

(2007) 01 BOM CK 0111

In the Bombay High Court

Case No : Criminal R. Application No. 19 of 2004

Sakharam Pandusa Tapsi

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 10-01-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 197, 197(1), 313, 397
Penal Code, 1860 (IPC) — Section 120B, 409

Citation : (2007) CriLJ 2201

Hon'ble Judges : S.R. Dongaonkar, J

Bench : Single Bench

Advocate : C.A. Joshi, for the Appellant; C.D. Kakde, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Dongaonkar, J.—Heard Mr. Joshi, Advocate for the applicant and Mr. Kakde, A.P.P., for respondent.

2. By this revision application u/s 397, Cr PC the applicant is challenging the order passed by Second Ad hoc Additional Sessions Judge, Akola in Criminal Appeal No. 7/2000, by which he maintained the judgment of conviction and sentence dated 31-1-2000 passed by Chief Judicial Magistrate, Akola in Criminal Case No. 529/ 1998, by which the accused was found guilty of the offence punishable u/s 409 of I.P.C. and he was sentenced to suffer R. I. for six months and to pay a fine of Rs. 1000/- and in default of payment of fine to suffer further R. I. for one month.

3. Facts leading to this revision can briefly be stated thus. The applicant was working as Sub Post Master at village Kothali, Tahsil and Police Station Barshitakli. One Vishwambhar Phirke who was the Inspector of Post Offices in Akola District after noticing the fact that accused had collected various amounts from the depositors and did not credit the same in the post office, had lodged a report to the Police Station, Barshi Takli on 14-2-1994 alleging that accused had

accepted Rs. 6000/- from one Ananda Shivram, Rs. 1000/- from Laxman Kondaji, Rs. 100/- from Tukaram, Rs. 1500/- from Shantaram and Rs. 1800/- from Vasanta, in all 10400/- and passed receipts to them, however, he did not make the relevant entries in the saving passbooks in the post office and thereby he misappropriated the said amount. The Police Authorities carried the investigation and filed the charge sheet against the applicant in the Court of Judicial Magistrate, First Class, Barshitakli, the proceedings in turn were transferred to the Court of Chief Judicial Magistrate, Akola, as the alleged misappropriation was for the amount more than Rs. 2000/-. During the trial, when the applicant pleaded not guilty to the said charge, prosecution examined six witnesses and the accused applicant was convicted by the trial Court for the aforesaid offences and sentenced him to R. I. for six months and pay fine of Rs. 1000/-, in default to suffer R. I. for further one month.

4. Being aggrieved by this order, accused applicant preferred an appeal bearing Criminal Appeal No. 7/2000, before Sessions Judge, 2nd Ad hoc Additional Sessions Judge decided the said appeal and dismissed the same thereby maintaining the order of conviction and sentence of the accused.

5. By this revision application, the applicant is taking exception to the said Judgment in appeal. Learned Counsel for the applicant Shri Joshi has submitted that the prosecution has failed to establish that the amount of Rs. 10400/- was collected by the accused and he did not deposit the said amount with the post office. According to him, the evidence of witness Inspector Vishwambhar Phirke - P.W. 1 is not reliable. He has submitted that though sanction to prosecute the applicant u/s 197 of Cr. P.C. was obtained, same was not produced in the trial and therefore no cognizance of an offence can be taken and accused cannot be held guilty for the offence punishable u/s 409 of I.P.C. in as much he was working in the discharge of his public duties and the alleged offence was committed during the same and therefore, sanction u/s 197 of Cr.P.C. was necessary as discharge of public duties was not proved the accused could not have been convicted.

6. In order to get support he has relied on the observations of this Court in 2006 (6) Mah LJ 244 : AIR 2007 Bom R 257 Prakash Vasudeo Tare v. State of Maharashtra. He has also relied on the principles laid down in Center for Public Interest Litigation and Another Vs. Union of India (UOI) and Another, by the Apex Court.

7. As against this the learned A.P.P. has submitted that there is clear admission on the part of the accused that he had received the amount in question, therefore, burden was on him to prove that in fact he has deposited the said amount with the said post office. Further according to him, he could have called the relevant record at the time of trial and prove this fact. In statement u/s 313, Cr.P.C. he did not make any positive statement regarding the same, nor he has led any evidence to show that he had deposited that amount with the post office. Further according to him, as the offence alleged against the applicant was one u/

s 409, it cannot be said that it could have been in the discharge of public duties by the applicant. He has pressed into service the observations of the Apex Court in Mohd. Hadi Raja Vs. State of Bihar and Another, and Matajog Dobey Vs. H.C. Bhari, to contend that sanction u/s 197 of Cr. P.C. was not at all necessary in this case and the prosecution has made out its case for offence u/s 409 IPC and that the trial Court and the appellate Court have rendered the concurrent and correct findings. As such this revision application should be dismissed.

8. The only point for my determination is whether the judgment of the appellate Court suffers from any illegality or impropriety.

9. It is pertinent to note that the prosecution has examined in all 6 witnesses. P.W.I Vishwambhar Phirke - Exhibit 17 is complainant. He is complainant Inspector of Post Offices at Akola District. He has deposed regarding the collection of the documentary evidence to show that the accused had collected the amount shown in the official documents of the concerned depositors and the same was not deposited with the post office. He has deposed about the same in paragraphs 3 to 7 about deposits by Anand Shivram, Laxman Kondaji, Tukaram, Shantaram and Vasant. He has also deposed about documentary evidence, stating as to how much amount was received by the accused from each of them and how much was not deposited in the R.D. Journal of the Post Office. He has further stated that the accused has misappropriated the said amount by not depositing the said after collecting the same from these persons and he has produced the copies of all the documentary evidence on record. In cross-examination, this witness has stated that Senior Superintendent of Post had given sanction in writing to launch prosecution against accused though, it is not filed on record. In cross-examination he has further stated that the written statements of the account holders were recorded but they are not produced in the case.

10. On perusal of his cross-examination, it would be seen that there is nothing in it to show that he has any grudge against accused to make false report. Further he has clearly stated that he has lodged report of whatever he has noticed during his inspection and therefore, no motive can be attributed to him so as to implicate accused falsely.

11. P.W. 2 Pandurang Warge-Exhibit 42 and P.W. 3 Samadhan-Exhibit 43, who have witnessed alleged seizure panchanama have turned hostile to the prosecution so also P.W. 4 Raju Nindane Exhibit 44.

12. P.W. 5 Vasanta Andhale Exhibit 45 and P.W. 6-Exhibit 46 Shantaram Waghade and are the witnesses who had deposited the amount with the accused. They have been suggested that they have not seen the concerned register of the Post Office and P.W.5 Vasant was specifically suggested that after his application, he has received the amount back after about 1 1/2 years and that there is nothing due in his passbook. No doubt both these witnesses who are alleged depositors and whose amounts are allegedly not deposited with the post office, have not

lodged any report, but that fact by itself will not make the accused entitled for acquittal.

13. P.W. 7 Jafar Ali-Exhibit 47, has deposed regarding the fact that in the investigation it was revealed that accused has misappropriated the amount of Rs. 10400/-without taking entry in the concerned R.D. account. He also states that he has not obtained sanction to prosecute accused.

14. As stated above the evidence of P.W. 1-complainant Inspector of Post Offices Akola is not ex-facie unreliable, nor there is anything in his cross-examination to show that he is deposing false. With this background, when statement of the accused u/s 313 is considered, it would be seen that there is no reason to discard the prosecution case.

15. In his statement u/s 313 of Cr. P.C. when he was asked why the above witnesses are deposing against him, he stated that there was previous conspiracy to terminate him from service. Obviously this is not sufficient to infer that the prosecution case is false and prosecution witnesses are bent upon to implicate the accused falsely. He clearly stated in negative as to whether he wanted to examine on oath or examine any defence evidence or he wanted to say in his defence.

16. There is absolutely no evidence on record or any reason to show as to why the P.W. 1 Vishwambhar Phirke lodged report falsely against him and therefore, in my opinion, the prosecution case on merits is clearly acceptable. Moreso, because there are concurrent findings of the trial Court and the appellate Court, with good reasons recorded by them in their judgments.

17. Therefore, the question as to whether sanction to prosecute the applicant-accused was necessary u/s 197, Cr.P.C. needs to be considered in the matter, as admittedly, the P.W. 1 has stated in cross-examination that Senior Superintendent of Post Offices has given sanction in writing to launch prosecution against accused, still it is not filed on record.

18. In 2006 (6) Mah LJ 244 : AIR 2007 Bom R 257 Prakash s/o Vasudeo Tare v. State of Maharashtra, this Court has held in paragraph 8 thus:

8. The very fact that the prosecution had approached the competent authority for grant of sanction to prosecute the petitioner shows that the prosecution was satisfied that sanction to prosecute the petitioner was required and when the competent authority refused to grant sanction, the prosecution changed its plea by submitting that no sanction was required.

Further in paragraph 12, it has been observed thus:

12. It is worthwhile to note that the inaction on the part of the petitioner in not performing his duties amounts to dereliction of duty which could have made him answerable for a charge of dereliction of his official duty. As such the omission or neglect on the part of the petitioner to act as per the duty list falls within the

scope and range of the official duties. Hence cognizance of the offence alleged to have been committed by the petitioner could not have been taken without previous sanction by the Central Government. It may be noted that the competent authority was moved for grant of sanction and the same was refused. In such circumstances, the Court could not have taken cognizance of the offence against the petitioner. On this count itself the prosecution against the petitioner is liable to be quashed and set aside.

19. In another judgment referred by the learned Counsel for the applicant, the Apex Court in *Center for Public Interest Litigation and Another Vs. Union of India (UOI) and Another*, in paragraph 9 observed thus:

9. The protection given u/s 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences against to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it is committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately

attracted on institution of the complaint case.

20. As against this, in the cases referred by the learned A.P.P. the Apex Court in *Matajog Dobey Vs. H.C. Bhari*, the Apex Court has observed in paragraphs 17 and 20 thus:

17. Slightly differing tests have been laid down in the decided cases to ascertain the scope and the meaning of the relevant words occurring in Section 197 of the Code "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". But the difference is only in language and not in substance.

The offence alleged to have been committed must have something to do, or must be related in some manner, with the discharge of official duty. Nor question of sanction can arise u/s 197, unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. There must be a reasonable connection between the act and the official duty. It does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as this question will arise only at a later stage when the trial proceeds on the merits.

What we must find out is whether the act and the official duty are so inter related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation. In AIR 1939 43 (Federal Court) , Sulaiman, J. observes:

The section cannot be confined to only such acts as are done by the public servant directly in pursuance of his public office, though in excess of the duty or under a mistaken belief as to the existence of such duty. Nor is it necessary to go to the length of saying that the act constituting the offence should be so inseparably connected with the official duty as to form part and parcel of the same transaction.

The interpretation that found favour with Varadachariar, J. in the same case is stated by him in these terms at page 56 : "There must be something in the, nature of the act complained of that attaches it to the official character of the person doing it". In affirming this view, the Judicial; Committee of the Privy Council observes in AIR 1948 128 (Privy Council) ."

A public servant can only be said to act or purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty.... The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office.

AIR 1939 43 (Federal Court) is referred to with approval in the later case of AIR 1944 66 (Federal Court) but the test laid down that it must be established that the act complained of was an "official" act appears to us unduly to narrow down the scope of the protection afforded by Section 197, Criminal P.C. as defined and

understood in the earlier case. The decision in AIR 1948 156 (Privy Council) does not carry us any further; it adopts the reasoning in "Gill's Case".

20. Is the need for sanction to be considered as soon as the complaint is lodged and On the allegations therein contained? At first sight, it seems as though there is some support for this view in - "Hori Ram's case", and also in "Sarjoo Prasad v. Emperor" AIR 1949 FC 25. Sulaiman, J. says that as the prohibition is against the institution itself, its applicability must be judged in the first instance at the earliest stage of institution. Varadachariar, J. also states that the question must be determined with reference to the nature of the allegations made against the public servant in the criminal proceedings.

But a careful perusal of the later parts of their judgments shows that they did not intend to lay down any such proposition. Sulaiman, J. refers (at page 52) to the prosecution case as disclosed by the complaint or the "police report" and he winds up the discussion in these words.

Of course, if the case as put forward fails or the defence established that the act purported to be done is in execution of duty, the proceedings will have to be dropped and the complaint discussed on that ground.

The other learned Judge also states at p. 55, "At this stage we have only to see whether the case alleged against the appellant or "sought to be proved" against him relates to acts done or purporting to be done by him in the execution of his duty".

It must be so. The question may arise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty, but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial may establish the necessity for sanction.

Whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case.

21. In B. Saha and Others Vs. M.S. Kochar, , in paragraphs 18, 23 and 29 the Apex Court has observed thus:

18. The words "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" employed in Section 197(1) of the Code, are capable of narrow as well as a wide interpretation. If these words are construed too narrowly, the Section will be rendered altogether sterile for, "it is no part of an official duty to commit an offence, and never can be". In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section

197(1) an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said provision. As pointed out by Ramaswami, J. in *Baijnath Gupta and Others Vs. The State of Madhya Pradesh*, "It is the quality of the act that is important, and if it falls within the scope and range of his official duties, the prosecution contemplated by Section 197 of the Criminal, Procedure Code will be attracted,"

23. The allegation against the appellants is about the commission of offences under Sections 409/120B, Indian Penal Code. To be more precise, the act complained of is dishonest misappropriation or conversion of the goods by the appellants, which they had seized and, as such, were holding in trust to be dealt with in accordance with law. There can be no dispute that the seizure of the goods by the appellants and their being thus entrusted with the goods or dominion over them, was an act committed by them while acting in the discharge of their official duty. But the act complained of his subsequent dishonest misappropriation or conversion of those goods by the appellants which is the second necessary element of the offence of criminal breach of trust u/s 409, Indian Penal Code. Could it be said that the act of dishonest misappropriation or conversion complained of bore such an integral relation to the duty of the appellants that they could genuinely claim that they committed it in the course of the performance of their official duty? In the facts of the instant case, the answer cannot but be in the negative. There is nothing in the nature or quality of the act complained of which attaches to or partakes of the official character of the appellants who allegedly did it. Nor could the alleged act of misappropriation or conversion, be reasonably said to be imbued with the colour of the office held by the appellants.

29. In the light of all that has been said above, we are of opinion that on the facts of the present case, sanction of the appropriate Government was not necessary for the prosecution of the appellants for an offence under Sections 409/120-B, Indian Penal Code, because the alleged act of criminal misappropriation complained of was not committed by them while they were acting or purporting to act in the discharge of their official duty, the commission of the offence having no direct connection or inseparable link with their duties as public servants. At the most the official status of the appellants furnished them with an opportunity or occasion to commit the alleged criminal act.

22. In my opinion, the conduct of the accused in the present case in not depositing the amount collected by him for depositing the same with the post office and not making suitable entries in the post office record, cannot be said to be in the discharge of his public duties. It is evident that this is not a case of some plausible explanation by the accused as to why he had retained that amount with him. He has also not explained, with satisfactory reasons, that he was going to deposit this amount with the post office. In fact, the non deposit of these amounts was detected in the inspection of the relevant records by the P.W. 1 Vishwambhar. It was not a solitary incident which can be said to be a mistake

or negligence. In fact series of collection of deposits and not depositing of the same with the post office make out intention of accused applicant explicit.

23. The complainant Vishwambhar in cross-examination, deposed that accused has misappropriated total amount more than Rs. 60000/- including the amount involved in this case. Answer to the suggestion given was - "It is not true that accused has not misappropriated amount more than Rs. 60000/-", fact remains that he has produced the documentary evidence to show that the some amounts were collected from Ananda, Shivram, Laxman, Tukaram, Shantaram, Vasanta and the same were not deposited in the post office, he had produced relevant documents on record, but from the said documents accused in cross-examination did not point out anything to show that these documents are not correct documents and in fact he has deposited all the amounts collected from these persons with the post office and made relevant entries in the R.D. Journal and that there is possibility of these documents being incorrect. Therefore, I find that this cannot be treated the offence committed during the discharge of public duties of the accused, for which sanction u/s 197, Cr. P.C. is required and accused deserves to be protected for the same. In my opinion, therefore the concurrent findings recorded by the trial Court as well as appellate Court on the point of conviction as well as non requirement of sanction u/s 197, of Cr. P.C. to prosecute the applicant cannot be said to be illegal and improper. Consequently alleged admission by P.W. 1 Vishwambhar that he had obtained sanction to prosecute accused but did not produce the same is hardly of any relevance, in favour of accused/applicant.

24. As regards the sentence, the learned Counsel for the applicant has contended that he should have been shown mercy as now he is no more in service.

25. In the circumstances of the case, I do not find that any indulgence as regards the reducing the sentence is called for in the circumstances of the case, I do not find that the order of appellate Court in criminal appeal No. 7/2000 of dismissing the same calls for any interference. Accordingly, this revision application is dismissed.

26. Applicant to surrender his bail bonds to serve the remaining sentence within a period of four weeks from today.