COURT OF THE PR. SESSIONS JUDGE
BHADERWAH

File No. : 01/Cr.Appeal
CNR No. : JKBD010001822018
Date of Inst. : 18.12.2018
Date of dec. : 26.08.2020

S T A T E

(Petitioner)

Ld. PP for the state.

Versus

1. Mohd Iqbal S/O Gh. Ahmed R/O Nowpachi, Marwah
2. Raj Kumar Dogra S/O Ram Dhan Dogra R/O Ward No.6 Court Road Udhampur Tehsil and Dist. Udhampur.

(Respondents)

Mr. Abdul Wahid Advocate for the respondent no.1
Mr. D.K. Gupta Advocate for the respondent no.2
both through virtual mode.

Criminal Appeal

O R D E R

Ashok Kumar
JO Code No.00041

1. The summarized facts which are put in this appeal while throwing challenge to the judgment passed by Sub Judge/JMIC Bhaderwah on 03.12.2016 reads that there was a complaint lodged by Branch Head of J&K

Bank Udrana the complainant in the case regarding some embezzlement related matter, that there is a case of embezzlement of cash to the tune of Rs.39.5 lacks. The matter was brought to the notice of the branch head by R.K. Dogra at about 10.15 PM on 29.08.2009, whileas the cashier of the branch namely Mohd Iqbal respondent no.1 herein did not report on duty after leaving the branch allegedly on Friday on 28.08.2009 at 3.30 PM, as he claimed some health issue. The further grounds are that the matter was reported to the higher authorities on 30.09.2009 which probably could have been on 30.08.2009 but may have been wrongly written as 30.09.2009. Whileas reportedly on 30.08.2009 at 9 AM the cluster head alongwith complainant and other officials of the branch found the cash of Rs.39.5 lac less in the safe and the case was registered under FIR No:131/2009 u/ss 409/109 RPC.

2. The police conducted the investigation and finally laid the challan against the accused persons/respondents in the court below and the court below allegedly on the basis of material on record framed the charges against the accused persons/respondents and conducted the full dressed trial in the case.

3. The main ground taken while throwing challenge to the judgment is that during the course of trial the prosecution has led cogent, positive and credible

evidence but the court below has ignored all the evidence of trustworthy witnesses and thus paved the way for acquittal of the accused/respondents herein. The impugned judgment passed by the court below is against law and the facts of the case as well as contrary to the evidence on record and as such deserves to be set aside. Besides the court has not appreciated the prosecution evidence in its right perpective and has thus landed in grave error by acquitting the accused/respondents. Hence the impugned judgment under challenge is unsustainable in the eyes of law.

4. This appeal has been filed before this court on 18.12.2018 and the other side was put to notice and pursuant to the notices served upon the respondents they did cause appearance and have participated in the case till the culmination of the proceedings and when the case is ripe for its arguments.

5. Before proceeding further what needs worth consideration herein is also to have a look over the charge sheet and while having look into the charge sheet it reveals that the charges as reproduced here to fore against the respondents are verbatim but still for the sake of clarity and better understanding the charges from the final report as taken simplicitor reads that it has come in the case that accused Mohd Iqbal was posted as cashier in J&K bank while as the accused Raj Kumar Dogra was also posted there as cash officer

and they both have committed criminal breach of trust by misappropriating Rs.39.5 lacks. The charges further reveals that it had come in the investigation that the accused Mohd Iqbal had disclosed it that he had given Rs.1.25 lacks to accused/respondent Raj Kuimar which the other accused has also disclosed to have admitted the facts, whileas the charges against Mohd Iqbal are that he has operated the bank account No.0030SD19413 by different transactions and has withdrawn an amount of Rs.10,83,263/- and the said accused himself has spent for his use an amount of Rs.25000/- after withdrawing it from the bank and has also disclosed that there was short of Rs.5 lackh since long which is being carried forward and has further made disclosure that he had also withdrawn further three lacks which he has given as a loan by illegal means to one Imran Ahmed S/O Noor Mohd Paray R/O Chanpora Tehsil Chadora and during investigation the said Imran Ajmed was also reportedly called in the police station and it was enquired from but he has clearly stated therein that actually he has not taken any amount. The accused Mohd Iqbal also has disclosed that he has obtained Met Life policy against an amount of Rs.60,000/- and besides has also purchased a Maruti car bearing registration No.JK02T/3754 for an amount of Rs.95000/-.

6. Whatever the evidence has come in the investigation the police has established that total

amount of Rs.22,50,000/- and an amount of Rs.39.5 lacks is found short and both the accused have committed criminal breach of trust and misappropriated the amount for their own use. While as for the amount of Rs.16,55,000/- no evidence or any proof has been found. Thus in short the charges are that both the accused persons have done it with a common criminal intention to commit breach of trust for misappropriation of the public money of the bank.

7. When the challan was laid before this court the prosecution has shown in the calander of witnesses 15 witnesses and almost all the witnesses have been produced by the prosecution during trial of the case to be more clear herein the witnesses which have been produced comprised of Pws Tej Ram Katoch I.O, Firdous Ahmed Constable, Surinder Kumar, Sanjay Kumar, Jaffer Ali, Subash Chander, Ghulam Hassan, Mohd Rafiq constable, Sanjay Kumar, Anaytullah, Nazir Ahmed, Kewal Krishan and Chander Hash Sharma.

8. The court below while passing final judgment has taken into consideration the full account of the evidence led by the prosecution while having produced these witnesses during trial and while appreciating the evidence PW Chander Hash Sharma has stated that he was telephonically called by the respondent Raj Kumar stating it to him about the short fall of the case and on the nest day when he came to the bank when he asked

him again about the misappropriation of the case who told that he had contacted Mohd Iqbal and who has said that cash is there in the bank which they can't trace. This statement was made by accused Raj Kumar in presence of 2/3 persons, then he told that Raj Kumar, Jaffer Hussain to go for search of accused Mohd Iqbal who came after one hour and told him that they have no information about his whereabouts, then he told him that again contact him on the telephone and when he fully satisfied him about the missing of cash then he informed the head office Voice President and the next day cluster has also came there from Doda and the cash amounting to Rs.39.5 lacks was found short. This witness further said that he being the branch head and whatever is transactions opening and closing the branch head has to keep the account of some but it does not require for it any daily certificate.

9. PW Kewal Krishan who was also posted in the said bank as and now he has retired from the bank and while was posted in the bank he used to daily check the opening and closing and daily transaction of the bank and in case there was any kind of irregularity found he used to get it verified and corrected and he had checked the cash for the day on 22.08.2009 and the cash was correct and it was after some days thereafter he heard that cash was found short in the bank and thereafter the case was registered against Raj Kumar cash manager and other accused Mohd Iqbal.

10. The statement of PW Nazir Ahmed who happens to be a shopkeeper and have been depositing cash in the bank states that when he and his father deposited the amount in the bank they used to deposit it with Mohd Iqbal. The statement of this witness is of no help to either side, as the witness has simply said that he was depositing the cash with one Mohd Iqbal, which could at the most suggest this fact that he was posted in the bank at the relevant time.

11. PW Anaytullah is a police witness has deposed that in the year 2008-09 he was posted as guard duty in Treasury Bhaderwah. He has stated that the key of the treasury gate was with Jaffer Husain while as the safe of the bank was in treasury and its keys used to be with the bank officials only. Mohd Iqbal and Raj Kumar Dogra have come to treasury and to take the amount for the bank. They have to come in the morning to take cash from the treasury and in the evening also they have to bring cash from the bank and deposit it in the treasury. On 28.08.2009 they came in the treasury, got the cash verified. He has given statement to the police. This witness in cross examination has stated that he can't say how much amount they used to withdraw from the treasury and redeposit it there. He used to remain on the gate. The statement of this witness is also of no help. PW Sanjay Kumar has stated on the same lines as is said by the aforesaid Pws.

12. After going through the statements of these witnesses the statement of PW Chander Hash Sharma Incharge cash has stated that when he enquired it from Raj Kumar Dogra about the short of cash who told that Mohd Iqbal told him that the cash is there in the bank and this thing he said to 2/3 persons who could have been the material witness in the case before whom such kind of averment was made by Raj Kumar Dogra, this has remained mistry in the case. Much less while seeing to the judgment under challenge the trial court had discussed the whole evidence and appreciated the whole case with required degree of standard of appreciation of proof and with required degree with it was required to appreciate. The trial court has also discussed the relevant provisions of section for which the accused have been charged with and latter on has come to the finding while to acquit the accused as there being no sufficient material found to connect them for any kind of offence for **breach of trust** or **misappropriation.**

13. The prosecution while throwing challenge to the said judgment has reitratingly mentioned that the statements of witnesses namely Anaytullah, Sanjay Kumar and Mohd Rafiq have not been appreciated but that does not sound well to the reasoning or any kind of support from the judgment, in turn what reveals as has been already stated the court below has discussed the

evidence and after appreciation of the evidence and analyzing the provision of law has not lend support to the charges as stand slashed on the accused for the commission of offence u/sec 409/109 RPC and thus has acquitted them.

14. Pertinently to mention here that while preferring this appeal a separate application for condonation of delay has also been filed and this court has gratned the permission. Needless to further go into the charges, it is already said that the prosecution while throwing challenge to the appeal has not taken any ground in law while to nullify the judgment as passed by the trial court but has simply relied its case on the factual aspects reiterating the same facts that the court has not appreciated the evidence on record.

15. Per contra the learned counsel for the accused/respondents has relied judgments which are reproduced as under:-

Criminal Law Journal in case titled N.R. Bhat vs State wherein the Hon'ble Apex court has held in para 33 of the judgment which is reproduced as under: -

> *33. As rightly pointed out by learned senior counsel. Mr. P.S Rajagopal, the genesis of the prosecution appears to be doubtful. Mere seriousness of*

> *allegations would be insufficient, unless they are established not by mere preponderance or probabilities, but by producing proof beyond reasonable doubt. What is proof beyond all reasonable doubts has been discussed and well considered at length by the Hon'ble Apex Court in the case of State of U.P. v. Krishna Gopal and another (AIR 1988 SC 2154).*

Reliance is also placed on 2004 CRI. L.J 365 SC in case titled L. Chandraish vs State of A.P and anr wherein it is held in para 9 of the judgment which is as under:-

> *“....... The crucial word used in Section 405 I.P.C. is “dishonestly” and therefore, it implies the existence of mens rea, that is to say a guilty mind. If there is no evidence to show that the appellants had knowledge that the vouchers were fabricated by A-3. It cannot be said that they acted with a criminal intent. It may, be and as rightly observed by the courts below, that they acted in a negligent manner and if they had taken due care they would have detected the fraud, but they failed to do so. However, that by itself would not constitute an offence*

> *under section 409 IPC.......”*

Reliance is also placed on AIR 2003 Supreme Court 3714 in case titled Kailash Kuamr Sanwatia vs State of Bihar and anr. wherein it is held in para 10 of the judgment which is as under:-

> *“--Only entrustment alleged and proved-Thus even if there was loss of money ingredients necessary to constitute criminal breach of trust were absent- If due to fortuitous or intervening situation person to whom money is entrusted is incapacitated from carrying out job, that will not bring in application of S.405 or S.409, unless misappropriation, or conversion to personal use or disposal of property is established – Accused cannot be convicted under section 409. ”*

16. Apart from this law the basic component in law while to prove any kind of offence is the criminal intention before committing any offence and it is the prime factor which needed to be proved. Besides this it is not proved anywhere from the evidence that there was **entrustment** of the cash said to have been embezzled or embezzlement being done by the

accused/respondents what being given to the accused by any superior officer to deal or keep in their custody but the evidence has come that they used to go to treasury daily to bring the cash & after verifying it and also in the evening they would return the same. What was especially required to be done by the cash head, the PW Chander Hash Sharma who is cited as witness. It was to daily verify and issue the certificate for opening and closing which he has not done but has stated that it was not necessary. In that set of circumstances as said neither the **element of criminal intention** or any **entrustment** is found before the court below nor the ingredients of section 409 RPC are attracted neither the evidence as put on record is coherent and speaking to lend credence to the prosecution case or for the prosecution to bring whom its point while seeking the conviction of the accused with the aforesaid offence. For this reason and also when the appellant has not thrown challenge in the appeal to the said judgment impugned here on any **legal point** but more or less the grounds taken in the appeal are based on factual aspects of the case and in addition while to have taken the plea that the court below has failed to appreciate the evidence in its right perspective which in other words does not sound well in the legal perspective of law.

17. In view of aforesaid discussions and provisions of law and also while going through the ingredients of section 409 RPC, there is no sufficient material found to convict them for the commission of offence. The trial court has rightly appreciated the evidence and come to the right conclusion, while acquitting them from the charges. The appeal, thus being incompetent and devoid of any legal force is accordingly dismissed. The trial court file be sent back forthwith alongwith copy of this order. The appeal is accordingly disposed of and be consigned to records after its due completion. The learned counsel for the accused respondents and ld. PP are informed accordingly through virtual mode.

Announced.

26.08.2020

(Ashok Kumar)
Pr. Sessions Judge,
Bhaderwah

ASHOK KUMAR

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