BAIDYA NATH PRASAD SRIVASTAVA

v.

STATE OF BIHAR

April 30, 1968

[V. RAMASWAMI, G. K. MITTER AND C. A. VAIDIALINGAM, *JJ.*]

Evidence—Failure of accused to produce evidence in support of his plea cannot be made basis of conviction—It is for prosecution to prove its case.

Code of Criminal Procedure, s. 342A—Failure of accused to examine himself—Court must not comment on it.

The appellant was a Mukhtear practising in Bihar. He along with some others attested the identity of certain persons on applications for loans under the Agriculturists Loan Act, 1884. It was found that the applications had been made under false names and the appellant along with other accused was tried for an offence under s. 467 read with s. 109 I.P.C. The appellant's plea was that he had made the endorsements on the assurance of a co-accused and in view of the fact that another Mukhtear, D had also attested the loan applications. D's plea as an accused was that he had made the attestation on the assurance of one R. The Sessions Judge acquitted all the accused. The State of Bihar appealed to the High Court. During the pendency of the appeal D died. The High Court set aside the acquittal of the appellant and convicted him on two grounds namely, (i) that though he had raised a defence that he had attested the applications on the assurance of S, no evidence had been produced to support this defence; (ii) that D with whose case the appellant's case was closely connected had not examined himself under s. 342A of the Criminal Procedure Code in support of his plea, and the same consideration applied to the appellant also. On appeal to this Court by special leave.

HELD : The order of the High Court could not be sustained.

(i) In requiring evidence in support of the plea raised by the appellant the High Court really threw the burden of proof on him instead of finding out whether the prosecution had proved its case and whether the order of acquittal was erroneous. [174 F]

(ii) In commenting on the failure of the accused to examine themselves on oath under s. 342A Cr. P.C. the High Court committed a breach of the proviso to that section which specifically states that the failure of an accused to give evidence shall not be made the subject of comment by any of the parties, or the court, or give rise to any presumption against himself or any other person charged together with him at the same time. [175 B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 47 of 1966.

Appeal by special leave from the judgment and order dated September 6, 1965 of the Patna High Court in Government Appeal No. 23 of 1962.

B. P. Singh and *D. N. Misra*, for the appellant.

D. P. Singh and *K. M. K. Nair*, for the respondent.

A The Judgment of the Court was delivered by

Vaidialingam, J. On behalf of the sixth-accused, the appellant herein, in this appeal, by special leave, Mr. B. P. Singh, learned counsel, challenges the order of the Patna High Court, dated September 6, 1965, setting aside the order of acquittal, B passed by the Second Additional Sessions Judge, Muzaffarpur, and convicting him for an offence, under s. 467, read with s. 109, IPC., and passing a sentence of three months' rigorous imprisonment.

For the relief and rehabilitation, of people who had suffered, in 1954, by the heavy floods in Sitamarhi Sub-Division, the C Government of Bihar was granting loans to needy and suitable persons, under the Agriculturist's Loan Act, 1884. The appellant was a Mukhtear, practising at Sitamarhi. There are certain formalities, to be gone through, in the matter of obtaining the loans, under that Act. One of the requirements was that an applicant had to put his signature, on an agreement form and, that D he should be identified, by a lawyer, who should also attest his signature. Several officers, connected with this Loan Department, including the Mukhtears practising at Sitamarhi, one of whom was the appellant, were alleged to have entered into a conspiracy, between November 19, 1955 and December 22, 1955, to cheat the Government, by inducing it to grant loans, in the names of E fictitious persons, and, in pursuance of that conspiracy, two applications, for loans in the names of two fictitious persons, Durga Singh and Hari Shankar Singh, were filed before the Sub Divisional Officer, Sitamarhi. According to the prosecution, the appellant and another Mukhtear. Devendra Prasad, had certified, in the loan applications of Durga Singh and Hari Shankar Singh, that they knew those parties and that they had signed, in their F presence. The amounts were drawn, in the usual course, from the treasury, by the said two persons; and, ultimately, it came to light that the two persons were fictitious persons, got up by the several accused. The appellant admitted having attested, in the loan applications of the two individuals concerned, but he stated that he did so, on the assurance of one Sheojee Prasad G Karpardaj. It may be stated that this Sheojee Prasad Karpardaj was also charge-sheeted, but he has been discharged, even by the committal Court.

The learned Sessions Judge found, on the evidence, that Durga Singh and Hari Shankar Singh were fictitious persons and a fraud was committed, on the Sub Divisional Officer, Sitamarhi, H and the Sub-treasury, as a result of which the Government sustained a loss of Rs. 1,000/-. The learned Sessions Judge accepted the appellant's plea that he had made the endorsement on the

assurance of Sheojee Prasad Karpardaj and, in view of the fact that other Mukhtiar, Devendra Prasad, had also attested the loan applications, and acquitted him. This Devendra Prasad had also been charged, for the same offence. While admitting, having attested the signatures of the applicants for the loan, Devendra Prasad had set up a plea that he did so, on the assurance, given by one Rudradeo Singh. This explanation has been accepted, by the trial Court and Devendra Prasad was acquitted. But, when the State appeal, against acquittal, was pending in the High Court, Devendra Prasad died. But, we have to refer to certain observations, made by the High Court, regarding this Devendra Prasad, which have, more or less, formed the grounds, for setting aside the order of acquittal of the appellant also. The High Court, on appeal, by the State Government, has set aside the order of acquittal of the appellant. Two reasons, so far as we could see, have been given, by the High Court, for interfering with the order of acquittal, *viz.*: (i) that though the appellant raised a defence that he attested the loan applications, on the representation and assurance of Sheojee Prasad Karpardaj, no evidence has been let in, by the appellant, to support this defence; and (ii) Devendra Prasad, with whose case the appellant's also was closely connected, had raised a plea that he attested the loan applications, on the assurance and representation of Rudradeo Singh and that Devendra Prasad has not examined himself as a witness, under s. 342A, Cr.P.C., nor did he adduce any other evidence, in support of his claim. It is really, on these grounds, that the appellant has been convicted, for the offence under s. 467 read with s. 109, IPC., and sentenced to undergo rigorous imprisonment, for a period of three months.

We are satisfied that the order of the High Court cannot be sustained. Regarding the first point, mentioned above, the High Court has really thrown the burden of proof on the appellant, instead of finding out whether the prosecution has proved its case and whether the order of acquittal is erroneous. Regarding the second point the High Court has really committed a breach of the proviso to s. 342A, when it has commented upon the non-examination of Devendra Prasad, that he has not examined himself, as a defence witness. Under cl. (b), of the proviso to s. 342A, Cr.P.C., it is specifically provided that the failure of an accused to give evidence, shall not be made the subject of any comment, by any of the parties, or the Court, or give rise to any presumption against himself, or any person charged, together with him, at the same time. The High Court has stated that the case of the appellant is closely connected with that of Devendra Prasad. In fact, the appellant had pleaded that he had attested the signatures of the applicants, for the loans, because Devendra Prasad, another Mukhtear, had attested the same

A and also on the assurance of one Sheojee Prasad Karpardaj. Devendra Prasad had taken a plea that he had attested the signatures of the applicants, on the assurance of one Rudradeo Singh, a class-mate of his. It is in considering this plea that the High Court has commented upon the failure of Devendra Prasad to give evidence under s. 342A, and the High Court has also taken the B view that the same reasons will apply to the appellant's defence also. That is, the failure of the appellant, to give evidence, has been commented upon, by the High Court, and it has also drawn a presumption, against him, both of which are illegal, under clause (b) of the proviso to s. 342A, Cr.P.C.

C In view of this serious infirmity, in the judgment of the High Court, the order, under attack, is set aside, and the order of the Second Additional Sessions Judge, Muzaffarpur, acquitting the appellant, will stand restored. In the result, the appeal is allowed.

G.C. *Appeal allowed.*