
(1983) 06 GUJ CK 0005
In the Gujarat High Court

State	Vs	APPELLANT
Patel Keshavlal Hiralal and Another		RESPONDENT

Date of Decision : 27-06-1983

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 212, 215
Penal Code, 1860 (IPC) — Section 408, 408, 477, 477A

Citation : (1983) 2 GLR 1094

Hon'ble Judges : A.S. Qureshi, J

Bench : Single Bench

Judgement

A.S. Qureshi, J.—This is a group of four appeals arising out of the same judgment and order passed by the learned Judicial Magistrate, First-Class, Kalol on April 18, 1979 whereby accused No. 1 was convicted for an offence punishable u/s 477A of the Indian Penal Code and accused No. 2 was convicted for offences punishable under Sections 408 & 477-A of the Indian Penal Code.

2. Criminal Appeal No. 716/79 is filed by the State against the order of acquittal of accused No. 1 u/s 408 of the Indian Penal Code. Criminal Appeal No. 717/79 is also filed by the State for the enhancement of sentence awarded to the two accused. Criminal Appeal No. 247/80 is filed by the original accused No. 1 and Criminal Appeal No. 248/80 is filed by the accused No. 2 against the conviction and sentence passed by the learned Judicial Magistrate, First-Class, Kalol as stated above.

3. As this group of four appeals arises out of a common judgment and as a result of one trial, the learned Additional Public Prosecutor and the Advocates of two appellants accused Mr. M. M. Desai and Mr. R. A. Mishra have urged that all these appeals may be heard together. At the outset Mr. Desai urged that in this case the charge Exhibit 7 (page 21) is defective and has caused prejudice to the accused at their trial. Mr. Desai has also urged that as a result of the faulty charge there has been miscarriage of justice. Hence he submits that the order of conviction and sentence passed by the trial court be quashed and set aside. Mr.

Trivedi, the learned Additional Public Prosecutor has urged that while there are some glaring defects in the charge they are not of such nature which would go to the root of the matter and vitiate the finding of the trial Court. To examine the two rival contentions of the learned Counsel, it would be necessary to refer to the grounds on which the charge is sought to be proved materially defective. The first defect according to Mr. Desai is that the offences covered in the charge span over a period exceeding one year which is contrary to the proviso to Sub-section (2) of Section 212 of the Criminal Procedure Code of 1973. The learned Additional Public Prosecutor has urged that it is not correct to say that the charge covers the offences committed over a period exceeding one year. According to him, the said offences have been committed between January 1974 and September 1974. The learned Public Prosecutor is right in his submission that the alleged offences do not cover a period exceeding one year; but he has to face another hurdle in this that the charge of the outset states that the accused were working as honorary Secretary and paid Secretary respectively during the period March 1, 1973 and February 22, 1974 whereas the alleged offences are said to have been committed after that period. Hence the offences alleged would not come u/s 408 of the Indian Penal Code. Therefore, the contention of Mr. Desai will have to be upheld that the charge as framed by the learned Magistrate is materially defective in this respect. The second defect which Mr. Desai has pointed out is that the charge refers to misappropriation of total amount of Rs. 21,079-58 P. whereas the specific allegations with regard to misappropriation on different dates do not total up to the said amount. This contention of Mr. Desai is right and has to be upheld. The third defect according to Mr. Desai is as regard the allegation of misappropriation of a sum of Rs. 15,000/- covered by a document (Exhibit-51) which is the voucher passed by the accused No. 2 admitting his liability to reimburse the Society of the said amount which he acknowledged to have been due from him to the Society. According to Mr. Desai, the allegation of misappropriation of the amount of Rs. 15,000/- laid against accused No. 1 is not justified. If at all any liability as regards that amount arises it would be that of accused No. 2 only. This contention of Mr. Desai could not be upheld as it would depend upon only the evidence adduced in this case and the Court will have to give its findings on the basis of the evidence before it.

4. Mr. R.A. Mishra, the learned Counsel for accused No. 2 has supported Mr. Desai and has contended that the charge is defective which has caused prejudice to the accused in their defence.

5. The learned Additional Public Prosecutor relying on Sections 215 and 464 of the Criminal Procedure Code has urged that the errors, emissions or defects in the charge would not invalidate the trial unless prejudice is caused to the accused or there is a failure of justice. According to him, in this case it cannot be said that either prejudice is caused to the accused or there is a failure of justice. It is difficult to agree with the learned Additional Public Prosecutor on this aspect. On the facts of this case it is evident that the aforesaid defects in the charge have, in fact, caused prejudice to the accused persons inasmuch as the charge is

not clear as to whether the accused were employees or servants of the Society on the date on which the alleged offences were committed. Looking at the evidence of the President of the Society Nathuji Bhavanji P. W. 4 (Exh. 47) and the audit report it becomes quite clear that the President has either wilfully or negligently failed to sign the cash book which he was bound to check every day. For months he has not bothered to inquire whether the accused No. 2 who sold the goods and received the sale proceeds did or did not hand over those amounts to the accused No. 1. This can happen only if he is in league with accused No. 2 and possibly with some other members of the Managing Committee. In fact, if he was not in league with them, it is culpable negligence on his part for which he must account for. Again his conduct to say the least is very curious that he had signed the voucher Exh. 51 which purports to vouch that the accused No. 2 had retained a sum of Rs. 15,000/- which he undertook to repay to the Society. This amount of Rs. 15,000/- is the sum total of the amounts which the accused No. 2 had either not paid or pay short out of every-day sale proceeds at the counter. Condoning of or conniving at this kind of criminal activity of the employees by the President strongly suggests his culpability which cannot be overlooked. It is quite possible that if a proper investigation is carried out, the major liability may rest on the President and the present two accused persons may turn out to be the tools in his hands, It is, therefore, necessary that this case should be thoroughly investigated by the competent authorities in the Co-operative Department and all those persons who are found to be involved in this apparently organised fraud be brought to book.

6. Ordinarily the court would not order a trial when the charge is defective because, framing of the charge is the responsibility of the court. If the court fails in its duty and frames a defective charge the accused should not have to go through the torture of a second trial. But in the present case, the facts disclose that there was a sort of organised conspiracy to misappropriate the funds of the Co-operative Society by the persons who stand in a relationship which is more or less fiduciary in nature and hence it cannot be taken lightly. Such illegal actions tend to strike at the very root of the Co-operative movement and have much wider implications than a mere misappropriation of a sum of money.

7. In the circumstances of the case, the learned Counsel on both the sides agree that the ends of justice would be met if a retrial is ordered not only of the present two accused but also those persons who may be found answerable in the course of a thorough investigation by the Co-operative Department be put on trial. All such persons should be put on trial at the same time so that each accused person will have an opportunity to defend himself fully against others. Considering that this matter is about a decade old, the Co-operative Department will carry out its investigations and assist the prosecuting Agency to the maximum extent and to see that a charge-sheet is presented not later than six months from today and the trial court is directed to take up this case on a priority basis and dispose it of within six months from the date of submitting of the charge-sheet.

8. In view of the aforesaid order the appeals by the two accused persons namely Criminal Appeals Nos. 247/80 and 248/80 are allowed. The order of conviction and sentence passed by the learned Magistrate is set aside. Fine, if paid, will have to be refunded to the accused.

9. The two appeals filed by the State namely Criminal Appeals Nos. 716/79 and 717/79 are hereby dismissed. In view of the above order a retrial of the accused is to be carried out as aforesaid.