

(1960) 08 KL CK 0009

In the High Court Of Kerala

Case No : Criminal Appeal No's. 349 and 352 of 1959

Gopalan Nair

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 16-08-1960

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 190, 342
Penal Code, 1860 (IPC) — Section 405

Citation : (1960) KLJ 1056

Hon'ble Judges : P. Govinda Menon, J

Bench : Single Bench

Advocate : Mathew Muricken, P.V. Paul and V.P. Joseph in Criminal Appeal 352/59 and T.N. Subramonia Iyer, A. Hariharasubramoniam and K. Sreedharankutty Menon in Criminal Appeal 349/59, for the Appellant;

Final Decision : Dismissed

Judgement

Govinda Menon, J.—The appellant in Criminal Appeal 349/59 is the 1st accused and the appellant in Criminal Appeal 352/59 is the 2nd accused in Criminal Case No. 3/59 on the file of the Special Judge, Trivandrum. They were found guilty and convicted for the offence of Criminal Misconduct defined u/s 5(t)(c) of the Prevention of Corruption Act II of 1947 (hereinafter referred to as the Act) and sentenced u/s 5(2) of the Act to undergo rigorous imprisonment for 3 years each.

The facts of the case may be briefly stated as follows: --

The two accused are Government servants. At all material times the 1st accused was the Block Development Officer of the N.E.S. Block at Mavelikara and he was in over-all charge of the Block. The 2nd accused was said to be the Head-clerk of that office. That office had different sections dealing with the different kinds of activities of the development centre, such as the Industrial Section, the P.W.D. Section and the Social Education Organisation Section. Each of the sections were under a separate officer called the Extension Officer. Then there were the Gramasevaks or Village Welfare Officers who were to work in the villages.

2. In 1956 at a conference convened by the 1st accused and the other staff of the Block, it was decided to advance loans for the purchase of sewing machines to the villagers. To implement the scheme an order was placed on 13--12--1956 with a firm called Jay Engineering Works Limited, Madras for the supply of 20 Usha Sewing Machines to the Block Development Office. The Gramasevaks collected the applications from the parties and placed them for being dealt with in the Industrial Section. P.W.32 was the Industrial Officer in charge of the section. The rule is that if the applications are found in order, loans will be sanctioned by the 1st accused. After such sanction security bonds are to be executed by the applicants and bills called "Bills for miscellaneous Payments" are issued in favour of such persons. In December 1956, twenty sewing machines were received in the office from the Jay Engineering Works. A sum of Rs. 4,485/- had to be paid to the company towards the cost of the machines supplied.

3. After the receipt of the machines, payment bills for the withdrawal of the loans were issued in the name of the various applicants. Though the bills had to be cashed by the applicants themselves the practice that was followed in the office was to get the bills endorsed in the names of either one or the other of the peons, P. Ws. 35 and 36. The bills so endorsed were cashed by the peons and the money was entrusted to the second accused who was the Head-clerk of the office. After ascertaining that the money had been received by the 2nd accused, P.W. 32 handed over the machines to the various applicants. After providing for the payment of the value of the machines to the company, there would be some petty cash to be returned to the parties and the 2nd accused paid the balance amounts to the parties. Out of the amounts drawn from the treasury, the amounts due for the cost of machines were kept by the office for remittance to the company. The money was however not paid to the company in spite of several demands made by the company both in writing and by personal representations to the two accused. The money was not brought to accounts also. Later the company suspected some foul play and filed a complaint before the Secretary, Anti-corruption at Trivandrum. A case was then registered and investigated and the two accused were charged.

4. The charge against them was that being entrusted in their capacity as public servants or having had control of the amount of Rs. 4,485/- drawn from the Sub-treasury at Mavelikara between 10--1--1957 and 29--3--1957 being the price of 20 Usha Sewing Machines supplied by the Jay Engineering Works Ltd., Madras they failed to remit the said amount to the company and dishonestly or fraudulently misappropriated the said amount for their own use, offence punishable u/s 5(2) read with Section 5(1)(c) of the Act.

5. The 1st accused while admitting the sanctioning of the Industrial Loans for the purchase of the machines stated that he was not aware that the amount was not paid to the company. As far as he was concerned, he had given formal sanction for the loan applications sent up by P.W. 32, and that the bills were never seen by him after that, that he had not authorized the endorsement of the bills to the

peons and that all the work connected with the Industrial Section was being attended to by P.W. 32, the Industrial Extension Officer and that it was his duty to see that the amount is collected and sent to the company. He stated that he had not misappropriated or utilised any amount for his use.

6. The second accused stated that he is not the Head-clerk of the office and that he was only an accounts clerk. He admitted that orders were placed with the company and that machines were received and distributed to the applicants. According to him it was P.W. 32 who was in charge of all this work. It was he who used to get the bills endorsed and it was he who received the amounts from the peons and he was keeping the money in the office safe. He pleaded that he had not misappropriated any amount.

7. The learned Judge on a consideration of the entire evidence held that the amounts were entrusted to the 2nd accused, that he failed to remit the money to the company or bring it into the Government account and misappropriated the amount and that the 1st accused allowed the 2nd accused to misappropriate.

8. Before discussing the merits of the case, I will deal with the two preliminary objections raised by the learned counsel for the appellants. The first point that was argued was that Ext. P. 69 the sanction accorded to the Circle Inspector of police to investigate their case does not satisfy the requirements of Section 5A of the Act, that the order does not disclose whether the Magistrate was satisfied that the Circle Inspector must be authorized to investigate that sanction was accorded only to investigate the case against the 1st accused and not against the 2nd accused and that the entire proceedings based on such investigation must fail.

9. Section 5A of the Act enjoins, that notwithstanding anything contained in the Code of Criminal Procedure, no police officer below the rank of a Deputy Superintendent of Police shall investigate any offence Punishable under Sub-Section (2) of Section 5 of the Act without the order of a 1st Class Magistrate. When a Magistrate is requested to accord sanction u/s 5A, he is expected to satisfy himself from all the available materials that there are good and sufficient reasons for authorizing an officer of lower rank to conduct the investigation. The granting of such a permission is not to be treated as a mere matter of routine, but it is an exercise of his judicial discretion. Under the Code of Criminal Procedure, most of the offences relating to public servants as such are non-cognizable. The underlying policy appears to be that the public servant who is to discharge his duties fearlessly and without favour should not be exposed, to the harassment of investigation, on information supplied possibly by persons affected by their official acts, unless the Magistrate is satisfied that investigation is necessary and is called for and on such satisfaction he should accord the permission. When the Legislature thought fit to remove this ban in so far as it relates to the investigation of the offences of corruption under the Act, by making offences cognizable, it considered it necessary to provide a safeguard by requiring that the investigation should be conducted only by a police officer of a

designated high rank. Having regard therefore to the peremptory language of the section and the policy underlying the provision, it is clear that the said provision must be taken to be mandatory.

10. In this case Ext. P. 69 is the sanction u/s 5A of the Act. That order refers to the report of the police dated 4--12--57 and it refers to the criminal misconduct in misappropriating the cost of the sewing machines due to the Jay Engineering works Limited, Madras an offence punishable u/s 5(2) read with Section 5(1)(c) of the Act. No doubt, that report has not been produced in the case. But that is no reason to think that the District Magistrate who granted the sanction had not bestowed thought on the matter before according sanction. What the District Magistrate has stated in Ext. P. 69 is that sanction is accorded to investigate the case mentioned above u/s 5(2) of the Act.

11. Specific reference has been made only to the 1st accused in the cause title of Ext. P. 69 and it is therefore argued that no sanction has been accorded to investigate the offence against the 2nd accused. At the time of applying for sanction to investigate the name of the accused who has committed the offence is not at all important. It is the crime that is important and the emphasis placed in Section 5A is on the investigation of any offence and not on the person involved.

12. The object of the amendment was stated by the Supreme Court in *The State of Madhya Pradesh Vs. Mubarak Ali*, as follows:

If it was in the interests of the public that corruption should be eradicated it was [equally in the interests of the public that honest "public servants should be able to discharge their duties free from false, frivolous and malicious accusation.

A reference to Section 6 of the Act would show that whereas sanction u/s 5A need only deal with the offences complained of, a sanction u/s 6 should specifically cover the persons involved in the offence. The learned Special Judge has dealt with this matter Under point No. 10 of his judgment and I am in perfect agreement with his view that in the order according sanction u/s 5A the name of the accused need not be specifically mentioned.

13. Now assuming that the sanction granted is not fully in conformity with the provisions contained in Section 5A, the question is what is the effect of such illegality. This question was considered in the case in *H.N. Rishbud and Inder Singh Vs. The State of Delhi*, . That was a case where two Government servants were prosecuted under the Act. The Special Judge quashed the proceedings on the ground that the investigation on the basis of which the appellants were being prosecuted was in contravention of the provisions of Sub-section (4) of Section 5 corresponding to Section 5A inserted by the amending Act 59/52 and hence the trial was illegal. The High Court of Punjab reversed the order of the Special Judge and the matter came up in appeal before the Supreme Court by Special leave. Dealing with the effect of illegality in investigations under the Act, their Lordships stated :

A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in Section 190 Cr.P.C., as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the court to take cognizance.

Their Lordships then stated :

If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illegality committed in the course of investigation does not affect the competence and the jurisdiction of the court for trial is well settled as appears from the case in AIR 1944 73 (Privy Council) and *Lumbhardar Zutshi v The King* AIR 1950 P.C. 26.

This decision has been followed in a later decision of the Supreme Court in *Din Dayal Sharma Vs. The State of Uttar Pradesh*, . Hence where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result unless miscarriage of justice has been caused thereby.

14. In my view the failure to comply with the mandatory provisions of Section 5A would not necessarily vitiate the trial as the omission of this type falls within the category of curable irregularities u/s 537 Cr.P.C. The question in each case depends upon whether prejudice has been occasioned or is likely to have been occasioned due to the non-compliance. The question whether the evidence has been collected by an officer not properly authorized to investigate does not appear to have much bearing on the merits of the case, the decision of which rests entirely on the evidence appearing against the accused at the trial. Therefore the entire proceedings based on a charge sheet and investigation by a person not properly authorized does not vitiate the trial if the evidence tendered has been found to be uninfluenced by the investigation and independently leads to the conclusion that the accused is really guilty of the offence he stands charged with.

15. The next objection that is raised is that the sanction accorded u/s 6 of the Act also is not proper and legal and is defective. Ext. P. 81 is the Government sanction. What is argued is that all the facts necessary for a considered order according to the section has not been placed before the sanctioning authority and the order of sanction does not give the reason why sanction has been accorded. Ext. P. 82 is the report of the Deputy Superintendent of Police, Crime X Branch. The facts of the case against both the accused are set out fully in the report and the reasons for finding that a prima facie case has been made out has also been stated. Sanction order shows that from the report the Government

were satisfied that the two accused have committed offence u/s 5(2) read with Section 5(1)(c) and (d) of the Act and that the Government after mature consideration deem it necessary that they should be prosecuted and tried for the said offences.

16. No specific type design, form or set of words have been prescribed for according sanction. All that the order of sanction must show is that all relevant materials were placed before the sanctioning authority, that the authority considered the materials and the order sanctioning the prosecution resulted there from. The sanction order need not set out the reasons for the sanction. The object of sanction is nothing more than to ensure discouragement of fraudulent, doubtful and impolitic prosecution.

17. In *Biswabhusan Naik Vs. The State of Orissa*, the Supreme Court referring to the Privy Council case reported in AIR 1948 82 (Privy Council) stated :

It is no more necessary for the sanction under the Prevention of Corruption Act to be in any particular form, or in writing or for it to set out the facts in respect of which it is given than it was under Clause 23 of the Order which their Lordships were considering. The desirability of such a course is obvious because when the facts are not set out in the sanction proof has to be given "aliunde" that sanction was given in respect of the facts constituting the offence charged, but an omission to do so is not fatal so long as the facts can be, and are, proved in some other way.

18. The learned counsel for the defence has placed reliance on the decision in AIR 1948 82 (Privy Council) . What their Lordships stated in that case was that the sanction to prosecute constituted a condition precedent to the institution of the prosecution and that, where there was nothing on the face of the sanction or other extraneous evidence to indicate that the sanctioning authority knew the facts alleged to constitute the offence, the sanction was invalid. In the case before their Lordships the sanctioning authority had before it the name of the accused and the clause under which he was sought to be prosecuted. It had no other facts before it when it granted the sanction to prosecute. In such a case their Lordships held that the sanction was invalid. The facts of that case have absolutely no application to the facts of the present case. The sanction order in this case, as I stated earlier, clearly states that the Government had applied their mind and was of the opinion that the appellants should be prosecuted. The charge framed against the appellants at the trial was with reference to the same matter. What more facts were required to be stated in the order of sanction, I am unable to understand. It was not for the Government at that stage to judge the truth of the allegations made against the accused by calling for the entire evidence that was sought to be adduced against the accused in the trial of the case. Papers which were placed before the Government apparently gave the necessary materials upon which they decided that they should sanction the prosecution. There is therefore no merit in this objection either.

19. Then coming to the merits of the case, the fact that 20 Usha Sewing Machines were purchased by the Mavelikara Block Development Office in 1956 from M/s. Jay Engineering Works Limited, Madras is amply proved. P.W. 6, the Divisional Sales Manager of the company, P.W. 7 the Sales Supervisor, P.W. 8 the representative of the company at Quilon and P.W. 38 the Office Manager of the company at Madras all have deposed that orders were placed with their company for 20 Usha Sewing Machines in 1956 and all the correspondence have been proved. P.W. 32 the Industrial Officer of the Block Development Office has deposed that in pursuance of the decision of the conference of the staff of the Block Development Centre, orders were placed on 13--12--1956 for the supply of 20 Usha Sewing Machines from the company. Ext. P. 50 is the copy of the order placed for supply of the machines. Ext. P. 7 is a letter by the company accepting the order. Ext. P. 11 is the covering letter of the company forwarding the machines by Rail. Ext. P. 49 is a letter from the Quilon Railway Station requesting the Block Development officer to take delivery of the machines. There is the endorsement of the 1st accused in the letter to take delivery of the machines. P.W. 32 has deposed to his having taken delivery of the machines and distributed the same to the applicants and the applicants who had been examined in the case have corroborated the evidence and stated that they have got the machines.

20. All the company officers have spoken to the effect that the amount due to them for the value of the machines had not been paid for by the office in spite of repeated demands and D.W. 1 the successor of the 1st accused had deposed to the payment of the price to the company by the Government after he took charge. The correspondence also proves this conclusively. That the machines were actually received is admitted by the appellants also. They only say that they did not know that the company had not been paid and that was the duty of P.W. 32 to have attended to this matter. The appellants have also admitted that the bills were prepared and the amount was drawn from the treasury. According to the 2nd accused it was P.W. 32 who got it endorsed in the name of P.Ws. 35 and 36 and it was he who received the money from the peons.

21. The next question that arises for consideration is whether the money has been received from the treasury. The prosecution has clearly proved the loan transaction and the supply of the machines to the various parties. The learned Special Judge has discussed this matter under point No. 3 and 4 and it need not be repealed here over again. There is also no serious controversy that the price of the machines were collected from the respective parties by the Block Development office. All the relevant documents had been filed. The procedure that was followed has been clearly proved. The Gramasevaks would forward the applications to P.W. 32 who would place them with his recommendations before the Block Development Officer, the 1st accused and he sanctions the loans. Bonds are then got executed by the parties and the bills are cashed from the treasury. Ext. P. 1 is one of such loan applications. It is seen to have been signed by the applicant, endorsed by the concerned Gramasevak, recommended by the Industrial officer P.W. 32 and sanctioned by the 1st accused. Ext. P.1(a) is the

bond executed by the party after sanction. Ext. P. 1(b) is the copy of the loan order given to the party. Ext. P.1(c) is the copy of the bill for miscellaneous payments", which is the document on the basis of which the amount was to be drawn from the treasury. Ext. P. 1(d) is the original of the bill presented to the Treasury with the Treasury stamp evidencing the cashing of the bill. On the back of the bill there is the endorsement by the party "contents received, please pay the amount to K. Vasudevan Filial". Below that there is the acknowledgement of Vasudevan Pillai having received the amount shown in the bill. So the bill was cashed not by the party, but by Vasudevan Pillai, who is the peon of the office. P.W. 32 has deposed that the endorsement in Ext. P1(c) was written by him and the person mentioned there was the peon P. W. 36. Similarly all the other application forms and bills were also properly proved and in all these cases either P.W. 35 or P. W. 36, the two peons in the office had gone to the treasury and encashed the bills. The applicants who were examined have deposed that they never went to the treasury to cash the bills. According to them only small amounts were received by them and the balance amount was adjusted towards the value of the machines.

22. Then we have to see as to what happened to the money after it was cashed from the treasury and brought to the office. Both P.Ws. 35 and 36 have categorically stated that the amounts were handed over by them to the 2nd accused who according to them was the Head-clerk of the office. P.W. 35 swears that all the amounts cashed by him under the bills Ext. P. 35(c), Ext. P. 37(d), Ext. P. 38(c), Ext. P. 39(d) and Ext. P. 59 were handed over by him to the 2nd accused. Similary P. W. 36 had deposed that the bills Ext. P. 1(d), Ext. P. 2(d), Ext. P. 3(d), Ext. P. 4(d), Ext. P. 5(d), Ext. P. 26(d), Ext. P. 27(d), Ext. P. 28(d), Ext. P. 29(d), Ext. P. 36(d), Ext. P. 40(d), Ext. P. 50, Ext. P. 57 and Ext. P.58 were all cashed by him from the treasury and that he had handed over the amount so got to the 2nd accused. P.W. 32 supports the version of the peons and says that the peons after cashing the bills used to hand over the money to the 2nd accused who was dealing with all cash transactions. In cross-examination he has even stated that on some occasions he had actually seen monies being handed over to the 2nd accused. P.W. 31 who was the overseer in the office says that all cash transactions were being dealt with by the 2nd accused and that he was in charge of the office safe. P.W. 24 a Gramasevak has stated that the 2nd accused was the Head clerk and the key of the safe was with him. P.W. 13 the typist in the office has stated that the 2nd accused was the Head clerk. All the Company Officers have discribed him as the Head-clerk of the office. The 2nd accused has disputed that he is not the Head-clerk, but whether designated as Head-clerk or not there is no dispute that he was clerk in the Block Development office during the relevant period. Even D.W. 2 who has been examined by him has referred to the 2nd accused as the Head-clerk.

23. The learned counsel for the accused has strenuously argued that these witnesses cannot be believed, that P.W. 32 being the industrial officer in charge of the Industrial Section and dealing with these loan transactions was the only

person who could have received the amount and that to save his own skin and to exonerate himself from all blame he is giving false evidence and that he had succeeded in getting at P. Ws. 31, 35 and 36 to support him and depose against the accused.

24. The learned defence counsel referred to the observation of the learned Special Judge where he has stated that if the prosecution had relied only on the evidence of P. Ws. 35 and 36 to support the version that amounts had been handed over to the second accused it would have been difficult for him to hold that the money had been handed over to the second accused. I have been taken through the evidence of these two witnesses and I do not find anything intrinsically wrong in their evidence to throw any the slightest doubt on the truth of the testimony. There is no reason why they should perjure against the 2nd accused. If they had cashed the bill and not accounted at the office the machines would not have been handed over to the parties. The fraud would have been at once noticed and found out. So their evidence alone can be accepted. But as the learned Judge has stated there are other corroborating circumstances.

25. P.W. 32 had deposed that out of the loan amounts sanctioned and cashed from the treasury after reserving the amounts to be paid to the company as cost of the machines the balance amount due to the parties were paid to the parties by the 2nd accused. I have been taken through the evidence of P. W. 32 and after scrutinizing his evidence in the light of the serious criticisms made by the learned counsel, I do not find my way to reject his testimony. Most of the applicants examined here have deposed to their receiving the balance amount from the Head-clerk. P.Ws. 1 to 5, 10, 11, 17, 19, 20 and 33 all deposed that the balance amount was given by the 2nd accused. 2 or 3 parties were not able to say as to who paid them the balance. There is absolutely no reason to doubt the evidence of these witnesses and no motive has been suggested as to why they should all depose against the 2nd accused, if really he was not the person who had paid them the great extent money and it was P.W. 32, who paid them the money. This evidence to a very corroborates the evidence of P. Ws. 32, 35 and 36 that the amounts cashed from the Treasury was handed over to the 2nd accused. If the money had not been handed over by the peons to the 2nd accused he would not have been able to pay the balance amount to the parties.

26. To make sure that no mistake has been committed with regard to the identity there was identification parade conducted by the Sub-Magistrate of Neyyattinkara P.W. 22. The parade was conducted for the purpose of identifying the person who paid the balance amount to the applicants. P.W. 32 as well as the 2nd accused were mixed up with other persons and the applicants who had obtained the loans in question were asked to identify the person who handed over the balance amount to them and also to point out the person who handed over the machines to them. All the witnesses pointed out P.W. 32 as the person who handed over the machines to them and all except one Raman Pillai pointed out the 2nd accused as the person who handed over the balance amount. Merely

because one or two persons stated that the amount was paid by P.W. 32 the evidence of the other witnesses cannot be brushed aside. This is an additional circumstance to probabalise the entrustment of the money with the 2nd accused.

27. From all these circumstances it is clear that the money had been entrusted to the 2nd accused. The amount so collected and received by the 2nd accused was not brought into the cash register of the office. Ext. P. 85 is the cash register of the office for the period between 31--8--56 and 30--3--57. The amounts entrusted to the 2nd accused are not seen entered in the cash book. The amount has also admittedly not been remitted into the treasury nor had. any draft been really obtained for the amount, for payment to the company. Beyond denying the entrustment, no explanation has been offered by the 2nd accused as to what was done with the money. The only irresistible inference that could be drawn is that the money so obtained had been misappropriated by him for his own use.

28. The conduct of the 2nd accused as deposed by the company officers and the correspondent proved in the case also would lend support to this conclusion. P.W. 7 is the Sales Supervisor of the company at Trivandrum. He has deposed that on 9--9--57 he visited the Block Development office. The 1st accused was not in the office and so he contacted the 2nd accused, whom he terms as the Head-clerk. The 2nd accused then told him that the amount had already been sent and that it was by a draft on the Reserve Bank. When questioned about the number of the draft he was told that the number of the draft could not then be given as the concerned clerk was absent, but when P.W. 7 insisted on getting at least the reference number of the covering letter he gave him the number of the covering letter to be CDB-2/186/57 dated 27--3--57. The 2nd accused also told him that the draft had originally been sent to the Calcutta office, that the same was returned as the address given was not correct, that the draft had been kept in a file by one of the clerks and that it was not traced. Ext. P. 20 is a letter by P.W. 7 to his office at Madras which fully corroborates his evidence in court. That letter also refers to the promise made by the 2nd accused to send a letter to the Madras office giving the draft number. Ext. P. 21 is a copy of a telegram sent to P.W. 7.

29. On 1--11--57 again P.W. 7 went to the Block Development Office along with P.W. 8 the representative at Quilon. The 2nd accused then told them that the money had been sent and gave P.W. 7 a copy of the letter which he said was sent to the company's office at Calcutta with copies to their Madurai and Madras offices. Copy of the letter so handed over to P.W. 7 is proved to be Ext. P. 23. The next day itself P.W. 7 forwarded the copy of the letter so handed over to him to his Madras office with a covering letter Ext. P. 22.

30. In the copy of the letter Ext. P. 23 which was handed over by the 2nd accused it will be seen that the 2nd accused had given the draft number as E-224097/40 dated 24--10--57 for Rs. 4,485/-. It has come out in evidence from Ext. P. 73 a letter from the Block Development office that the particular draft No. 224097/40 dated 24--10--57 was only for a sum of Rs. 500/- sent to the

Principal of the Extension Training Centre at Kottarakara towards the advance to meet the preliminary expenditure in connection with the dispatch of slabs to West Bengal, Madras and Delhi. The 2nd accused has therefore purposely given a false number of the draft knowing that it was an entirely different draft and that it had nothing to do with the Jay Engineering Works Limited. This is a very significant circumstance which would lead us to believe that having misappropriated the money, the 2nd accused was trying to cover up his fraud. P.W. 8 has corroborated the evidence of P.W. 7 on this matter. There is absolutely no reason to doubt the testimony of these disinterested witnesses. The plea of the 2nd accused that he wrote all this correspondence at the instance of P.W. 32 and that he did not know anything about them cannot easily be accepted. I have no hesitation in finding that the explanation is false and that the 2nd accused purposely wrote the letters to mislead the company.

31. It was argued by the learned counsel for the 2nd accused that there is no evidence of wrongful conversion and that the prosecution has not alleged or proved that the 2nd accused was in possession of any pecuniary resources or property disproportionate to his known source of income and that the prosecution has failed to prove wrongful conversion. It is neither necessary nor possible in every case of breach of trust to prove in what precise manner the money was spent or appropriated by the accused. The question is one of intention and not a matter of direct proof, but giving a false account of what he has done with the money received by him may be treated as a strong circumstance against the accused.

32. In a case of criminal breach of trust the failure to account for the money proved to have been received by an accused can be considered to be a strong circumstance against the accused. The offence u/s 5(1) (c) is the same as embezzlement which in English law is constituted when the property has been received by the accused for or in the name or on account of the master or employer of the accused and it is complete when the servant fraudulently misappropriates that property. (Halsbury's Laws of England--3rd edition, Vol. X page 787). In this case, it is conclusively proved that the money had been entrusted to the 2nd accused, that he has not accounted as to what happened to the money which has been put into his hands that he has given false explanation that the money had been sent by draft to the company which has been found to be false. The only irresistible inference that could be drawn from all these circumstances is that he has misappropriated the money and is guilty of the offence he stood charged with. His conviction u/s 5(2) of the Act is therefore perfectly correct. The sentence of 3 years rigorous imprisonment in a case of this nature cannot at all be said to be excessive. The sentence is also confirmed.

33. Now coming to the case against the 1st accused he has been convicted u/s 5 (2) for having "allowed" the 2nd accused to misappropriate the monies. The learned Special Judge has clearly found that the money had been entrusted with the 2nd accused and that he had misappropriated the amount. It was also found

that there was no proof of the 1st accused having used the amount for his own purposes. The learned Judge relying on the conduct of the 1st accused as seen from the evidence of the company officers and certain correspondence marked in the case found the 1st accused guilty for having allowed the 2nd accused to misappropriate the amount. The question is as to how far the inferences drawn by the learned Special Judge can be justified.

34. The first question that arises is as to the import of the word "allowed" used in Section 5(1) (c). u/s 405 of the Penal Code, the offender must willfully suffer any person to misappropriate the property entrusted. But u/s 5 (1) (c) if he "allows" another person to dishonestly or fraudulently misappropriate then it becomes an offence. There is certainly difference between willfully suffering another and allowing a person to do an act. The word allowed is much wider in its import.

35. In words and Phrases by Roland Burrows, Vol. I at page 164 while dealing with the word allow reference is made to the case in Crabtree v Fern Spinning Co., Ltd. (1910) 85 L. T. 549 where Lord Alverstone C. J. observes:

Mr. Sutton said that these words "shall not allow" mean in the statute "shall prevent".....I think that if the Legislature had meant anything of that kind they would have said so; they would have said "shall prevent".....but they used the words "shall not be allowed". It seems to me that a man cannot be said to allow that of which he is unaware, or that which he cannot prevent.....It would be straining the words of the statute beyond what the Legislature could have intended to hold that the words "shall not allow" mean "shall absolutely prevent".

36. Reference is also made to an Australian case in Gilbert v Gulliver 1918 V. L, R. 185. Cussen J. stated therein :

Ordinarily speaking, before a person can be said to "allow" anything there must be something in the nature of actual knowledge or connivance, or in some cases extensive delegation of authority in circumstances where the defendant has delegated his power to prevent the act from being done.....Of course the meaning of the word "allow" may vary, having regard to the circumstances and in some cases to the class of enactment in which it is found.

37. In Shantaram Rama Wadkar v Emperor AIR 1932 Bom 474 the question arose whether the accused who is the owner of a motor car could be said to have committed an offence u/s 6 of the Motor Vehicles Act, VIII of 1914. Section 6 stated that no owner of a motor vehicle shall allow any person who is not so licensed to drive the car and there was no evidence in the case that the accused knew that his driver was going to take the car or that he in any way authorized that act. The learned Magistrate took the view that the word "allow" u/s 6 of the Act meant did not permit. Beaumont C.J. stated :

I think that the word "allow" ordinarily involves permission express or implied,

and that it is used in that sense in S. 6 of this Act. Evidence of express permission to use a car beyond the terms of the license would no doubt generally be lacking. But permission may be implied from the facts. In the present case there is however no evidence at all from which, as it seems to me, we can infer any sort of permission, because there is no evidence that the car had ever been used in this way before, and there is no evidence that the accused knew that it was going to be used in this way on the present occasion.

38. Their Lordships agreed with the conclusions of the Calcutta High Court in the case in Varaj Lall Vs. King-Emperor, where it was stated :

The principle I should adduce from the cases is that, where a particular intent or state of mind is not of the essence of an offence, a master can be made criminally liable for the acts of his servant, acts expressly prohibited, but not otherwise, if the Act provides for liability for permitting and causing a certain thing unless it can be shown that the act was done with the master's knowledge and assent, express and implied.

I am in respectful agreement with the views expressed above. However wide the import of the word "allow" there must be some evidence that the accused had known of the misappropriation and that by some act or omission of his he made it possible or easy for another person to misappropriate. His failure to bring the offender to book or his gross negligence in detecting the fraud that was committed would not by itself lead to the inference that he allowed the fraud to be perpetrated.

39. The learned Judge has dealt with the case of the 1st accused under point No. -6. As stated it is amply proved that the 1st accused knew about the order that had been placed for the supply of the machines, that the machines had actually been received in the Block Development Office, that the bills had been drawn and the amount covered under those bills were cashed and received in the Block Development Office for payment to the Company. Ext. P. 52 is the letter by the company to the 1st accused dated 28--1--1957 requesting for payment. The 1st accused had made an endorsement in that letter to the I.O. (Industrial Officer) stating that the amount already collected may be remitted immediately. That would show that he knew that the money had been collected from the parties and was ready in the office for dispatch to the company. The question is whether he allowed the 2nd accused to misappropriate and knew that the money was in fact not actually sent to the company.

40. The learned Judge has relied on the evidence of P. Ws. 6 to 8 and the correspondence between the company and the Block Development Office and found that the 1st accused has been telling the representatives of the company that payment had been made which is false and that these statements are inconsistent with his being not aware of the real state of affairs. There is first the evidence of P.W. 7 that on 18--4-1957 he had visited the Block Development Office and met the 1st accused and asked for payment and the 1st accused told

him that the money had been sent on 27--3--1957. According to the 1st accused P. 7 had not met him on 18--4--1957 as alleged and that he was not in the office at all on that day and to prove this he has produced Ext. D2, which is the diary book of the Block Development Office. In that book under date 18--4--1957 it is seen entered that the 1st accused had proceeded to Quilon and discussed with the Deputy Collector for Planning about the arrangements to be made for the Seminar and that he returned to the Head-quarters only at 9 P.M., that day. It is not disputed that this is a book kept in the office in the regular course of business and there is no case for the prosecution that it is not properly maintained or has been got up for the purpose of this case. This would, at any rate, throw serious doubt on the truth of the version given by P.W.7. It may be that P.W. 7 had committed a bona fide mistake. No correspondence corroborating this particular visit of P.W.7 to the Block Development Office on 18--4--1957 has been brought to my notice as in other instances. It was the case of P.W. 7 that when he was talking with the 1st accused there were other clerks also present, but curiously none of them had been examined. It is also seen from the evidence of P.W. 7 that the 1st accused gave him the reply after sending for some clerk and perusing some papers placed by the clerk before him. So even assuming that the 1st accused gave such a reply it cannot be stated that when he gave the reply that the draft was sent on 27--3--1957 he made the statement knowing that it was false. It could only be, that he told P.W. 7 what he gathered from the correspondence placed before him by the clerk and it could not be stated that the 1st accused made a deliberately false statement as the learned Judge seems to think.

41. There is then the evidence of P.W. 6 that he met the 1st accused on the 30th September. P.W. 6 stated that the 1st accused then told him that money had already been sent. Reliance is also placed on Ext. P. 31 the office copy of the letter sent by the Block Development Office which is said to contain the initials of the 1st accused. P.W. 32 does not speak about this letter. P.W.31 the overseer of the office has proved that Ext. P.31 is in the hand-writing of the 2nd accused. He only stated that the initials shown in the letter looks like that of the 1st accused. That would indicate that he is not definite about the initials. The other witness is P.W. 13, a typist of the office. She was also shown Ext. P. 31 and she stated that she could not say whose initials it was. The original letter if really there was such a letter has not been produced. It may be that the 1st accused was not aware of such a letter at all. The 1st accused has not been specifically questioned u/s 342, Cr.P.C., about each of these letters. It is seen that one general question has been asked by the learned Judge.

42. Ext. P. 32 is a copy of an alleged telegram in the hand-writing of the 2nd accused. P.W. 32 has proved that the initials is that of the 1st accused and P.W. 13 has stated that the initials appear to be that of the 1st accused. Ext. P. 33 is a copy of a letter to the company from the Block Development Office but this docs not contain the initials of the 1st accused. On the back of that letter an endorsement is found made by the 1st accused wherein he has asked the office

to send another telegram or express letter since the draft has not been received back till date. That would also indicate that he would have believed the version given by the 2nd accused that the draft had been sent. If that is not so one fails to see why he should make such an endorsement to address the treasury. There is no evidence whether the 2nd accused did really address the treasury.

43. There is then the evidence of P.W. 8. According to him on 24-9-57 the 1st accused had come to his office and when questioned he had told him that the amount had been sent to the company and that he then complained that the company had not received the amount and it might be that the money must have been misappropriated by somebody in his office. Ext. P. 30 is the notes prepared by the 1st accused when he visited the Quilon office. It is proved to be in the hand-writing of the 1st accused and it is not denied by him. In the note the 1st accused has specifically instructed the office to verify the details of payment and send a telegram or express letter to the Mutual Benefit Corporation, Quilon. It was after that on 30--9--57 that P.W. 6 had gone and met the 1st accused in his office and he told him that the draft for the amount had been sent to the Calcutta office. The learned Special Judge has stated that all the statements which the 1st accused had made are inconsistent with his being not aware of the real state of affairs and that his conduct can only be explained by his being in active collusion with the 2nd accused with regard to the non-payment of the amounts collected in the office for the purpose of sending to the company. I don't think that it is a safe inference which could be drawn.

44. If the 1st accused is to be found guilty of allowing the 2nd accused to misappropriate there must be some evidence that at the time when the money was misappropriated by the 2nd accused he knew that the money was being misappropriated or that he was so grossly negligent as to facilitate the misappropriation by the 2nd accused. There was no attempt made by the prosecution to prove that the 1st accused instigated the 2nd accused to commit breach of trust or that he engaged with him in any conspiracy for doing so or that he intentionally aided by any act or illegal omission the commission of the offence. From all that has been found by the learned Judge what emerges is that in spite of attention of the 1st accused being drawn to the non-payment of the money, he was grossly negligent and did not take prompt action but foolishly believed the 2nd accused, but from this alone it could not be inferred that he was privy to the fraud.

45. It is in evidence that the Block Development office consists of various Departments and the 1st accused is, no doubt, the officer in charge of the overall management of the whole business, but in the very nature of things he may not be expected to know the minute details of all the business that would have been going on in the various departments. Had there been any proof of conspiracy between him and the 2nd accused, the case against the 1st accused might have been stronger, but in the absence of such evidence, the question is whether the 1st accused could be imputed with the knowledge of the falsity of

the representation that he made on the basis of the office correspondence. Taking into consideration of the ordinary run of official business in concerns like this, the prosecution, according to me, has not been able to prove that the 1st accused made the representation to the company officers knowing them to be false.

46. In inferring a person's guilt from such pieces of evidence, it must be shown that the inculcator facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. As pointed out by Wills J. on circumstantial evidence: It is not enough that a particular hypothesis will explain all the phenomena; nothing must be inferred merely because, if true, it would account for the facts, and if the circumstances are equally capable of solution upon any other reasonable hypothesis it is manifest that their true moral cause is not exclusively ascertained, but remains in uncertainty, and they must, therefore be discarded as exclusive presumption of guilt- Every other reasonable supposition by which the facts may be explained consistently with the hypothesis of innocence must be rigorously examined and successively eliminated and only when no other supposition will account for all conditions of the case, can the conclusion of guilt be legitimately adopted.

Bearing these principles in- mind I have carefully examined the entire evidence and the circumstances and the inference sought to be drawn from them and while I am prepared to agree that the 1st accused was grossly negligent in not taking prompt action when the fact of non-payment of the money to the company was brought to his notice, it does not lead to the only inference that he did not do it because he was a party to the fraud and had allowed the 2nd accused to misappropriate. The 1st accused, no doubt, has demonstrated himself to be thoroughly unfit to hold any responsible position or to be in charge of such an office and has been most callous and irresponsible in the discharge of his duties. It may even be stated that there is an amount of suspicion against him whether he had not known about the misappropriation, but in a case of this kind conviction cannot be based on suspicion only, however strong they might be. It does not carry conviction to my mind. I am therefore constrained to give the 1st accused the benefit of doubt and must hold that the case against him has not been fully established by the prosecution. In the result, the appeal filed by the 1st accused is allowed. His conviction and sentence are set aside. The conviction and sentence passed on the 2nd accused is confirmed and his appeal is dismissed.