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Court : Rajasthan

Decided On : Apr-08-1954

Reported in : AIR1954Raj211

Judge : Wanchoo, C.J. and; Modi, J.

Acts : Indian Penal Code. 1860 - Secton 409; Prevention of Corruption Act, 1947 - Secton 5(1) and 5(4); General Clauses Act, 1897 - Secton 26

Appeal No. : Criminal Appeal No. 33 of 1953

Appellant : State

Respondent : Gulab Singh

Advocate for Def. : B.B. Desai, Adv.

Advocate for Pet/Ap. : L.N. Chhangani, Govt. Adv.

Disposition : Appeal dismissed

Judgement :

Wanchoo, C.J.

1. This is an appeal by the State against the acquittal of Gulab Singh accused of an offence under Section 409, Penal Code.

2. The prosecution case was briefly this. Gulab-Singh was a cashier in the Panchayat Office at Udaipur, and used to remain in charge of moneys relating to that office. The money used to be kept in a safe which was placed in the office of the Inspector of Schools for safe custody. The accused left for Jaipur on casual leave on 24-5-1952, with the permission of Sundernath, the then Officiating Panchayat Officer. He should have returned to duty on the 29th of May, but did not. He sent applications for extension of his leave time and again. This extension however was not granted, but as the address of the accused was not known, he could not be informed of this refusal.

In the meantime, Sundernath was relieved by Krishna Vallabh as Panchayat Officer on 31-5-1952. Krishna Vallabh wanted the keys of the safe in order to count the cash. Sundernath said that the keys were with the accused who had not returned. Thereafter, orders were sought from the Chief Panchayat Officer at Jaipur, who replied that the safe might be broken up. Preparations were made to break open the safe on 3-7-1952 in the presence of a gazetted officer.

But on the same day, Harnath Singh, brother of the accused, appeared and produced four keys. The safe was opened with the help of these keys, and was found to contain Rs. 45/9/- only. There was thus a deficiency of Rs. 1,017/-/9 according to the account books. Consequently, a report was made on the 4th of July to the police that this amount had been embezzled by the accused. The accused appeared on 13-7-1952, and immediately produced the money. The prosecution case thus' is of temporary embezzlement from 24-5-1952, to 13-7-1952.

3. The accused also put forward his defence on the 13th July, to which he has stuck throughout. His case was that there were two compartments in the safe. In one compartment, which is under single lock, small cash is kept. In the other compartment, which is under double lock, deposits of Panchayats above Rs. 500/- are kept. The key of this second or inner compartment is kept with the Panchayat Officer. Thus no money can be taken out of this second or inner compartment unless the cashier opens the safe, and the Panchayat Officer opens the inner compartment. The accused further said that orders had been received from Jaipur

to send the amount relating to deposits there.

Consequently, Sundernath, Panchayat Officer, took out the money from the inner compartment for purchase of a bank draft to be sent to Jaipur and gave it to him to take necessary steps. Sun-dernath's father was ill that day, and he went away from the office at 11 A. M. leaving instructions to the applicant to write out the necessary letters. The applicant went with the letters to the house of Sundernath who then said that he could not counter-sign them and money could, not be sent. Sundernath asked the accused to go back saying that he was coming, and would put the money back in the safe.

The accused went back to the office, and waited till 4 P. M., but Sundernath did not come. It was a Saturday, and the office was to close at 1 P. M. so he went after 4 P. M. to Sundernath's house, and asked him to arrange to put back the money in the safe. Thereupon, Sundernath gave him two keys which used to be kept by him, and told the accused that the responsibility was his. As the accused could not put the money in the safe because the office was closed, and the choukidar would not permit him to touch the safe, he went home and kept the money there. Thereafter, he went away on leave.

Later he applied for extension of leave from time to time. He denied that he Had absconded. The accused also produced the document Ex. Cl which bears the date 24th of May. In that document he complained to the Panchayat Officer that he was overburdened with work, and also incidentally mentioned that the money, which had been taken out, could not be put in the safe, and was at his house. This document bears the endorsement of Sundernath of the same date, namely 24-5-1952. The case of the accused, therefore, is that the money certainly remained in his possession, but there was no dishonest intention whatsoever on his part to misappropriate it.

4. The Magistrate held that the case was proved, and the money had, been dishonestly taken away, and convicted the accused. In appeal, the Sessions Judge, while he was of the view that dishonest intention was established, held that Section 409, Penal Code, was by implication repealed by Section 5 (1) (c), Prevention of Corruption Act, 1947, and relied on -- 'the State v. Gurucharan

Singh', AIR 1952 Punj 89 (A) in this connection. He, therefore, acquitted the accused.

5. This appeal by the State challenges the view taken by the Sessions Judge that Section 409, Penal Code, as applicable to public servants, has been repealed by Section 5(l)(c), Prevention of Corruption Act, 1947. The accused, on the other hand, supports the judgment of the Sessions Judge on this point, and it is further contended on his behalf that even if he could be prosecuted under Section 409, the Sessions Judge was wrong in holding that dishonesty had been proved, and therefore he should be acquitted on that account also.

6. We shall first deal with the question whether Section 409, Penal Code, has been repealed by Section 5 (1) (c), Prevention of Corruption Act, so far as it relates to public servants. This matter was considered at length by the Punjab High Court in 'Gurucharan. Singh's case (A),' and it was held that there was repeal by implication of Section 409 so far it related to public servants, by Section 5 (1) (c), Prevention of Corruption Act, 1947. The learned Judges pointed out that the Prevention of Corruption Act introduced certain major changes so far as the law relating to embezzlement by public servants was concerned, and therefore the intention of the Legislature must have been to repeal Section 409, Penal Code, as applicable to public servants, as the Legislature could not have intended to leave it open to the State to choose whether to prosecute a public servant under Section 409 or under Section 5 (1) (c).

7. This matter came to be considered by other High Courts also. In -- 'Bhup Narain v. State AIR 1952 All 35 (B), a question arose whether a person could be punished under Section 5(2), Prevention of Corruption Act, when he was charged under specific offences under the Penal Code. It was held that this could not be done even though there might be a higher punishment under Section 5(2), Prevention of Corruption Act. The exact point before us did not arise in that case; but Section 409 has also been mentioned in that judgment, and one may infer that the Judges were of the view that a person could be prosecuted under Section 409, and that it had not been repealed by Section 5(l)(c).

8. In -- 'V. V: Safcyenarayanamurthy', AIR 1953 Mad 137 CO, a learned Judge of the Madras High Court dissented from the view taken in -- 'Cur-charan Singh's case (A)', though it must be said that the reasons given in -- 'Gurcnaran Singh's case (A) were not examined.

9. In -- 'Madho Prasad v. State1, AIR 1953 Madh-B. 139 (D), a learned Judge of the Madhya Bharat High Court dissented from -- 'Gurcnaran Singh's case (A) and relied on Section 26, General Clauses Act, and the amendment to Section 5, Prevention of Corruption Act, which was made in August, 1952.

10. In -- 'Mohamed Ali v. The State', AIR 1953 Cal 681 ((E)), a Bench of the Calcutta High Court held that Section 5(1) (c) did not repeal Section 409, Penal Code, as it related to public servants and relied on the amendment made in August, 1952, of Section 5, Prevention of Corruption Act. One of the learned Judges had earlier decided to the contrary following the Punjab view, but he pointed out in this case that after the amendment there was no scope for any doubt that Section 5(l)(c) never repealed Section 409, Penal Code.

11. In a later case -- 'Puran Mal v. The state', AIR 1953 Punj 249 (P) the Punjab High Court adhered to the view it had taken in -- 'Gurcharan Singh's case (A)' holding that the amendment of August, 1952, was not retrospective, and that between the period from 1947 to 1952 Section 409 must be deemed to have been repealed.

12. The amendment, which was made in August, 1952, by inserting sub-s, 5(4) was this-

'The provisions of this section shall be in addition to, and not in derogation of, any other law for the time being in force, and nothing contained herein shall exempt any public servant from any proceeding which might, apart from this section, be instituted against him.'

This amendment makes it abundantly clear that Section 409 is not repealed by Section 5(l)(c), at any rate, since the amendment came into force. The only question, that remains then, is whether for the period between 1947 when the

Prevention of Corruption Act was passed, and August, 1952, when the amendment was made, Section 409, as it related to public servants, can be deemed to have been repealed by implication.

13. It has been held in a number of cases that a special law does not repeal the general criminal law unless the intention is made clear in that law. The Madras High Court held in 1876 -- 'High Court Proceedings', 22-1876, 1 Mad 55 (G) that the ordinary criminal law was not excluded by Regulation 7 of 1817, or Act 20 of 1863. The question there related to criminal breach of trust in respect of certain property belonging to a temple. It was contended that in view of the provisions in certain special laws, the trustee could not be prosecuted for criminal breach of trust except with the consent or on the motion of the committee appointed under the special laws. The High Court held that permission was only required when the procedure prescribed by the special Acts was to be followed, and these special provisions could not be taken out of the special Acts, and applied as a restriction to the ordinary operation of the criminal law.

14. In -- 'Emperor v. Joti Prasad Gupta', AIR 1932 All 18 (H), it was held that there was nothing in the special Act, namely the Salt Act, to exclude tile operation of the usual criminal law as contained in the Penal Code, and it could not be presumed that there was an intention on the part of the legislature to exclude it. Such an intention must appear either from the express words of the text, or by necessary implication.

15. There is no express provision in the Prevention of Corruption Act repealing Section 409, Penal Code as applicable to public servants. Further it seems to us that it is not possible to hold that Section 409, Penal Code is repealed by necessary implication by Section 5(l)(c), of Prevention of Corruption Act, even though there are some differences as pointed out in -- 'Gurcnaran Singh's case (A)', particularly in view of the amendment which was made in August, 1952. The legislature has now made it clear that Section 5(l)(c) is not intended to repeal Section 409 as it relates to public servants.

In the face of this amendment, it is difficult to hold that the legislature intended necessarily in 1947 that Section 409 would be repealed by Section 5('l)(c). We are,

therefore, in agreement with the view taken in -- 'Mahomed Ali's case (E)' that it is not possible now after the amendment to hold that the legislature ever intended by necessary implication to repeal Section 409, Penal Code, even though the words of the amendment are not retrospective in nature. We, therefore, hold that Section 409, Penal Code has not been repealed by Section 5(l)(c), Prevention of Corruption Act, 1947.

16. The next question is whether even if Section 409 is not repealed by Section 5(l)(c), it was open to the State to launch a prosecution under Section 409 for an offence which was exactly covered by Section 5(l)(c) when the latter section required sanction under Section 6, Prevention of Corruption Act. In this connection, our attention has been drawn to -- 'Ram Nath v. Emperor', AIR 1925 All 230 (I), In that case, a person was prosecuted under Section 465, Penal Code, though his offence came specifically under Section 171P of the same Code. The learned Judge held that where there are two provisions, one specific, and the other general --the specific provision ought to be applied in preference to the general one, and pointed out two circumstances in support of this view, namely (1) that the offence under Section 171P had a smaller maximum punishment, and (2) that the prosecution under Section 171P required the sanction of the local Government.

17. This case, in our opinion, does not apply to the facts of the case before us. In that case, the two offences were under the same law, namely the Penal Code, and Section 26, General Clauses Act, 1897 did not apply to the facts of that case. Section 26 is as follows-

'Where an act or omission constitutes an offence under two or more, enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.'

Where, therefore, an act or omission is an offence under two different laws, Section 26 gives option to the prosecutor to prosecute under either of the two laws, with this limitation that no person would be punished twice for the same offence. In the -- 'Allahabad case', mentioned above, the act was not an offence

under two enactments, but under two provisions of the same enactment, and Section 26, General Clauses Act did not apply in the circumstances.

In such a case, the view may be correct that where an act is an offence under two provisions of the same law, and one of them requires sanction while the other does not, and one applies more specifically than the other, the prosecution must be under the more specific one, or under the one requiring sanction. But where, as in this case, the act is an ofience under two different enactments, Section 26 gives option to the prosecutor to prosecute either under one or the other, and it is not open, to our mind, for the court to say that the prosecution must be under that enactment which requires sanction.

18. Section 6, Prevention of Corruption Act, which provides for sanction, mentions Sections 161 and 165, Penal Code, but does not mention Section 409 specifically, which shows that it was not the intention of the legislature to Insist on sanction in cases against public servants under section 409. It is true that sanction was required by this section for offences under Section 5(2), and that included the offence defined in Section 5(l)(c) which is exactly the same as the offence under Section 409. Even so, if the option is in the prosecutor under Section 26, General Clauses Act, to prosecute under either enactment, it is not open to the court to insist that the prosecution must be under that enactment which, requires sanction, and that it will not proceed to try the case under that enactment which does not require sanction.

It may also be pointed out that the position is now made crystal clear by the amendment to Section 5 which we have quoted above. That amendment does not merely say that the provisions of Section 5. shall be in addition to, and not in derogation of, any other law but it goes on further to say that nothing contained herein shall exempt any public servant from any proceeding which might apart from this section, be instituted against him. This, to our mind, clearly means that if it was possible to institute any proceeding against a public servant without sanction for an act, which was an offence under any other law, the fact that the act was made an offence under this section would not exempt the public servant from being prosecuted under that law.

What this amendment has made clear was already, to our mind, implicit in view of Section 26, General Clauses Act. It is, therefore, open to the prosecutor to prosecute a public servant under Section 409, Penal Code, without sanction from the State, and the Court cannot insist that the prosecution must be under Section 5(1) (c), Prevention of Corruption Act with the sanction of the state. The Sessions Judge is, therefore, wrong in acquitting the accused on the ground that Section 409 had been repealed. We are further of opinion that the prosecution cannot fail because sanction had not been obtained.

(Turning to the facts of the case his Lordship,on consideration of the evidence, held that thedishonest intention of the accused in retaining themoney was not satisfactorily proved and consequently dismissed the appeal.)