then transmit the records with the registers and documents to this Court within a period of six weeks from the date."

The complainant thereupon produced the documents as ordered and examined two witnesses in proof of the documents. The appeal was then heard and allowed and the acquittal of the appellant was set aside and he was convicted and sentenced as already stated. The High Court held that there was overwhelming evidence to prove the receipt of the three sums by the appellant and that the additional evidence demonstrated clearly that the money received by the appellant was not deposited with the cashier of the Company. The appellant has filed this appeal by special leave, and it is contended that the High Court acted beyond the jurisdiction conferred by s. 428 of the Code of Criminal Procedure in receiving additional evidence which has enabled the prosecution to improve its case. This is the only point which was argued and which we need consider, because, if the evidence was rightly received, there is no doubt that the conclusion of the High Court on fact is correct.

The appellant strongly relies upon a decision of this Court reported in *Abinash Chandra Bose* v. *Bimal Krishna Sen and another*(1) and the respondents upon *Ukha Kolhe* v. *State of Maharashtra*,(2) another case of this Court which is to be found in the same volume at p. 1531. Both sides have referred us to many cases decided by the High Courts defining the powers of the appellate Court to take additional evidence. The appellant contends that additional evidence could not be taken in the appeal against the order of acquittal in the present case.

It may be stated at once that the Code does not differentiate between the ambit of an appeal from a conviction and that of an appeal from an order of acquittal except that an appeal against a conviction is as of right and lies to Courts of different jurisdiction depending on the nature of sentence, the kind of trial and the court in which it was held, whereas an appeal against an order of acquittal can only be made to the High Court by the State Government or by a complainant (where the case started on a complaint) with the special leave of the High Court. The matters on which an appeal under the Code is admissible are stated in s. 418 and they are the same for the two kinds of appeals. Such appeals lie on a matter of fact as well as a matter of law (except in trials by

(1) A.I.R. [1963] S.C. 316. (2) A.I.R. [1963] S.C. 1531.

A July). The procedure for dealing with the two kinds of appeals is identical and the powers of appellate Courts in disposing of the appeals, though indicated separately in s. 423 are in essence the same. Under that section the appellate Court (which means the High Court in an appeal against an order of acquittal) may—

B "(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

C (b) in an appeal from a conviction (1) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or with or without

D altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding alter the nature of the sentence but, subject to the provisions of section 106, sub-section (3), not so as to enhance the same;

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Section 428 next provides :

"428. (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons,

F and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the

G Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the

H additional evidence is taken; but such evidence shall not be taken in the presence of jurers or assessors.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV, as if it were an inquiry."

It was at one time felt that the powers of the High Court were somewhat limited when dealing with an appeal against an order of acquittal but that was dispelled by the Judicial Committee in *Sheo Swarup & others* v. *King Emperor*(1) in a categoric pronouncement (later accepted by this Court in many cases) that :

> "There is.....no foundation for the view apparently supported by the judgments of some Courts in India that the High Court has no power or jurisdiction to reverse an order of acquittal on a matter of fact except in cases in which the lower court has 'obstinately blundered' or has 'through incompetence, stupidity or perversity' reached such 'distorted conclusions as to produce a positive miscarriage of justice', or has in some other way so conducted itself as to produce a glaring miscarriage of justice or has been tricked by the defence so as to produce a similar result. Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

The appellant relies upon certain observations of this Court in the case of *Abinash Chandra Bose*(2). The accused in that case was prosecuted under s. 409, Indian Penal Code for misappropriating an amount belonging to his client who was the

(1) 61 I.A. 398. (2) A.I.R. 1963 S.C. 316.

A complainant. Prosecution was based upon a letter said to be written by him which he stated was a forgery. No expert was examined by the complainant and the accused was acquitted. The High Court set aside the acquittal and ordered a retrial. It was held by this Court that this was against "all well-established rules of criminal jurisprudence" that "an accused person should not be B placed on trial for the same offence more than once, except in very exceptional circumstances". Holding that if the High Court did not think that "the appreciation of the evidence by the trial court was so thoroughly erroneous as to be wholly unacceptable," "it should not have put the accused to the botheration and expense of a second trial simply because the prosecution did not adduce C all the evidence that should and could have been brought before the Court of first instance" and which "it was nowhere suggested had been refused to be received." Mr. Chakravarti contends that there is no essential difference between the taking of fresh evidence under s. 428 or the ordering of a retrial under s. 423, that this evidence was always available and had, in fact, been asked to be D brought in at the trial but was not, and the prosecution should not have another chance whether by way of retrial or additional evidence. The other side contends that in *Ukha Kolhe's case*(1) the principles were restated exhaustively and that we should guide ourselves by the statement of the law laid down there. In that case there was a conviction of the accused under s. 66(b) of the E Bombay Prohibition Act. The report of the Chemical Examiner proved the existence of alcohol in the sample of blood but there were many points in the evidence of experts, which remained unexplained and their examination was perfunctory. On appeal the conviction was set aside and a retrial was ordered. This Court in F dealing with the order of retrial observed in the majority judgment :

> "An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no G jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or ten- H dering evidence material to the charge, and in the interests of justice the appellate Court deems it appro-

(1) A.I.R. [1963] S.C. 1531.

priate having regard to the circumstances of the case, that the accused should be put on his trial again....."

It was pointed out that the Sessions Judge could have taken recourse to the power conferred by s. 428 and not ordered a retrial.

Section 428 occurs in Chapter XXXI which deals with appeals. It speaks of any appeal under that Chapter and the word 'any' means every one of the appeals (no matter which) mentioned in the thirty-first Chapter of the Code. Section 417(3) is in that Chapter and s. 428 clearly applied to the appeal which was in the High Court. It only remains to determine the limits (if any) of the jurisdiction and power of the appellate Court (here the High Court) in ordering additional evidence and whether the limits so determined were exceeded by the High Court in the present case.

Mr. Chakravarti contends that the discretion under s. 428 is subject to the same conditions as those in s. 423 and which were laid down in *Abinash Chandra Bose's case*(1). He lays special emphasis on the condition that the prosecution should not be given a second chance to fill up the gaps in its case. He submits that this has been done here. Mr. Sarjoo Prasad on the other hand explains the *Abinash Chandra Bose's case* with the aid of *Ukha Kolhe's* case(2) and submits that in the latter, this Court gave an exhaustive list of circumstances in which an order for retrial can be made and indicated that in cases falling outside those circumstances, the appellate Court has a discretion to order additional evidence, if considered necessary.

These arguments disclose a tendency to read the observations of this Court as statutory enactments. No doubt, the law declared by this Court binds Courts in India but it should always be remembered that this Court does not enact. The two cases of this Court point out that in criminal jurisdiction the guiding principle is that a person must not be vexed twice for the same offence. That principle is embodied in s. 403 of the Code and is now included as a Fundamental Right in Art. 20(2) of the Constitution. The protection, however, is only as long as the conviction or acquittal stands. But the Code contemplates that a retrial may be ordered after setting aside the conviction or acquittal (as the case may be) if the trial already held is found to be unsatisfactory or leads to

(1) A.I.R. [1963] S.C. 316. (2) A.I.R. [1963] S.C. 1531.

A a failure of justice. In the same way, the Code gives a power to the appellate Court to take additional evidence, which, for reasons to be recorded, it considers necessary. The Code thus gives power to the appellate Court to order one or the other as the circumstances may require leaving a wide discretion to it to deal appropriately with different cases. The two cases of this Court deal B with situations in which a retrial was considered necessary by the appellate Court. In the case of *Abinash Chandra Bose*, this Court held that the order for retrial was not justified. In *Ukha Kolhe's case* too the order for retrial was considered unnecessary because the end could have been achieved equally well by taking additional evidence. This Court mentioned, by way of illustration, some of C the circumstances which frequently occur and in which retrial may properly be ordered. It is not to be imagined that the list there given was exhaustive or that this Court was making a clean cut between those cases where retrial rather than the taking of additional evidence was the proper course. It is easy to contem- D plate other circumstances where retrial may be necessary as for example where a conviction or an acquittal was obtained by fraud, or a trial for a wrong offence was held or abettors were tried as principal offenders and *vice versa*. Many other instances can be imagined. The Legislature has not chosen to indicate the limits of the power and this Court must not be understood to E have laid them down. Cases may arise where either of the two courses may appear equally appropriate. Since a wide discretion is conferred on appellate Courts, the limits of that Court's jurisdiction must obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt some analogy between the power to order a F retrial and the power to take additional evidence. The former is an extreme step approximately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section.

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Additional evidence may be necessary for a variety of reasons which it is hardly necessary (even if it was possible) to list here. We do not propose to do what the Legislature has refrained from doing, namely, to control discretion of the appellate Court to certain stated circumstances. It may, however, be said that addi- H tional evidence must be necessary not because it would be impossible to pronounce judgment but because there would be failure of justice without it. The power must be exercised sparingly

and only in suitable cases. Once such action is justified, there is no restriction on the kind of evidence which may be received. It may be formal or substantial. It must, of course, not be received in such a way as to cause prejudice to the accused as for example it should not be received as a disguise for a retrial or to change the nature of the case against him. The order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it unless the requirements of justice dictate otherwise. Commentaries upon the Code are full of cases in which the powers under s. 428 were exercised. We were cited a fair number at the hearing. Some of the decisions suffer from the sin of generalization and some others from that of arguing from analogy. The facts in the cited cases are so different that it would be futile to embark upon their examination. We might have attempted this, if we could see some useful purpose but we see none. We would be right in assuming the existence of a discretionary power in the High Court and all that we consider necessary is to see whether the discretion was properly exercised.

The appellant here had received three sums from the agents and the allegation was that he had misappropriated the amount. During his trial he asked for certain documents but for some reason, into which it is hardly necessary to go, they were not brought. There was oral evidence tending to show that the money was not credited with the cashier of the Company. The Magistrate was not inclined to accept oral evidence and basing himself entirely on this failure, ordered an acquittal. The High Court took additional evidence because it was of the opinion that this evidence was necessary. It is manifest that, if the High Court wished to rely on oral evidence, fair play at least demanded that the accused (appellant) should be given a chance of seeing the documents where the deposit by him would be mentioned, if made. Mr. Chakravarti contends that the Magistrate had drawn a presumption against the complainant from the failure of the complainant to produce this evidence and the order of the High Court deprived the appellant of the benefit of the presumption. There is no force in this argument which may be raised invariably in all cases in which the powers under s. 428 are exercised. There was a serious defalcation of money. The money was received and the only question was whether it was deposited or not. Oral evidence showed that it was not. The accused insisted that the books of account should have been brought and so they were brought as a result of the order. The accused himself demanded that evidence and but for the vagueness of his demand, this evi-

A dence would have been produced earlier. Rather than take a different view of the oral evidence, the High Court rightly thought that interests of justice and fair play demanded that this additional evidence should be taken. In our judgment, the High Court acted within the powers conferred by the Code.

B The appeal thus has no substance. It fails and is dismissed.

Appeal dismissed.