

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO. 224 OF 2005

Shriram Balwantrao Kendre
(since deceased through his L.Rs.)

1/A. Padminibai w/o Shriram Kendre
Age 50 years, Occ. Household,
R/o. Kokwadi, Tq. Kandhar
District Nanded

1/B. Ganpati s/o Shriram Kendre
Age 18 years, Occ. Student,
R/o. As above

1/C Ganga Sagar d/o Shriram Kendre
Age 23 years, Occ. Nil.
R/o. As above

...Applicants

versus

The State of Maharashtra
Through Police Station Kandhar
Tq. Kandhar, Dist. Nanded
(Copy to be served on Government Pleader,
High Court Bench at Aurangabad)

...Respondent

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Ms. Aummaheshwari S. Jadhav h/f Mr. P. R. Katneshwarkar,
Advocate for the applicants.
Mr. A.P. Basarkar, A.P.P. for Respondent-State.

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CORAM : V. K. JADHAV, J.
Reserved on : 07.03.2019
Pronounced on : 16.04.2019

JUDGMENT :-

1. By way of this criminal revision application, the applicant challenges the judgment and order of conviction passed by the Judicial Magistrate, First Class, Kandhar, district Nanded, dated 7.9.2001 in Regular Criminal Case No. 193 of 1999 thereby convicting the original accused Shriram Balwantrao Kendre (husband of applicant No. 1/A and father of applicant Nos. 1/B and 1/C) who now is no more, for the offence punishable under Section 381 of I.P.C. and sentenced him to suffer S.I. for six months and to pay a fine of Rs.3000/- i/d to suffer S.I. for two months and the judgment and order dated 16.12.2004 passed by the learned Additional Sessions Judge, Kandhar in Criminal Appeal No. 15 of 2003 thereby modifying the judgment and order of conviction and sentence awarded by the learned J.M.F.C. Kandhar in Regular Criminal Case No. 193 of 1999 and instead of sentencing to suffer S.I. for six months, the accused is ordered to undergo S.I. till rising of the court and fine amount is enhanced to Rs.5000/- from Rs.3000/- i/d to suffer S.I. for three months.

2. Brief facts giving rise to the present criminal revision

application are as follows:-

a) The complainant Sudam Kamble, Head Mechanic of S.T. Department, S.T. Depot Kandhar has filed a complaint on 15.7.1999 alleging that when he was on workshop duty at Kandhar Depot from 6.00 p.m. on 14.7.1999 till 3.00 a.m. on 15.7.1999, alongwith other staff members, after interval when he came back at 10.00 p.m. on duty at workshop alongwith staff members, he came to know from one staff member Mr. D.D. Fulpagar that without any permission of the Depot Manager or without having authorization, accused Shriram Kendre took away the S.T. Bus bearing No. MH-20-D-3130 from the S.T. Depot. He had informed the said incident to the Depot Manager. After taking search and inquiry, the complainant filed complaint against the original accused Shriram Kendre.

b) On the basis of aforesaid complaint, crime No. 132 of 1999 came to be registered with Kandhar police station for the offence punishable under Sections 381 of I.P.C. The investigating officer has prepared spot panchanama in presence of panchas and seized the S.T. Bus bearing no. MH-20-D-3130 in presence of two panchas and handed over the same to the Depot Manager of

Kandhar on *Supurtnama*. The investigating officer recorded the statement of witnesses, who are acquainted with the facts and circumstances of the case on same day and on completion of investigation, submitted charge-sheet against accused for the offence punishable under Section 381 of I.P.C.

c) The learned J.M.F.C. read over and explained the charge to the accused. The accused pleaded not guilty to the same and claimed to be tried. In order to substantiate the charge levelled against the accused, the prosecution has examined in all seven witnesses. After completion of evidence of prosecution witnesses, the statement of accused under Section 313 of Cr.P.C. came to be recorded. The defence of the accused was that of total denial and of false implication by the complainant in this case to harass him.

d) After hearing both sides, the learned J.M.F.C. Kandhar convicted the original accused Shriram Balwantrao Kendre for the offences punishable under Section 381 of I.P.C. and sentenced him to suffer S.I. for six months and to pay a fine of Rs.3000/- i/d to suffer S.I. for two months. The conviction and sentence awarded by the learned J.M.F.C. Kandhar in Regular Criminal Case No. 193

of 1999 was modified by the learned Additional Sessions Judge, Kandhar in Criminal Appeal No. 15 of 2003 by judgment and order dated 16.12.2004 and instead of sentencing to suffer S.I. for six months, the accused is ordered to undergo S.I. till rising of the court and fine amount is enhanced to Rs.5000/- from Rs.3000/- i/d to suffer S.I. for three months. Hence, this criminal revision application.

3. Learned counsel for the applicants-accused submits that there is no direct evidence in this case. The prosecution case entirely rests upon the circumstantial evidence. The courts below have overlooked the fact that all prosecution witnesses are interested witnesses and thus conveniently brushed aside the inconsistencies in evidence of witnesses and these are filled in by assumptions and presumptions. The evidence of the prosecution witnesses is unreliable and untrustworthy and not believable. Learned counsel submits that the provisions of Section 381 of IPC speak about the theft in respect of property in possession of his master or employer. The fact of taking possession of any property of his master or employer, the same need to be proved by the master. The master or employer at present in this case is the Depot Manager. Thus, in

absence of employer's evidence in taking away the Bus without consent, it cannot be concluded that offence under Section 381 of I.P.C. is committed. The learned counsel for the applicants, thus submits that the criminal revision application deserves to be allowed.

4. Learned counsel for the applicants, in order to substantiate his submissions, places reliance on the case of ***Vithal Yedu Khalse vs. The State of Maharashtra***, decided by this Court at its Principal Seat (Coram : M. L. Pendse, J.) on 17.02.1982.

5. Learned A.P.P. for the respondent-State has supported the judgment and order of conviction passed by the court below. The learned A.P.P. submits that the evidence of prosecution witnesses is consistent, reliable and trustworthy. They have deposed about theft committed by the original accused Shriram Kendre. Both the courts below have thus rightly convicted the applicant for the offences punishable under Sections 381 of I.P.C. There is enough evidence to conclude that the applicant/accused has committed theft of S.T. Bus. The prosecution has succeeded in proving the theft committed by the applicant Shriram Kendre as defined under Section 381 of

I.P.C. There is no substance in the criminal revision application and the same is liable to be dismissed.

6. In order to substantiate his contention, learned APP places reliance on the case of *K. N. Mehra vs. State of Rajasthan*, reported in *AIR 1957 SC 369*.

7. I have heard learned counsel for the applicant and the learned APP for the respondent State. I have perused the memo of revision application, annexures thereto and the record and proceedings.

8. Section 381 of IPC provides for a severe punishment when a clerk or a servant has committed offence of theft. So far as the offence of theft as defined under Section 378 of IPC is concerned, the intention is the gist of the offence. It is the intention of the taker which must determine whether the taking or moving of a thing is theft. The intention to take dishonestly exists when the taker intends to cause wrongful gain to one person and wrongful loss to another person. In the instant case, admittedly the applicant/accused was an employee/driver working in M.S.R.T.C.

He had taken out the S.T. bus from the S.T. Depot without any permission from the Depot manager. It is the defence of the applicant/accused that he had taken away the said S.T. bus along with some mechanics working there in the Depot, for the purpose of dinner at his house in village Tokwadi. It has come in the evidence that the aforesaid bus was taken from the S.T. Depot without making any entry in the concerned register. However, I do not find any evidence to conclude that the applicant/accused was intending to cause wrongful gain to himself or wrongful loss to his employer by taking away or moving the said S.T. bus from the S.T. depot. Thus is not a case that in a clandestine manner in the darkness of the night the applicant/accused had committed theft of the S.T. bus. On the other hand, the said S.T. bus was taken to his residence at village Tokwadi. Almost all the witnesses have admitted that there was a heavy rain fall in the said night of the incident. It is also the case of the applicant/accused that after enjoying party at his residence alongwith the mechanics, when one of the mechanics had tried to take the bus towards the S.T. Depot, due to heavy rain fall, the vehicle slipped and dashed against one loose stone wall.

9. In the case of *Vithal Yedu Khalse* (supra), relied upon by learned counsel for the applicants, the applicant/accused therein had been to Barshi police station for lodging complaint in respect of some incident. However, the constables at Barshi police station were sleeping and when he tried to awake them, they got offended and threatened him to leave the police station. The applicant/accused therein felt aggrieved and thus took up a handcuff which was hanging over the table of the police officer and proceeded towards Solapur to produce it before the Superintendent of Police and point out how the constables at Barshi police station are behaving. At Solapur, the applicant/accused came across the Head Constable Sardar who was on duty at Panjarapole. On seeing the handcuff in the hands of a private person, the applicant/accused was booked for having committed theft of the handcuff. In the facts of the said case, this Court (Coram: M. L. Pendse, J.) has observed that the main ingredient of the offence is that the article should be taken dishonestly out of the possession with a view to cause wrongful loss to other person. The accused had no intention to cause any wrongful loss to the police.

10. In the instant case, I do not find any such intention on the part of the applicant/accused. The inference about intention can be drawn when the taker intends to cause wrongful gain to one person and wrongful loss to another person. There is no question of causing any wrongful loss to the M.S.R.T.C. since the applicant/accused was working as a driver in M.S.R.T.C. Equally, there was no intention to cause wrongful gain to either himself or any other person. The applicant/accused may be subjected to departmental enquiry for taking away the S.T. bus from the depot without consent of the Depot Manager. However, certainly, in the facts and circumstances of the case, I do not think that the ingredients of the offence of theft are attracted.

11. In the case of *K. N. Mehra vs. State of Rajasthan* (supra), relied upon by learned APP, the allegations are severe about commission of theft of an aircraft. The appellant K.N.Mehra and other co-accused were the cadets on training in the Indian Air Force Academy, Jodhpur. The appellant/accused Mehra was a cadet receiving training as a Navigator and the duty of a Navigator is only to guide a pilot with the help of instruments and maps. However, the another accused Phillips knew flying. On the day of

incident, in the morning, admittedly the said accused Mehra and Phillips took off the aircraft without authorization and without observing any of the formalities, which are prerequisites for an aircraft flight. It is also admitted that some time in the forenoon of the same day, they landed at a place in Pakistan about 100 miles away from the Indo-Pakistan border. The main contention of the appellant/accused is that there is no proof of any dishonest intention and as per the definition of theft that the taking or moving of property should have been with an intention to take it dishonestly. In the facts of this case, while considering the question of intention, the Supreme Court has observed that if the purpose for which the flight was undertaken was to go to Pakistan, and if in order to achieve that purpose, breach of various regulations relating to initial taking out of such aircraft for flight was committed at the very outset, there is no difficulty in coming to the conclusion, as the courts below have done, that the dishonest intention, if any, was at the very outset.

12. In the instant case, I do not find any such contingency. Even the applicant/accused has examined the defence witness of his village Tokwadi. He has also deposed that the applicant/accused

alongwith some three/four mechanics came in the S.T. bus in the night of the incident. There was a heavy rain fall in the night as admitted by the other prosecution witnesses also. At the time of leaving that place after completion of the dinner party, the bus dashed against a loose stone wall of his agricultural field. He has further explained that the bus could not be taken away from the place thereafter. Thus, considering the entire aspect of the case, I do not find any dishonest intention on the part of the accused. At the most, he is liable for facing departmental enquiry. However, certainly he has not committed theft as defined under Section 378. In the result, the impugned judgment and order of conviction as modified by the learned Additional Sessions Judge, Kandhar, sentencing thereby the applicant/accused to suffer S.I. till rising of the court and to pay fine of Rs.5,000/- in default, to suffer S.I. For three months, is liable to be quashed and set aside. Hence the following order:

ORDER

- I. The criminal revision application is hereby allowed.
- II. The judgment and order of conviction dated 7.9.2001 passed by the Judicial Magistrate, First Class, Kandhar,

district Nanded, in Regular Criminal Case No. 193 of 1999 thereby convicting the original accused Shriram Balwantrao Kendre (husband of applicant No. 1/A and father of applicant Nos. 1/B and 1/C) who now is no more, for the offence punishable under Section 381 of I.P.C. and sentencing him to suffer S.I. for six months and to pay a fine of Rs.3000/- i/d to suffer S.I. for two months and the judgment and order of conviction dated 16.12.2004 passed by the learned Additional Sessions Judge, Kandhar in Criminal Appeal No. 15 of 2003 (New) [Criminal Appeal No. 76 of 2001 (Old)], thereby modifying the judgment and order of conviction passed by the Magistrate as above and sentencing him to undergo S.I. till rising of the court and fine amount is enhanced to Rs.5000/- from Rs.3000/- i/d to suffer S.I. for three months, are hereby quashed and set aside.

- III. The applicant/accused Shriram Balwantrao Kendre is hereby acquitted of the offence under Section 381 of IPC vide Regular Criminal Case No. 193 of 1999.
- IV. The fine amount, if deposited by the applicant/accused, shall be refunded to applicant no. 1/A.
- V. The criminal revision application is accordingly disposed of. Rule made absolute.

(V. K. JADHAV, J.)