

(2017) 03 GUJ CK 0130
In the Gujarat High Court
Case No : 4585 of 2012

JAVEDAKHTAR MOHMED MIRZA

APPELLANT

Vs

STATE OF GUJARAT & ANR.

RESPONDENT

Date of Decision : 28-03-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 405](#),
[Section 406](#) - Criminal breach of trust - Punishment for
Criminal breach of trust

Citation : (2017) 03 GUJ CK 0130

Hon'ble Judges : N.V.Anjaria

Bench : Single Bench

Advocate : RJ GOSWAMI, LB DABHI

Judgement

1. Applicant herein has invoked powers of this Court under Section 482 of the Code of Criminal Procedure, 1973, praying for quashment of First Information Report bearing Crime Register No.I-171 of 2011 registered with Umra Police Station, Surat City, on 10th June, 2011.

2. The F.I.R. is in respect of the alleged offence under Section 406, IPC. Section 406 may be reproduced herein itself before noticing the allegations in the F.I.R. so as to properly comprehend whether ingredients of the offence are made out. Section 406, IPC, speaks for punishment for the offence of criminal breach of trust. The offence of criminal breach of trust is mentioned in Section 405, IPC which is extracted hereunder. "405. Criminal breach of trust-Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

3. Adverting to the acts and conduct alleged in the F.I.R., the applicant was serving as Talati. During his service tenure on 21st February, 2011, he was taking 10 cuts of Surat City Revenue record on his motorcycle for the purpose of getting them Xeroxed. While on the way the bag containing the record was lost. The bag which was tied and hanged with the hind part of the motorbike carrier fell down and handles of the bag were found hanging. For loss of record, a complaint dated 22nd February, 2011 was registered with Umra Police Station. It was alleged that since it was a case of loss of government record, the office of Deputy Collector concerned as well as Collector concerned were informed on 23rd February, 2011. According to the complaint, which was filed by Mamlatdar of Surat City, since it was a sensitive matter of loss of government record, report was called for by the Collector's office, in response to which the necessary report was sent. 3.1 It was further alleged that out of the 10 cuts of papers, 2-3 cuts were found available from the office of the applicant-accused. It was therefore alleged that though it was the responsibility of the accused to preserve the government record in his custody and the same was a record necessary for other proceedings, he lost the same. It was alleged that the accused kept the record in his possession and misused it and by stating wrong facts, misguided the higher officer and thus committed offence of criminal breach of trust.

3.2 Noticing other factual aspects and developments which are attendant and relevant, on the very next date, that is 22nd February, 2011, the accused a communication to Police Inspector stating that he was taking certain original record for the purpose of getting Xerox as required as per the applicant demand and while going towards Surat on his motorcycle tying the bag on the hind side of the motorcycle, he lost the same somewhere in the way. It was stated that the bag was found to have been lost by getting detached whereas the handle of the bag remained tied with the motorcycle. An affidavit dated 22nd February, 2011 was also affirmed by the applicant stating the very facts, further stating that same was done for the purpose of filing police complaint. Police complaint was also filed by the complainant. A similar letter was addressed to Mamlatdar, Surat, on 22nd February, 2011 stating out the development and filing of complaint, etc. Not only that, a public advertisement was given by the applicant in local dailies "Gujarat Mitra" and "Gujarat Darpan" about the loss of record in his own name. Thus the applicant made frantic efforts after he lost the bag containing the record.

3.3 The material on record further indicated that, subsequently the Mamlatdar obtained certified copies of the lost material to complete the availability of the record. Certain parts of the paper were available. It further appears from letter of the Collector dated 08th March, 2011 that he put eight queries to the applicant to explain the circumstances of loss of the record which all were replied by the accused. It further appears that the Deputy Collector concerned after considering the reply of the accused, addressed letter dated 10th March, 2011 to the Collector in which it was stated that the applicant was a committed and honest government servant and his conduct all throughout was above board and

he was hard working to be helpful in any work assigned in respect of his duty. It was recommended that his was not an intentional act and the mistake was required to be pardoned.

4. Heard learned advocate Mr.R.J. Goswami for the applicant and learned Additional Public Prosecutor Mr.L.B. Dabhi. Though served, none appeared for respondent No.2.

5. As Section 405, IPC reads, offence of criminal breach of trust is committed when a person entrusted with a property or entrusted with dominion over any property dishonestly misappropriates the property, it occurs when the property so entrusted is converted to his own use or the same is dishonestly used or disposed of in breach of some trust reposed while entrusting. The criminal breach of trust is an offence all about a dishonest misappropriation and use of property entrusted to a person by that person. 5.1 In *Sardar Singh v. State of Haryana* [(1997) 1 SCC 463], the Supreme Court stated that an essential ingredient of the offence under Section 405, IPC is that the accused being in any manner entrusted with property or with dominion over property dishonestly misappropriates or converts to his own use that property or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or any legal contract, express or implied, which he has made touching the discharge of such trust. In that case, the appellant was posted as Patvari and was entrusted with the Receipt Book and dominion over it but in absence of anything to establish that he dishonestly misappropriated the receipt book or converted it to his own use, the conviction under Section 409 was held to be not proper. The Supreme Court observed that it was quite possible that the appellant might have lost or mislaid the receipt book and hence, he might have been unable to return it to the superior authorities. 5.2 Also in *Narendra Pratap Narayansinh v. State of U.P.* [(1991) 2 SCC 623] accused in charge of government agricultural seed was charged for preparing forged bills. Highlighting the ingredient of dishonest intention for commission of offence of criminal breach of trust, the Apex Court stated that the prosecution was required to establish the main ingredient of 'dishonesty' against the accused even if he may be guilty of dereliction of duty. 5.3 Similarly, the property lost from the hands of custodian of the property, would not by itself amount to misappropriation, and would not constitute the offence of criminal breach of trust unless the loss is shown to be with dishonest intention on part of the custodian of the property. A decision of Orissa High Court in *State of Orissa v. Husen Khan* [(1990) 3 Srim 783 (Ori)] explains. In that case, the facts were that the property were logs and 24 logs were entrusted to the accused for keeping in his custody, out of which 18 logs went missing. The court observed, "Missing of the logs by itself does not amount to misappropriation or conversion to own use by accused. If such missing is on account of dishonest intention of the accused a case of misappropriation or conversion to his own use may be inferred from facts and circumstances of a case although there is no direct evidence in support of such misappropriation or conversion to own use". In the

present case even circumstantially, it is not possible to draw inference about dishonest intention, on the contrary, the attending facts suggest that it was a pure accidental loss out of negligence. 5.4 In order to constitute an offence of criminal breach of trust and so as to establish the commission of this offence, the dishonest intention is a basic thread running across the provision. In absence of such dishonest intention, the offence cannot be said to have been committed. The act of entrustment would not suffice, the dishonesty must accompany and must be shown in the appropriation or use of the property. Gist of the offence is dishonest intention. 5.5 It is the dishonesty alone and not negligence which will be required to be shown. A negligent conduct or a conduct amounting to dereliction of duty will not make out the offence of criminal breach of trust. Also, where a person in entrustment of the property loses it because of lack of care etc. on his part, such loss in absence of dishonest conduct cannot be the offence under this Section. A negligent act or conduct does not have an intake of mens rea. Without mens rea no offence under 406 is conceivable, dishonest intention being a necessary element. In the element of dishonesty, there is a mens rea. It is a sine qua non without which breach of trust may not result in criminal breach of trust.

6. Applying the above aspects in the present case and underlining that mere negligence is not dishonesty, the loss of revenue record by the applicant by itself would not constitute commission of offence punishable under Section 406, IPC, though it may be a sheer act of negligence. Whether there was a dishonest intention or not, could be gathered from the facts of the case, the conduct of the applicant and the attendant circumstances. Applicant's case was that while he was going towards Surat on his motorbike with a bag containing record made to hang on the back side of the motorbike, the bag fell down on the way, it was lost and the handles remained lying with the motorbike. The applicant immediately communicated to the police as well as to the higher authority-the Mamlatdar about the loss of bag and also registered a police complaint. The higher ups inquired the incident by grilling the applicant with queries in writing which the applicant replied satisfactorily. The Deputy Collector concluded to submit in writing that the loss of record was an act of negligence and there was no bad intention on part of the applicant who otherwise was described as a competent and committed government servant. In the departmental inquiry held against the applicant for loss of bag, he was adjudged to be negligent in discharge of duty.

6.1 Taking all these facts and circumstances cumulatively, it is not possible to conclude that in the conduct of the applicant which resulted into loss of record, there was any dishonest element. The facts did not show any dishonest misappropriation or conversion or disposal of the property, namely the government record by the applicant. A negligent act cannot be termed as criminal breach of trust where the facts and attendant aspects unmistakably showed absence of dishonest intention which would take the offence out of purview of Section 406, IPC.

6.2 When the basic and necessary ingredient of dishonesty is not shown to be

present for making out offence under Section 406, IPC against the applicant, prosecuting him criminally sans justification in law. Criminal case or criminal prosecution cannot be permitted to be continued for the sake of it.

7. As no offence is made out, the FIR in question and the resultant proceedings, if any, deserves to be quashed. Consequently, the present application is allowed by quashing and setting aside FIR bearing Crime Register No.I-171 of 2011 registered with Umra Police Station for the offence under Section 406, IPC against the applicant herein as well as the consequential proceedings.