
(1990) 08 SHI CK 0043
In the High Court Of Himachal Pradesh
Case No : Criminal Appeal No. 93 of 1983

State of Himachal Pradesh

APPELLANT

Vs

Hira Nand

RESPONDENT

Date of Decision : 24-08-1990

Acts Referred:

Constitution of India, 1950 — Article 282(2)
Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 106, 114, 24, 25, 26
Penal Code, 1860 (IPC) — Section 409, 477A
Punjab Treasury Rules, 1985 — Rule 2.23, 2.24, 2.8

Citation : (1991) 1 ShimLC 50

Hon'ble Judges : V.P. Bhatnagar, J; D.P. Sood, J

Bench : Division Bench

Advocate : M.L. Chauhan, Asstt. Advocate General, for the Appellant; Kuldip Singh Kanwar, for the Respondent

Judgement

D.P. Sood, J.—By the leave of this Court the State of Himachal Pradesh has come up in this appeal against the judgment dated August 16, 1983 of the learned Chief Judicial Magistrate, Simla whereby the accused had been acquitted of the offences under Sections 409 and 477-A, I.P.C.

2. The sole question for determination in this appeal is "whether the court below has misdirected itself in appreciating the evidence while recording the order of acquittal of the accused." The answer is in the affirmative.

3. The prosecution case is that the accused at the material time was employed as a Laboratory Attendant at Fruit Canning Unit, Naubahar, Simla in the year 1974. Amongst others, one of his duties was to collect the daily sale proceeds of fruit products from the salesman of the sale counter of Fruit Canning Unit, Naubahar, Simla and to deposit the same in the Treasury. For the period from May 30, 1974 to August 16, 1974, he received a total sum of Rs. 11,598.15 P from the salesman of the aforesaid counter. Allegedly, he did not deposit the said amount into the Treasury but mentioned bogus/false treasury challan numbers in the

certificates recorded in the cash book For convenience sake, various amounts not so accounted for are tabulated as under:

_ Date Amount Page of cash Bogus Challan No. book as shown in the (Ex. P-8) certificate.

30-5-1974	1047.52	138	18	22-6-1974	2254.97	141	51	30-6-1974	
2141.31	143	97	11-7-1974	406.89	144	9	17-7-1974	965.87	145
791.90	146	28	20-7-1974	371.52	146	62	31-7-1974	369.20	147
151.48	147	79	7-8-1974	1969.32	148	22	16-8-1974	586.12	149
								51	542.05
-- Total :									11598.15

The aforesaid fact was noticed by the Department in the year 1978. Mr. Satwant Singh, Food Technologist lodged the complain with respect to the embezzlement with the Anti-corruption Unit, Simla against the accused. During the investigation, the Anti-corruption Unit made a reference to the reasury Officer, Simla requiring him to intimate whether the amount had been deposited in the treasury vide treasury challans mentioned in the certificates recorded by the accused in the cash book or not. The latter, however, certified that the aforesaid detailed amounts had not been deposited in the Treasury. It is further alleged that the accused allegedly confessed his guilt to the Joint Director of Horticulture and the Director of Horticulture in two letters written by him in his own hand wherein he promised to pay the embezzled amount within certain specified period. On his failure to do so, the report was lodged. Ultimately, on completion of the investigation, the accused was prosecuted for the offences under Sections 409 and 477-A, I.P.C.

4. To the charge framed in relation to the aforesaid offences, the accused abjured the guilt and pleaded false implication. In his state-ment u/s 313 Code of Criminal Procedure, the accused admitted that at the material time he was employed as Laboratory Attendant in the aforesaid Unit and was assigned the job of collecting sale proceeds from the salesman, referred to above and that he was also responsible for depositing those receipts in the Treasury. He also admitted having received the entire amount, tabulated above against due receipts written and signed by him. However, he pleaded that he deposited the entire amount in the Government Treasury against the treasury challans as detailed in column No. 4 above. According to him, the aforesaid challans detailed in the certificates referred to above were not bogus. He further pleaded that at the time of handing over the charge of the job of collecting the sale proceeds and depositing the same in the Treasury, he handed over the cash book Ex. P-8 and file containing the challans to one Mr. B.D. Sharma. At that time none of those challans were pasted in the cash book. Rather, two challans Exs. D-1 and D-2 were returned to him by said Mr. B.D. Sharma as the amounts deposited through the said challans were not recorded in the cash Book. As regards letters Exs. P-6/A and P-6/B, the accused pleaded that they were dictated to him by Mr. K.C. Azad, (PW 6), Director of Horticulture under threat that in case he did not agree to pay the

amount he would be dismissed from service.

5. In order to bring the guilt home to the accused, the prosecution has produced 13 witnesses and proved various documents. The accused did not lead any evidence in this case except proving challans Exs D-1 and D-2 and office order Ex. D-3.

6. Out of the aforesaid witnesses PW 6 and PW 12 constitute central evidence against the accused. In view of the admission of the accused the remaining witnesses are of formal nature. They provide link evidence with respect to the accused being a public servant, entrustment of Government money to him and his duty to deposit the same in the Government treasury on behalf of the Department.

7. The learned Asstt. Advocate General has assailed the impugned judgment by contending that the view taken by the trial court is wholly unsound and perverse inasmuch as the accused has been proved not to have deposited the amounts shown in the table in the Treasury and as such the challan numbers are bogus and have falsely been detailed in the certificates pertaining to each item referred to therein Secondly, the trial court has wrongly ignored letters Exs. PW 6/A and PW 6/B as also the certificate of the Treasury Officer which he recorded on the letter written to him by the Inspector, Anti-Corruption Unit during investigation. Thus, according to the him trial court wrongly drew an adverse inference u/s 114 of the Evidence Act against the prosecution particularly when it was not required to produce the Subsidiary register prepared by the officials of the Treasury or challans or any other document before the Court. It is urged that aforesaid letters Exs. PW 6/A and PW 6/B tantamount to extra judicial confession inasmuch as they were voluntary in nature and they had been written by the accused before registration of criminal case against him and in any case the accused had agreed to deposit a sum of Rs. 2,000 immediately and had sought time to deposit the remaining embezzled amount within a week from July 21, 1978. It has also been pointed out that the said certificate had been issued by the Treasury Officer after consulting the Subsidiary register and the observations made in the impugned judgment to the contrary are wrong.

8. On the other hand, Mr. Kuldip Singh, learned Counsel for the Respondent, has adopted the reasoning given in the impugned judgment and has urged that firstly letters Exs. PW 6/A and PW 6/B do not amount to extra judicial confession but at the most it can be used as an admission; secondly, that the said admission has been made before a person in authority; and thirdly, in the said letters the accused did not admit any amount which may be said to have been embezzled by him. In any case even if it be treated as an extra judicial confession, it is a weak piece of evidence and it cannot be relied upon for having conviction of the accused unless corroborated by some other credible evidence. Apart from it the learned Counsel has assailed the certificate, referred to above, on the reasoning given by the trial court Reliance has been placed on the observations made in Kanda Padayachi alias Kandaswamy Vs. State of Tamil Nadu, . We have carefully

gone through the rival contentions advanced by the learned Counsel for the parties and have also gone through the record.

9. In order to indict the accused for the offence of criminal breach of trust by a public servant, there has to be an entrustment, thereafter misappropriation or conversion to one's own use or use in violation of any legal direction or of any legal contract and finally the misappropriation or Conversion or disposal must be with a dishonest intention. In order to be dishonest the property must be misappropriated or converted with the intention of causing wrongful gain to one person or wrongful loss to another, that is, with the intention to cause gain by unlawful means of property to which the person gaining it is not legally entitled or the loss by unlawful means of property to which the person losing it is legally entitled. As such every offence of criminal breach of trust though involves a civil wrong in respect of which the complainant may seek his redress for damages in a civil court yet every breach of trust in the absence of measure or criminal intention cannot legally justify a criminal prosecution.

10. In the instant case, indisputably the accused was a public servant at the material time. The factum of entrustment of the entire amount referred to in the table above is also not in controversy. Thus, to this extent we feel no necessity of discussing the evidence so adduced by the prosecution because the accused admits that he was a Laboratory Attendant at a relevant time and was assigned the job of collecting sale proceeds from the concerned salesman and depositing the same in the Treasury. Thus, the only controversial point remains to be determined is whether or not the amount so received by the accused has or has not been deposited in the Government Treasury. At the cost of repetition, the prosecution in support of its allegation that the amount has not been deposited and that the challan numbers given in the cash book are bogus and have wrongly been detailed in the certificates which are apparently false, relies upon the certificate of the Treasury Officer (Mr. N.C. Katoch PW 12) which he had recorded on the letter written to him by the Inspector, Anti-Corruption Unit In this certificate Ex PB/I. PW 12 has certified that the amounts referred to above and shown in the letter Ex. PB had not been deposited during the relevant period under the head "105-Agriculture/Horticulture and Miscellaneous Receipts" The learned court below considered the following circumstances in rejecting the said certificate:

(i) that the officer had not stated the basis of his declaration about non deposit of the aforesaid amount in the said certificate;

(ii) that while appearing as PW 12, the Treasury Officer admitted in his cross-examination that he himself did not look into the Subsidiary register or any other record at the time of recording the certificate and thus the said certificate is merely a hearsay; and

(iii) the primary evidence regarding existence or non-existence of the entry in the Subsidiary register regarding deposit of the embezzled amount against the

alleged bogus treasury challan has not been produced and as such the certificate cannot be treated even as secondary evidence.

In other words, PW 12, the author of the certificate himself did not look into the record to verify whether or not the alleged defalcated amounts had been deposited and even otherwise he being a human being could err in his observation. Thus, adverse inference can legitimately be drawn against the prosecution for non-production of the record.

11. In this respect we cannot agree with the view taken by the learned trial court inasmuch as the court below has ignored the fact that the record of the Treasury is an official record maintained by respective public servant under the overall supervision of the Treasury Officer and strictly in accordance with the Treasury Rules issued under Articles 282(2) of the Constitution of India. In other words, the said Treasury Rules have a force of law of which judicial notice can be taken by this Court u/s 57 of the Evidence Act. Secondly, the said record of the Treasury i.e., Subsidiary register and various other registers pertaining to the transactions are maintained by the official headed by the Treasury Officer in the discharge of their official duties in accordance with the procedure as contained in Rule 2.8 to Rule 2.23 of the Punjab Treasury Rules (Part-I) as applicable to the State of Himachal Pradesh. It is to be noted that under the said Rules any monthly comparison of receipts between the departmental or treasury offices are required to be certified by the concerned Treasury Officer under Rule 2.24 which lays down that:

The advices of receipts which, according to any rule, have to be sent to Departmental Officers or departments, and consolidated receipts or certificates or receipts required by any rule to be given to any Departmental Officer or department should be prepared in the treasury, and not in the Bank, as the point to be advised or certified is not that the money has been received at the Bank, but that the receipt has entered the treasury account.

12. The expression "Treasury" includes a sub-treasury and Bank treasury means a Treasury the cash business of which is conducted by the Bank. Admittedly, the department of the accused was located at Simla and also the receipts and disbursement of the Government cash at this place used to be and is conducted by the Bank Treasury i.e. State Bank of India. In order to cross checking the account of the Treasury and that of the Bank, the prescribed forms STR-4 were being used in dealing with the receipts and disbursement of the Government money and both the Treasury and the Bank were following Punjab Treasury Rules, referred to above. Thus, certificate Ex. PB/1 issued PW 12 by Shri N.G. Katoch, the then Treasury Officer not only becomes relevant but also admissible in evidence u/s 35 of the Evidence Act. P W 12, in his statement on oath, has categorically stated that he issued the above-said certificate after consulting the Subsidiary register i.e. the official record concerned. Thus, the said certificate has legally been proved on record which refuted non deposit of the alleged items referred to and tabulated above. The learned court below does not seem to

have been apprised of Rule 2.24 and also other Rules pertaining to the procedure to be followed by the Treasury and the Bank concerned which resulted in the erroneous findings. Thus, we are of the opinion that the above said certificate could be taken judicial notice of by the learned court below. The other limb of the evidence regarding non deposit of the embezzled amount is found in the deposition of Dr. K.C. Azad (PW6). He has categorically stated that as per the verification of the record the aforesaid items of the embezzled official amount had not been deposited by the accused in the Treasury at Simla. In his statement on oath PW 6 has proved letter Ex. PW 6/C written by the Director of Horticulture, Himachal Pradesh to the Treasury Officer for verification of the treasury challans pertaining to the embezzled amount. He has also proved letter Ex. PW 6/E received from the then Treasury Officer which disclosed that no such amount had at all been deposited on the dates mentioned therein. The learned court below has not adverted to this part of the evidence adduced by the prosecution. Rather it has wrongly been observed that certificate had been issued by the Treasury Officer without looking into the Subsidiary register.

13. Now adverting to the other limb of the case as to what is the evidentiary value of PW 6/A and PW 6/B respectively. Admittedly, these letters have been proved by Dr. K.C. Azad who at the material time was holding the office of Joint Director of Horticulture, Himachal Pradesh. It is categorically stated that the Director of Horticulture was the appointing as well as dismissing authority of the accused at the relevant time. According to him, the accused had promised to deposit the embezzled amount within a week. This fact is reflected by letter Ex. PW 13/F. As per this witness, the accused again came after one week and gave in writing that he would be in a position to deposit the embezzled amount after selling the apple crop. There is no gainsaying the fact that the aforesaid letters are dated July 28, 1978 and that at that time no criminal case had been registered against the accused. The close perusal of the said letters indicate that the accused had agreed to deposit a sum of Rs. 2,000 immediately and the remaining amount after sale of the apple crop. It is also a fact that Dr. K.C. Azad was a superior authority vis-a-vis the accused at the material time and as such he must be taken to be a person in authority. Also, this witness has admitted in his cross-examination that he had told the accused that if he wanted more time for depositing the money, he should give in writing, and that it would be in his own interest to deposit the money.

14. Now the only question is as to whether the said statement was caused by inducement, threat or promise as envisaged u/s 24 of the Evidence Act. PW 6 at the material time was unbiased not even remotely inimical towards the accused and in respect of this nothing has been brought out which may tend to indicate that he may have motive for attributing an untruthful statement to the accused; the words spoken to by the witness are clear, unambiguous and unmistakably convey that he did not cause the writing of letters Exs. PW 6/A or PW 6/B by inducement, threat or promise. The mere fact that the said witness told the accused that if the money was deposited, he would gain by that, does not in any

way fall within the expression of inducement, threat or promise. In Kanda Padayachi's case (supra) it has been held:

(i) A confession has to be a direct acknowledgment of the guilt of the offence in question and such as would be sufficient by itself for conviction. If it falls short of such a plenary acknowledgment of guilt it would not be a confession even though the statement is of some incriminating fact which taken along with other evidence tend to prove his guilt. Such a statement is admission but no confession.

(ii) An admission of fact, however incriminating, but not by itself establishing the guilt of the maker of such admission, would not amount to confession within the meaning of Sections 24 to 26 of the Evidence Act.

15. Adjudging the contents of letter Ex. PW 6/A and PW 6/B with the touchstone of the above said principles, it is true that the accused has not admitted the alleged amount as embezzled one but he was ready and willing to deposit Rs. 2,000 immediately and the remaining amount after one month. In other words, the aforesaid statement fails short of plenary acknowledgement of guilt and it though did not amount to confession but amounted to an admission of some incriminating fact which taken alongwith other evidence tends to prove the guilt of the accused.

16. It is unthinkable that the prosecution witnesses particularly PW 6 and PW 12 formed an unholy combination to trap the accused for no apparent reason. The evidence of the prosecution as already discussed is convincing. It has been found on the evidence adduced by the prosecution that the accused was a public servant did receive the amount due to the Government but did not account for the same though he was bound to do so. The abovesaid facts were within the knowledge of the accused Thus, he was guilty of mis-appropriation. In this regard we are supported by the view taken in Krishan Kumar Vs. The Union of India, :

...It is not the law of this country that the prosecution has to eliminate all possible defences or circumstances which may exonerate him. If these facts are within the knowledge of the accused then he has to prove them. Of course the prosecution has to establish a prima facie case in the first instance, It is not enough to establish facts which give rise to a suspicion and then by reason of Section 106 of the Evidence Act to throw the onus on him to prove his innocence.

17. The evidence referred to above, coupled with the certificate Ex. PB/1 issued by the Treasury Officer under Rule 2.24 of the Punjab Treasury Rules did establish that the receipts of the amounts due to the Government as tabulated above though alleged to have been deposited in the Bank had not been entered into the Treasury account. In other words, the said amounts due to the Government had not been deposited into the Treasury. Thus in the circumstances, a prima-facie case of criminal misappropriation of the amounts due to the Government stood established against the accused and the onus to

prove that they had actually been so deposited in the Bank shifted upon the accused u/s 106 of the Evidence Act. That has not been done. As such the prosecution has been able to bring home guilt against the accused by adducing overwhelming cogent and convincing evidence oral as well as documentary on record.

18. We are conscious of the fact that the order of acquittal should not lightly be interfered with and if two views are reasonably possible, the Appellate Court should be slow in interfering with the same even if it is possible to take a different view after process of laborious reasoning. However in the instant case from whatever angle the evidence may be viewed it leads to no other conclusion except the one that the accused is the perpetrator of the crime in question. In that view of the matter, the impugned judgment is liable to be set aside. We order accordingly.

19. As a result the appeal filed by the State of Himachal Pradesh is accepted and the order of acquittal quashed consequently the accused is convicted under Sections 409 and 477-A I.P.C. As regards the sentence, the incident took place in the year 1974 and was highlighted thereafter in the years 1977/1978. No doubt, the conviction would entail into termination of the services of the accused, yet the offence committed by him being anti-social in nature, requires to be dealt with deterrent punishment particularly when the accused has not deposited even the embezzled amount till date -However the long duration of trial and the appeal constitutes to some degree punishment in itself. Cumulatively, we are of the view that the ends of justice would be met if the accused is sentenced to undergo rigorous imprisonment for a period of two years and a fine of Rs. 10,000. In default of payment of fine, the accused is directed to suffer further simple imprisonment for a period of 6 months. Orders are made accordingly. The accused would surrender to his bail bonds forthwith to undergo the sentence.