
(1968) 08 KL CK 0030
In the High Court Of Kerala
Case No : Criminal A. No. 151/68

State of Kerala

APPELLANT

Vs

Syed Mohammed Rawther, Muvattupuzha

RESPONDENT

Date of Decision : 30-08-1968

Acts Referred:

Penal Code, 1860 (IPC) — Section 107, 108, 109, 115, 116

Citation : (1969) KLJ 215

Hon'ble Judges : K. Sadasivan, J

Bench : Single Bench

Advocate : N. Raghava Kurup and M.S. Narayana Pillai, for the Respondent

Final Decision : Dismissed

Judgement

K. Sadasivan, J.—This appeal is against the order of acquittal passed by the appellate court. Before the First Class Magistrate of Ernakulam three persons were charged with offences of criminal breach of trust, forgery, falsification of accounts etc. falling under sections 409, 468, 471 and 477A I.P.C. The first accused was the store keeper on Public Works Department (B & R) Division in Muvattupuzha; the 2nd accused was a transporting contractor who was employed by the Executive Engineer, Muvattupuzha for transporting 333 tons of Max phalt 80/100 tar from the Burmah shell company at Willingdon Island to the P.W.D. Store at Muvattupuzha from 30-11-1961 to 25-3-1962; and the third accused was the technical assistant, P.W.D. (B & R), Muvattupuzha. The prosecution case was that the tar entrusted to the 2nd accused from the Burmah shell company at Willingdon Island under orders of the Executive Engineer, P.W.D. to be transported to the store at Muvattupuzha was misappropriated by the accused and instead of taking the tar to Muvattupuzha, it was sold to one P.M. Paul, M.E.S. contractor at the Naval base, Cochin with the help of Pws. 1, 4 and 5 and the proceeds were shared by the accused. This was done at the direction of the first accused and so he was charged with the substantive offence of criminal breach of trust, forgery and falsification of accounts; while the other

two were charged as abettors, i.e., the said offences read with S. 109 I.P.C. The first accused is absconding and so the trial had to be proceeded against accused 2 and 3 alone. The charge was denied by the accused. At the conclusion of the trial the third accused was acquitted and the 2nd accused was convicted as abettor and sentenced to R.I. for one year and also to pay a fine of Rs. 1000/-. He has been convicted and sentenced under three other counts also; but the sentences have been directed to run concurrently. He appealed to the sessions Judge of Ernakulam against the said conviction and sentence and the Sessions Judge acquitted him. Against the order of acquittal the State has come up in appeal.

2. I do not see any reason to interfere with the order of acquittal entered by the learned sessions Judge. The prosecution case is that accused 2 and 3 along with the absconding accused No. 1 with the intention of misappropriating Max phalt tar which the P.W.D. had purchased from the Burmah shell company, diverted it to the Naval Base and sold to Pw. 21 Paul, M.E.S. Contractor and shared the proceeds between them. The 2nd accused in his capacity as transporting contractor had undertaken to transport these barrels of tar to the P.W.D. store at Moovattupuzha. He was entrusted with this job by Pw. 29 the Executive Engineer, B & R. Muvattupuzha on 23-11-1961. The period of the contract extended to 25-3-62 and within the period a total number of 1076 barrels of Max phalt 80/100 Bitmen tar was taken delivery of from the Burmah Shell company, Willingdon Island. Of this total quantity, 52 barrels taken delivery of on 17-1-1962, 208 barrels taken delivery of on 24-1-1962 and another 200 barrels taken delivery of on 28-2-1962, were not actually transported to the P.W.D. store at Muvattupuzha. All these 460 barrels were sold to Pw. 21 under orders of the first accused and in order to cover the fraud, false entries were made in the accounts, measurement book, day book, ledger etc, by the first accused himself in such a way as to make it appear that the entire 460 barrels had also reached the store. The 2nd accused abetted the first accused by aiding, that is to say, by diverting the barrels to the Naval Base and delivering the same to Pw. 21. The third accused, the technical assistant, had also a hand in the completion of the fraud by his certifying to the effect that the entire quantity was received at the store; but the part played by the 3rd accused having not been satisfactorily proved he was acquitted.

3. In the case of the 2nd accused the matter has to be looked at mainly from two standpoints and they are:

(1) whether he should be convicted as an abettor pure and simple when offence against the principal offender has not been proved; and (2) from the standpoint of master and servant.

4. On the first point, conviction of the abettor is ordinarily not dependent upon the conviction of the principal offender. Abetment by itself is a substantive offence. So the abettor can be convicted before the principal is apprehended and put on trial. Earle, C.J., observed in a similar case:--

We consider the conviction may be sustained as a substantive absolute felony. Suppose the accessory is captured before the principal; under the statute he may be at once tried and convicted. If afterwards the principal is taken, tried, and acquitted, has the accessory a right to be discharged ? We are of opinion that he has no such right. His sentence may have expired; is any wrong done to him? We think not; whether he is tried before or at the same time as the principal, he may be guilty as an accessory, although the principal be acquitted, it being no means certain that, although acquitted, the principal is not really guilty. (Vide Gours" Penal law of India, Vol. 1, 8th Edn. p. 745)

5. In a recent case *Jamuna Singh Vs. State of Bihar*, the Supreme Court has maintained a distinction in such cases between abetment by instigation and conspiracy on the one hand and abetment by aiding on the other. In the latter, i.e., abetment by aiding the charge against the abettor would normally fall when the principal offender is acquitted. The learned Judges would observe:

It cannot be held in law that a person cannot ever be convicted of abetting a certain offence when the person alleged to have committed that offence in consequence of the abetment has been acquitted. The question of the abettor's guilt depends on the nature of the act abetted, and the manner in which the abetment was made. Under S. 107 I.P.C. a person abets the doing of an act in either of three ways which can be: instigating any person to do an act; or engaging with one or more person in any conspiracy for the doing of that act; or intentionally aiding the doing of that act. If a person instigates another or engages with another in a conspiracy for the doing of an act which is an offence, he abets such an offence and would be guilty of abetment under S. 115 or S. 116 I.P.C. even if the offence abetted is not committed in consequence of the abetment. The offence of abetment is complete when the alleged abettor has instigated another or engaged with another in a conspiracy to commit the offence. It is not necessary for the offence of abetment that the act abetted must be committed. This is clear from explanation 2 and illustration (a) thereto, to S. 108 I.P.C..... It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment against him would be expected to fail when the person alleged to have committed the offence is acquitted of that offence. The case of *Faguna Kanta Nath Vs. The State of Assam*, lays this down. The observations of this court in that case bring out clearly the distinction in the case of persons instigating another or engaging in conspiracy with another on the one hand, and that of a person aiding the person committing a certain offence. The observations are:-

It is not the prosecution case that the appellant abetted the offence by instigating Khalilur Rehman to demand the illegal gratification; nor has the prosecution set up or proved a case of conspiracy between the appellant and Khalilur Rahman for the commission of an offence under S. 161. On the findings of the court the appellant received the money for and on behalf of Khalilur Rahman and the evidence of the complainant is that Khalilur Rahman had asked

him to hand over the money to the appellant. If Khalilur Rahman is acquitted and therefore the offence under S. 161 is held not to have been committed, then in this case no question of intentionally aiding by any act or omission the commission of the offence arises.

6. So also in the present case the second accused is charged with having intentionally aided the first accused in committing criminal breach of trust and a definite part was played by him in the act which went to constitute the offence and the part played was that he either by himself or under his orders by his servants, carried barrels of tar to the Naval Base instead of to the proper destination, viz., Moovattupuzha and caused the sale of the barrels to Paul, M.E.S. contractor at Naval Base. Thus the second accused, according to the charge, was himself actively engaged in the commission of the act. In such a case if the first accused is acquitted it would be difficult for the court to sustain the conviction of the 2nd accused. But here the first accused has not been apprehended at all and so it is possible to argue that the guilt against him has not been proved, because without putting him on trial it is not possible to say that the charge against him has been proved. The learned state prosecutor tried to sustain the position by saying that from the available evidence it could safely be concluded that the offence so far as relates to the first accused stands proved. I do not think the argument is sound. The evidence accepted in the case by the trial court so far as the act against the first accused is concerned is the evidence not tested by cross-examination by the first accused and under such circumstances how could it be said that it is evidence on which the conviction could be entered on him. In these circumstances it is difficult to convict the 2nd accused for abetment simpliciter. Even otherwise, the conviction cannot be sustained against the 2nd accused, because the evidence available in the case is insufficient to establish the charge of abetment against him.

But, of course, though the principal may not be punished, the evidence against the abettor must establish all the points necessary to complete his guilt. If, for instance, a person is charged for an abetment of murder, the murderer may not have been brought to book, but there must be evidence against the abettor to show that there had been a murder, and that the accused had instigated it. (Vide Gour's Penal Law of India, Vol. I, 8th Edn. p. 745).

7. Now, what is the evidence against the 2nd accused? The main witnesses relied on by the trial court in coming to the conclusion that the first accused was abetted by the 2nd accused are Pws. 1, 4 and 5. It has to be remembered in this connection that even according to the prosecution the 2nd accused by himself did not transport the goods to the naval base. The charge is that he did it through his servants and the servants are stated to be Pws. 1 and 4. But according to second accused Pw. 1 was never his servant. There is nothing to show that Pw. 1 was ever employed by the 2nd accused for any purpose; but Pw. 1 would pose himself as the 2nd accused's employee and would swear that C.C. Mani (Pw. 4) went and told him that the first accused wanted to meet him at the

Taj Hotel. He accordingly went and met the first accused at the Taj Hotel and from there they went to Paul's office at Vendumthiy and with him they went to the Burmah Shell company. A letter was given by the 2nd accused authorising them to deliver the tar to him (Pw. 1). This is in respect of 208 barrels delivered on 24.1.62. The tar was accordingly transported to the workshop of Paul at the Willingdon Island. With respect to the 52 barrels taken delivery on 17.1.62 the case of Pw. 1 is, that, that quantity was taken from the Mercantile Marine Company. Himself, the first accused, Pw. 4 and Paul went to the Mercantile Marine Company and after conversation with the manager the quantity was taken delivery of and it was given over to Paul. He would also say that in token of having taken delivery he has signed in Ex. P-1. But we do not know whether the tar taken from the Mercantile Marine Company is the quantity covered by the 2nd accused's contract with the executive Engineer. That apart, on the evidence of Pw. 1, taking for granted that all he swears is true, the complicity of the 2nd accused is not proved. Without an authorisation given by the 2nd accused, neither Pw. 1 nor Pw. 4 can act for him, and as a matter of fact, the authorisation was given also according to these witnesses; but that has not been produced in evidence. Pw-4's evidence also is of no good to connect the 2nd accused with the crime. The tar if at all taken delivery of was not taken on the authorisation of the 2nd accused and no authorisation was produced also. Moreover, both Pws. 1 and 4 as also Pw. 5 who, is introduced into the picture as one engaged in transporting the tar, are all accomplices according to both the courts. All the three of them even on their own showing have been benefitted by the transaction and the proceeds have been shared by them. In the circumstances, without independent corroboration their evidence cannot be accepted at all. The case of the 2nd accused is that the tar entrusted to him for transportation to Moovattupuzha was, in fact, transported and that is further seen from the records maintained in the P.W.D. store at Moovattupuzha. There was a physical verification of the stock by Pw. 30, Krishna Iyer, Assistant Engineer and it was reported by him that Max phalt tar which is involved in the case was found intact there, and there was no shortage at all with respect to this particular variety of tar, even though certain other articles including asphalt tar were missing. The measurement book, day book, ledger etc. showed that there was no shortage with respect to Max phalt tar. Thus, so far as the 2nd accused is concerned the work entrusted to him was duly performed and he cannot be made liable for any breach of contract or misappropriation or abetment of any such offence. The learned state prosecutor contended for the position that the registers were all fabricated by the officers and as such those records cannot be accepted as showing the correct position. But it is important to note that the government have not taken so far any action against these officers including pw. 30 who was reported about the stock position on the relevant date. It is also significant that in the matter of correction of the accounts, the 2nd accused has not been found to be an abettor. So even if there is any falsification of accounts he cannot be held liable for either breach of contract or misappropriation or abetment thereof.

8. Now, coming to the second point, the question is worth considering, and that is whether the 2nd accused could be vicariously made liable for the act committed--even conceding that it was committed--by his servants. It is the case of the prosecution that the 2nd accused himself did not personally transport the tar; the work was entrusted by him to his servants; and if the servants have committed an offence could he be made liable without proof to show that he had given his authorisation for the doing of it? *Anthrew v. The State* (AIR. 1952 T.C. 158) is an authority for the position that the master can be made liable only if mens rea is proved. That was a case where the first accused master, was charged for the breach of trust committed by the 2nd accused who was his servant. The first accused was a licence holder for the purchase of paddy on behalf of the government from the landholders. He was supplied with printed triplicate receipts by the taluk office. It was alleged that the 2nd accused who was entrusted with the task by the first accused got 25 paras of paddy from Pw. 1 and gave Ex. A receipt. But out of that, only 4 paras was shown in the counterfoil. When the fraud was detected, both accused 1 and 2 were charged with criminal breach of trust and misappropriation. The court held: Mens rea is the essence of the offence of criminal breach of trust. The mere fact that the 2nd accused was employed by the 1st accused, a government licensee for purchase of paddy, for purchasing paddy and issuing receipts cannot make the first accused vicariously liable for the offence of criminal breach of trust and forgery committed by the 2nd accused in the course of his employment. The 1st accused may be answerable to the government for the misappropriation of paddy committed by the 2nd accused, but that does not mean that he will be criminally liable for the offence committed by his employee. According to the definition of the offence of criminal breach of trust the 1st accused will be criminally liable for the offence of the 2nd accused only if it is proved that he wilfully suffered the 2nd accused to commit the offence. So long as there is nothing to show that the accused wilfully allowed the 2nd accused to commit the offence of dishonestly misappropriating paddy it cannot be said that the 1st accused has committed the offence of criminal breach of trust.

Applying the same principle to the present case, it must be held that the 2nd accused is not guilty, he having not wilfully allowed any of his servants to commit the offence. The result, therefore, is that the order of acquittal entered by the appellate court is proper and has to be upheld.

In the result the order of acquittal is confirmed and this appeal is dismissed.