
(2011) 11 BOM CK 0129

In the Bombay High Court

Case No : Criminal APPEAL NO. 414 of 2000

Raghunath Dhondu Vani and Bajoriya Oil Refinery, Through
Partner Shri Adit Bajoriya

APPELLANT

Vs

Ilahi Babulal Mujavar

RESPONDENT

Date of Decision : 15-11-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 313, 408, 420

Citation : (2012) CriLJ 1345

Hon'ble Judges : Hari P. Davare, J

Bench : Single Bench

Advocate : K.C. Sant, for the Appellant; P.R. Patil, Advocate, for respondent no.1 and Mr. S.N. Kendre, Additional Public Prosecutor, for respondent no.2, for the Respondent

Final Decision : Dismissed

Judgement

Shri Hari P. Davare, J.—Heard learned respective Counsel for the parties.

2. The present appeal has been preferred by the appellant (original complainant), challenging the judgment and order of acquittal dated 29th February 2000, rendered by the learned Judicial Magistrate (First Class), Pachora, in Regular Criminal Case No. 133 of 1991, thereby acquitting the respondent no.1 (original accused) for the offence punishable u/s 408 of Indian Penal Code.

3. The appellant no.1 and respondent no.1 are referred to as per their original status i.e. complainant and accused, respectively.

4. Briefly stated, the facts of the case are that the complainant is Accountant of the firm carrying on business under the name and style, Bajoriya Oil Refinery, Pachora; whereas the accused was working as Cashier in the said firm for about 6 -7 years till 1-9-1991. There were two other sister firms, namely, Adarsha Engineering and Oil Millers, and Bajoriya Fats and Proteins. The accused used to

maintain accounts of aforesaid all three sister concerns, and also used to disburse salary to the workers. In the said context, the accused was entrusted with the amounts from time to time in connection with business of the said firms and during his tenure, he gained confidence of the complainant by his conduct. Hence, relying upon the accused, the complainant also entrusted with him the amounts from time to time. However, it is alleged that the accused dishonestly misappropriated amount of Rs. 1,25,000/-and left the service on 1-9-1991.

5. It is also alleged that the complainant came to know about alleged defalcation of the amount when the accused was called upon to submit account on or before 13th February 1991, but the accused failed to comply with the same. It is the case of the complainant, that on 22nd February 1991, accused voluntarily made confession in writing and admitted his guilt, and further assured the complainant to repay the whole amount on or before 1-8-1991, and requested the complainant not to take severe action against him. However, the accused failed to repay the said amount inspite of written assurance. Hence, the complainant was constrained to file complaint against the accused, before the learned Judicial Magistrate (First Class), Pachora, on 12-11-1991, u/s 408 and 420 of Indian Penal Code, since according to the complainant, the accused had swallowed the amount and utilized the same for his own purpose. Accordingly, process came to be issued against the accused u/s 420 and 408 of Indian Penal Code on 10-12-1991. The accused appeared in the said proceeding and evidence before the charge was recorded, and finding sufficient evidence to frame the charge against the accused, learned Judicial Magistrate (F.C.), Pachora, passed order on 1-11-1999, for framing charge against the accused. Accordingly, charge came to be framed against the accused on 5-11-1999, under Exhibit 44, for the offence punishable under 408 of Indian Penal Code. The accused pleaded not guilty to the charge framed against him and claimed to be tried.

6. To substantiate the charge levelled against the accused, the complainant examined as many as two witnesses, as mentioned below :

(1) PW 1 Raghunath s/o. Chondu Wani i.e. complainant -Accounts Manager in Bajoriya Oil Refinery, and

(2) PW 2 Bhavanishankar s/o. Babulal Bajoria - Partner of Bajoriya Oil Refinery.

7. The defence raised by the accused is that the confessional statement was got written from him under the duress and threat, and under the pressure of initiation of Police action against him, and the complainant has made scapegoat of the accused in order to suppress the illegal transaction, and accordingly, the accused claimed to be innocent and prayed for acquittal. However, the accused neither examined himself nor examined any defence witness in support of his defence.

8. Considering the oral and documentary evidence on record, and after scrutinizing the same, learned Judicial Magistrate (F.C.), Pachora, acquitted the accused for the offence punishable u/s 408 of Indian Penal Code, by way of

judgment and order dated 29th February 2000, delivered in Regular Criminal Case No. 133/1991. Being aggrieved and dissatisfied by the said judgment and order of acquittal, the complainant has filed the present appeal assailing the same, and prayed for quashment thereof, and urged that the accused be convicted and sentenced for the offence with which he was charged.

9. Before adverting the submissions advanced by the learned Counsel for the parties effectively, it is necessary to deal with the material evidence adduced / produced by the complainant, and in the said context, coming to the deposition of PW 1 Raghunath Wani, who has stated that he was working in Bajoriya Oil Refinery, as Accounts Manager, since 1945, and Adarsha Engineers and Fabricators and Oil Millers, and Bajoriya Fats and Proteins Pvt. Ltd. were sister concerns of the said Company, and he was looking after accounts of all the three concerns. The accused was serving as Cashier in Bajoriya Oil Mill from 1984 to 1991, and he used to maintain accounts of all the said three concerns, as well as, he used to accept the money and disburse the payments to the labourers and employees. He has stated that initially the accused worked well for a period of two years, and thereafter slowly started misappropriation of the amounts.

10. PW 1 Raghunath Wani has further stated that PW 2 Bhavanishankar is the partner of Bajoriya Oil Mill and other concerns. Bhavanishankar demanded accounts from the accused on 21-1-1991, but the accused informed that the amount of Rs. 1,25,000/- was short. Hence, again accused was asked to submit detail accounts till 13-2-1991, and at that time, the accused confessed that the aforesaid amount was actually falling short and requested time to make good thereof till August 1991. PW 1 Raghunath Wani has further stated that the accused offered possession of his house and landed property to adjust the said amount. However, the accused could not repay the said amount till August 1991, and hence, notice was issued to him, dated 9-9-1991 (Exhibit 29) which was duly served upon him. He has further stated that thereafter accused came to the employer and requested not to terminate him and expressed his willingness to pay the amount from his salary by installments of Rs. 500/- per month, as well as, he requested not to file Police complaint against him. Accordingly, he has stated that the accused utilized the whole amount of Rs. 1,25,000/- for himself.

11. PW 1 Raghunath Wani has further stated that the accused gave a statement in his own handwriting and stated that he misappropriated the aforesaid amount of Rs. 1,25,000/- and acknowledged the guilt and signed the said statement which is produced at Exhibit 30. He has further stated that the accused did not repay the said amount inspite of receipt of legal notice, and accordingly, misappropriated the said amount and utilized the same for his own purpose, and thereby caused loss to the Company.

12. During cross examination, PW 1 Raghunath Wani has admitted that the accused was not authorized to sign cheques and withdraw amount on behalf of the factory, whereas all the three partners of Refinery Firm were authorized to sign cheques and withdraw amount from the Bank. He also admitted that all

dealings were through cheques. A suggestion was given to him that writing on Exhibit 30 i.e. confessional statement and Exhibit 38 were given when the accused was not in Company's service, but the same was denied by him. It was also suggested to him, that the aforesaid writing was got written from him under threat of prosecution, but the same was also denied by him. A suggestion was also given to him, that there was no misappropriation, but the same also was denied by him.

13. Pertinently, PW 1 Raghunath Wani has further stated in the cross examination, that all the vouchers i.e. Exhibit 50 to Exhibit 57, bear signature of the partner and the voucher shown in the credit of the accounts of the accused is at Exhibit 58. He has also admitted that the aforesaid amount had fallen due against the accused only on the basis of his confessional statement. Hence, he was shown voucher dated 31-3-1991 and thereupon he admitted that the said voucher does not bear signature of the accused, but it also bears signature of factory owner which is marked as Exhibit 59. He has further stated that the accused submitted the account on 13-2-1991, about the balance shown against him, and said acknowledgment is produced at Exhibit 61. In the said context, he has stated that except said document, he has no other documentary evidence to show the outstanding amount. He has further stated that the other vouchers i.e. Exhibits 59 to 60 were prepared on the basis of Exhibit 61, but the said Exhibit 61 does not bear signature of the accused though it is in his handwriting. Hence, a suggestion was given to him that Exhibit 61 was got prepared by keeping the accused under pressure, but the same was denied by him. As regards the other concern, namely, Bajoriya Fats & Proteins Pvt. Ltd., he did not verify the account and confirmed about the outstanding amount. However, he has stated that on 31-3-1991, the another concern, namely, Adarsh Engineering and Fabricating debited the amount of Rs. 71,868/- in the name of Bajoriya Oil Refinery and the said amount was shown due against the accused, and the said voucher is at Exhibit 62.

14. PW 1 Raghunath Wani has further admitted in his cross examination, that yearly audit is maintained but the Auditor has not raised any objection. He has also stated that he had not informed the aforesaid transaction to the Income Tax Department. As regards confessional statement, he has admitted that it was not written in his presence. Hence, a suggestion was given to him, that the accused was forced to give confessional statement, but the same was denied by him. He was also suggested that the accused was assured that no criminal complaint would be filed in the Police Station, and under that pretext, confessional statement was got written from the accused, but the same was denied by him.

15. Coming to the deposition of PW 2 Bhavanishankar, who has stated that he is one of the partners of Bajoriya Refinery. The complainant Raghunath was his Manager at the relevant time and accused was working at the factory and the accused was Cashier from 1984-85. He has stated that even on the date of alleged transaction, accused was in the employment and accused was handling

the cash transactions and he was having full faith in him. He has further stated that on 21-2-1991, he called upon accused to submit account, and the accused assured him for the same. On the next day, the accused prepared the account and showed it to him. He submitted the account on 13-2-1991. However, as per said account, amount of Rs. 1,25,000/-was found short. He has further stated that the accused confessed before him, that he had spent said amount towards the family expenses, and it was not possible to refund the same, and requested him that he be allowed to remain in service and deduct the amount from his salary. The accused also assured him that he would refund the amount by disposing of his property. Besides, he has stated that the accused voluntarily gave written confession about his guilt in a letter to him and the said letter has been produced at Exhibit 30.

16. PW 2 Bhavanishankar has further stated that they are the income tax payers, as well as, audit the accounts through Chartered Accountant. He has also stated that they used to maintain Kird and Khatavani about daily expenditure. Moreover, besides Kird and Khatavani, they also used to maintain Khate Vahi for other accounts in a Journal Book. He has further stated that besides confessional statement Exhibit 30 and Exhibit 38, he does not have any other document, such as, Daily Kird, Khate-Vahi or Journal, to show the accounts and defalcation made by the accused. A suggestion was given to him, that Exhibits 30 and 38 are outcome of coercion, but the same was denied by him. It was also suggested to him, that these documents were got executed by him under the false assurance that his services would not be terminated, but the same was denied by him.

17. As regards the written confession, PW 2 Bhavanishankar has stated that it was not written in his office. Moreover, at the time of submitting written statement, the accused was in his employment. As regards the statement of account produced at Exhibit 38, he has stated that it was written in factory office. But he has stated that he did not tally the said amounts with the accounts of factory. A suggestion was given to him, that the accused was directed to write down the confession and putting him under coercion of Police action, his confession was obtained from him, but the same was denied by him.

18. On the background of the aforesaid oral evidence, it was canvassed by the learned Counsel for the appellant, that the complainant has proved and established the guilt of the accused beyond reasonable doubt and it was submitted that the modus operandi of the accused was to gain confidence of the owner by his initial good conduct and thereafter to misappropriate the amount of the Company for own purpose by committing defalcations in the accounts, since he was working as Cashier in the firm since substantial period and since he used to disburse salary to the employees and since the complainant entrusted with him the amount from time to time therefore. It is also canvassed that the accused gave voluntary confession on 22-2-1991 in his own handwriting (Exhibit 30) and admitted his guilt and requested not to take drastic action against him. By the said confessional statement, accused also assured that he would repay

the entire amount, and requested not to take severe action against him. However, the accused failed to repay the said amount inspite of written assurances. Accordingly, it is submitted that the accused swallowed the said money of Rs. 1,25,000/-, and utilized the same for his own purpose, and consequently, misappropriated the said amount.

19. As regards the confessional statement, learned Counsel for the appellants has placed reliance on the following judicial pronouncements :

(i) The judgment of Hon. Apex Court, in the case of State of Punjab v. Harjagdev Singh reported at AIR 2009 (SCW) 4133, wherein the Apex Court has observed thus :

A promise is always attached to the confession alternative while a threat is always attached to the silence alternative; thus, in one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the court is to determine the absence or presence of an inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession, the words "appear to him" in the last part of the section refer to the mentality of the accused.

(ii) Judgment of Orissa High Court, in the case of Arjuna Pradhan Vs. The State, , wherein it is observed thus :

The extra judicial confession is not a weak piece of evidence. On the contrary, if it is credible and the court finds that the confession was made voluntarily, it can form the basis of conviction. One thing has to be kept in mind while considering the extra-judicial confession. It has to be seen whether the person before whom such a confession was made is known to the person making confession, that is, the confession is not made before a stranger. Normally a person would not make an imprecatory statement before a stranger. If the person before whom the confession is made is a close relative of the person making confession, or has possibility of being in his confidence, the same can be a piece of evidence to be utilized against the accused. We find that three independent witnesses have spoken about the confession. They were co-villagers and not strangers. Therefore, in our considered opinion, the learned Sessions Judge has rightly believed it and has acted upon.

(iii) The judgment of Hon. Apex Court, in the case of Baldev Raj Vs. State of Haryana, , wherein the Hon. Apex Court has observed thus :

An extra-judicial confession, if voluntary, can be relied upon by the court along with other evidence in convicting the accused. The value of the evidence as to the confession depend upon the veracity of the witnesses to whom it is made. It is true that the court requires the witness to give the actual words used by the accused as nearly as possible but it is not an invariable rule that the court should not accept the evidence, if not the actual words but the substance were given. It is for the court having regard to the credibility of the witness to accept the evidence or not. When the court believes the witness before whom the confession is made and it is satisfied that the confession was voluntary, conviction can be founded on such evidence. Keeping these principles in mind, we find that the confession has been properly accepted and acted upon by the courts below and there is no scope for any doubt regarding the complicity of the appellant in the crime. The confession of the appellant was voluntary. The testimony of PW-4 and PW-5 being responsible persons could not be doubted in the absence of any material to show that they had been motivated to falsely implicate the appellant. The very presence of the appellant and his father with the party of Ishar Dass throughout the operation up to lodging of complaint at the police station dispel any suspicion against the prosecution case and clearly point to the truthfulness of the same. We are, therefore, unable to find any infirmity in the confession which has been accepted and relied upon by the courts below.

20. Learned Counsel for respondent no.1 (original accused) countered the said arguments vehemently and submitted that the extra-judicial confession i.e. Exhibit 30 and Exhibit 38 are made basis and foundation for filing the present complaint, but both Exhibit 30 i.e. extra-judicial confession and Exhibit 38 i.e. statement of account have been obtained from the accused when he was under the employment of the complainant / Company as a Cashier. It is also canvassed that the said confessional statement was got written from the accused under threat, and it is submitted that the text and contents of the confessional statement Exhibit 30 would clarify that there is nothing inculpatory in the statement of the accused, and it is apparent that the same has been got written from the accused under the supervision of legal expert. Thus, it is submitted that the accused was in service of the complainant at the time of writing of the said confession. It is also submitted that the language of the said confessional statement itself reflects that the accused apprehended the Police action and made request repeatedly, not to lodge report or to take any coercive action against him, and hence, it is submitted that the said confessional statement was obtained from the accused under duress and stress. It is further submitted that a suggestion was given in the cross examination, that the complainant tried to take forcible possession of the house of the accused with the intervention of the Police, and hence, the accused was under tremendous pressure, which constrained him to make the said extra-judicial confession, and hence, it is

canvassed that the said confessional statement and statement of account are not voluntary. It is further canvassed that the extra-judicial confession is a weak type of evidence and complainant's witnesses have admitted in their respective cross examinations, that except the said confessional statement, they do not have any other documentary evidence, such as, Books, Khate Vahi, Kird and vouchers, to show entrustment of cash to the accused, and hence, such sole extra-judicial confession, without any other corroborating evidence, cannot be made basis for conviction against the accused, and accordingly, urged that the present appeal bears no substance and the same is devoid of any merit, and the same be rejected.

21. To substantiate the aforesaid contentions, learned Counsel for respondent no.1 (original accused) has relied upon following judicial pronouncements :

(i) The judgment of Hon. Apex Court, in the case of Baldev Singh Vs. State of Punjab, , wherein the Hon. Apex Court has observed thus :

Evidence of extra-judicial confession is generally of a weak nature. No conviction ordinarily can be based solely thereupon unless the same is corroborated in material particulars. Extra-judicial confession must be found to be reliable.

(ii) The judgment of Hon. Apex Court, in the case of Shaikh Maqsood v. The State of Maharashtra, reported at 2009 (2) Bom.C.R.(Cri.) 273, wherein the Hon. Apex Court has observed thus :

The importance of observing faithfully and fairly the provisions of section 313 of the Code cannot be too strongly stressed. It is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material substance which is intended to be used against him. The questionings must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. Fairness, therefore, requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.

(iii) The judgment of Hon. Apex Court, in the case of Sambhaji Hindurao Deshmukh & others v. The State of Maharashtra reported at 2008(1) Bom.C.R. (Cri.) 713, wherein the Hon. Apex Court has observed thus :

The principles relating to interference by the High Court in appeals against acquittal are well settled. While the High Court can review the entire evidence and reach its own conclusions, it will not interfere with the acquittal by the trial Court unless there are strong reasons based on evidence which can dislodge the findings arrived by the trial Court, which were the basis for the acquittal. The High Court has to give due importance to the conclusions of the trial Court, if they had been arrived at after proper appreciation of the evidence. The High

Court will interfere in appeals against acquittals, only where the trial Court makes wrong assumptions of material facts or fails to appreciate the evidence properly. If two views are reasonably possible from the evidence on record, one favouring the accused and one against the accused, the High Court is not expected to reverse the acquittal merely because it would have taken the view against the accused had it tried the case. The very fact that two views are possible makes it clear that the prosecution has not proved the guilt of the accused beyond reasonable doubt and consequently the accused is entitled to benefit of doubt.

22. I have perused the oral and documentary evidence adduced / produced by the complainant, as well as, perused the impugned judgment dated 29-2-2000, which is under challenge, as well as, perused the judicial pronouncements cited by the learned Counsel for the parties, carefully, and heard learned respective Counsel for the parties, anxiously, and it is significant to note that the extra-judicial confessional statement of the accused produced at Exhibits 30 and Statement of Account Exhibit 38 have been apparently made as the basis and foundation for filing the complaint against the accused and both the witnesses of the complainant have admitted categorically in their respective cross examinations, that except said confessional statement, they do not have any other documentary evidence, such as, Books, Khate Vahi, Kird and vouchers, to show entrustment of cash to the accused. Admittedly, the evidence of extra judicial confessions is a weak type of evidence and needs to be accepted cautiously and, if voluntary, can be relied upon with other corroborative evidence. Moreover, it is also important to note that although PW 2 Bhavanishankar has admitted in his cross examination, that the accounts were audited year-wise and they have submitted income tax returns, but still the complainant did not produce the account books showing entrustment of cash to the accused and the said inaction on the part of the complainant sustains fatal blow to his case. Moreover, other documents are vouchers at Exhibits 50 to 60 and 62, and Exhibit 49 is the extract of said vouchers from April 1990 to 31st March 1991, but none of the said vouchers bears signature of the accused.

23. Hence, turning to the confessional statement of the accused, the submissions made by the learned Counsel for the accused appear to be more probable and it appears the said confessional statement was got written from the accused under duress and threat and the text and contents of Exhibit 30 i.e. confessional statement also appears to be inculpatory and involuntary. Admittedly, the accused was in service of the complainant at the time of writing of the said confession and the contents of the said confessional statement reflect that the accused apprehended Police action against him and made repeated request, not to take coercive action against him, and hence, it is apparently clear that he was under stress at the time of giving the said confessional statement. Moreover, suggestions given to the complainant's witnesses, that the complainant tried to put charge on the property of the accused and tried to take forcible possession of the house of the accused with the intervention of Police, cannot be overlooked

although denied.

24. In the said context, learned trial court has rightly observed in paragraph 14 of the judgment, that "The learned Counsel for complainant further tried to show that statement was voluntary and for that he has placed reliance on finding recorded by Labour Court in application No. PGA/16/91. Complaint was filed by accused since complainant has withheld payment of gratuity and fund." It is further observed, that "In the cross examination, accused admitted about alleged confession. However, entire cross examination does not show that statement was made voluntary." Moreover, there was no opportunity given to the accused to say anything about the confessional statement. However, learned Counsel for the accused has pointed out that even certified copy of the said confessional statement was not produced on record in the said court.

25. Moreover, the ingredients in order to constitute criminal breach of trust are as follows :

- (i) entrusting a person with property or with any dominion over property,
- (ii) that person entrusted
 - (a) dishonestly misappropriating or converting that property to his own use; or
 - (b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation
- (i) of any direction of law prescribing the mode in which such trust is to be discharged,
- (ii) of any legal contract made, touching the discharge of such trust.

Applying the said parameters to the present case, it is apparently clear that the said ingredients do not exist in the present case, and the complainant has failed to prove and establish the same beyond reasonable doubt against the accused. Moreover, in the instant case, the extra-judicial confession of the accused, which is admittedly weak type of evidence, also has come under the doldrums in view of the foregoing discussion and without any corroborative evidence, and even such extra-judicial confession, which is involuntary and inculpatory, cannot be the basis for conviction against the accused.

26. Accordingly, after assessing and analyzing the evidence on record, I am not inclined to accept the submissions advanced by learned Counsel for the appellants, and the view adopted by the learned trial court, while acquitting the accused, is a possible view to be adopted after scrutinizing the evidence on record, and the said view does not appear to be perverse. Moreover, there does not appear to be any glaring mistake in the impugned judgment which warrants reversal of the finding of the trial court, and hence, no interference is called for in the conclusion of acquittal drawn by the learned trial court, since this is not a fit case therefore.

27. In the result, present Appeal, which is sans merits, stands dismissed, and impugned judgment and order of acquittal dated 29-2-2000 stands confirmed.