

Kerala High Court

C. Mukundan vs State on 16 September, 2009

IN THE HIGH COURT OF KERALA AT ERNAKULAM

Crl.Rev.Pet.No. 697 of 2001()

1. C. MUKUNDAN

... Petitioner

Vs

1. STATE

... Respondent

For Petitioner :SRI.S.M.PRASANTH

For Respondent :PUBLIC PROSECUTOR

The Hon'ble MR. Justice P.S.GOPINATHAN

Dated :16/09/2009

O R D E R

P.S.GOPINATHAN, J.

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Crl.R.P.No.697 of 2001  
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Dated this the 16th day of September, 2009

ORDER

The revision petitioners are the accused in C.C.No.257 of 1990 on the file of the Judicial Magistrate of the First Class, Sulthanbathery. The learned magistrate by judgment dated 25/2/1995 found them guilty for offence under section 403 & 409 r/w.34 I.P.C. Accordingly they were convicted for the said offences and were sentenced to rigorous imprisonment for two years and a fine of Rs.2,000/- each with usual default clause for offence under section 409 read with section 34 I.P.C. No separate sentence was awarded for offence under section 403 r/w.34 IP.C. Though the appellants were also prosecuted for offence under section 477(A) I.P.C, they were found not guilty and acquitted.

2. Challenging the above conviction and sentence Criminal Appeal No.32/95 was preferred before the Sessions Judge, Kalpetta. The learned Sessions Judge by judgment dated 24/5/2001 dismissed

the appeal. Assailing the legality, Crl.R.P.No.697 of 2001 correctness and propriety of the above conviction and sentence as confirmed in appeal this revision petition was preferred.

3. The appellants were the President and Secretary of Cheengeri Colony Girijan Service Co-operative Society, Ambalavayal. As such they were authorized to operate two accounts maintained by the society, one at the District Co-operative bank, Wayanad and the other at Service Co-operative Bank, Ambalavayal as per resolution No.13 of the society recorded in page 50 of Ext.P8. According to the prosecution, the revision petitioners were in custody of the pass book, cheque book, cash book, etc. Exts.P1 and P2 are the pass book and cheque book respectively in respect of the account maintained at the District Co-operative Bank, Vayanad. Exts.P4 and P5 are the pass book and cheque book respectively in respect of Account No.1235 maintained at Service Co-operative Bank, Ambalavayal. On 28/10/1985 the revision petitioners who are jointly operating the account drew Ext.P6 cheque from Ext.P2 cheque book and withdrew a sum of Rs.200/- from the District Co-operative Bank. On 29/11/1985 Ext.P7 cheque was drawn from Ext.P5 cheque book and a sum of Rs.5,000/- was drawn from the Service Co-operative Bank, Ambalavayal. The above two amounts Crl.R.P.No.697 of 2001 were not accounted in Ext.P3 cash book and thus committed breach of trust.

4. On the side of the prosecution PWs.1 to 11 were examined and Ext.P1 to P17 were marked. PW.1 is the auditor who audited the account and detected the defalcation. PW.2, the Assistant Registrar of the Co-operative Society sent a copy of the inspection report along with report of misappropriation with a covering letter to the District Superintendent of Police, Wayanad who in turn forwarded the same to the C.I of Police, Sulthanbathery who forwarded the same to the S.I. of Police, Ambalavayal on the basis of which the S.I. registered a case as Crime No.82/89 against the revision petitioner for offence under sections 403, 409, 477 (A) read with section 34 I.P.C.

5. PW.1, who audited the accounts had deposed that she had audited the accounts of the society and that Ext.P9 is the audit report. She had further deposed that revision petitioners were the president and secretary of the above mentioned society. She had proved that Exts.P1 and P4 passbooks, Ext.P2 and P5 cheque books, Ext.P6 & P7 cheques whereby the amount misappropriated were drawn and Ext.P8 minutes books. She had further deposed that in Ext.P3 cash book the amount so Crl.R.P.No.697 of 2001 withdrawn were not entered. Since there is no entry in the cash book, it can be safely concluded that the amount withdrawn by Exts.P6 and P7 cheques were not accounted. There is also no material to show that the amounts so withdrawn were appropriated by the revision petitioners for any purpose of the society. In defence they have no case that the amounts so withdrawn have been either spent for any of the purpose of the society or accounted any where. In the above circumstances, from Ext.P8 it is established beyond doubt that the revision petitioners as president and secretary were authorised to operate Exts.P1 and P4 accounts in the name of the society. On 28/10/1985 and 29/11/1985 by Exts.P6 and P7 cheques, jointly drawn by the revision petitioners for Rs.200/- and Rs.5,000/- respectively, were encashed. Those amounts were not accounted or appropriated for any of the purpose of the society. So, it can be legally presumed that the said amounts were appropriated by the revision petitioner for their own use.

6. The revision petitioners being president and secretary of the co-operative society, they may not come within the category of persons (public servant, banker, merchant or agent, Crl.R.P.No.697 of

2001 etc) mentioned in 409 I.P.C. The second revision petitioner being secretary of the society he may come within the category of persons mentioned in Section 408 I.P.C. But the first revision petitioner being the president he may not come within the purview of the sections 408 I.P.C. also. He would come within the purview of Section 406 I.P.C. Hence the finding of the courts below that the revision petitioners had committed offence u/s.409 I.P.C. is not sustainable. But there are materials to find that the first revision petitioner had committed offence punishable under section 403 and 406 I.P.C. and the second revision petitioner had committed offence punishable under section 403 and 408 I.P.C. The conviction under challenge requires such modification.

7. According to the learned counsel for the revision petitioners the revision petitioners belonging to most backward class were the president and secretary of a Cheengeri Colony Girijan Service Co-operative Society and the offence alleged was committed as early as 1985 and as on that date they were aged 48 and 29 respectively and that the first revision petitioner, then a peon now retired from service and aged 72 years and the second revision petitioner, an agricultural labour now aged 53 Crl.R.P.No.697 of 2001 years and in the circumstances, the sentence awarded is harsh and excessive. Though delay in disposal may not be a ground to determine the sentence, I find some substance in the submission made by the learned counsel for the revision petitioner. Having due regard to the facts and circumstances stated above, I find that as regards the sentence, a modification is necessitated and that a sentence of simple imprisonment till rising of the court and a fine of Rs.3,000/- each for offence under section 403 & 406 as regards the first revision petitioner and under section 403 & 408 as regards the second revision petitioner would meet the ends of justice.

8. In the above circumstances, the revision petition is allowed in part. The conviction under challenge is modified to one under section 403 & 406 as regards the first revision petitioner. As regards the second revision petitioner, it is modified to one under section 403 & 408 I.P.C. Both of them are sentenced to simple imprisonment till rising of court and a fine amount of Rs.3,000/- each for each offence under section 403, 406 & 408 I.P.C. respectively. [Total fine Rs.6,000/- (Rupees Six thousand only) each]. In default of payment of fine amount, the Crl.R.P.No.697 of 2001 revision petitioner shall undergo simple imprisonment for a period of 3 months. The fine amount if any collected shall be paid to the society provided it is now functioning or else it shall be credited to the State.

P.S.GOPINATHAN, JUDGE Skj.