

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA NO.44 OF 2003

(From the judgment and order dated 3rd February, 2002 passed by learned Special Judge (Vigilance), Sambalpur in T.R. Case No.19 of 1993)

Judhisthir Pradhan

... Appellant

-versus-

State of Odisha

... Respondent

Advocates appeared in the case through hybrid mode:

For Appellant : Mr.H.K.Mund, Advocate

संयुक्त न्याये -versus-

For Respondent: Mr.M.S.Rizvi,
Addl. Standing Counsel
(Vigilance)

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

23.12.2022.

Sashikanta Mishra,J. The Appellant challenges the judgment dated 3rd February, 2003 passed by learned Special Judge

Vigilance, Sambalpur in T.R. Case No.19/1993 convicting him under Section 13(2) read with Section 13(1)(c) of the P.C. Act and Section 409 of I.P.C. and sentencing him to undergo R.I. for one year and to pay fine of Rs.5,000/-, in default to undergo R.I. for three months on each count for the aforementioned offences. The sentences were directed to run concurrently.

2. The prosecution case, briefly stated, is that on 19th April 1990, an F.I.R. was lodged by the Inspector (Vigilance), Sambalpur before the S.P. (Vigilance) stating that during an inquiry it was found that the Appellant was posted as Junior Engineer, N.H. Sub-division at Boinda from 2nd May, 1984 to 8th April, 1988 and in such capacity he had taken charge of the store of the Sub-division. On 9th April, 1988 he left Boinda on transfer to Pallahara but did not make over charge of the store and kept the same under lock. On 28th March, 1989 he made over charge of the store to his successor, Rama Chandra Sahu. At that time several materials valued at Rs.70,000/- approximately

were found to be short, which could not be accounted for. On such report, Sambalpur Vigilance P.S. Case No.5/1990 was registered and investigation was taken up. Upon completion of investigation and receipt of sanction for prosecution, charge sheet was submitted and the accused put to trial.

3. The Appellant took the plea of denial. He also took the specific plea that the shortage of materials was already there since the time he took over charge from his predecessor.

4. To prove its case, the prosecution examined 9 witnesses and exhibited 23 documents. The prosecution also proved 4 material objects. Defence examined 4 witnesses and proved 5 documents.

5. The trial court, on consideration of the evidence on record held that out of 11 items the accused could account for 10 but could not account for one item i.e., 29 kgs. of 16 M.M. Dia M.S. Rods. The Trial Court therefore, held the accused guilty of misappropriation

of the said M.S. Rods and convicted and sentenced him accordingly.

6. Heard Mr. H.K.Mund, learned counsel for the Appellant and Mr. M.S. Rizvi, learned Addl. Standing Counsel for the Vigilance Department.

7. Assailing the impugned judgment, learned counsel for the Appellant raised the following grounds;

(i) The charge framed against the accused-Appellant was contrary to law resulting in prejudice.

(ii) The Trial Court grossly erred in relying upon the charge report Ext.10 in the absence of proof of the book balance.

(iii) The Trial Court completely ignored the entry in Ext.10 showing excess of 731 kgs. of various sizes of M.S. Rods and thereby of the reasonable possibility of the rods in question being included therein.

(iv) The Trial Court completely ignored the fact that the store in question was used even during the absence of the Appellant.

(v) The order of conviction is bad in law because the accused was never given a chance to explain the alleged shortage of the materials in question during his examination under Section 313 of Cr.P.C.

On the above grounds, it is contended that the order of conviction cannot be sustained.

8. Per contra, Mr. M.S.Rizvi has argued that the objection relating to the charge was never raised at the appropriate stage and in any case, the appellant has not proved by cogent evidence as to how he was prejudiced thereby. On merits, it is submitted by Mr. Rizvi that here is clear proof of entrustment of the materials and the failure of the Appellant to account for the same, which proves the offence of misappropriation. It is further contended that the defence plea is highly unacceptable.

9. As regards the question of defective charge, it is seen that the Trial Court framed the following charges:-

“That you, in between 2.5.84 and 8.7.88 at Boinda, being a public servant employed as Junior Engineer, N.H. Sub-division, Boinda and while being in charge of the store of the said Sub-Division, committed criminal misconduct by dishonestly misappropriating the property worth Rs.91,337.50 entrusted to you and thereby committed an offence under Section 13(1) (c) of the P.C. Act, 1988 punishable under Section 13(2) of the said Act and within my cognizance.

That you, during the aforesaid period and place, being entrusted with the property worth Rs.91,337.50 P., committed criminal breach of trust in respect of the said property, and thereby committed an offence punishable under Section 409 I.P.C. and within my cognizance.

And I hereby direct that you be tried on the aforesaid charges.”

- 10.** To appreciate the Appellant’s contentions in this regard, it would be profitable to refer to Section 212 (2) of Cr.P.C. which reads as follows:

“When the accused is charged with criminal breach of trust or dishonest misappropriation of money or other movable property, it shall be sufficient to specify the gross sum or, as the case may be, describe the movable property in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact

dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 219; Provided that the time included between the first and last of such dates shall not exceed one year.”

11. According to Mr. Mund, the provision does not contemplate mixing up the charge relating to misappropriation of money and of goods. In the instant case, the charge does not mention the details of the misappropriated goods in respect of which the alleged offence was committed and only the money value has been given. This has caused prejudice inasmuch as law requires that the particulars specified in the charge should be reasonably sufficient to give the accused notice of the matter with which he was charged.

12. This Court however refrains from entering into the controversy for the reason that the accused has failed to show as to how he was prejudiced by such framing of charge. In fact he participated in the trial without raising even a murmur of protest at the relevant time. Section 215 of Cr.P.C. reads as follows:-

“215. Effect of errors. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.”

13. This Court on the facts and circumstances of the case as also the evidence adduced by the prosecution and the defence finds no reason to believe that the accused was misled in any manner at any point of time during trial so as to materially affect his defence. The contention of Mr. Mund in this regard is therefore, rejected.

14. As regards the other grounds raised by Mr. Mund, it is seen from the evidence on record that the Appellant could satisfactorily account for 10 out of the 11 items of shortage. The only item which he could not satisfactorily account for was 29 kgs. 16 M.M. Dia M.S. Rods. The prosecution has heavily relied upon a document marked Ext.10, which purports to be the charge report. It contains the list of materials stocked in the store made over and taken over. Sl. No.7 relates

to 16 M.M. M.S. Rods which, as per book balance was 0.152 MT. Out of the same, 0.073 MT was actually handed over and 0.029 MT was the shortage amount. Firstly, prosecution has not proved the corresponding entry in the book balance or adduced any oral evidence to show that the same was actually 0.152 MT. In the absence of the entry in the book balance or the register, it cannot be straight away accepted as gospel truth. In the case of **Dada Rao v. State of Maharashtra**; reported in AIR (1974) SC 388, the Supreme Court held that mere entries in the books of account without any oral evidence supporting the same cannot prove entrustment. In this case, the evidence on record suggests that Ext.10 was prepared jointly by the Appellant and his successor. According to the Appellant the said report was prepared by his successor Rama Chandra Sahu (P.W.4). The Trial Court has rejected the defence plea that the signature of the accused-Appellant was obtained forcibly. This Court also is not inclined to accept the defence plea, but then in the absence of the corresponding entries in

the books of account and oral evidence in support thereof, the charge report cannot be treated as sacrosanct. Even though the defence plea as above is rejected, the prosecution still has to prove that 0.152 MT of materials was actually entrusted to the accused. The Trial Court has simply rejected the defence plea and rightly so, but proceeded only on such basis to hold that entrustment was proved. Obviously, prosecution cannot be absolved of its burden to prove actual entrustment of the items in question. This is more so as the same charge report (Ext.10) shows an excess of 0.731 MT M.S. rods of various sizes. Obviously 'various sizes' would also include 16 M.M. Dia M.S. Rods. Therefore, a reasonable doubt arises that in the so-called surplus stock found in the store weighing 0.731 M.T. M.S. Rods, 0.029 kgs of 16 M.M. Dia Rods may also have been included. It goes without saying that in a criminal trial if two views are possible on the same set of evidence, the one favouring the accused is to be accepted.

15. Another important aspect that appears from the record is, the accused during his examination under Section 313 of Cr.P.C. was asked as many as 27 questions. Some of the questions relate to the so called shortage of different items specifically mentioning the same. For instance, Question No.19 is as follows:

“Q.No.19. It transpires from the evidence of P.W.4 and from the Bin Cards, there was shortage of 291 bags of cement of his Section and also shortages of Bitumen as per Bin Cards Exts.13 and 14. What do you say about it?”

Similarly Question No.24 is as follows:-

“Q.No.24. It transpires from the evidence of P.W.9-Sankatbhanjan Pattnaik that he presented preliminary enquiry report as per “Ext.22 to the S.P.(Vig) to the effect that there was shortage of 33 drums of Bitumen, 549 bags of cement, 12 numbers of R.C.C. Hume pipes, 9 nos. of Iron Pullin, one iron back strad, two front strod, one iron collar and asphalt of 8.963 metric tones and approximate cost of the materials found short was Rs.70,000/-. What do you say about it ?”

16. No question was put to the accused as to the so-called shortage of 0.029 MT of 16 M.M. Dia M.S. Rods. So, if from the evidence, the Court below could discern that out of 11 items of shortage the Appellant could satisfactorily account for 10 items, then it was incumbent upon the Trial Court to have specifically put a question relating to the balance item so as to afford an opportunity to the accused to explain the same. Since the very same evidence was utilized to hold the accused guilty without bringing the same to his notice during his examination under Section 313 of Cr.P.C., the so-called incriminating evidence could not have been utilized against him. This is the settled position of law.

17. Thus, on a conspectus of the analysis of the evidence on record and the discussion made herein before, this Court is left with no doubt that the impugned order of conviction cannot be sustained in the eye of law. Resultantly, the impugned judgment of conviction and sentence is hereby set aside and the

accused-Appellant is acquitted of the charge. The Appellant being on bail, his bail bonds be discharged.

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(**Sashikanta Mishra**)
Judge

Ashok Kumar Behera





