

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

Case: Cr. Rev. No.54/1999 & Cr.M.P. No. 166/1999

Dated: 03.09.2008

Shabeer Ahmad

Vs.

State of J&K

Coram:

Hon'ble Mr. Justice Virender Singh, Judge.

Appearing counsel:

For petitioner : Mr. Anil Sethi, Advocate.

For respondent : Mrs. Shaista Hakim, Dy. Advocate General.

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| i) | Whether approved for reporting
in Press/Journal/Media | Yes/No |
| ii) | Whether to be reported in
Digest/Journal | Yes/No |

Petitioner, Shabeer Ahmad, (hereinafter for short as 'accused') who was working as Junior Assistant in Govt. Girls High School, Darhal Malkian, stands convicted under Section 409 Ranbir Penal Code by the learned Chief Judicial Magistrate, Rajouri, vide judgment dated 12.01.1999, which is further affirmed by learned Sessions Judge, Rajouri, vide judgment dated 03.07.1999. He has been sentenced to undergo rigorous imprisonment for two years and a fine of Rs.10,000/-, in default thereof, to further undergo imprisonment for six months. Aggrieved of both the judgments, he has preferred the instant revision petition, which already stands admitted and his substantive sentence has been suspended during the pendency of the instant petition. Presently he is on bail.

Although the prosecution case, in detail, is narrated in both the impugned judgments, yet it needs to be reflected once again in brief.

Head Master, Govt. Girls High School, Darhal Malkian, lodged a written complaint in Police Station Darhal on 19.12.1992 alleging therein that the petitioner and one M. K. Handoo had misappropriated the government money relating to the following treasury vouchers:-

“Rs.98916-20 Paisa drawn on 14.08.92 vide Treasury Voucher No.267
Rs.7608 drawn on 14.08.92 vide Treasury Voucher No.266
Rs.10125-00 drawn on 29.07.92 vide Treasury Voucher No.379
Rs.2656-00 drawn on 29.07.92 vide Treasury Voucher No.378.”

At the relevant time the accused was working as Junior Assistant in the school, whereas aforesaid Handoo was Drawing & Disbursing Officer (hereinafter for short as 'DDO') of the school. The allegation was that both had drawn the aforesaid amount from the government treasury Rajouri as Pay Fixation Arrears of the employees, but did not disburse the same to the concerned officials. Primarily, on these allegations F.I.R. No.115/1992 was registered with the concerned police. During investigation it revealed that in fact the petitioner had misappropriated government money to the tune of Rs.1,19,305.20/- for which he could not account for, therefore, a challan (final report in terms of Section 173 Cr.P.C.) was submitted against him only and aforesaid Handoo was not found to be involved in the present case by the police in its investigation, instead he was put in the list of witnesses by the prosecution and examined also during the trial.

The accused was, accordingly, charged under Section 409 R.P.C.

The plea of the accused is of false implication in this case shifting the entire liability to the aforesaid M.K. Handoo.

I have heard Mr. Anil Sethi, learned counsel for the petitioner, Mrs. Shaista Hakim, learned Dy. Advocate General representing the State and have also gone through both the impugned judgments, the evidence and the other relevant material from trial Court record.

Mr. Sethi at the very outset submits that although the accused had taken the shelter under Section 197 Cr.P.C. before both the Courts below but the same was not legally available to him and, therefore, he does not press the instant petition on that count. The foremost attack launched by him is that, in fact, the real culprit in this case was M. K. Handoo, Zonal Education Officer, who was admittedly the Drawing and Disbursing Officer (DDO). He has been let off by the prosecuting agency during investigation without any basis and even the trial Court has given him a clean chit by simply saying that he was very careless in discharging his duties. According to the learned counsel, without passing the bills by Mr. Handoo, it was not possible to draw the amount from the treasury. Even otherwise, after taking out the money from the treasury, the same was subject to verification by the DDO and thereafter the entries were to be made in the cash book. Only then the amount was to be disbursed to the concerned employees. Therefore, it was the prime duty of the DDO to check and have the initial control over the cash received from the treasury. He states that even on drawl register on page 36, the words 'cancelled and not drawn' are written and this is cross-checked by the signatures of DDO. According to Mr. Sethi, the entire procedure is provided in

Financial Rules and the present case, if examined from that angle, then the DDO only was to be booked in this case and not the accused, who had simply acted upon the instructions of aforesaid Mr. Handoo. He has drawn the attention to the relevant entry from drawl register.

Taking the prosecution case, yet on another technical aspect, Mr. Sethi submits that the accused had at no stage any dominion over the aforesaid amount as he was never entrusted with that and, therefore, he can not be held liable for misappropriating the same or to convert into his own use. To elaborate his view point further, Mr. Sethi submits that for the purpose of proving the charge of Section 409 RPC, the prosecution is supposed to prove the main ingredients viz.; an entrustment of the property or dominion over the property in a capacity as a public servant; there should be criminal breach of trust with regard to that property and there should be conversion of the said property for personal use of the public servant. In the present case, the prosecution has not been able to prove any of the three ingredients so as to bring it within the mischief of Section 409 RPC. While referring to the statement of certain witnesses (five in number from the trial Court record), Mr. Sethi submits that all these witnesses have deposed that the accused was a accounts clerk in the school and have nowhere stated that he was dealing with the cash. Therefore, merely dealing with the accounts as Accountant would not amount to deal with the cash. Even otherwise, disbursement was also not the job of the accused at all. From all these facts, Mr. Sethi wants to develop that both the Courts below have fallen into grave error by presuming that the accused was required to make the

disbursement and, as such, the view taken against the accused is bad in the eyes of law calling for the interference of this Court.

Mr. Sethi then assails the conviction submitting that not affording a reasonable opportunity to the accused to lead his defence is a glaring irregularity in the procedure resulting into miscarriage of justice and this flaw also calls for interference of this Court so as to remit the entire case to the trial Court. According to him, a valuable right of defence has been virtually snatched from the accused causing grave prejudice to him. He submits that the accused has been facing a grave charge, which has very serious ramifications, and, therefore, under the present set of circumstances especially when the accused has been facing a protracted trial for the last more than sixteen years, if is not able to have a verdict of acquittal in his favour on the basis of weaknesses pointed out hereinabove, his alternative prayer for remand of the case to the trial Court enabling him to put up his effective defence may be acceded to.

In order to strike his aforesaid view point home, Mr. Sethi submits that on 05.11.1993 the accused had placed on record two receipts as is evident from the short order (zimini order) dated 05.11.1993 and when PW Mohd. Ameen (Headmaster/ Incharge of Govt. Girls High School) had stepped into witness box on 27.07.1994, one of the receipts dated 14.08.1992 amounting to Rs.94,000/- was shown to him suggesting that the same was bearing his signatures, but he denied the said factum. A specific suggestion was put to him that he himself had embezzled the amount and made the accused scapegoat in this case. So far as the second receipt is concerned, it related to another witness Mohd.

Akbar, who appeared as prosecution witness on 21.09.1994 but he had not deposed against the accused and perhaps for that reason the said receipt was not shown to him. Mr. Sethi submits that since the main witness namely Mohd. Ameen had denied his signatures on the receipt dated 14.08.1992, the accused after the closing of the prosecution evidence, moved an application under Section 73/45 of the Evidence Act before the trial Court on 23.02.1998 asserting therein that in order to come to the just conclusion of the case, he be granted an opportunity to lead the evidence by way of getting the report of the expert with regard to the author of those receipts. The plea was that the prosecution had not come with clean hands and that even the investigation was also silent on that aspect. The grievance now projected is that the said application stands rejected by the learned trial Court vide order dated 24.03.1998 without any basis observing that allowing of the said application would amount to wastage of time. Attention of the Court has been drawn to the said application and the impugned order from the trial Court file.

Mr. Sethi submits that, in fact, the aforesaid application was rejected by the learned trial Judge by passing a cursory order and instead of sending the admitted and disputed signatures to the handwriting expert, took upon himself the job of comparing the signatures. He submits that although Section 73 of the Evidence Act, empowers the Court to compare the disputed writing with the specimen/ admitted writing shown to be genuine, the prudence demands that Court should be extremely slow in venturing an opinion on the basis of mere comparison, more so, when the quality of evidence in respect of admitted writing is not of high standard.

Section 73 of the Evidence Act does not give an absolute power to the Court to act as an handwriting expert and in the absence of testimony of any handwriting expert in the matter, it would be rather too much for the judge to use his own eyes for the purposes of deciding a very vital point. According to Mr. Sethi, the learned trial Judge, while rejecting the application of the accused, has compared the signatures on the receipt produced by the accused with some signatures appended by the signatory in the Court file. He contends that to fall within the definition 'admitted signatures' the signatures should be such, which are affixed or used prior to the offence so that the genuineness thereof cannot be challenged. Any clever person can change his signatures in the Court and make that look different from the one appended by him on earlier occasion. Therefore, the learned Magistrate being of non-technical person instead of comparing the signatures himself should leave it to the wisdom of handwriting expert. The learned trial Judge was not able to differentiate the two handwritings and it depends upon many factors like pressure upon the paper, angle, softness, hardness and mode of writing etc., and these aspects these cannot be compared with a naked eye. Therefore, rejecting the application by the learned trial Judge in a hurried manner has caused grave prejudice to the accused as he has been deprived a valuable right of defence. He submits that the prosecution was afforded long seven years to complete its evidence, whereas the accused was not at all given a reasonable time to defend his cause. He is ready to face the ultimate outcome but through proper and fair trial, and, therefore, prays for remand of the case. In support of his contentions, Mr. Sethi relies upon the following two judgments:-

1. **State (Delhi Administration) v. Pali Ram, AIR 1979 SC page 14**
2. **State of Maharashtra v. Sukhdeo Singh and another, AIR 1992 SC page 2100**

Mr. Sethi lastly submits that though he is on sound footing, yet in the event of conviction of the accused being upheld by this Court, his case deserves to be dealt with leniently with regard to quantum of sentence. He has already faced a protracted trial of long sixteen years in which he has not only lost his job, his entire family of which he is the sole bread winner is shattered. It consists of female children also. He then submits that the accused also remained in custody for sometime during trial and for few odd days after his appeal was dismissed by learned lower Appellate Court, and, therefore, he may be let off with the period already undergone by him.

Arguments advanced by Mr. Sethi are repudiated by Mrs. Hakim vehemently on all counts praying for the dismissal of the instant revision petition.

Revision petition on hand is to be rescanned within a settled limited zone of appreciation. Admittedly, the conviction suffered by the accused stands confirmed by the lower Appellate Court and, therefore, it would call for interference only when there is a manifest illegality committed by both Courts below or the gross irregularity apparent on record committed in the procedure.

Let me examine this case first of all with regard to charge. In this regard, I have gone through the statements of certain relevant witnesses, who have deposed against the accused.

The pay arrear bills amounting to Rs.1,19,305.20/- have been prepared by the accused and after getting them signed by the Zonal Education Officer, he presented them in the Government Treasury. PW Mohd. Ameen, who was Incharge Headmaster of the school in 1992, has deposed that the accused was Junior Assistant in the school and he was drawing pay and T.A., of the employees of the school and used to disburse the same to the employees. He has further stated that accused also used to maintain the cash-book and drawl register.

In year 1992, the grades of the employees were revised on account of which employees of the school were entitle to their arrears w.e.f. 1987 to 1992. The arrears due to them were not paid as is clear from the statements of certain witnesses. It has also come in evidence of some of the employees that accused avoided and told them that there was no cash in the treasury, and he had even concealed the drawl register, cash-book and other relevant record, which were ultimately taken into custody during investigation.

PW Ghulam Hussain has categorically stated that in September, 1992 when he joined the school as Headmaster, the employees demanded their pay arrears and on his inspection and checking he found that the bills for pay arrears were entered in the drawl register, but certain entries had been cancelled. He thereafter got the bills prepared and submitted to the treasury through one teacher namely Mohd. Azam, but came to know that the bills had already been drawn. On enquiry, he came to know that the accused was the concerned clerk dealing with the accounts i.e. pay etc., and had drawn an amount of Rs.1,19,305.20 paise

from the government treasury. He also stated that on page 36 of the drawl register the words 'cancelled and not drawn' were found written by the accused and the DDO had crossed his signatures.

PW Romesh Chander, the then accountant in treasury, has deposed that the accused was dealing with the bills and he was coming to the treasury to encash them. He also states about the payment made to the accused with regard to the arrear bills of the employees of the school.

Statement of PW Mohd. Azam, the then treasury officer, is also relevant in this regard. He has stated that in 1992 he was working as treasury officer in Government Treasury and accused used to visit the treasury as cashier of the school. Drawl register of the school was shown to him and on the basis of the record, he stated that on 09.07.1992 payment was drawn from the treasury and vide page 36 of the drawl register, the alleged treasury voucher Nos. 266, 267, 378 & 379 were drawn from the treasury after bills were passed by him. No doubt, with regard to words 'not drawn' on page 36 of the drawl register, this witness stated that it was not known to him as in whose hand those words were written as it was in possession of the school official.

I do not feel the necessity of reproducing the statements of certain employees, who when stepped into the witness box, stated that the accused was incharge of drawl and disbursement, and he had drawn the amount from the treasury with regard to the arrears of the employees, but the same were not paid to them.

No doubt, in the statement of aforesaid PW Ghulam Hussain, it has come that on page 36 of the drawl register the words 'cancelled and not drawn' are cross-checked by the DDO, but in my

view, the same would not make any difference. Though, Mr. Sethi from this fact situation has made an attempt to demolish the case of the prosecution saying that it was Mr. Handoo, the DDO who had crossed his signatures on this writing and, therefore, the entrustment of the amount to the accused is not proved and not that the prosecution has let him off, even the Court has also given him a clean chit by dubbing him a careless official only, yet in my view, the argument advanced by him has no weightage at all as it is clear from the statement of PW Romesh Chander, the Accountant of the treasury, that at the relevant time the accused was dealing with the payment to the Education Department and he on behalf of the DDO was presenting the bills of the school and in the same manner he had presented the pay arrear bills relating to the present case in the treasury, which were duly passed and signed for payment to the bank. He has also stated that the DDO had authorized the accused to encash the bills and, therefore, the payments were made to him.

After rescanning all the relevant facts, I do not find any difficulty in holding that the accused being a Junior Assistant was dealing with the accounts of the school at the relevant time and he had drawn the alleged bills amounting to Rs.1,19,305.20 paise vide Treasury voucher Nos. 266 & 267 dated 14.08.1992 and Treasury voucher Nos.378 & 379 dated 29.07.1992. He is, thus, solely responsible in this case, who was duly entrusted with the amount as he is one, who got all the bills cleared from the treasury but did not disburse them further to the employees. Entrustment is, thus, proved to the hilt. Therefore, the argument advanced by Mr. Sethi with regard to non-involvement of Mr. Handoo the then DDO, is neither here nor there as the same would not advance his cause to

any extent. Admittedly, he was initially booked but subsequently not challaned as the prosecution agency did not find any fault from his side. The learned trial Court has also observed that he was careless in discharging his duties and did not bother to follow the rules governing the drawl and disbursement of government money, but at the same time held that he was not a party to the crime committed by the accused alone and that is the reason that he was not arrayed as accused during trial. I do not find any good cause to disturb that finding so as to extend any benefit towards the accused, whose case, in my considered view falls squarely within the mischief of Section 409 RPC.

As a sequel to the aforesaid discussion, I do not find any manifest illegality committed by both the Courts below in appreciating the prosecution evidence causing miscarriage of justice.

Let me now advert to the so-called irregularity projected by Mr. Sethi in the procedure stating that a reasonable opportunity to the accused was not afforded to lead his defence evidence. He in this regard relies upon two receipts, one allegedly prepared and signed by PW Mohd. Ameen and the other by Mohd. Akbar. So far as receipt relating to Mohd. Akbar is concerned, admittedly, it was not shown to him when he stepped into the witness box. The argument advanced by Mr. Sethi that there was no need of showing the said receipt to this witness as he had not said much against the accused is not appealing to me. This witness has categorically stated that he had not received the arrears of pay fixation and whenever he enquired from the accused or even from Z.E.O., the explanation was that the bills were not passed. Thereafter, he was

transferred from the school in December, 1992 and ultimately he got the arrears in May, 1994 as double drawl. He has further stated that the accused used to draw and disburse the pay to the employees.

With regard to the receipt amounting to Rs.94,000/- dated 14.08.1992, when PW Mohd. Ameen stepped into the witness box, in his cross-examination, the said receipt was shown to him and he denied the factum of the same being signed or issued by him. His statement was recorded on 27.07.1994. Admitted position on record is that the aforesaid receipt and the other receipt allegedly issued by PW Mohd. Akbar were placed on record for the first time by the accused on 05.11.1993 as is evident from the zimini order. Undoubtedly, these were in possession of the accused only and he did not make any attempt to build his defence on the basis of the said receipts during investigation. Those receipts were simply tendered by his counsel on 05.11.1993 and one of the receipts amounting to Rs.94,000/- was shown to PW Mohd. Ameen for the first time on 27.07.1994 when he appeared as prosecution witness. The accused cannot get out of the fact situation till that date, he was not banking upon the said receipt. As is evident from the record, after the closure of prosecution evidence, he moved an application on 23.02.1998 under Sections 45, 67 and 73 of the Evidence Act for comparison of the signatures of the witnesses by a handwriting expert, which came to be dismissed by the trial Judge on 24.03.1998. I have gone through the said order once again minutely and the same when reproduced, reads thus:-

***“P.O. present. Sh. Pervez Ahmed Adv. for the
defence. Accused is present in person also. An***

application has been moved by defence counsel on 23.2.1998 under sections 45, 67 and 73 of Evidence Act for comparison of signatures by expert. This application has been resisted by the prosecution and the objection put forth by prosecution are on record.

Heard arguments and perused the file.

The case against the accused is that has misappropriated the Govt. money and the case was on the stage of final arguments, when the instant application came to be moved by defence counsel. As per defence counsel an amount of Rs.94500/- has been received by PW6 Mohd Ameen against a receipt dated 14.8.1992. The receipt is on the file. As per accused the receipt has been signed by PW6 Mohd Ameen and he has denied having signed the such receipt in his examination in the court, so the alleged signatures of PW6 on the receipt for Rs.94500/- dated 14.8.92 need to be compared with the admitted signatures of PW6 on his statement recorded in the court on 27.7.94. Similarly counsel for the accused has submitted that PW Mohd Akber has also signed a receipt for Rs.9700/- and his statement too has been recorded and his signatures too on the statement be compared with the disputed signature on the receipt. After considering the matter thoughtfully. I am of the opinion that the matter does not need an expert opinion. I have compared the signatures myself in terms of section 73 of Evidence Act so far as signatures of PW6 on his statement is concerned. I feel that, it is no way similar to that of disputed signature on the receipt dated 14.8.1992. The expert opinion is needed in the very complicated cases of disputing writing and in the instant case, I feel that there is no similarity between the admitted signature

and the disputed signature. Would there be any similarity in the signatures, the opinion of expert was needed but I feel that the admitted signature and disputed signature of PW6 Mohd Ameen are totally dissimilar and by naked eye even it can be observed that the signatures are not alike and so I feel that it would be mere wastage of time & money to refer the matter to expert. Similar is the case with PW Mohd Akber also. Counsel for the defence has in the open court conceded that there is no similarity in the admitted signature and disputed signature of PW Mohd Akber and so he admitted that his signature does not need any expert opinion.

In the light of foregoing reasons, I feel that the opinion of expert as sought by defence counsel in respect of the admitted and disputed signatures of PW Mohd Amin and Mohd Akber is not needed at all as the signatures are totally different and do not demand any expert examination. I feel that the application is groundless (sick) so rejected. File shall come up for final arguments on 11.4.1998.”

No doubt, that the Court while comparing the disputed writing should be slow in venturing its own opinion on the basis of mere comparison made by a naked eye, but it depends upon the facts of an individual case. In the case on hand, the learned trial Court has categorically observed that the expert opinion is needed in a very complicated case of disputed writing and in the present case there is no similarity between the admitted signatures and the disputed signatures. The observation of the Court is that admitted signatures and disputed signatures of Mohd. Ameen are totally dissimilar and the same can be observed even by a naked eye. So

far as signatures of Mohd. Akbar is concerned, it is said that the accused himself had admitted that the same do not call for expert opinion. I do not find any fault with the view taken by the learned trial Court and, therefore, in my view, the accused cannot derive any advantage on this count calling it to be a gross irregularity in defending his cause. The judgments cited by Mr. Sethi on this aspect are not applicable to the facts of the case on hand and, therefore, do not put the accused on any advantageous position.

The statement of the accused recorded under Section 342 Cr.P.C., also assumes importance in this regard. After the entire incriminating evidence was put to him in the shape of twelve questions, he did not say a word about this receipt. From this all, one can simply gather that his intention was just to delay the proceedings and nothing beyond that. Therefore, in my considered view, the learned trial Court has rightly rejected the said application on all counts.

After re-scanning the prosecution case once again within the settled legal parameters, I hold that there is no manifest illegality or gross irregularity, apparent on record, calling for the interference of this Court in exercise of its revisional jurisdiction. I, therefore, confirm the conviction of the accused as already recorded by the trial Court and upheld by the learned lower Appellate Court.

At the same time, I do not find any substance in the arguments advanced by Mr. Sethi with regard to extending any lenient tilt vis-à-vis the quantum of sentence. Even otherwise, the instant revision petition, which is pending since 1999, is primarily delayed by the accused himself, may be at one stage, it was heard and reserved for orders by this Court and subsequently put for re-

hearing to seek some clarification on certain aspects. Delay in disposal cannot be said to be mitigating circumstance in favour of the accused especially in such type of cases.

Corruption in a civilized society is a disease like Cancer, which, if not detected in time, is sure to lead to the disastrous consequences. The evil of corruption has persistently crept into various levels and this hydra-headed dragon of corruption has to be lynched at the earliest, otherwise it is going to shake the socio-economic fabric.

Taking into account the present case from all aspects, the sentence already slapped upon the accused in no manner can be said to be harsh, rather it is most adequate and, therefore, does not call for any reduction by way of lenient tilt.

The net result is that the present revision petition fails on all counts and is, hereby, dismissed alongwith connected CMP(s).

Let necessary steps be taken to take the accused in custody for serving the remainder of his substantive sentence. All quarters concerned be informed accordingly.

(Virender Singh)
Judge

Jammu
03.09.2008
Narinder.