THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CRIMINAL APPEAL Nos.1307 and 1463 OF 2006

COMMON JUDGMENT:

These appeals are filed under Section 378(3) and (1) of Cr.P.C. by the State assailing the common judgment dated 25.01.2005 in Criminal Appeal Nos.103 of 2000 and 100 of 2000 respectively on the file of the Court of the Sessions Judge, Srikakulam, wherein and whereby setting aside the conviction and sentence imposed against the respondents-accused Nos.3 and 5 vide judgment dated 04.08.2000 in C.C.No.2 of 1991 on the file of the Court of the Judicial Magistrate of First Class, Srikakulam, for the offence punishable under Section 409 read with 109 I.P.C.

2. The point involved in both the appeals is one and the same; therefore, this Court is inclined to dispose of both the appeals simultaneously.

3. For the sake of convenience, the parties will be hereinafter referred to as they were arrayed before the trial Court.

4. The facts leading to filing of the present appeals are briefly as follows: Accused No.1 worked as Divisional Accounts Officer (Works), Executive Engineer's Office, R & B Department, Srikakulam. Accused No.2 worked as Clerk in the office of accused No.1. Accused Nos.3 and 4 are the close followers of accused No.1. Accused No.5 is the Branch Manager of Andhra Bank, Srikakulam, at the relevant point of time. PW.1 lodged a complaint Ex.P.33 to the Sub-Inspector of Police, II Town Police Station, Srikakulam, who in turn registered a case in Crime No.197 of 1988 against the accused for the offences punishable

under Sections 409, 419, 467, 468, 477-A and 420 I.P.C. During the course of investigation, it is revealed that with the active assistance of the other accused, accused No.3 opened account in Andhra Bank, Srikakulam Branch in name of Krishna Murthy, Executive Engineer, R & B, Srikakulam. Accused No.1 handed over the demand drafts of the contractors to accused No.3, who in turn withdraw the Government amount. The bank officials helped accused Nos.1 and 3 to withdraw the Government money. After completion of the investigation, the investigating officer laid charge sheet against the accused for the offences punishable under Sections 409 and 420 read with 109 I.P.C. The learned Judicial Magistrate of First Class, Srikakulam, has taken the case on file against accused No.1 for the offences under Sections 409 and 420 I.P.C. and accused Nos.2, 3 and 5 for the offences under Sections 409 and 420 read with 109 I.P.C. Accused No.4 absconded; therefore, the case against him was split up. On appearance of accused Nos.1, 2, 3 and 5, copies of all documents were furnished to them as contemplated under Section 207 Cr.P.C. On hearing both parties, the trial Court framed charges under Sections 409 and 420 I.P.C. against accused No.1 and under Sections 409 and 420 read with 109 I.P.C. against accused Nos.2, 3 and 5, read over and explained to them in Telugu, for which they pleaded not guilty and claimed to be tried.

5. In order to bring home the guilt of the accused, before the trial Court, on behalf of the prosecution, PWs.1 to 21 were examined and Exs.P.1 to P.116 were marked. After completion of the prosecution side evidence, the accused was examined under Section 313 Cr.P.C. with reference to the incriminating evidence

deposed against them by the prosecution witnesses, which they denied. On behalf of the defence, DW.1 was examined and no documents were marked.

6. Basing on the oral, documentary evidence and other material available on record, the trial Court arrived at a conclusion that the prosecution proved the guilt of accused No.1 for the offence punishable under Section 409 I.P.C. and accused Nos.2, 3 and 5 for the offence punishable under Section 409 read with 109 I.P.C. and accordingly, convicted and sentenced them to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs.5,000/- each, in default, to undergo simple imprisonment for a period of six months each. Feeling aggrieved by the conviction and sentence imposed against accused Nos.3 and 5, they preferred Criminal Appeal Nos.103 of 2000 and 100 of 2000 respectively on the file of the Court of the Sessions Judge, Srikakulam. The learned Sessions Judge, after reappraising the oral and documentary evidence available on record, arrived at a conclusion that accused Nos.3 and 5 were found not guilty for the offence under Section 409 read with 109 I.P.C. and consequently, set aside the conviction and sentence imposed against them. Hence, the present appeals are preferred by the State.

7. Learned Public Prosecutor submitted that the oral testimony of PWs.4, 6 and 11 clinchingly establishes that accused No.3 opened the fictitious account in Andhra Bank, Srikakulam in the name of Krishna Murthy. He further submitted that the appellate Court failed to consider that there is no procedure to open Government account in Andhra Bank. He also submitted that the

first appellate Court failed to consider that at the instructions of accused No.5, PW.6 introduced accused No.3 as Krishna Murthy. He further submitted that the findings recorded by the first appellate Court are not based on assumptions and presumptions; therefore, it is a fit case to allow the appeal.

8. *Per contra,* Sri A.Ravi Shankar, the learned counsel for the respondent-A.3 in Criminal Appeal No.1307 of 2006 and Sri T.Vishwarupachary, the learned counsel for respondent-A.5 in Criminal Appeal No.1463 of 2006 strenuously submitted that the findings recorded by the trial Court are based on assumptions and presumptions. They further submitted that even if the testimony of PWs.4, 6 and 11 is taken into consideration, no case is made out against accused Nos.3 and 5. They also submitted that the first appellate Court considered the oral and documentary evidence in right perspective and allowed both the appeals.

9. Now the points that arise for consideration in these appeals are:

1. Whether the prosecution has proved the guilt of accused Nos.3 and 5 for the offence punishable under Section 409 read with 109 I.P.C.? and
2. Whether the findings of the first appellate Court are sustainable?

10. Point Nos.1 and 2 are intertwined with each other; hence, this Court is inclined to address both the points simultaneously in order to avoid recapitulation of facts and evidence.

11. Before adverting to the findings of the trial Court, it is not out of place to refer the following decisions.

(i) **State of Rajasthan vs. Mohan Lal[1],** wherein the Hon'ble Apex Court held at Para No.34 as follows:

> 34. From the above decisions, in Chandrappa and Ors. v. State of Karnataka, (2007) 4 SCC 415, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal were culled out:
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> (1) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.
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> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
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> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.
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> (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.
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> (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

(ii) **State of Maharashtra v Dnyaneshwar Laxman Rao Wankhede[2],** wherein the Hon'ble apex Court held at Para Nos.15, 21 and 22 as follows:

> 15. Before embarking on the rival contentions raised before us, it is our duty to remind ourselves that we are dealing with a judgment of acquittal and, thus, it is absolutely essential to keep in mind the well-settled principles of law that in the event two views are possible to be taken, this Court shall not interfere with a judgment of acquittal. There cannot be any doubt that in the event, having regard to the materials brought on record, the Court comes to the conclusion on the basis thereof that only one view is possible, a judgment of acquittal may be interfered with. (See *Shivappa* v. *State of Karnataka*, (2008) 11 SCC 337, *State of Maharashtra* v. *Rashid B. Mulani*, (2006) 1 SCC 407 and *State* v. *K. Narasimhachary*, (2005) 8 SCC 364.)

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[1] AIR 2009 SC 1872
[2] (2009) 15 SCC 200

> 21. Even in a case where the burden is on the accused, it is well known, the prosecution must prove the foundational facts. (See *Noor Aga* v. *State of* Punjabi, (2008) 16 SCC 417 and *Jayendra Vishnu Thakur* v. *State of Maharashtra*, (2009) 7 SCC 104.)
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> 22. It is also a well-settled principle of law that where it is possible to have both the views, one in favour of the prosecution and the other in favour of the accused, the latter should prevail. (See *Dilip* v. *State of M.P.,* (2007) 1 SCC 450 and *Gagan Kanojia* v. *State of Punjab*, (2006) 13 SCC 516.)

12. As per the principle enunciated in the cases cited supra, where it is possible to have two views – one in favour of the Prosecution and the other in favour of the accused – the latter view should prevail. Let me consider the facts of the case on hand in the light of the principles enunciated in the cases cited supra.

13. Basing on Ex.P.33 complaint of PW.1, the Sub-Inspector of Police, II Town Police Station, Srikakulam, registered a case in Crime No.197 of 1988 Ex.P.115 against the accused. A perusal of the record clearly reveals that PW.1 set the criminal law in motion. It is the case of the prosecution that accused No.3 opened the bank account in the name of Krishna Murthy and assisted accused No.1 in misappropriating the Government money. It is the further case of the prosecution that accused No.3 opened the bank account No.19188 in Andhra Bank, Srikakulam, in the name of said Krishna Murthy with the help and support of accused No.5. The gist of the accusation made against accused Nos.3 and 5 is that they assisted accused No.1 in misappropriating the Government funds. In order to prove the guilt of accused No.3, the prosecution mainly relied on the oral testimony of PWs.4, 6, 11 and 19, and Exs.P.7, 42 and 112. The trial Court made an observation in para 42 of its judgment that the opinion expressed by the expert is corroborating by the oral testimony of PWs.4, 6 and 11. The trial Court convicted and sentenced accused No.3

basing on the oral evidence of the above witnesses. At the relevant point of time, PWs.4, 6 and 11 worked in different capacities, in Andhra Bank, Srikakulam Branch. They are the competent persons to say whether accused No.3 opened the bank account in the name of Krishna Murthy. There is no whisper in the testimony of PW.4 that he has seen accused No.3 on 31.01.1987 in Andhra Bank, Srikakulam. There is no whisper in the testimony of PW.6 that he has seen accused No.3 while opening account No.19188 on 31.01.1987. Likewise, there is no whisper in the testimony of PW.11 that on 31.01.1987 he has seen accused No.3 in bank premises, Andhra Bank, Srikakulam. The testimony of these witnesses is no way helpful to prosecution to establish that accused No.3 opened account No.19188 on 31.01.1987 in Andhra Bank, Srikakulam. This Court is unable to understand how the trial Court came to a conclusion that PWs.4 and 6 have seen accused No.3 on 31.08.1987. The findings of the trial Court that PWs.4 and 6 have seen accused No.3 on 31.08.1987 is not supported by their testimony. The first appellate Court arrived at a conclusion that the testimony of PWs.4, 6 and 11 is no way helpful to the prosecution to establish that they have seen accused No.3 in the bank premises on 31.08.1987. I am fully endorsing the findings recorded by the first appellate Court on this aspect.

14. As seen from the testimony of PW.6, he has prior acquaintance with accused No.3. Ex.P.42 is the introduction card along with specimen signatures of S.B. Account No.19188 of Andhra Bank, Srikakulam. Ex.P.7 is the introduction slip in respect of S.B. Account No.19188 dated 31.07.1987. If really PW.6 has not seen accused No.3 while opening the account, what

prevented him to introduce him? At one stage, PW.6 deposed that he has seen specimen signatures only. The testimony of PW.6 is not corroborated by any other evidence. PW.6 has given different versions. His testimony further reveals that he was arrested in this crime and released subsequently. This indicates that the investigating agency suspected role of PW.6 in this transaction. The evidence available on record falls short to establish that on 31.01.1987 accused No.3 opened account No.19188 in the name of Krishna Murthy. Having regard to the facts and circumstances of the case, it is not safe to place reliance on the testimony of PW.6.

15. The other circumstances on which the prosecution placed reliance are the oral testimony of PW.19 and Ex.112. PW.19 is an expert. As per the prosecution version, the investigating agency collected the admitted signatures of accused No.3 and sent the same along with the bank records and pay slips to the expert. As per the testimony of PW.19, the standard signatures of accused No.3 i.e., 25 to 29 are similar to the signatures in Sl.Nos.30 to 39. He simply stated that the signatures are similar. It is not in dispute that the signatures of accused No.3 were taken without the leave of the Court. It appears that the investigating officer collected the alleged signatures of accused No.3 from A.P.S.R.T.C. Department. The expert has to give reasons much less cogent and convincing reasons for giving such an opinion. The opinion expressed by an expert is not a substantive piece of evidence. It is needless to say that no one will be convicted basing on the opinion of the expert alone. As observed earlier, the testimony of PW.6 is not trustworthy for consideration. If the testimony of PWs.4, 6 and 11 is discarded, there is no other piece of evidence to corroborate

with the opinion expressed by the expert. In criminal cases, the prosecution has to establish the guilt of the accused beyond all reasonable doubt. If the version put forth by the prosecution creates any amount of doubt, the accused is entitled for the benefit of doubt. The first appellate Court has considered the oral and documentary evidence in touch stone with the fundamental principles of criminal law and Indian Evidence Act. The findings recorded by the first appellate Court are based on evidence much less legally admissible evidence. I am agreeing with the findings recorded by the first appellate Court.

16. It is the case of the prosecution that accused No.5 in connivance with accused No.1 opened bank account No.19188 by introducing accused No.3 as Krishna Murthy. As on 31.08.1987 accused No.1 was working as Branch Manager in Andhra Bank, Srikakulam. PWs.4, 6 and 11 are the competent persons to speak about the role of accused No.5. There is no whisper in the testimony of PWs.4 and 11 that on 31.08.1987 they opened account No.19118 in the name of Krishna Murthy at the instructions of accused No.5. The testimony of PWs.4 and 6 is no way helpful to the prosecution to prove the guilt of accused No.5. The trial Court believed the evidence of PW.6 and arrived at a conclusion that accused No.5 found guilty for the offence punishable under Section 409 read with 109 I.P.C. and accordingly, convicted and sentenced him. The testimony of PWs.4, 6 and 11 reveals that accused No.5 joined as Branch Manager of Andhra Bank, Srikakulam 15 days prior to 31.08.1987. The material placed before the Court clinchingly establishes that accused No.5 is altogether a new person. There is no material on

record to establish that accused No.5 had prior acquaintance either with accused No.1 or accused No.3. As per the testimony of PW.6 on 31.07.1987 while he was on duty in Andhra Bank, Srikakulam, the Branch Manager i.e., accused No.5 came to his cabin and asked him to sign on introduction form of accused No.3. At the instance of accused No.5, he signed on the form as introducer. His testimony further reveals that on the same day he struck off his signature on Ex.P.42. A careful perusal of the testimony of PW.6 clearly reveals that he had acquaintance with accused No.3. His testimony further reveals that accused No.3 and himself are the roommates or side roommates for a period of one year. His testimony further reveals that he has no acquaintance with accused No.5 prior to his joining as Branch Manager. There is no whisper in the testimony of PW.6 that accused No.5 has acquaintance with accused No.3 or accused No.1 prior to joining as Manager of Andhra Bank, Srikakulam. In such circumstances, what is the necessity for accused No.5 to go to the cabin of PW.6 and ask him to sign on the form as introducer? This aspect was not properly considered by the trial Court. Appreciation of evidence does not mean to place reliance on stray sentence of evidence. The Court has to consider the totality of facts and circumstances of case while appreciating the rival contentions. PW.6 in unequivocal terms deposed that he signed on bank form as an introducer of accused No.3. The relevant question that falls for consideration is who struck off that introducer column. PW.21 investigating officer categorically stated that he does not know when the introducer column was struck off and who has struck off. PW.6 deposed that he struck off the introducer column. This itself indicates that in order to avoid the legal consequences, the possibility of striking off his name and throwing blame on accused No.5 cannot be ruled out completely. The first appellate Court has considered the material available on record meticulously and arrived at a conclusion that the prosecution failed to prove the guilt of accused No.5 for the offence punishable under Section 409 read with 109 I.P.C. The findings recorded by the trial Court that accused No.5 was found guilty for the offence punishable under Section 409 read with 109 I.P.C. is not sustainable either on facts or in law. I am fully agreeing with the findings recorded by the first appellate Court on this aspect. The findings recorded by the first appellate Court are supported by evidence much less legally admissible evidence. There are no grounds much less valid grounds to upset the findings recorded by the first appellate Court.

17. In the result, both the Criminal Appeals are dismissed. Consequently, Miscellaneous Petitions, if any, pending in both the Criminal Appeals shall stand closed.

T. SUNIL CHOWDARY, J

Date: 08.02.2018
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