

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

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**Criminal Revision No.3140 of 2013 (O&M)
Date of Decision : 05.04.2019**

Rohtash

... Petitioner

Versus

State of Haryana

...Respondent

CORAM:HON'BLE MR. JUSTICE HARNARESH SINGH GILL

Present: Mr. Mayur Kanwar, Advocate for the petitioner.

Mr. S.S.Pannu, DAG, Haryana.

HARNARESH SINGH GILL,J.

The present criminal revision has been filed by petitioner-Rohtash being aggrieved by the judgment dated 18.09.2009 passed by Additional Sessions Judge, Hisar vide which criminal appeal filed by Rohtash against judgment and order dated 24/25.11.2008 passed by Judicial Magistrate Ist Class, Hansi vide which Satbir was convicted under Section 409 IPC and was sentenced and convicted for 3 years of RI along with fine of ₹1,000/-, had been partly allowed and the substantive sentence imposed upon the petitioner was reduced to the period which he had already spent in judicial custody, during the pendency of the trial and he was also ordered to undergo imprisonment till the rising of the court.

Brief facts of the present case are that on 17.07.2000 a letter was received from the office of Tehsildar, Narnaund, Police Station Narnaund

with the allegations that Rohtash-petitioner, Patwari Halka Kapro-III had been entrusted with an amount of ₹1,08,400/- on 05.07.2000 to be disbursed as an old age pension to various pensioners in the area. The petitioner was directed to disburse the pension and account for the same by 10.07.2000 in the office of Tehsildar through Field Kanungo. The statements of the pensioners were recorded by the Tehsildar and found that the pension amount had not been disbursed to the pensioners and the Area Kanungo submitted his report. Even, the house of the petitioner was visited, but he was not found present. Thus, it was alleged that the petitioner had committed criminal mis-appropriation of the amount qua the old age pension, entrusted to him. Accordingly, FIR No.164 dated 17.07.2000 under Section 409 of IPC, Police Station Narnaund, was registered against him.

Finding a prima facie, charge under Section 409 IPC was framed against the petitioner to which he pleaded not guilty and claimed regular trial.

The prosecution examined 12 witnesses i.e. PW-1, Zile Singh, Office Kanungo, Narnaud, authorized official, who had handed over the amount of ₹1,08,400/- to the petitioner on 05.07.2000 for disbursing the amount of old age pension to the pensioners, for the month of June, 2000. Prosecution also examined PW-2, Krishan Kumar, Kanungo, who had tendered his report Ex.P-4 against the petitioner. Similarly, Brij Bhushan Sharma, appeared as PW-3 who had sent the complaint Ex.P-3/A to the police for registration of the FIR. In addition to that, 9 more witnesses had stepped into the witness box to prove the case of the prosecution.

Statement of the petitioner under Section 313 Cr.P.C. was

recorded in which he pleaded false implication and claimed innocence.

In his defence, the petitioner had produced his wife, namely, Sharda Devi as DW-1 and one Sunheri wife of Mahabir as DW-2.

After considering the evidence on record, trial court had concluded that the petitioner had committed a serious offence of criminal breach of trust with respect to the public money amounting to ₹1,08,400/- and accordingly, he was sentenced to undergo rigorous imprisonment for a period of three years and to pay a fine of ₹1000/- for the commission of offence punishable under Section 409 IPC, vide judgment and order dated 24/25.11.2008.

The petitioner preferred an appeal which came up for hearing before Additional Sessions Judge, Hisar. Vide judgment dated 18.09.2009, the Additional Sessions Judge, Hisar had drawn the conclusion that considering the totality of the circumstances, the trial court was not justified in sentencing the appellant for rigorous imprisonment for the period of three years plus fine in the sum of Rs.1000/-. It was further recorded that the appellant should have not been punished for rigorous imprisonment for the period of three years, for merely keeping the public amount of ₹1,08,400/- in his domain for the period of one week only. Accordingly, the appellate court partly accepted the appeal of the petitioner and order of sentence passed against the petitioner, was ordered to be partly set-aside. Accordingly, the substantive sentence of the petitioner was ordered to be reduced to the one already undergone by him and further to undergo, imprisonment till the rising of the court.

Still aggrieved, the petitioner has preferred the present revision.

Learned counsel for the petitioner has argued that even as per the

allegations, the amount in question remained with the petitioner from 05.07.2000 to 17.07.2000 i.e. for 12 days and for that a genuine reason was placed before the courts below that the wife of the petitioner was not well. Thus, in any way, there is no mensrea attributed to the petitioner. Learned counsel for the petitioner has drawn attention of this Court towards the testimonies of the witnesses i.e. PW-6 to PW-12, who were declared hostile as they did not support the prosecution case.

Per contra, learned State counsel who has stressed in his arguments that petitioner was the Area Patwari and the pension amount which was to be distributed to the pensioners of the area was illegally retained by him. Learned State counsel has further argued that the petitioner's wife was not well he should have given the information in writing to the competent authority and he was bound to deposit the amount in the office which was entrusted to him and that the entrustment is proved by the entry Ex.P-1, recorded in the register maintained by the office of Kanungo, Narnaund. The learned State counsel accordingly prays for the dismissal of the present petition.

I have heard learned counsel for the parties and with their able assistance has gone through the record of the trial court.

Instant is a case, the amount of Rs.1,08,400/- was entrusted to the petitioner. The said amount had remained with the petitioner from 05.07.2000 to 17.07.2000 i.e. only for 12 days. Later on the said amount was returned by the petitioner to the authorities. Though the learned counsel for the petitioner has argued that in view of the fact that there was no mensrea on the part of the petitioner, he could not have been held guilty, but the fact remains that the amount remained with the petitioner for 12 days

and it was only when the FIR was registered, the petitioner had deposited the amount back with the authorities. Both the Courts have appreciated the evidence on record. In the revisional jurisdiction, this Court has to see if the learned Courts below had ignored, not appreciated or misconstrued the evidence on record. Instance is not a such case. In view of the said fact, no interference is called for so far as the conviction of the petitioner is concerned.

While upholding the conviction awarded by the appellate court, in my opinion, it is a fit case which fulfills the ingredients of granting probation. The charges against the petitioner has not been proved beyond the reasonable doubt. Admittedly, the petitioner has been facing the agony of trial for the last 18 years. Besides, the petitioner is not a previous convict. Thus, no useful purpose will be served by sending the petitioner behind the bars once again to undergo the remaining sentence. It is a fit case, where the petitioner, who is otherwise not reflected to be a previous offender, can be released on probation.

In my view, Sections 360 and 361 of the Code of Criminal Procedure would mandate a Court to consider the release of an accused on probation.

Section 360 Cr.P.C. reads as under:-

360. Order to release on probation of good conduct or after admonition.

(1) When any person not under twenty- one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty- one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to

the Court before which he is convicted, regard being had to the age, character or antecedents of the offender,

and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour: Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by subsection (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub- section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860), punishable with not more than two years'

imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law: Provided that the High Court or Court of Session shall not under this subsection inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(6) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under sub- section (1), shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has

failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and such Court may, after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.”

The Hon’ble Supreme Court in ***Chandreshwar Sharma Vs. State of Bihar***, (2000) 9 SCC 245, while considering such mandate, has held to the following effect:-

“3. The appellant herein was convicted under Sections 379 and 411 Indian Penal Code and was sentenced to rigorous imprisonment for one year as 3.5 kg of nonferrous metal was recovered from his possession. On an appeal being filed, the conviction under Section 379 was affirmed. The appellant carried the matter in revision, but the revision also stood dismissed. All along the case of the appellant was that the recovery from the Tiffin carrier kept on the cycle would not tantamount to recovery from the possession of the appellant, and this contention has been negatived and rightly so. When the matter was listed before this Court, a limited notice was issued as to why the provisions of Section 360 of the Criminal Procedure Code should not be made applicable. Pursuance to the said notice, Mr. Singh, the learned standing counsel for the State of Bihar has entered appearance. From the

perusal of the judgment of the learned Magistrate as well as the Court of Appeal, and that of the High Court, it transpires that none of the forum below had considered the question of applicability of Section 360 of the Criminal Procedure Code. Section 361 and Section 360 of the Code on being read together would indicate that in any case where the Court could have dealt with an accused under Section 360 of the Code, and yet does not want to grant the benefit of the said provision then shall record in its judgment the specific reasons for not having done so. (Emphasis Supplied). This has apparently not been done, inasmuch as the Court overlooked the provisions of Sections 360 and 361 of the Criminal Procedure Code. As such, the mandatory duty cast on the Magistrate has not been performed. Looking to the facts and circumstances of the present case, we see no reasons not to apply the provisions of Section 360 of the CrPC. We accordingly, while maintain the conviction of the appellant, direct that he will be dealt with under section 360, and as such, we direct that the appellant be released on probation of good conduct instead of sentencing him, and he should enter into a bond with one surety to appear and receive the sentence when called upon during the period of one year for the purpose in question. The bond for a year shall be executed before the learned Chief Judicial Magistrate, Ranchi, within 3 weeks from today. The appeal is disposed of accordingly.”

Similar is the view taken by this Court in **Akhtar and another vs. State of Haryana**, 2013(8) RCR (Criminal) 2992 and CRR No. 1087 of 1987 titled **Bachna Ram versus State of Haryana**.

Keeping in view the totality of the case and after going through the record, it is a fit case to release the petitioner on probation while upholding his conviction.

Resultantly, while upholding the conviction of the petitioner under Section 409 IPC, his substantive sentence of imprisonment is set aside. Instead, he is ordered to be released on probation for a period of one year subject to his executing bonds to the satisfaction of the Chief Judicial Magistrate concerned, undertaking to keep peace and be of good behaviour for the said period and to appear and receive the sentence as and when called upon to do so in case of violation of any of the conditions of the bonds.

Revision petition stands disposed of in the above terms.

05.04.2019
pooja saini

(HARNARESH SINGH GILL)
JUDGE

<i>Whether speaking/reasoned?</i>	<i>Yes</i>
<i>Whether reportable?</i>	<i>Yes</i>