

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO. 494 OF 2010

Bhagwan Tatoba Gadade
Age 40 years, Occ.: Service
Residing at Kolshet Road,
Behind Ruchana Park, Dhokali,
Thane.

... Applicant
(Orig. Accused)

Versus

State of Maharashtra

... Respondent
(Orig. Complainant)

...

Mr Sachin S. Punde for the Applicant.

Mr A. A. Palkar, APP for the Respondent-State.

...

CORAM : R. N. LADDHA, J.

RESERVED ON : 4 SEPTEMBER 2023

PRONOUNCED ON : 26 SEPTEMBER 2023

JUDGMENT:

This Revision Application is directed against the concurrent orders and judgments of the Courts below convicting the Accused/ Applicant, under Section 409 of the Indian Penal Code (for short 'IPC') and sentencing him to rigorous imprisonment for one year and a fine of Rs.1,000/- or in default,

further one month's rigorous imprisonment.

2. It is the case of the prosecution that on 5 March 2000, Mr Chaudhary, the workshop superintendent, instructed in a written letter to bring various items, including a gearbox, from the Wagle Depot of Thane Municipal Corporation Transport Services (for short 'TMC') to the Kalwa Depot. As per the order, Pandurang Patil and driver Bhatia took bus No. MCU-9974 (for short 'bus') and transported the items as per the list to Kalwa Depot. Accused Bhagwan, who was on duty as a security guard, checked the things and led the bus to the Kalwa Depot. Accused Gadade told them to unload the vehicle, and only the gearbox remained inside the bus. Then, the bus went for washing in the depot itself. Accused Prakash Jadhav inspected the vehicle, and then accused Taterao Mahake and Kishor Kulkarni drew the bus out. The next day, it was discovered that the gearbox was missing. Therefore, Mr Deepak Kakade, the workshop officer of Wagle and Kalwa Depot of TMC, filed a complaint at the Kalwa Police Station. The verbal complaint was recorded in writing by PSO Kalwa. Based on this complaint, an offence under Section 409 read with 34 of the Indian Penal Code was registered against the Applicant and other co-accused, who at the relevant time were working with the TMC in various capacities.

3. On completion of the investigation, a charge sheet was sent up, and trial was held in the Court of Judicial Magistrate First Class at Thane. Upon considering the material placed before him, the learned Magistrate framed a charge against the accused for the offence punishable under Section 409 read with 34 IPC. Since the accused pleaded not guilty, he was put on trial.

4. At the trial, to substantiate the indictment against the accused, the learned trial Court recorded the evidence of witnesses, namely Deepak Madhukar Kakade-PW1, an Assistant Workshop Officer TMC; Pandurang Patil-PW2, tyre fitter TMC; Rajendra Mhatre-PW3, sweeper TMC; Rajen Patil-PW4, sweeper TMC; Nitin Sontakke-PW5, an employee of TMC deputed at Wagle Depot; Tejas Masarkar-PW6, an employee of TMC at Kalwa Depot; Azeen Husain Parte-PW7, an employee of TMC; Damodar Navkar-PW8, Administrative Officer TMC; PI Suresh Bendre-PW8, an Investigating Officer.

5. The statement of the accused under Section 313 of the Code of Criminal Procedure, 1973, came to be thereafter recorded, consisting of a denial and false implication.

6. Upon consideration of evidence tendered before him, the

learned Magistrate convicted all the accused and sentenced them as aforementioned.

7. The judgment of conviction and order of sentence passed by the Judicial Magistrate First Class, Thane, dated 7 July 2008 in SCC No. 2332 of 2000 was assailed in appeal before the learned Ad-hoc Additional Sessions Judge, Thane, vide Criminal Appeal No. 106 of 2008, who, appreciating the evidence on record, acquitted the co-accused but concurred with the conviction of the Applicant.

8. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction, the Applicant has preferred this Criminal Revision Application.

9. I have heard Mr Sachin Punde, the learned counsel for the Accused/Applicant, and Mr A. A. Palkar, learned Additional Public Prosecutor for the State and perused the impugned judgments, ground in the revision application, evidence of the prosecution witnesses and the entire material on record.

10. Mr Sachin Punde, the learned counsel appearing on behalf of the Applicant, argued that the impugned orders passed by both the trial Court and the Appellate Court failed to appreciate

that the gearbox was never given to the Applicant by anyone, for any reason, at any time. Therefore, the question of criminal breach of trust by the Applicant does not arise. According to him, the ingredients of the offence under Section 409 were totally absent. He submitted that there was no evidence on record to show that the Applicant was on duty in the second shift from 2:00 p.m. to 10:00 p.m. Mr Navkar-PW8, the Administrative Officer, himself was on leave on 5 March 2000. Nothing is on record to show that the bus was taken out of the depot in the evening.

11. According to the learned counsel, even if it is presumed that the gearbox was brought to the depot on 5 March 2000 and missing, it was, at the highest an unsolved case of theft and certainly not of criminal breach of trust. He submitted that there was an unexplained delay of about 12 days in lodging the FIR. He submitted that after having acquitted all the other accused who could have been responsible for the misappropriation, there is absolutely no justification for convicting only the Applicant, whose duty was at the gate, as per the prosecution case. He points out that in the FIR, Pandurang (PW2) was made an accused, but later on, he was examined as a witness.

12. Mr A. A. Palkar, learned Additional Public Prosecutor, supported the line of reasoning adopted by both the trial Court and the Appellate Court to record the finding of conviction against the present Applicant. He invited the attention of this Court to the testimony of PW7 to contend that the gearbox was sent from Wagle Depot to Kalwa Depot. The gearbox was still on the bus when it reached Kalwa Depot. According to learned APP, the evidence of Tejas-PW6 and Azeen-PW7 proved that the gearbox was not removed and that the Accused/Applicant had control and responsibility over the property. According to learned APP, as the entrustment and dominion of property is proved, the Accused/ Applicant cannot escape from his liability.

13. After examining the evidence of the prosecution witnesses, it revealed that Mr Chaudhary, the depot in-charge, received the gearbox from Pandurang Patil (PW2), who brought it from Wagle Depot. The evidence of prosecution witnesses shows that Mr Chaudhary checked the gearbox at the gate along with the list of items. He also accompanied the bus from the entrance gate to the workshop, which was about 80 feet away. He instructed the workers, Rajendra Mhatre (PW3) and Rajen Patil (PW4), to unload the articles from the bus. However, these two witnesses did not see the gearbox on the bus while unloading. Rajendra

Mhatre (PW3) stated that he did not notice the gearbox among the items. On the other hand, Azeen Parte (PW7) claimed that he saw the gearbox on the bus at that time. It is pertinent to note that the gearbox was a heavy object weighing more than 100 kg, but no one witnessed it being moved from the bus. Admittedly, the gearbox was never recovered after the alleged incident. Even if it is presumed that the gearbox was brought to the depot and missing, still, the prosecution utterly failed to connect the Accused/Applicant to the alleged crime.

14. There is no documentary evidence on record to show that the Applicant was on duty at the gate when the bus left the depot in the evening. Damodar Navkar (PW8) testified that he did not know anything about the security guards' duties or what happened on 5 March 2000, even though he supposedly conducted the internal enquiry. He did not even make any enquiry as to how many guards were on duty on that day. Admittedly, there were three/four guards on duty at a given time. Pandurang Patil (PW2) also said that he had to stay until the material was unloaded, and his duty was not over until then. Mr Chaudhary, however, was not called as a witness. Furthermore, Nitin Sontakke (PW5) said that the gearbox was kept under the seat in the middle of the bus. But Tejas Masarkar (PW6) and

Azeen Husain (PW7) claimed it was near the back of the bus.

15. Upon perusal of the impugned judgment, it seems that the learned Judge has applied the wrong concept of duty negligence. The real issue was the entrustment and disappearance of the entrusted item. The language of Section 409 IPC states that entrustment is the only thing that matters, regardless of how it happened. But in this case, there is no proof of entrustment either. The prosecution evidence falls short of fetching the accused within the purview of Section 409 IPC. The law is clear that the prosecution must prove its case. The only logical conclusion is that the Accused/Applicant cannot be convicted under Section 409 IPC.

16. Consequently, this Revision Application is allowed. The judgments and orders passed by the Court below are set aside. Accused/Applicant is acquitted of the offence punishable under Section 409 IPC. The amount of fine paid by the Applicant may be returned to him. His bail bonds stand cancelled.

17. Revision Application is disposed of in the aforesaid terms.

R. N. LADDHA, J.