

MUSTAFIKHAN
v.
STATE OF MAHARASHTRA

DECEMBER 4, 2006

[DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Penal Code, 1860—Section 409—Criminal breach of trust—Misappropriation of Government money—By Public Servant—Payments made to fictitious persons proved—Entrustment of money admitted by the accused—Conviction—Justification of—Held: Conviction is justified—Where entrustment of property is admitted by the accused, burden to prove the discharge of the entrustment lies on the accused—Evidence—Burden to prove.

Appellant-accused was incharge of execution of construction of irrigation tanks under a Government Scheme. During a particular period same set of 21 labourers were shown to have been engaged at one and the same time for construction of the tank at two places. Payments were shown to have been made by the appellant. In reality bogus names were shown. The investigation revealed that appellant was responsible for misappropriation. Accused No. 2 was a labourer engaged and he was made to put his thumb marks on the muster rolls to show receipt of monies by fictitious persons. Both the accused were charged under Sections 409, 407, 468 read with Section 109 IPC and Sections 5(1)(d) and 5(2) of Prevention of Corruption Act, 1947. Trial Court convicted appellant-accused of all the charges except under Section 467 IPC. Accused-2 was acquitted of all the charges. On appeal, High Court convicted the appellant only under Section 409 IPC and acquitted him of all the charges. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1. In View of the clinching evidence tendered by the prosecution which has been analysed at great length by the trial Court and the High Court, there is no scope for interference. [19-F-G]

2. In order to sustain a conviction under Section 409 IPC the prosecution is required to prove that (a) the accused, a public servant was entrusted with property of which he has duty bound to account for, (b) the accused had

A misappropriated the property. Where the entrustment is admitted by the accused, it is for him to discharge the burden that the entrustment has been carried out as accepted and the obligation has been discharged. [18-D-F]

Jagat Narayan Jha v. State of Bihar, [1995] 4 SCC 518, relied on.

B 3. It is not necessary or possible in every case to prove as to in what precise manner the accused had dealt with or appropriated the goods. In a case of criminal breach of trust, the failure to account for the money, proved to have been received by the accused or giving a false account of its use is generally considered to be a strong circumstance against the accused.

C Although onus lies on the prosecution to prove the charge against the accused, yet where the entrustment is proved or admitted it would be difficult for the prosecution to prove the actual mode and manner of misappropriation and in such a case the prosecution would have to rely largely on the truth or falsity of the explanation given by the accused. [18-F-H; 19-A]

D 4. It was found by the trial Court and the High Court with reference to the evidence on record that payments were shown to have been made to persons who were found to be fictitious. PW8 - a Finger Print Expert after comparing the thumb prints, he gave his opinion that the disputed prints were not of any of the six persons whose prints were submitted to him for examination, but were of one and the same person. He found that prints in the muster rolls of place 'D' were identical with the finger print of the acquitted accused. In

E respect of the muster rolls of place 'K' he found that the finger prints were not identical with the specimen impressions of six persons named above, but they were identical *inter se*, that is they were of the same person. The evidence of the village kotwal, also shows that there was no such person in the village

F to whom the appellant claimed to have made payment. [19-B-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1261 of 2006.

G From the final Judgment and Order dated 22-2-2006 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in CrI. A. No. 325/1996.

Garvesh Kabra, Ms. Deepti R. Mehrotra and Ravi Prakash Mehrotra for the Appellant.

Aniruddha P. Mayee for the Respondent.

H The Judgment of the Court was delivered by

Dr. ARIJIT PASAYAT, J. Leave granted.

Challenge in this appeal is to the judgment rendered by a learned Single Judge of the Bombay High Court, Nagpur Bench. By the impugned judgment the High Court while setting aside the conviction of the appellant for offences punishable under Sections 468, 477-A of the Indian Penal Code, 1860 (in short the 'IPC') and Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947 (in short the 'PC Act') maintained the conviction for offence punishable under Section 409 IPC. The trial court had convicted the appellant for offences punishable under Sections 409, 468, 477 A IPC, Section 5(1)(d) read with Section 5(2) of the PC Act. Different custodial sentences were imposed along with fine.

Background facts in a nutshell are as follows:

The appellant was working as Junior Engineer and was in-charge of execution of construction of tanks at Kudwa, Dhakni and Mundipar in Gondia Sub Division. This work was to be executed under the Employment Guarantee Scheme. The appellant was assisted by four muster clerks to keep a track of persons employed for the work of construction of these tanks. Between 7.1.1976 and 11.3.1976, same set of 21 labourers were shown to have been engaged at one and the same time for construction of the irrigation tanks at Kudwa, Dhakni and Mundipar. Payments were shown to have been made by the appellant, but in reality no such payments were made. Bogus names were shown. The investigation revealed that in all a sum of Rs.6,764.10 was misappropriated by the appellant abusing his position as supervisor. Accused No.2 was a labourer engaged and he was made to put his thumb marks on the muster rolls to show receipt of monies by fictitious persons, who were shown to have been engaged for the works. After the report, F.I.R. was registered and on completion of investigation, charge sheet was sent up and trial was held in the Court of Special Judge at Gondia.

Upon consideration of material placed before him, the learned Special Judge charged both the accused of offences punishable under Sections 409, 467 and 468 read with Section 109 IPC and Section 5(1)(d) and 5(2) of the PC Act. Since the accused pleaded not guilty, they were put on trial. In order to bring home the guilt of the accused, prosecution examined 14 witnesses. Upon consideration of evidence tendered before him, learned Special Judge acquitted accused No.2 of all offences and also acquitted the present appellant of the offence punishable under Section 467 IPC. However, he convicted the appellant of the other offences and sentenced him as aforementioned.

A Aggrieved thereby the appellant has preferred this appeal.

As noted above, the High Court held that prosecution had not been able to establish commission of offences other than Section 409 IPC. Accordingly, the conviction under that provision was maintained and custodial sentence of one year and fine of Rs.1,000/- with default stipulation was maintained.

B

Learned counsel for the appellant submitted that the prosecution has not established the commission of offence punishable under Section 409 IPC. The essential ingredients necessary to constitute that offence have not been proved.

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It was submitted that the so called fake payment has not been established and reliance was placed on a decision of this Court in *Inderjit Singh and Ors. v. State of Punjab and Ors.*, [1995] Supp 3 SCC 289, to contend that the accusations have to fail.

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Learned counsel for the respondent-State on the other hand supported the judgment of the High Court.

In order to sustain a conviction under Section 409 IPC the prosecution is required to prove that (a) the accused, a public servant was entrusted with property of which he has duty bound to account for, (b) the accused had misappropriated the property.

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Where the entrustment is admitted by the accused, it is for him to discharge the burden that the entrustment has been carried out as accepted and the obligation has been discharged.

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The above position was reiterated in *Jagat Narayan Jha v. State of Bihar*, [1995] Supp 4 SCC 518.

It is not necessary or possible in every case to prove as to in what precise manner the accused had dealt with or appropriated the goods. In a case of criminal breach of trust, the failure to account for the money, proved to have been received by the accused or giving a false account of its use is generally considered to be a strong circumstance against the accused. Although onus lies on the prosecution to prove the charge against the accused, yet where the entrustment is proved or admitted it would be difficult for the prosecution to prove the actual mode and manner of misappropriation and in such a case the prosecution would have to rely largely on the truth

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or falsity of the explanation given by the accused. In the instant case, there is no dispute about the entrustment. A

Learned counsel for the appellant submitted that all through the accused had taken the stand that the payments were not made by him directly but through the middle men, who distributed the amount to the persons who were engaged. This plea has been elaborately dealt with by both the trial Court and the High Court. It was the duty of the appellant to make payment. He cannot escape from liability by saying that he had entrusted the job to someone else. B
It was found by the trial Court and the High Court with reference to the evidence on record that payments were shown to have been made to persons who were found to be fictitious. PW8 - Arun Borikar is a Finger Print Expert in Finger Print Bureau and was at the relevant time posted at Nagpur. He C
stated about his qualifications and expertise. He stated that he had received 17 muster rolls and specimen impressions of left and right thumbs of PWs Nos. 1, 7, 9, 13 and the two accused. After comparing the thumb prints, he gave his opinion (Exhibit 55). He stated that the disputed prints A and A-1 to A-19 were not of any of the six persons whose prints were submitted to D
him for examination, but were of one and the same person. He found that prints in the muster rolls of Dhakni Tank at Exhibits B-15, B-4 and B-16 were identical with the finger print of Amarsing Sohanlal, that is the acquitted accused. In respect of the muster rolls of Kudwa tank, he found that the finger E
prints at Exhibits C-1 to C-21 and C-1(a) and C-2(a) were not identical with the specimen impressions of six persons named above, but they were identical *inter se*, that is they were of the same person.

The evidence of the village kotwal, who was examined as PW6 also shows that there was no such person in the village to whom the appellant claimed to have made payment. The Facts involved in *Inderjeet's* case (*supra*) are clearly distinguishable. In that case the question was of tallying the thumb F
mark of the appellant with the disputed thumb marks. The factual scenario of that case was entirely different.

Looked at from any angle in view of the clinching evidence tendered by the prosecution which has been analysed at great length by the trial Court and the High Court, we find no scope for interference. G

The appeal, therefore, fails and is dismissed.

K.K.T.

Appeal dismissed.

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