

Present:
Ms. Justice Naima Haider
and
Mr. Justice Md. Ruhul Quddus

Criminal Appeal No.70 of 1995

Md. Borkat Ali
... Appellant
-Versus-
Md. Kobad Ali
... Respondent

No one appears for either of the parties

Judgment on 21.4.2011

Md. Ruhul Quddus, J:

This appeal at the instance of a complainant is preferred under section 417(2) of the Code of Criminal Procedure against judgment and order dated 9.11.1994 passed by the Magistrate of first class, Pabna acquitting the respondent from charge under sections 406 and 420 of the Penal Code in C. R. Case No.192 of 1992 and commencing proceedings against the complainant under section 250 of the Code by issuing a notice upon him. The appeal has been appearing in the cause list since 4.4.2011 i.e. six days before starting of the vacation. Today it is taken up for hearing but no one appears for either of the parties. In view of its long pendency for more than sixteen years, we take it up for disposal.

Facts relevant for disposal of the appeal, in brief, are that the appellant as complainant filed a petition of complaint before the Thana Magistrate, Santhia, Pabna on 31.12.1991 alleging *inter alia* that he was the Loan Officer of Santhia

T.C.C.A (Thana Central Co-operative Association), an association of co-operative societies. The respondent being a member of Dhopadaha Uttarpara Krishak Shomobyai Shamity bought two shallow pump machines namely, Duez-210 and Yanmar-105 on 5.1.1981 and 20.11.1981 respectively taking loan of Taka 24,060/= for Duez-210 machine and Taka 20,420/= for the Yanmar-105. It was stipulated that he would pay the entire installments against the Duez-210 within 30.9.1986 and against the Yanmar-105 within 31.3.1987. But he sold the said machines elsewhere without paying any subsequent monthly installment and misappropriated total Taka 2,58,961/= including the interest. In spite of service of notice, he did not pay off the loan although executed a written undertaking for payment of loan in favour of the T.C.C.A. In this way the respondent had committed offence of criminal breach of trust and cheating.

On receipt of the said complaint, the Thana Magistrate took cognizance of offence against the respondent under sections 406 and 420 of the Penal Code and issued warrant of arrest against him. The respondent voluntarily appeared before the Court and obtained bail on 24.2.1993. Thereafter, the case was sent to the Magistrate of first class (Md. Anisur Rahman), Pabna for hearing and disposal. The learned Magistrate by his order dated 17.7.1993 framed charge against him under the said penal sections, to which he pleaded not guilty and claimed to be tried.

The prosecution in order to prove the case examined three witnesses including the complainant and two employees of the T.C.C.A. After closing the prosecution, the learned Magistrate examined the respondent under section 342

of the Code of Criminal Procedure, to which he reiterated his innocence, but did not adduce any evidence in defense. The defense case as it transpires from the trend of the cross-examination that the respondent was innocent, he did not purchase any machine and was falsely implicated in the case.

After conclusion of trial, the learned Magistrate passed the impugned judgment and order of acquittal commencing the proceedings under section 250 of the Code, as aforesaid. Against the said judgment and order, the complainant moved in this Court with the instant criminal appeal.

It appears that P.W. 1, the complainant Md. Borkat Ali deposed in full support of the complaint case. He proved the petition of complaint and his signature thereon as exhibits-1 and 1/1 respectively, but did not adduce in evidence any loan sanction letter, money receipt, agreement or undertaking in support of the loan or purchase of machines. In cross-examination he stated that he himself did not hand over the pump machines to the respondent. He further stated that earlier he had filed C. R. Case No.183 of 1991 under sections 406 and 420 of the Penal Code against the same accused, but subsequently withdrew from the case on 23.10.1992. In that case he made allegation in respect of only Duez-210 pump machine and admitted that he had no claim in respect of another. He also admitted that the Rural Development Officer served a notice upon the respondent on 27.4.1992, wherein claim for only one machine was raised and there was no mention about the other machine.

P.W.2 M. A. Samad, an Inspector of Santhia T.C.C.A. though corroborated P.W.1, did not adduce any documentary evidence. In cross-

examination he stated that at the relevant period he was not assigned for Dhopadah Krishak Shomobiyai Shamity and further stated that he himself did not hand over any Duez-210 pump machine to the respondent.

P.W.3 Md. Kamrul Alam, another Inspector of the T.C.C.A. deposed corroborating the evidence of P.Ws.1-2. He also did not adduce any documentary evidence. In cross-examination he stated that he himself did not hand over any Duez-210 pump machine to the respondent and was not present at the time of delivery of Yanmar-105 machine.

According to the prosecution case, loan against two shallow pump machines were given by Santhia T.C.C.A to the respondent. It was done in due course of official transaction of the T.C.C.A. But none of the witnesses adduced in evidence any loan sanction letter, receipt, agreement or undertaking in support of the loan or purchase of pump machines, and all of them stated that they were not present at the time of delivery of the machines. In such a position it cannot be said that disbursement of loan against purchase of two pump machines as alleged in the complaint was proved, especially when the case was denied by the defense.

The complainant himself as P.W.1 deposed that notice was served upon the respondent in respect of Duez-210 machine and they had no claim over the other machine (meaning the Yanmar-105). The previous case filed in respect of Duez-210 was also withdrawn. Therefore, the present case on allegation of misappropriation of loan against two machines is not believable.

In view of the above discussion we do not find that the impugned judgment of the learned Magistrate is perverse, or so unreasonable that it

would amount to miscarriage of justice, so far it relates to acquittal of the respondent. But at the same time we hold that the prosecution case has not been proved against the respondent for want of documentary evidence, which does not mean that the case was false and frivolous or vexatious. There is no satisfaction on the part of the learned Magistrate that the case was knowingly false and the complaint case was brought with some ulterior motive i.e to harass the accused or bring pressure on him to achieve some other purpose. Moreover, the complainant had initiated the present case in his capacity as Loan Officer of Santhia T.C.C.A, an association of cooperative societies. He was a mere employee in the said co-operative association and supposed to act under instruction of the concerned authority. The complainant should not be prosecuted for initiation of such a case and therefore, we are inclined to modify the judgment discharging him from the proceedings under section 250 of the Code commenced with passing of the impugned judgment.

In the result, the appeal is dismissed with modification. The complainant Md. Borkat Ali, Loan Officer, Santhia T.C.C.A is discharged from the proceedings under section 250 of the Code of Criminal Procedure.

Send down the lower Court records.

Naima Haider, J:

I agree.