

HON'BLE SMT. JUSTICE ANIS

CRIMINAL REVISION CASE No. 1005 OF 2008

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ORDER:

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This Criminal Revision Case under Sections 397 and 401 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C') is filed by the revision petitioner/accused challenging the judgment dated 09.07.2008, passed by the learned III Additional Sessions Judge, Tirupati, in Criminal Appeal No.143 of 2005, whereunder and whereby the conviction and sentence passed against the revision petitioner for the offence punishable under Section 408 of the Indian Penal Code, 1860 (for short 'IPC'), vide judgment dated 07.06.2005 in C.C.No.28 of 2002 by the

II Additional Judicial Magistrate of I Class, Tirupati, were confirmed.

2. The revision petitioner herein is the accused and the respondent herein is the complainant in C.C.No.28 of 2002 before the trial Court. For the sake of convenience, the parties hereinafter will be referred to as they are arrayed in the C.C. before the trial Court.

3. The case of the prosecution is brief is that the accused was working as unobserved N.M.R. Assistant on the time scale in Health Office, TTD, Tirumala, whereas PW1, the *de facto* complainant, is working as Health Officer in the same office. PW1, being the Health Officer, purchases pesticide medicine for preventing malaria. For that purpose, PW1 used to depute some of the staff members to Chennai for purchasing medicine which is called as malaria oil from Indian Oil Corporation, Chennai. During the course of time, in the year 2000, PW2, who was working as Field Assistant in the Malaria Department, TTD, Tirumala, has handed over a demand draft for Rs.1,47,137/- and cash of Rs.15,000/- to PW3 – another Field Assistant for purchase of malaria oil at Chennai. Accordingly, PW3 took the demand draft and cash of Rs.15,000/- from PW2 and went to Chennai, but he was informed that the rate has been increased and the amount carried by him was not sufficient to purchase malaria oil. Therefore, PW3 returned back and handed over the demand draft and cash of Rs.15,000/- to PW2. Later on, as per the instructions

of the then Office Superintendent P.Subrahmanyam, A.A.O., Audit Office, TTD, Tirupati (LW7), PW2 handed over the demand draft and cash of Rs.15,000/- to the accused after obtaining a receipt for the same under Ex.P.2. As per the procedure, the accused has to credit cash of Rs.15,000/- and the demand draft by way of challan to the TTD account, Tirupati. But, the cash of Rs.15,000/- was not remitted to the TTD account by the accused as per the procedure. The said transaction did not come to the notice of PW1 since the Superintendent concerned was looking after the wing in the absence of regular Senior Assistant who was on long leave and further there was no Assistant Executive Officer at that time since the post fell vacant on account of retirement of one N.Jayaram and it was not filled up. During the verification of office records, PW4 – O.S.D. found that the accused failed to remit the cash of Rs.15,000/- to the TTD account in Andhra Bank. Thereafter, the said fact was informed to PW1 by PW4. Accordingly, PW1 called for the accounts and also summoned PW5 – Junior Assistant, Health Office, TTD, Tirumala, who in turn showed the challan pertaining to Rs.1,47,137/- to PW1 and submitted that there is no challan for cash of Rs.15,000/-. Then, the matter was brought to the notice of PW1 through PW4. Thus, the accused was found to have misappropriated the TTD funds of Rs.15,000/- when the said amount was entrusted to him as a Government servant for remitting the same to the TTD account. Further, the accused failed to produce the challan to the TTD authorities and on the other hand started abstaining from attending the duties from then onwards. Therefore, after obtaining the directions from the Executive Officer, TTD, PW1 lodged a complaint before the Deputy Superintendent of Police, Tirumala for taking necessary criminal action against the accused. After receiving the complaint from the DSP Office, Tirumala, PW6 – S.I. of Police, registered the same as a case in Crime No.187 of 2001. Then, PW6 took the investigation, examined the witnesses and recorded their statements. Further, on 27.11.2001, the accused was arrested and forwarded before the Court for judicial remand. After completion of investigation, PW6 filed the Charge sheet into the Court.

4. The learned II Additional Judicial Magistrate of I Class, Tirupati, took cognizance of the case and framed charge against the accused for the offence punishable under Section 408 IPC.

5. During the course of trial, to prove the case of prosecution, PWs.1 to 6 were examined and Exs.P.1 to P.3 were got marked.

6. After closure of the prosecution evidence, the accused was examined under Section 313 Cr.P.C putting all incriminating material available against him. Accused denied the material evidence and reported no oral or documentary evidence on his behalf.

7. The trial Court, after considering the evidence of PWs 1 to 6 and Exs.P.1 to P.3, came to a conclusion that the prosecution proved the ingredients attracting the provisions of Section

408 IPC, and thereby convicted the accused for the offence punishable under Section 408 IPC and sentenced him 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 one month.

8. Aggrieved by the conviction and sentence passed by the trial Court, the accused preferred Criminal Appeal No.143 of 2005 before the III Additional Sessions Judge, Tirupati, where the appellate Court after hearing the arguments and considering the evidence on record, dismissed the appeal by confirming the conviction and sentence passed by the trial Court.

9. Being aggrieved by the judgment of the appellate Court passed in Criminal Appeal No.143 of 2005, the revision petitioner preferred the present revision case.

10. The learned counsel for the revision petitioner/accused argued that the prosecution failed to prove that there was an entrustment of money to the accused, but as per the records, the other officers were entrusted with the cash and demand draft; that the petitioner is no way concerned with the transaction; that PW1, Health Officer, gave the demand draft and cash to PW2 and in turn he gave it to PW3, and as PW3 was unable to purchase the malaria oil due to cost factor, he returned the demand draft and cash to PW2; that the petitioner is not the competent person to receive the demand draft and cash; that the petitioner was implicated in this case by the staff working in Malaria Department; that the prosecution failed to prove the abnormal delay in lodging the complaint as the alleged misappropriation was found on 02.12.2000 and

11.05.2001, but strangely the complaint was lodged on 07.11.2001; that according to the prosecution, as per the directions of LW7, PW2 entrusted the demand draft and cash to the petitioner, therefore the evidence of LW7 is crucial to prove the link between PW2 and the petitioner, and he is the best witness to speak about the alleged transaction; and that the trial Court as well as the appellate Court failed to appreciate the evidence of PW1 in proper perspective.

The learned counsel for the revision petitioner/accused relied on a case-law reported in *Bore Gowda Vs. State of Karnataka*, wherein the Hon'ble Supreme Court held at Para 2 and 3 as follows:

“These are cases where the appellant was convicted under Section 408 of the Indian Penal Code and his sentence has been reduced to rigorous imprisonment for one month. He was Secretary of a cooperative society. During audit report some irregularities had been detected on the basis of which he was prosecuted. The irregularities happened in the year 1981-82. The 3 instances for which the present cases have been registered and charge-sheeted pertain to small amounts like Rs 1812 and below. Learned counsel for the appellant submitted that as soon as the irregularities had been pointed out the appellant had replenished the entire amount together with interest which means the Society had not been put to loss.

In view of the aforesaid circumstances and also the fact that it happened in the year 1981-82 we are of the view that the benevolent provisions of the Probation of Offenders Act can be extended to this appellant. We, therefore, order that the appellant instead of undergoing the sentence be released on his executing a bond before the trial Court for keeping peace and be of good behaviour for a period of 3 years. The bond shall be supported by two solvent sureties for a sum of Rs 3000. The sentence will hence stand suspended sine die.”

The learned counsel also relied on a case-law reported in *State Vs. M.Govardhan Reddy and another*, wherein this Court held at Para 24 as follows:

“Further, in this case, the shortage of cash was noticed on 9.9.2000 in the course of inspection conducted by K.C. Veeraiah, Circle Auditor. It was confirmed in the surprise joint check carried out by the bank officials along with CBI officials on 17.10.2000. The FIR was registered by PW4-Inspector of Police, CBI, Hyderabad on 3.1.2002. Thus, there was a delay of nearly 15 months in registering the first information report. The delay has not been properly explained by the prosecution. The delay in filing the FIR in this case is very much material and also fatal to the case of the prosecution because from the delay it can be understood that the bank was wavering in its decision to fix up the responsibility relating to the act of misappropriation committed in the bank.”

and finally, prayed the Court to allow the revision case by setting aside the impugned judgment of the appellate Court.

11. On the other hand, the learned Public Prosecutor argued that the prosecution was able to prove the guilt of the accused for the alleged offence; that the prosecution examined PWs 1 to 6 who categorically stated that the accused committed the offence punishable under Section 408 IPC; that in Ex.P.2, the accused himself stated about receipt of demand draft and cash from PW2, hence the accused cannot deny the transaction; that both the Courts below concurrently held that the accused committed the offence punishable under Section 408 IPC, and finally prayed the Court to dismiss the revision case.

12. Now, the point for determination is --

Whether the revision petitioner/accused is entitled to set aside the concurrent judgments passed by the trial Court as well the appellate Court for the offence punishable under Section 408 IPC?

13. **POINT:**

A perusal of the evidence shows that while PW1 was working as Health Officer at TTD, Tirumala, the accused was also working as NMR Health Assistant in the time scale at TTD, Tirumala. According to PW1, PW4 informed him that cash of Rs.15,000/- was found to be in shortage. After receiving the said information, PW1 enquired into the matter with LW7 T.Subramanyam, under whose directions cash of Rs.15,000/- was handed over to the accused by PW2. PW1 also stated that it was brought to the notice of PW1 by PW4 that the accused was not remitted the cash into the bank and the said fact was brought to the notice of Joint Executive Officer, Tirumala as well as Executive Officer, TTD by PW1, and then PW1 gave a report to the DSP, Tirumala for taking action.

14. PW2 stated that he is working as Sanitary Inspector at TTD, Tirumala and PW3 is working as Field Assistant. According to PW2, he handed over the demand draft of Rs.1,47,137/- and cash of Rs.15,000/- to PW3 for purchasing

malaria oil from Chennai. Thereafter, PW3 went to Chennai, but he could not purchase due to increase of price and handed over the demand draft as well as cash to PW2. Further, according to PW2, as per the instructions of LW7 - T.Subramanyam, Office Superintendent, PW2 handed over the demand draft and cash of Rs.15,000/- to the accused and obtained the receipt under Ex.P.2 from the accused. PW3 supported the evidence of PW2 regarding handing over the cash and demand draft to PW2 for purchasing malaria oil from Chennai.

15. The evidence of PWs 4 and 5 shows that on the verification of the accounts, they found that there is a challan for Rs.1,47,137/-, but there is no challan for Rs.15,000/- in the bank account.

16. Basing on Ex.P.1, PW1 lodged a complaint. Further, basing on Ex.P.2 – receipt given by the accused, both the Courts below held that the accused was entrusted with the demand draft and cash by PW2 as per the instructions of LW7, but the accused failed to deposit the amount in the TTD account of Andhra Bank, and thus, the accused committed the offence punishable under Section 408 IPC.

17. Insofar as entrustment of cash to the accused is concerned, PW2 is working as Sanitary Inspector in the TTD, Tirumala, whereas the accused is working as NMR Health Assistant in the timescale at TTD, Tirumala. The prosecution has to establish that whether the accused is empowered to receive the cash and demand draft from PW2 and to deposit the same in the TTD account of Andhra Bank. Actually PW2 received the demand draft and cash from PW3 as PW3 was unable to purchase the malaria oil from Chennai due to increase in the rates. Then, PW2 in turn should have been deposited the amount in the bank and also the demand draft as the purpose of purchasing malaria oil was not materialised. But, basing on the instructions of LW7 – Office Superintendent, PW2 entrusted the demand draft and cash to the accused. The important link between PW2 and the accused is LW7, but the prosecution strangely failed to examine LW7 to prove that as per his instructions only, PW2 entrusted the demand draft and cash to the accused.

18. According to the prosecution, the accused without depositing the cash in the TTD account of Andhra Bank, misappropriated the amount and absconded from the duties thereafter. This piece of evidence strengthens the case of the

prosecution that the accused committed the offence punishable under Section 408 IPC. Though the prosecution failed to prove that as per the instructions of LW7, PW2 handed over the demand draft and cash to the accused, but basing on Ex.P.2 – receipt which was given by the accused that he received the cash and demand draft from PW2, both the Courts below gave a concurrent finding that the accused was liable for punishment under Section 408 IPC.

19. The learned counsel for the revision petitioner/accused argued that the prosecution failed to explain the delay in lodging the complaint Ex.P.1. PW1 in his evidence stated that due to non-availability of proper supervisory staff in the Health Department, the said misappropriation was brought to the notice by the concerned Head of Department, therefore there was a delay. Further, after taking the charge and after verification, PW4 found the deficiency of the cash of Rs.15,000/- and in turn informed the said fact to PW1. Till then, nobody informed that the accused misappropriated the cash of Rs.15,000/-.

20. It is no doubt that as per Ex.P.2 the accused admitted about receiving the cash. But, the accused failed to deposit the same into the TTD account of Andhra Bank. The fact remains is that it is the duty of PW2 to verify whether the accused deposited the demand draft and cash into the bank or not, but PW2 committed fault. Further, the prosecution also failed to examine LW6 T.Subramanyam on whose instructions PW2 handed over the cash and demand draft to the accused. The prosecution has to establish under what instructions of TTD, LW7 directed PW2 to handover the cash and demand draft to the accused. Those aspects have not brought to the notice of the Court by way of evidence, but the fact remains is that the accused himself gave Ex.P.2 wherein he stated about receipt of cash and demand draft from PW2. Basing on the said fact, both the Courts below rightly convicted the accused and the said findings need no interference by this Court. Further, the decision relied on by the learned counsel for the revision petitioner/accused in *Bore Gowda Vs. State of Karnataka*

(1 supra) is not applicable to the present facts of the case as in the said case, the appellant had replenished the entire amount together with interest, but in the present case there is no such evidence. Likewise, the decision in *State Vs. M.Govardhan Reddy and another* (2 supra) is also not applicable to the present facts of the case as Ex.P.2 shows conclusively that the accused committed

misappropriation of amount and there was no scope for some other official to take away amount from the bank, hence the delay is not fatal to the facts of the present case.

21. At this stage, the learned counsel for the revision petitioner/accused prayed the Court to take a lenient view as the alleged crime has taken place 14 years back, the evidence on record is wavering and the officials of Malaria Department are unable to fix the liability on the officials but fixed the liability on the accused, who was an unobserved NMR Assistant. Considering the evidence on record, the order of conviction passed by both the Courts below is hereby confirmed. Insofar as sentence of imprisonment is concerned, in view of the facts and circumstances and considering the request of the learned counsel for the revision petitioner/accused to take a lenient view, I am of the view that if the sentence of imprisonment imposed on the revision petitioner/accused is reduced to some extent it would meet the ends of justice.

22. Accordingly, the conviction recorded by the II Additional Judicial Magistrate of I Class, Tirupati, in C.C.No.28 of 2002 for the offence punishable under Section 408 IPC against the revision petitioner/accused as confirmed by the III Additional Sessions Judge, Tirupati in Criminal Appeal No.143 of 2005, is hereby confirmed. But, the sentence of Simple Imprisonment of one year for the offence punishable under Section 408 IPC is hereby modified and reduced to three (3) months. However, it is made clear that the fine imposed against the revision petitioner/accused for the offence punishable under Section 408 IPC is not interfered with. The period of imprisonment already suffered by the revision petitioner/accused is directed to be given set off.

23. Accordingly, the Criminal Revision Case is disposed of. Miscellaneous petitions pending if any, in this Criminal Revision Case, shall stand closed.

ANIS, J

Date: 29.04.2015

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