

**Suman Kumar Vs. State of H.P.**

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**Court :** Himachal Pradesh

**Decided On :** Dec-29-2008

**Reported in :** 2009CriLJ2311

**Judge :** Surinder Singh, J.

**Appellant :** Suman Kumar

**Respondent :** State of H.P.

**Disposition :** Appeal dismissed

**Judgement :**

**Surinder Singh, J.**

1. The appellant has challenged his conviction and sentence passed by the learned Special Judge in the Corruption Case No. 33 of 1995/1996 decided on 20-6-2001.

(A). Prosecution case.

2. Appellant Suman Kumar had been working as Junior Engineer in irrigation and Public Health (IPH) Sub-Division, Kumarsain with effect from 1978 to 1980. He was in-charge of Dhanadhar Section and was looking after the execution of various water supplies schemes under him. He received many store articles in the course of his official duties and made its entry in the material-at-site (MAS) register

Exhibit PW1/K in his own hands. In the month of October, 1980 he was transferred and was succeeded by PW1 Julfi Ram Junior Engineer. The appellant did not hand over the charge of his section to his incumbent, which compelled the Executive Engineer of IPH Division Rampur Bushehar to issue written orders to the appellant to hand over the charge to his successor. Lastly, the appellant handed over the charge to Julfi Ram aforesaid on 20-10-1980 as per the charge lists Exhibit PW1/A to PW1/H and PW1/J prepared on the basis of MAS register Exhibit PW1/K and material handed over on spot. The shortages found therein were duly reflected in the aforesaid documents which were acknowledged by the appellant under his signatures.

3. The measurement books (MBs) Exhibit PW1/L to PW1/O also did not reflect the use of the said material found short in the said water supply schemes which were in the hands of the appellant himself.

4. The appellant was directed to account for the shortages, viz., GI Pipes, Cement Bags, grit, stones sand etc. by a written communication but he failed to do, rather he asked the Department vide his letter to supply him the details of shortages, which otherwise were known to him while handing over the charge and one copy of charge list was with him.

5. The appellant was subordinate to PW12 Ramesh Chander Goel, Executive Engineer. When the appellant failed to account for the shortages, referred the matter to Police for the registration of the case.

6. The Anti-corruption Department of the Police held the preliminary enquiry and seized the record of IPH Sub-Division Kumarsain and IPH Division, Rampur Bushehar. Finding a prima facie case against the appellant, an FIR was registered.

7. The work of IPH Sub-Division, Kumarsain was audited in the year 1983-84. PW3 Shri B.N. Matan was one of the members of the audit party. The shortages were also pointed out by them in their audit report Exhibit PW3/A (32 leafs).

8. Despite written communication again, the appellant failed to count for the shortages or make good the losses.

9. Vide letters Exhibit PW4/B, dated 18-12-1991 and PW4/C, dated 30-9-1992, the then Executive Engineer of IPH Division, Rampur informed the Deputy Superintendent (Vigilance) Anti-corruption Zone, Shimla with respect to the complete details of the case. The final conclusion of the investigation by the Police was that the appellant while working as Junior Engineer in IPH Sub-Division, Kumarsain was incharge of the on-going Water Supply Schemes in Thanedhar Section and in his such capacity, he was entrusted with or was having dominion over various store articles of Thanadhar, Showath, Malana, Sonadhar, Kotgarh and Shanthla Water Supply Schemes. The appellant dishonestly and fraudulently committed the criminal breach of trust in respect of the store articles valuing Rs. 1,09,861.30 paise belonging to the State of Himachal Pradesh found short and he fraudulently misappropriated and converted the aforesaid store articles to his own use and thereby committed an offence punishable under Section 409 of the Indian Penal Code read with Section 13(1)(c) of the Prevention of Corruption Act. 1988 punishable under Section 13(21) of the Prevention of Corruption Act. Thus the challan was presented in the Court for the trial of the appellant.

10. Finding a prima facie case against the appellant, he was charge-sheeted by the learned Special Judge for the offences aforesaid. He pleaded not guilty and claimed trial.

11. To prove its case, the prosecution examined its witnesses and the appellant was also examined under Section 313 of the Code of Criminal Procedure with respect to the circumstances which were found attendant upon him. He also led the evidence in defence.

(B) Facts admitted by the appellant.

i) During the period with effect from 1978 to October, 1980 the appellant remained posted as Junior Engineer in IPH Sub-Division, Kumarsain in Thanedhar Section : In the month of June, 1979 he was on earned leave, in his absence charge was handed over to PW10 Dharam Singh, J.E.

ii) The construction of Water Supply Schemes in Bhuti, Jadun, Dakhnudhar, Narkanda, Thanedhar, Matiana, Shwat Bhanona, Kandri Dhar, Sona Dhar, Bhali, Shantla and Kanda were under his control and supervision.

iii) The procedure adopted while taking the charge of store articles was that every Junior Engineer while taking over the charge of store articles taken in charge, used to enter the store articles taken in charge in the MAS register which was shown as the opening balance and was usually prepared on the basis of the charge list at the time of handing/taking over the charge.

iv) While taking over the charge on his first posting in the said Sub-Division, the appellant had shown the opening balance in the MAS register Exhibit PW1/A in his own hands which was received by him from his predecessor;

v) Dharam Singh (PW10) aforesaid during the leave period of the appellant in the month of June, 1979, looked after the work of three Schemes of Thanadhar Section, namely Sonadhar, Shawat Bhanana and Kanda Dhar and got the work executed as shown in his charge-list Exhibit PW10/A. The material which was taken over by the appellant under his signatures on joining the duties after availing the leave, was reflected therein and was also entered in the material-at-site (MAS) register.

vi) In the month of October, 1980, he was transferred and was succeeded by PW1 Julfi Ram Junior Engineer.

vii) The appellant admitted his specimen signatures and handwriting Exhibit PW11/P1 to PW11/P4 taken before PW14 Executive Engineer Virender Jit Singh and also admitted his signatures on the MAS register and on the charge-lists referred above.

viii) The appellant did not deny the shortages found at the time of handing over the charge to PW1 Julfi Ram, Junior Engineer.

(C) Defence raised by the appellant.

12. The appellant had raised the defence that in his absence, the store articles were handled by different persons and that PW10 Dharam Singh had utilized the material when he was incharge during his leave but it was not reflected by PW10 in the measurement books but no such suggestion was put to him in his cross-examination. He also stated that at the time of handing over the charge on his transfer, the charge lists were prepared by the Junior Engineer Julfi Ram (PW1) hurriedly which were signed by him.

13. Further his case was that the Executive Engineer, IPH Division No. 11 vide his letter Exhibit DW1/B, dated 1-1-1982 addressed to Executive Engineer, Master Plan Division, H.P.P.W.D., Shimla-9, he referred to the value of shortages worth Rs. 23045.13 paise. Since he was working under him, therefore, the appellant was directed to hand over the complete charge to his successor under intimation to the Assistant Engineer, IPH Sub-Division, Kumarsain, so that his LPC could be sent to his Division. Pursuant to that, vide letter, Exhibit DW1/A, dated 18-8-1992, Executive Engineer IPH Division No. 11 had informed the appellant to re-concile the shortages worth Rs. 23045.13 paise as noticed by the Assistant Engineer, IPH Sub-Division Kumarsain besides the shortages of stores of MAS works which was handed over by him to Julfi Ram Junior Engineer. The Assistant Engineer by making a reference to the above letter of the Executive Engineer vide letter Ext. DW2/A, dated 16-11-82 requested to make good the shortages of the same value. In response to it, vide letter Exhibit DW2/B, dated 18-10-1982, the appellant informed the Assistant Engineer to supply him scheme-wise full details of material found short. A letter Exhibit DW1/C, dated 31-12-1982 was again issued by the Executive Engineer IPH Division No. 11 to the appellant inviting his personal attention to the letter Exhibit DW1/A copy of which was also endorsed to him informing him that despite repeated reminders, he failed to reconcile the shortages worth Rs. 23,045.13 paise.

14. By referring to the above documentary evidence led in defence, the appellant had tried to canvass that initially when there was a shortage of store material worth Rs. 23,045.13 paise, then how it was raised to Rs. 1,09,861.30 paise. Secondly, despite his requests the details of shortages were not supplied to him.

15. Further by referring to the cross-examination of PW1 Julfi Ram, the appellant had tried to show that the area where these water supply schemes were going on, was spread over an area of about 30/35 kms. thus it was not possible for him to guard the material on site in absence of store and Chowkidar. Therefore the shortages pointed out do not constitute the offence charged.

(D) Findings of learned Special Judge.

16. Learned trial Court at the end of the trial, after examining the evidence of the prosecution and the defence pleas raised in the light of the explanation given by the appellant, held the appellant guilty of the offences charged, while convicting the appellant, sentenced him to under-go rigorous imprisonment for one year and to pay a fine of rupees 2000/- under Section 409, I.P.C. and rigorous imprisonment for one-year and fine of rupees 2000/-under Section 13(2) of the Prevention of Corruption Act and in default of payment of fine, to undergo further simple imprisonment for six months on each count.

(E) Contention in appeal.

17. The appellant has assailed in this appeal his conviction and sentence precisely on the grounds firstly, that the appellant was not provided any room or godown to keep the store articles at Thanadhar. The pipes and iron rods (Saria) etc. were lying open and un-guarded at all times which could be removed easily by any one. Secondly, the stores were lying at different sites where the nine schemes were being executed in an area of about 35 kms and the physical supervision of any kind was not possible and the removal of the store items by any person could not be ruled out. Thirdly, that the shortages which were reflected in the charge-list, were due to the loss sustained on account of non-effective and non-availability of store as aforesaid. Thus, it was a simple case of bona fide genuine shortages having taken place for the reasons stated above. Fourthly, the value of the shortages was inflated from 23045.13 paise to 1,09,861.30 paise deliberately without any reasonable cause and the audit report was not a genuine document. Fifthly, the report of the hand writing expert could not have been acted upon to convict the appellant. Sixthly, that the sanction for prosecution was not valid and Seventhly, the simple shortages were given the colour of a criminal offence

incorrectly.

(F) Submissions before this Court by the counsel for parties.

18. Shri M.S. Chandel, Advocate learned Counsel for the appellant while taking me through the evidence on record in its meticulous details and ventilated that the shortages which were initially shown to be of rupees 23,045.13 paise were highly inflated after 2/3 years in order to make the case more graver against the appellant for no fault on his part. The nature of the items and the area to be guarded was so huge that it Was not humanly possible to take care of each and every item in absence of any Chowkidar or godown or the store provided to the appellant, thus effective check was not possible. If there has been some pilferage, for that the appellant could not have been held guilty. To buffress his arguments, he cited AIR 1981 SC 1446.

19. Contra, Shri J.S. Guleria, Law Officer while supporting the judgment of conviction and sentence passed by the learned trial Court argued that there is no error of judgment while holding the appellant guilty for the offence charged. According to him, ingredients of the offence charged stands proved in accordance with law and the appellant failed to account for the articles entrusted to him or the items regarding which he had dominion over it, despite repeated requests and even during the trial of the case, no cogent explanation came forward. Rather, he admitted the case of the prosecution in so many words, even he knew about the shortages as having been pointed out in the charge-lists and MAS register duly acknowledged by him in full senses under his control. The initial burden which was on the prosecution of entrustment of the property to the appellant stood discharged and is also admitted by the appellant. Therefore, the actual manner of mis-appropriation of the said property by him is not required to be further proved. To support the arguments, he relied upon the judgment of the Supreme Court reported in : 2006 CriLJ2917 .

20. I have given my thoughtful consideration to the rival contentions of the parties and have carefully re-appraised the evidence on record.

(G) Findings by this Court.

21. PW1 Julfi Ram has testified that all the material except sand, grit and stones are kept in the store premises and some article such as Saria and pipes were stored in the open which was duly fenced and the entries were regulated through the gate. He further stated that the charge lists were sent to the office of the Assistant Engineer without any loss of time. He also stated that these lists were prepared on the basis of the relevant record maintained by the appellant after checking the material lying in the store and the sites at the time of taking over the charge. He further stated that as and when material is issued, it is entered in the site book and the site consumption register. Entries are reconciled in the MAS register and the MB at the end of the month. Public Health Department, each Junior Engineer incharge of the Section has to maintain his MAS register separately and the entries of the successor are incorporated on the basis of last entry of MAS register.

22. In the year 1983-84, PW3 B. N. Matan was working as Auditor in Accountant General's Office at Shimla. He along with Shri B.K. Chawla and thereafter with M. L. Gupta Audit Office had conducted the audit and he proved the audit report Exhibit PW3/A and the relevant para concerning this case is at paras 16 and 17 of the said report.

23. PW4 Shri P.L. Thakur was the Divisional Accountant in IPH Division, Rampur during the year 1990 till July, 1992. He was associated in the investigation of this case and he was a witness with respect to handing over of the documents mentioned in Exhibit PW4/A and he identified the signatures of Shri J. C. Gupta, Executive Engineer on letters PW4/B and PW4/C. PW5 Shri Jai Parkash Senior Assistant has proved the signatures of Shri S.C. Kapoor on letter Exhibit PW5/A. The casual leave applications Exhibits PW6/A to PW6/D of appellant Suman Kumar were handed over by PW6 vide memo Exhibit PW6/A. PW8 Shri P.S. Mehta, Senior Clerk handed over the documents Exhibit PW8/B and H to the police vide memo Exhibit PW8/A. PW9 Shri Mast Ram was the Assistant Engineer in IPH Kumarsain Division with effect from December, 1981 to 1984. According to him, appellant had been working as Junior Engineer in Thanedhar Section prior to his posting at Kumarsain Division. In the year 1982, periodical audit of Kumarsain Division of IPH was sought to be conducted by a team of auditors from A. G.

Office regarding which an intimation was received by him in advance. He sent for the books of accounts of all the sections operating under him including the total lists of handing over and taking over of the appellant and his successors. On perusal of such reports, he found large scale shortages in the store which had been under the control of the accused person Suman Kumar.

24. Exhibit PW1/K is the material of site register maintained by the appellant. On Exhibit PW11/A, PW1 Julfi Ram his successor and the appellant himself have signed these entries. Exhibit PW11/A and PW11/B reflects the shortages with respect to the construction work of water supply schemes of Bhuti, Exhibit PW11/C, Exhibit PW11/D of Narkanda, Exhibit PW11/E of Water Supply Scheme Matiana, PW11/G and PW11/H of Thanedhar, PW11/J of Shwaf Bharana, PW11/K of Sona Dhar, PW11/L of Kotgarh, PW11/M of Shantla and PW11/N reflects the construction work of Water Supply Scheme of Kanda.

25. Thus, the shortages of the material which are noticed above have not been reflected in the measurement books showing the material having been consumed. The compilation of the shortages found in the MAS register and on physical verification, have been shown in the list Exhibit PW9/A1 to PW9/A5 which have been signed by PW9 Mast Ram the then Assistant Engineer of IPH Sub-Division Kumarsain and also Pw Julfi Ram.

26. The charge lists Exhibit PW1/A pertaining to Kanda Exhibit PW1/B Shawat Bhanana Water Supply Scheme. PW1/C relating to Thanedhar, PW1/D of Shantla Water Supply Schemes and PW1/H and PW1/J coupled with the entries in the MAS register Exhibit PW1/K have shown that the shortages which have been endorsed and admitted by the appellant and has not been accounted for by him. The audit conducted in the year 1983 by a team of auditors has also highlighted these shortages. Despite repeated letters, the appellant failed to explain the shortages and count for that, His only defence is that the shortage could be due to the pilferage as no godown or store was provided to him but there is nothing on the record to show that he at any point of time had informed or communicated with his superior to provide him the stores or the Chowkidar. Apart from this, small items like sockets, band, elbow etc., there has been a shortage of cement bags

which were not required to be kept by the Junior Engineer in the open place as it gets deteriorated and further the G.I. pipes which were in good number could not have been kept unguarded and un-attended. As per the practice, the departmental labour is always put to guard by the Junior Engineer. Otherwise also, when the store articles are entrusted to him, he was under obligation to take proper care of these valuable items which he failed to do.

27. However, to prove an offence under Section 409 of the Penal Code, the prosecution is obliged to prove:

- (i) The accused must be a public servant;
- (ii) He must have been entrusted, in such capacity, with property;
- (iii) He must have committed the breach of trust.

28. It is an admitted fact that and also proved on record that the appellant remained posted as Junior Engineer in IPH Sub-Division, Kumarsain in Thanedhar Section with effect from 1978 to October, 1980 and he was in charge of on-going water supply schemes stated above which were under his care, control and supervision. He was transferred from that Sub-Division to another and PW1 Julfi Ram J.E. succeeded him, he took over the charge from him and prepared the list Exhibits PW1/A to PW1/H and PW1/J on the basis of MAS register Exhibit PW1/A. The existing possession with regard to the material on site reflected in the MAS register aforesaid by the appellant showing the opening balance and also the balance of the items at the time of taking the charge. The charge-lists and each page of the MAS register showing balance against each item was also signed by the appellant at the end, knowing fully well its consequences, while handing over the charge, which fact has not been denied by the appellant. According to Julfi Ram (PW1) the charge was handed over by the appellant on 20-10-1980 after having been repeatedly directed by the Assistant Engineer. The material found short was not found to have been utilized by the appellant in any of the water supply schemes. Measurement Books (MB's) further corroborates this fact. PW1 has stated that the works under-taken and executed by the Junior Engineer are entered in the MBs and thereafter entries are checked and verified by the

Assistant Engineer after physical verification on the spot. Further, PW10 Dharam Singh has also proved charge-list Exhibit PW10/A whereby he had handed over the material to the appellant. The authorship of the signatures thereon has been proved to be that of the appellant by PW11 Shri B.A. Vaid Handwriting expert. As noticed above, which is supported by detailed reasons. His testimony has not been assailed in cross-examination. Therefore, by admitting the signatures on the charge-lists and MAS register and in view of the unchallenged testimony of the handwriting expert, it stands proved that all the documents aforesaid, over which appellant had signed while handing over the charge are correct. This fact has also been corroborated by PW12 Ramesh Chand XEN under whom the appellant had worked as J.E.

29. The appellant has nowhere disputed the entrustment of any of the articles found short as indicated in the above referred documents. Thus the acquisition of dominion or control over the property, as a public servant stands proved. Therefore, the ingredient of entrustment stands established by the prosecution.

30. Legally, it does not lie on the prosecution to prove the actual mode of misappropriation. The prosecution is only required to prove entrustment of goods for specific purpose to a public servant and it becomes the bounden duty of the accused to discharge that trust in the manner undertaken by him or at least deal with that property in a honest manner. His failure to do so, proves the offence against him.

31. It is worth-while to mention here that from the evidence on record, it also stands proved that as per practice, three copies of the charge lists are prepared. One copy is retained by the person taking over the charge and another is submitted to the supervisor, in the instant case Assistant Engineer and the third copy is retained by the person handing over the charge. Appellant knew fully well about the shortages himself then it does not lie in his mouth to ask for the detailed particulars of the scheme-wise shortages sought to be recovered from him. Further, during the period of his earned leave, in the month of June, 1979, the charge was handed over by him to Dharam Singh (PW10) Junior Engineer, Kumarsain. He got extracted the stores and grit for the water supply schemes and

its stock was handed over to the appellant by him on 10-7-1979 as per the list Exhibit PW10/A on his joining after availing the leave. Even that balance was not counted for by the appellant.

32. It was not a case that due to some intervening situation, the appellant was incapacitated from carrying out the required job. It is immaterial whether the shortages was of rupees 23045.13 paise or 1,09,861.30 paise. Shortage remains the shortage. It may be of any value. In the year 1980, the amount of rupees 23045/- was not a less amount. Even otherwise the letter Exhibit DW1/A makes it clear that the shortage was of rupees 23045.13 paise besides the shortage of store of MAS work which was not handed over by the appellant to Julfi Ram in spite of various directions from his office.

33. It is well settled that it is not necessary or possible in every case to prove in what precise manner, the accused person has dealt with or appropriated the goods. In such a case, the element of criminal offence of mis-appropriation stands established if the prosecution proves that the accused received the goods, he was bound to count for the same and had not done so, it is not the law that the prosecution has to eliminate all possible chances or circumstances which may exonerate him. If the facts are within the knowledge of the accused then he was to prove them. Of course, the prosecution has to establish a prima facie case in the first instance. It is enough from the established facts which give rise to the suspicion and then by reason of Section 106 of the Evidence Act, the onus is thrown on the accused to prove his innocence.

34. In State of H.P. v. Karamvir : 2006 CriLJ2917 the Apex Court has held that the initial burden is on the prosecution to prove the entrustment of the property to the accused and the actual manner of mis-appropriation of the property by the accused is not to be proved by it. Once the initial burden is discharged by the prosecution, the onus would lie on the accused to prove how the property entrusted to him was dealt with by him.

35. Therefore, in the circumstances, once the charge against the accused was made out and the appellant had failed to count for it, the appellant cannot take the shelter of the judgment of the Supreme Court in Janeshwar Dass Aggarwal v.

State of U.P. : AIR 1981 SC1646 which is of no help to the appellant as it has different facts wherein there was no evidence at all to show that any such entrustment was made. There were also no document in the nature of list or charge which had shown that the physical charge of the article after being regularly counted in the godown was made over to the appellant and further the godown was also in the physical charge of the chowkidars and if there was any shortage and it was held that it was not the appellant. Overseer who would be liable but in the instant case, the factum of entrustment, stands proved and admitted by the appellant and he has failed to explain and show that it was used for the purpose for which it was received by him.

36. Insofar as sanction for prosecution is concerned, it has not been disputed during the arguments by the learned Counsel for the appellant. Otherwise also, I do not find any ambiguity or illegality therein and it stands proved on the record as per the evidence of the prosecution.

37. Therefore, the sum and substance of the foregoing discussion is that the appellant has criminally mis-conducted and the prosecution has been able to prove the charges against the appellant in accordance with law and I do not find any error in the judgment recorded by learned trial Court. Accordingly the appeal is dismissed.