(1997) 08 J&K CK 0004

In the Jammu And Kashmir High Court

Case No : Criminal Appeal No. 17 of 1978

Ghulam Mohi-ud-Din Navchoo APPELLANT

Vs

State of J. and K. RESPONDENT

Date of Decision : 21-08-1997

Acts Referred:
Ranbir Penal Code, 1989 — Section 409

Citation : (1998) CriLJ 2302

Hon'ble Judges : A.Q. Parray, J

Bench : Single Bench

Advocate : M.A. Qayoom, for the Appellant; No counsel, for the Respondent

Final Decision : Allowed

Judgement

A.Q. Parray, J.—Despite the fact that case has been duly listed for final hearing today and the name of Addl. Advocate General has been

shown in the cause list and a messenger was also sent to the Advocate General's office, neither anybody appeared for the State nor had anybody

courtesy to cause his appearance in the matter. So the appeal is being decided without the assistance from the respondent/State.

2. While advancing arguments, Mr. Qayoom appearing for the appellant submits that the appellant was previously working as cashier in the

Industries Department and on his transfer, as alleged, he had not handed over the charge. In the meanwhile, new cashier who had joined the office

in place of accused/appellant had encashed pay bills of the month of May 1973. This second cashier Noor Mohammad after having encashed bills

and disbursement of pay dues had Rupees 6960/- as cash in hand. Noor Mohammad did not carry this cash to his home and as there was no

chest handed over to him by the person of accused/ appellant on the relevant date, so Mr. Noor Mohammad handed over this cash to the

accused/ appellant to be kept in safe custody in the chest/ safe. On second day, when the offices were opened, the person of the accused opened

the chest and found a deficiency of Rs. 1,870/- in cash and started lamenting and weeping. This may be a pretext to have a cover of the missing

cash, but nevertheless when matter came to the notice of the officials, he assured them that he will make up the deficiency and he did make up a

part of the deficiency next day by depositing Rs. 833/- and assured that the remaining amount of Rs. 1000/-will be deposited within a couple of

days.

3. It may be noted that when the amount was entrusted by Noor Mohammad to the accused, a receipt seems to have been issued by the accused/

appellant in token thereof showing thereby that he had no intention of grabing his amount or in any way misappropriate the amount. The next day

when he joined the issue just to have sympathies of other fellow officials, but it did not pay him and finally the officials who were having some

annoyance about the accused, threatened him that in case he does not make the amount available, he will be handed over to police. So merely

because the person of accused/appellant had ran away from the spot, the case was lodged. The case was investigated and it was committed u/s

409, RPC for trial before learned Sessions Judge, who after holding the trial had returned a finding of misappropriation by the accused/appellant

and convicted and sentenced him to three years, rigorous imprisonment and a fine of Rs. 2000/-.

4. As rightly argued by Mr. Qayoom that in order to bring home the offence of 409, RPC, the ingredient of the offence i s that entrustment should

be proved and secondly the factum of misappropriation of the entrusted articles/ amount is to be proved by the prosecution as has been laid down

in Janeshwar Das Aggarwal Vs. State of Uttar Pradesh, .

5. Now having a close scrutiny of the facts of the case, it can safely be said that till the accused/ appellant was acting as Cashier, the investigating

agency or the complainant did not find that any amount was misappropriated or embezzled by the person of the accused/appellant in his capacity

as Cashier. After thorough investigation by the police agency they could not lay their hands on the mis-appropriation or embezzlement having been committed by the accused.

6. Now as regards the episode of handing over of cash of Rs. 6,960/- by Noor Mohammed to be kept in safe custody by accused/appellant, it

does not come within the purview of entrustment of State property. It was person to person. The person of Noor Mohammad new Cashier had

handed over the cash against proper receipt to person of the accused/appellant with the request to keep the same in safe custody, for want of safe/

chest. Thus in case there way any misappropriation or any deficiency in repayment of the amount to Noor Mohammad, it was a private

transaction. But even if otherwise it will be taken that it was done in official capacity, then this is hot the entrustment of the official money or the

State cash which was entrusted to him or which had come to his possession as because the accused/ appellant was not functioning as Cashier on

the relevant date. He was a mere custodian of that amount which was entrusted to him by the new cashier Noor Mohammad and second day he

made the deficiency good by paying Rs. 33/-, leaving the deficiency of about Rs. 1000/- which he assured that he will' make that amount also

available within couple of day s, but the authorities did not pay any heed to his requests and he was handed over to the police and the police has in

turn filed the challan. So the first part of entrustment in the legal connotation, in my opinion, is not proved of the State cash or the cash which had

come to his possession in the capacity of a Cashier on the relevant date.

7. The person of the accused/appellant was under transfer. He had handed over the charge of some articles and cash to the new incumbent Noor

Mohammad and was now to handover the charge of some articles like safe etc. So on the relevant date, he was not acting as a Cashier in the

office. So whatever things/cash have been entrusted to him by Noor Mohammad were in his private capacity and that too against a proper receipt.

The things would have been understandable in case Noor Mohammad would have handed-over cash to him without obtaining a receipt of the

same and the accused would have misappropriated the same. In that case things would have been that he wanted to play cheat to the person of

Noor Mohammad who had trusted him. But the matter is not that way. The bona fides of the accused are clear when he had issued receipt of the

amount and when he assured the officials/officers that he will make loss good and he did make payment of portion of the missing amount of Rs.

1870/- and only some more amount was to be paid. He was not given chance to make payment of remaining amount and instead was put to trial

for the last more than two decades.

8. Secondly to bring home the offence, the prosecution has to prove that the amount has been misappropriated. When the accused/appellant had

assured the person of Noor Mohammad and office people that he will make the loss good, there is no question of misappropriation and he did

make the payment of Rs. 833/- next date. Only Rs. 1000/ - was to be paid. He had never said or denied payment of that amount. In Sardar Singh

Vs. State of Haryana, their Lordships of the apex Court while dealing with a case u/s 409, RPC have held :

...Section 409 can be invoked only if it can be shown that the accused being in any manner entrusted with property or with dominion over property

in his capacity as public servant committed criminal breach of trust in respect of that property....

9. In the case in hand before their Lordships the accused who was a patwari was admittedly entrusted with the receipt books or in any event with

dominion over it, but there was no evidence to establish that he dishonestly misappropriated the receipt book or converted it to his own use or

dishonestly used or disposed of the receipt book and in such circumstances it was held that the accused might have lost or mislaid the receipt book

and hence he might have been unable to return it to the superior authorities. What the section required was something much more than mere failure

or omission to return the receipt book. The prosecution had to go further and show that the appellant dishonestly misappropriated or converted the

receipt book to his own use or dishonestly used or disposed of it.

10. So in light of the judgment supra, I do find that prosecution has not been in a position to show that the amount which was entrusted to the

accused/appellant by the person of Noor Mohammad, Cashier, was done in his official capacity and that the person of the accused

misappropriated the said amount entrusted to him and converted it to his own use, dishonestly. The statement of the accused before the trial Court

as well as before this Court is that the amount was kept by him in the safe and in the morning he found it deficient by Rs. 1,870/-, though he lamented for this loss, in no way he had misappropriated or converted it to his own use and he had no intention to dishonestly convert that cash to

his own use and in fact he had returned an amount of Rs. 833/- which was found deficient and Rs. * 1000/- which was still deficient was promised

to be paid by him by next date. But because of the threat which was extended to him by the officials that he was feeling nervous and that is why

they had referred the matter to the police with the intention that there may be some embezzlement of huge amount committed by the

accused/appellant in his capacity as Cashier in the Department for a pretty long time, but to their surprise the investigating agency could not

establish. So merely because the accused/appellant caused delay in making the loss good to the person of Noor Mohammad was highlighted in

such a way that there is nothing outcome of the whole episode and it may safely be said that the conviction and sentence passed by the trial Court

without having appreciated the ingredients of the offence, for which he was put to trial, is not in accordance with law.

11. Viewing thus, the appeal is allowed and the order of conviction and sentenced dated 30-8-1978 passed by Additional Sessions Judge,

Srinagar is set aside and the appellant/accused is acquitted of the charges levelled against him. The appeal file be consigned to records. Records be

sent back to the trial Court.