

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL REVISION CASE No.128 of 2008

ORDER:

_____ This criminal revision case is filed under Section 397 read with 401 Cr.PC., by the petitioner–sole accused challenging the judgment dated 25.1.2008 in Criminal Appeal No.14 of 2006 on the file of the court of IV Additional Sessions Judge, Visakhapatnam wherein and whereby the conviction and sentence imposed against the accused in C.C. No.234 of 2002 on the file of the court of III Additional Chief Metropolitan Magistrate, Visakhapatnam at Gajuwaka was confirmed.

2. In nutshell, the prosecution case is that on 09.6.2000, tanker bearing No.AP 31V 9031 (the Tanker) was loaded with Styrene monomer chemical at the premises of East India Petroleum Limited, Visakhapatnam in order to deliver the same to M/s.Shin Ho Petrochemicals (India) Limited at Chennai. The accused, who is the driver, was present at the time of loading of the chemical in the Tanker. The accused was given one of the samples drawn at the time of loading of the Tanker. On arrival of the Tanker at M/s.Shin Ho Petrochemicals (India) Limited, Chennai on 21.6.2000, the officials of M/s.Shin Ho Petrochemicals (India) Limited tested the chemical in the Tanker and found it as water. On receipt of the complaint, the Station House Officer, Mallikapuram L&O Police Station, Visakhapatnam City registered a case in Crime No.59 of 2000 for the offences punishable under Sections 407 and 420 IPC and investigated into. After completion of the investigation, the Investigating Officer laid the charge sheet against the accused for the offences under Sections 407 and 420 IPC.

3. The learned Magistrate, after satisfying himself with the material produced before him, has taken cognizance of offences under Sections 407 and 420 IPC. The trial court, after hearing the learned

Public Prosecutor and learned counsel for the accused, framed charges under Sections 407 and 420 IPC against the accused, read over and explained to him for which he pleaded not guilty and claimed to be tried. In order to prove the guilt of the accused, the prosecution examined P.Ws.1 to 11 and marked Exs.P1 to P10. On behalf of the accused, no oral or documentary evidence was adduced.

4. The trial court, after hearing both sides and perusing material available on record, arrived at a conclusion that the accused committed the offence punishable under Section 407 IPC, convicted him accordingly and sentenced to undergo rigorous imprisonment for a period of five years and pay a fine of Rs.2,000/-; in default of payment of fine, the accused shall undergo simple imprisonment for a period of three months. However, the trial court found the accused not guilty for the offence under Section 420 IPC and accordingly acquitted him. Feeling aggrieved by the conviction and sentence imposed by the trial court, the accused preferred Crl.A.No.14 of 2006. The appellate court, after reappreciating the entire material available on record, vide judgment dated 25.1.2008, dismissed the appeal by confirming the conviction and sentence imposed by the trial court. Hence, the accused filed the present criminal revision case.

5. The contention of learned counsel for the accused is three fold:

(1) the prosecution failed to establish that 10.44 tons of Styrene Monomer chemical was entrusted to the accused on 09.6.2000 at the premises of East India Petroleum Limited, Visakhapatnam;

(2) the courts below failed to consider that Ex.P7 delivery challan does not bear the signature of the accused; and

(3) the findings recorded by the courts below are perverse as the same are based on the evidence, which is not legally admissible.

Refuting the contention of learned counsel for the accused, learned Public Prosecutor submitted that by examining P.Ws.1, 4, 5 and 6 and marking Exs.P1 to P7, the prosecution clearly proved the entrustment

of the Tanker loaded with 10.44 tons of Styrene monomer to the accused, who in turn misappropriated the same. He further submitted that the concurrent finding of fact recorded by the courts below is supported by evidence much less legally admissible evidence. He also submitted that it is not a fit case to interfere with the concurrent findings recorded by the courts below while exercising revisional jurisdiction.

6. Now the point that arises for consideration in this revision case is: *Whether the concurrent findings of fact recorded by the courts below are perverse and not sustainable in law?*

7. Before advertng to the findings recorded by the trial court, it is not out of place to refer the case law on the point.

K. Chinnaswamy Reddy v. State of A.P. ^[1],

7. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of Section 439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court, or where the acquittal is based on a

compounding of the offence, which is invalid under the law. These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal; and in such a case it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the provisions of Section 439(4). We have therefore to see whether the order of the High Court setting aside the order of acquittal in this case can be upheld on these principles.

In **Amar Chand Agarwalla Vs. Shanti Bose and Anr., etc.**^[2] at

para No.20 the Hon'ble apex Court held as follows:

“Even assuming that the High Court was exercising jurisdiction under Section 439, in our opinion, the present was not a case for interference by the High Court. The jurisdiction of the High Court is to be exercised normally under Section 439, Criminal Procedure Code, only in exceptional cases, when there is a glaring defect in the procedure or there is a manifest error of point of law and consequently there has been a flagrant miscarriage of justice. The High Court has not found any of these circumstances to exist in the case before us for quashing the charge and the further proceedings.”

The same principle was reiterated in **State of Haryana Vs. Rajmal and Another**^[3].

8. Let me consider the facts of the case on hand, in the light of the above legal principles, in order to ascertain whether there are any grounds to upset the findings recorded by the courts below.

9. Establishment of the following two aspects is *sine qua non* to convict the accused for the offence under Section 407 IPC.

(1) the factum of entrustment of property to the accused; and

(2) the factum of misappropriation of the entrusted property by the accused.

10. By examining P.Ws.1 and 11 and marking Ex.P1–complaint and Ex.P10–F.I.R., the prosecution clinchingly established that P.W.1, the General Manager of Corporate Cars and Carriers Limited, set the criminal law into motion. As seen from the testimony of P.W.1, Corporate Cars and Carriers Limited is the authorized transporter of

M/s.Shin Ho Petrochemicals (India) Limited. The testimony of P.W.1 and P.W.10 clearly reveals that Corporate Cars and Carriers Limited hired the Tanker, which belongs to Exim Oil Company Limited for transportation of Styrene Monomer from East India Petroleum Limited, Visakhapatnam to M/s.Shin Ho Petrochemicals (India) Limited, Chennai. P.W.2 is the Assistant Manager and P.W.3 is the Quality Control Officer of M/s.Shin Ho Petrochemicals (India) Limited. P.Ws.4 and 5 are the Senior Technicians of East India Petroleum Limited, Visakhapatnam. P.W.6 is the Tally Clerk in Pinnacu Marine Services Private Limited. The testimony of P.Ws.2 to 6 clearly reveals that on 09.6.2000, the Tanker was loaded with Styrene monomer after following due procedure. The testimony of P.W.6 further reveals that he has taken two samples from the Tanker and entrusted one sample to the accused. The recitals of Exs.P2 to P4 support the version of the prosecution so far as loading of the Tanker with Styrene monomer at the premises of East India Petroleum Limited, Visakhapatnam on 09.6.2000.

11. As pointed out by the learned counsel for the accused, Ex.P7 delivery challan-cum-gate pass does not bear the signature of the accused. Ex.P7 bears the signatures of authorized persons of East India Petroleum Limited, Visakhapatnam, Exim Oil Company Limited and Corporate Cars and Carriers Limited. The important document in this case is Ex.P6, which is the lorry receipt dated 09.6.2000 issued by Corporate Cars and Carriers Limited. A perusal of Ex.P6 clearly indicates that the Tanker was loaded with 10.44 tons of Styrene monomer on 09.6.2000 vide Inv. cum Ch.No.6325, dated 09.6.2000. Ex.P6 bears the signature of the accused. The Investigating Officer (P.W.11) also clearly stated that Ex.P6 receipt bears the signature of the accused.

12. In fact, nothing is elicited in the cross-examination of prosecution

witnesses that the Tanker was not entrusted to the accused on 09.6.2000. The very purpose of cross-examination of the prosecution witnesses is to demolish the prosecution version or to substantiate the defence version thereby to improbabilise the prosecution version. The defence counsel did not put any suggestion to P.Ws.1 to 6 in general, P.W.1 in particular, that Ex.P6 does not bear the signature of the accused. No suggestion was put to prosecution witnesses that the Tanker was not loaded with Styrene monomer on 09.6.2000 at the premises of East India Petroleum Limited, Visakhapatnam in the presence of the accused so as to deliver the same to M/s.Shin Ho Petrochemicals (India) Limited at Chennai. The prosecution established that the Tanker after loading with 10.44 tons of Styrene monomer chemical was entrusted to the accused on 09.6.2000 at Visakhapatnam under Ex.P6 receipt. It is the case of the prosecution that the accused has to take the Tanker to M/s.Shin Ho Petrochemicals (India) Limited, Chennai within three days from 09.6.2000. Admittedly, he has not done so.

13. Even without taking the Tanker to Chennai within the time, the accused came forward with a theory that by mistake, he went to Jaheerabad as directed by the cleaner and due to exhaustion of diesel he was forced to stop the Tanker there. As per the testimony of P.W.10, the Accountant of Exim India Oil Company Limited, he received mail from their Vizag office on 18.6.2000 informing that the Tanker was stopped at Jaheerabad and asked to supply diesel to the Tanker. His testimony further reveals that the accused came to Head Office at Hyderabad and thereafter he accompanied the accused with diesel in another lorry to Jaheerabad.

14. As per the testimony of P.Ws.2 and 3, the Assistant Manager and Quality Controlling Officer of M/s.Shin Ho Petrochemicals (India) Limited, on 21.6.2000, on reaching of the Tanker to Chennai, they

tested the chemical loaded in the Tanker and found it as pure water. The testimony of P.Ws.3 and 6 clearly reveals that the seal of the Tanker was found tampered. It is not the case of the defence that Styrene monomer was delivered to M/s.Shin Ho Petrochemicals (India) Limited at Chennai. By examining P.Ws.1 to 6, 10 and 11 and marking Exs.P1 to P9, the prosecution clearly established that 10.44 tons of Styrene monomer was entrusted to the accused.

15. This court is very much conscious of the evidentiary value of admission made by the accused during the course of examination under Section 313 Cr.PC. As observed by the courts below, the accused himself admitted during the course of examination under Section 313 Cr.PC that the Tanker containing 10.44 tons of Styrene monomer was entrusted to him on 09.6.2000. The accused having taken control over the Tanker failed to deliver the same at Chennai. In all probability, except the accused, there is no other person, who is capable of misappropriating the chemical entrusted to him. By examining P.Ws.1 to 6 and marking Exs.P1 to P9, the prosecution clearly established that the accused committed criminal breach of trust by misappropriating 10.44 tons of Styrene monomer. The concurrent findings recorded by the courts below are supported by oral and documentary evidence, which is legally admissible.

16. After perusing the material available on record, I am unable to countenance the contentions raised by the learned counsel for the accused that the findings recorded by the courts below are perverse and not based on material available on record. There is no infirmity much less legal infirmity in the findings recorded by the courts below. Viewed from factual or legal aspects, it is not a fit case to interfere with the concurrent finding of fact recorded by the courts below that the accused committed the offence punishable under Section 407 IPC.

17. The learned counsel for the accused requested this court to take

some lenient view in view of lapse of time. A perusal of the record reveals that the accused is now aged about 46 years. The crime is of the year 2000 and the present criminal revision case is of the year 2008. The accused might have undergone lot of mental agony during the pendency of trial and appeal. Taking into consideration all these facts and circumstances of the case, I am of the considered view that it is a fit case to reduce the sentence of rigorous imprisonment from five years to four years while confirming the sentence of fine.

18. In the result, the criminal revision case is partly allowed reducing the sentence of rigorous imprisonment from five years to four years. The conviction for the offence under Section 407 IPC and sentence of fine amount are confirmed. The bail bonds executed by the accused shall stand cancelled. The trial court is directed to take appropriate steps to see that the accused shall undergo the remaining period of sentence. Miscellaneous petitions if any pending in the criminal revision case shall stand closed.

T.SUNIL CHOWDARY, J

29.2.2016.

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[\[1\]](#) AIR 1962 SC 1788

[\[2\]](#) (1973) 4 SCC 10

[\[3\]](#) (2011) 14 SCC 326