

CASE NO.:
Appeal (crl.) 904 of 1996

PETITIONER:
Kailash Kumar Sanwatia

RESPONDENT:
Vs.
The State of Bihar and Anr.

DATE OF JUDGMENT: 02/09/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT.

JUDGMENT:
J U D G M E N T

ARIJIT PASAYAT, J.

The appeal is at the instance of the informant who set law in motion against respondent no.2-Gautam Bose along with two others for alleged commission of offence punishable under Section 409 read with Section 34 of the Indian Penal Code, 1860 (for short 'IPC').

Case of the prosecution was that on 23rd August, 1982 the appellant went to the State Bank of India, Jharia Branch for taking two banks drafts of Rs.75,000/- each. His servant Indradeo Ram was also with him. The appellant had carried a sum Rs.1,50,200/- with him out of which Rs.75,100/- was of Mahabir Bhandar of which appellant was owner, while balance Rs.75,100/- was of Swastik Bhandar belonging to brother of appellant. The total amount was handed over to accused-Ganaori Sao for the purpose of counting at the instance of accused-Gautam Bose & 200\223 the Head Cashier. The cash peon told him that he would count the money, and return the bag in which the money was carried at 2.00 p.m. Informant-appellant handed over cash vouchers duly filled in to Amit Kumar Banerji an officer of the bank and returned to his shop on being told that the drafts will be handed over around 2.00 p.m. Around 1.00 p.m. the peon of the bank named Jagdish came to his shop and told him that the money handed over by him was missing from the cash counter. On hearing this, both the informant and his brother rushed to the bank. They were told that a complaint had already been lodged by the Manager of the bank regarding missing of money. By the time the appellant and his brother reached the bank, police had already arrived. Ganaori admitted that he was counting the money handed over by the informant. When he went outside for a short time, during that time the money had been taken away by some one. The informant filed a written report before the police officer (Ex.P-3) in the premises of the bank and on the basis of this the case was instituted and investigation undertaken.

On completion of investigation, charge sheet was placed and charges were framed against Gautam Bose, Ganaori Sao, and Jagdish Ram under Section 409 read with Section 34 IPC. Accused persons pleaded innocence. They took the stand that the case was falsely instituted to get money from the bank through the insurance company.

Ten witnesses were examined to substantiate the prosecution case. The Trial Court placing reliance on their evidence found that only respondent no.2-Gautam Bose and Ganaori Sao were guilty of offences

punishable under Section 409 IPC read with Section 34 IPC and were sentenced to undergo imprisonment for two years each. The said accused persons filed two appeals before the Additional Sessions Judge, Dhanbad, who in CrI. Appeal no.145/1986 and CrI. Appeal no. 151/1986 held that accusations have not been brought home because there were many infirmities in evidence and there was doubt as regards the manner of entrustment for bringing in application of Section 409 IPC. The matter was carried in revision before the Patna High Court by the informant-appellant. By the impugned judgment, learned Single Judge held that though the money appears to have been handed over, it has not been established by credible and cogent evidence when the money were really missing. It, however, recorded that fact of handing over of Rs.1,50,200/-, and missing of money from the cash counter. But it is not proved beyond reasonable doubt from the evidence on record that actually the cash was entrusted to Ganaori Sao at the instance of Head Cashier-Gautam Bose, though money was missing from bank premises and from the cash counter. It was held that the possibility of theft of the money cannot be ruled out. Since the informant had filed suit for recovery of the amount from the bank he could pursue it. Due to paucity of evidence on the point of entrustment, case under Section 409 was held to be not made out. Against the said judgment of the High Court, this appeal has been filed.

Learned counsel for the appellant stated that when it is admitted that money was missing from the cash counter of the bank at the bank premises, and information had been lodged by the Manager alleging theft of the amount and commission of offence under Section 380 IPC, the Trial Court, First Appellate Court and the High Court were not justified in holding that there was paucity of material as regards the manner of entrustment with reference to Section 409 IPC. It was submitted that the language of the provisions made it clear that whatever be the manner of entrustment, if the factum of entrustment is established, nothing more is required to be further established.

In spite of notice, respondent no.2 has not entered appearance. Learned counsel appearing for the State of Bihar submitted that the stand adopted by the appellant is adopted by it.

Section 409 IPC deals with criminal breach of trust by public servant, or by banker, merchant or agent. In order to bring in application of said provision, entrustment has to be proved. In order to sustain conviction under Section 409, two ingredients are to be proved. They are:

- (1) the accused, a public servant, or banker or agent was entrusted with property of which he is duty bound to account for; and
- (2) the accused has committed criminal breach of trust.

What amounts to criminal breach of trust is provided in Section 405 IPC. Section 409 is in essence criminal breach of trust by a category of persons. The ingredients of the offence of criminal breach of trust are: -

- (1) Entrusting any person with property, or with any dominion over property.
- (2) The person entrusted (a) dishonestly misappropriating or converting to his own use that property; or (b) dishonestly using or disposing of that property or willfully suffering any other person so as to do in violation of law
- (i) of any direction of law prescribing the mode in which such trust is to be discharged; or
- (ii) of any legal contract made touching the discharge of trust.

The basic requirement to bring home the accusations under Section

405 are the requirements to prove con-jointly (1) entrustment and (2) whether the accused was actuated by the dishonest intention or not misappropriated it or converted it to his own use to the detriment of the persons who entrusted it. As the question of intention is not a matter of direct proof, certain broad tests are envisaged which would generally afford useful guidance in deciding whether in a particular case the accused had mens rea for the crime.

In the instant case even if it was proved as contended by learned counsel for the appellant, that money was entrusted which fact is borne out by the admitted case about missing of money from the cash counter of the bank, one factor which needs to be decided is whether the accused had dishonestly misappropriated or converted to his own use the property entrusted or dishonestly used or disposed of that property. As presented by the prosecution, the money was taken away from the cash counter. It is not the case of prosecution that money which was given to the accused-Gautam Bose and the cash peon to obtain bank drafts was taken away by accused-Gautam Bose or the cash peon Ganaori Sao. Because of an intervening situation, the disappearance of the cash due to theft by somebody else the bank drafts could not have been prepared and handed over to the appellant. Even if there is loss of money, the ingredients necessary to constitute criminal breach of trust are absent. If due to a fortuitous or intervening situation, a person to whom money is entrusted is incapacitated from carrying out the job, that will not bring in application of Section 405 IPC or Section 409 IPC, unless misappropriation, or conversion to personal use or disposal of property is established. Unfortunately, the courts below have not looked at the issues from these vitally relevant angles. The inevitable conclusion is that accused persons cannot be convicted under Section 409 IPC. This, however, will not stand in the way of the appellant getting such relief as available in law otherwise by pursuing a suitable remedy.

The appeal is dismissed with the aforesaid observations.