(2000) 08 MAD CK 0075

In the Madras High Court

Case No : Criminal R.C. No. 935 and 936 of 1996

Shanmugam and Vijayan Rananathan — APPELLANT

Vs

State of Tamil Nadu — RESPONDENT

Date of Decision : 16-08-2000

Acts Referred:
Penal Code, 1860 (IPC) — Section 120B, 21, 406, 408, 409

Citation : (2002) 2 LW(Cri) 658

Hon'ble Judges : R. Balasubramanian, J

Bench : Single Bench

Advocate : G. Devadas in Crl.R.C. No. 935 of 1996, Mr. S. Shanmugavelayutham for the Petitioner in Crl.R.C. No. 936 of 1996, for the Appellant; R. Karthikeyan, Government Advocate for the Respondent, for the Respondent

Final Decision : Allowed

Judgement

R. Balasubramanian, J.—The first revision is by the convicted first accused in C.C.No.228/94 on the file of the Judicial Magistrate No. 1, Pudukottai and the sole appellant in C.A.No29/95 on the file of the Principal Sessions Judge, Pudukottai. The second revision is by accused 2 and 3 in that Calendar Case, who were also convicted, and they are before this court after losing their appeal in C.A.No.30/95. A1 was charged for offences punishable under sections 120-B; 409 (8 counts) and 477-A (8 counts) of the India Penal Code. A2 was charged for offences punishable under sections 120-B; 408 (8 counts) and 477-A of the Indian Penal Code. A3 was charged for offences punishable under sections 120-B; 409 (8 counts) and 477-A of the Indian Penal Code.

2. The learned trial Judge found A1 guilty for the offences referred to earlier and sentenced him to undergo rigorous imprisonment for six months, together with a fine of Rs.500/-, carrying a default sentence, for the offence punishable u/s 120-B I.P.C.; to undergo rigorous imprisonment for two years on each count for the offence punishable u/s 409 of the I.P.C.(8 counts), together with a fine of Rs.

500/- on each count, carrying a default sentence and also to undergo rigorous imprisonment for one year for the offence punishable u/s 477-A of the I.P.C. together with a fine of Rs.500/- on each count (8 counts), carrying a default sentence. A2 was also found guilty for the offence punishable u/s 120-B of the I.P.C. and sentenced to undergo rigorous imprisonment for six months together with a fine of Rs.500/-, carrying a default sentence; to undergo rigorous imprisonment for two years for the offence punishable u/s 408 of the I.P.C. (8 counts), together with a fine of Rs.500/- on each count, carrying a default sentence land to undergo rigorous imprisonment for one year for the offence punishable u/s 477A, together with a fine of Rs.500/- on each count (8 counts), carrying a default sentence. A3 was also found guilty and sentenced to undergo rigorous imprisonment for six months together with a fine of Rs.500/- carrying a default sentence for the offence punishable u/s 120-B of the I.P.C.; to undergo rigorous imprisonment for two years on each count for the offence punishable u/s 408 of the I.P.C. (8 counts) together with a fine of Rs.500/-, carrying a default sentence and to undergo rigorous imprisonment for one year on each count (8 counts) for the offence punishable u/s 477-A, together with a fine of Rs.500/- on each count, carrying a default sentence. The appeal filed by the convicted A1 in C.A.No.29/95 was dismissed. The appeal filed by the convicted A2 and A3 in C.A.No.30/95 was also dismissed. It is the correctness of the said judgements that are being questioned in these two revisions. Heard Mr. G. Devadas learned counsel appearing for the revision petitioner in the first revision; Mr. S. Shanmugavelayutham learned counsel appearing for the revision petitioner in the second revision and Mr. R. Karthikeyan learned Government Advocate appearing on the criminal side for the State/respondent in each of the revision.

3. The argument of Mr. G. Devadas, learned counsel for the revision petitioner in the first case is that the revision petitioner is not a public servant within the meaning of Section 21 of the Indian Penal code and therefore the charge and conviction u/s 409 IPC cannot be legally sustained. It is next contended by the learned counsel for the revision petitioner in that case that the prosecution had not established any entrustment at all with the first accused and if that being the basic requirement of law, the absence of the same is fatal to the case of the prosecution. If the ingredients of the offence falling u/s 409 of the IPC are not made out, then the first accused cannot even be held guilty for any of the lesser offences, namely the offences falling under Sections 408 or 406 of the IPC. Assuming the prosecution had established the facts as projected by them, yet it would only amount to a civil liability on the part of the first accused and definitely not a criminal liability. The sum and substance of the argument of Mr. G. Devadas, learned counsel for the revision petitioner in the first case is that on the materials found and established, the conviction of the first accused cannot be sustained at all though the records my show that the first accused had signed in those records. Mr. S. Shanmugavelayutham, assailing the correctness of the judgment and conviction as far as A2 and A3 is concerned, would contend that except being held responsible as a Director of the Society without any further

active involvement on the part of the second accused, the conviction of the second accused for the offences referred to above cannot be sustained. There is absolutely no evidence, according to the learned counsel for the revision petitioners, on record to even prima facie show the involvement of the second accused in any of the alleged malpractices brought to the notice of the court by the prosecution. Unless entrustment is actually shown and established with the second accused, he cannot be held responsible at all for any offence. At best, the prosecution had established that under the resolution (Ex.P. 15), of the General Body of the Cooperative Society, the second accused has to have some cross check in the discharge of the functions of the first accused vis-a-vis the Society. That by itself, assuming the second accused had not done his duty according to the resolution, cannot fasten any criminal liability on his part. As far as the third accused is concerned, the argument of the learned counsel for the revision petitioners is that his involvement is neither spoken to by anyone nor is established by any evidence, either oral or documentary. Therefore on the evidence available, the conviction of A2 and A3 is also bad in law. Mr. R. Karthikeyan, learned Government advocate on criminal side, would contend that there are overwhelming documentary evidence available in this case specifically entrusting a particular type of work to be discharged by A1 and A2. The documents are in the form of resolutions of the Board of the Society. Therefore they cannot escape from the responsibility by contending that neither there was entrustment nor it is shown that they had any domain over the property of the Society. The money deducted at source from and out of the salary of the members of the Society had been forwarded to the Society and that fact remains established. The fact also remains established that the money so collected from its various members have not been given full credit to. Therefore the submission of the learned Government counsel is that the conviction of the accused is sustainable in law.

4. Having regard to the arguments advanced by the learned counsel on either side, I went through the entire materials. A1 is the Vice President of the Cooperative Society namely Avudayar Koil Panchayat Union Employees Cooperative Thrift Society. A2 was the Director of the said Society and A3 was the clerk. The members of the Society are both teaching and non-teaching staff. They used to avail loan from the society and the salary disbursing officer of the office, where the borrowers are employed, would deduct a particular sum from and out of their salary and forward it to the Society towards discharge of the loan availed by each one of the members. This practice is not disputed at all. The evidence let in by the prosecution shows that various sums of money were deducted by the salary disbursement officer; forwarded to the Society for being credited to the respective loan accounts of the borrowers and only a portion of the amount so received by the Society had been credited to the respective accounts thereby resulting in a loss of Rs.50,000/-. The prosecution by the oral evidence wants to pin down the responsibility for such shortage alleging that it was misappropriated by A1 to A3 by relying upon Ex.P-15. Ex.P-15 is the

resolution of the General Body of the society. There are two resolutions, one dated 31-5-1982 and the other dated 5-11-1982. They are found at pages 115 to 119 of the resolution book. The resolution dated 31-5-1982 had been signed by the first accused in his capacity as the Vice President along with others. It may be true that this resolution would be in force so long as there is no President. Under this resolution, the first accused was specifically entrusted the job responsibility of looking after the entire affairs of the Society including money transactions. Therefore it is clear that the first accused is not proceeded with in this case solely in his capacity as Vice President of the Society but on the basis of the specific resolution authorizing him to do a particular job mentioned in that resolution which includes looking after the cash transactions of the Society. Under that resolution it is no doubt true that A2 was also authorised to have a cross-check on the discharge of duties by the first accused. This is also not disputed.

5. There are 8 counts of charges of misappropriation. They are evidenced by Exs.Pl, P3, P5, P7, P8, P9 and P13. The cash books of the Society are Exs.P19 and P20. The Courts below have found that these entries are signed by the first accused not only in his capacity as the Vice President of the Society but also as the person in charge of the duties referred to in Ex.P15. The finding is that under Exs.P9 to P13 as against a larger amount received from the salary disbursement officer and for which receipts have been issued, only a lesser amount had been credited into the account of the Society as against the individual borrowals of the members of the Society. These documents show that as against a sum of Rs.67,975.45 received by the Society, only a sum of Rs.44,826.70 had been credited into the account leaving a deficit of Rs.23,147.75. All these exhibits have been signed by the first accused. Therefore the authenticity of the entries made by the first accused cannot be disputed at all. The evidence of P.W.2 would show that large amount than the amount actually credited had in fact been collected and forwarded to the Society. These documents do not contain the signature of A2. Likewise, Exs.P8, P1, P3 and P5 show me receipt of a larger amount and crediting only a lesser amount i.e., as against a sum of Rs. 19,116.85, only a sum of Rs. 13,000/- had been credited; as against a sum of Rs.16,195/-, Rs.9,695.45 alone was credited; as against a sum of Rs.15,797.65, only a sum of Rs.6,986.50 was credited and lastly as against a sum of Rs.16,091.95 only a sum of Rs.13,760/- was credited. Ex.P20 evidenced such deficit credit into the accounts of the Society. The evidence of P.W.1 shows that the amount shown to have been received was actually deducted and passed on to the Society. It is also established that the first accused had signed in all the above referred to exhibits. The signature of the first accused in all these exhibits are not even disputed by the first accused. In fact, the prosecution had taken the abundant caution of sending the signatures of the first accused i.e., the admitted signatures to an expert, examined in this case as PW11 and his evidence and his report clearly show that the signatures found reflected in all the documents referred to earlier are that of the signature of the first accused. Therefore there

cannot be any doubt that the prosecution had established beyond doubt that the first accused is the author of all the entries in the above exhibits. But at the same time, it must be remembered that the second accused had not signed in any of these exhibits. He is made to face criminal prosecution solely on the basis of the resolution referred to earlier to have a cross-check over the discharge of duties by the first accused. The case of the first accused is that he used to sign blank receipts in advance, forward it to the salary disbursement officer through A3 and it is A3 who has swindled the entire money. This was not accepted by the Courts below. This defence of the first accused would show mat he had violated the duties specifically entrusted to him under the resolution Ex.P15. Likewise, in respect of the other accused also, the prosecution relied on Ex.P 15. It appears that a cheque for a sum of Rs. 800/-was signed by A1 and A2 and handed over to the A3 for collection. The record shows that A3 had collected that money from the bank as spoken to by PW8. However the materials available on record would show that A3 had handed over this money to A1 and A1 had made a credit entry in the books of accounts of the society without actually remitting the money into the accounts of the society. There is another instance of a sum of Rs.700/- received from the members on 21-4-1984 and no amount was credited to the account of the society. Ex.P20 cash book is under the custody of the first accused and it shows that the amount had been given credit to, but the amount is not actually brought in. Therefore it is clear that at every stage of the alleged malpractices, it is the mind and intention of the first accused that has been playing the lone and exclusive role without any reference to the order accused. The last charge against the accused is that as against the sum of Rs.392/- collected, only a sum of Rs.322/- was credited to and the balance sum of Rs.70/- was misappropriated. Again, this entry is found in Ex.P 19 and the first accused is the author for the same. Mr. Shanmugavelayudiam, learned counsel appearing for the revision petitioners in the second revision brought to my notice, two judgments of this court to contend that a person cannot be fastened with criminal liability as in the case on hand, merely on the basis of resolutions. The first judgment of this Court is rendered in K.S. Chandrasekaran v. The Inspector of police (1989 TNLJ 13) wherein it has been held by a learned single Judge of this court that criminal liability cannot be fastened on the official of the society merely on the basis of a resolution alone in the absence of any material evidence regarding legal entrustment. In Viswanathan v. State/Superintendent of Police (1982 Law Weekly (Crl.)70) it has been held by a learned single judge of this court that in the absence of any evidence implicating the petitioner in that case directly or indirectly with any criminal offence, the charge u/s 409 of the Indian Penal code cannot be legally sustained. In Sundararaj, In (1984 Law Weekly (Crl.) 223) a similar view was taken by another learned single Judge.

6. In view of my finding in this case that except the resolution namely Ex.P15, the role of the second accused in any manner involving himself directly or indirectly in misappropriating the amount mentioned earlier is not established by the prosecution and therefore he cannot be found guilty for the offence for which

he stands punished. As far as A3 is also concerned. I find that on the materials, he also cannot be convicted since there is no legal evidence against him. The Hon''ble Supreme Court of India in a Judgment in Jiwan Dass v. State of Haryana (1999 SCC (Crl.) 288) held that in case of criminal breach of trust by a public servant, the prosecution must establish by legal evidence the entrustment of the property with the accused. In this case, I have already found that except the resolution, there are no materials at all to show that the second and the third accused either directly or indirectly involved them selves in being a party to the criminal offence of criminal breach of trust or even criminal misappropriation. There is practically no material to show that A2 was ever entrusted with the cash of the society or he had any domain over the same. As far as A3 is concerned, though entrustment of a sum of Rs.800/- to him is established, yet it is seen from the records that after collecting the same sum from the Bank, he had handed over the same to A1. Therefore the conviction of the second and the third accused is without any legal evidence to support it and therefore they are entitled to succeed.

7. As far as the first accused is concerned, the materials available on record, bodi documentary as well as oral evidence, are overwhelming in nature and they clinchingly and convincingly establish the guilt of The courts below were not inclined to accept the defence of A1 that he used to send blank signed receipts to A3 and therefore he alone was exclusively responsible for the offences. The records produced by the prosecution would show the entrustment of the cash to Al and his failure to bring the same to the account of the society. It is next contended by the learned counsel that the first accused cannot be a public servant as held by the Hon''ble Supreme Court in its judgment in State of Maharashtra v. Laljit Rajshi Shah (2000 SCC (Crl.) 533) and therefore conviction u/s 409 IPC cannot be sustained. The learned counsel would also add that since the prosecution had come forward before the courts below with a positive case that A1 is responsible for the offence in his capacity as a public servant, then their case must stand or fall on that specific allegation. It would not be open to them to contend that though A1 may not be a public servant, yet he can be convicted u/s 409 of the I.P.C. in his capacity as the agent of the Society. For this purpose the learned counsel relies upon the judgment of this court reported in State by Public Prosecutor v. Subramanian (1987 Law Weekly (Crl.) 288). The learned counsel would also contend that even if this court is inclined to hold that on the material that the conviction u/s 409 IPC can be altered into 406 of the Indian Penal code, even then in view of the fact that the entire money had been reimbursed by the first accused, this court may consider letting him off under the probation of offenders'' Act.

8. I applied my mind carefully to the arguments advanced by the learned counsel for the first accused. It has been held, as rightly pointed out by the learned counsel for the revision petitioner in State of Maharashtra v. Laljit Rajshi Shah (2000 SCC (Crl.) 533) that the chairman and members of the Managing committee of the cooperative society under the Maharashtra cooperative

Societies Act would not be public servant as defined u/s 21 of the Indian Penal Code. Applying the same principle, there cannot be any difficulty at all in holding that the first accused cannot be held guilty for the offence punishable u/s 409 IPC since admittedly he is not a public servant and he being only the Vice-President of the Cooperative Society. On the question whether the conviction u/s 409 IPC could be sustained on the first accused as an agent of the Society, the judgment reported in State by Public Prosecutor v. Subramanian (1987 Law Weekly (Crl.) 288) brought to my notice by the learned counsel would disable this court from sustaining the conviction u/s 409 IPC holding the first accused as an agent. In the above case, a learned Judge of this Court held that the prosecution cannot be held to shift their stand from stage to stage and try to sustain the conviction. In that case also, the acquittal of the accused by the lower court u/s 409 IPC was on the ground that the accused was not a public servant. It was also a case relating to a cooperative Society. However the accused was found guilty for the offence punishable u/s 406 IPC. In the appeal filed by the State, it was contended mat the acquittal u/s 409 IPC is improper since the accused definitely comes under the category of an agent which is another category mentioned in 409 of the Indian Penal Code. Only in mat context, it was held in the judgment referred to supra that the prosecution would not be allowed to shift their stand and therefore, it is not possible to convict me accused u/s 409 IPC at all. However at me same time it cannot be said mat once the offence punishable u/s 409 IPC falls to the ground, me accused should not go out of the court without any punishment. Definitely, the materials available on record would show that me offence punishable u/s 406 IPC is made out. There are precedents by his court by convicting the accused u/s 406 IPC while me offence u/s 409 IPC is found not proved. One such judgment in K. Somasundaram v. State rep. By Inspector of Police (1990 Law Weekly (Crl.) 172) is brought to my notice. Therefore, mere cannot be any difficulty in holding the first accused guilty of me offence punishable under sect ion 406 IPC.

9. As far as the other offence namely 477-A IPC for which the first accused stands convicted is concerned, it is clear mat the records referred to earlier in his judgment are at the instance of me first accused and they do not reflect me correct state of affairs. It appears that in Exs.P19 and P20, cashbook, some wrong entries have been made u/s 477-A IPC if a person among other things willfully and with intent to defraud, falsifies any book or account would be held guilty of mat offence. Making a false document is defined u/s 464 of the Indian penal code. Having the requirement of law to be established u/s 464 as well as 477-A of the Indian Penal code and going by Exs.P19 and P20, it is clear mat though the documents available namely Exs.P9, P10, P11, P12, P13, P8, P1, P3 and P5 show a larger amount has been received under those receipts, yet a lesser amount alone had been given credit to under Ex.P19 and P20 to make it appear as though only those amounts were in fact received. Therefore it is clear that the credit entries in Exs.P19 and P20 are opposed to me actual amount received as shown in Exs.P1, P3, P5, and P8, to P13. The courts below have

concurrently held that these entries in Exs.P19 and P20 are made by the accused only with a view to show that it was the money that was actually received, while in fact a larger amount is admittedly received. This would definitely amount to making a false entry in the books of account. This would constitute the offence u/s 477-A of the IPC.

10. In the result, accused 2 and 3 are acquitted of all the offences for which they were tried and found guilty. The judgments of the courts below so far as A2 and A3 are concerned are set aside. The fine amount, if any, paid by them shall be refunded to them. The bail bonds, if any, executed by them shall remain cancelled forthwith. As far as the first accused is concerned, his conviction u/s 120-B of the Indian Penal code is set aside. However, his conviction u/s 409 of the IPC is altered into one u/s 406 of the IPC and his conviction u/s 477-A of the IPC is sustained. Accordingly Crl.R.C.No.935/96 is disposed of on the lines indicated above i.e., the petitioner in mat case is acquitted of the offence punishable u/s 120-B of the I.P.C.; his conviction u/s 409 of the IPC is altered into one u/s 406 of the IPC and his conviction u/s 477-A of the I.P.C. is sustained. Crl.R.C.No.936/96 is allowed and the petitioners in that case are acquitted of all the offences for which they were tried and found guilty. This petition having been posted for "Being mentioned" on Wednesday the 16th day of August 2000 in the presence of the aforesaid Advocates the Court made the following Order:

Order Dated 16.8.2000 : When the judgment was pronounced in open court, on 31.07.2000, Mr. G. Devadas learned counsel appearing for the petitioner in Crl.R.C.No.935/96 brought to my notice that the revision petitioner in that revision had reimbursed the entire amount of Rs.48,700/- to the society; therefore some leniency may be shown on the question of sentence and this court may even consider releasing him under the provisions of the probation of offenders Act. Mr. G. Devadas learned counsel also produced before this court the original remittance challan for having remitted that money to the credit of the society. On this, I directed Mr. R. Karthikeyan, learned Government Advocate to verify whether such remittance is true or not. Accordingly, this case is listed before me today again only to decide on the question of sentence. Mr. R. Karthikeyan, learned Government counsel, would produce a communication dated 3-8-2000 sent by the Deputy Registrar of the Cooperative society, Pudukottai, who is the Investigating officer in this case, which discloses that the revision petitioner in Crl.R.C935/96 had remitted a sum of Rs.48,700/-. Inasmuch as the sum stated to have been misappropriated had been reimbursed by the revision petitioner/accused, I am of the opinion that interest of justice would be met by letting off the convicted revision petitioner under the probation of offenders Act instead of sending him to prison. There are precedents to this effect namely 1990 Law Weekly (Crl.) 172 : 1991 (1) Law Weekly (Crl.) 355. Accordingly, while confirming the conviction of the revision petitioner in Crl.R.C. 935/96 on the lines indicated earlier, I am inclined to invoke the provision of the probation of offenders Act. Accordingly, while modifying the conviction imposed on the revision petitioner in Crl.R.C.No.935/96 on the lines indicated above, I set aside the sentence imposed on him for the offences referred to earlier and direct him to be released on his executing a bond for a sum of Rs. 10,000/- with one surety each for a likesum to the satisfaction of the learned Judicial Magistrate No.1, Madurai within eight weeks from today; to keep peace and be of good behaviour for a period of six months and to appear and receive the sentence when called for during the said period.

