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MADAN LAL

v.

STATE OF PUNJAB

April 5, 1967

B [R. S. BACHAWAT AND J. M. SHELAT, JJ.]

Indian Penal Code, 1860 (*Act* 45 *of* 1860), *ss.* 120*B,* 196(2) *and* 409—*Officer authorised his clerk to receive and disburse moneys—Moneys not paid to persons concerned—Clerk admits receipts but alleges handing over to officer—Value of admission—Both charged for conspiracy and criminal breach of trust—Officer acquitted—If clerk could be convicted for criminal breach of trust—Sanction not obtained—If conviction for criminal breach of trust vitiated.*

C

J had authorised the appellant a clerk under him, to withdraw moneys from Bank for payments to different persons. J, discovering that the moneys were not paid to persons concerned, lodged a report. The appellant admitted to have withdrawn the moneys, but stated that he had handed them over to J, and made entries in the register showing disbursement at J s instance, and J had initiated them. J was charged under s. 409 and the appellant under ss. 409, 465, 477A and 120-B I.P.C. The Trial Court convicted both under ss. 120-B and 409 but the Sessions Judge acquitted J and convicted the appellant under s. 409 only. The High Court, too, maintained the appellant's conviction holding that the moneys having been admittedly received by the appellant, the burden of proof was upon him to show what he had done with them and there being no evidence that he handed them over to J, except his bare allegation he had failed to discharge that burden. In appeal to this Court, the appellant contended that (i) the case proceeded erroneously as if the appellant had to prove his case beyond reasonable doubt that he had handed over the moneys to J and a reasonable doubt could have been raised in the prosecution evidence if the document called for by the appellant had been produced and his application for their production had not been rejected; (ii) it was not his duty as a clerk to receive these moneys and that he had only received them at the instance of J; (iii) the charge as to criminal breach of trust against the appellant and J being one under s. 409 read with s. 120-B and there being no charge under s. 409 simplicitor a conviction under s. 409 only was not valid; (iv) the trial suffered from misjoinder of charges in that there were six items of moneys in respect of which misappropriation was alleged and three entries in respect of which falsification of accounts was charged against the appellant; and (v) though he was charged under s. 120-B and s. 477-A no sanction under s. 196-A(2) of the Criminal Procedure Code was obtained and, therefore, the entire trial was vitiated.

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HELD : The appeal must be dismissed.

(i) There was no question of the appellant raising any reasonable doubt in view of his admission that he had received the moneys. There was no substance in the contention that if the documents had been produced the appellant could have made out a reasonably probable case that he had handed over the moneys to J. [444A-B]

H

(ii) There was evidence that the appellant not only used to receive moneys but also used to disburse them. Whether it was done by him as part of his duties would clearly be a matter of evidence, which cannot be gone into in this Court as it was not raised in the High Court. J

authorised the appellant to draw and receive the moneys in question for the express purpose of payment to different parties. There was, therefore, entrustment to the appellant of the said moneys for an express purpose. [444D, F] A

Budha Lal v. *State of Rajasthan*, [Cr. A. No. 156 of 1962 decided on 27th January 1965], referred to.

(iii) If the charge of conspiracy to commit criminal breach of trust is followed by a substantive charge of criminal breach of trust in pursuance of such conspiracy there is nothing to prevent the court convicting an accused under the second charge even if the prosecution fails to establish conspiracy. In any event, there was no prejudice caused to him as he was aware that there was a substantive charge under s. 409 against him. [444H-445B] B

Kizhakkeppallik Moosa v. *State*, A.I.R. 1963 Kerala 68, disapproved. C

Willie Slaney v. *State of Madhya Pradesh*, [1955] 2 S.C.R. 1140, referred to.

(iv) The appellant did not at any earlier stage take objection to the charges under ss. 409 and 477-A on the ground that he was likely to be embarrassed in his defence. He has also not shown that any prejudice was caused to him and that being so this contention also must fail. [445D] D

(v) Though the charge under s. 120-B required sanction no such sanction was necessary in respect of the charge under s. 409. At the most, therefore, it can be argued that the Magistrate took illegal cognizance of the charge under s. 120-B as s. 196(2) prohibits entertainment of certain kinds of complaints for conspiracy punishable under s. 120-B without the required sanction. The absence of sanction does not prevent the court from proceeding with the trial if the complaint also charges a co-conspirator of the principal offence committed in pursuance of the conspiracy or for abatement by him of any such offence committed by one of the conspirators under s. 109 of the Penal Code. The fact that sanction was not obtained in respect of the complaint under s. 120-B did not vitiate the trial on the substantive charge under s. 409. No prejudice could be said to have resulted in view of the appellant's confession. [447C-F] E

Abdul Mian v. *The King*, A.I.R. 1951 Pat. 513, *Govindram Sunder Das* v. *Emperor*, A.I.R. 1942 Sind. 63 and *Nibaram Chandra Bhattacharyya* v. *Emperor*, A.I.R. 1929 Cal. 754, referred to. F

Sukumar Chatterjee v. *Mosizuddin Ahmed*, 25 C.W.N. 357, *Syed Yawar Bhakat* v. *Emperor*, 44 C.W.N. 474, *Ram Pat* v. *Emperor*, (1962) 64 P.L.R. 519 and *Mohd. Bachal Abdulla* v. *The Emperor*, A.I.R. 1934 Sind. 4, approved. G

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 116 of 1964.

Appeal by special leave from the judgment and order dated December 20, 1963 of the Punjab High Court in Criminal Revision No. 824 of 1963.

K. Baldev Mehta, G. D. Gupta and *Indu Soni*, for the appellant. H

Bikramjit Mahajan and *R. N. Sachthey*, for the respondent.

A The Judgment of the Court was delivered by

Shelat, J. In 1961 Ravi Datt Joshi was the Assistant District Inspector of Schools at Karnal and the appellant was then working under him as a clerk. Between March to December 1961, Joshi authorised the appellant to draw certain amounts from the
B State Bank of India, Karnal. Accordingly, on March 11, 1961, the appellant drew Rs. 979.12 for payment to M/s. Joti Pershad Gupta & Sons. On March 31, 1961, he drew a further sum of Rs. 1449.38 out of which Rs. 1404 were to be paid to the Indian Red Cross Society. He made an entry in the cash book showing as if that amount was paid to the said Society and got that entry initialled by Joshi. On July 3, 1961, he encashed a bill
C for Rs. 424, the amount being payable to two teachers, Ishwar Datt and Chand Ram. The appellant made an entry in the acquittance roll showing as if he had paid Rs. 200 to Chand Ram. On November 15, 1961 he received Rs. 281.15 in respect of arrears of salary of one teacher, Harbhajan Kaur and on December 2, 1961, he received Rs. 42.66 and Rs. 494, the first amount
D being the salary of Ram Sarup, another teacher and the other as contingent fund payable to the staff. None of these amounts was paid to any of the aforesaid persons for payment to whom they were received by him. On M/s. Joti Pershad Gupta & Sons complaining to Joshi that the amount due to them was not paid, Joshi looked into the matter and finding that that amount and other
E amounts were embezzled, he lodged a complaint before the Police. The police thereupon registered a case under s. 409 against the appellant and under ss. 409, 465, 477-A and s. 120-B of the Penal Code against Joshi. The trial Magistrate convicted Joshi and the appellant under s. 120-B and under s. 409 for criminal breach of trust in respect of Rs. 3414.53 and also under s. 477-A and awarded different sentences and fines directing the
F sentences to run concurrently. In appeal, the Additional Sessions Judge acquitted Joshi of all the charges. He also acquitted the appellant on charges under s. 120-B and s. 477-A but upheld his conviction under s. 409. The appellant filed a revision in the High Court where he conceded that the aforesaid amounts were received by him from the Bank but pleaded that he had handed
G them over to Joshi and that it was Joshi's duty to disburse those amounts and to maintain accounts as Joshi was incharge of the office. The High Court held that the said moneys having been admittedly received by the appellant, the burden of proof was upon him to show what he had done with them, that there being no evidence that he handed them over to Joshi except his bare
H allegation, the appellant had failed to discharge the burden and was, therefore, rightly convicted under s. 409. The High Court relied upon the evidence of Sukhminder Singh, the District Inspector of Schools that the appellant had confessed before him that

out of the said sum of Rs. 3414.53 he had misappropriated Rs. 2500 and that Joshi had misappropriated the balance of Rs. 979 and that the appellant was prepared to deposit the amount of Rs. 2500. The evidence of the District Inspector of Schools also was relied upon as showing that when approached for payment, the appellant had falsely represented to M/s. Joti Pershad Gupta & Sons and the Assistant Secretary of the Red Cross Society that he had remitted to them the two amounts payable to them.

Before the High Court, the appellant contended that the trial suffered from misjoinder of charges, that Joshi being the drawing and disbursing officer, it was he and not the appellant who was responsible for the said misappropriation, that he had applied to the trial Magistrate for production of certain documents, that those documents were not produced and that he was prejudiced by the said non-production as he could have shown from those documents that he had handed over the said amounts to Joshi as Joshi was the officer responsible for disbursements. The High Court rejected these contentions and on merits accepted the finding both of the Magistrate and the Additional Sessions Judge that the appellant had misappropriated the said amounts and dismissed the revision. Hence this appeal by special leave.

Mr. Mehta for the appellant first contended that the High Court erred in proceeding with the case as if the appellant had to prove his case beyond reasonable doubt that he had handed over the said moneys to Joshi. In support of his contention he relied upon *Woolmington* v. *The Director of Public Prosecutions*(1) and argued that if the appellant could show that his case was reasonably probable and could cast a doubt on the prosecution case that would be enough to entitle him to the benefit of reasonable doubt. There was, however, no question of the appellant raising any reasonable doubt in view of (a) his admission that he had received the said moneys, (b) the evidence of the District Inspector of Schools that he had confessed before him of having misappropriated Rs. 2500 at least and was prepared to deposit the said amount, and (c) the evidence as to his false representations to M/s. Joti Perhad Gupta & Sons and the Assistant Secretary of the Red Cross Society that moneys due to them had already been remitted. But the argument of Mr. Mehta was that he could have raised a doubt on the prosecution evidence if the documents called for by the appellant had been produced and his application for their production had not been rejected.

In his statement under s. 342 of the Code of Criminal Procedure the appellant admitted that he had drawn the said amounts from the Bank. His case, however, was that he did so on Joshi

(1) [1935] A.C. 462.

A authorising him to do so and that he had handed them over to Joshi. He pleaded that he had made entries in the remittance transfer register showing disbursement of these amounts but those entries were made by him at the instance of Joshi and Joshi had initialled those entries. The argument was that in order to prove his case the production of the said documents was necessary.

B The appellant had called for five documents, *viz.*, (1) A Memo dated June 27, 1960 from the Secretary to the Finance Department to all heads of Departments showing that it was the head of office, *i.e.*, Joshi, who was responsible for disbursement, (2) Instructions issued in 1962 according to which a clerk could make disbursement only if he had furnished security of Rs. 600, C (3) the Bill book which witness Des Raj admitted was maintained and which if produced would have shown that the appellant had handed over the said moneys to Joshi, (4) the remittance transfer register admitted by the District Inspector of Schools could be found in the office, and (5) the sub-voucher for Rs. 494 which the District Inspector assured the trial Magistrate he would D send for but failed to produce. Regarding item No. 1 a copy of the Memo was in fact filed in the court and admitted in evidence. For the rest of the items, the trial Magistrate passed an order directing the prosecuting police inspector to make a report. On December 29, 1962, the officer made the report that there was no bill book, *i.e.* item No. 3, that item No. 4, the remittance transfer register was part of the record of the Assistant District E Inspector's office and that the same could be found there and that the sub-voucher item No. 5 was not traceable. No grievance remained in respect of items 1 and 2 as a copy of the said Memo was admitted in evidence. Therefore, there would be no dispute that Joshi was the disbursing authority. But in view of the extra-judicial confession made by the appellant that he had in fact mis-F appropriated Rs. 2500, the fact that Joshi was the disbursing authority would not be of any importance. Items 3 and 5, according to the said report, could not be traced. No point, therefore, can be made on the score of their non-production. There remained, therefore, only the remittance transfer register. The order sheet of the Magistrate shows that at the time when the prosecu-G ton closed its case and the statements of the appellant and Joshi were recorded under s. 342 of the Code, no objection was taken by the appellant that the case should not proceed until the said register was produced. The case was adjourned to December 29, 1962 for defence evidence. On that date also no objection appears to have been taken and the case was allowed to proceed. Ulti-mately on January 14, 1963, the Magistrate passed his aforesaid H order of conviction. Apart from that, since the moneys were not remitted to the parties concerned there can be no question of there being any R.T.R. in respect of them. Evidentially that

document was called for by the appellant in order to create confusion knowing full well that it was not there. We find, therefore, no substance in the contention that if these documents had been produced the appellant could have thrown some doubt on the prosecution evidence and could have made out a reasonably probable case that he had handed over the said amounts to Joshi.

Mr. Mehta next argued that under s. 409 assuming that the said moneys were entrusted to the appellant, such entrustment must be in his capacity as a public servant. Being a clerk in the office of the Assistant District Inspector of Schools the appellant undoubtedly was a public servant. But the contention was that it was not his duty as a clerk to receive these moneys and that he had only received them at the instance of Joshi. Not being his duty so to receive the said moneys, it cannot be said that it was in his capacity as a clerk or as part of his duties that the said moneys were entrusted to him. There was, however, evidence that the appellant not only used to receive moneys but also used to disburse them. Whether it was done by him as part of his duties, would clearly be a matter of evidence. This contention was not raised in the High Court and being dependent on evidence, he is not entitled now to raise it before us. The decision of this Court in *Budha Lal* v. *The State of Rajashan*(1) rested on different facts as there was clear evidence that entrustment of moneys deposited in the complainant's savings account in the post office was to the accused's brother who was the post master and not to the accused. In the present case the position is that Joshi authorised the appellant to draw and receive the moneys in question for the express purpose of payment to different parties. There was, therefore, entrustment to the appellant of the said moneys for an express purpose. The decision in *Budha Lal's*(1) case cannot apply.

The third contention of Mr. Mehta was that the charge as to criminal breach of trust against the appellant and Joshi being one under s. 409 read with s. 120B and there being no charge under s. 409 simplicitor a conviction under s. 409 only is not valid. He argued that as the prosecution failed to establish conspiracy the appellant could not be convicted of the offence under s. 409 simplicitor. In our view, there is no substance in this contention. If the charge of conspiracy to commit criminal breach of trust is followed by a substantive charge of criminal breach of trust in pursuance of such conspiracy there is nothing to prevent the court convicting an accused under the second charge even if the prosecution fails to establish conspiracy. In any event, there was no prejudice caused to him as he was aware that there was a sub-

(1) Criminal Appeal 156 of 1962 decided on 27th January, 1965

A stantive charge under s. 409 against him. Mr. Mehta, however, relied upon a decision of the Kerala High Court in *Kizhakeppallik Moosa* v. *The State*(1). That decision cannot be of any avail as it is directly contrary to this court's decision in *Willie Slaney* v. *The State of Madhya Pradesh*(2).

It was then argued that the trial suffered from misjoinder of B charges in that there were six items of moneys in respect of which misappropriation was alleged and three entries in respect of which falsification of accounts was charged against the appellant. There is some conflict of judicial opinion as to whether a charge of misappropriation where a lump sum consisting of several items together with a charge of falsification of several entries made with a C view to screen the misappropriation is correct. We need not in the present case decide which view is correct. The appellant did not at any earlier stage take objection to the charges under ss. 409 and 477-A on the ground that he was likely to be embarrassed in his defence. He has also not shown that any prejudice was caused to him and that being so this contention also must fail.

D The last contention was that though he was charged under s. 120-B and s. 477-A no sanction under s. 196-A(2) of the Criminal Procedure Code was obtained and, therefore, the entire trial was vitiated. We may observe that the Additional Sessions Judge found that sanction was not obtained though the appellant and the said Joshi were charged under the aforesaid two sections along E with the charge under s. 409. Reliance in this connection was placed on a decision of the Patna High Court in *Abdul Mian* v. *The King*(3), where it was held that sanction to prosecute is a condition precedent to the institution of prosecution and that it is the sanction which confers jurisdiction on the court to try the case. The charge-sheet in that case was under s. 295-A of the Penal Code and sanction having not been obtained for prosecu- F tion the High Court held that even though the Magistrate trying the accused ultimately convicted him under s. 298 which did not require sanction the trial was vitiated as the Magistrate could not proceed with the charge-sheet without the requisite sanction. The decision in *Govindram Sunder Das* v. *Emperor*(4) was also called in aid as it has been observed there that where the offence of cons- G piracy to commit forgery is charged against a person and the previous consent of the local Government under s. 196A though required is not obtained, the court cannot take cognizance of the complaint. These decisions, however, are in respect of cases where a single charge in respect of an offence requiring sanction was preferred against the accused and previous sanction was not ob- H tained and the court held that in the absence of such sanction the trial court could not take cognizance of the complaint.

(1) I.A.R. 1963 Kerala 68. (2) [1955] 2 S.C.R. 1140.
(3) A.I.R. 1951 Pat. 513 4) A.I.R. 1942 Sind 63.

Section 196A(2) provides that no court shall take cognizance of the offence of criminal conspiracy punishable under s. 120-B in a case where the object of the conspiracy is to commit any non-cognizable offence or a cognizable offence not punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, unless the State Government or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the State Government has, by order in writing, consented to the initiation of the proceedings. It is clear that the court cannot take cognizance without the necessary consent in the case of a charge of criminal conspiracy under s. 120-B of which the object is as stated therein. The conspiracy to commit an offence is by itself distinct from the offence to do which the conspiracy is entered into. Such an offence, if actually committed, would be the subject-matter of a separate charge. If that offence does not require sanction though the offence of conspiracy does and sanction is not obtained it would appear that the court can proceed with the trial as to the substantive offence as if there was no charge of conspiracy. In *Sukumar Chatterjee* v. *Mosizuddin Ahmed*(1) where the charge was under s. 404 read with s. 120-B and no sanction was obtained it was held that the case could proceed though only under s. 404. Similarly, in *Syed Yawar Bakht* v. *The Emperor*(2), the accused was charged under s. 120-B read with s. 467 and also under s. 467 read with s. 109 of the Penal Code. No sanction was obtained. It was held that the consequence of not obtaining the sanction was as if the charge under s. 120B read with s. 467 had never been framed but the accused could be convicted under the other charge *viz.*, under s. 467 read with s. 109 of the Penal Code. The same view has also been taken by the Punjab High Court in *Ram Pat* v. *State*(3) where it was held that where a complaint discloses more offences than one, some of which can be inquired into without sanction and others only after sanction has been obtained, there can be no objection to the inquiry being carried on in respect of the first category of offences. Reference may be made to the decision in *Nibaran Chandra Bhattacharyya* v. *Emperor*(4). The two petitioners were convicted under s. 120B. They were also convicted under s. 384 and s. 384 read with s. 114 of the Penal Code respectively. The learned Judge accepted the contention that the trial was vitiated as no sanction was obtained in respect of the charge under s. 120-B and set aside the conviction also under s. 384 and s. 384 read with s. 114 passed against petitioners 1 and 2. But the report of the decision shows that he did so because he felt that by proceeding with the charge under s. 120-B admitting evidence on that charge and that charge resulting in conviction prejudice was caused to the petitioners in the matter of the other charges and

(1) 25 C.W.N. 357.
(2) 44 C.W.N. 474.
(3) (1962) 64 P.L.R. 519.
(4) A.I.R. 1929 Cal. 754.

A that therefore the trial could not be said to be severable. No such question of prejudice can be said to arise in the present case in view of the extra-judicial confession of the appellant of having misappropriated Rs. 2,500 out of Rs. 3,414 and odd in question.

There was in the instant case not only a charge for conspiracy
B under s. 120-B but also two other separate charges for offences under ss. 409 and 477-A alleged to have been committed in pursuance of the conspiracy. Though the charge under s. 120B required sanction no such sanction was necessary in respect of the charge under s. 409. At the most, therefore, it can be argued that the Magistrate took illegal cogni-
C zance of the charge under s. 120-B as s. 196-A(2) prohibits entertainment of certain kinds of complaints for conspiracy punishable under s. 120-B without the required sanction. The absence of sanction does not prevent the court from proceeding with the trial if the complaint also charges a co-conspirator of the principal offence committed in pursuance of the conspiracy or for abetment by him of any such offence committed by one of the co-conspira-
D tors under s. 109 of the Penal Code. (See *Mohd. Bachal Abdulla* v. *The Emperor*(1). In our view, the fact that sanction was not obtained in respect of the complaint under s. 120-B did not vitiate the trial on the substantive charge under s. 409. No prejudice could be said to have resulted in view of the appellant's confession that he had in fact misappropriated Rs. 2,500 and was pre-
E pared to deposit that amount.

The appeal is dismissed.

Y.P. *Appeal dismissed.*

(1) A.I.R. 1934 Sind 4.