

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

WEDNESDAY, THE 10TH DAY OF JUNE 2015/20TH JYAISHTA, 1937

CRL.A.No. 492 of 2001 ()

AGAINST THE JUDGMENT IN CC 36/1999 of ENQUIRY COMMISSIONER.& SPECIAL
JUDGE, THRISSUR DATED 11-05-2001
APPELLANT/ACCUSED NO.1:

M.K.CHANDRASEKHARAN NAIR,
FORMER SUPERINTENDENT,
KERALA STATE WAREHOUSING CORPORATION,
KOTTAYAM NOW RESIDING AT
MANJANATTU HOUSE, PALLIPAD P.O, HARIPAD.

BY ADVS.SRI.M.T.SURESH KUMAR
SRI.V.V.RAJA

RESPONDENT/COMPLAINANT:

STATE OF KERALA REP.BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.K. RAJEEV

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.492 of 2001
.....

Dated this the 10th day of June, 2015.

O R D E R

The first accused in C.C.No.36/1999 on the file of the Enquiry Commissioner and Special Judge, Thrissur is the appellant herein. The appellant along with two others were charge sheeted by the Deputy Superintendent of Police, Vigilance and Anti Corruption Bureau, Kottayam unit in VC/8/91 of VACB, Kottayam under section 5(1)(c) and (d) read with section 5(2) of the Prevention of Corruption Act, 1947 (hereinafter referred to as 'the P.C.Act' for short) and sections 409 and 120B of the Indian Penal Code.

2. The case of the prosecution in nutshell was that the first accused, the appellant herein, being the Superintendent of the Kerala State Warehousing Corporation, Kottayam and third accused, being the Class-IV employee of the said Corporation, entered into a criminal conspiracy along with the second accused, who was working as Assistant at the Kerala State Warehousing Corporation and dishonestly and fraudulently misappropriated wheat worth ₹33,538.75 and rice

worth ₹46,754.20 between the period 23.3.1987 and 16.11.1987 and thereby all of them have committed the above said offences.

3. After the investigation, final reports were filed before the court below as 'A' and 'B' charge and on the basis of 'B' charge court below had taken cognizance of the case as C.C.No.36/1999. During the course of the investigation, the original second accused died and charge against him was abated and final reports were filed only against original accused 1 and 3, who includes the present appellant.

4. When the accused appeared before the court below, after hearing both sides, charge under sections 5(1)(c) and (d) read with section 5(2) of the P.C. Act, 1947 and sections 409 and 120 B of the Indian Penal Code was framed and the same was read over and explained to them and they pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 9 were examined and Exts.P1 to P68 were marked on their side. After closure of the prosecution evidence, the accused were questioned under section 313 of the Code of Criminal Procedure (hereinafter referred to as 'the Code' for short) and they denied all the incriminating circumstances brought against

them in the prosecution evidence. The first accused had stated that he had not committed any offence and he was innocent of the same and he has been falsely implicated in the case at the instance of Balachandran, who created some documents against him. He had further stated that he was in charge of 19 godowns in Kottayam district and it is physically impossible for him to monitor personally all the incoming and outgoing articles in each godown. Further, the second accused was in charge of this godown who was responsible for the receipt and release of articles and he was only issuing the stock receipt and release orders on the basis of the slip received from the godown sent by the second accused. He had not committed any misappropriation. There is no dereliction of duty on his side. He came to know about the deficit only during handing over the charge while physical verification was done. Further, the actual loss has not been correctly assessed. Due deduction has not been given for shrinkage and there were mistakes occurred in the weight using the defect in the balance kept in the godown. These aspects were not properly appreciated by the special judge as well. So he had not committed any offence. The original third accused had

submitted that he was only a class-IV employee and he was only acting as per the direction of his superiors and he had no control or domain over any of the articles and he is only helping despatch of the articles on the basis of the release order issued. In order to prove the case of the appellant, one of the employees was examined as DW1. After considering the evidence on record, the court below found the third accused not guilty of the offences under sections 5(1)(c) and (d) read with section 5(2) of the P.C. Act, 1949 and sections 120 B and 409 of the Indian Penal Code and acquitted him of the charge levelled against him giving him the benefit of doubt under section 248(1) of the Code. But the court below found the first accused, who is the appellant herein, guilty for the offence under sections 5(1)(c) and (d) read with section 5(2) of the P.C. Act, 1949 and sections 409 and 120 B of the Indian Penal Code and convicted him thereunder and sentenced him to undergo rigorous imprisonment for four years and also to pay a fine of ₹90,000/-, in default to undergo simple imprisonment for one and a half years under sections 5(1)(c) read with section 5(2) of the P.C. Act of 1947 and further sentenced him to undergo rigorous imprisonment for two years under section 5

(1)(d) read with section 5(2) of the P.C. Act, 1947 and further sentenced to undergo rigorous imprisonment for two years each for the offences under sections 120B and 409 of the Indian Penal Code and directed the sentences run concurrently. Set off was allowed for the period of detention already undergone under section 428 of the Code. Aggrieved by the same, the present appeal has been preferred by the appellant / first accused before the court below.

5. Heard the learned counsel for the appellant, Sri. M.T. Suresh Kumar and Public Prosecutor Sri. K.K. Rajeev and perused the records.

6. The counsel for the appellant submitted that the Special Judge has no jurisdiction to convict the appellant for the offences under sections 5(1)(c) and 5(1)(d) read with section 5 (2) of the P.C. Act, 1947 as by the time final report was filed, the said Act has been repealed and replaced by the present Act, 1988 and there are differences in the section and they are inconsistent and as such, conviction entered by the court below under the repealed Act is illegal and the same is liable to be set aside on that ground. He had further argued that the evidence adduced on the side of the prosecution will go to show

that he was in charge of 19 godowns as Superintendent in Kottayam district and in each godown, there was one person to assist him and second accused was the person to assist him in the godown. It is admitted by the prosecution witnesses that it is humanly impossible for the appellant to go and verify the incoming and outgoing articles personally on each occasion in each godown and in the present godown the second accused was in charge of these articles and it was he, who was releasing the articles at the relevant time. Further, possible loss of grains caused at the time of loading and unloading, shortage to be found at the time of receipt of the articles, possible shrinkage of grains etc were not taken into account while fixing the loss said to have been sustained. Further, actual physical verification of the articles was not done. They have only counted the bags seen there and verified the same with the stock register and on that basis the loss was assessed, which is not proper. Further, there is no investigation conducted to prove the conspiracy or the role played by the first accused in the alleged misappropriation of the articles. The court below was not justified in relying on Ext.P4, a joint affidavit said to have been given by accused 2 and 3, in which it was alleged that all

things were done at the instance and direction of the first accused, the appellant herein, and there is no investigation conducted regarding the genuineness of the allegations made therein and to whom these articles were said to have been given misusing the official position of the appellant and also there is nothing on evidence to show that any of the acts alleged were done by the appellant with dishonest intention so as to defraud the Government and there is no evidence to show that these articles were really converted to own use of the appellant as well. Further, even assuming that the entire allegation of shortage is accepted, there is only a civil liability and at the most, it may amount to dereliction of duty on the part of the appellant in doing the supervisory work and find out the loss sustained on account of the act done by the second and third accused in the godown and realize the same from them. Except this godown, in any other godowns there is no shortage found as well. That shows that there was no dishonest intention and the appellant had not committed any of the offences alleged. He prayed for an acquittal.

7. On the other hand, the learned Public Prosecutor submitted that the evidence adduced will go to show that he

was in charge of the godown and the articles were entrusted to him in the capacity as Superintendent of the godown and he is liable to account for the loss. Further, the evidence will go to show that huge quantity of wheat and rice were found missing at the time of verification conducted by PW2 and CW2-Balachandran, the person who is expected to take charge from the appellant, and Ext.P3 report will go to show about the shortage which was signed by the appellant as well. Further, there is no dispute regarding the fact that there was shortage and considering the quantity of shortage found out, even if marginal deductions were given for shrinkage, even then there is no explanation forthcoming from the side of the appellant regarding the shortage found. Further, the evidence will go to show that without his consent and concurrence, such things could not be possible. So, under the circumstances, the court below was perfectly justified in relying on the oral evidence and also Ext.P4 joint affidavit given by accused 2 and 3 regarding this aspect before the verification officer and rightly convicted the appellant for the offences alleged. Failure to account for the loss by a person responsible will amount to misappropriation if it is proved that these articles

were entrusted to him and he is in domain of the same and he is in possession of the same as a trustee for the Government. So, according to him, the conviction entered by the court below is perfectly justifiable.

8. The points that arise for consideration are:

(1) whether the Special Judge has got jurisdiction to entertain the case under the old Act when the final report was filed and the old Act was repealed and the present Act was come into force?

(2) whether the court below was justified in coming to the conclusion that the appellant had misusing his official position, obtained favour to himself against public interest and he had by illegal means misappropriated the articles entrusted to him so as to cause unlawful gain to him and loss to the Government?

(3) whether the court below was justified in convicting the appellant for the offence under sections 5(1)(c) and (d) read with section 5(2) of the P.C. Act, 1947 and sections 120 B and 409 of the Indian Penal Code?

(4) whether the sentence imposed is proper and legal?

9. Point No.1: The counsel for the appellant submitted

that the alleged period of misappropriation had happened between the period 23.3.1987 and 16.11.1987 at the time when the P.C. Act, 1947 was in force. But when the final report was filed and the case was taken on file in the year 1999, the said Act has been repealed and replaced by the present Act of 1988. The ingredients of sections 5(1)(c) and 5(1)(d) of the old P.C. Act and section 13(1) (c) and (d) of the present Act are entirely different and inconsistent and as such, the court below should not have proceeded against them under the old P.C. Act. He had relied on the decision reported in **Jagan M. Seshadri v. State of T.N** (2002 (9) SCC 639) in support of his case.

10. On the other hand, the learned Public Prosecutor submitted that offence was committed at the time when the old P.C. Act was in force and the First Information Report was registered at that time and whatever action taken under the old P.C. Act will be saved by the present Act and as such there is nothing wrong for the court to entertain the case and proceed against him under the old Act.

11. It is an admitted fact that the offence in the case as alleged to have been committed at the time when the old Act

was in force namely between the period 23.3.1987 and 16.11.1987 and the new Act was come into force with effect from 9.9.1998. Further, section 30(2) of the new Act says that notwithstanding such repeal without prejudice to the application of section 6 of the General Clauses Act, 1897, anything done or any action taken or purported to have been done or taken under or in pursuance of the Acts so repealed shall, insofar as it is not inconsistent with the provisions of the new Act, be deemed to have been done or taken under or in pursuance of corresponding provisions of the new Act. Further section 6 of the General Clauses Act deals with effect of repeal which reads as follows:

6. Effect of repeal:- Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so

repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.”

12. This question was considered by the apex court in the decisions reported in **Central Bureau of Investigation v. Subodh Kumar Dutta** (AIR 1997 SC 869), **Nar Bahadur Bhandari v. State of Sikkim** (AIR 1998 SC 2203) and **Gupta M.C v. Central Bureau of Investigation, Dehradun** (2012 (8) SCC 669) = 2012 KHC 4474 and held that by virtue of section 30(2) of the new Act and section 6 of the General Clauses Act, even if any offence has been committed while the old Act was in force and any proceedings have been initiated on that basis, then those acts will be covered under the old Act and not under the new Act and taking cognizance of the

offence by the special court under the old Act in such circumstances is perfectly justifiable and saving clause contained in section 30 was not exhaustive as well. The dictum laid down in the decision reported and relied on by the counsel for the appellant namely **Jagan M. Seshadri's case (cited supra)** is not applicable to the facts of this case as that was a case where though the offence was committed at the time when the old Act was in force and the final report was filed under the new Act and High Court had found that charge ought to have been framed under section 13(1)(e) of the present Act instead of section 5(1)(e) of the old Act and that was found to be not correct by the apex court in this decision as the provisions are inconsistent and if there is any inconsistency, the court should not have framed charge under the new Act but it should have been proceeded under the old Act. In this case, the offence was committed at the time when the old Act was in force and proceedings were initiated at that time, First Information Report was registered and final report was filed under the old Act though at that time the new Act has come into force and the court had taken cognizance of the case for the offence under the old Act and proceeded and convicted the

appellant under the old Act. In view of the dictum laid down in the decisions cited supra and relied on by this Court, the action of the Special Judge is perfectly justifiable and no illegality has been committed by the court below in taking cognizance of the case and proceeding against the appellant for the offences alleged under the old Act and the appellant is not entitled to get acquittal on that ground. The point is answered accordingly.

13. Point Nos. 2 & 3:

The accused were charge sheeted for the offences under sections 5(i)(c) and (d) read with section 52 of the P.C.Act, 1947 and sections 120B and 409 of the Indian Penal Code. The case of the prosecution was that while the first accused, who is the appellant herein was working as Warehouse Manager/Superintendent of Kottayam including the godown at Chingavanam, accused 1 to 3 have conspired and committed misappropriation of wheat worth ₹33,538.75 and rice worth ₹46,754.20 between the period 27.3.1986 and 22.3.1987 and thereby all of them have committed the above said offence.

14. Before going into the factual aspects, the legal aspects on this matter have to be considered. In the decision

reported in **Wilson J.Mangalam v. State** (2011(2) KHC 902)

this Court has held that:

Failure to maintain relevant registers and records by the public servant and thereby giving room for missing of properties also would amount to abuse of office punishable under sections 13(1)(c), 13(1)(d) and 13(2) of the Act.”

In the same decision it has been observed that:

“If a person in custody of the registers and responsible to maintain the registers allowed another person who was not responsible to account the goods or to make entries in the manner that person likes or omits to make entries that also would amount to abuse of the office”.

15. In the decision reported in **Jaikrishnadas Manohardas Desai and another v. State of Bombay** (AIR 1960 SC 889) it has been observed that:

“To establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of

property and failure, in breach of an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property, entrusted to him or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made”.

16. In the decision reported in **Krishan Kumar v. Union of India** (AIR 1959 SC 1390) it has been observed that:

“The offence under S.5(1)(c) is the same as embezzlement, which in English law, is constituted when the property has been received by the accused for or in the name or on account of the master or employer of the accused and it is complete when the servant fraudulently misappropriates that property.

Wrongful gain includes wrongful retention and wrongful loss includes being kept out of the property as well as being wrongfully deprived of property. Therefore, when a particular thing has gone into the hands of a

servant he will be guilty of misappropriating the thing in all circumstances which show a malicious intent to deprive the master of it.

It is not necessary or possible in every case to prove in what precise manner the accused person has dealt with or appropriated the goods of his master. The question is one of intention and not a matter of direct proof but giving a false account of what he has done with the goods received by him may be treated a strong circumstance against the accused person. In the case of a servant charged with misappropriating the goods of his master the elements of criminal offence of misappropriation will be established if the prosecution proves that the servant received the goods, that he was under a duty to account to his master and had not done so. If the failure to account was due to an accidental loss then the facts being within the servant's knowledge, it is for him to explain the loss. 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 enough to establish facts which give rise to a suspicion and then by reason of S.106 of the Evidence Act to throw the onus on him to prove his innocence.

If under the law it is not necessary or possible for the prosecution to prove the manner in which the goods have been misappropriated then the failure of the prosecution to prove facts it sent out to prove the manner of misappropriation or the identity of the goods would be of little relevance”.

17. The same view has been reiterated in the decision reported in **State of Kerala v. Vasudevan Namboodiri** (1987 (2) KLT 541) and **Bagga Singh v. State of Punjab** [1996 Crl.L.J 2883 (SC)].

18. Further in the decision in **M. Narayanan Nambiar v. State of Kerala** (AIR 1963 SC 116) while considering the scope of Section 5(1)(d) of Prevention of Corruption Act, 1947 that public servant causing wrongful loss to the Government by benefiting third party, it has been held that:

“As the Act is a socially useful measure conceived in public interest, it should be liberally construed so as to bring about the desired object i.e to prevent corruption among public servants and to prevent harassment of the honest among them. It will not be correct to say that S.5 (1)(d) would only take in cases of direct benefit obtained by a public servant for himself or for any other person

from a third party in the manner described therein and does not cover a case of wrongful loss caused to the Government by abuse of his power. Taking the phraseology used in the clause the case of a public servant causing wrongful loss to the Government by benefiting a third party squarely falls within it. The Act was brought in to purify public administration. When the Legislature used comprehensive terminology in S.5(1)(d) to achieve the said purpose, it would be appropriate not to limit the content by construction when particularly the spirit of the Statute is in accord with the words used therein.

The juxtaposition of the word 'otherwise' with the words "corrupt or illegal means", and the dishonesty implicit in the word "abuse" indicate the necessity for a dishonest intention on the part of the public servant to bring him within the meaning of the clause."

19. In the decision reported in **Vishwa Nath v. State of J. & K** (AIR 1983 SC 174) it has been held that once it is proved by the prosecution that the amount was entrusted and it was misappropriated by the public servant, then refund of the amount when act of defalcation discovered does not absolve him of the offence committed.

20. In the decision reported in **Som Nath Puri v. State of Rajasthan** (AIR 1972 SC 1490) it has been observed that :

“Section 405 I.P.C does not provide that the entrustment of property should be by someone or the amount received must be the property of the person on whose behalf it is received must be the property of the person on whose behalf it is received. As long as the accused is given possession of property for a specific purpose or to deal with it in a particular manner, the ownership being in some person other than the accused, he can be said to be entrusted with that property to be applied in accordance with the terms of entrustment and for the benefit of the owner. The expression 'entrusted' in S.409 is used in a wide sense and includes all cases in which property is voluntarily handed over for a specific purpose and is dishonestly disposed of contrary to the terms on which possession has been handed over.”

21. In the decision reported in **Jiwan Dass v. State of Haryana** (1999 Crl.L.J 2034) it has been held that if there are two persons in charge of the property and delivery and control was given to the junior officer who in token thereof had signed not only on cash memo but also on register itself entrustment of oil to senior officer or his dominion over same, not proved, mere fact that the said senior officer had taken bank draft and that authorization had been given in his favour

by his superior officer alone would not establish entrustment or his dominion over and conviction of the senior officer is unsustainable in such circumstances.

22. In the decision reported in **T. Retnadas v. State of Kerala** (1999 Crl.L.J 1488), it has been held that if entrustment of money to the accused is proved, failure of the accused established by preponderance of probability that he has discharged his duty to disburse the said amount to the beneficiaries, then conviction for offence for the misappropriation is established.

23. If a person in charge of the grain and disbursement of the grain was with another person he was responsible for the disbursement of the same and in the absence of evidence to show that the supervisor was entrusted with the article merely because he admits some endorsement that the article has been weighed and delivered in the presence of that accused will not be sufficient to convict him under section 408 of the Code of Criminal Procedure. This was so held in the decision reported in **State of Rajasthan v. Kesar Singh** (1969 Crl.L.J 1595) by the Rajasthan High Court. In the decision it has been observed that:

“In cases of criminal breach of trust a distinction has to be drawn between the person entrusted with property and one having control or general charge over the property. In case of the former, if it is found that the property is missing, without further proof, the person so entrusted will be liable to account for it. In the latter case, that person will be liable only when it is shown that he misappropriated it or was a party to criminal breach of trust committed in respect of that property by any other person”.

24. So, it is clear from the above decisions that once the entrustment of article is proved and there is a direction to disburse the articles in a particular manner and if the accused failed to explain the loss or account for the same in the manner required for or gives an explanation which is false or improbable, then dishonest intention and misappropriation can be inferred and the accused can be convicted for the offence of criminal breach of trust and misappropriation and if this was done by a public servant, then it will amount to misconduct and he can be convicted for the offence of his misconduct under the Prevention of Corruption Act as well. If a particular mode of discharge of the article entrusted is within the knowledge of the accused and failure from the part of the accused to prove

the same atleast by preponderance of probabilities, then also it can be presumed that he has got the dishonest intention of misappropriating the articles entrusted. Further, if he has got duty to maintain registers, then failure to maintain the registers and entrusted somebody and on account of which loss has been caused to the article entrusted, then also the public servant so entrusted will be said to have committed the offence of misappropriation and criminal breach of trust and misconduct which invites punishment for the offences alleged. It is always difficult for the prosecution to prove the modus operandi of the misappropriation committed by the accused. If the prosecution has proved the entrustment and loss or shortage of the article, then in the absence of any convincing evidence adduced on the side of the accused to account for the loss, then the burden of the prosecution is discharged and the burden of the accused is not discharged, then it will be entitled him in conviction. With this principles in mind the case in hand has to be considered.

25. It is an admitted fact that the first accused was the Superintendent of the Warehouse at Chingavanam in Kottayam and he was the Superintendent or Warehouse Manager of

other 19 godowns in Kottayam district and he had taken charge as per Ext.P2 proved by PW1 and it is also come out in evidence that he had taken charge as Warehouse Manger or Superintendent after physically verifying the articles in the godwon. It is also an admitted fact that second accused was an Assistant of the first accused in Chingavanam godown and third accused was a Class IV employee. It was brought out in evidence of Pws 2 and 4 to 7 that first accused was in charge of the godown and there was no written order of delegating the power of management of the godown to the second accused made by the first accused. It is also brought out in evidence that the first accused was responsible for verifying the stock deposited and issuance of releasing order of the articles to be delivered to the third parties and it was he who is preparing the release order on the basis of which the articles were released to the third parties from the godown. It is also admitted by the accused and proved by the prosecution evidence by producing Exts.P13 to P39, copies of the warehouse receipt, Exts.P42 to 49, original warehouse receipts, Exts.P51 series weighment slip books and Exts.P54 to P56 stock registers and deposit registers maintained in the Warehouse Corporation

will go to show that all these documents were issued or maintained by the first accused after verifying the list issued from the godown. So, it is clear from the above that he has been entrusted with the articles and he is having domain over the articles entrusted and without his knowledge, no article can go out of the godown.

26. It is also seen from the evidence of Pws 1 and 2 that at the time of taking charge, physical verification of the stock was done and it was found that there was a shortage of wheat and rice and thereby loss has been caused. This was fortified by verification report, Ext.P3 original which was produced and marked as Ext.P4 in C.C.No. 35/1999 of the same court in connection with the same crime. It was signed by the first accused as well. So he cannot now say that there was no shortage found. He had also no case that there was no shortage. But his case was that he was not responsible for the shortage and that could have happened due to shrinkage, normal loss of weight, transit loss and calculation at the time of weighing the articles. But it will be seen from the evidence that shortage was found on the basis of verification of the stock noted in the stock register and the actual stock available

in the godown. It is also come out in evidence that in none of the stock registers or the receipt given at the time of receiving stock in the godown, any shortage was noted. Further, it was also brought out in evidence that allowable shortages have been taken into consideration while fixing the shortage found to assess the loss. It is on that basis that it was found that an amount of Rs.33,538.75 towards the loss of wheat and Rs.46,754.20 being the value of the rice were fixed in this case during the period 23.3.1987 and 16.11.1987.

27. Further the evidence of Pws 1 to 4 and 7 will go to show that all the registers namely stock register, delivery receipt, release order etc were signed by the first accused which will be evident from Exts.P54 to P57. It is also brought out in the evidence of all these witnesses that no article can be released or received without approval of the first accused. It is also brought out in the evidence of all these witnesses that though second accused was assisting the first accused in the godown, there is no independent charge given to him in respect of that godown and everything was done under the supervision and direction of the first accused. So, under the circumstances, it cannot be said that the first accused was not

in control or domain over the articles and second accused was independently handling the articles in respect of that godown as claimed by the counsel for the appellant.

28. Merely because there was some error in the balance used in the godown is not a ground to come to the conclusion that there was no shortage at all. The accused had no case that articles were weighed using that balance and on account of that, deficit in the quantity received could not be noticed.

29. As per the rules, circulars and guidelines issued under the Kerala Warehouse Act, 1960 and Kerala Warehouse Rules, 1961, it is the duty of Warehouse Manager to maintain the records and verify the stock from time to time and if any loss has been caused, he will be responsible for the same. It will be seen from Ext.P4 affidavit given by accused 2 and 3 that articles were delivered as instructed by the first accused. Further it is evident that without the knowledge of the first accused, no article can be received or go out of the godown as well and everything has been entered in the respective register and signed by the first accused after verification of the documents received from the godown. Delivery of the articles is made from the godown on the basis

of the release order issued by the first accused. So, without the delivery order or direction from the first accused, the second accused cannot deliver the articles to the third parties. There is an admission on the part of the second accused in Ext.P4 affidavit that articles were delivered to several persons without any document. But according to him, it was done as instructed by the first accused. So, it is clear from this that the transaction of delivering the articles without proper document from the godown, against the directions and the purpose for which it has been given was done with the active connivance of accused 1 and 2.

30. It is settled law that in the case of conspiracy, it is very difficult to prove the same by direct evidence. But it can be only established through circumstantial evidence and attending circumstances leading to culmination of the act has to be considered for the purpose of inferring conspiracy on the part of the accused persons in executing the illegal agreement entered into between to do an unlawful act in an illegal manner or lawful act by illegal means. So it is clear from this that the articles were sent out of the godown without any document with the dishonest intention of causing loss or making

unlawful gain for accused 1 and 2 and thereby the court below was perfectly justified in coming to the conclusion that the first and second accused have conspired together to commit the illegal act of misappropriation by doing certain things in an illegal manner with dishonest intention of causing loss to the Government and thereby they have committed the offence punishable under section 120 B of Indian Penal Code.

31. Once entrustment of the article is proved and shortage is also found out, then the burden is on the accused to prove as to how the shortage had occurred. Merely giving some false explanation or giving some explanation which could not be established alone is not sufficient to discharge him from that obligation of accounting for the loss sustained. If the burden cast on the accused is not discharged atleast by preponderance of probabilities, then it can only be inferred that he had misappropriated the articles entrusted with the dishonest intention of causing loss to the Government or unlawful benefit to somebody else or for others, thereby they have committed the offence punishable under section 409 of the Indian Penal Code.

32. The evidence of DW1 that accused 2 and 3 had

given Ext.P5 as instructed by deceased Balachandran, who is having enmicial terms with the first accused, cannot be believed as there is no other evidence adduced on the side of the accused to prove that fact. So, the lower court was perfectly justified in rejecting the evidence of DW1 especially when the first accused had signed the verification report, Ext.P3 which will go to show that physical verification of the articles was done and the shortage was noted in his presence.

33. It is also settled law that it is not possible for the prosecution to prove the modus operandi of the accused in causing loss or misappropriating the amount or articles entrusted. It is also not possible to prove the exact loss that has been caused and merely because these things are not established, it cannot be said that the prosecution had not succeeded in establishing the guilt of misappropriation against the accused beyond reasonable doubt. The modus operandi and as to how the loss occurred are within the knowledge of the accused and in the absence of any evidence adduced on the side of the accused to discharge his burden it can only be presumed that he had committed the offence and he is liable to be punished for the same. So, under the circumstances, the

court below was perfectly justified in coming to the conclusion that the first accused had committed the offence punishable under section 409 of the Indian Penal Code. Once it is proved that he had committed the offence of misappropriation in conspiracy with the second accused, then it will amount to misconduct under section 5(1)(c) and (d) of the P.C. Act which is punishable under section 5(2) of the said Act. So under the circumstances, the court below was perfectly justified in convicting the first accused, who is the appellant herein, for the offences under sections 409 of the Indian Penal Code and sections 5(1)(c) and (d) read with section 5(2) of the P.C. Act and the findings on this aspect do not call for any interference. The points are answered accordingly.

34. Point No.4. Learned counsel for the appellant submitted that the sentence imposed is harsh and the appellant has already retired from service and an aged person.

35. On the other hand, learned Public Prosecutor submitted that the sentence imposed is proper and legal.

36. The appellant was sentenced to undergo rigorous imprisonment for four years and also to pay a fine of Rs.90,000/-, in default to undergo simple imprisonment for 1 ½

years under section 5(1)(c) read with section 5(2) of the P.C. Act, 1947 and further sentenced to undergo rigorous imprisonment for two years under section 5(1)(d) read with Section 5(2) of the P.C. Act and further sentenced to undergo rigorous imprisonment for two years each for the offences under sections 120 B and 409 of the Indian Penal Code and directed the sentences run concurrently and set off was allowed for the period of detention already undergone under section 428 of the Code.

37. It is settled law that P.C. Act itself was enacted for the purpose of cleansing the administration and to eradicate corruption in the public administration system. Showing leniency in sentence in such cases will only give a wrong signal to the society and person dealing the public administration system. In cases where corruption is proved or offences under the special enactment has been established, then normally they must be dealt with severe punishment so as to give a message to others that if they commit such offence, they will also have to face the same consequences.

38. It is settled law in respect of sentencing policy that showing of unnecessary leniency on flimsy grounds in imposing

lesser sentence will only give a wrong signal to the public and it will cause loss of confidence of the public in the criminal justice delivery system. Considering the fact that the first accused was sentenced for two years each for the offences under section 5(1)(d) read with section 5(2) of the P.C. Act and 120 B and 409 of the Indian Penal Code, this Court feels that imposing the same substantive sentence for the offence under section 5(1)(c) read with section 5(2) will be sufficient and to that extent the sentence can be modified. Imposing a fine of Rs.90,000/- though justified, default sentence of 1 ½ years imposed appears to be little excessive considering the fact that substantive sentence itself was awarded only for two years. So, the default sentence can be reduced to six months and that will meet the ends of justice. So the sentence imposed for the offence under section 5(1)(c) read with section 5(2) of the P.C. Act is set aside and modified by sentencing the first accused to undergo rigorous imprisonment for two years and also to pay a fine of Rs.90,000/-, in default to undergo simple imprisonment for six months retaining the other sentence imposed by the court below and direction to run substantive sentences concurrently. So, the sentence is

modified as follows:

The appellant is sentenced to undergo rigorous imprisonment for two years and also to pay a fine of Rs.90,000/-, in default to undergo simple imprisonment for six months under section 5(1)(c) read with section 5(2) of the P.C. Act and further sentenced to undergo rigorous imprisonment for two years each for each of the offences under section section 5(1)(d) read with section 5(2) of the P.C. Act, 1947 and section 120 B and 409 of the Indian Penal Code and substantive sentences are directed to run concurrently. Set off is allowed for the period of detention already undergone. The points answered accordingly.

In the result, the appeal is allowed in part confirming the order of conviction but modifying the sentence to the extent mentioned above.

Sd/-

K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

cl

K. RAMAKRISHNAN, J.

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Crl.A.No.492 of 2001

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10th day of June, 2015.

O R D E R