

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 578 of 2015

Awadhesh Kumar Bhar

Vs.

State of West Bengal

For the appellant : Mrs. Chandreyi Alam (Learned Legal Aid Counsel).

For the State : Mr. Abhra Mukherjee,
Mr. Dipankar Mahato.

Heard on : 14.07.2023

Judgment on : 04.08.2023

Shampa Dutt (Paul), J.:

1. THE APPEAL:-

The present appeal has been preferred against the Judgment and Order of conviction and sentence dated 27.07.2015 and 28.07.2015 respectively passed by the learned Judge, 5th Special Court, Asansol, Burdwan in Sessions Trial No.8 of 2013 arising out of Sessions case No.1 of 2013 thereby convicting the accused/appellant under Section 409 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for

two years and pay a fine of Rs.5,000/-, in default to undergo simple imprisonment for a further period of three months.

2. THE PROSECUTION:-

- i) That on 24.07.2012 one Lakshmi Narayan Dey, Assistant Superintendent of Posts, Asansol lodged a written complaint to the Officer-in-Charge, Hiraipur Police Station alleging that accused Awadhesh Kumar Bhar was an employee of postal department as Postal Assistant, Burnpur Mukhya Dak Ghar. On 31.01.2011 he accepted a sum of Rs.10,000/- from Indu Bhusan Pathak having SB Account No.379632. On 20.1.2011 and on 3.6.2011 accepted a sum of Rs.5700/- from Shri Biman Bihari Mondal having SB Account No.376601 and subsequently on 15.2.2011 he accepted Rs.10,000/- from Sisir Kumar Mukherjee. He made the relevant entries in the Pass Books in his own hand and impressed date stamps **but he did not credit the said money in Government account, on the said date or any subsequent dates and in this way he defalcated the government money.**
- ii) On the basis of the said complaint, Mirapur Police Station case No.195 of 2012 under Section 409 of the Indian Penal Code was registered for investigation.
- iii) On completion of investigation the Investigating Authority submitted charge sheet against the accused for offence under Section 409 of the Indian Penal Code. The learned ACJM, Asansol was pleased to take cognizance of the offence and send

the records to the file of the learned Judge, 5th Special Court, Asansol. On 20.12.2013 the learned Judge, 5th Special Court, Asansol was pleased to frame charge against the accused under Section 409 of the Indian Penal Code. The accused pleaded 'not guilty' and claimed to be tried.

iv) In course of trial seven witnesses were examined by the prosecution. Two witnesses were examined on behalf of the accused including the accused himself as DW1. On conclusion of the trial the learned Judge, 5th Special Court, Asansol, vide his judgment and order dated 27.07.2015 was pleased to hold the accused guilty as charged and accordingly convicted him under Section 409 of the Indian Penal Code. By further order dated 28.07.2015 the learned Trial Judge was pleased to sentence the accused to suffer rigorous imprisonment for two years and also to pay a fine of Rs.5000/-, in default to undergo simple imprisonment for three months.

3. THE EVIDENCE :-

Prosecution witness no.1 is the complainant (Assistant Superintendent of Post Office). He has proved the FIR (Ext. 1), the three written statements made by the accused (Ext. 12 series), the Pass book entries and connected ledgers, scrolls, (Ext. 1 to 10). He has deposed in cross-examination that according to rule the money collected by the Counter Clerk is deposited with the treasurer at the end of the day.

Prosecution witness nos.2 to 5 are the depositors who have deposed that relevant entries were duly made by the appellant in their respective pass books.

Prosecution witness no.3 is a formal witness.

Prosecution witness nos.4 is a formal witness to the seizure.

Prosecution witness no.6 is also a depositor. He has deposed that on verification he realised that two amounts deposited by him were not credited to his amount.

4. ANALYSIS OF EVIDENCE :-

Appellant has been convicted for offence punishable under Section 409 of IPC.

Prosecution witness no.1 is the complainant, the Assistant Superintendent who on Inspection detected the anomalies in the transaction.

The alleged defalcated amount was deposited by the appellant in May, 2012 with the permission of the Post Master. P.W 2, 5 are the customers whose deposits, though entered in their passbooks was not deposited in the government account.

The appellant as defence witness no.1 has deposed that on getting information about the dispute, he deposited the amount on 14.5.2012 with the permission of the Senior Post Master. He has further deposed that he has been discharged in a departmental proceedings initiated against him.

Defence witness no.2 is a postal authority who has deposed as authorised by the Senior Superintendent of Post Office, Asansol. This witness has corroborated the statement of the appellant that with the

permission of the Senior Post Master, has deposited the disputed amount. On being examined in chief he has deposed that the departmental proceedings against the appellant has not yet been disposed of but the appellant is still in service as his suspension was withdrawn.

MOTIVE OF CRIME:-

Motive in a case of defalcation is primarily for personal gain.

The dictionary defines:-

Defalcation as:-

(1) misappropriation of money or funds held by an official, trustee, or other fiduciary.

(2) the sum misappropriated.

Fraud as:-

Wrongful or criminal deception intended to result in financial or personal gain.

Fraud Triangle

In order to deter, detect and investigate fraud, one must understand how and why people commit fraud. The concept states that there are three components which, together, lead to fraudulent behavior. They are:-

(1) a perceived un-shareable financial need (motive/pressure),

(2) a perceived opportunity to commit fraud, and

(3) the rationalization of committing the fraud.

Motive/Pressure

- (1) Personal financial pressure.
- (2) Addiction.

Opportunity

- (1) Lack of internal control.
- (2) Senior management not watching.

Rationalization

- (1) “I haven’t received a raise”.
- (2) “ It’s only a loan: I’ll pay it back.”

The “opportunity” element of the fraud triangle refers to the circumstances that allow fraud to occur. Even in organizations with an excellent control environment, fraud is possible if employees circumvent controls being placed in a position of complete trust. There may be collusion among employees or a lack of adequate management review. There is a nearly endless list of reasons a person would feel compelled to commit fraud. It could be personal financial problems, such as mounting medical bills, gambling debts or a spouse laid off from their job, employee’s compensation tied to financial performance, or greed. Rationalization of committing fraud involves fabricating a moral excuse to justify the fraud. Many fraudsters view themselves as honest, ordinary people and not as criminals, so they have to come up with some reasoning to reconcile the act of committing fraud.

In **Civil Appeal No. 5848 of 2021 (Union of India & Ors. vs. Dalbir Singh)** the Supreme Court held (relevant paragraphs are reproduced herein):-

“25. This Court in *Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corpn. Ltd., Haldia & Ors.*, (2005) 7 SCC 764 held that the degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove the guilt of the accused “beyond reasonable doubt”, he cannot be convicted by a court of law. In a departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of “preponderance of probability”.

It was held as under:-

“11. As far as acquittal of the appellant by a criminal court is concerned, in our opinion, the said order does not preclude the Corporation from taking an action if it is otherwise permissible. In our judgment, the law is fairly well settled.

Acquittal by a criminal court would not debar an employer from exercising power in accordance with the Rules and Regulations in force. The two proceedings, criminal and departmental, are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on the offender, the purpose of enquiry proceedings is to deal with the delinquent departmentally and to impose penalty in accordance with the service rules. In a criminal trial, incriminating statement made by the accused in certain circumstances or before certain officers is totally inadmissible in evidence. Such strict rules of evidence and procedure would not apply to departmental proceedings. The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. The rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the

prosecution and unless the prosecution is able to prove the guilt of the accused “beyond reasonable doubt”, he cannot be convicted by a court of law. In a departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of “preponderance of probability”. Acquittal of the appellant by a Judicial Magistrate, therefore, does not ipso facto absolve him from the liability under the disciplinary jurisdiction of the Corporation. We are, therefore, unable to uphold the contention of the appellant that since he was acquitted by a criminal court, the impugned order dismissing him from service deserves to be quashed and set aside.”

(Emphasis Supplied)

This Court in ***Noida Entrepreneurs Association v. Noida & Ors.*** **(2007) 10 SCC 385**, held that the criminal prosecution is launched for an offence for violation of a duty, the offender owes to the society or for breach of which law has provided that the offender shall make satisfaction to the public, whereas, the departmental inquiry is to maintain discipline in the service and efficiency of public service. It was held as under:-

“11. A bare perusal of the order which has been quoted in its totality goes to show that the same is not based on any rational foundation. The conceptual difference between a departmental inquiry and criminal proceedings has not been kept in view. Even orders passed by the executive have to be tested on the touchstone of reasonableness. [See Tata Cellular v. Union of India [(1994) 6 SCC 651] and Teri Oat Estates (P) Ltd. v. U.T., Chandigarh [(2004) 2 SCC 130] .] The conceptual difference between departmental proceedings and criminal proceedings have been highlighted by this Court in several cases. Reference may be made to Kendriya Vidyalaya Sangathan v. T. Srinivas [(2004) 7 SCC 442 : 2004 SCC (L&S) 1011] , Hindustan Petroleum Corpn. Ltd. v. Sarvesh Berry [(2005) 10 SCC 471 : 2005 SCC (Cri) 1605] and Uttaranchal RTC v. Mansaram Nainwal [(2006) 6 SCC 366 : 2006 SCC (L&S) 1341] .

“8. ... The purpose of departmental inquiry and of prosecution are two different and distinct aspects. The

criminal prosecution is launched for an offense for violation of a duty, the offender owes to the society or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of public duty. The departmental inquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in the criminal cases against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental inquiry and trial of a criminal case unless the charge in the criminal trial is of grave nature involving complicated questions of fact and law. Offense generally implies infringement of public duty, as distinguished from mere private rights punishable under criminal law. When the trial for a criminal offense is conducted it should be in accordance with proof of the offense as per the evidence defined under the provisions of the Indian Evidence Act, 1872 [in short 'the Evidence Act']. The converse is the case of departmental inquiry. The inquiry in a departmental proceeding relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. ... Under these circumstances, what is required to be seen is whether the departmental inquiry would seriously prejudice the delinquent in his defense at the trial in a criminal case. It is always a question of fact to be considered in each case depending on its own facts and circumstances."

This Court in ***Depot Manager, A.P. State Road Transport Corporation v. Mohd. Yousuf Miya & Ors., (1997) 2 SCC 699***, held that in the disciplinary proceedings, the question is whether the respondent is guilty of such conduct as would merit his removal from service or a lesser punishment. It was held as under:

“7. ...There is yet another reason. The approach and the objective in the criminal proceedings and the disciplinary proceedings is altogether distinct and different. In the disciplinary proceedings, the question is whether the respondent is guilty of such conduct as would merit his removal from service or a lesser punishment, as the case may be, whereas in the criminal proceedings the question is whether the offences registered against him under the Prevention of Corruption Act (and the Penal Code, 1860, if any) are established and, if established, what sentence should be imposed upon him. The standard of proof, the mode of enquiry and the rules governing the enquiry and trial in both the cases are entirely distinct and different. Staying of disciplinary proceedings pending criminal proceedings, to repeat, should not be a matter of course but a considered decision. Even if stayed at one stage, the decision may require reconsideration if the criminal case gets unduly delayed.” (Emphasis Supplied)

28. *Mr. Yadav, learned counsel for the writ petitioner has submitted that during the pendency of the writ petition before the High Court, 9 (1997) 2 SCC 699 the appellants were given opportunity to produce the registers of the entrustment of S.L.R. to the writ petitioner. But it was stated that record was not available being an old record as the incident was of 1993. The enquiry was initiated in 2013 after the acquittal of the writ petitioner from the criminal trial. Therefore, in the absence of the best evidence of registers, the oral evidence of use of official weapon stands proven on the basis of oral testimony of the departmental witnesses.*

29. *The burden of proof in the departmental proceedings is not of beyond reasonable doubt as is the principle in the criminal trial but probabilities of the misconduct. The delinquent such as the writ petitioner could examine himself to rebut the allegations of misconduct including use of personal weapon. In fact, the reliance of the writ petitioner is upon a communication dated 1.5.2014 made to the Commandant through the inquiry officer. He has stated that he has not fired on higher officers and that he was out of camp at the alleged time of incident. Therefore, a false case has been made against him. His further stand is that it was a terrorist attack and terrorists have fired on the Camp. None of the departmental witnesses have been even suggested about any terrorist attack or that the writ*

petitioner was out of camp. Constable D.K. Mishra had immobilized the writ petitioner whereas all other witnesses have seen the writ petitioner being immobilized and being removed to quarter guard. PW-5 Brij Kishore Singh deposed that 3-4 soldiers had taken the Self-Loading Rifle (S.L.R.) of the writ petitioner in their possession. Therefore, the allegations in the chargesheet dated 25.2.2013 that the writ petitioner has fired from the official weapon is a reliable finding returned by the Departmental Authorities on the basis of evidence placed before them. It is not a case of no evidence, which alone would warrant interference by the High Court in exercise of power of judicial review. It is not the case of the writ petitioner that there was any infraction of any rule or regulations or the violation of the principles of natural justice. The best available evidence had been produced by the appellants in the course of enquiry conducted after long lapse of time.”

In the present case, the evidence is not clear as to whether the departmental proceedings against the appellant has been completed or not, though his suspension has been withdrawn.

Section 409 of the Indian Penal Code, lays down:-

“409. Criminal breach of trust by public servant, or by banker, merchant or agent. – Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Ingredients of offence:-

The essential ingredients of the offence under Section 409 are as follows:-

- (1) Accused was a public servant, or a banker or merchant or agent or factor or broker or an attorney;*
- (2) In such capacity accused was entrusted with certain property or he gained domain over such property which was not his own;*
- (3) Accused committed criminal breach of trust with respect to such property.”*

In **N. Raghavender vs. State of Andhra Pradesh, CBI, Criminal**

Appeal No. 5 of 2010, on 13.12.2021, the Supreme Court held:-

“41. Section 409 IPC pertains to criminal breach of trust by a public servant or a banker, in respect of the property entrusted to him. The onus is on the prosecution to prove that the accused, a public servant or a banker was entrusted with the property which he is duly bound to account for and that he has committed criminal breach of trust. **(See: Sadupati Nageswara Rao v. State of Andhra Pradesh⁹).**

42. The entrustment of public property and dishonest misappropriation or use thereof in the manner illustrated under Section 405 are a sine qua non for making an offence punishable under Section 409 IPC. The expression ‘criminal breach of trust’ is defined under Section 405 IPC which provides, inter alia, that whoever being in any manner entrusted with property or with any dominion over a property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property contrary to law, or in violation of any law prescribing the mode in which such trust is to be discharged, or contravenes any legal contract, express or implied, etc. shall be held to have committed criminal breach of trust. Hence, to attract Section 405 IPC, the following ingredients must be satisfied:

- (i) Entrusting any person with property or with any dominion over property;
- (ii) That person has dishonestly mis-appropriated or converted that property to his own use;
- (iii) Or that person dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation of any direction of law or a legal contract.

43. It ought to be noted that the crucial word used in Section 405 IPC is ‘dishonestly’ and therefore, it presupposes the existence of mens rea. In other words, mere retention of property entrusted to a person without any misappropriation cannot fall within the ambit of criminal breach of trust. Unless there is some actual use by the accused in violation of law or contract, coupled with dishonest intention, there is no criminal breach of trust. The second significant expression is ‘mis-appropriates’ which means improperly setting apart for ones use and to the exclusion of the owner.

44. No sooner are the two fundamental ingredients of ‘criminal breach of trust’ within the meaning of Section 405 IPC proved, and if such criminal breach is caused by a public servant or a banker, merchant or agent, the said

offence of criminal breach of trust is punishable under Section 409 IPC, for which it is essential to prove that:

- (i) The accused must be a public servant or a banker, merchant or agent;
- (ii) He/She must have been entrusted, in such capacity, with property; and
- (iii) He/She must have committed breach of trust in respect of such property.

45. Accordingly, unless it is proved that the accused, a public servant or a banker etc. was 'entrusted' with the property which he is duty bound to account for and that such a person has committed criminal breach of trust, Section 409 IPC may not be attracted. 'Entrustment of property' is a wide and generic expression. While the initial onus lies on the prosecution to show that the property in question was 'entrusted' to the accused, it is not necessary to prove further, the actual mode of entrustment of the property or misappropriation thereof. Where the 'entrustment' is admitted by the accused or has been established by the prosecution, the burden then shifts on the accused to prove that the obligation vis-à-vis the entrusted property was carried out in a legally and contractually acceptable manner.

71. To sum-up the above-stated discussion, the following incontrovertible factors have emerged in the present appeal:

First, no financial loss was caused to the Bank.

Second, the record before us does not indicate that any pecuniary loss was caused to B. Satyajit Reddy or to any other customer of the Bank.

Third, the material before us does not disclose any conspiracy between the accused persons. In the absence of any reliable evidence that could unfold a prior meeting of minds, the High Court erred in holding that Appellant and other accused orchestrated the transactions in question to extend an undue benefit to Accused No.3.

Fourth, the Appellant committed gross misconduct by misusing his position as the Branch Manager. Notwithstanding the final outcome, the Appellant's abuse of powers clearly put the Bank at the risk of financial loss.

Fifth, despite dereliction of his duties, none of the acts proved against the Appellant constitute 'criminal misconduct' or fall under the ambit of Sections 409, 420 and 477-A IPC."

Section 405 of Indian Penal Code, lays down:-

"405. Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to

his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

In the present case, there was 'entrustment' in favour of the appellant a public servant who on receiving the cash deposits from P.W 2, 5 and 6 made the relevant in the respective pass books but did not deposit the cash with the government nor did he made the relevant entries in the respective ledgers. Though he has admittedly repaid the said amount by depositing the same on a subsequent date (on 14.05.2012), there has been criminal breach of trust with respect to the said amount on his part in the capacity of a public servant in the year 2011. The fact of repayment also lends strength to the case of the prosecution.

The amount in respect which the said offence has been committed is Rs.10,000/- (P.W 2), Rs.10,000/- (P.W 5), Rs.2,000/- and Rs.3,700/- (P.W 6). Total is Rs.25,700/-.

The charge has been framed in respect of an amount of Rs.10,000/- + Rs.10,000/- Rs.2,000/- = Rs.22,000/-.

Section 212 of the Cr.P.C. provides:-

- (1) ***The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.***
- (2) *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.

In this case the charge as framed by the Trial Court includes the period of offence committed within period of one year.

But the amount mentioned in the charge does not match the actual amount.

Section 215 in the Cr.P.C., 1973

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.

The **Supreme Court** in Criminal Appeal no. 1051-1054 of 2021 with Criminal Appeal no. 1055-1059 of 2021, (**Nasib Singh Vs. The State of Punjab**) vide judgment dated 8th October, 2021 laid down the **principle on retrial** in paragraph 28 of the judgment as follows:-

“The principles that emerge from the decisions of this Court on retrial can be formulated as under:-

- (i) *The Appellate Court may direct a retrial only in 'exceptional' circumstances to avert a miscarriage of justice;*
- (ii) *Mere lapses in the investigation are not sufficient to warrant a direction for retrial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a retrial be directed;*
- (iii) *A determination of whether a 'shoddy' investigation/trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence;*
- (iv) *It is not sufficient if the accused/prosecution makes a facial argument that there has been a miscarriage of justice warranting a retrial. It is incumbent on the Appellant Court directing a retrial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process;*
- (v) *If a matter is directed for re-trial, the evidence and record of the previous trial is completely wiped out; and*
- (vi) *The following are some instances, not intended to be exhaustive, of when the Court could order a retrial on the ground of miscarriage of justice :*
 - a) The trial court has proceeded with the trial in the absence of jurisdiction;*
 - b) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and*
 - c) The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the charge, resulting in the trial being rendered a farce, sham or charade."*

So even if it is seen that the charge framed by the Trial Court in this case was not in accordance with the provision of Section 212 of Cr.P.C, the circumstances in the present case **do not warrant a retrial**. More so in view of the fact that there is exhaustive oral and documentary evidence on record for consideration of the Court. Section 215 of Cr.P.C. has to be also kept in mind while considering if a case is to be remitted for retrial. The materials

on record in this case also do not come under any of the grounds for retrial as laid down by the Supreme Court in the judgment under reference.

5. CONCLUSION:-

The accused, therefore, being a public servant had the requisite knowledge that the deposit money received from account holders will have to be credited in the ledger and pass book on the same day. The very fact that the accused retained with him the entrusted amount Rs.25,700/- is not disputed. If he did not utilise the amount for the purpose for which the same had been deposited, an offence must be held to have been committed.

Accordingly the Judgment and Order of conviction and sentence respectively dated 27.07.2015 and 28.07.2015 delivered and passed by the learned Judge, 5th Special Court, Asansol, Burdwan in Sessions Trial No.8 of 2013 arising out of Sessions case No.1 of 2013 thereby convicting the accused/appellant under Section 409 of the Indian Penal Code, being in accordance with law requires no interference by this Court and is thus affirmed.

Appeal being CRA 578 of 2015 is dismissed.

The appellant is directed to appear before the trial court within one month from the date of this order to serve out the sentence of the trial court.

Interim order/orders/Bail order, if any, stands vacated/cancelled.

Copy of this judgment be sent to the learned Trial Court for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)