

• **UNREPORTED**
• **N THE HIGH COURT OF DELHI AT NEW DELHI**

% DATE OF RESERVE: January 15, 2009

DATE OF DECISION: March 25, 2009

+ **CRL. REV.P.886/2002 and Crl. Misc.1137/2002**

MAYA RAM SHARMA Petitioner

Through: None.

versus

STATE & ANR. Respondents

Through: Mr.Manoj Ohri, APP for the State/R-1.

Mr.Sumeet Verma, Amicus Curiae for R-2.

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: **REVA KHETRAPAL, J.**

1. By way of this revision petition, the petitioner seeks setting aside and reversal of the order of acquittal dated 28.03.2002 passed by the learned Addl. Sessions Judge Shri D.C.Anand in Crl. Appeal No.7/2002 arising out of FIR No.295/98, under Sections 381/411 IPC, Police Station Vivek Vihar, Delhi and prays for condonation of delay in filing the petition by way of an application under Section 5 of the Limitation Act, being Crl. Misc.1137/2002.

2. First, the application for condonation of delay. There appears to be a delay of 101 days in the filing of this petition, which is sought to be justified by the petitioner on the ground that the State having refused to file an appeal against the order of acquittal, the petitioner/complainant had to seek the requisite permission from the State for impugning the order of acquittal passed by the learned Addl. Sessions Judge and the State's permission to file this petition was received by the petitioner on 09.10.2002, that is, after more than five months (about 158 days) and the petition was filed two days thereafter. The aforesaid explanation, in my view, justifies the delay in filing the petition, which is accordingly condoned.

3. Adverting to the material facts necessary for deciding the present revision petition, the case of the prosecution is that accused/respondent No.2 herein was challaned to face trial on the allegation that on 09.10.1998 at about 5:35 p.m. at D-50, Vivek Vihar, Delhi, as an employee of the petitioner (Maya Ram Sharma) he had committed theft of brass articles valued at Rs.35,000/-. The prosecution, in support of its case, examined six prosecution witnesses viz. PW-1 ASI Sudesh Chand, PW-2 Maya Ram Sharma (petitioner herein), PW-3 Ct. K.P.Mohan, PW-4 Ct. Ashok Kumar, PW-5 Rakesh Raviranjana and PW-6 SI Shriniwas Rajera.

4. PW-1 ASI Shudesh Chand proved the FIR dated 09.10.1998 (Ex.PW-

1/A), PW-2 Maya Ram Sharma (petitioner herein) testified about the material particulars of the case, to which I shall presently advert in detail. Suffice it to note at this stage that the testimony of this witness has gone unchallenged and uncontroverted, despite the respondent No.2 having moved three applications under Section 311 Cr.P.C. for cross-examining the said witness (two of which were allowed, while the third was rejected). The next witness, PW-3 Ct. K.P.Mohan is stated to be the witness in whose presence the alleged recovery of some of the brass articles was made, and he has testified about the manner in which the said recovery was effected from the accused/respondent No.2. PW-4 Ashok Kumar has testified about the employment of the accused/respondent No.2 with the complainant and the respondent No.2/accused having the charge of the store during the period when PW-2 Maya Ram Sharma (the petitioner herein) was not well. PW-5 is also a co-worker of the respondent No.2 and has testified on similar lines as PW-4. PW-6 SI Srinivas Rajora is the Investigating Officer of the case, who has testified about the manner in which he conducted the investigation. The testimonies of PW-3 to PW-5 have also gone unchallenged and uncontroverted.

5. The statement of the accused/respondent No.2 was recorded under Section 281 Cr.P.C., but the accused did not lead any defence evidence.

6. After hearing the arguments, the respondent No.2/accused was held

guilty under Section 381 IPC by the learned Addl. Chief Metropolitan Magistrate, Delhi and sentenced to undergo rigorous imprisonment for two years with a fine of Rs.1,000/-, in default of payment of fine to further undergo rigorous imprisonment for 15 days.

7. The respondent No.2/accused having preferred an appeal against the aforesaid judgment of the learned ACMM, the same was finally heard and disposed of by the learned Addl. Sessions Judge vide the impugned judgment dated 28.03.2002. The learned Addl. Sessions Judge set aside the judgment of conviction for the offence punishable under Section 381 IPC as well as the sentence awarded to the accused/respondent No.2 and acquitted him. It is against this judgment that the present revision petition has been preferred.

8. I have heard Mr.Dinesh Kumar Gupta, the learned counsel for the petitioner, Mr.Manoj Ohri, the learned Addl. Public Prosecutor for the State/respondent No.1 and Mr.Sumeet Verma, the learned amicus curiae appointed by the Court to represent the respondent No.2/accused.

9. Mr.Sumeet Verma, the learned amicus curiae, in the first instance urged that in viw of the embargo contained in Section 401 (3) of the Cr.P.C. this Court is not empowered to convert the order of acquittal into one of conviction and, therefore, if this Court ultimately finds that the revision petition is to be accepted, then in that eventuality it can be remanded back to the Appellate

Court, instead of recording the conviction therein. I find from a perusal of the ordersheets in the instant case that the aforesaid position of law was fairly conceded by the learned counsel for the petitioner and accordingly this Court had ordered that this aspect shall be looked into at the time of hearing the final arguments.

10. On merits, Mr.Verma submitted that the learned Addl. Sessions Judge had rightly set aside the order of conviction passed by the learned Addl. Chief Metropolitan Magistrate. The mainstay of Mr.Sumeet Verma's defence was that the ingredients of Section 381 IPC were not made out in the instant case. It was also urged by him that not only was the prosecution story altogether unbelievable, but the same was not tenable in law, as the FIR itself (Ex.PW-1/A) was hit by Section 162 of the Cr.P.C. Then again, he submitted that no independent witness was examined by the prosecution in support of the so-called recovery effected from the respondent No.2/accused and the whole story in relation to the recovery effected was altogether implausible.

11. Mr. Verma pointed out that the undisputed facts are that on 06.09.1998, the petitioner had lodged a complaint with Police Station concerned (Ex.PW-2/A). When the police did not take any action on the said complaint, he then went to the Police Station on 09.10.1998 and got registered the FIR (Ex.PW-1/A) in respect of the very same theft. A look at the testimony of the petitioner

Maya Ram Sharma, who appeared in the witness box as PW-2, in my view, is warranted at this stage.

12. PW-2 Maya Ram Sharma testified that the respondent No.2/accused was his employee and during his illness, he had given the charge of the store to him. During this period, the respondent No.2/accused used to maintain the stock register and was supposed to submit report with respect to the stock month-wise. When the accused/respondent No.2 gave the stock report for the month of September, 1998, it was found that certain articles worth Rs.35,000/- were missing. When he was confronted by the petitioner, the respondent No.2 could not give any satisfactory explanation for the same and thereafter he stopped coming to the factory premises of the petitioner. Accordingly, he (the petitioner) lodged a report with the police (Ex.PW-2/A).

13. I pause here to look at the report (Ex.PW-2/A) dated 06.09.1998. A glance at the said report shows that the petitioner in the said report had named one Rajesh Singh and two others viz., Gautam Sharma and Matadin as the culprits. It was stated by him before the police that the aforesaid persons could be traced out at 503/A, Sunder Nagar or at their houses. No FIR was recorded by the police on this complaint and subsequently on 09.10.1998 the petitioner lodged another report with the police naming the respondent No.2/Chhotey Lal as the accused. His other employees, on whom suspicion had been expressed

by the petitioner in his first report lodged with the police on 06.09.1998, i.e., Rajesh Singh, Gautam Sharma and Matadin, did not figure in the First Information Report (Ex.PW-1/A) which named the respondent No.2 and the respondent No.2 alone as the accused.

14. The further prosecution story that subsequently on 31.10.1998 the respondent No.2 was apprehended on the road side standing with the bag of brass articles on his right shoulder at the instance of the petitioner, which articles were seized by the police vide seizure memo (Ex.PW-2/B) and a disclosure statement of the accused/respondent no.2 was recorded in respect thereof, is also supported by the petitioner (PW-2) alone and by no other independent witness.

15. The learned amicus curiae, Mr.Sumeet Verma has contended, and I think rightly so, that the subsequent statement of the complainant/petitioner recorded by the police on 09.10.1998 was hit by Section 162 Cr,P.C. [See ***T.T.Anthony Vs. State of Kerala (2001) 6 SCC 181***]. I also find merit in the further contention of the learned amicus curiae that the ingredients of Section 381 IPC are not attracted at all to the FIR/complaint. In order to attract Section 381 IPC the prosecution must establish and prove:

“(i) that the property in question is movable property;

(ii) that such property was in the possession of a

person;

(iii) that the accused moved such property whilst in the possession of that person;

(iv) that he did so without the consent of that person;

(v) that he did so in order to take the same out of the possession of that person;

(vi) that he did so with the intent to cause wrongful loss to that person or wrongful gain to himself; and

(vii) that the accused was at the time, a clerk or servant, and was employed in such capacity by the person in whose possession the stolen property was”

16. The evidence on record in the instant case unmistakably shows that the respondent No.2/accused had been given the charge of the store/stock by the complainant/petitioner and the brass articles were in his possession during the time when the petitioner was not well. Certainly, the respondent No.2/accused could not have intended to take or dishonestly taken the said articles when the said articles were already in his possession and under his charge and exclusive control. This is as per the prosecution's own case. The testimony of PW-2 also clearly brings out the fact that the brass articles were under the charge and exclusive control of the respondent No.2/accused. There was, therefore, no question of the respondent No.2 taking the same from the possession of the petitioner without his consent. When the possession is with the master section 381 applies, when it is with the servant as in the instant case, Section 408

comes into operation which deals with criminal breach of trust by clerk or servant. Assuming this to be a case under Section 408 IPC, neither the accused/respondent No.2 was chargesheeted for the offence under Section 408 IPC, nor it is the case of the complainant/petitioner in the FIR as was got recorded by him that there was any entrustment to the accused/respondent No.2 and as such it is not possible to convict the respondent No.2/accused for the offence of having committed criminal breach of trust in respect of it. Furthermore, as observed by the learned Addl. Sessions Judge the offence under section 408 IPC is quite distinct from the offence under Section 381 IPC for which the respondent No.2/accused was chargesheeted.

17. It also deserves to be highlighted that no satisfactory explanation has been given by the petitioner in his deposition made on oath before the trial court as to what prevented him from approaching the police at the earliest available opportunity. Even assuming it is believed that no FIR was recorded on his initial complaint to the police (Ex.PW-2/A). The First Information Report does not reveal any such facts as are set out in the initial complaint (Ex.PW-2/A). As a matter of fact, the two are at direct variance and in direct contradiction with each other. There is also no explanation on record as to what made the petitioner name the respondent No.2 in the second complaint which culminated in the registration of the First Information Report and that

too after a month of his initial statement/complaint to the police.

18. Apart from the above, there are other glaring lacunae in the prosecution case, but this, in my considered opinion, do not justify the remand of the case to the trial court to enable the prosecution to fill up the said lacunae. The incident took place 10 years ago. The accused has suffered the ordeal of trial and the anguish of one appeal after another for the last 10 years. He has also suffered incarceration for six months. The prosecution evidence, including the testimony of PW-2 Maya Ram Sharma (petitioner herein) do not inspire confidence, nor the manner in which the alleged recovery is stated to have been effected from the accused/respondent No.2.

19. For all the aforesaid reasons, I am of the view that the present petition deserves to be dismissed and the same is accordingly dismissed.

REVA KHETRAPAL, J.

MARCH 25, 2009

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