

Bajnath Gupta and Others

Vs

The State of Madhya Pradesh

Criminal Appeals Nos. 77, 162 and 163 of 1962 and 74 of 1965

(A. K. Sarkar, M. Hidayatullah, V. Ramaswami – I JJ)

07.05.1965

JUDGMENT

SARKAR J. –

I have had the advantage of reading the judgment to be delivered by my learned brother Ramaswami in these four appeals. I agree with him that the appeals by the appellant Kale, being Criminal Appeals Nos. 162 of 1962 and 163 of 1962 should be dismissed and have nothing to say in regard to these appeals.

The other two appeals, namely, Criminal Appeals Nos. 77 of 1962 and 74 of 1965 are by the appellant Gupta against his conviction under s. 477A, read with s. 109, and s. 409 of the Indian Penal Code. Ramaswami J. is of the opinion that the conviction under s. 477A, read with s. 109, cannot be sustained as sanction to start the proceedings had not been duly obtained under s. 197 of the Code of Criminal Procedure. This is also my view. In regard to the conviction for the other offence, his opinion is that sanction was not necessary and so, that conviction should be upheld. With this view I am unable to agree and in this judgment I will deal only with this matter.

The appellants Gupta and Kale were respectively the Chief Accountant- cum- Office Superintendent and Assistant Cashier of the Madhya Bharat Electric Supply, an enterprise run by the Government of Madhya Bharat. It is not disputed that Gupta was a public servant who was not removable from his office save by the sanction of the Madhya Bharat government. The only point is whether in regard to the charge under s. 409 he was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty. If he was, then in view of s. 197 of the Code of Criminal Procedure no court could take cognizance of the offence without the sanction of the government of Madhya Bharat and his conviction under s. 409 of the Indian Penal Code cannot be upheld.

It appears that in fact a sanction under s. 197 of the Code of Criminal Procedure was obtained but as this was done after cognizance had been taken, it was of no use. It is clear from the language of s. 197 that the sanction has to be taken before cognizance has been taken. This indeed is not disputed. It is also clear from the facts that cognizance of the case had been taken on April 6, 1953 when witnesses were summoned on a future date so that the matter might be enquired into by the magistrate : see *Hori Ram Singh v. The Crown* (1) [1939] F. C. B. 159, 179, *R. R. Chari v. The State of Uttar Pradesh* (2) [1951] S. C. R. 312 and *Gopal Marwari v. King Emperor* (3) [1943] I. L. R. 22 Pat 433. The sanction however was obtained on July 1, 1953. I, therefore, have to proceed on the basis that the sanction had not been obtained.

Criminal Appeal No. 77 of 1962 arises out of a criminal misappropriation by Gupta of Rs. 10,000 and Criminal Appeal No. 74 of 1965 out of a similar misappropriation of Rs. 21,450, both of which sums were entrusted to him in his official capacity. The challan in the first case was in these terms : "Both the accused in conspiracy with each other have embezzled an amount of Rs. 10,000 on 25-8-50 from this Government money and made false entries of receipt and expenditure in the concerned Government registers for concealment of this embezzlement. From investigation, doing of an offence under ss. 409, 477A and 34 Indian Penal Code is proved against both the aforesaid accused. Hence the charge sheet is submitted for awarding sentences according to law. " The challan in the other case states, "Both these accused in conspiracy with each other have embezzled an amount of Rs. 21,133-5-0 on 29-9-50 and expenditure of Rs. 1,450 is shown and it is written there that this amount has been remitted in the treasury but actually.

Now the only question is whether in respect of the charges under s. 409 of the Indian Penal Code, Gupta can be said to have been "accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". It is said on behalf of trust no sanction is necessary as such an offence can never be said to be so committed because it is no part of the official duty of a public servant to misappropriate moneys of his employers. With that proposition, I am unable to agree. It was rejected by this Court in *Shreekantiah Ramayya Munipalli v. The State of Bombay* (1) [1955] 1 S. C. R. 1177 and *Amrik Singh v. The State of PEPSU* (2) [1955] 1 S. C. R. 1302.

I think on the authorities as they stand, it is now clearly established that whether an offence was committed in the course of official duty will depend on the facts of each case. In *Hori Ram Singh's case* (3) [1939] F. C. R. 159 Sulaiman J. stated at p. 180, "The question whether a criminal breach of trust can be committed while purporting to act in execution of duty is not capable of being answered hypothetically in the abstract, without any reference to the actual facts of the case. " In the same case, in discussing the test to be applied in determining whether or not an act is one purported to be done in execution of duty as a public servant, Varadachariar J. observed at p. 187, "I would observe at the outset that the question is substantially one of fact, to be determined with reference to the act complained of and the attendant circumstances; it seems neither useful nor desirable to paraphrase the language of the section in attempting to lay down hard the fast tests. " In *Gill v. King*, (1) [1948] F. C.

The case nearest to the present is *Amrik Singh v. State of PEPSU* (4) [1955] 1 S. C. R. 1302. There a public officer entrusted with moneys for payment of wages was charged with defalcation of a sum of Rs. 51 which he showed as paid to a Khalasi (menial servant) named Parma on account of wages and which was vouched by a thumb impression purporting to be of the payee but which amount it was alleged had not been paid to the Khalasi because there was no one of that name and the thumb impression was of the accused himself who had misappropriated the money to his own use. This Court held that a sanction was necessary in order to prosecute the public servant on a charge of this kind. It was observed at p. 1310, "If what appears on the face of the roll is true-and whether it is true or not is not a matter relevant at the stage of sanction-then the acts with which the appellant is charged fall within the scope of his duties and can be justified by him as done by virtue of his office. Clearly, therefore, sanction was rejected

I find it impossible to distinguish the facts of that case from the present. Regarding the defalcation of Rs. 21,450 the challan that I have already quoted would show that the defalcation had been committed by the making of certain false entries in the books by Gupta and Kale acting in conspiracy. Whether these entries were correct or not is not a matter for investigation when the

question of the necessity for sanction arise. Applying the test laid down by the Privy Council in Gill's case (1) [1948] F. C. R. p. 19, 40 the necessity for the sanction had to be determined by putting the question, could the accused have reasonably stated that what he had done, he had done in the course of his official duty? In the present case when charged with the defalcation of that amount, he could have reasonably said that he had sent the amounts to the treasury as the accounts showed and that would have been an act done in the course of his official duty. The other amount of Rs. 10,000 was entered in the accounts on the exp

Mr. Shroff for the respondent said that the decisions of this Court in Om Prakash Gupta v. State of U. P. (3) [1957] S. C. R. 423 and K. Satwant Singh v. State of Punjab (4) [1960] 2 S. C. R. 89 showed that the conviction of the appellant Gupta under s. 409 even in the absence of the sanction was perfectly valid. I am unable to accept this contention. The first of these cases dealt with a charge under s. 409 and it was observed at p. 437, "Quite a large body of case law in all the High Courts has held that a public servant committing criminal breach of trust does not normally act in his capacity as a public servant." I do not think that this observation at all helps. All that it says is that normally an offence under s. 409 cannot be said to have been committed by a public servant in the discharge of his official capacity. This clearly implies that there may be cases where an offence under that section may be committed by a public servant in the discharge of his official duties. The fact that on the facts o

K. Satwant Singh's case (1) [1960] 2 S. C. R. 89 was concerned with the offence of cheating under s. 420 of the Indian Penal Code. Imam J. in delivering the judgment of this Court in that case approved of the test formulated in Amrik Singh's case (2) [1955] 1 S. C. R. 1302 that the offence charged must have necessary connection with the performance of the duties of a public servant. What had happened there was that Satwant Singh, a contractor, had entered into conspiracy with a government official, Henderson, and obtained from him a false certificate of work done by him for government by cheating the government. As the two had been tried jointly, it was contended that the charge against Henderson was in respect of an act done in the course of his official duty in issuing the certificate and the trial was bad as no sanction had been obtained. Imam J. pointed out that Henderson had not been prosecuted for any offence concerning his act of certification and had been prosecuted for abetting the appellant in the

I would allow both the appeals of the appellant Gupta on the ground that his conviction under s. 409 also is unsustainable in the absence of the sanction.

RAMASWAMI, J. –

Criminal Appeals nos. 77 of 1962 and 74 of 1965 are brought, by special leave, on behalf of Gupta against the judgment of the High Court of Madhya Pradesh, Indore Bench, Indore dated December 22, 1961 dismissing Criminal Revision Applications nos. 262 and 263 of 1960 and affirming the convictions and sentences imposed on Gupta under ss. 409 and 477-A of the Indian Penal Code. Criminal Appeals nos. 162 and 163 of 1962 are brought, by special leave, on behalf of Kale against the judgment of the High Court of Madhya Pradesh, Indore Bench, Indore dated December 22, 1961 dismissing Criminal Revision Applications nos. 265 and 266 of 1960 and maintaining convictions of the appellant under ss. 477-A and 409/109 of the Indian Penal Code.

The appellant-Gupta-was charged with having committed criminal breach of trust of a sum of Rs. 21,450 on September 29, 1950 and of a sum of Rs. 10,000 on August 25, 1950. In respect of these two items he was also charged of having abetted the offence of falsification of accounts said to have

been committed by the appellant Kale. With regard to these two items appellant Kale was charged under s. 477-A for falsification of accounts and under ss. 409/109 for abetment of criminal breach of trust committed by appellant-Gupta. The Indore Electric Power House was a Government concern at the time the alleged offence was committed. The appellant-Gupta-entered the service of the Power House as a Clerk in the year 1933. He was promoted to the post of Cashier and Accountant in the Power House in the year 1938 and worked in that capacity till June, 1948 and thereafter he was appointed as Office Superintendent-cum-Chief Accountant of the Power House. At that time Shri Sibbal was the Chief Electrical Engineer and General M

Criminal Appeals Nos. 77 of 1962 & 74 of 1965 :

The principal question of law arising in these two appeals is whether the conviction of the appellant-Gupta-under ss. 409 and 477-A of the Indian Penal Code is illegal as sanction of the State Government was not given to his prosecution under the provisions of s. 197 of the Criminal Procedure Code. Section 197(1) of the Criminal Procedure Code states as follows :

"197. (1) When any person who is a Judge within the meaning of section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a 'State Government' or 'the Central Government', is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the 'previous sanction-

(a) in the case of a person employed in connection with the affairs of the Union, of the Central Government; and

(b) in the case of a person employed in connection with the affairs of a State, of the State Government."

Hori Ram Singh v. Emperor (1) [1939] F. C. R. 159 is a decision of the Federal Court on the necessity for sanction under s. 270 of the Government of India Act, 1935, which is similar to s. 197(1) of the Code of Criminal Procedure in its purpose and intent. The facts in that case were that a Sub-Assistant Surgeon was charged under s. 409 with having dishonestly removed certain medicines from a hospital which was under his charge, to his own residence, and under s. 477-A, with having failed to enter them in the stock book. The sanction of the Government had not been obtained for the prosecution under s. 270 of the Government of India Act. The question for decision in that case was whether such sanction was necessary. It was held by the Federal Court that the charge under s. 477-A required sanction, as 'the official capacity is involved in the very act complained of as amounting to a crime'; but that no sanction was required for a charge under s. 409, because 'the official capacity is material only in connectio

"In one group of cases, it is insisted that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it.-[cf. In re Sheik Abdul Khadir Saheb (A. I. R. 1917 Mad. 344); Kamisetty Raja Rao v. Ramaswamy (I. L. R. 50 Mad. 74) Amanat Ali v. Emperor (A. I. R. 1929 Cal 724); Emperor v. Maung Bo Maung (I. L. R. 13 Rang. 540); and Gurushidayya Shantivirayya Kulkarni v. Emperor (A. I. R. 1939 Bom. 63)]. In another group more stress has been laid on the circumstance that the official character or status of the accused gave him the opportunity to commit the offence. It seems to me that the first

is the correct view. In the third group of cases, stress is laid almost exclusively on the fact that it was at a time when the accused was engaged in his official duty that the alleged offence was said to have been committed [see *Gangaraju v. Venki* (I. L. R. 52 Mad 602, at p. 605) quoting from *Mitra's Commentary on the Criminal Procedure Code*]. The use of the ex

In *Gill v. The King* (1) [1948] F. C. R. 19 the question arose directly with reference to s. 197(1) of the Criminal Procedure Code. In that case the accused was charged under s. 161 with taking bribes, and under s. 120-B with conspiracy. On the question whether sanction was necessary under s. 197(1) it was held by the Judicial Committee that there was no difference in scope between that section and section 270 of the Government of India Act, 1935, and approving the statement of the law by Varadachariar, J. in *Hori Ram Singh v. Emperor*, (1) [1939] F. C. R. 159 Lord Simonds observed in the course of his judgment at page 40 of the Report :

"In the consideration of s. 197 much assistance is to be derived from the judgment of the Federal Court in *Hori Ram Singh v. The Crown* ([1939] F. C. R. 159), and in particular from the careful analysis of previous authorities which is to be found in the opinion of Varadachariar, J. Their Lordships, while admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials, cannot accede to the view that the relevant words have the scope that has in some cases been given to them. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus, a judge neither acts nor purports to act as a judge in receiving a bribe, though the judgment which he delivers may be such an act : nor does a Government in picking the pocket of a patient whom he is examining, though the examination itself may be such

The view expressed by the Judicial Committee in *Gill v. The King* (2) [1948] F. C. R. 19 was followed by the Judicial Committee in the later cases *Albert West Meads v. The King* (1) 75 I. A. 185 and *Phanindra Chandra v. The King* (2) 76 I. A. 10 and has been approved by this Court in *R. W. Mathams v. State of West Bengal* (3) [1955] 1 S. C. R. 216. It is not every offence committed by a public servant that requires sanction for prosecution under s. 197(1) of the Criminal Procedure Code; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary. It is the quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by s. 197 of the Criminal Procedure Code will be attracted. An offence may be entirely unconnected

Applying the principle to the present case, we are of opinion that sanction of the State Government was not necessary for the prosecution of Gupta under s. 409 of the Indian Penal Code, because the act of criminal misappropriation was not committed by the appellant while he was acting or purporting to act in the discharge of his official duties and that offence has no direct connection with the duties of the appellant as a public servant, and the official status of the appellant only furnished the appellant with an occasion or an opportunity of committing the offence.

With regard to the other charge under ss. 477-A/109 of the Indian Penal Code the legal position is different and, in our opinion, the sanction of the State Government is necessary for the prosecution

of the appellant on this charge because it was committed within the scope of official duties, though in dereliction of them.

On behalf of the appellant Mr. Chari referred to the decision of this Court in *Amrik Singh v. The State of Pepsu* (4) [1955] 1 S. C. R. 1302 and submitted that even with regard to the charge under s. 409, Indian Penal Code the sanction of the State Government would be necessary. In that case the appellant was a Sub-Divisional Officer in the Public Works Department, Pepsu and at the material date he was in charge of certain works at a place called Karhali. It was part of his duties to disburse the wages to the workmen employed in the works, and the procedure usually followed was that he drew the amount required from the treasury, and paid the same to the employees against their signatures or thumb-impressions in the monthly acquittance roll. In the roll for April 1951, one Parma was mentioned as a Khalasi and a sum of Rs. 51 shown as paid to him for his wages, the payment being vouched by thumb-impression. The case of the prosecution was that there was, in fact, no person of the name of Parma, that the thumb-

"We have no hesitation in saying that where a public servant commits the offence of cheating or abets another so to cheat, the offence committed by him is not one while he is acting or purporting to act in the discharge of his official duty, as such offences have no necessary connection between them and the performance of the duties of a public servant, the official status furnishing only the occasion or opportunity for the commission of the offences (vide *Amrik Singh's case*-1955 1 S. C. R. 1302). The Act of cheating or abetment thereof has no reasonable connection with the discharge of official duty. The act must bear such relation to the duty that the public servant could lay a reasonable but not a pretended or fanciful claim, that he did it in the course of the performance of his duty [vide *Matajog Dobey's case*-[1955] 2 S. C. R. 925]. It was urged, however, that in the present case the act of Henderson in certifying the appellant's claims as true was an official act because it was his duty either to certi

We consider that the present case falls within the principle laid down by this Court in *Satwant Singh v. The State of Punjab* (1) [1960] 2 S. C. R. 89 by which we are bound and the view we have taken is supported by the decisions of the Federal Court in *Hori Ram Singh v. Emperor* (2) [1939] F. C. R. 159 and of the Judicial Committee in *Gill v. The King* (3) [1948] F. C. R. 19.

It was argued by Mr. Shroff on behalf of the respondent that sanction of the State Government was given for the prosecution of the appellant on July 1, 1953 and the prosecution witnesses were examined by the Magistrate in the case against the appellant after that date and that, therefore, the conviction of the appellant under s. 477-A of the Indian Penal Code cannot be held to be legally invalid. We do not think there is justification for this argument. It appears from the Order Sheet that the police submitted charge-sheet against the appellant on April 4, 1953. The Order sheet shows that on April 6, 1953 the Additional City Magistrate, Indore City made the following order:

"Challan be recorded in R. Register. Accused no. 1 & 2 will be present in the Court from the Central Jail on 15-4-53. Prosecution witnesses according to challan no 1, 2, 3, 4 be summoned on date 15-4-53. The file be put up at the time of evidence of prosecution on 15-4-53."

For some reason or the other the witnesses were not present on April 15, 1953 and the case was adjourned for several dates and the evidence of the witnesses was recorded for the first time on July 6, 1953, but there is no doubt that the Additional City Magistrate took cognizance of the offence on

April 6, 1953 when he ordered that the prosecution witnesses should be summoned and the appellant should be produced in the Court from the Central Jail on April 15, 1953. The legal position is not seriously disputed on behalf of the respondent and Mr. Shroff frankly conceded that cognizance was taken by the Additional City Magistrate on April 6, 1953. It follows, therefore, that there is no proper sanction for the prosecution of the appellant with regard to the charge under s. 477-A, Indian Penal Code and the conviction of the appellant on that charge must be quashed.

For the reasons expressed, we partly allow these two appeals and quash the conviction of the appellant-Gupta-of the charge under s. 477-A of the Indian Penal Code and sentence imposed on that charge in both these cases. With regard to the charge under s. 409, Indian Penal Code, we maintain the conviction and sentence imposed by the lower Courts in both the cases.

Criminal Appeals nos. 162 & 163 of 1962.

On behalf of the appellant-Kale-it was submitted by Mr. Barlingay that though the false entries in the rough cash-book dated September 29, 1950 and August 25, 1950 were made by the appellant, he was not criminally liable under s. 477-A or ss. 409/109 of the Indian Penal Code as the entries were made by him at the instance of the appellant Gupta who was Superintendent of his office and superior to the appellant in official position. It was also contended on behalf of the appellant that he did not make the false entries wilfully and with intent to defraud the Power House and that he had no knowledge of the criminal intent of appellant Gupta. The case of the appellant has been rejected by the lower Courts and we do not propose to review the evidence on this aspect of the case because the question raised is essentially one of fact and there is a concurrent finding of the lower Courts that the appellant made the false entries in the account-books wilfully and with intent to defraud the Power House and that he lant, asked the witness to write the accounts in the rough cash book newly issued. The evidence of these two witnesses has been accepted by the lower Courts as true and it has been found that the appellant and Gupta jointly made an attempt to have the accounts re-written and manipulated. In our opinion, no case is made out for interfering with the conviction and sentence imposed on the appellant under s. 409/109 or s. 477-A of the Indian Penal Code and these appeals must be dismissed.

ORDER

In Criminal Appeals Nos. 77 of 1962 and 74 of 1965.

In accordance with the majority Judgment, these appeals are partly allowed.

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