



Crl. A. No. 01 of 2017
Prem Singh Tamang (Golay) vs. State of Sikkim
Crl. A. No. 02 of 2017
Til Bahadur Gurung vs. State of Sikkim

THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

S.B.: HON’BLE MR. JUSTICE SATISH K. AGNIHOTRI, CJ.

Crl. A. No. 01 of 2017

Prem Singh Tamang (Golay),
S/o Kalu Singh Tamang,
R/o Singling Busty, Soreng,
West Sikkim. ... Appellant.
versus
State of Sikkim. ... Respondent.

Crl. A. No. 02 of 2017

Til Bahadur Gurung,
S/o Late Motilall Gurung,
R/o Below Housing Colony,
6th Mile, Tadong,
East Sikkim. ... Appellant.
versus
State of Sikkim. ... Respondent.

Appearance:

Mr. K. T. Bhutia, Senior Advocate with Ms. Bandana Pradhan, Mr. D. K. Pradhan and Ms. Sarita Bhusal, Advocates for the Appellant in Crl. A. No. 01 of 2017.

Mr. N. Rai, Senior Advocate with Ms. Tamanna Chettri and Ms. Malati Sharma, Advocates for the Appellant in Cr. A. No. 02 of 2017

Mr. A. Mariarputham, Advocate General with Mr. Karma Thinlay, Addl. Public Prosecutor, Mr. N. P. Sharma, Mr. A. J. Sharma, Public Prosecutors, Mr. Santosh K. Chettri and Ms. Pollin Rai, Asstt. Public Prosecutors for the State.



Crl. A. No. 01 of 2017
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J U D G M E N T
(28.06.2017)

Satish K. Agnihotri, CJ

Both the appeals are directed against the common judgment and order of sentence dated 28.12.2016 in Sessions Trial (Vig.) Case No.02 of 2009 (05 of 2013), whereby and whereunder the appellant in Crl. A. No.01 of 2017 (hereinafter referred to as "A – 1") was convicted of the offences under Section 403; Section 120B (2) read with Sections 403/406 of the Indian Penal Code, 1860 (in short, "IPC") (in regard to cheque Nos.208236 and 208249) and Section 13(2) read with Section 13(1)(d)(ii) of the Prevention of Corruption Act, 1988 (in short, "PC Act") (in regard to the amounts concerning with the said cheques and other cheques encashed through PW-40). A-1 was sentenced to undergo SI for a period of one year and to pay a fine of Rs.10,000/- (Rupees Ten thousand) only, in default to pay fine to further undergo further SI for a period of six months for the substantive offence committed under Section 13(2) read with Section 13(1)(d)(ii) of the PC Act. Further he was sentenced to undergo SI for a period of one year under Section 403 IPC and he was also sentenced to undergo SI for a period of six months under Section 120B(2) read with Sections 403/406 of the IPC. The appellant in Crl. A. No.02 of 2017 (hereinafter referred to as "A – 2") was convicted of the offences under Section 406 IPC (in



respect of cheque No.208249); Section 403 IPC (in reference to cheque No.208236) and Section 120B(2) read with Section 403/406 IPC/Section 13(1)(d)(ii)/(2) of the PC Act. He was sentenced to undergo SI for a period of one year and to pay a fine of Rs.5,000/- (Rupees Five thousand) only for an offence committed under Section 406 IPC. In default to pay fine amount, to further undergo SI for a period of three months. A-2 was further sentenced under Section 403 IPC to undergo SI for a period of eight months and for offence under Section 120B(2) read with Sections 403/406 IPC/Section 13(1)(d)(ii)/(2) of the PC Act to undergo SI for a period of six months. Thus, both the appeals are being considered together.

2. The provenance of filing of charge-sheet against A - 1 and 2 for allegedly having committed offences under Sections 468/120B(2) IPC; Sections 420/120B(2) IPC; Sections 403/120B(2) IPC; Sections 409/120B(2) IPC; and Sections 13(1)(d)(ii)/13(2) of the PC Act and other persons, namely, Keshu Agarwal (A - 3), Subash Tamang (A - 4) and Sanjay Agarwal (A - 5) for committing offences under Sections 468/120B(2) IPC; Sections 420/120B(2) IPC; and Sections 403/120B(2) IPC, was in pursuance of the order dated 04.03.2003 passed by this High Court in Writ Petitions No.03/98, 05/98, 03/99 & 06/99, wherein the Vigilance Department was



permitted to register a regular case for alleged irregularities committed in respect of the purchase and distribution of milch cows by the Animal Husbandry & Veterinary Services (AH&VS) Department, Government of Sikkim. A Sikkim Vigilance Police Station (SVPS) Case No.RC-1/2003 was registered by the Vigilance Police on 12.03.2003 for the offences as afore-stated against A - 1 and 2 along with other three persons.

3. The learned trial Judge, on examination and appreciation of several witnesses produced by the Prosecution, held as under:-

" 62. *Resultantly*, the Prosecution case partly succeeds so far as the accused Nos. 1 & 2 are concerned. The accused No. 1 is, accordingly, convicted of the offences under Section 403; Section 120B(2) *read with* Sections 403/406 of the IPC, 1860 (*with regard to the amounts concerning cheque Nos. 208236 & 208249*); and Section 13(2) *read with* Section 13(1)(d)(ii) of the PC Act, 1988 (*with regard to the amounts concerning the above cheques and the other cheques encashed through PW 40*). The accused No. 2 is convicted of the offences under Section 406 (*with regard to amount concerning cheque No. 208249*); Section 403 (*with regard to amount concerning cheque No.208236*); & Section 120B(2) *read with* Section 403/406 IPC/Section 13(1)(d)(ii).(2) of the PC Act, 1988. They be taken into custody forthwith.

63. The accused Nos. 3, 4 & 5 however stand acquitted of the respective charges against them under Sections 468/120b(2), 420/120B(2) & 403/120B(2) of the IPC, 1860. They are also discharged from the respective bail bond(s)."

4. It is pertinent to state here that the defence has not examined any witness in their favour, but all the alleged accused were examined by the trial Court. Proper sanction for



prosecution of A - 1, who happened to be Minister-in-Charge at the time of alleged commission of offences, was obtained from the Governor vide Sanction Order (Exhibit 2). The sanction in respect of A - 2, being a Government employee, was also obtained by the State Government vide Sanction order (Exhibit 3). The allegation in the charge-sheet was, in total, for a misappropriation of the amount to the tune of Rs.50,39,500/- (approx.).

5. Mr. K. T. Bhutia, learned Senior Counsel appearing for the A - 1, would contend that the case of the Prosecution rests solely on the statements made by one Bikram Lama (PW-40) and also by Bimal Tamang (PW-8), who are interested witnesses. Bikram Lama was working with A - 1 and was suspended from service in March, 2000. Bikram Lama has deliberately implicated A - 1 out of vengeance for his suspension by A - 1. Bimal Tamang had also implicated falsely both the A - 1 & 2, and he, without there being any substantive proof of authorization on behalf of accused, accepted the cheque and got it encashed and also gave false undertaking. The charge-sheet was filed against A - 1 on account of affiliation to other party, due to political vendetta. PW-8 and PW-40 were treated as star witnesses for being the supporters of the opposite ruling party. Thus, their



statements are unworthy of any credit and deserve to be rejected outright.

6. It was further contended that the opinion/report dated 24th July, 2006 (Exhibit 240) was rejected, thus, the signatures and handwritings of the witnesses could not be held as proved. It is further urged that the deposition of PW-40 is not creditworthy in respect of various letters (Exhibits - 105, 109, 115, 117, and 119) for the reasons that the witness, at one stage, stated that he has not seen the letters as the letters were in the sealed envelopes, but on the said letters being shown to him, he stated that the said letters were issued to the Managing Director, Sikkim Milk Union. The statement made by PW-40 was contradictory, thus, not capable of being trustworthy. The prosecution has not produced a list of suppliers of milch cows, which goes against the prosecution in the light of the provisions of Section 114 (g) of the Indian Evidence Act, 1872. The witness (PW-40) has constructed a 5 ½ storied RCC building when he was earning a meager amount of Rs.4000/- to Rs.5000/- per month, that itself goes to show that he was supported by the ruling party to implicate the A - 1. Mr. Bhutia would next urge that there was no loss to the exchequer, as PW-3 had clearly admitted that a sum of Rs.20,10,000/- was received subsequently. It is also submitted that the alleged A - 1 was



discharging his official duty and as such learned trial Judge committed an error in holding that no sanction to prosecute A - 1 under the provision of Section 19 (1) of the PC Act and also under Section 197 of the Cr. P.C., was required.

7. Mr. N. Rai, learned Senior Counsel appearing for A - 2, would contend that the accused was working as Managing Director, Sikkim Co-operative Milk Producers' Union Ltd. A - 1 was the Minister-in-Charge. A - 2 had signed the cheques prepared by other officers without his direction, under command of the Head of the Department, i.e. A - 1. Prosecution has failed to establish that A - 2 has misappropriated funds to his benefit. It is well established that even if there is violation in codal conduct on the part of the subordinate officers, that would not come within the mischief of criminal offence. No evidence has come on record that cheques were made and delivered to unauthorized persons in complicity with A - 1. Thus, no conspiracy was proved and, as such, granting benefit of doubts, the A - 2 be acquitted.

8. It is further urged that no instructions were issued by the Secretary, Animal Husbandry & Veterinary Services Department, fixing the mode of disbursement of fund for supply of milch cows, as is evident from the deposition of the Head of Department of concerned Department. There was no rule or



executive circular for sanction and payment of money to the suppliers of the milch cows. The trial Court has held that A – 2 was not in Government service, as such conviction under Section 13 (1) (d) (ii)/(2) of the PC Act was misplaced.

9. Alternatively, it is submitted that A - 2 is an old man of 81 years, having deserted daughter with two kids. At this stage, if A - 2 is convicted, the other dependent members of the family would suffer irreparable loss. Thus, the case may be considered with leniency in favour of A - 2 for exoneration from the conviction.

10. Resisting the submissions of the learned Senior Counsel appearing for the appellants/accused, Mr. A. Mariarputham, learned Advocate General would contend that it is wrong to say that no method was prescribed, as is evident from the letter dated 25th May, 1996 (Exhibit – 16), whereunder the cheques were issued in favour of Sikkim Milk Union, it was clearly stated therein that no disbursement of any fund may be made without prior formal approval of the Commissioner-cum-Secretary, AH & VS Department. It is further urged that there were several letters issued by the Deputy Director, AH & VS Department addressed to the Managing Director, Sikkim Milk Union (Exhibits – 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35) whereby the Deputy Director has



granted sanction to release a particular sum of amount in favour of a named person therein, who had supplied number of milch cows. The Deputy Director (A/cs) was authorized by the Commissioner-cum-Secretary, AH & VS Department, vide letter dated 18th October, 1996 (Exhibit-17). Pursuance of the earlier letter dated 25th May, 1996 (Exhibit-16), whereby four cheques, bearing:

1. Cheque No. BSP 003404 dt. 30.03.1996 for Rs. 2,50,000.00
2. Cheque No. BSP 003405 dt. 30.03.1996 for Rs. 8,00,000.00
3. Cheque No. BSP 003402 dt. 30.03.1996 for Rs.37,50,000.00
4. Cheque No. BSP 003403 dt. 30.03.1996 for Rs.37,50,000.00

Rs.85,50,000.00

were transferred to the Managing Director, Sikkim Milk Union, it was a clear a condition to keep the said money in a new account in the bank and also that no disbursement of fund may be made without prior formal approval of the Commissioner-cum-Secretary, AH & VS Department.

11. Learned Advocate General would further contend that after A - 2 assumed the office of the Managing Director in the month of November 1996, thereafter A - 1 issued several letters/notes (Exhibit - 105, Exhibit - 109, Exhibit - 115, Exhibit - 117 and Exhibit - 119) to A - 2, directing to issue cheques in favour of PW-8 and PW-40. Exhibit - 105 clearly indicates a



noting made by A - 2, wherein it is stated that on discussion with the Minister, the money be released in favour of PW-8. PW-8 and PW-40 have deposed in categorical terms that after receipt of money, he encashed the cheques, and the amount so received was handed over to A - 1. A - 2 was very well aware of the manner in which the amount deposited be disbursed, but, without verifying as to whether the recipients were actual suppliers of milch cows or not, it was done to extend benefit to A - 1. The cheques were issued, vouchers were duly signed and undertakings were given by PW-8 and PW-40, who were not, admittedly, suppliers of milch cows. The entire incidents cumulatively establish that A - 1 along with A - 2 committed criminal breach of trust for appropriation of funds. The writings made in such letters have not been denied by A - 1 and A - 2. PW - 8 and PW - 40 have clearly admitted their signatures in vouchers and undertakings given by them. The bank authorities have also produced the relevant cheques, vouchers. Undertakings given by them were also seized and produced in the Court. There is no reason to disbelieve the testimony of PW-8 and PW-40, who have clearly admitted that the amount so received from the bank, have been handed over to A - 1. It has further come on record that subsequently a sum of Rs.20,10,000/- was sent to the Sikkim Milk Union in a carton. The bearer of the carton clearly deposed that the money was



sent by A – 1, who happened to be the Minister-in-charge at the relevant time. Why, A – 1, who happened to be the Minister-in-charge, would send cash in such a large sum also establishes the offence of A – 1. A -2 has committed the criminal breach of trust in complicity with A – 1. In such factual background having been recorded by the trial Court and also the conviction recorded by the trial Court holding A – 1 and A – 2 as guilty of offence and further sentencing them accordingly is just, proper, legal, warranting no interference.

12. Heard learned counsel appearing for the parties, perused the impugned judgment and documents annexed as exhibits, produced before the trial court.

13. On analysis of the aforestated, it is discernible that the State Government transferred a sum of Rs.75.00 lakhs vide letter dated 25th May, 1996 (Exhibit-16) to the Sikkim Milk Union, vide two cheques bearing Nos. BSP 003402 and BSP 003403 dated 30.03.1996 along with other two cheques meant for other purpose with a direction to park the said money in a new account in the bank maintained for the operation of the above fund with a condition that no disbursement of the said fund may be made without prior formal approval of the Commissioner-cum-Secretary, AH & VS Department. Subsequently, on 18th October, 1996 (Exhibit-17), the Managing Director, Sikkim Milk Union was



informed that the Deputy Director (A/cs.) has been authorized to sign the letter on behalf of the Commissioner-cum-Secretary, AH & VS Department for the release of payment to the respective cow suppliers. It is indisputably admitted by all the parties that the fund was intended for supply of milch cows. It was also stated that during Dusserah season, which fell in October, money was to be released for needy suppliers of milch cows.

14. Learned counsel appearing for A-2 submitted that to avoid lapse of the amount in the financial year, the money was parked with the Sikkim Milk Union, and it is not disputed by the State as well as A-1. It is further evincible that in the manner prescribed for disbursement of the amount, several letters (Exhibits – 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 dated 18th October, 1996 and one more letter dated 28th November, 1996 (Exhibit-35) were issued by the authorized Deputy Director (A/cs.), AH & VS Department to the Managing Director, Sikkim Milk Union to release a specified amount to the named persons in the said letters. It was found that the amount was released to the actual suppliers of milch cows, accordingly. Thereafter, it has come on record that in the meantime A-2 working as the General Manager since 29th December 1995, became Managing Director with effect from 26th



November, 1996, and was subsequently confirmed vide order dated 21st April, 1997.

15. The mode prescribed for release of fund, on approval granted by the Commissioner-cum-Secretary, AH & VS Department through the Deputy Director (A/cs.), was unofficially modified, as A-1 being the Minister-in-charge, commenced sending letters/notes under his signature to A-2 vide Exhibits – 105, 117, 115, 119, 109 and 199 dated 15.01.1997, 20.01.1997, 06.02.1997, 09.02.1997, 20.02.1997 and 02.05.1997 respectively directing A-2 to release the specified amount in the name of Bikram Lama (PW-40) and others, thus, the total sum of Rs.08.50 lakhs was released to PW-40. The said Bikram Lama signed respective cash vouchers (Exhibits – 71, 80, 79, 76, 81 and 78) endorsing the receipt of cash and also the undertakings (Exhibits-197, 241, 201, 242, 198 and 200) were duly signed by the said Bikram Lama (PW-40) to make refund of the payment of the cows or to replace the cows if the committee or the authorized Government Officers find that the cows are unproductive and sterile and not up to the breed specification. All the cheques, cash vouchers, undertakings, etc. were seized from the respective authorities and duly analyzed by the trial court.



16. Bikram Lama (PW-40) was an employee working with A-1. It is submitted by learned Senior Counsel for A-1 that PW-40 is not trustworthy as he was a partisan witness, as he deposed out of animosity for his suspension by A-1, on account of allegation of misappropriation, on 31st March 2000. The suspension was revoked only after A-1 left the ruling party in the year 2013, sometimes in 2014. It is further contended that PW-40 having a meager means of earning had constructed a 5 ½ storied RCC building with the support of ruling party and the land was allotted to him on the recommendation of the present Chief Minister of Sikkim.

17. Responding to the said submission, it is stated by the prosecution that sufficient evidence has come up on record to establish the fact that PW-40 has received money, as aforestated, and paid to A-1. PW-40 had ancestral property and allotment of plot was made as a routine allotment to several persons. PW-40 had sufficient source to construct alleged premises.

18. I have examined the aforestated letters/notes written by A-1 to A-2 and the cheque dated 15.01.1997 (Exhibit - 104) for Rs.1.00 lakh; the second cheque (Exhibit - 116) dated 24.01.1997 for Rs.1.00 lakh; the third cheque dated 07.02.1997 (Exhibit - 114) for Rs.2.00 lakhs; the fourth cheque dated



10.02.1997 (Exhibit – 108) for Rs.2.00 lakhs; the fifth cheque dated 20.02.1997 (Exhibit – 118) for Rs.2.00 lakhs and the sixth cheque dated 10.05.1997 (Exhibit – 112), all in the name of Bikram Lama for Rs.50,000/- and as such in total six cheques in favour of Bikram Lama (PW-40) for Rs.8.5 lakhs was issued, which was encashed vide cash vouchers (Exhibits – 71, 80, 79, 76, 81 and 78) by him and also undertakings vide Exhibits – 197, 241, 201, 242, 198 and 200 were given by PW-40. Bikram Lama (PW-40) in his deposition has clearly stated that he was appointed as Lab Attendant but was assigned the duty to attend the works of A-1 in the office as well as in his residence. He used to carry files, documents etc. from the office and residence. Further, he stated that he was not one of the cow suppliers under the Milch Cow Distribution Scheme undertaken by the Government of Sikkim. PW-40 has further categorically stated that he carried letters from A-1 to A-2. Thereafter, cheques, as aforestated, were issued and the same were encashed. He has duly signed the cash vouchers and the undertakings, as required under the Scheme. After collecting the amount from the bank, he has handed over the same to A-1, the then Minister. Further, as noticed that the amount was returned subsequently, he said that he had never returned any amount to the Government Department or Sikkim Milk Union under the Milch Cow Distribution Scheme received by him from the State Bank of



Sikkim, as stated earlier. In the cross-examination he stated that letters were issued to the Managing Director, Sikkim Milk Union by A-1, however, in examination-in-chief, it was stated that he has received sealed envelopes which he handed over to A-1. Referring to this minor contradiction, it was contended that there is a discrepancy in deposition of PW-40, this minor discrepancy does not demolish the authenticity of the statement made by PW-40.

19. *In respect of construction of house, it was alleged that* he was paid by the ruling party to implicate A-1. PW-40 has clearly stated that he received rent and agricultural produce from his ancestral land measuring about 4 acres located at Syari, Gangtok, as his father had 22 acres of land and on his death in 1988, he obtained 4 acres of land as his share. PW-40 strongly denied that he was making any wrong statement in respect of handing over of money to A-1 at the instance of some other political party. He also denied of holding and displaying the flag of SDF party at any point of time, as alleged by the defence.

20. On careful examination, I do not find any reason to disbelieve the statement of PW-40, which is duly supported by several documents, as the signatures made by him in the cash vouchers and undertakings, was admitted by him and he has also identified the signatures made by A-1 on various documents on



the ground that since he was working with A-1, he was well aware of the signature of A-1.

21. It is next contended that since the money has been refunded back, the charge of misappropriation come to an end. The Investigating Officer (PW – 79) namely, R.K. Sundas, in his statement stated that during investigation, it was found that an amount of Rs.20,10,000/- was refunded by different individuals to Sikkim Milk Union in the year 2001, after filing of a Public Interest Litigation, which resulted into a direction of investigation in this matter. One Bal Krishna Rai (PW-7) who was working in the Sikkim Milk Union deposed, referring to a notings (Exhibit-5/2), that the notings relate to deposit of an amount of Rs.20,10,000/- received by him in a carton from an individual who told him that the said amount was sent by A-1, which, he had received on a telephonic call from the then Secretary, AH & VS Department, Mr. D.K. Gajmer and transferred the said amount to the account of the Department through a cheque. The then Secretary, AH & VS Department, Mr. D.K. Gajmer, was also examined as PW-14. In his deposition, he stated that he had received a telephonic call from an unknown caller that he was instructed by the then Minister, A-1, to make refund of certain amount received by the suppliers for supply of milch cows under the Scheme. According to him, he directed the said caller to



meet Bal Krishna Rai (PW-7) the then Accountant of Sikkim Milk Union and deposit the amount. Thereafter, he was informed by the Managing Director, Sikkim Milk Union that the amount to the tune of Rs.20,10,000/- was received. It was contrasted by the learned Senior Counsel for A-1 that Dr. R.K. Tamang (PW-2), who was posted in March, 2003 as Managing Director, Sikkim Milk Union, had submitted a report to the Controller and Auditor General for the year 1999-2000, that an advance to the tune of Rs.20,10,000/- was recovered from the suppliers and the same was credited in the respective account of the Sikkim Milk Union, thus, the amount was received from the suppliers who had taken advance amount earlier. In his deposition before the Court, PW-2 stated that the money was refunded. On perusal of the said report, (page 1762 of the compilation), it is not clear as to whether the money was deposited by the individual suppliers or by one individual as it has come on record from the depositions of various authorities, that a sum of Rs.20,10,000/- was deposited in cash on the instruction of A-1, which was duly received by the then accountant and credited in the relevant account. As observed, it is stated by PW-40 that he has not refunded any money. The money was refunded by A-1, there is no reason as to why A-1 will refund the money and that too in cash through some individual person, unless he had received the amount from PW-40 and PW-8 as stated by them. This also



fortifies the offence committed by A-1, which stand established on the basis of letters, cheques, cash vouchers and undertakings. Even otherwise, the subsequent refund of money will not exonerate A-1 and A-2 from offence of misappropriation and criminal breach of trust under the provisions.

22. Coming to the next allegation, another conduit was Bimal Tamang (PW-8). Bimal Tamang (PW-8) was given a cheque of Rs.1.00 lakh for encashment. PW-8 stated in his deposition that he was asked by A-1 to meet A-2. On meeting, he received a cheque for Rs.1.00 lakh, which he encashed and signed the cash voucher (Exhibit-132). In his cross-examination, the location of handing over of the cheque in his residence was denied, but reiterated receipt of cheque, encashment of the said cheque vide cash voucher (Exhibit-132). He further stated that no letter was given to him, he was merely asked by A-1 to meet A-2, he accordingly received the amount, which he handed over to A-1. On verification, his signature was duly identified by him on the reverse side of the cash voucher (Exhibit-132 [a]). The trial Judge was found him confused as he could not identify the place, where he had received the cheque. On this account, learned Senior Counsel for A-1 submitted that there was no clarity in the place, he could have been summoned for re-examination, which was not done, thus, the deposition of the



witness was untrustworthy and be rejected. The witness has also admitted during cross-examination at one place that cash voucher (Exhibit – 132) does not pertain to the cheque issued to him by A-2 at his residence. The deposition of PW-8 was recorded after about 19 years. On this account, the testimony of PW-8 cannot be rejected as the voucher alone is enough to substantiate the payment of Rs.1.00 lakh to PW-8, when admittedly PW-8 was not a supplier of milch cows under the Scheme. There is sufficient reason to establish that a cheque for Rs.1.00 lakh was issued by A-2 in favour of a person, who was not a supplier of milch cows, when there was a clear direction that the fund was given to Sikkim Milk Union for disbursal of cow suppliers on the basis of prior approval from the Commissioner-cum-Secretary, AH & VS Department. The aforestated overall evidence, which have come on record, proved the case of prosecution that on the instruction of A-1, A-2 knowing fully-well that the manner prescribed under the letter whereby the amount was transferred was not complied with, issued various cheques in favour of non-suppliers of milch cows. This clearly indicate the involvement of A-2 also. Thus, the prosecution has clearly established that A-1, in complicity with A-2, have misappropriated the funds to the tune of Rs.9.50 lakhs illegally with criminal intent.



23. It is further pleaded by learned Senior Counsel appearing for A-1 that the handwriting expert, while giving opinion has not submitted the reasoning therein, as admitted by Narendra Kumar (PW-77) in his cross-examination. Thus, the handwriting expert's opinion may not be accepted in support and taken on record. Be that as it may, in certain cheques, which are not the subject matter of the instant appeal, for want of support of other evidence, the opinion rendered by handwriting expert may not be sufficient to establish the charge. But in the case, wherein issuance of cheques, cash vouchers and undertakings have been affirmed by other testimonies, lack of reasons in support of opinion may not be relevant to prove the case of the prosecution.

24. A-1 and A-2 were charge-sheeted along with others. The trial Judge, after examination and analysis, have not found issuance of other cheques and encashment of cash subsequent thereto, in favour of certain other beneficiaries to benefit the A-1 or A-2 as illegal. Thus, the charge in relation to other cheques were not substantially proved and as such were dropped. In such facts and circumstances, this Court is concerned with the charges in relation to issuance of cheques in favour of Bikram Lama (PW-40) and Bimal Tamang (PW-8), which I have discussed at length in the preceding paragraphs, and that clearly



go to establish the charges, as found by the learned trial Judge, proved, are proper, legal and did not warrant interference.

25. The role of A-2 in the entire criminal offence has also been established. A-2, who was working as Managing Director, Sikkim Milk Union during the period, received various letters of A-1 for payment and also it is evident from the letter/note dated 15.01.1997 (Exhibit-105), where it is recorded by A-2 that he had discussed with the Minister and it was directed to issue a cheque of Rs.1.00 lakh in favour of Bimal Tamang (PW-8) of Chakung constituency. The cheque was, it appears, issued in favour of PW-8 on the basis of discussion with A-1. In such scenario, it is difficult to hold that A-2 has acted only on the instruction of his superiors and as such he has not committed any illegal act. Thus, A-2 is rightly found guilty of offence of criminal breach of trust as mentioned in the impugned judgment rendered by the trial court. A-1 and A-2 were convicted for an offence under Sections 403/406 read with Section 120 B (2) IPC.

26. Sections 403 and 406 IPC 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.

Explanation 1 – A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Explanation 2 – A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or



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before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found."

x

x

x

"406. Punishment for criminal breach of trust – Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

27. Section 403 contemplates that 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. Section 406 deals with punishment for criminal breach of trust. The A-1, being the Minister of the concerned Department has dishonestly misappropriated an amount to the tune of Rs.9.50 lakhs to his benefit. A-2 was entrusted with the amount for the purpose of disbursement to the suppliers of milch cows under the Scheme. He committed a criminal breach of trust by issuing the cheques in favour of non-suppliers of cows knowing fully well that the amount so encashed was meant for A-1 through PW-8 and PW-40. Thus, necessary ingredients for both the provisions are available to convict A-1. Section 120B (2) provides for punishment of criminal conspiracy, in this case, to commit an offence of misappropriation of property as well as criminal breach of trust. In so far as conviction under



Section 13 (2) read with Section 13 (1) (d)(ii) of the PC Act is concerned, A-1 was Minister-in-charge and as such indisputably was a public servant. The offence committed by him was not within the ambit of his assignment, as such it was rightly held by learned trial Judge that no sanction was required and he was rightly convicted under the provisions of Section 13 (2) read with Section 13 (1) (d)(ii) of the PC Act. The trial Court has held that A-2 was not a public servant. A-2 was held by learned trial Judge as not a public servant, which is not challenged by the prosecution in the appeal and as such his conviction under Section 13 (2) read with Section 13 (1) (d)(ii) of the PC Act was not justified. However, conviction under Section 406 IPC, sentencing him to undergo simple imprisonment for a period of one year and to pay a fine of Rs.5,000/- was justified. The conviction under Section 120 B (2) read with Section 403/406 IPC to undergo simple imprisonment for a period of six months was also proper. However, on analysis, it appears that no evidence has been found to prove that A-2 has misappropriated the funds or converted a moveable property i.e. money to his own use and as such conviction under Section 403 IPC was not proper and justified. Also since he was held as not a public servant under Section 13 (2) read with Section 13 (1) (d)(ii) of the PC Act is not justified and is, accordingly, set aside.



28. Explanation 1 to Section 403 prescribes that a dishonest misappropriation for a time only is a misappropriation within the meaning of dishonest misappropriation under Section 403. Thus, even if the money was refunded and the State has not suffered any loss, misappropriation for a temporary period also attracts the rigours of provision of Section 403. As such, A-1 was rightly held guilty of an offence committed under Section 403 IPC. Section 405 IPC defines criminal breach of trust. A person who is entrusted with property or within the 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 any legal contract, express or implied indisputably. In the case on hand the amount was transferred to Sikkim Milk Union for a specific purpose. A-1 and A-2 have deliberately used the amount (fund) meant for disbursement to the suppliers of milch cows on prior approval by the Commissioner-cum-Secretary, AH & VS Department, but A-1 in complicity with A-2, got the amount encashed through PW-8 and PW-40 and misappropriated the same to his benefit, as observed earlier. A-2 was instrumental and has committed criminal breach of trust being the custodian or having dominion over the said fund, but it is not established that he has converted or misappropriated the fund to his benefit.



29. Learned Senior Counsel has further submitted that non submission of list of suppliers, done deliberately, attract the provisions of Section 114 (g) of the Indian Evidence Act, to draw adverse inference. In support thereof, he made a reference to the observation made in ***Chittaranjan Choudhury vs. State of Bihar*¹**. In ***Chittaranjan Choudhury***, the accused, a godown clerk of Food Corporation of India, was prosecuted on charge of criminal breach of trust on the allegation that the wheat bags in the truck standing in front of the godown were loaded under the instruction of the accused clerk but the defence plea was that the bags were being loaded as per certain release order and the prosecution failed to produce the release order seized from the custody of the accused and as such was entitled to be acquitted. In such fact, adverse inference can be drawn against the accused, when the release order was seized but not produced. In the facts of the case, where relevant materials are available, mere absence of list of suppliers of cows will not vitiate the case of the prosecution. Thus, the contention deserves to be rejected.

30. In ***Sait Tarajee Khimchand and others*²**, relied on by the Senior Counsel for A-1, the documents exhibited were not

1 AIR 1987 SC 856
2 AIR 1971 SC 1865



proved, wherein it was held that “The irresistible inference arises that the plaintiff’s books would not have supported the plaintiffs.” The facts of the case, being distinguishable is not applicable to the instant case.

31. In ***Chanan Singh vs. State of Haryana***³, referred to by Mr. Bhutia, wherein the issue was as to whether the conduct of the witness in running away from the place of occurrence even though he was not chased or threatened by any one of the assailants, whether this conduct be treated as abnormal. It was held that re-examination cannot be allowed for new matters except with leave of the Court. In the case on hand, certain basic questions were not put to Bikram Lama (PW-40) and an application was made by the prosecution and contested by other side. The application was made stating that two cheques which are required to be identified by PW-40 was not done as it forms part of the record. The leave was granted vide order dated 18.05.2016. Accordingly, he was re-examined to establish the charges.

32. In ***Pannayar vs. State of Tamil Nadu***⁴, the re-examination was sought to get clarification of some doubts created in cross-examination, the Supreme Court held that one

3 AIR 1971 SC 1554
4 AIR 2010 SC 85



cannot supplement examination-in-chief by way of a re-examination and for the first time, start introducing totally new facts, which have no concern with the cross-examination. This is not of any assistance to the facts of the case on hand.

33. The Delhi High Court in ***Sudir Engineering Company vs. Nitco Roadways Ltd.***⁵ referred to by Mr. Bhutia, deals with the manner how the documents be exhibited and approved.

34. In support of his submission that PW-40 was a partisan witness, Mr. Bhutia, refers to ***Ram Ashrit and others vs. State of Bihar***⁶, wherein the Supreme Court observed that the material witness of the prosecution who are either related or otherwise interested in the prosecution, their testimony had to pass the test of close and severe scrutiny before their testimony could be safely acted upon. In the case on hand, PW-40, who was pleaded by the appellants as partisan witness, was closely scrutinized and his testimony was accepted as it found support from various cheques and vouchers.

35. Facts involved in ***Mahavir Singh vs. State of Madhya Pradesh***⁷, relied by Mr. Bhutia are altogether different

5 1995 (34) DRJ 86
6 1981 Cr.L.J. 484
7 (2016) 10 SCC 220



and as such, ratio laid down therein is not applicable to the case on hand.

36. It is further argued by Mr. Bhutia, learned counsel appearing for A-1 that Bikram Lama (PW-40) was some other person, who had supplied cows to Dentam constituency. Letter and cheques were issued in favour of Bikram Lama, supplier of cows at Dentam constituency and as such PW-40 impersonated to receive the money and wrongly stated to have handed over the same to A-1. Bikram Lama in his deposition had clearly stated that he was not a supplier of cows at any place including at Dentam constituency. However, he was given certain envelopes containing letters, wherein A-2 was directed to issue cheques in his favour. Accordingly, cheques were issued and encashed vide cash vouchers and also undertaking was taken by him to A-2. A-2 knew very well that Bikram Lama (PW-40) was the attendant of A-1 and as such he was not a supplier of cow, still money was released in his favour and it was handed over to A-1, as it has been noticed that an amount to the tune of Rs.20,10,000/- was sent by A-1, which has come on record and proved by deposition of PW-7 and PW-14. The defence has not examined the said Bikram Lama of Dentam constituency, as pleaded hereinabove.



37. As a sequel, conviction and sentencing of A-1 by learned trial Court is affirmed and upheld. In so far as A-2 is concerned, as held aforestated, the conviction under Section 403 and under the provisions of Section 13 (1) (d)(ii)/(2) of the PC Act is set aside. However, keeping in view the age of the convict and also the nature of the offence committed by him, the sentence under Section 406 is reduced to six months and payment of fine to the tune of Rs.5,000/- (Rupees five thousand) is affirmed. In default to pay the fine, he shall undergo simple imprisonment for a period of three months. However, conviction under Section 120B (2) read with Section 406 IPC to undergo simple imprisonment for a period of six months is also upheld. The appellants be taken into custody forthwith.

38. The appeal preferred by A-2 is allowed to the above extent. The appeal filed by A-1 is dismissed.

39. All the sentences shall run concurrently. The period of imprisonment, if any, already undergone by the convicts/appellants in connection with this case shall be set off against the aforestated period(s) of imprisonment.

Chief Justice
28.06.2017



Crl. A. No. 01 of 2017
Prem Singh Tamang (Golay) vs. State of Sikkim
Crl. A. No. 02 of 2017
Til Bahadur Gurung vs. State of Sikkim