

Janak Raj Vs. State

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Court : Jammu and Kashmir

Decided On : Nov-05-2004

Reported in : 2005(1)JKJ245

Judge : S.K. Gupta, J.

Acts : Jammu and Kashmir Prevention of Corruption Act, 2006(BK) - Section 5(1) and 5(2); ;Ranbir Penal Code (IPC) - Sections 109, 120B and 409; ;Indian Penal Code (IPC) - Sections 24, 403, 405, 408 and 409; ;Code of Criminal Procedure (CrPC) - Section 342

Appeal No. : Criminal Appeal No. 8/1997

Appellant : Janak Raj

Respondent : State

Advocate for Def. : B.S. Salathia, Sr. AAG

Advocate for Pet/Ap. : B.S. Bali and; Subhash Mukhnotra, Advs.

Disposition : Appeal allowed

Judgement :

S.K. Gupta, J.

1. This appeal arises out of the judgment and order dated 21-05-1997 propounded by Special Judge, Anti-Corruption, Jammu, whereby accused, Janak Raj, only has been convicted and sentenced to undergo six years rigorous imprisonment and a fine of Rs. 25,000/-, in proof of offence under Section 5(1)(c) read with Section 5(2) of the Jammu and Kashmir Prevention of Corruption Act, 2006 (BK) and in case of non-payment of fine, to further undergo rigorous imprisonment for a period of one year; further sentenced Janak Raj to suffer ten years' rigorous imprisonment and a fine of Rs. 25,000/- for commission of offence under Section 409 RPC and in case of non-payment of fine, to further undergo rigorous imprisonment of two years; and also for hatching a conspiracy with deceased Bishan Dass, Driver of the truck, to undergo rigorous imprisonment for a period of five years and a fine of Rs. 5,000/- and in case of default of the payment of fine, to further suffer one year's rigorous imprisonment, and all the sentences to run concurrently.

2. The prosecution case, as unfolded during trial, depicted in narration, is that accused, Janak Raj, who happened to be Storekeeper, was detailed by the Executive Engineer, Irrigation Division, Dharmari, Mahore, to receive 200 bags of cement, vide indent issued in this behalf, from the Central Procurement Stores, Jammu. The cement was required to be transported to Mahore, to be utilized in the construction work in the said Division. The cement was loaded in a truck belonging to Agro Industries Development Corporation with Bishan Dass as its Driver and Thoru Ram as its Cleaner. The cement, which was received by Janak Raj, Storekeeper, from the Central Procurement Stores, Jammu, did not reach the destination and had been sold in black-marketing to accused, Anil Saraf, in consideration of Rs. 10,000/-. The said cement came to be stored in the Brick Kiln of Prabh Dayal at Nagbani. It was further alleged that out of the sale consideration, Rs. 6,000/- were received by accused, Janak Raj. However, on the receipt of information with regard to sale transaction of the cement belonging to the Government, by the Vigilance Organisation, an FIR was registered and investigation ensued. The truck bearing registration No. 3177-JKN, in which the cement was loaded from Central Procurement Stores, Jammu, did not reach the destination at Mahore and was seized empty from the compound of the Central Procurement Stores Jammu. Accused, Janak Raj, was arrested and an amount of

Rs. 6,000/- was seized from his possession. The person, to whom the cement was sold, was also identified and the sold cement was recovered from the Brick Kiln of Prabh Dayal in a raid conducted by Vigilance Organisation. The other accused also came to be arrested. The sold cement was recovered on the disclosure statement made by Anil Saraf, accused, and at his instance. On the conclusion of investigation, challan was presented against the accused, Janak Raj, Bishan Dass and Thoru Ram, to stand their trial for the commission of offence under Section 5(2) of the Prevention of Corruption Act, 2006 (BK) read with Sections 120B and 409 RPC, and as against Anil Saraf and Prabh Dayal for offences under Sections 409, 109, 120B RPC. After framing the charge and adducing evidence produced by the prosecution and hearing the arguments, the Special Judge, Anti-Corruption, found Janak Raj, accused, to have committed offences under Section 5(1)(c) read with Section 5(2) of the J&K; P.C. Act and Section 409 RPC and convicted and sentenced him accordingly; whereas Anil Saraf, Prabh Dayal and Thoru Ram stood acquitted for want of any evidence against them to connect them in the commission of offence vide order dated 21-05-1997, impugned in the appeal; and whereas Bishan Dass, accused, died during the currency of the trial and challan against him stood abated.

3. I have heard the learned counsel for the respective parties in extenso. A minute examination of facts on record file has also been made.

4. Mr. B.S. Bali, learned counsel appearing for the appellant, at the threshold, submitted that the Trial Court has not appreciated the evidence in its proper perspective. His further submission is that there is no evidence let in by the prosecution to prove the sale of the cement by accused, Janak Raj, and dishonestly misappropriated the sale proceeds, so as to hold him guilty of the commission of offences with which he stands charged. Mr. Bali further submitted that there is not an iota of evidence to prove that accused Janak Raj was in criminal conspiracy with Bishan Dass, truck driver, who is stated to have sold the cement in stead of taking it to the destination at Mahore. There is neither direct nor circumstantial evidence to prove Janak Raj, accused, to be a member of conspiracy with Bishan Dass in the sale of cement in black-marketing, instead of taking it to Mahore, to be utilized in construction in the Irrigation Division, and

dishonestly misappropriated the sale proceeds. Mr. B.S. Salathia, Senior Additional Advocate General, on the other hand, submitted that the prosecution has succeeded in proving the guilt of the accused beyond any shadow of doubt by convincing and reliable evidence. The accused has been convicted and sentenced after proper appreciation of evidence and the order impugned in appeal does not suffer from any factual or legal infirmity.

5. It is not in dispute that Janak Raj, accused-appellant, was the Storekeeper at the relevant point of time in irrigation Division, Dharmari. It is also not in dispute that the truck was hired from Agro Industries Development Corporation to transport the cement after its procurement from Central Procurement Stores, Jammu, to Irrigation Division, Dharmari. Accused, Bishan Dass, was the Driver of the truck and Thoru Ram its Cleaner at that time. It is also proved from the evidence that 200 bags of cement were received through indent issued by the Executive Engineer, Irrigation Division, Dharmari, by Janak Raj, accused, from the Central Procurement Stores, Jammu. The cement was also admitted to have been loaded in the truck, of which Bishan Dass, accused, was the Driver and Thoru Ram, Cleaner. In order to prove entrustment of the cement to Janak Raj, accused, the prosecution has relied upon the testimony of Hoshiyar Singh Bali, Executive Engineer, in regard to the indent issued under his signatures for obtaining 200 bags of cement from Deputy Director, Central Procurement Stores, Jammu, for Irrigation Division, Dharmari, PW R.P. Abrol, Deputy Director, who affirmed that 200 bags of cement were issued vide order, EXPW-RP, under his signatures, and PW Suresh Chander, with regard to the loading of 200 bags of cement in Vehicle No. 3177-JKN, received by Janak Raj, accused, and entry in this respect was signed by Janak Raj, accused, marked as EXPW-SC/2. From their evidence, it is proved conclusively that against indent, issued by Hoshiyar Singh Bali, Executive Engineer, Irrigation Division, Dharmari, 200 bags of cement were received by Janak Raj and loaded in truck No. 3177-JKN belonging to Agro Industries Development Corporation to be carried to Dharmari Store, as per indent and authorization given thereunder. So, the entrustment of the cement to Janak Raj, accused, is proved by overwhelming evidence adduced by the prosecution.

6. Further case of the prosecution is that the cement procured and entrusted to the accused, Janak Raj, Storekeeper, for being carried to its destination to Dharmari, was sold to Anil Saraf, accused, for Rs. 10,000/- and the latter stored it in the Brick Kiln of Prabh Dayal at Nagbani, wherefrom it was recovered and seized vide EXPW-CS, by Investigating Agency on the disclosure statement of accused, Anil Saraf, at his instance. PW Kartar Singh, Investigating Officer, stated that the investigation of the case was entrusted to him on 05-03-1989 by Superintendent of Police, Vigilance Organization. After having inspected the Central Procurement Stores and seizure of the empty truck No. 3177-JKN vide EXPW-SK, he proceeded in search of accused, Janak Raj, Bishan Dass, Driver, and Thoru Ram, Cleaner. He found accused, Janak Raj, Storekeeper at Bikram Chowk and arrested him, and from his personal search recovered Rs. 6,000/- and seized vide EXPW-SK/I. According to the Investigating Officer, he learnt about the involvement of the accused Prabh Dayal and Anil Saraf on the recovery of the cement. The Trial Court, however, after recording the evidence, pertaining to the recovery and seizure of the cement, produced by the prosecution, reached a conclusion that the prosecution has failed to prove the recovery of the cement from the Brick Kiln of Prabh Dayal and whittled down the disclosure statement made by Anil Saraf, leading to recovery at his instance having not been duly proved and, thus, cannot be accepted and consequently recorded their acquittal along with Thoru Ram, Cleaner. Whereas the finding of the Trial Court with regard to accused Prabh Dayal, Anil Saraf, accused, pertaining to recovery and seizure of cement reads as under:

'However, the prosecution has failed to prove the recovery of the cement from the brick kiln of Prabhdyal at the instance of accused Anil Saraf satisfactorily and cogently. The prosecution has also not been able to prove even the fact that accused Prabh Dayal is the owner of Jai Ganesh Brick Kiln nor any role played by him in the entire transaction has been disclosed in the evidence of the prosecution.'

7. So far as the case of prosecution against accused; Janak Raj, is concerned, it is stated that he has sold the cement in conspiracy, with Bishan Dass, truck Driver, in consideration of Rs. 10,000/- instead of transporting it to its place of destination

at Dharmari. Accused, Janak Raj, has not disputed the entrustment of the cement to him in his statement under Section 342 Cr.P.C. It is, however, stated that after having received 200 bags of cement from Central Procurement Stores, Jammu, it was loaded in truck and handed over to the Driver, Bishan Dass, with the direction to carry the cement to Dharmari. Janak Raj, accused, however, did not accompany the truck carrying the load of 200 bags of cement meant for Dharmari and stayed back, as he had to do some other work at Jammu. The Trial Court found that since Bishan Dass, accused, instead of carrying the cement to Dharmari, had sold it in black-marketing and the accused Janak Raj having not lodged any complaint or report against Driver, Bishan Dass, for making embezzlement of the cement, is itself a sufficient evidence to prove criminal conspiracy to do an illegal act, between Bishan Dass, truck Driver, and accused, Janak Raj. The Trial Court further observed that terms of entrustment of the duty on Janak Raj, Storekeeper, would be discharged only when after receiving consignment of cement, it gets deposited in Dharmari Store. The accused having not carried out the terms of entrustment and, in violation of his duty handed over the cement to Bishan Dass, Driver, cannot escape his liability of having conspired with Bishan Dass to embezzle the cement unless renders a valid and cogent explanation to discharge the duty. It was further observed by the Trial Court that the law does not exclude the culpability of a person who allows some one else to misappropriate such property.

8. In order to prove conspiracy, the essential ingredients are that there should be an agreement between the persons who are alleged to conspire and such agreement should be for doing of an illegal act or for doing by illegal means an act which by itself may not be illegal. Therefore, the essence of criminal conspiracy is an agreement to do an illegal act and such agreement can be proved either by direct evidence or by circumstantial evidence or by both or any of them and a matter of common experience that direct evidence to prove conspiracy is rarely available. Therefore, the circumstances proved before, during and after the occurrence have to be considered to decide about the complicity of the accused. But if those circumstances are compatible also with the innocence of the accused, then it cannot be held that the prosecution has successfully established its case. Even if, some acts are proved to have been committed it must be clear that they

were so committed in pursuance of an agreement made between the accused who were parties to the alleged conspiracy. Inferences from such proved circumstances regarding the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation. It may further be pointed out that offence to conspire cannot be deemed to have been established on mere suspicion and surmises or inferences, which are not supported by cogent evidence. The prosecution, even if relies on circumstantial evidence, a clear link has to be established and the chain of nexus has to be completed, otherwise it would indeed be hazardous to accept a part of the link as a complete one and on the basis of such incomplete evidence, the allegation for commission of offence cannot be accepted. Before conviction based solely on circumstantial evidence or inferences drawn from circumstances can be sustained, it must be such as to be conclusive of the guilt of the accused and must be incapable of explanation of any hypothesis consistent with the innocence of the accused. A guilt of an accused has to be established beyond all reasonable doubt.

9. In the present case, there is no doubt that accused, Janak Raj, received 200 bags of cement and loaded in the truck. Entrustment is established. The only question is whether there is any evidence that he had entered into a criminal conspiracy with Bishan Dass accused for the sale of cement in black-marketing, and that Janak Raj has misappropriated such money received out of the consideration of sale. Assuming that Bishan Dass was not authorized to hand over the cement for carrying it to Dharmari and there was a breach of terms of entrustment, would it lead to draw inference from such proved circumstances that there was an alleged criminal conspiracy between the parties to do an illegal act.

10. It is significant to point out that even if, some acts are proved to have been committed, but before any inference is drawn from such circumstances, it must be clear that they were so committed in pursuance of an agreement made between the accused who are parties to alleged conspiracy. It may further be indicated that inferences from such circumstances with regard to the guilt may be drawn only when such circumstances are incapable of any other reasonable explanation. Admittedly, there is no direct or circumstantial evidence from which the inference with regard to a criminal conspiracy between Janak Raj and Bishan Dass, Driver

could be proved except that accused Janak Raj has authorised, in violation of the terms of entrustment, to Bishan Dass to carry the load of cement to Dharmari, which, in fact, did not reach there and was sold in black-marketing by illegal transaction, more particularly, when the persons involved in such illegal transaction have already stood acquitted, as there being no positive evidence to prove the factum of recovery of cement on the disclosure statement of one of the accused. The offence of conspiracy cannot be deemed to have been established on mere suspicion and surmise or inferences, which are not supported by positive and reliable evidence. Accused Janak Raj may, at the most, in such circumstances, be liable for disciplinary action, but cannot be said to have entered into a criminal conspiracy with Bishan Dass for illegal sale of cement, particularly, when there is no evidence or circumstance showing that he has misappropriated the sale proceeds of the cement, except the recovery of Rs. 6,000/- from his possession and for which he has rendered reasonable and plausible explanation to have been given by the Executive Engineer, J.L. Koul. According to accused, Janak Raj, the amount of Rs. 6,000/- recovered from him, is entrusted to him by the Department and in support of his explanation, he has produced and examined J.L. Koul, Executive Engineer. Defence witness, J.L. Koul, has, in unambiguous terms, proved his certificate, EXDW-JL, in stating that Rs. 10,000/- had been paid to accused, Janak Raj. The Trial Court also accepted the explanation of the accused in its judgment with regard to Rs. 6,000/- having been recovered from his possession through personal search. To this effect are the following observations of the Trial Court in its judgment:

'The prosecution says that six thousand rupees recovered from the accused were sale proceeds of the cement but there is no evidence available to prove this fact against the accused. Therefore, there is nothing to doubt the version of the accused.'

11. In order to complete the commission of offence and hold the accused, Janak Raj, guilty of criminal breach of trust by misappropriating (embezzlement) of the money, it was incumbent upon the prosecution to prove criminal conspiracy with accused Bishan Dass and dishonest misappropriation of money by accused Janak Raj.

12. The case of the prosecution with regard to entrustment of 200 bags of cement is also admitted by the accused. The only question required to be proved by a sufficient and cogent evidence is, was there a criminal conspiracy and misappropriation of money by accused Janak Raj? There is not an iota of evidence adduced by the prosecution to prove that there was an agreement to do an illegal act between Janak Raj accused and Bishan Dass, nor there is any evidence, circumstantial or direct, to prove that the sale proceeds of the cement sold in black-marketing were received or shared by accused Janak Raj.

13. Another evidence relied upon by the prosecution is recovery of Rs. 6,000/- from the personal search of the accused, when arrested immediately after the occurrence. The accused had given explanation for having in his possession Rs. 6,000/-, being the Government money, given to him by Executive Engineer, J.L. Koul. This fact stood affirmed from the certificate, issued by J.L. Koul, and proved in his evidence, examined in his defence. This circumstance, therefore, totally negated the prosecution case with regard to the criminal conspiracy between Janak Raj accused and Bishan Dass in the sale of the cement, instead of taking it to the place of its destination, and further misappropriation of the money by Janak Raj, accused. At the most, it could be said to be a negligence on the part of Janak Raj accused for having not carried out the terms of entrustment in carrying the cement to the place of its destination and having handed over the cement to Bishan Dass to do the job, in violation of the terms of the entrustment, but could not provide a sufficient inference from such circumstance even with regard to the criminal conspiracy or with regard to misappropriation of money by any stretch of reasoning. An identical situation came up for consideration before the Apex Court in case entitled *Kailash Kumar Sanwatia v. State of Bihar and Anr.*, 2003 CrL. L. J. 4313, in which it was held as under:

'In the instant case even if it was proved as contended by learned counsel for the appellant, that money was entrusted which fact is borne out by the admitted case about missing of money from the cash counter of the bank, one factor which needs to be decided is whether the accused had dishonestly misappropriated or converted to his own use the property entrusted or dishonestly used or disposed of that property. As presented by the prosecution, the money was taken away from

the cash counter. It is not the case of prosecution that money which was given to the accused-Gautam Bose and the cash peon to obtain bank drafts was taken away by accused Gautam Bose or the cash peon Ganaori Sao. Because of an intervening situation, the disappearance of the cash due to theft by somebody else the bank drafts could not have been prepared and handed over to the appellant. Even if there is loss of money, the ingredients necessary to constitute criminal breach of trust are absent. If due to a fortuitous or intervening situation, a person to whom money is entrusted is incapacitated from carrying out the job, that will not bring in application of Section 405, IPC or Section-409, IPC, unless misappropriation, or conversion to personal use or disposal of property is established.'

In another case reported as 1998 Cri. L. J. 3771, State of Maharashtra v. Mohan Radhakrishna Pednekar, the Apex Court held as under:

'6. The facts of this case are more or less admitted by all the persons concerned. There was a missing of cash of Rs. 29,200/- from the counter. Prima facie, the Cashier is answerable for this loss. According to the respondent the cash was missing but he has not misappropriated it. On the facts and circumstances proved in this case the respondent has not committed any offence of misappropriating the amount. Merely because the respondent was not able to produce the property which was entrusted to him it cannot be said that the respondent is liable for criminal breach of trust as defined under Section 408, IPC. Section 408, IPC reads thus:

'408. Criminal breach of trust by clerk or servant. -- Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property or with any dominion over property, commits criminal breach of trust in respect of that property shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.'

We are fully in agreement with the finding of the learned Magistrate.'

'7. In order to establish an offence under Section 408, IPC there must be a dishonest misappropriation of the property entrusted. So long as the amount has not been recovered from the person of the respondent or from his house and there is no evidence that he has taken the amount though he was answerable from the amount as Cashier, it cannot be held that that he has dishonestly misappropriated that amount. In a bank transaction due to the rush of the customers who come for transactions in the counter, the amount might have been missed by paying excess amount to the customers. Every such incident of missing of the amount in the counter cannot be said to be an act of criminal breach of trust, unless there exists material to implicate the incumbent for criminal offence.

Criminal breach of trust has been defined under Section 405, IPC, which reads thus:

'405. Criminal breach of trust -- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits 'criminal breach of trust'. To constitute an offence of criminal breach of trust as rightly pointed out by the Court below, there must be a dishonest misappropriation. Mere misappropriation will not amount to criminal breach of trust. It must be dishonest. Dishonest misappropriation is again defined under Section 403, IPC, which reads as under:

'403. Dishonest misappropriation of property -- Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."Dishonestly' has been further defined under Section 24 of the Indian Penal Code, which reads as under:

'24. 'Dishonestly' -- Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing 'dishonestly'.'

Whoever does anything with the intention of causing wrongful gain or loss to any other is said to have committed that thing dishonestly. Therefore in order to constitute an offence under Sections 403 and 408, IPC there must be a wrongful gain to the person who commits the offence or there must be wrongful loss to another person. Thrust of the provision is to the gain or loss. In these circumstances it is important to note that so long as the money has been recovered either from the person or from the house of the respondent it cannot be said that he had an intention of causing wrongful gain by taking the said amount. No witness has spoken that the amount was taken by the respondent. Therefore, as rightly observed by the Court below no offence of criminal breach of trust has been constituted in the facts and circumstances of the case and the Court below rightly acquitted the respondent. Sometimes the respondent may be liable for negligence but not liable for the offence, he was charged. In view of this we do not find any ground to interfere with the impugned judgment.'

14. Unfortunately, the Court below does not seem to have looked the issue from these vital relevant angles. In assessing this fact, it is not necessary for this Court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities of misappropriation, but required to evaluate the material to find out if the facts emerging therefrom taken at their face value establish the ingredients constituting the said offence. The evidence and the circumstances relied upon by the prosecution to prove a criminal conspiracy and misappropriation of sale proceeds of the cement by accused Janak Raj is qualitatively and quantitatively insufficient. Conspiracy cannot be proved merely on the basis of inferences. The inferences have to be backed by the evidence. When the material put forward by the prosecution is insufficient to prove the essential ingredients of the offence, the inescapable conclusion is that the accused is entitled to be acquitted. It is not gatherable as to wherefrom the learned Trial Court has drawn the inferences to establish conspiracy and misappropriation of the sale proceeds of the cement bags by accused, Janak Raj, when disbelieved the entire evidence with regard to the recovery and seizure of the cement. As regards the further contention of the prosecution with regard to the recovery of Rs. 6,000/- from the possession of accused, Janak Raj, to be the sale proceeds of the cement, in view of the explanation tendered by him that he had received Rs.

10,000/ from Executive Engineer and was Government money, the offence of criminal conspiracy or for that purpose the misappropriation, cannot be deemed to have been established on mere suspicion and surmises, which are not supported by cogent evidence.

15. In the light of what I have said above, I find it difficult to agree with the view expressed by the Trial Court to sustain the impugned judgment. Consequently, I allow the appeal, set aside the conviction and consequent sentence recorded by the Trial Court against Janak Raj, Appellant, in proof of offence with which he stands charged. Accordingly, the accused is ordered to be acquitted in resultant thereof. The accused, I believe, is on bail, his bail bonds shall stand cancelled.

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