

(2010) 03 BOM CK 0171

In the Bombay High Court

Case No : Criminal Revision Application No. 336 of 2009

Hilal Dhudku Patil

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 30-03-2010

Acts Referred:

Penal Code, 1860 (IPC) — Section 408

Citation : (2010) 03 BOM CK 0171

Hon'ble Judges : Shrihari P. Davare, J

Bench : Single Bench

Advocate : Joydeep Chatterjee, for the Appellant; K.S. Patil, Assistant Public Prosecutor, for the Respondent

Judgement

Shrihari P. Davare, J.—Rule. Rule is made returnable forthwith. Heard finally with the consent of the learned Counsel for the parties.

2. By the present Criminal Revision Application, the petitioner has questioned and challenged the correctness and legality of the judgment and order dated 30.11.2009, rendered by the learned Additional Sessions Judge, Dhule in Criminal Appeal No. 2 of 2005 and the judgment and order of conviction recorded by the learned Judicial Magistrate, First Class, Sindkheda in R.C.C. No. 150 of 1998 on 10.1.2005, for the offence punishable u/s 408 of the Indian Penal Code.

3. It appears that the petitioner Hilal was in service as a Secretary of Vividh Karyakari Seva Sahkari Society Limited, Sawai Mukti (Society) and he was entrusted with the duty to maintain accounts and its related transactions. He also had domain over the property of the society. The first informant Pandharinath i.e. PW1 was the second auditor, who carried out the audit of the said society for the period from 1.1.1982 upto 30.6.1983. However, during the said audit, the first informant Pandharinath noticed that on various dates, such as, on 2.1.1982 (Rs. 316/-), on 11.1.1982 (Rs. 200/-), on 31.5.1982 (Rs. 25/-), on 10.7.1982 (Rs. 1,000/-), on 22.5.1982 (Rs. 255/-), on 15.6.1982 (Rs. 218.19) and on

19.5.1982 (Rs. 150/-) receipts were issued, but same were not shown in Kird book, and total receipts were shown less in the kird book, as also deposits were also not found to be shown in the bank. Accordingly, the first informant Pandharinath called upon Hilal to submit his explanation, but he failed to do so. Hence, on 14.12.1985, the first informant Pandharinath lodged a report (Exh. 26) and thereupon offence came to be recorded under CR No. 65 of 1985 against the applicant u/s 408 of the Indian Penal Code.

4. At the conclusion of trial, after appreciating the evidence adduced and produced on record, learned Judicial Magistrate, First Class, by judgment and order dated 10.1.2005 in R.C.C. No. 150 of 1998 convicted the original accused i.e. the applicant herein for the offence punishable u/s 408 of the Indian Penal Code and sentenced him for a period of three months R.I. and fine of Rs. 1,000/-, in default to suffer further S.I. for 15 days.

5. Being aggrieved and dissatisfied by the said judgment and order of conviction, the applicant (original accused) preferred Criminal Appeal No. 2 of 2005 before the Additional Sessions Judge, Dhule and same came to be dismissed by the judgment and order dated 30.11.2009 and thereby confirming the conviction recorded by the trial Court, the applicant herein has questioned the correctness and legality of both the said judgments in the present Criminal Revision Application and prayed for quashment thereof.

6. On perusal of the judgment and order rendered by the learned Judicial Magistrate, First Class, Sindkheda on 10.1.2005 in R.C.C. No. 150 of 1998, it is seen that the prosecution examined the first informant Pandharinath as PW1 and produced the documents i.e. cash book (Exh. 22), special report dated 7.4.1984 (Exh. 23), audit report (Exh. 24) and notice to the accused dated 24.11.1983 (Exh. 25). However, the accused did not examine himself on oath, but he examined a defence witness, namely Ramesh Wagh in his defence.

7. After appreciation of the evidence, learned Trial Judge has come to the conclusion and observed in para No. 28 of the judgment that the petitioner (original accused) misappropriated an amount of Rs. 1541/- by different modes as discussed in the said judgment and held the petitioner/accused guilty for the offence punishable u/s 408 of the Indian Penal Code, and no fault can be found in the reasoning adopted therefore .

8 While awarding the sentence to the petitioner, learned trial Judge has observed that the petitioner has deposited the entire amount claimed to be misappropriated just after filing the complaint, and therefore, lenient view was taken considering the said aspect and also considering the other aspect that the trial was going on for 19 years and the applicant faced the same for half of his life and considering his age, sentence of R.I. for a period of 15 days and fine of Rs. 1,000/-, in default of payment of fine to suffer further S.I. for 15 days was awarded to him. While awarding the sentence, learned Trial Judge has considered the mitigating circumstances and awarded the sentence suitably and properly.

Hence, having the comprehensive view of the matter, I do not find any perversity in the judgment and order rendered by the trial court convicting and sentencing the applicant as afore said on 10.1.2005.

9. The lower Appellate Court while deciding Criminal Appeal No. 2 of 2005 also considered the evidence on record and reappreciated the same and came to the conclusion that the appeal is devoid of any merits and same was dismissed and the reasoning adopted by the learned Additional Sessions Judge, Dhule for dismissing the said appeal also cannot be faulted with and I am of the view that the lower Appellate Court has rightly confirmed the conviction and sentence awarded to the applicant dismissing the Criminal Appeal No. 2 of 2005 by judgment and order dated 30.11.2009.

10. Learned Counsel Shri Joydeep Chatterjee for the petitioner invited my attention to the aspect that as observed by the Trial Judge, the petitioner has deposited in the court, even more amount than the amount claimed to be misappropriated, as well as it is submitted that the petitioner has already deposited the fine amount in the court. Hence, it is submitted that there is no dispute about the deposit of amount claimed to be misappropriated and fine amount in the court.

11. As regards the sentence part, learned Counsel Shri Chatterjee invited my attention to the facts that the first information report was lodged on 14.12.1985 and thereafter the petitioner came to be arrested on 27.1.1986 and thereafter M.C.R. was granted on 10.2.1986, and subsequently he came to be released on bail. It is also urged that after the decision of the appeal on 30.11.2009, the petitioner surrendered on 7.12.2009 and was released on bail on 9.12.2009. Hence, learned Counsel for the petitioner canvassed that considering the days in custody of the petitioner i.e. 27.1.1986 to 10.2.1986 and 7.12.2009 to 19.12.2009, the applicant was in custody for 17 days, and therefore, he has undergone the sentence more than 15 days, which is awarded to him.

12. In the said context, learned Counsel for the petitioner relied upon the following observations made in the case of AIR 1949 140 (Nagpur) .

The original sentence was 6 months rigorous imprisonment and a fine of Rs. 100, or in default of payment a further term of 6 months rigorous imprisonment; the appellate Court reduced the substantive sentence to the imprisonment already undergone, viz. 1 day, and raised the fine awarded from Rs. 100 to Rs. 600, or in default of payment of the fine a further term of six months rigorous imprisonment.

13. Learned Counsel for the petitioner also placed reliance on the judgment of Honourable Supreme Court in the case of State of Karnataka Vs. Marigowda, wherein, while restoring the conviction, it is observed as under:

Having regard to the time that has elapsed, we do not think that it is necessary to send the respondent back to jail. In the circumstances of the case we reduce

the sentence of imprisonment to the period already suffered by him but increase the fine imposed upon him by the trial court from Rs. 500/- to Rs. 1,750/-. If the amount of fine is realised, it will be paid to the Aladahalli Large Scale Cooperative Society. In default of payment of fine, the accused will undergo rigorous imprisonment for a period of three months.

14. Reliance was also placed by the learned Counsel for the petitioner on the judgment of this Court in the case of *The State of Maharashtra v. Harishchandra Tukaram Awatade and Ors.* reported at 1997 (1) ALL MR 196 in which it is observed as under:

Accused were already in jail for about 10 months as under trial prisoners, hence instead of sending them to jail each of them ordered to pay Rs. 10000/- as fine, within a period of six months in the Trial Court, in default to undergo sentence of R.I. for two years.

15. Considering the afore said position, I am of the view that there is no perversity in the judgment and order of conviction recorded by the learned Trial Judge while convicting the petitioner for the offence punishable u/s 408 of the Indian Penal Code, as well as no fault can be found with the reasoning adopted by the learned lower Appellate Court confirming the same, and hence, the conviction recorded against the petitioner is required to be maintained. However, considering the afore said calculations, it is apparent that the applicant was in custody for about 17 days i.e. more than 15 days which is the sentence awarded, and therefore, sentence awarded to him is required to be modified and the period undergone by the petitioner in custody is required to be construed as the sentence awarded to him for the afore said offence and since he is on bail, during the pendency of the present Criminal Revision Application, he need not surrender.

16. In the result, present Criminal Revision Application No. 336 of 2009 is allowed partly and conviction inflicted upon the applicant by the judgment and order dated 10.1.2005 rendered by the learned Judicial Magistrate, First Class, Sindkheda in R.C.C. No. 150 of 1998 and upheld by the lower Appellate Court by the judgment and order dated 30.11.2009, delivered by the learned Additional Sessions Judge, Dhule in Criminal Appeal No. 2 of 2005, is hereby confirmed and maintained. However, the sentence awarded to the petitioner stands modified to the extent of the period undergone by him in the custody. The bail bond of the petitioner stands cancelled.