

**Pratapsinh V. Ved Vs. the State**

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**Court :** Gujarat

**Decided On :** Apr-09-1955

**Reported in :** 1955CriLJ1208

**Judge :** Chhatpar and; Baxi, JJ.

**Appellant :** Pratapsinh V. Ved

**Respondent :** The State

**Judgement :**

**Chhatpar, J.**

1. This appeal is from an order of conviction of the appellant of an offence Under Section 409, Indian Penal Code, and sentence of two years' rigorous imprisonment and a fine of Rs. 400/-, in default further rigorous imprisonment of three months. The offence was alleged to have been committed by the accused in respect of a sum of Rs. 397-8-0 received and misappropriated by him. The accused was a junior clerk in the office of the Chief Minister from February 1949 to December 1950.

The staff of the office of the Chief Minister in April 1949 comprised a Personal Secretary who then was R. C. Raval, two stenographers named Bhadrakant Dholakia and K. G. Oza and a junior clerk, the accused. The duties of the accused then were to receive and despatch post, to present bills in the office of the

Comptroller, to receive cheques for payments, to receive payments and cheques from the Bank and to disburse the amounts so received.

It was also his duty to receive money orders and to maintain accounts which were then kept in an exercise book. In short, he was not a mere despatch clerk but was also doing duties as a cashier to receive and remit amounts. It is however not very necessary for the purposes of the present case to define exactly the duties then performed by the accused; but there is no doubt that he was receiving money orders which were being received by\_ the office of the Chief Minister and he

2. The financial year of 1948-49 was a scarcity year and a Scarcity Relief Fund was started by Government of Saurashtra. Amounts were being received towards it by cash, cheques, drafts and money orders in the office of the Chief Minister. The account relating to the fund was not being maintained in the Chief Minister's office but in the Home Department of the Government, to which or (?) the treasury, cheques, drafts and cash were being forwarded when received by the office of the Chief Minister; whenever any communication relating to the fund was received by the Chief Minister's office it was forwarded to the Home Department.

In short, the Chief Minister's office was merely an intermediary. On 23-4-1949 a sum of Rs. 400/-less remittance charges, the net amount being Rs. 397-8-0 was received by a telegraphic money order from Busum Bhatia in Uganda, South Africa, in the office of the Chief Minister as contribution to the fund. On this date admittedly both Baval and Oza were at Jamnagar and admittedly the amount was received by the accused.

The amount was sent by one Laxmishanker Joshi who also sent a letter (Ex. 6) dated 21-4-1949 addressed personally to the Chief Minister, accompanied by a list of donors (Ex. 7). The letter refers to two items, one of Rs. 600/- and the other of Rs. 400/-, the latter being towards the scarcity fund. It also states that the money had been sent by the telegraphic money order. The letter was received by Baval, the Personal Secretary to the Chief 'Minister on 10-5-49 as we find his initials with this date and the word 'scarcity' in his handwriting.

The letter does not show that it was in awarded in the office as it does not bear the inward number; it is also not entered in the inward register. The letter along with the accompanying list of donors (Ex. 7) was sent to the Home Department on 14-5-1949 by a covering letter (Ex. 8) signed by Raval. This letter is not outwarded; it is not entered in the outward register. It is couched in few words forwarding Exs. 6 and 7 saying that they related to the scarcity department.

The letter was received by the Home Department on the same date and in awarded in that department. There is no note in the inward register of the Home Department that any money was received with the forwarding letter. On the contrary there is an endorsement on Ex. 6 that receipt of money may be awaited. So money was not received by the Home Department. The amount was also not credited in the treasury.

This is firmly established. As these three Exs. 6, 7 and 8 were sent from the office of the Chief Minister direct to the Home Department without their being in awarded or outwarded in the office of the Chief Minister, it is very probable that the accused who was then doing the work of despatching letters had no knowledge of their receipt in the Chief Minister's office and despatch to the Home Department, else the letters would have been in-warded and outwarded.

The accused's defence to the charge of breach of trust was that although he had received the amount on 23-4-1949 by telegraphic money order from Africa, he had handed over the amount in accordance with the usual practice to Raval, the Personal Secretary to the Chief Minister, two or three days after receipt. It is firmly established and not disputed that on the date of receipt neither Raval nor Oza were in Rajkot. They were then at Jamnagar; but he says that when they returned two or three days thereafter he handed over the amount to Raval.

Then only an exercise book was being maintained by the Chief Minister's office as an account book but evidence of Raval as well as Oza is that the amounts received by the Chief Minister's office in respect of the scarcity fund were never entered in it. This was probably due to the fact that the account relating to the scarcity fund was being maintained by the Home Department, the Chief Minister's office merely acted as a sort of post office to forward communications and

contributions received by it.

We lay particular emphasis on the fact that Exs. 6, 7 and 8' were sent direct by Raval to the Home Department. If the amount was handed over by the accused to Raval as is being alleged by the accused and Raval had intended to misappropriate the amount, he would not be so foolish as to forward Exs. 6, 7 with 8 to the Home Department. Nothing would have been easier for him than to have destroyed Exs. 6 and 7.

Being the Personal Secretary to the Chief Minister, post addressed personally to the Chief Minister would be opened by him and not by any ' junior clerk like the accused. The two alternatives are either the accused misappropriated the amount or he handed it over to Raval who misappropriated it or forgot all about it.

3. The next stage comes at about June 1949 I when a letter dated 27-6-1949 was sent by the Comptroller's office to the Personal Secretary to the Chief Minister stating that an amount of Rs. 400/- and a further amount of Rs. 615/- (with which we are not concerned) were not credited towards the famine relief fund. This letter has not been produced by the prosecution and there is no evidence as to what action was taken thereon.

But we find a letter written by Raval on 19-6-1950 about a year thereafter, to the Comptroller, Saurashtra State, in which he states that the Chief Minister would like to know the statements of total amounts received on account of famine relief fund upto date, and also as to how the amounts were used. Along with this letter is enclosed a statement of amounts received from various persons by the Chief Minister's office which were either sent to the Comptroller direct or through the Chief Secretary (meaning through the Home Department).

The letter adds that this statement may- not be perfect and required verification. It ends with a request to verify the statement, figures of which had been taken from the office of the Chief Minister as also from the Chief Secretary's office. This letter is Ex. 9 and the accompanying statement Ex. 10. In the letter we find the item of Rs. 400/- received from L. K. Joshi (Dhrolwala), Busum Bhatia, Uganda, on 21-4-1949,

To this letter was received a reply dated 25-6-1950 from the office of the Comptroller, which says that the figures shown in the statement have been verified with the register showing contributions received on account of the relief fund, but that there is a difference of Rs. 1015/- which comprises two items of Rs, 615/- and of Rs. 400/-, the latter being stated to have been received from L. K. Joshi.

These two items are not shown in the register maintained by the Comptroller's office and in the last paragraph of this letter, reference is made to the previous letter dated 27-6-1949 referred to above wherein these two amounts were also stated not to have been received. Now Exs, 9 and 10 are both in the handwriting of Raval. Mr. Dalai the learned advocate for the appellant is fair enough to concede this. Ex. 10, the statement, contains the item of Rs. 400/- received from Joshi.

The same argument would apply that if Raval had misappropriated this amount he would not have mentioned this item in the list (Ex. 10).

4. Raval left charge as Personal Secretary on about 14-7-1950. Thereafter Chunibhai Vaishnav took charge as Personal Secretary to the Chief Minister and worked upto 8-12-50 when Raval resumed charge. Raval continued upto 14-6-1951 when Shankerlal Mankad relieved him and he worked upto 21-2-54. Vaishnav took up the matter about this missing item of Rs, 397-8-0. Vaishnav says he addressed two letters to Laxmishanker Joshi, copies of which are Exs. 12 and 13.

In Ex. 12 dated 5-8-1950 he stated that the amount of Rs. 400/- equivalent to 600 shillings which was sent by Joshi by telegraphic money order, had not been credited in the Accountant General's office and asked Joshi to send the postal receipt of the amount, if received by him. In Ex. 13 dated 18-9-50, he invited Joshi's attention to the prior letter which had not been replied to in\$ made the same enquiry. Both these letters were to be sent by air-mail. No reply was received.

5. Now Ex. 12 is not entered in the despatch book which has been produced, Several entries in it relating to letters sent on the date which this letter bears, i.e.,

5-8-50, are in the handwriting of the accused. So the inference would be that the accused knowing that this enquiry was being made did not enter this letter in the despatch register and he did not actually post it as no reply was received thereto.

Similar is the case with the second letter Ex. 13 except that the entries in the outward register of other letters sent on the same date are in the handwriting of another clerk named Waghani who has not been examined in the case. Vaishnav seems to have then become suspicious and he wrote a third letter (Ex. 14) dated 20-10-1950 which he says, he posted personally. In this letter he refers to two previous letters and requests for information.

There is also a fourth letter (Ex. 15) dated 13-11-1950 which is to the same effect as Ex. 14. To Ex. 14, a reply (Ex. 16) purporting to come from Laxmishanker Joshi dated 7-12-1950 addressed to the Chief Minister personally, was received, stating that the writer had sent 600 shillings by telegraphic postal money order on 21-4-1949 for the famine relief fund and on enquiry by him from postal authorities in Africa this amount was actually sent and must have been received by somebody in the office of the Chief Minister, and it appeared that some mischief was played at the Chief Minister's end.

He further states that Vaishnav wrote to him, meaning Ex. 14, that he had written two previous letters dated 5-8-50 and 18-11-50, and that the first letter was never received by him and as regards the second letter, he had merely received a cover addressed to him containing a blank sheet of paper which he was sending along with the cover.

On receipt of this letter Ex. 16, Raval who had by then resumed charge made enquiries from the postal authorities at Rajkot to try to trace the person who had signed the receipt of money, and ultimately the receipt was traced which showed the amount to have been received by the accused on 23-4-1949. This was definitely ascertained in early February 1951.

6. The cover bearing the address of Laxmishanker Joshi containing a blank piece of paper is Ex. 19. The accused admits that this address is in his handwriting. It bears Service stamps but is not franked as is usual in sending official

correspondence. It is also significant to note that although Exs. 14 and 15 are entered in the outward register, Exs. 12 and 13 are not. On the date of Ex. 12, i.e., 5-8-50,' the accused had despatched several other letters and entered them in the register.

7. The learned Sessions Judge admitted Ex. 16 in evidence Under Section 32, Indian Evidence Act on the ground that the whereabouts of its writer were not known as deposed to by Vaishnav. He further says that statements in Ex. 16 are made in die ordinary course in reply to the letter sent by Vaishnav. He probably and under contemplation Clause (2) of Section 32, Indian Evidence Act or explanation to Section 47, although he has not referred to diem definitely.

Mr. Dalai the learned advocate for die accused argues that Ex. 16 is not admissible, as Joshi has not been examined. We have therefore to decide this question. The learned Government Pleader argues that this letter is admissible under Sub-section (2) of Section 32. Now the relevant part of Section 32 says that statements, written or verbal of relevant facts made by a person who is dead or who cannot be found etc. are themselves relevant, when the statement in question was made by such person in the ordi- nary course of business and in particular, when it consists of any entry or memorandum made by him in books kept in the ordinary course of business or in the discharge of professional duty or of an acknowledgment written or signed by mm of the receipt of money, goods, securities or property or of any kind used in commerce written or signed by him or the date of a letter of the document usually dated, written or signed by him. This is provided by Clause (2) of the Section.

But this clause is subject to the main part of the Section which says that statements written or verbal of relevant facts made by a person who is dead or who cannot be found etc., are themselves relevant facts, which presupposes that there must, in the first place, be proof that the statement in question was of the person who is dead or who cannot be found etc.

That means that the letter Ex. 16 must be proved to have been written by Laxmishanker Joshi, The primary evidence would be of Joshi but since his whereabouts are unknown or his presence cannot be obtained without an

unreasonable amount of delay or expense, the letter could be proved by several other modes of proof of handwriting laid down by the Indian Evidence Act. If there is no such proof at all, the contents of the letter would not be admissible as written by Laxmishanker Joshi.

8. Now Section 67, Indian Evidence Act enacts that if a document is alleged to be signed or to have been written wholly or in part by any person the signature or handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. Handwriting may be proved or disproved in the following ways (a) by calling the writer; or (b) any person, e.g., an attesting witness, who actually saw him write the document; or (c) by the evidence of the opinion of experts Under Section 45 of the Act, or (d) by the opinion-evidence of non-experts, namely, Under Section 47 by the evidence of a person who has acquired a knowledge of the character of the handwriting in one of the ways specified in this section.

A witness who has such knowledge may testify to his belief that a writing shown to him is in the handwriting of another person, though he cannot swear positively thereto. Such knowledge may be acquired, firstly, by having at any time seen the party write; secondly, by the receipt of documents purporting to be written by the party in answer to documents written by the witness or under his authority and addressed to that party; and thirdly, by having observed in the ordinary course of business documents purporting to be written by the person in question.

In this connection, I may refer to the Commentary of Woodroffe and Ameer Ali on the Law of Evidence, 9th Edn., at pp. 459 and 460. So far as the present case is concerned the only section which can possibly be brought to the aid of prosecution would be the explanation to Section 47, which says:

A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.



Nor Vaishnav through whom Ex. 16 was sought to be put in evidence, nor Raval, had received any other letter from Joshi in reply to their letters. The two letters Exs. 12 and 13 were never replied to as they were never sent and the first reply that was received was Ex. 16. So neither Vaishnav nor Raval could be said to have received documents purporting to be written by Joshi in answer to letters written by them so as to be in a position to swear to Ex. 16 to be in the handwriting of Joshi.

There is no other Section under which contents of Ex. 16 would be admissible. We are therefore of the opinion that Ex. 16 is not proved to be in the handwriting of Joshi, and therefore the contents thereof are not admissible in evidence Under Section 32, Indian Evidence Act. But although contents of Ex. 16 are not proved, the fact of its receipt purporting to come from Joshi in reply to a letter written to Joshi would be relevant Under Sections 7 and 11, Evidence Act towards proof of the fact that when a letter (Ex. 12) was given to the appellant for despatch no reply was received from the addressee leading to the inference of its being suppressed, but when the letter (Ex. 14) was posted personally by Vaishnav a reply was received purporting to come from the same addressee.

The cover in which Ex. 16 was received has been produced. To that extent, the receipt of Ex. 16 would be a relevant fact which would support the prosecution case that the accused knowing that his defalcation of the amount was now being brought to light, was trying to suppress correspondence.

9. And lastly the case of the prosecution against the accused rested also upon an extra judicial confession alleged to have been made by the accused on about 24-7-1951 in the presence of Raval, Shankerlal Mankad who was then the Personal Secretary to the Chief Minister and Nalini-kant who was then an additional Personal Secretary to the Chief Minister.

The learned Sessions Judge though holding that this extra judicial confession must have been made under pressure from Shankerlal who was then the Secretary and the superior officer of the accused, has nevertheless referred to it as 'lending assurance to the other evidence produced in the case.' In our opinion, he was not competent to do so once having come to the conclusion that the

confession was made under pressure. The learned Government Pleader has however referred to a letter written by the accused to Nalinikant (Ex. 30) dated 26-7-1951, wherein he had asked Nalinikant to wait till Saturday next.

This was in reference to some conversation between them two days back. lie states therein that his brother might possibly come by plane and that the matter would be settled by Saturday next. This has been interpreted by Nalinikant to refer to the interview when the accused is said to have made the extra judicial confession before the three persons. This witness as well as Raval say that the accused was very reluctant to make any admission and Mankad definitely says that the accused was prepared to admit his guilt on the promise of his not being proceeded against.

So it appears to us that the confession was not only made under pressure as held by the learned Sessions Judge but also induced by some promise, and therefore could not be said to have been entirely voluntary. When the accused wrote Ex. 30 he must presumably be under the same influence. We have therefore ruled out of consideration this extra judicial confession.

10. Summing up, the main features of the case against the accused are, first, the admission of the accused of the receipt of the amount in question. He says that he gave the amount to Raval. Raval definitely says that the amount was not paid to him, and Raval's subsequent conduct in sending Exs, 6, 7 and 8 and thereafter also making an enquiry from the Comptroller's office in Exs. 9 and 10 in which the item in question is mentioned, go to prove that Raval could not have misappropriated the amount nor could he have forgotten all about it as he has been in correspondence relating to it.

In addition, we have this fact that when the letter, copy of which is Ex. 12 was sent by Vaishnav to the accused for despatch to Laxmishanker Joshi, it was not so despatched as the letter is not inwarded, and no reply was received to this letter. This suppression is supported by the fact that when Vaishnav himself posted a letter, copy of which is Ex. 14, a reply was received thereto. These facts sufficiently prove the offence without taking into consideration the contents of Ex. 16 or the extra judicial confession.

Although the learned Sessions Judge has taken other factors into consideration we are convinced upon above discussed evidence that the prosecution has succeeded in establishing the guilt of the accused beyond all reasonable doubt. In spite of some discrepancy in the evidence of Raval, the learned Sessions Judge has believed this witness when he says that he did not receive the amount from the accused. His finding is that either he never received the amount from the accused, or if he received the amount he must have handed it over to the accused to be sent to the Home Department along with Ex. 8 and its enclosures.

We are not prepared to differ from the appreciation of evidence in this respect of the learned Sessions Judge, although we are of the view that the accused never handed over the amount to Raval at all. Raval does not say that he gave back the money to the accused when sending Ex. 8 as surmised by the learned Sessions Judge in the alternative. The money was received in the absence of Raval by the accused and misappropriated by him. The letters Exs. 6, 7 and 8 were sent by Raval in the ordinary course to the Home Department in the belief that the amount must have already been sent by the accused as it was received some days before the receipt of Exs. 6 and 7.

11. Mr. Dalai for the appellant has argued that the present case is One of word against word, by which he means that there is only the word of Raval against the word of the accused. But as discussed above, the sending of Exs. 6, 7, 8, 9 and 10 by Raval proves his innocence. They are incompatible with this having misappropriated the amount or not having sent the amount by inadvertence. The learned advocate has also criticised the different versions given by Raval at different times; but we must take into consideration that Raval was giving evidence some years after the offence was committed and it is not unnatural that there would be some discrepancies.

But we are satisfied that the essence of the matter i.e., the receipt and misappropriation by the accused are established beyond all reasonable doubt.

12. The learned Advocate has next criticised the non-production of the exercise book in the case. This exercise book has been missing. But there is no real point in its suppression by the prosecution if it was available. The entries in this book

used to be made by the accused. Since it is established conclusively that the amount was not sent from the office of the Chief Minister either to the Treasury or to the Home Department and if the exercise book did contain an entry of the receipt of this amount, the person who would be interested in suppressing this book would be the accused himself.

So the non-production of this missing book does not advance the case of the accused, nor does it throw any doubt on the prosecution case, Or the other hand, if the book did not contain the entry of this amount, the inference would be the same. On the contrary it would damage the case of the accused if the practice was to enter therein amounts received for the scarcity fund.

13. The learned Advocate also adversely commented upon the conduct of Raval in not putting any questions to the accused at the time when he sent Ex. 8 along with Exs. 6 and 7 to the Home Department, nor when the letter in June 1949 was received from the Comptroller's Office showing that the item in question was not credited towards the scarcity fund, and nor even when Ex. 11 dated 25-7-1950 was received from the Comptroller's office by Raval in which this item is also mentioned as not having been credited.

It is true that there is no explanation by Raval as to why he did not, to the first place, make enquiries from the accused, and even Vaishnav who succeeded him for some time, did not enquire from the accused but sought information from Joshi. It is quite possible that these persons might have thought it inexpedient or imprudent to make such a serious charge as of breach of trust against their subordinate unless and until they had positive proof of the fact which was only when the receipt of the telegraphic money order was traced showing the amount in question to have been received by the accused and nobody else.

So we are not impressed by this contention of Mr. Dalai. As discussed above there are only two alternatives, either the amount was misappropriated by Raval or by the accused. We have<sup>1</sup> already dealt with the question that the conduct of Raval showed clearly that it could not have been misappropriated by him nor could it have escaped from his memory, and having come to this conclusion, the only other alternative is that the accused has failed to account for this money

admittedly received by him.

14. Mr. Dalai has also commented upon some irregularities in the office of the Chief Minister. Both Oza and Raval seem to accuse each other of retaining sums for some months before they were remitted to the proper authorities. Raval also has said at some stage that it was the usual practice for the accused to hand over money received to him and of this fact much has been made by the learned advocate; but there is no point in such an argument as the breach of trust would only rise when a particular amount is not handed over in the ordinary course.

The simple issue of fact, in spite of some irregularities in the office, was whether the item in question was in fact received by Raval from the accused. Our decision is clearly in favour of Raval exculpating him from any complicity in the offence. Under the circumstances, we see no reason to interfere and dismiss this appeal.

**Baxi, J.**

15. I agree.