

(1965) 06 GUJ CK 0014
In the Gujarat High Court

Ambalal Asharam Joshi

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 11-06-1965

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 222(2), 235
Penal Code, 1860 (IPC) — Section 409, 409, 477A, 477A

Citation : (1965) 6 GLR 925

Hon'ble Judges : Akbar S. Sarela, J

Bench : Single Bench

Judgement

Akbar S. Sarela, J.—The appellant has been convicted by the City Magistrate IV Court of offences undersecs 409 and 477A of the Indian Penal Code and sentenced to a single sentence of rigorous imprisonment for 18 months and a fine of Rs. 200/- in default of payment, to suffer further rigorous imprisonment for three months. The sentences in this case were ordered to run concurrently with those passed against the same appellant by the same Magistrate in Criminal Case No. 299 of 63.

2. The appellant was a paid servant of the State Transport Employees Co-operative Credit and Thrift Society at Ahmedabad and the charge relates to a criminal breach of trust in respect of various sums amounting to Rs. 3472/- alleged to have been entrusted to him during the period between 17th October 1960 and 31st December 1960 at Ahmedabad. The appellant joined the Society as its Secretary in 1950 and was working as such Secretary at the relevant period when the offences are alleged to have been committed. As such Secretary he had to maintain books of accounts and had to handle cash as deposed to by prosecution witness No. 1 Bava Amritsing Bhalla who was Chairman of the Society at the time he was examined and P.W. 7 Bansilal Ambalal Joshi who was the Societys Internal Auditor for a considerable period. The say of these witnesses on this point is supported by by-law No. 49 of the Society which has been produced in this case. Bhallas testimony shows that on 26th July 1962 he was told that there was a suspected fraud in the affairs of the society as it

appeared that in one case an amount had been debited as loan in the account of a person who normally did not take any loan and that in another case a loan though sanctioned was not taken by the member. On being confronted by Bhalla with the facts of these two cases the appellant admitted that he had defrauded to the extent of Rs. 3200/and with a view to bring the matter to a close he passed according to Bhalla a writing which has been produced as Exh. 3 in the case. In that writing after admitting misappropriation of Rs. 3200/the appellant promised to pay a sum of Rs. 2000/by 30th July and appealed to Bhalla to close the matter and not to take steps against him. Bhalla placed the matter before the Managing Committee the next day that is on 27th and the Managing Committee considering appellants long service to the Society decided not to prosecute him or to impose any severe penalty except stoppage of four increments for one year. On the second August 1962 the appellant paid Rs. 2200/ to the Society but that on the very day so Bhallas testimony runs Bhalla received information of defalcation in respect of the sums of two persons namely Manilal Bhavsar and Inspector Pathak. The appellant was again interrogated and this time he admitted defalcation to the extent of Rs. 160 and requested the chairman in writing to give him time to pay up the amount which he promised to repay in full. That writing has been produced at Exh. 7. The matter was again placed before the Managing Committee. It was decided to hand over the case to the police. Accordingly a complaint was filed. That complaint dated 4-8-1962 is at Exh. 9. Investigation followed and the present case is one of the cases put up against the appellant as a result of the investigation.

3. The Society is a credit society and one of the by-laws of the Society namely by-law 50 provides inter alia that no fresh loan shall be given to a member till the old debt remains to be cleared. This fact is deposed to also by witness Bhalla. A practice appears to have therefore come into existence for a debtor member to pay up the balance of his previous loan at the time of applying for a fresh loan. The balance would be paid either in cash or by way of deduction from the amount payable for the fresh loan. According to the prosecution some of the payments so made by members while obtaining fresh loans have been misappropriated by the appellant and have not been entered by him in the Society's Cash Book as it was his duty to do as a Secretary of the Society. The amounts with which this case is concerned are as under:

- (1) Rs. 214/- from Ilaben Gunvantlal P.W. 2.
- (2) Rs. 425/- from Bansilal Bhaishankar P.W. 3.
- (3) Rs. 479/- from Gunvantlal Hiralal Dave P.W. 4.
- (4) Rs. 169/- from Nityanand Bhaishankar P.W. 5.
- (5) Rs. 715/- from Prasantlal Veniprasad P.W. 6.
- (6) Rs. 715/- from Nandlal C. Parmar.
- (7) Rs. 230/- from Vinod R. Vyas.

(8) Rs. 500/- from Yusufkhan Jabarkhan.

Out of these the prosecution has led evidence of the first five witnesses both as regards payment of the amount to the appellant and as regards the absence of any credit entries in the Cash Book in respect of these amounts. As regards the remaining three items the persons concerned not having been examined it is not necessary to refer to the absence of such payment in the Cash Book.

4. The appellants case was that none of these payments was made to him and there was no entrustment and therefore consequently there was no scope for crediting these amounts in the Cash Book.

5. The learned Magistrate accepted the prosecution evidence and has convicted and sentenced the appellant as stated above.

6. In appeal three points have been urged by Mr. Surti on behalf of the appellant namely (1) that the entrustment of the amount in question has not been proved by satisfactory evidence; (2) that the joinder of charges under Sections 409 and 477A was illegal and therefore the trial was vitiated; and (3) that in any case the conviction u/s 409 cannot be maintained as the appellant is not a public servant and that at best there can be a conviction either u/s 406 or u/s 408 of the Indian Penal Code.

7. In respect of the alleged entrustment the principal evidence is the oral testimony of the five witnesses earlier mentioned namely P. Ws. Nos. 2 3 4 5 and 6. Of these Bansilal (P.W.3) and Prasantlal Nanavati (P.W.6) speak of their amounts having been paid by deduction from the fresh loans sanctioned for them and the other three witnesses speak of their respective amounts as paid by them in cash to the appellant. The trial Court who had an opportunity to observe the demeanour of these witnesses has stated in his judgment that they were perfectly reliable. That estimate of the oral testimony by a Court is entitled to weight. Mr. Surti has taken me in detail through the evidence of each witness and I have not been able to notice any substantial ground to justify my not accepting the trial Courts estimate of the reliability of these witnesses. Mr. Surti argued that even so the oral evidence of the witnesses should not be held sufficient to prove entrustment because firstly so he says they are accomplices; secondly they made no complaint to the authorities; thirdly they have not produced any receipt of payments; and fourthly that their sureties have not been examined to say that the actual amount placed in the hands of these witnesses was not the amount for which the surety bond was taken. Some of these arguments may be disposed of in brief. There was no reason for any of the witnesses to complain to the authorities in respect of the cash payment received or in respect of the deduction made by the appellant before the amount of fresh loan was paid to them because by-law 50 itself requires the old loans to be cleared off before a fresh loan could be made. It is not clear what the complaint could be about and what purpose it was going to serve. No doubt receipts could have been taken by the witnesses in respect of the payments or deductions

made. But the fact that the witnesses did not take receipt is not a good ground for rejecting their testimony particularly in view of the fact that the payments have been recorded in their respective pass-books to which I shall presently refer. The sureties were sureties to the promise to repay and they could not be expected to be witnesses to the alleged entrustment. The only important argument then is the argument that the witnesses are accomplices in the sense that by-law 50 was being violated in the spirit and the witnesses were parties to it. I do not think that this makes them accomplices. They are not participators in crime. Mr. Surti would however be right if he argued that as the witnesses would be liable to pay to the society in case these payments are not accepted as proved they are to that extent interested in swearing to the payment and that this consideration calls for some corroboration to the testimony of the witnesses before it is accepted.

8. One piece of evidence corroborating the say of the witnesses about the payments is the pass-books. It appears that each member of the society is given a pass-book in which payments made by him to the society are entered on the credit side and the payments made by the society to him are entered on the debit side by a servant of the society. All these witnesses except witness Nanavati have produced their respective pass-books and in those pass-books the payments deposed to by the members to which the charge relates have been entered as received on the dates deposed to by them. Nanavati has not produced his pass-book because he states that he has lost it. The pass-books appear to have been kept regularly and it would appear from the evidence of the witnesses the entries therein are made regularly by the Secretary of the Society. The entries should therefore carry weight as made in regular course of the Societys business. Taken together they lend corroboration to the evidence of the witnesses as to the fact of payment. But the evidence on this count does not rest there. Four of witnesses who have produced their respective pass-books have deposed that the entries of payment in their respective pass-books are in the hand-writing of the appellant. Mr. Surti asks me to disbelieve the witnesses on this point because these hand-writings were not shown to the hand-writing expert in spite of the appellants denial of the entries being in his hand-writing. It is not clear why the hand-writing was not so sent. Perhaps the reason was that in respect of the Personal Ledger entries to which I shall refer presently the hand-writing expert was not able to give a definite opinion and therefore it was perhaps believed that no useful purpose would be served by sending the pass-books. There are at any rate no sufficient grounds to disbelieve the witnesses when they say that these entries were made by the appellant. That part of their evidence is consistent with the probabilities because under the by-laws the appellant is in charge of all accounts and has to handle the cash. It would therefore be the appellant who would be expected to make entries of payment in the respective pass-book.

9. Another piece of corroborative evidence is the Personal Ledger Accounts. The Society keeps a ledger in which there is a separate personal account of each

member taking a loan and these accounts have been produced. They have been produced from the custody of the Society because they were meant to be in the custody of the Secretary of the Society. In these accounts the respective payments of these five witness appear as credited on the dates of the payments. According to the prosecution the entries in these Personal Ledger Accounts are all in the handwriting of the appellant. The appellant has denied it. The Police Officers evidence shows that when these entries were sent to the hand-writing expert the latter was not able to express a definite opinion. But the prosecution witnesses Nos. 2 3 4 and 6 deposed that the entries of their individual Ledger Accounts are in the handwriting of the appellant. Some of them state that they were made in their presence and some that they were acquainted with the hand-writing of the appellant. P.W.5 having admitted that the entry in the Ledger was not made in his presence and having not stated that he knew the hand-writing of the appellant his testimony on the point of entries may be left out. Even so the evidence of the other witnesses if accepted would lend sufficient corroboration to the evidence of the payment. The learned Magistrate has accepted their evidence and I do not see any sufficient reason to differ.

10. The two other pieces of evidence relied on by the prosecution to corroborate the story of the witnesses are the two confessional writings of the appellant Exhs. 3 and 7 and the fact that in pursuance of the undertaking given by him in writing at Exh. 3 he made a payment of Rs. 2200/on 4th August 1962. The appellant states that these writings were taken under inducement promise and threats and the payment of Rs. 2200/was not towards the alleged defalcation but was an independent deposit made by him to the Society. The receipt of the payment of Rs. 2200/which the appellant has produced does not bear out his say that it was an independent deposit but on the other hand specifically mentions that it was a payment towards the principal of the debts. As for the allegation that the confessional statements were taken by inducement temptation and threat that allegation has been denied by witness Bhalla against whom it is principally made and is not supported by any probability much less any evidence. In the cross-examination of Bhalla the only allegation made was that Exhs. 3 and 7 were taken from the appellant by giving promise and inducement. There was no allegation of threat. In the written statement filed by the appellant however he came out with the story of threats also and he further added the allegation of temptation. The fact that in the meeting of the Managing Committee held on 27-7-62 it was decided not to take severe action against the appellant and the resolution in terms of Exh. 4 was passed negatives these allegations of the appellant. The appellant appears to have been conscious of this position and therefore came out with the story that Exh. 3 though dated 26th July 1962 was really given at the same time as Exh. 7 namely on or about 3rd August 1962. The wording of Exh. 3 does not support that story. In fact if that was so it is difficult to say how Exh. 3 could be considered in the meeting held on 27th July 1962 the minutes of which are at Exh. 4. The appellant therefore alleged that the minutes of that meeting were also false and that the meeting was in fact held not

on 27th July 1962 but on or about 4th August 1962. These are mere allegations not supported by any evidence or probabilities. The evidence of the confessional statements and the payment of Rs. 2200/towards the defalcated amount therefore deserves to be accepted. However there is no evidence to connect the amount referred to in these confessional statements with the amounts to which the present case refers and to that extent this part of the evidence does not serve as corroboration to the testimony of the five prosecution witnesses but only goes to prove the back-ground of the case and the circumstances under which the complaint came to be filed. I do not therefore consider these confessional statements as rendering corroboration to the testimony of the prosecution witnesses in respect of their different sums. Even so on the other evidence led in the case which has been sufficiently analysed by the learned Magistrate he rightly came to the conclusion that the entrustment of the amount deposited to by five witnesses was proved.

11. That takes me to the second submission of Mr. Surti. His contention is that although in respect of the total amount misappropriated there could be a single charge u/s 222(2) of the Criminal Procedure Code and the offence would be one offence there ought to have been eight charges in respect of falsification of accounts as according to him the eight items of falsification were distinct and independent. That argument is answered by reference to Section 477A of the Indian Penal Code. That section refers to two kinds of offences namely (1) falsification of accounts; and (2) making of a false entry and as Ratanlal points out in his LAW OF CRIMES these two offences are distinct and not inter-dependent. The offence of falsification of accounts is one offence although it may cover several entries. The Assistant Government Pleader has on this point invited my attention to a recent decision of this High Court in Dinkarray Runghnath v. The State 3 L.R. 701. There it has been pointed out that-

A series of falsification of accounts made to cover a single act defalcation may be laid in one charge u/s 477A of the Penal Code and would not constitute distinct offences merely by reason of the plurality of false entries intended to cover the same defalcation.

Here the defalcation was substantially one namely the defalcation of the Societys moneys. The intention was to defraud the Society by writing of the accounts in such a manner as to omit from the account entries of payment of the various amounts in respect of which the Society was being defrauded by the appellant. This would amount to a single offence of falsification of accounts. The charge u/s 477 A was therefore a charge not of eight offences but of ore offence only under that section.

12. It was next argued by Mr. Surti that the charge u/s 477A could not be legally joined with a charge u/s 409. Now if his further submission to which I shall refer later that the offence proved is an offence not u/s 409 but u/s 408 is accepted his submission of misjoinder is sufficiently answered by Section 234 of the Criminal Procedure Code which permits a joint charge of three offences of the

same kind committed within a space of twelve months. The offences under see 408 and 477A are Mr. Surti concedes offences of the same kind as explained in Sub-section (2) of Section 234 of the Criminal Procedure Code. But the learned Assistant Government Pleader submits that the offence committed in this case is not u/s 408 but u/s 409 a submission which I shall consider later. On the assumption that the offence is u/s 409 the question is whether that offence can be joined in the same charge with an offence u/s 477A. This could be done if it is conceded if the case is covered by Sub-section (1) of Section 235 of the Criminal Procedure Code. That sub-section provides that-

if in one series of acts so connected together as to form the same transaction more offence than one are committed by the same person he may be charged with and tried at one trial for every such offence.

The short question is whether in this case the acts which go to constitute the offence u/s 409 and the acts which go to constitute the offence u/s 477A are so connected together as to form the same transaction.

the expression same transaction has not been defined in the Code but it has been interpreted in the decision of the Gujarat High Court above referred to where at page 714 His Lordship the Chief Justice observes that: the expression same transaction used in Section 235 of the Code is difficult if not incapable of exact definition. The question whether the acts are so connected together as to form one transaction or not would depend on the facts and circumstances of a particular case. It is not possible to lay down any comprehensive formula of universal application. The real and substantial test for determination of the question is the continuity of action and purpose.

The facts of this case establish continuity of action and purpose as contemplated by the expression the same transaction. The purpose through out was to defraud the society. The method adopted was identical both as regards misappropriation and as regards falsification of accounts. There is a continuity of action and purpose running through the misappropriation and the series of omissions by which the accounts were falsified. The facts in Dinkarra's case earlier referred to were similar. There the person involved was the Nazir of the Court and the amounts misappropriated related to the payments made into Court by various persons and received by the Nazir on behalf of the Court. These payments were not accounted for and false entries were made to cover up defalcations. His Lordship the Chief Justice observed that:

though each act of defalcation may form a complete act each such act was linked with the other by the continuity of purpose and action the main purpose of the accused being to defraud the Government. Each such act of defalcation was sought to be covered up or facilitated with the making of a false entry. In our view the facts in this case disclose a continuity of action and common purpose each act of defalcation and falsification of accounts being related to each other the main purpose being to defraud the Government.

These observations apply with equal force to the present case where the main purpose was to defraud the society. A case similar to the present one will also be found in Chandi Prasad Singh Vs. The State of Uttar Pradesh, the facts of which I shall refer to while dealing with the third submission of Mr. Surti. There also it was held on similar facts that the case was governed by Section 235 of the Criminal Procedure Code as several offences u/s 409 and 477A arose out of the same acts and formed part of the same transaction. The second submission of Mr. Surti therefore cannot be accepted.

13. The last submission of Mr. Surti is that the offence does not fall u/s 409 of the Indian Penal Code but may at best fall u/s 408. Mr. Surti's argument that the appellant is not a public servant is correct. But Section 409 is not confined to a public servant. It also applies amongst others to an agent and the argument of the Assistant Government Pleader is that the appellant was such an agent as is contemplated by Section 409. He has invited my attention to the decision of the Supreme Court in Chandi Prasad Singh Vs. The State of Uttar Pradesh, . The accused in that case was a Secretary of a Society known as a Model Town Co-operative Housing Society Ltd. which was registered under the provisions of the Co-operative Societies Act. As such Secretary it was his duty to receive amounts paid towards purchase of shares. The case against him was that he had received three different sums from three different persons as share money in December 1948 but had misappropriated the same; and that he had falsified the minute book by omitting to show therein the share money received from the three persons. He was therefore charged for offences under Sections 409-477A of the Indian Penal Code. He was convicted on both the counts. In appeal to the Supreme Court one of the contentions urged was that the true status of the appellant in that case was that of a servant and not of an agent and that he should have been charged not u/s 409 but u/s 408. His Lordship Vankatrama Ayyar J. posed the question What was the status of the appellant as Secretary of the Society in which capacity he committed the offence servant or agent? and he referred to Halsbury's Laws of England Volume 22 page 113 para 192 where the distinction between the two was thus stated:

A servant acts under the direct control and supervision of the master and is bound to conform to all reasonable orders given to him in the course of his work.... An agent though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal is not subject in its exercise to the direct control or supervision of the principal.

His Lordship went on to observe that having regard to the nature of the duties of the appellant as Secretary of the Society they were clearly of opinion that his status was that of an agent and not a servant. The point therefore is whether the nature of the duties of the present appellant as Secretary of the Co-operative Society was that of an agent or of a servant. Mr. Desai argued that it was that of an agent and Mr. Surti submitted that it was that of a servant. The evidence of Chairman Bhalla and Internal Auditor Joshi is that as such Secretary it was the

appellants duty not only to keep accounts but to handle all cash meaning to receive money and make payments. This part of the evidence is substantiated not only by the wording of bylaw 49 but also by the evidence of the several witnesses who have been examined in respect of the alleged entrustment. There is therefore sufficient support for the argument of the Assistant Government Pleader that the appellant was an agent. No doubt one should expect more satisfactory evidence on this point. But it does not appear that the point was taken in the lower Court. It has been taken for the first time in the appeal and therefore unless it is shown that prejudice has been caused to the appellant the conviction u/s 409 instead of u/s 408 particularly when the sentence inflicted is covered by Section 408 will not be illegal. In this connection my attention was invited to decisions of the Supreme Court in Willie (William) Slaney v. the State of Madhya Pradesh AIR 1956 Sc 117 and in Birichh Bhuian and Others Vs. State of Bihar, as also to the decision the Supreme Court in Chandi Prasad Singhs case already referred to. In Birichh Bhuians case the Supreme Court has laid down that joinder of charges in contravention of Sections 234 235 236 and 239 of the Criminal Procedure Code amounts to a misjoinder of charges which would attract Section 537 of the Criminal Procedure Code. In Chandi Prasad Singhs case which is a case more directly in point and the facts of which have been referred to by me earlier it was urged that there was a violation of Section 234 of the Criminal Procedure Code in that the appellant had been charged with three offences undersecs 409 and 477A. The Supreme Court held that the case was governed by Section 235 as several offences under Sections 409 and 477A arose out of the same acts and formed part of the same transaction and went on to observe that:

Moreover the appellant has failed to show any prejudice as required by Section 537.

14. Therefore it is clear that unless the appellant is able to show prejudice the conviction need not be disturbed. The only other case to which I have been referred is Willie Slaney v. The State of Madhya Pradesh. In that case the appellant was charged along with others u/s 302 read with Section 34 of the Indian Penal Code. The co-accused was acquitted by the lower Court and the appellant was convicted of an offence u/s 302. It was argued that the conviction was illegal as there was no charge for the offence u/s 302. It was held that having regard to the evidence led at the trial and the examination of the accused he cannot be said to have been prejudiced by the failure to frame a charge against him u/s 302 and that the failure was therefore curable by Section 537 of the Criminal Procedure Code. His Lordship Bose J. observed at page 128 as under:

In adjudging the question of prejudice the fact that the absence of a charge or a substantial mistake in it is a serious lacuna will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was or was reasonably likely to have been misled in the circumstances of any particular case he is as much entitled to the benefit of it here as elsewhere; but if

on a careful consideration of all the facts prejudice or a reasonable and substantial likelihood of it is not disclosed the conviction must stand; also it will always be material to consider whether objection to the nature of the charge or a total want of one was taken at an early stage.

Applying this test to the present case it must be held that no prejudice has been caused, to the appellant and the conviction u/s 409 can stand.

15. In the result the conviction and sentence on the appellant are confirmed and the appeal is dismissed. The appellant to surrender to bail.