Mahfuz Ali (In Jail) vs State on 17 September, 1952

Equivalent citations: AIR1953ALL110, AIR 1953 ALLAHABAD 110

JUDGMENT

Mukerji, J.

1. Mahfooz Ali, the appellant, was charged under Section 5 (2) of Act 2 of 1947, for having committed "criminal misconduct" on 11-10-1949, by abusing his position as a head constable, for the purpose of deriving from one Shivlal pecuniary advantage to the extent of Rs. 20 for himself by illegal and corrupt means. The learned Additional Sessions Judge of Agra convicted the appellant on the aforesaid charge and sentenced him to undergo two years' E. I. and a fine of Rs. 200, in default of payment of fine the accused was ordered to undergo further rigorous imprisonment for six months. The appellant has preferred the aforesaid appeal from his conviction.

2. The facts giving rise to his conviction briefly put were these.

3. The appellant, Mahfooz Ali, was posted as a head constable at the Idgah outpost in the City of Agra at the time when he is alleged to have committed the offence with which he was charged and for which he was convicted. The complainant in this case was one Shivlal.

4. Shivlal is alleged to have len a sum of Rs. 150 under two promissory notes--one of Rs. 100 and the other of Rs. 60. Shivlal wanted his money back from Susa, which Susa was not repaying and, therefore, it is said that on 6-9-1949 Shivlal served a notice of demand on Susa. On 10th September in the evening it is said that Susa went to the shop of Shivlal and there was a quarrel between the two over this repayment of debt. Shivlal then lodged a report against Susa at the police station Rakabganj and he followed it up by filing a complaint against Susa in the Court of City Magistrate. This criminal case ended in a compromise, on Susa paying RS. 50, being possibly the loan on one of the two promissory notes.

Shivlal then filed a suit in respect of the other promissory note of RS. 100 which was decreed against Susa. Shivlal complainant's story then is that while the complaint against Susa was pending, the accused Mahfooz Ali sent for him (Shivlal) told him that he had received an application from Susa complaining that he (Shivlal) had not returned the promissory note, even though, he had received payment for the same. Shivlal then says that he told the accused that the allegation of Susa was absolutely false and saying so he came away from, the accused. Shivlal goes on further to lay that he was sent for by the accused 6 or 7 says later and was again told by the accused that he was going to lose his case and he was further going to be prosecuted under Section 420, Penal Code. Shivlal says that thereon he made entreaties to the accused to save him, whereupon the accused demanded a sum of RS. 50 as illegal gratification for making a favourable report. Bargain was settled at Rs. 20 instead of RS. 50.

5. Shivlal, after his return from the accused, went and complained about this to one Babulal Lodh who was a member of the Ward Congress Committee. Babulal Lodh thereupon took Shivlal with him to Babulal Mittal, the President of the Town Congress Committee, and apprised him of the entire story. Babulal Mittal thereupon gave a letter to Shivlal addressed to the Additional District Magistrate. Shivlal wont to the Additional District Magistrate with this letter of Babu Lal Mittal who, in his turn, gave him another letter or the City Magistrate, Sri R. C. Asthana. Shivlal then went to the City Magistrate with the letter of the Additional District Magistrate and there the statement of Shivlal was recorded by Sri Mathur and two ten rupee notes were taken from Shivlal, their numbers noted and the notes returned to Shivlal. These notes were meant, according to the plan, for being passed on to the accused.

6. The usual trap was then laid, the notes were then passed on to the accused and on a search of the person of the accused these notes were recovered. The recovery list is EX. p. 2 on the record and it records the following facts:

7. That Sri J. S. Mathur along with Sri Asthana, City Magistrate, went to Idgah Outpost at about 7-10 p. m. on 11-10-1949, and found the accused sitting in the room with Babulal Lodh accused was asked if any money had been given to him in connection with any application for police enquiry, whereupon the accused is recorded to have answered in the affirmative saying that RS. 20 had been given to him by Babulal Lodh who was then present with him and who told him that he was going shortly to bring an application for a police enquiry. The two currency notes of RS. 10 each bearing NOS. c/21-878216 and C/45-773757 were recovered from the pocket of the accused. The recovery memorandum further indicates that Shivlal was also present at the recovery. It is further recorded in this memorandum that Shivlal had gone, after the notes had actually been passed to the accused, to inform the City Magistrate and Sri Mathur that the money had been passed, to a nearby place where these officers were lying in ambush.

8. The accused was put up on his trial on the above facts and circumstances. The defence of the accused was that the two currency notes of RS. 10 each had been given to him by Babulal Lodh as a repayment because the accused had advanced Rs. 20 to Babulal for the purpose of supplying him ghee which the accused required in connection with the circumcision ceremony in his family.

9. From the prosecution and the defence version the following fact is beyond controversy;

> "that the notes were passed to the accused and that the notes were recovered from his person in the presence of Shivlal, Babulal, the City Magistrate and Sri Mathur on 11-10-1949."

The controversy that arose in the case was whether these notes wore given to the accused by Shivlal as a bribe for hushing up the alleged complaint made against him by Susa or these currency notes had been given to the accused through Babulal Lodh because Shivlal had received Rs. 20 from the accused earlier for supplying him ghee which Shivlal could not supply.

10. The trial Judge accepted the prosecution version by believing the prosecution evidence and naturally rejecting the defence case. It was contended by Mr. P. C. Chaturvedi that there was no satisfactory proof of the fact that there was any complaint by Susa to the accused which he could utilise as a lever for extracting the alleged bribe. It was said that the original application was not produced. A copy that was produced was not properly proved. The absence of the original application was explained by the prosecution to have been due to the fact that this must have been with the accused and it was not possible for the prosecution to get hold of it. In my opinion, the absence of the original application did not, in any manner, detract from the prosecution case if once, it was found that the statement which Shivlal made was reliable.

Shivlal was told by the accused about an application having been made by Susa and, if the statement of Shivlal is believed, then it did not matter whether or not there was an application by Susa, for, in my view, even if the accused invented this story of an application for the purpose of extracting a bribe, even then, his complicity in the crime was quite clear. Some contradictions have been referred to and some alleged improbabilities have been pointed out by learned counsel on which he submitted that this part of the prosecution case was not true. I do not think it necessary to notice those contradictions and alleged improbabilities inasmuch as, in my opinion, they are not of such a character as could persuade me, on the strength of those contradictions and alleged improbabilities, to disbelieve this part of the prosecution story. I am in agreement with the trial Judge that the accused did tell Shivlal about Susa's application, whether there was, in fact, such an application or not, and that the accused did use this assertion of his to make it the basis of his demand for illegal gratification from the complainant Shivlal.

11. The story of the defence, namely, that this money came from Babulal as a repayment of the advance which the accused had made to Shivlal for the purpose of ghee, in my judgment, was not true. There is nothing on the record, except the bald statement of the accused himself that there was a 'circumcision' ceremony in the family of the accused and that, for the purpose of such a ceremony, ghee was required. There is further nothing on the record to indicate that Shivlal had anything to do with any ghee business and that ghee could be had through his mediation.

12. Learned counsel for the defence raised certain questions of law and on the basis of such questions he argued that the conviction of the appellant under Section 6(2) of Act 2 of 1947 was illegal.

13. The first point which was raised was that the charge which was framed was defective inasmuch as it did not indicate the manner in which the accused had abused his position in order to have pecuniary advantage by illegal and corrupt means. It was further said that the illegal and corrupt means employed was also not indicated in the charge. In my opinion the inclusion of all these matters in the charge may have and possibly would have, made the charge better but their absence from the charge did not amount to anything more than a petty irregularity which could be cured, specially, when I find that by this no prejudice has been caused to the accused.

14. The next submission made by learned counsel for the appellant was that on the facts found a conviction under Section 5 (2), Prevention of Corruption Act, could not be made. Section 5 (1) of the

Act defines "criminal misconduct" in the following words :

> (a) "A public servant is said to commit the offence of criminal misconduct if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in Section 161, Penal Code, or
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> (b) if he habitually accepts or obtains or (sic) to ascept or attempts to obtain for himself or for a(sic) person, any valuable thing without consideration on(sic) consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom ho is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, or
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> (c) if he dishonesty or fraudulently misappropriates or otherwise concerts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do, or
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> (d) if he, by corrupt or illegal means or by otherwise abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage."

15. Mr. Chaturvedi's contention was that what the appellant, at the worst, did was to obtain a bribe from Shivlal on a solitary occasion. There was, he said, no evidence and no finding which could indicate that the accused was a habituation offender. I agree with Mr. Chaturvedi's contentions that there is no evidence nor is there a finding to the effect that the appellant was a habitual offender but I do not agree with Mr. Chaturvedi's contention that Section 5 applies only to the case of habitual offenders and cannot be made applicable to the case of a person who takes illegal gratification on a solitary occasion. In my judgment Section 5 (1) (d) makes provision for a case of the present type namely, a case where the accused is charged with having taken illegal gratification on a solitary occasion.

16. It was next contended by Mr. Chaturvedi that Clause (d) of Section 5 (1) does not strictly cover (sic) case of a person who obtains money from another as illegal gratification. According to him this clause of Sub-section 5 (1) contemplates cases where the accused takes some object in species or gains some pecuniary advantage and not merely takes cash. I have given this argument my careful consideration and I am of opinion that the argument is not sound for, in my judgment, the words "pecuniary advantage" are wide enough to include cases (sic) cash payment. A man when he gets some money in cash certainly makes a pecuniary gain and, therefore, has a pecuniary advantage.

17. Mr. Chaturvedi's next contention was th (sic) the learned Judge has relied, for convicting the accused, on a presumption which the Act, namely, the Prevention of Corruption Act, allows the Courts to make under Section 4 of the Act. Section 4 of the Act reads as follows:

> "Where in any trial of an offence punishable under Section 161 or Section 165, Penal Code, it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted do obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be as motive or reward such as is mentioned in the said Section 16 or, as the case may be, without consideration on consideration which he knows to be inadequate:
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> (sic)ed that the Court may decline to draw such (sic)tion if the gratification or thing aforesaid is in its on so trivial that no inference of corruption may (sic)irly be drawn."

18. Mr. Chaturvedi's contention was that the asumption which was permissible under the provisions of the Act, quoted above, could not be invoked when the Court had charged the accused under Section 5 (1) of the Act; in his submission, the presumption permissible under Section 4, was only available when the charge against the accused was under Section 161, Penal Code. I do not think that this submission of Mr. Chaturvedi is right. In (sic)inly judgment, the presumption available under Section 4 is not confined to those cases only where the accused is, in fact, charged under Section 161, Penal Code, but it is in my view also available in cases where the accused is charged under some other section where the gravamen of the charge is the same as that under Section 161, Penal Code. Section 4 which has been quoted earlier in this judgment in extenso says : "Where in any trial of any offence punishable under Section 161 . ..." It does not say where in any trial the accused is charged for an offence under Section 161. Section 5 (1) provides for the same type of offence--the gravamen of the o charge being the same--as in Section 161, Penal Code;

in my judgment, the trial Court was fully justified in relying upon the presumption available under Section 4.

19. I may further state that the Court has not merely relied on this presumption. It has, in my judgment, mainly relied on the facts which proved the offence independently of the presumption.

20. The next "legal" argument of Mr. Chaturvedi was that the Court had relied on the statement made by the accused at the time of the search, a statement recorded in the 'recovery memorandum.' Mr. Chaturvedi's contention was that this statement recorded in the "recovery memorandum" could either be a statement under Section 161, Criminal P. C. or under Section 364 of the same Code. If, it was a statement under Section 161, Criminal P. C., Mr. Chaturvedi submitted it was not admissible in evidence. According to him, it could not have been a statement under Section 364, Criminal P. C., for the simple reason that it was not an examination of the accused by a Magistrate, Mr. Chaturvedi further contended that, if anything, it amounted to a confession by the accused, and the same not having been recorded with the formalities required by the law, for the record of confessions, it could

not be used against the accused. I must say that Mr. Chaturvedi is right in regard to this submission. I am of the view that the "admission" of the accused which finds place in the recovery memorandum could not be used by the Court against the accused at the trial. I may here mention that I am fortified in the view that I have taken by an unreported decision of a Bench of 3 Court, given in the case of Shiva Balak (sic)pgh v. The State, (criminal Appeal No. 908 of (sic) decided on 2-4-1951).

21. The next question that arises for consideration is whether the trial Court did, in fact, use this statement of the accused against him in order to arrive at its decision. I have carefully considered the judgment of the trial Court and am of the opinion that the Court has not relied on the statement of the accused for convicting him.

22. Lastly, it was submitted by Mr. Chaturvedi that the accused has been prejudiced inasmuch as the trial Court never told the accused that he was, under the provisions of the Prevention of Corruption Act (Act 2 of 1947), entitled to appear as a witness on his own behalf. Section 7 gives the accused a right to appear as a witness in his own defence. Section 7 does not cast any obligation on the Court to invite the accused to offer himself as a witness for himself. The accused was represented by a counsel and a counsel certainly must be presumed to know the law and I must assume that he knew the law, and that knowing the law he did not consider it proper to advise his client in this case to offer himself as a witness in his own defence. Section 7 has to it some provisos and, in my judgment, these provisos clearly indicate that a Court cannot ask the accused to appear as a witness for himself, nor can the Court draw a presumption against the accused, if the accused has chosen not to appear as a witness for himself.

23. It appears to me that Section 7 never contemplated Courts giving a kind of warning or offering a kind of a reminder, to the accused about the right or privilege conferred upon him by Section 7. Further, in my opinion, the accused has not, in any manner, been prejudiced by not appearing as a witness for himself. What ho could say as a witness for himself he has already said in his statement as an accused. The Court has considered that statement and given it due weight.

24. In my judgment, therefore, this appeal has no force and I accordingly dismiss it. The conviction and the sentence of the appellant is maintained. The appellant is on bail. He will immediately surrender to his bail and serve out his sentence.