Supreme Court of India
Jaikrishnadas Manohardas Desai ... vs The State Of Bombay on 16 March, 1960
Equivalent citations: AIR 1960 SC 889, (1960) 62 BOMLR 893, 1960 3 SCR 319
Author: Shah
Bench: J Shah, K Wanchoo, J Imam
JUDGMENT Shah, J.

1. At a trial held with the aid of a common jury in Case No. 38 of the Vth Session 1955 before the Additional Sessions Judge, City Court, Greater Bombay, the two appellants were convicted of offences under s. 409 read with s. 34 of the Indian Penal Code. The Additional Sessions Judge sentenced the first appellant to suffer rigorous imprisonment for five years and the second appellant to suffer rigorous imprisonment for four years. In appeal, the High Court of Bombay reviewed the evidence, because in the view of the Court, the verdict of the jury was vitiated on account of a misdirection on a matter of substantial importance, but held that the conviction of the two appellants for the offence under s. 409 read with s. 34 of the Indian Penal Code was, on the evidence, not liable to be set aside. The High Court accordingly confirmed the conviction of the two appellants but reduced the sentence passed upon the first appellant to rigorous imprisonment for three years and the sentence against the second appellant to rigorous imprisonment for one year. Against the order of conviction and sentence, the appellants have appealed to this court with special leave.

2. The facts which gave rise to the charge against the two appellants are briefly these :

On June 15, 1948, the Textile Commissioner invited tenders for dyeing Pugree Cloth. The Parikh Dyeing and Printing Mills Ltd., Bombay - hereinafter to be referred to as the company - of which the first appellant was the Managing Director and the second appellant was a Director and technical expert, submitted a tender which was accepted on July 27, 1948, subject to certain general and special conditions. Pursuant to the contract, 2,51,059 3/4 yards of cloth were supplied to the company for dyeing. The company failed to dye the cloth within the stipulated period and there was correspondence in that behalf between the company and the Textile Commissioner. Approximately 1,11,000 yards out of the cloth were dyed and delivered to the Textile Commissioner. On March 25, 1950, the company requested the Textile Commissioner to cancel the contract and by his letter dated April 3, 1950, the Textile Commissioner complied with the request, and cancelled the contract in respect of 96,128 yards. On November 20, 1950, the contract was cancelled by the Textile Commissioner in respect of the balance of cloth and the company was called upon to give an account without any further delay of the balance undelivered and it was informed that it would be held responsible for "material spoiled or not accounted for". On December 4, 1950, the company sent a statement of account setting out the quantity of cloth actually delivered for dyeing, the quantity of cloth returned duly dyed and the balance of cloth, viz., 1,32,160 yards remaining to be delivered. Against the cloth admitted by the company remaining to be delivered, it claimed a wastage allowance of 2,412 yards and admitted liability to deliver 1,29,748 yards lying with it on Government account.

3. It appears that about this time, the company was in financial difficulties. In December 1950, the first appellant left Bombay to take up the management of a factory in Ahmedabad and the affairs of the company were managed by one R. K. Patel. In June 1952, an application for adjudicating the two appellants insolvents was filed in the Insolvency Court at Ahmedabad. An insolvency notice was also taken out against the two appellants at the instance of another creditor in the High Court at Bombay. Proceedings for winding up the company were commenced in the High Court at Bombay. In the meantime, the mortgagee of the machinery and factory of the company had entered into possession under a covenant reserved in that behalf, of the premises of the factory of the company.

4. The Textile Commissioner made attempts to recover the cloth remaining undelivered by the company. A letter was posted by the Textile Commissioner on April 16, 1952, calling upon the company to deliver 51,756 yards of cloth lying with it in bleached condition to the Chief Ordnance Officer, Ordnance Depot, Sewri, but the letter was returned undelivered. It was ultimately served with the help of the police on the second appellant in October 1952. Thereafter on November 7, 1952, another letter was addressed to the company and the same was served on the second appellant on November 25, 1952. By this letter, the company was reminded that 1,35,726 3/4 yards of cloth were lying with it on account of the government and the same had to be accounted for, and that the instructions to deliver 51,756 yards to the Chief Ordnance Officer, Ordnance Depot, Sewri, had not been attended to. The Textile Commissioner called upon the company to send its representatives to "clarify the position" and to account for the material. After receiving this letter, the second appellant attended at the office of the Textile Commissioner and on November 27, 1952, wrote a letter stating that "the main factors involved in not delivering the goods in finished state was that the material was very old", was "dhobi bleached in different lots", was "bleached under different conditions and therefore unsuitable for vat colour dyeing in heavy shades", that it varied in length, weight, and finish and had "lost affinity for vat colour dyeing". It was also stated that the company had in dyeing the basic material, suffered "huge losses" estimated at Rs. 40,000. It was then stated : "We are, therefore, however prepared to co-operate with the Government and are willing to make good the government's bare cost. Please let us know the detail and the actual amount to be deposited so that we may do so at an early date. We shall thank you if we are given an appointment to discuss the matter as regards the final amount with respect to the balance quantity of the basic material.

5. On December 29, 1952, the premises of the company and the place of residence of the appellants were raided, but no trace of the cloth was found. A complaint was then filed with the police charging the two appellants with criminal breach of trust in respect of 1,32,404 1/2 yards of cloth belonging to the Government.

6. There is no dispute that approximately 1,30,000 yards out of the cloth entrusted to the company by the Textile Commissioner for dyeing has not been returned. By its letter dated December 4, 1950, the company admitted liability to deliver 1,29,748 yards of cloth, but this cloth has not been returned to the Textile Commissioner in spite of repeated demands. That the appellants, as directors of the company had dominion over that cloth was not questioned in the trial court. The plea that there were other Directors of the company besides the appellants who had dominion over the cloth has been negatived by the High Court and in our judgment rightly. Direct evidence to establish misappropriation of the cloth over which the appellants had dominion is undoubtedly lacking, but to

establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion, even when a duty to account is imposed upon him, but where he is unable to account or renders an explanation for his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made.

7. In this case, on a search of the factory on December 29, 1952, the cloth remaining to be delivered by the company was not found. At the trial, the appellants sought to explain the disappearance of the cloth from the factory premises where it was stored, on the plea that it was old and was eaten up by white-ants and moths, and had been thrown away as rubbish. This plea of the appellants was not accepted by the High Court and we think rightly. No information was given at any time to the Textile Commissioner after December 4, 1950, that the cloth had been eaten up by white-ants and moths, and was therefore thrown away or otherwise destroyed. Nor was any evidence led in support of the plea by the appellants.

8. In this court, counsel for the first appellant contended that failure to return the cloth may give rise to a civil liability to make good the loss occasioned thereby, but in the circumstances of the case, the first appellant cannot be found guilty of the offence of criminal breach of trust. Counsel submitted that the first appellant had left Bombay in 1950 and had settled down in Ahmedabad and was attending to a factory in that town, that thereafter the first appellant was involved in insolvency proceedings and was unable to attend to the affairs of the company in Bombay, and if, on account of the pre-occupation of the first appellant at Ahmedabad, he was unable to visit Bombay and the goods were lost, no criminal misappropriation can be attributed to him. But the case pleaded by the appellant negatives this submission. The first appellant in his statement before the trial court admitted that he often went to Bombay even after he had migrated to Ahmedabad and that he visited the mill premises and got the same opened by the Gurkha watchman and he found that the heap of cloth lying in the mill was getting smaller every time he visited the mill and on inquiry, he was told by the watchman that every day one basketful of sweepings was thrown away. He also stated that he was shown several places in the compound of the factory where pits had been filled up with these sweepings, and that he found a small heap lying by the side of the "Tulsipipe gutter" and also in the warehouses in the mill premises. It is clear from this statement and other evidence on the record that even after he migrated to Ahmedabad, the first appellant was frequently visiting the factory at Bombay. The evidence also discloses that meetings of Directors were held from time to time, but the minutes of the Directors' meetings have not been produced. The books of account of the company evidencing disbursements to the Directors of remuneration for attending the meetings and the expenses for the alleged collection and throwing away of the sweepings have not been produced. It is admitted by the first appellant that the letter dated November 27, 1952, was written by the second appellant under his instructions. In his statement at the trial, the first appellant stated

that he was informed of the letter dated November 26, 1952, from the Textile Commissioner and that he could not attend the office of that officer because he was busy attending to the insolvency proceedings and that he deputed the second appellant to attend the office and to explain and discuss the position. He then stated, "We had informed the Commissioner that the company was prepared to pay for the cloth remaining after deducting the amount claimed as damages". The letter dated November 27, 1952, was evidently written under the direction of the first appellant and by that letter, liability to pay for the cloth after certain adjustments for losses alleged to be suffered by the company in carrying out the contract was admitted. By the letter dated December 4, 1950, liability to deliver the cloth was admitted and by the letter dated November 27, 1952, liability to pay compensation for the loss occasioned to the Government was affirmed. The appellants who were liable to account for the cloth over which they had dominion have failed to do so, and they have rendered a false explanation for their failure to account. The High Court was of the opinion that this false defence viewed in the light of failure to produce the books of account, the stock register and the complete absence of reference in the correspondence with the Textile Commissioner about the cause of disappearance established misappropriation with criminal intent.

9. Counsel for the first appellant contended that probably the goods passed into the possession of the mortgagees of the assets of the company, but on this part of the submission, no evidence was led in the trial court. Counsel for the first appellant, relying upon the observations in Shreekantiah Ramayya Munipalli v. The State of Bombay , also contended that, in any event, a charge under s. 409 read with s. 34 of the Indian Penal Code cannot be established against the first appellant unless it is shown that at the time of misappropriation of the goods, the first appellant was physically present. But the essence of liability under s. 34 is to be found in the existence of a common intention animating the offenders leading to the doing of a criminal act in furtherance of the common intention and presence of the offender sought to be rendered liable under s. 34 is not, on the words of the statute, one of the conditions of its applicability. As explained by Lord Sumner in Barendra Kumar Ghose v. The King Emperor ((1924) L.R. 52 I.A. 40, 52), the leading feature of s. 34 of the Indian Penal Code is 'participation' in action. To establish joint responsibility for an offence, it must of course be established that a criminal act was done by several persons; the participation must be in doing the act, not merely in its planning. A common intention - a meeting of minds - to commit an offence and participation in the commission of the offence in furtherance of that common intention invite the application of s. 34. But this participation need not in all cases be by physical presence. In offences involving physical violence, normally presence at the scene of offence of the offenders sought to be rendered liable on the principle of joint liability may be necessary, but such is not the case in respect of other offences where the offence consists of diverse acts which may be done at different times and places. In Shree Kantiah's case (supra), misappropriation was committed by removing goods from a Government depot and on the occasion of the removal of the goods, the first accused was not present. It was therefore doubtful whether he had participated in the commission of the offence, and this court in those circumstances held that participation by the first accused was not established. The observations in Shree Kantiah's case (supra) in so far as they deal with s. 34 of the Indian Penal Code must, in our judgment, be read in the light of the facts established and are not intended to lay down a principle of universal application.

10. The High Court has found that the two appellants were liable to account for the cloth over which they had dominion and they failed to account for the same and therefore each had committed the offence of criminal breach of trust. The High Court observed : "In such a case, if accused Nos. 1 and 2 (Appellants 1 & 2) alone were concerned with the receipt of the goods, if they were dealing with the goods all the time, if they were receiving communications from the Textile Commissioner's office and sending replies to them, and if the part played by each of them is apparent from the manner in which they are shown to have dealt with this contract, then it is a case of two persons entrusted with the goods and a breach of trust obviously being committed by both of them".

11. It was submitted that the High Court erred in finding the appellants guilty of offences under s. 409 of the Indian Penal Code when the charge framed against them was one under s. 409 read with s. 34 of the Indian Penal Code. A charge framed against the accused person, referring to s. 34 is but a convenient form of giving notice to him that the principle of joint liability is sought to be invoked. Section 34 does not create an offence; it merely enunciates a principle of joint liability for criminal acts done in furtherance of the common intention of the offenders. Conviction of an accused person recorded, relying upon the principle of joint liability, is therefore for the offence committed in furtherance of the common intention and if the reasons for conviction establish that the accused was convicted for an offence committed in furtherance of the common intention of himself and others, a reference in the order recording conviction to s. 34 of the Indian Penal Code may appear to be a surplusage. The order of the High Court recording the conviction of the appellants for the offence under s. 409 of the Indian Penal Code is therefore not illegal.

12. It was submitted for the first appellant that the sentence passed against him was unduly severe, and that, in any event, no distinction should have been made between him and the second appellant in the matter of sentence. It is evident on the findings accepted by us that property of considerable value has been misappropriated by the first appellant. He was the Managing Director of the company and primarily, he had dominion over the property entrusted to the company. The second appellant was, though a Director, essentially a technician. Having regard to these circumstances, if the High Court has made a distinction between the two appellants, we ought not to interfere with the sentence, which by itself cannot be said to be excessive.

13. The appeal fails and is dismissed.

14. Appeal dismissed.