

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRREV NO.218 OF 1997

(From the judgment dated 10th November, 1994 passed by learned J.M.F.C., Digapahandi in G.R. Case No.57/1990 (T.R. No.439/91) and judgment dated 17th March, 1997 passed by learned Second Addl. Sessions Judge, Ganjam, Berhampur in Crl. Appeal No.11/1996 (Crl. A. No.195/1994 (GDC))

Naresh Pradhan

... Petitioner

-versus-

State of Orissa

... Opposite Party

Advocates appeared in the case through hybrid mode:

For Petitioner

: Mr. S.D. Das, Sr. Advocate

-versus-

For Opposite Party

**: Mr.P.Tripathy
Addl. Standing Counsel**

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

05.7.2022.

Sashikanta Mishra, J.

The Petitioner was convicted for the offence under Section 409 of I.P.C. by the learned J.M.F.C., Digapahandi vide judgment dated 10th November, 1994 in G.R. Case No.57/1990 (T.R.

No.439/1991) and was sentenced to R.I. for two years and to pay fine of Rs.3000/-, in default, to undergo further R.I. for six months. The said judgment of conviction and sentence passed by the trial court was confirmed in appeal by the learned Second Addl. Sessions Judge, Berhampur in Criminal Appeal No.11/1996 as per the judgment passed on 2nd April, 1997. Challenging the aforementioned judgments, the Petitioner has filed the present Revision.

2. The facts of the case are that the Petitioner was the Sarpanch of Podamari Grama Panchayat during the year 1989 and pursuant to Government Notification dated 22nd December, 1989 the Sarpanchs were asked to hand over charge to VLW. Accordingly, by order dated 26th December, 1989 issued by the BDO, Sanakhemundi, the Petitioner was directed to hand over charge to the VLW which he did on 4th January, 1990, but he failed to hand over the cash balance of Rs.31,392/- drawn by him in Jawahar Rojagar Yojana (JRY) which was kept in his personal custody. As such, the BDO, Sanakhemundi lodged F.I.R. before Pattapur P.S. on the basis of which P.S. Case No.23/1990 was registered under Section 409 of I.P.C. and investigation was taken up. In course of investigation GRY account of Podamari Grama

Panchayat for the year 1989-90 was audited by the Departmental Auditor who found that cash of Rs.31,392/- was kept with the Petitioner which he failed to produce during the audit nor could he submit the vouchers and as such, held that the Petitioner had misappropriated the funds. Upon completion of investigation charge sheet was submitted. While taking the plea of denial the accused took the specific plea that the amount in question was received by the Secretary of Grama Panchayat and that vouchers for the amount had been submitted, which was utilized for development work. He further claimed that he had never been asked by the Auditor during audit and that all the vouchers are kept with the Secretary.

Prosecution, in order to prove its case examined seven witnesses and also proved the documents marked Exhibits 1 to 7. The accused examined four witnesses from his side and exhibited four documents marked Exts.A to E. After analyzing the evidence on record in detail the trial court held that entrustment of the amount in question was clearly established and, therefore, the onus was on the defence to duly account for the amount entrusted to him. In analyzing the evidence of the prosecution witnesses as also the witnesses examined by the defence including the Government

examiner of questioned documents (handwriting expert), the trial court held that the so called vouchers produced by the defence vide Exts.A to E were fabricated for the purpose of the case and, therefore, rejected the defence plea that the amount in question had been duly utilized for the purpose it was drawn. On such basis the trial court held that the charge under Section 409 of I.P.C. was proved and accordingly, convicted the accused-Petitioner and sentenced him as aforesaid.

The Petitioner carried the matter in appeal. The lower appellate court independently scanned the evidence on record meticulously and held that entrustment of the amount in question was clearly proved, which the accused had failed to account for. It was further held that rejection of the evidence of the handwriting expert by the trial court was justified. As such the order of conviction and sentence passed by the trial court was confirmed.

3. Heard Mr. S.D.Das, learned Senior counsel for the Petitioner and Mr. P. Tripathy, learned Addl. Standing Counsel for the State.

4. Assailing the impugned judgment learned Senior counsel has contended that the evidence of P.Ws.2,3 and 4 to the effect that

money was given in advance to D.Ws.2, 3 and other contractors for purchase of building and other materials and such evidence being supported by vouchers duly signed by them in presence of the Secretary of Grama Panchayat, both the courts below committed grave error of law in overlooking such tell tale evidence. Learned Senior counsel has also contended that the trial court committed an illegality in substituting his own findings with regard to the handwriting in Exts.A to E over that of the handwriting expert. The opinion of the handwriting expert being admissible under Section 45 of the Indian Evidence Act, it was completely unjustified for the trial court to have rejected the same. Alternatively, it is contended by learned Senior counsel that the occurrence took place way back in the year 1990, the Petitioner is aged about 75 years at present. Therefore, in the event of his conviction being found to be justified, he should be granted the benefit of the P.O. Act instead of sending him to prison to serve the remaining part of his sentence.

5. Per contra, Mr. P.Tripathy, learned Addl. Standing Counsel for the State, contended that the essential ingredients of the offence under Section 409 of I.P.C. being entrustment and misappropriation were clearly proved from the oral and documentary evidence on

record. Further, there being no challenge on the point of perversity or any material illegality having been committed by the courts below, the concurrent findings of fact need not be interfered with by this Court exercising revisional jurisdiction. It is also contended that the Court is the expert of experts and, therefore, is competent to accept or reject the evidence of an expert witness.

6. This being a case under Section 409 of I.P.C. the first ingredient required to be proved is entrustment of the money in question, which in the present case is Rs.31,392/-. The trial court has relied upon the evidence of the prosecution witnesses particularly P.Ws.1, 2 and 6 as also the relevant documents, cash books, receipt books etc. A reading of the impugned judgment reveals that the trial court noted the inflow of different amounts on different dates as mentioned in the cash book as also the receipt book from 19th June, 1989. The trial court also found that the accumulation of money from the JRY account had increased and decreased during different transactions in between 31st July, 1989 to 4th December, 1989 and finally on 4th December, 1989, a sum of Rs.31,392/- was kept in hand of the accused. This finding was concurred by the lower appellate court also upon appreciation of the oral and documentary evidence referred to above. It has not been shown

before this Court as to how such finding, which is essentially a finding of fact, is perverse or erroneous. Nevertheless, this Court has also gone through the evidence of P.Ws.1 to 6, the JRY cash book marked M.O.I, miscellaneous cash receipt book marked as M.O.II and JRY pass book marked M.O.III. It is not disputed that the accused was Sarpanch of Podamari Grama Panchayat since 27th January, 1984. This Court has found no evidence whatsoever to show that the amount in question was received by the Secretary (P.W.4) of the Grama Panchayat. Defence has adduced evidence in the form of D.Ws.2 and 3 who are said to be different contractors who supposedly received payment for supplying building materials for the JRY work and the vouchers marked Exts.A to E. This Court finds that apart from the fact that the so called vouchers were rejected by the trial court by referring to the opinion of the handwriting expert (D.W.1), it is also seen that the same were produced from the custody of the accused himself and only during trial. As has been rightly held by the trial court and concurred by lower appellate court, if the vouchers were available in the office, why were the same not produced before the auditor at the relevant time. Further, if the vouchers were in fact present in the office why was the guard file, which is supposed to contain the vouchers, not

called for during trial by the accused. Similarly the advance register, which is supposed to show the payment of advance amounts to the contractors, was also not called for. All these facts cumulatively lead to the irresistible conclusion that the accused had taken the plea of payment to contractors purely as an after- thought to save himself from conviction in the case. Therefore, this Court fully agrees with the findings arrived at by the trial court as confirmed by the lower appellate court.

7. This leaves the court with the question of law raised by the learned Senior counsel to the effect that it was not proper on the part of the trial court to reject the opinion of the handwriting expert and to substitute the same with his own opinion. It is seen that according to the handwriting expert, the person who wrote the specimen writing (P.W.4) had also written the vouchers marked Exts.A to E. The trial court himself compared the specimen writing contained in the vouchers and found certain material discrepancies visible to the naked eye and, therefore, held the opinion of the handwriting expert to be not acceptable. The law relating to the acceptance of the opinion of an expert has been dealt with by the Apex Court in several decisions. In the case of State of

H.P. v. Jailal and others, reported in 1999(7) SCC 280 the Apex

Court held as under:-

“An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.

The report submitted by an expert does not go in evidence automatically. He is to be examined as a witness in court and has to face cross-examination. This Court in the case of *Hazi Mohammad Ekramul Haq v. State of W.B.* concurred with the finding of the High Court in not placing any reliance upon the evidence of an expert witness on the ground that his evidence was merely an opinion unsupported by any reasons.”

8. Thus, it seen that the opinion of an expert is not binding on the Court as it is open to it to form its own opinion based on other evidence on record. In an earlier decision, i.e. in the case of ***Kanchansingh Dholaksingh Thakur v. State of Gujarat*** reported in 1979 (4)SCC 599 it was held as under:-

“It is well settled that in order to rely on the evidence of an expert the Court must be fully satisfied that he is a truthful witness and also a reliable witness fully adept in the art of identification of handwriting in order to opine whether the alleged handwriting has been made by a particular person or not. As the evidence of the expert has been disbelieved by the High Court on the most material points, we find it wholly unsafe to base the conviction of the appellant merely on the testimony of the expert.”

Such being the position of law, this Court finds that the trial court has rightly rejected the opinion of the handwriting expert for reasons adequately spelt out by it and so also the lower appellate court in confirming such findings.

9. For the foregoing reasons therefore, this Court finds that the trial court has rightly held the Petitioner guilty of the offence under Section 409 of I.P.C. The lower appellate court has also correctly appreciated the facts and law while confirming the order of conviction. This Court, therefore, finds no reason to interfere with the order of conviction. However, as regards the sentence, considering the fact that the Petitioner is presently aged about 75 years and the occurrence took place nearly 32 years ago, this Court holds that ends of justice would be best served if the accused is released as per the provisions of Section 4 of the P.O. Act instead of sending him to prison to serve the remaining part of his

sentence, more so as no criminal antecedent is reported against him.

10. In the result, the Criminal Revision is allowed in part. The order of conviction passed by the trial court and confirmed by the lower appellate court is hereby maintained. The sentence imposed by the trial court is, however, modified to the extent that the Petitioner shall be released as per provisions of Section 4 of the P.O. Act. For the above purpose the Petitioner shall appear before the trial court on 4th August, 2022, failing which the trial court shall pass necessary orders requiring him to serve the remaining part of the sentence as originally imposed.

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(*Sashikanta Mishra*)
Judge

Ashok Kumar Behera





