Samresh Singh vs The State on 24 September, 1951

Equivalent citations: AIR1953ALL781, AIR 1953 ALLAHABAD 781

ORDER

Beg, J.

1.This is a revision on behalf of one Samresh Singh, who has been convicted under Section 408, Penal Code, by the learned Additional Sessions Judge of Bahraich and sentenced to three months' rigorous imprisonment and a fine of Rs. 200/-, in default two months' rigorous imprisonment. This case has had a chequered career. The accused, along with his father, Kumar Singh, was prosecuted under Section 408, Indian Penal Code. The accused was charged with having embezzled Rs. 1,864/2/9 in his capacity as an agent of Chandra Bir Singh. This amount is alleged to have been embezzled between 20-3-1949 and 10-8-1949. The father of the accused Kumar Singh was also alleged to have embezzled a sum of Rs. 1,500/- and he was also charged, along with the accused in this case, for having committed a breach of trust in respect of that amount and the accused was charged with having abetted his father in the commission of the said offence.

2. The learned trial Court acquitted the accused's father in respect of the offence for which he was charged as well as the accused-applicant for abetment of the same. As regards the amount of Rs. 1,864/2/9 in respect of which the applicant was charged under Section 409, (sic.) the Magistrate did not find that the entire amount was embezzled and he acquitted the accused in respect of some of the items. Ho, however, convicted the accused for having embezzled a sum of about Rs. 900/-which formed the price of the sugar-cane supplied and sold by the accused on behalf of his master to the sugar mills. He also convicted the accused in respect of certain amounts which he had realised from tenants of some of the villages.

3. The accused filed an appeal against the said judgment before the learned Additional Sessions Judge of Bahraich, who allowed the appeal of the accused and acquitted him. The complainant filed a revision against the said order of acquittal which came before a learned Judge of this Court, who remanded the case to the lower Court and directed that the appeal should be reheard, In accordance with the said order appeal was again heard by the learned Additional Sessions Judge of Bahraich, who dismissed the appeal of the accused upheld his conviction and maintained the sentence passed on him by the trial Court. The accused has now filed a revision in this Court. After hearing it at length, I have come to the conclusion that this revision must be allowed.

4. So far as the accused is concerned, the charge of embezzlement against him relates to two items; the first item consists of the price he realised for the sale of sugar-cane at the sugar mills and the second amount consists of various amounts which the accused is alleged to have realised from the tenants of the villages owned by his master. So far as the first amount is concerned, learned Counsel

appearing for the complainant stated before me that after a scrutiny into the evidence of the case all that he could say was that the amount came approximately to a figure of Rs. 900/- out of which the complainant had adduced evidence to prove that Rs. 884/- was embezzled by the accused. The practice would appear to be that the accused used to take sugar-cane on behalf of his master to the sugar mills and he used to be given parches or purzis indicating the price of the sugar-cane. It would appear that the accused used to get these receipts and hand them over to one Ram Kumar, who was a servant of a brother of the complainant and put his signature on those purzis to indicate that he had received the amounts shown in the purzis and was responsible for the same. These purzis formed the most important pieces of evidence for proving that the amounts had been realised by the accused and the payments acknowledged by him. One would think that the complainant would have filed these purzis either with the complaint or in proceedings under Section 202, Criminal P. C. No definite stage for filling evidence is, however prescribed by Criminal P. C., and it was certainly open to the complainant to summon it at any stage. The complainant admitted in his statement that he came to know that these purzis were with Ram Kumar on 11-6-1949. The complaint was filed on 14-6-1949, and Ram Kumar was summoned on a number of dates by the complainant. The complainant made the first application for summoning witnesses on 13th June but the name of Bam Kumar was not mentioned in it at all. If the complainant knew that Ram Kumar had these important documents in his possession, there was no justification for the complainant to omit such an important witness as Ram Kumar from the list of witnesses summoned. On 18-7-1949, the complainant made another application for summoning witnesses. He did mention the name of Ram Kumar as a witness to be summoned. In spite of it he did not summon these pursis from Ram Kumar. Again the complainant gave applications for summoning witnesses on 12-8-1949 and 24-8-1949 but in none of these applications was Ram Kumar summoned with the purzis. An application for summoning these purzis from Ram Kumar was for the first time made on 12-11-1949, on which date he was summoned with these purzis for 25-11-1949, when he appeared in Court and produced these purzis in evidence.

5. The manner in which Ram Kumar was summoned and the delay in summoning purzis made by the complainant certainly goes to support the argument on behalf of the accused that the prosecution had not come to Court with clean hands and that it was trying to suppress the production of these purzis. The reason seems to have been that these purais bore the signatures of the accused and they would have shown beyond doubt that the accused did not at all want to conceal the fact that he had realised these amounts and was responsible therefor. They would have shown not only that he had appended his signatures to these purzis, but also that he had handed over these purzis to Ram Kumar, who was the servant of the complainant's own brother. If the accused had a dishonest intention, it is inconceivable that he would hand over most important documents which would provide evidence against him to the servant of the complainant's own brother. They certainly go to negative the case of dishonest intention set up by the prosecution against the accused.

6. Further it is also significant that the complainant made an application for the issue of a search warrant against the accused. At item No. 22 in the search warrant he mentioned the purzis as the documents in respect of which the bouse of the accused was to be searched. The complainant has admitted that he knew the fact that the purzis were with Ram Kumar on 11-6-1949, i. e., three days prior to the date on which he filed his complaint, and yet in his application for search warrant given

on 14-6-1949, he applied for a search of the house of the accused being made for the recovery of the purzis. There was, therefore, absolutely no justification for mentioning these purzis in the warrant of search. It clearly implied that the purzis were retained by the accused who was acting dishonestly throughout. I understand from the statement made by the learned counsel on behalf of the accused that a number of other documents were recovered from the house of the accused but no purzis were recovered.

7. To add to all these infirmities of the prosecution case, there can be no doubt that the learned Magistrate who tried the case committed a serious error of law in not putting any question whatsoever to the accused relating to these purzis. His attention was never drawn to the fact that there were purzis on which he had signed. He was never given any opportunity to explain as to what he had to say on this point. As a matter of i'act on the amounts embezzled the trial Court put only the following two questions to the accused:

> (1) "Question: Bid you between the dates 20-3-1949 and 10-6-49 in your capacity as a servant of Thakur Chandra Bir Singh and having authority as such embezzled an amount of Rs. 1,864/2/ 9? (2) "Question: Did you on 5-6-1949 abet Kumar Singh in embezzling a sum of Rs. 1,500/-?

1. "Kya tumne batarikh 20-3-1949 Isvi wa 10-6-49 Isvi ke darmiyan men Thakur Chandra Bil Singh ki mulazmat men hote hue aur is haisiyat se adhikar hote hue mubligh 1864 rupaiya do anna nau pie ka gavan kiya?

2. "Kya tumne batarikh 5-6-1949 Isvi ko Kumar Singh be mubligh 1500/- rupaye gavan karne men madad diya?

8. The first question is a composite one. It is complicated and misleading. It only gives a consolidated amount of Rs. 1864/2/9 which the accused is alleged to have embezzled. The accused in reply to that question gave a reply in the negative. It only meant that he had not embezzled the said amount. It would, therefore, appear that the trial Court did not even ask the accused as to whether he had realised or collected any amount in respect of the sale of sugar-cane. He did not even specify the said amount. He did not ask as to what he did with it if he realised it and as to what explanation he had to offer on those points. The learned Counsel appearing for the accused stated that the consolidated amount of Rs. 1,864/2/ 9 mentioned in the charge was made up of the following items embezzled at various times:

> (1) Rs. 884/- realised by sale of sugar cane.
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> (2) Rs. 100/- realised by sale of the mango grove.
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> (3) Rs. 24/- realised as rent from tenants of village Dharampur. (4) Rs. 335/2/3 realised as rent from tenants.
>
> (5) Rs. 272/14/- realised as rent from tenants.

(6) Rs. 248/2/6 realised as rent from tenants.

None of the above items was specifically put to the accused nor his explanation asked in regard to them. I consider this mistake committed by the trial Court to be of a serious nature. It has no doubt caused a grave prejudice to the accused. This error on the part of the trial Court has been considered to be fatal in a large number of cases which are based on the famous Privy Council ruling reported in -- 'Dwarkanath Varma v. Emperor', AIR 1933 P. C. 124 (A). The practice adopted by the trial Court has been considered to be indefensible and fatal to the prosecution case and calculated to defeat the very object of Section 342, Criminal P. C. The provisions of Section 342 are clearly mandatory and the purpose of Section 342 is to obtain from the lips of the accused an explanation of the main items of prosecution evidence against him. If any reference were necessary to further rulings on this point, I may only refer to -- 'Raghubar Dayal v. Emperor', A. I. R. 1934 All 735 (B), -- 'Makkhan v. Emperor', A. I. R. 1945 All 81 (C), -- 'Malumd Lal v. Emperor', AIR 1947 All 424 (D), -- 'Sohan Lal v. Emperor', AIR 1933 Oudh 305 (E) and -- 'Mahamed Anis v. Emperor', AIR 1936 Oudh 405 (P).

9. In -- 'Abu v. King Emperor', A. I. R. 1948 Oudh 81 (G) the prosecution had failed to put an alleged confession to the accused and it was laid, down by a learned Judge of the later Chief Court of Avadh that "The failure of the trying Magistrate to put an alleged confession to the accused to elicit his explanation when the accused has pleaded not guilty is an infringement of the provisions of Section 342, Cr. P. C. and would exclude the confession from consideration in determining the guilt of the accused. It is an illegality and not a mere irregularity which can be cured under Section 537, Cr. P. C."

10. The above rulings indicate that the omission to put questions on important pieces of evidence against the accused must result in the complete exclusion of evidence relating to them, it is obvious that the purzis constituted a most important piece of evidence against the accused. If no question relating to purzis or even payment of the specific sum realised through them was put to the accused, then the Court would be fully justified in excluding all that evidence on the point. If that evidence is completely ignored, the whole case of the prosecution relating to that item must break down. The same is true of other items also.

11. In spite of this clear legal position a vigorous attempt has been made to support the conviction of the accused end it has been strenuously argued on behalf of the State that where an accused has filed a written statement or has promised to file one, there has been sufficient compliance with the provisions of Section 342, Criminal P. C. Reliance in this connection was placed on --'S. Satyanarayana v. Emperor', AIR 1944 Patna 67 (H) and other rulings, If any such law was meant to be laid down in any of those cases, then I express my respectful dissent from them. I am of opinion that the law laid down under Section 342 is quite clear and casts a grave responsibility on the Court in solemn proceedings instituted against the accused to comply with its mandatory provisions, and the Court cannot absolve itself of its onerous responsibility by shifting the burden of it on the accused and saying that because the accused had promised to file a written-statement the Court was not bound to put any such question. The duty is of the Court and the Court alone, and the Court must discharge it. The provisions of Section 342, Criminal P. C., can neither be short-circuited nor by-passed without incurring the risk of prosecution case suffering a complete breakdown or without

seriously imperilling its integrity. There is no provision for filing the written statement in the Criminal Procedure Code and it is only by way of courtesy that the Courts receive such statements.

12. It has been further argued that in view of certain statements made in the written statement the accused is not prejudiced. I allowed the learned Counsel appearing for the State to read out those portions which stated that the accused had realised the amounts of the sale proceeds of sugar-cane or had specifically dealt with the question of purzis. All that the learned Counsel could, point out was the statement made by the accused in his written statement to the effect that the complainant had shown some fictitious amounts as having been embezzled by him. It is evident that trial Court did find that some of the items in respect of which the accused was charged were not embezzled by him at all, and the allegation of the accused, was perfectly correct. It is, therefore, clear that even the written statement is quite silent on this point.

13. The learned Additional Sessions Judge trying the case at the stage of the appeal has stated repeatedly in his judgment that the Counsel appearing for the accused admitted or rather conceded before him that the payment of these amounts was made to the accused. I think this procedure is absolutely unjustifiable. Whatever value the statement of the Counsel may have in a civil case, I certainly do not think that the Counsel can by his statement made in the course of his arguments on a question of fact bind the accused with it, or that such statement can be treated as a substitute for the mandatory provisions of Section 342. If such a procedure were to be followed, it is bound to have disastrous consequences, for it would result in denuding the accused of that cloak of protection which is thrown round him by the salutary provisions of Section 342, Criminal P. C.

14. I have no doubt that the failure to comply with the provisions of Section 342, Criminal P. C., has caused a serious prejudice to the accused and neither the trial Court nor the appellate Court was justified in resorting to any other method for taking the explanation of the accused on vital points.

15. The second part of the prosecution case against the accused relates to certain realisations alleged to have been made by the accused from the tenants. The accused issued receipts in respect of these amounts and under the circumstances there was no question of any attempt on the part of the accused to conceal the realisation of these amounts. It is however unnecessary for me to examine the evidence in detail on this point for the simple reason that against the accused was not put any question relating to the realisations made by him from the tenants. No particular amount was specified as having been realised by the accused from the tenants. No dates of any such realisations were given. No question was even put to the accused as to whether he had any explanation to offer with regard to the realisations made by the tenants. When I put this question to the learned Counsel appearing for the complainant, the only answer that he could give to this question was that as the accused had filed a written statement, therefore in the circumstances of this case the provisions of Section 342 should be taken to have been complied with. As I have mentioned above, I am of opinion that there is no force in this argument. Even supposing for a moment, one admits the written statement and scrutinises the contents of the same, one would fail to find any reference to the realisations of rents from tenants by the accused. All that is contained in the written statement is a vague statement that "the realisations from tenants used to remain, with the complainant". This is obviously a general statement and would not help the Court in coming to the conclusion as to the

specific items in respect of which the accused was charged. The learned Additional Sessions Judge in his judgment has translated the written statement of the accused and has observed that according to the written statement "the realisations "all" remained with the complainant". The written statement has been read out to me by the learned Counsel appearing for the State and I fail to find the word "all" in the written-statement. This case, therefore, exemplifies, the danger of making a written statement or the statement of the Counsel a substitute for Section 342. That is the reason why the Court is bound to record the questions put to the accused and the answer of the accused himself. Again, on this point I am constrained to observe that the non-compliance with the provisions of Section 342 has caused a serious prejudice to the accused.

16. The lower appellate Court has further observed in its judgment, "The second point of importance is that the appellant did not offer to pay the money when the complaint was brought". The complainant himself does not state in his evident that he made any demand for payment, There is no doubt that the lower appellate Court treated failure of offer to pay as an important point against the accused and yet no question was put to the accused as to whether he had offered to pay the money to the complainant or not. In the absence of any evidence or any question on this point, which the appellate Court considered to be a point of great importance, the omission of the trial Court to ask any question was not justifiable and the lower appellate Court should not have placed any reliance on this circumstance at all.

17. The accused's case would appear to be that there is enmity between, him and he complainant and that a report of the murder of one Ummed was lodged at the police station and the name of Chandra Bir Singh was mentioned in that report. That report has been reed out to me and no doubt Chandra Bir Singh has not been mentioned as an accused in that case, yet it is mentioned therein that Chandra Bir Singh was at the back of a large number of cases instituted against the deceased Ummed. The case of the accused is that he was asked by his master to help him in this matter and he having refused to do it a complaint was lodged against him. This report was made at 3 P. Mr on 13th of June and the complaint in the present case was filed on the very next day, that is, on 14th June without sending a notice to the accused or calling upon him, to make the payment The sequence of dates and the hurry in lodging the present complaint are rather significant; but, in the absence of other reliable evidence on the point, it is difficult to hold that the motive attributed by the accused to the complainant is pro-ed. That, however, cannot relieve the prosecution of the initial burden of proving the dishonest or fraudulent intention of the accused; and, if there is any doubt on the question of intention, the prosecution must fail on the ground that the necessary ingredient of mens rea has not been made out.

18. In view of the above circumstances, and particularly in view of the breach of the mandatory provisions of Section 342, Criminal P. C., and the grave prejudice to the accused caused thereby, the conviction of the accused must be set aside.

19. The only point that remains to be considered by me is whether I should order a retrial in this case. This case has been going on since June 1949. It has dragged on for sufficiently long time. The parties have already incurred a good deal of expenditure in the case. Even if the case is retried. It is not quite certain that the prosecution would succeed in proving that the intention of the accused was

fraudulent or dishonest. Under these circumstances, I do not think that it is a fit case for ordering a retrial

20. I accordingly allow this revision and set aside the conviction of the accused. The fine If paid shall be refunded. The accused is on bail. He need not surrender.