THE HON'BLE SRI JUSTICE M.S.K.JAISWAL

CRIMINAL REVISION CASE No.1061 of 2009

ORDER:

This Criminal Revision Case is filed by the revision petitoner/A1 against the judgment in Crl.A.No.127/2007, dated 30.06.2009 on the file of the IV Additional District & Sessions Judge (FTC), Mahabubnagar, by and under which, the conviction and sentence as imposed by the trial Court was confirmed.

2. Heard the learned counsel appearing for the revision petitioner/A1 and the learned Additional Public Prosecutor, representing the State.

3. The case of the prosecution is that on 17.01.2003 PW 4-Sub-Manager and PW 2-Cashier of Andhra Bank, Jadcherla, located at Badepally, on the instructions of PW 1-Manager, took out cash of Rs.9,50,000/- from the strong room and handed over to PW 3-Cash peon to prepare proper bundles and for labelling in order to remit the said amount at Mahabubnagar Main Branch. At about 2.30 p.m. on the same day PW 2-Cashier in the presence of PW 3-Cash Peon on the instructions of PWs 1 & 4-Manager & Sub-Manager, handed over the said cash of Rs.9,50,000/- in the denomination of 100 x 7000 & 50 x 5000 to A1 & A2, who were Clerk and Attender of the Bank for purpose of remitting the said amount in Mahabubnagar Main Branch. But A1 & A2 remitted only an amount of Rs.7,00,000/- at Mahabubnagar Branch with PW 5-Joint Custodian-cum-cashier at Andhra Bank, Mahabubnagar and knocked away the remaining amount of Rs.2,50,000/- for their personal benefits. In this regard, PW 1 lodged a complaint before the Station House Officer, Jadcherla and the same was registered as a case in Cr.No.8/2003 of Jadcherla P.S. under Section 409 IPC, and after investigation, the police filed charge sheet.

4. On appearance of the accused before the trial Court, they were examined under section 239 Cr.P.C, and the charge under section 409 IPC has been framed against A1 & A2, for which they pleaded not guilty.

5. During course of trail, the prosecution examined PWs 1 to 10 and got marked Exs.P1 to P6 and M.O.1. After closure of the prosecution evidence, the accused was examined under Section 313 Cr.P.C putting all incriminating material available against them. Accused denied the material evidence and no oral evidence was adduced on their behalf, but the copy of writ petition in WP.No.1420/2003 and 161 Cr.P.C statements of PWs 3 and 4 were marked as Exs.D1 to D3 on their behalf.

6. On appreciation of oral and documentary evidence, the trial Court found A1 & A2 guilty of the offence alleged, convicted them for the offence under Section 409 IPC and sentenced A1 to undergo simple imprisonment for a period of two years and to pay a fine of Rs.3,000/-, in default to suffer simple imprisonment for a period of six months, and sentenced A2 to undergo simple imprisonment for a period of one year and to pay a fine of Rs.1,000/- in default to suffer simple imprisonment for a period of three months.

7. Challenging the conviction and sentence passed by the trial Court, both A1 & A2 preferred appeal in Crl.A.127/2007 before the lower appellate Court. The learned Sessions Judge, on re-appreciation of oral and documentary evidence, dismissed the appeal while confirming the conviction and sentence recorded by the trial Court against both the accused. Aggrieved by the same A1 filed the present criminal revision case.

8. Now the point that arises for consideration in this revision is whether the conviction and sentence imposed by the Courts below against the revision petitioner/A1 for the offence under Section 409

IPC is legal and sustainable.

9. The petitioner was A.1 and he along with non-petitioner/A.2 who subsequently died during the pendency of the trial are alleged to have misappropriated a sum of Rs.2.50 lakhs belonging to Andhra Bank, on 17-01-2003. The petitioner was the Cashier whereas the non-petitioner/A.2 was a Daffary. They were working in Jedcherla Branch. The procedure of the Bank is that they are not supposed to keep liquid cash in the branch exceeding certain limits. The excess amount was required to be deposited by Jedcherla Branch in the Andhra Bank branch at Mahabubnagar or was to be sent to the S.B.H., Branch at Jedcherla. On several occasions in the past, excess amount was being sent to either Andhra Bank, Mahabubnagar or S.B.H., and the petitioner and others responsible staff of Jedcherla Branch were being entrusted with the task of taking the cash and depositing in their Head Office at Mahabubnagar. They were being provided with the assistance of one sub-staff and the non-petitioner/A.2 was one such person.

10. The admitted case is that on 17-01-2003, the duty of remitting the cash in Andhra Bank, Mahabubnagar was entrusted to the petitioner/A.1 with the assistance of the non-petitioner/A.2. A sum of Rs.9.50 lakhs was required to be taken from Jedcherla Branch to Mahabubnagar Branch which is hardly at a distance of about 20 KMs., and which can be covered within a span of about half-an-hour. PW.1 was the Branch Manager at Jedcherla at the relevant time. It is in his evidence that on the date of incident viz., 17-01-2003, A.1 and A.2 were entrusted with a sum of Rs.9.50 lakhs to be deposited at Mahabubnagar. Ex.P.2 is the remittance schedule which is signed by A.1 and A.2 after receiving cash of Rs.9.50 lakhs. PW.3 was working as a Cash Peon at Jedcherla Branch. On the date of the incident, as per the instructions of his superiors, PW.3 prepared cash bundles of ‘100’ denomination and ‘50’ denomination notes, totalling to Rs.9.50

lakhs and handed it over to the Bank Cashier. The said bundles were put in a brief-case-M.O.1 and handed over to the cashier. It is also in the evidence of PW.4 that himself and the Cashier-PW.5 took out the cash from the strong room and that was kept in the brief-case. According to PW.4 also the cash was counted and bundles were prepared and the petitioner/A.1 prepared the voucher-Ex.P.2 and after verifying the amount, he put his signature thereon. It is also in the evidence of PW.5 that the said amount duly kept in the brief-case was locked properly and handed over to A.1 and A.2 along with its key. The above facts are spoken to by PWs.1, 2, 3, 4 and 5. The evidence of the five bank officials including the sub-staff would clearly show that a sum of Rs.9.50 lakhs was taken from the strong room, they were tied into the bundles and the same was kept in a brief-case duly locked and handed over to A.1 for being deposited in Mahabubnagar Branch. It is also in the evidence that at about 2.45 p.m., A.1 and A.2 left the Branch with the brief-case, but by about 04.00 p.m., a phone call was received in the Branch that the brief-case only contained Rs.7 lakhs but not Rs.9.50 lakhs and hence it is A.1 and A.2, who were made accountable and liable for the disappearance of Rs.2.50 lakhs from brief-case which was duly locked in their presence and the key was handed over to A.1.

11. After minutely perusing the evidence on record, what is noticed is that a specified procedure was followed in remitting the excess cash from Jedcherla Branch to the Head Office Branch at Mahabubnagar. The amount was kept in a brief-case and was properly locked. Key was given to A.1. The brief-case was not sealed as such. It is A.1 who has filled up the voucher-Ex.P.2, which was required to be presented at Mahabubnagar Branch and Ex.P.2 contains the signature of both A.1 and A.2 and it is also spoken to by the witnesses that it was filled up by A.1. That means, it is A.1 who

has verified the cash duly being kept in the brief-case and after it was locked, the key was with him and he has filled up the voucher and himself and the sub-staff supposed to accompany him viz., A.2 who subsequently died has signed thereon. It is also on record that when the accused reached Mahabubnagar branch and the brief-case was opened, the amount was found to be short by Rs.2.50 lakhs. There was no damage to the brief-case. The lock was not tampered. The key was with A.1. The brief-case was in the exclusive custody of A.1. It is he who took the brief-case from Jedcherla Branch to Mahabubnagar Branch in a RTC bus belonging to Karnataka State. Immediately on reaching Mahabubnagar Branch, the amount was found to be short and A.1 not only informed his superiors at Jedcherla Branch but also informed the II-Town P.S., at Mahabubnagar, who immediately swung into action, intercepted the bus at some distance, checked and searched the bus and the passengers travelling therein but did not find the cash. On matter being informed to the branch, higher officials were immediately alerted and even the A.G.M., from Kurnool reached the Branch at Jedcherla. The Branch Manager and the A.G.M. all counted the cash at Jedcherla Branch and verified the same with reference to the records but did not find any cash in excess in the Branch, thereby implying that the amount that was kept in the brief-case was Rs.9.50 lakhs but not Rs.7 lakhs as was found when the brief-case was opened at Mahabubnagar branch by A.1. The Bank officials and police officials have taken all precautions and checked and cross-checked all facts. It is also on record that as per the instructions of the Superintendent of Police to whom the matter was reported at about 09.00 p.m., on 17-01-2003, the houses of all the employees working in Jedcherla Branch including the accused were searched. However, no cash was recovered. Subsequently, on 18-01-2003 at about evening official complaint was lodged which was registered and investigation taken up.

12. From the above facts, the aspect that is evident is that it is A.1 who being a responsible cashier in Jedcherla Branch was entrusted with the cash duly kept in a brief-case, properly locked and the key was with A.1 and the brief-case was in the exclusive custody of A.1 till he reached Mahabubnagar Branch. Therefore, it is he who is accountable and answerable for the deficit or shortfall, if any, in the amount that is kept in the brief-case. As already stated, the matter would have been different had it been sealed by a Branch Manager at Jedcherla Branch and the seal was found in tact when the brief-case reached Mahabubnagar Branch. That was not the case. The brief-case was securely locked and the key was in the exclusive custody of A.1 for nearly two hours. When the brief-case is opened, if the cash is deficit, it is A.1 who is answerable and accountable and none else. It is also on record that neither there was any external damage to the brief-case nor was the lock tampered with for suspecting the hand of any external element.

13. The contention of the petitioner/A.1 is that he is charged with an offence punishable under Section 409 IPC., which is criminal misappropriation and the facts of the case do not attract the ingredients thereof. Reliance is placed upon the decision of the Supreme Court reported in **KAILASH KUMAR SANWATIA v. THE STATE OF BIHAR AND ANR**[1] wherein the Supreme Court held as under in pars 7, 8 and 9:-

> "Section 409 IPC., deals with criminal breach of trust by public servant, or by banker, merchant or agent. In order to bring in application of said provision, entrustment has to be proved. In order to sustain conviction under Section 409, two ingredients are to be proved. They are:-
>
> (1) the accused, a public servant, or banker or agent was entrusted with property of which he is duty bound to account for; and
>
> (2) the accused has committed criminal breach of trust.

What amts to criminal breach of trust is provided in Section 405 IPC. Section 409 is in essence criminal breach of trust by a category of persons. The ingredients of the offence of criminal breach of trust are:-

1) Entrusting any person with property, or with any dominion over property.

2) The person entrusted (a) dishonestly misappropriating or converting to his own use that property; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so as to do in violaltion –

(i) of any direction of law prescribing the mode in which such trust is to be discharged; or

(ii) of any legal contract made touching the discharge of trust.

The basic requirement to bring home the accusations under Section 405 are the requirements to prove con-jointly (1) entrustment and (2) whether the accused was actuated by the dishonest intention or not misappropriated it or converted it to his own use to the detriment of the persons who entrusted it. As the question of intention is not a matter of direct proof, certain broad tests are envisaged which would generally afford useful guidance in deciding whether in a particular case the accused had mens rea for the crime."

14. The facts before the Supreme Court are quite distinct and different from the one in the case on hand. In the decision referred to above, cash was entrusted to a bank employee admittedly and the said amount was found missing from the cash counter. Since the amount was missing from the cash counter, it was held that it could not be treated as the amount being misappropriated by the cashier. In that case, the cash was kept in the counter and due to theft by somebody else the cash disappeared because there was an intervening situation in between entrustment of the cash and the inability of the cashier to comply with the requirement of the customer who gave the cash. Therefore, it was held that there was no misappropriation. However, in the instant case, there is no any intervening situation which can be

said to have incapacitated the petitioner/A.1 from remitting the cash which he took from the Branch in the Head Office at Mahabubnagar.

15. Even at the cost of repetition, it may be stated that the facts that are proved are that A.1 being a responsible cashier in Jedcherla branch was entrusted with the job of remitting the amount at Mahabubnagar branch and for that purpose, the cash was taken out, counted and bundled, kept in the brief-case, locked securely, key was handed over to A.1, deposit voucher was prepared by A.1 himself and it was signed by both A.1 and A.2, that the brief-case was handed over to the accused and he was in the exclusive custody of A.1 for nearly two hours. What happened during transit from Jadcherla branch to Mahabubnagar which as already stated is hardly at the distance of about 20 KMs., is not known but when the brief-case reached Mahabubnagar branch, the brief-case had no external signs of damage nor was there any evidence of the locks being tampered with, but the key was in the safe custody of A.1 and when the brief-case was opened, cash was found to be deficit by 2.50 lakhs and it is A.1 who alone had access to the brief-case together with its key and none else had any scope for meddling with the contents in the brief-case.

16. Learned Counsel for the petitioner/A.1 submits that A.1 being the custodian of the brief-case containing the cash and the key thereof, would have been the last person to tamper with the contents thereof, obviously for the reason that he knows for sure that it is he and he alone is accountable and answerable for the deficit, if any, in the contents of the brief-case of which he was custodian. It is further submitted that it is not as though that the petitioner/A.1 has disappeared with the brief-case for any point of time. Admittedly, within less than two hours after having left the Branch at Jedcherla, he reached the Head Office at Mahabubnagar and it is he himself who opened the brief-case at Mahabubnagar Branch, and found the cash to

be missing and without loosing any time, alerted the superior officers at Jedcherla Branch and also informed the local police who immediately swung into action and when the bank officials checked the cash in the branch, the police officials have searched the bus and the other passengers travelling therein. Learned Counsel therefore submits that A.1 would not have conducted himself in such manner had he been really guilty of having opened the brief-case and took out any amount there from. This submission of the petitioner/A.1, no doubt, sounds attractive but I am afraid no credence thereto can be given for the reason that mainly because A.1 conducted in a most diligent manner immediately after he noticed the shortfall in the amount in the brief-case it cannot exonerate or exculpate or in any way mitigate the accountability or answerability of A.1 for the contents in the brief-case which was in his exclusive custody along with its key, an element of doubt could have arisen had the key of the brief-case been in the custody of any person other than A.1 or there were any signs of damage to the brief-case or tampering with the lock. Since that is not the case in hand, the petitioner/A.1 cannot be heard saying that he cannot be held responsible for the shortfall in the amount in the brief-case considering his conduct immediately on his reaching the bank at Mahabubnagar, opening the brief-case, and finding the amount to be short of Rs.2.50 lakhs.

17. Upon appreciating the entire material on record and having perused the Judgments of both the Courts below, I find myself in agreement with the concurrent findings arrived at by both the Courts below that it is A.1 and the deceased A.2 who are responsible for the disappearance of the cash and they are rightly found guilty of the charge punishable under Section 409 IPC.

18. With regard to the quantum of sentence, it is submitted that the petitioner/A.1 who has been sentenced to undergo R.I. for two years and fine of Rs.3,000/- has already suffered the punishment of

dismissal from service. It is further submitted that when the incident took place in the year 2003, he was aged about 40 years and at present, he is aged more than 50 years and therefore, a lenient view in the matter of sentence is prayed for.

19. Considering the above facts and circumstances and the totality thereof and the circumstances in which the cash disappeared from the brief-case, I feel that the ends of justice will be met if the petitioner/A.1 is sentenced to undergo S.I. for six months for the offence punishable under Section 409 IPC., instead of two years as imposed by both the Courts below. Subject to this modification, the revision is liable to be dismissed. Fine amount is sustained.

20. In the result, the Criminal Revision Case is dismissed, confirming the conviction recorded by the Courts below against the petitioner/A1 for the offence under section 409 IPC, however, the sentence of imprisonment is reduced from two years simple imprisonment to six months simple imprisonment. Rest of the sentence of imposition of fine shall stand sustained. The trial Court shall take steps, in accordance with law, for apprehending the revision petitioner/A1 for serving the sentence.

Pending miscellaneous applications, if any, shall stand closed in consequence.

M.S.K.JAISWAL,J

Date: 21.12.2015
Dsr/Smr

[1] AIR 2003 SC 3714