Supreme Court of India
Baijnath Gupta And Others vs The State Of Madhya Pradesh on 7 May, 1965
Equivalent citations: 1966 AIR 220, 1966 SCR (1) 210
Author: A Sarkar
Bench: Sarkar, A.K.

PETITIONER:
BAIJNATH GUPTA AND OTHERS

Vs.

RESPONDENT:
THE STATE OF MADHYA PRADESH

DATE OF JUDGMENT:
07/05/1965

BENCH:
SARKAR, A.K.
BENCH:
SARKAR, A.K.
HIDAYATULLAH, M.
RAMASWAMI, V.

CITATION:
1966 AIR 220 1966 SCR (1) 210
CITATOR INFO :
RF 1967 SC 776 (6)
R 1970 SC1661 (4)
R 1979 SC1841 (18,27,28)
R 1983 SC 610 (7)

ACT:
Code of Criminal Procedure (Act 5 of 1898), s. 197(1)-Sanction for prosecution of public servant for offence committed in the discharge of official duty-Public servant charged under ss. 477A and 409 I.P.C.-Sanction whether required.

HEADNOTE:
G was Chief Accountant-cum-Office Superintendent in the Electric Supply Undertaking run by the Government of the erstwhile state of Madhya Bharat. He was prosecuted along with K, an assistant Superintendent in the same office, for criminal breach of trust of money which had been entrusted to them. They were also charged with making false entries in the accounts. The prosecution case was that sums amounting to Rs. 21,450 were falsely shown in the accounts as having been sent to the treasury but were not actually deposited there. Further, a sum of Rs. 10,000 had been

falsely shown on the debit side to cover the extraction of that sum by K, the said entry having been later on cancelled by G. G was convicted by the trial court under s. 477A read with s. 109 and under s. 409 of the Indian Penal Code. The High Court dismissed his appeal By special leave be appealed to this Court.

It was contended on behalf of the appellant that he was a public servant and the alleged offences, if committed by him, were committed in the discharge of his official duty and therefore his trial and conviction for the alleged offences was bad on account of prior sanction not having been obtained under s. 197(1) of the Code of Criminal Procedure.

HELD : Sanction under s. 197(1) of the Code of Criminal Procedure was necessary for the prosecution of the appellant for the offence under s. 477A/199 of the Indian Penal Code because it was committed within the scope of official duties though in dereliction of them. [223F]

Per Hidayatullah and Ramaswami, JJ. It is not every offence committed by a public servant that requires sanction for prosecution under s. 197(1) of the Criminal Procedure Code, nor every act done by him while he is engaged in the performance of his official duties; but if the art complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of his office then sanction would be necessary. It is the quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by s. 197 of the Criminal Procedure Code will be attracted. [223 A-C]

Applying the principle to the present case the sanction of the State Government was not necessary for the prosecution of the appellant under s. 409 of the Indian Penal Code because the act of criminal misappropriation was. not committed by the appellant while he was acting or purporting to act in discharge of his official duties and that offence had no direct connection with the duties of the appellant as a public servant, and the official status of the appellant only furnished the appellant with an occasion or an opportunity of committing the offence. [223E]

Satwant Singh v. State of Punjab, [1960] 2 S.C.R. 89, followed.

211

Hori Ram Singh v. Emperor, [1939] F.C.R. 159, Gill v. The King, [1948] F.C.R. 19 and Om Parkash Gupta v. State of U.P. [1957] S.C.R. 423, relied on.

Amrik Singh v. State of Pepsu, [1955] 1 S.C.R. 1302, referred to.

Per Sarkar, J. Whether an offence was committed in the course of official duty will depend on the facts of each case. The test is whether the public servant, if challenged, can reasonably claim that what he did he did in virtue of his office. [213 G-H; 215 C-D]

Hori Ram singh v. The Crown, [1939] F.C.R. 159, Shreekantiah Ramayya Munipalli v. State of Bombay, [1955] 1 S.C.R. 1177 and Gill v. King, [1948] F.C.R. 19, referred to.

The facts of the present case could not be distinguished from those in Amrik Singh's case. The appellant when charged with the defalcation of Rs. 21,450 could have reasonably said that he sent the amounts to the treasury as the accounts showed, and that would have been an act in the performance of his official duty. In respect of the sum of Rs. 10,000 he could similarly have said that he spent them in the discharge of his duty. Whether he had actually done that or not would be irrelevant for deciding the necessity for sanction. [215B, D, E-F]

The trial and conviction of the appellant under s. 409 Indian Penal Code for defalcation of the two sums of Rs. 10,000 and Rs. 21,450 was therefore bad in the absence of the necessary sanction. [215 F-G]

Amrik Singh v. State of Pepsu, [1955] 1 S.C.R. 1302, followed.

Om Prakash Gupta v. State of U.P. [1957] S.C.R. 423 and K. Satwant Singh v. State of Punjab, [1960] 2 S.C.R. 89, distinguished.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeals Nos. 77, 162 and 163 of 1962 and 74 of 1965.

Appeals by special leave from the judgments and orders dated December 22, 1961 of the Madhya Pradesh High Court (Indore Bench) at Indore in Criminal Revisions Nos. 262, 263, 265 and 266 of 1960.

A. S. R. Chari, and Ravinder Narain, for the appellant (in Cr. A. Nos. 66/62 and 74/65).

W. S. Barlingay and A. G. Ratnaparkhi, for the appellant (in Cr. As. Nos. 162 and 163/62).

I. N. Shroff for the respondent (in all the appeals). Sarkar, J. delivered a partly dissenting Opinion. The Judg- ment of Hidayatullah and Ramaswami, JJ. was delivered by Ramaswami, J.

Sarkar J. I have had the advantage of reading the judgment to be delivered by my learned brother Ramaswami in these four appeals. I agree with him that the appeals by the appellant Kale, being Criminal Appeals Nos. 162 of 1962 and 163 of 1962 should be dismissed and have nothing to say in regard to these appeals.

The other two appeals, namely, criminal Appeals Nos. 77 of 1962 and 74 of 1965 are by the appellant Gupta against his conviction under s. 477A, read with S. 109, and S. 409 of the Indian Penal Code. Ramaswami J. Is of the opinion that the conviction tinder S. 477A, read with S. 109, cannot be

sustained as sanction to start the proceedings had not been duly obtained under s. 1.97 of the Code of Criminal Procedure. This is also my view. In regard to the conviction for the other offence, his opinion is that sanction was not necessary and so, that conviction should be

-upheld. With this view I am unable to agree and in this judgment I will deal only with this matter. The appellants Gupta and Kale were respectively the Chief Accountant-cum-Office Superintendent and Assistant Cashier of the MAdhya Bharat Electric Supply, an enterprise run by the Government of Madhya Bharat. It Is not disputed that Gupta was a public servant who was not removable from his office save by the sanction of the Madhya Bharat government. The only point is whether in regard to the charge under s. 409 he was accused of an offence alleged to have been committed by him while acting or Purporting to act in the discharge of his official duty. If he was, then in view of S. 197 of the Code of Criminal Procedure no court could take cognizance or the offence without the sanction of the government of Madhya Bharat and his conviction under s. 409 of the Indian Penal ('ode cannot be upheld. It appears that in fact a sanction under S. 197 of the Code of Criminal Procedure was obtained but IS this was done after cognizance had been taken, it was of no use. It is clear from the language of S. 1 97 that the sanction has to be taken before cognizance has been taken. This indeed is not disputed. It is also clear from the facts that cognizance of the case had been taken on April 6, 1953 when witnesses were summoned on a future date so that the matter might be inquired into by the magistrate : see Hori Ram. Singh v. The Crown(1), R. R. Chari v. The State of Uttar Pradesh(2) and Gopal Marwari v. King Emperor(3). The sanction however was obtained on July 1, 1953. 1, therefore, have to proceed on the basis that the sanction had not been obtained.

Criminal Appeal No. 77 of 1962 arises out of a criminal mis- appropriation by Gupta of Rs. 10,000 and Criminal Appeal No. 74 of 1965 out of a similar misappropriation of Rs. 21,450, both of which sums were entrusted to him in his official capacity. The (1) [1939] F.C.B. 159, 179. (2) [1951] S.C.R. 312. (3) [1943] I.L.P,. 22 Pat. 433.

chalan in the first case was in these terms : "Both the accused in conspiracy with each other have embezzled an amount of Rs. 10,000 on 25-8-50 from this Government money and made false entries of receipt and expenditure in the concerned Government registers for concealment of this embezzlement. From investigation, doing of an offence under ss. 409, 477A and 34 Indian Penal Code is proved against both the aforesaid accused. Hence the charge sheet is submitted for awarding sentences according to law." The chalan in the other case states, "Both these accused in conspiracy with each other have embezzled in amount of Rs. 21,133-5-0 on 29-9-50 and expenditure of Rs. 1,450 is shown and it is written there that this amount has been remitted in the treasury but actually Rs. 1,133-5-0 were remitted in the treasury on, that date and the balance of Rs. 21,450 was embezzled and false entries were made in the account books. From an investigation, the offence under Sections 409, 477A and 34 Indian Penal Code is found and the Chalan is submitted." There is some confusions in the wording of this chalan but it is not in dispute that what was meant was that Rs. 21,450 had been embezzled by showing two sums of Rs. 21,133-5-0 and Rs. 1,450-0-0, totaling Rs. 22,583-5-0, as having been sent to the treasury while actually only Rs. 1,133-5-0 had been sent. By "both the accused" the chalans referred to Kale and Gupta but it is not in dispute that in regard to kale no sanction under s. 197 was necessary. Now the only question is whether in respect of the charges under s. 409 of the Indian Penal Code, Gupta can be said to have been "accused of any

offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty". It is said on behalf of the prosecution that in respect of an offence of criminal breach of trust no sanction is necessary as such an offence can never be said to be so committed because it is no part of the official duty of a public servant to misappropriate moneys of his employer. With that proposition, I am unable to agree. It was rejected by this Court in Shreekantiah Ramayya Munipalli v. The State of Bombay(1) and Amrik Singh v. The State of PEPSU(2).

I think on the authorities as they stand, it is now clearly established that whether an offence was committed in the course of official duty will depend on the facts of each case. In Hori Ram Singh's case(1) Sulaiman J. stated at p. 180, "The question whether a criminal breach of trust can be committed while purporting to, (1) [1955] 1 S.C.R. 117 (2) [1955] 1 S.C.R. 1302. (3) [1939] F.C.R. 159.

act in execution of duty is not capable of being answered hypothetically in the abstract, without any reference to the actual facts of the case." In the same case, in discussing the test to be applied in determining whether or not an act is one purported to be done in execution of duty as a public servant, Varadachariar J. observed at p. 187, "I would observe at the outset that the question is substantially one of fact, to be determined with reference to the act complained of and the attendant circumstances; it seems neither useful nor desirable to paraphrase the language of the section in attempting to lay down hard and fast tests." In Gill v. King,(1) Lord Simonds in delivering the judgment of the Board observed that much assistance was to be derived from the judgment of the Federal Court in Hori Ram Singh's case(2) and added, "The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office." In Shreekantiah Ramayya Munipalli's case(3), Bose J. in delivering the judgment of this Court fully agreed with the observations of Varadachariar J. which I have earlier quoted. That case concerned with a charge under s. 409 as the present case is. The accused there had been charged with dishonest misappropriation of government properties by selling them with intent to pocket the sale proceeds. Bose J. held on the facts of that case that the misappropriation was an act which must be said to have been done in the purported discharge of official capacity. This case shows beyond doubt that it cannot be laid down as an invariable proposition that an offence under s. 409 can never be committed by a public servant while acting in the discharge of his official duty.

The case nearest to the present is Amrik Singh v. State of pepsu(4). There a public officer entrusted with moneys for payment of wages was charged with defalcation of a sum of Rs. 51 which he showed as paid to a khalasi (menial servant) named Parma on account of wages and which was vouched by a thumb impression purporting to be of the payee but which amount it was alleged had not been paid to the khalasi because there was no one of that name and the thumb impression was of the accused himself who had misappropriated the money to his own use. This Court held that a sanction was necessary in order to prosecute the public servant on a charge of this kind. It was observed at p. 1310, "If what appears on the face of the roll is true--and whether it is true or not is not a matter relevant at the stage of sanction--then the acts with which the appellant is charged fall within the scope (1) [1948] F.C.R: p.19,40, (3) [1955] 1 S.C.R. 1177. (2) [1939] F.C.R. 159. 4) [1955] 1 S.C.R. 1302.

of his duties and can be justified by him as done by virtue of his office. Clearly, therefore, sanction was required under s. 197(1) of the Code of Criminal Procedure before the appellant could be prosecuted under s. 409 and the absence of such sanction is fatal to the maintainability of the prosecution. The conviction should, therefore, be quashed." I find it impossible to distinguish the facts of that case from the present. Regarding the defalcation of Rs. 21,450 the chalan that I have already quoted would show that the defalcation had been committed by the making of certain false entries in the books by Gupta and Kale acting in conspiracy. Whether these entries correct or not is not a matter for investigation when the question of the necessity for sanction arises. Applying the test down by the Privy Council in Gill's case(1) the necessity for had to be determined by putting the question, could the accused have reasonably stated that what he had done, he had done 'the course of his official duty? In the present case when charged with the defalcation of that amount, he could have reasonably said that lie had sent the amounts to the treasury as the accounts showed and that would have been. an act done in the course of his official duty. The other amount of Rs. 10,000 was entered in the accounts on the expenditure side with a note "(diff. of 48)". This entry appears at a later stage to have been crossed out but in arriving at the total of the expanses made on that date the amount of it had been included. Here also the appellant Gupta could reasonably have said that he had spent the sum of Rs. 10,000 in the course of his official duty. Whether he had actually done that or not would be irrelevant for deciding the necessity for the sanction. In view of the decision in Amrik Singh's case(1) which seems to have applied the principle deducible from authoritative decisions on this question, I think I must hold that the conviction of the appellant Gupta for defalcation of the two sums of Rs. 10,000 and Rs. 21,450 was bad in the absence of the necessary sanction.

Mr. Shroff for the respondent said that the decisions of this Court in Om Prakash Gupta v. State of U.P.(3) and K. Satwant Singh v. State of Punjab (4) showed that the conviction of the appellant Gupta under s. 409 even in the absence of the sanction was perfectly valid. I am unable to accept this contention. The first of these cases dealt with a charge under s. 409 and it was (1) [1948] F.C.R. p. 194).

(3) [1957] S.C.R. 423.

(2) [1955] 1 S.C.R. 13(2.

(4) [1960] 2 S.C.R. 89.

observed at P. 437, "Quite a large body of case law in all the High Courts has held that a public servant committing criminal breach of trust does not normally act in his capacity as a public servant." I do not think that this observation at all helps. All that it says is that normally an offence under S. 409 cannot be said to have been committed by a public servant in the discharge of his official capacity. This clearly implies that there may be cases where an offence under that section may be committed by a public servant in the discharge of his official duties. The fact that on the facts of that case it was held that criminal breach of trust there alleged had not been done in the course of official duty would not show that on the facts of the present case the same view must be taken. It is of some interest to point out that learned counsel for the respondent did not contend that the facts

of that case were the same as of this case.

K. Satwant Singh's case(1) was concerned with the offence of cheating under S. 420 of the Indian Penal Code. Inam J. in delivering the judgment of this Court in that case approved of the test formulated in Amrik Singh's case(1) that the offence ,charged must have necessary connection with the performance of the duties of a public servant. What had happened there was that Satwant Singh, a contractor, had entered into conspiracy with a government official, Henderson, and obtained from him a false certificate of work done by him for the government and on the basis of it received money from the government by cheating the government. As the two had been tried jointly, it was contended that the charge against Henderson was in respect of an act done in the course of his official duty in issuing the certificate and the trial was bad as no sanction had been obtained. Imam J. pointed out that Henderson had not been prosecuted for any offence concerning his act of certification and had been prosecuted for abetting the appellant in the act of cheating. All that the case decided was that that abetment by Henderson was not an offence committed by him while acting in the discharge of his official duty and, therefore, S. 197 had no application. It seem.,; to me that the decision might well have been otherwise if Henderson had been prosecuted for a false certificate given by him. I find nothing in these two cases which would lead me to the view that the criminal misappropriation alleged in the present case had not been committed by Gupta while purporting to and in the discharge of his official duty. Neither do they furnish any reason for distinguishing Amrik Singh's case(2). As I have (1) [1960] 2 S.C.R. 89.

(2) [1955] 1 S.C.R. 1302 already said, on the facts these two cases are quite distinct from the case in hand.

I would allow both the appeals of the appellant Gupta on the sound that his conviction under s. 409 also is unsustainable in the absence of the sanction.

Ramaswami, J. Criminal Appeals nos. 77 of 1962 and 74 of 1965 are brought, by special leave, on behalf of Gupta against the judgment of the High Court of Madhya Pradesh, Indore Bench, Indore dated December 22, 1961 dismissing Criminal Revision Applications nos. 262 and 263 of 1960 and affirming the convictions and sentences imposed on Gupta under ss. 409 and 477-A of the Indian Penal Code. Criminal Appeals nos. 162 and 163 of 1962 are brought by special leave on behalf of Kale against the judgment of the High Court of Madhya Pradesh Indore Bench,, Indore dated December 22, 1961 dismissing Criminal Revision Applications nos. 265 and 266 of 1960 and maintaining convictions of the appellant under ss. 477-A and 409/109 of the Indian Penal Code. The appellant-Gupta-was charged with having committed criminal breach of trust of a sum of Rs. 21,450 on September

29. 1950 and of a sum of Rs. 10,000 on August 25, 1950. In respect of these two items he was also charged of having abetted the offence of falsification of accounts said to have been committed by the appellant Kale. With regard to these two items appellant Kale was charged under s. 477-A for falsification of accounts and under ss. 409/109 for abetment of criminal breach of trust committed by appelant--Gupta. The Indore Electric Power House was a Government concern it the time the alleged offence was committed. The appellant--Gupta-entered the service of the Power House as a

Clerk in the year 1933. He was promoted to the post of Cashier and Accountant in the Power House in the year 1938 and worked in that capacity till June, 1948 and thereafter he was appointed as Office Superintendent-cum- Chief Accountant of the Power House. At that time Shri Sibhal was the Chief Electrical Engineer and General Manager of the Power House while Shri Narsingh Venkatesh Murti was the Assistant General Manager. Appellant Kale was working as a Cashier in the relevant period. In the Power House there was a practice of having two daily account-books, one rough and the other fair and according to the practice, the daily transactions of receipt of cash and expenditure used to be entered in the rough cash book by the Cashier, Kale. Each day he would strike the balance and the appellant Gupta and the Assistant General Manager Murti would check and countersign the entries in the rough cash-books. A part of the cash balance used to be deposited in the Government Treasury and the remaining cash used to be kept in the safe of the Power House under lock and key. According to the prosecution case the key of the safe always remained with appellant Gupta and he had the dominion over the cash in the sale. Accounts in the rough cash-book were written by appellant Kale and, as already stated, the accounts were checked and countersigned by appellant Gupta every day. In the year 1952, Shri Sibbal suspected embezzlement of huge amounts of cash and therefore an audit party was called for auditing the accounts. It was found that in all, a sum of Rs. 77,000 and odd was un- accounted for and some of the cash-books were not even written. The matter was accordingly reported to the police. The prosecution case was that though the rough cash-book showed that on September 29, 1950 a sum of Rs. 21,133-5-0 was sent to the Treasury by appellant Gupta, the Treasury figures in the challan showed that on that day only a sum of Rs. 1,133-5-0 was deposited into the Treasury and thus a sum of Rs. 20,000 was dishonestly misappropriated. Similarly, another item of Rs. 1,450 was falsely shown in the said cash-book of the same date as having been deposited into the treasury though in fact it was not so deposited and thus this item was also misappropriated. Hence it was alleged that a sum of Rs. 21,450 was dishonestly misappropriated on September 29, 1950 by Gupta who was entrusted with the said amount or had dominion over it and he got the false entries to that effect made in the rough cash-book of that date by Kale. With regard to the other item of Rs. 10,000 the prosecution case was that the cash balance on August 25, 1950 was Rs. 63,894-9-6 but the entry of Rs. 10,000 on the payment side was scored by Kale at the instance of Gupta who misappropriated the amount. The false entry was made by Kale to cover the abstraction of Rs. 10,000 and later cancelled by Gupta. It therefore, remained unaccounted for. It was also alleged that in respect of this amount, Gupta committed criminal breach of trust and abetment of the offence of the falsification of accounts. The charge against Kale was that with regard to both Rs. 21,450 and Rs. 10,000 he wilfully made the false entries in the daily cash book and that he also abetted criminal breach of trust committed by Gupta. It was stated by Gupta in defence that he was not in possession of the safe or its keys or the cash of the Power House at the relevant time. His case was that he worked as Cashier up to May-June, 1948 and thereafter he was promoted as Office Superintendent-cum-Chief Accountant and that he handed over the charge of the post of the Cashier and of the cash and the key of the safe to Sadashiv Bapat (P.W. 5) and after that he had nothing to do with the cash of the Power House. He also denied having abetted the offence of falsification of account said to have been committed by Kale. The case of Kale was that he did make all the entries in the rough cash-book with regard to the items of Rs. 21,450 and Rs. 10,000 but Kale alleged that he made those entries at the instance of appellant Gupta who was his Office Superintendent. It was pleaded by Kale that he did not abet appellant Gupta in the criminal misappropriation of the amounts. The trying Magistrate held that appellant Gupta was in charge of

the cash, the safe and its key at the relevant period and that he was entrusted or had dominion over the cash of the Power House and that he committed criminal breach of trust in regard to the two sums of Rs. 21,450 and Rs. 10,000. He also held that in respect of these two sums appellant Gupta abetted the offence of falsification of accounts under S. 477-A, Indian Penal Co& by appellant Kale who made false entries in the rough Cash- Book. Accordingly he convicted appellant Gupta under S. 409 and 477-A/109, Indian Penal Code and sentenced him on each of the two counts in both the cases. With regard to appellant Kale the trying Magistrate rejected his defence that he made entries in the rough cash-book mechanically without any fraudulent intention. His finding was that Kale made the entries in the cash-book wilfully with the intention to defraud the Power House and that he abetted appellant Gupta in the criminal misappropriation. He accordingly convicted Kale under ss. 477-A and 409/ 109, Indian Penal Code in the two criminal cases for the two respective amounts of Rs. 21,450 and Rs. 10,000. Both Kale and Gupta preferred appeals against their convictions in the Court of the Sessions Judge, Indore but the appeals were dismissed by the First Additional Sessions Judge, Indore who maintained the convictions with regard to the two items of the cash-book already mentioned. The two appellants thereupon filed revision applications to the High Court of Madhya Pradesh which dismissed the revision applications and confirmed the conviction and sentence imposed upon the appellants.

Criminal Appeals Nos. 77 of 1962 & 74 of 1965 The principal question of law arising in these two appeals is whether the conviction of the appellant--Gupta-under ss. 409 and 477-A of the Indian Penal Code is illegal as sanction of the State Government was not given to his prosecution under the up.

CI/65-15 provisions of s. 197 of the Criminal Procedure Code. Section 197(1) of the Criminal Procedure Code states as follows :

> "197. (1) When any person who is a Judge within the meaning of section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a 'State Government' or 'the Central Government', is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the 'previous sanction-
>
> (a) in the case of a person employed in connection with the affairs of the Union, of the Central Government; and
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> (b) in the case of a person employed in connection with the affairs of a State, of the State Government.".

Hori Ram Singh v. Emperor(1) is a decision of the Federal Court on the necessity for sanction under S. 270 of the Government of India Act, 1935, which is similar to s. 197(1) of the Code of Criminal Procedure in its purpose and intent. The facts in that case were that a Sub-Assistant Surgeon was charged under s. 409 with having dishonestly removed certain medicines from a hospital which was under his charge, to his own residence, and under s. 477-A, with having failed to enter them in the

stock book. The sanction of the Government had not been obtained 'or the prosecution under s. 270 of the Government of India Act. The question for decision in that case was whether such sanction was necessary. It was held by the Federal Court that the charge under s. 477-A required sanction, as the official capacity is involved in the very act complained of as amounting to a crime'; but that no sanction was required for a charge under s. 409, because 'the official capacity is material only in connection with the entrustment and does not necessarily enter into the later act of misappropriation or conversion, which is the act complained of'. In the course of the judgment, Varadachariar, J. discussed the scope of s. 197(1) of the Criminal Procedure Code and after observing that the decisions on that section were not uniform, proceeded to group them under three categories-those which had held that sanction was necessary when the act complained of attached to (1) [1939] F.C.R. 159.

the official character of the person doing it, those which had held that it was necessary in all cases in which the official character of the person gave him an opportunity for the commission of the crime, and those which had held it necessary when the offence was committed while the accused was actually engaged in the performance of official duties. Varadachariar, J. expressed his agreement with the first of the three views. At page 187 of the Report the learned Judge states :

> "In one group of cases, it is insisted that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it.- [cf. In re Sheik Abdul Khadir Saheb (A.I.R. 1917 Mad. 344); Kamisetty Raja Rao v. Ramaswamy (I.L.R. 50 Mad. 74) Amanat Ali v. Emperor (A.I.R. 1929 Cal. 724); Emperor v. Maung Bo Maung (I.L.R. 13 Rang. 540); and Gurushidayya Shantivirayya Kulkarni v. Emperor (A.I.R. 1939 Bom. 63)]. In another group more stress has been laid on the circumstance that the official character or status of the accused gave him the opportunity to commit the offence. It seems to me that the first is the correct view. In the third group of cases, stress is laid almost exclusively on the fact that it was at a time when the accused was engaged in his official duty that the alleged offence was said to have been committed [see Gangaraju v. Venki (I.L.R. 52 Mad. 602, at p.
>
> 605) quoting from Mitra's Commentary on the Criminal Procedure Code]. The use of the expression 'while acting' etc. in s. 197 of the Criminal Procedure Code particularly its introduction by way of amendment in 1923) has been held to lend some support to this view. While I do not wish to ignore the significance of the time factor, it does not seem to me right to make it the test. To take an illustration suggested in the course of the argument, if a medical officer, while on duty in the hospital, is alleged to have committed rape on one of the patients or to have stolen a jewel from the patient's person, it is difficult to believe that it was the intention of the Legislature that he could not be prosecuted for such offences except with the previous sanction of the Local Government.

In Gill v. The King. (1) the question arose directly with reference to s. 197(1) of the Criminal Procedure Code. In that (1) [1948] F.C.R. 19.

case the accused was charged under s. 161 with taking bribes, and under s. 120-B with conspiracy. On the question whether sanction was necessary under s. 197(1) it was held by the Judicial Committee that there was no difference in scope between that section and section 270 of the Government of India Act, 1935, and approving the statement of the law by Varadachariar, J. in Hori Ram Singh v. Emperor,(1) Lord Simonds observed in the course of his judgment at page 40 of the Report :

> "In the consideration of s. 197 much assistance is to be derived from the judgment of the Federal Court in Hori Ram Singh v. The Crown ([1939] F.C.R. 159), and in particular from the careful analysis of previous authorities which is to be found in the opinion of Varadachariar, J. Their Lordships, while admitting the cogency of the argument that in the circumstances prevailing in India a large measure of protection from harassing proceedings may be necessary for public officials, cannot accede to the view that the relevant words have the scope that has in some cases been given to them. A public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Thus, a judge neither acts nor purports to act as a judge in receiving a bribe, though the judgment which he delivers may be such an act : nor does a Government medical officer act or purport to act as a public servant in picking the pocket of a patient whom he is examining, though the examination itself may be such an act. The test may well be whether the public servant, if challenged, can reasonably claim that, what he does, he does in virtue of his office. Applying such a test to the present case, it seems clear that Gill could not justify the acts in respect of which he was charged as acts done by him by virtue of the office that he held. Without further examination of the authorities their Lordships, finding themselves in general agreement with the opinion of the Federal Court in the case cited, think it sufficient to say that in their opinion no sanction under s. 197 of the Code of Criminal Procedure was needed."

The view expressed by the Judicial Committee in Gill v. The King(1) was followed by the Judicial Committee in the later cases (1) [1939] F.C.R. 159.

(2) [1948] F.C.R. 19.

Albert West Meads v. The King(1) and Phanindra Chandra v. The King (2) and has been approved by this Court in R. W. Mathams v. State of West Bengal. (3) It is not every offence committed by a public servant that requires sanction for prosecution under S. 197(1) of the Criminal Procedure Code; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary. It is the quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by s. 197 of the Criminal Procedure Code will be attracted. An offence may be entirely unconnected with the official duty as such or it may be committed within the scope of the official duty. Where it is unconnected with the official duty there can be no protection. It is only when it is either within the scope of the official duty or in excess of it

that the protection is claimable.

Applying the principle to the present case, we are of opinion that sanction of the State Government was not necessary for the prosecution of Gupta under S. 409 of the Indian Penal Code, because the act of criminal misappropriation was not committed by the appellant while he was acting or purporting to act in the discharge of his official duties and that offence has no direct connection with the duties of the appellant as a public servant, and the official status of the appellant only furnished the appellant with an occasion or an opportunity of committing the offence.

With regard to the other charge under ss. 477-A/109 of the Indian Penal Code the legal position is different and, in our opinion, the sanction of the State Government is necessary for the prosecution of the appellant on this charge because it was committed within the scope of official duties, though in dereliction of them.

On behalf of the appellant Mr. Chari referred to the decision of this Court in Amrik Singh v. The State of Pepsu(4) and submitted that even with regard to the charge under s. 409, Indian Penal Code the sanction of the State Government would be necessary. In that case the appellant was a Sub-Divisional Officer in the Public Works Department, Pepsu and at the material date he was in charge of certain works at a place called Karhali. It was (1) 75 A. 185. (2) 76 I.A. 10.

(3) [1955] 1 S.C.R. 216. (4) [1955] 1 S.C.R. 1302.

part of his duties to disburse the wages to the workmen employed in the works, and the procedure usually followed was that he drew the amount required from the treasury, and paid the same to the employees against their signatures or thumb-impressions in the monthly acquittance roll. In the roll for April, 1951, one Parma was mentioned as a khalasi and a sum of Rs. 51 shown as paid to him for his wages, the payment being vouched by thumb impression. The case of the prosecution was that there was, in fact, no person of the name of Parma, that the, thumb-impression found in the acquittance roll was that of the appellant himself, chat he had included a fictitious name in the acquittance roll, with intent to himself draw the amount, and that by this expedient he had received Rs. 51 and misappropriated the same. It was held by the High Court of Pepsu that the appellant was guilty both under s. 465 and s. 409 of the Indian Penal Code and the sanction of State Government was not necessary for either of the charges. It was conceded on behalf of the respondent in this Court that the sanction was necessary with regard to the charge under s. 465 but with regard to the charge under s. 409 also it was held by this Court that sanction of the State Government was necessary and conviction of the appellant on both the charges was quashed. Speaking for the Court Venkatarama Ayyar, J. approved the principle expressed by the Federal Court in Hori Ram Singh v. Emperor(1) and also by the Judicial Committee in Gill v. The King (2) Mr. Chari relied much on the decisions of this Court in Amrik Singh v. The State of Pepsu(3) and submitted that it supported the appellant's case. We need not examine how far the decision in Amrik Singh's(3) case can stand in view of the earlier decisions of the Judicial Committee and the two subsequent decisions of a larger Bench of this Court in Om Prakash Gupta v. State of U.P.(4) and in Satwant Singh v. The State of Punjab.(1) In Om Prakash Gupta v. State of U.p.,(4) it was pointed out, at pace 437 of the Report, that sanction to the prosecution of a public servant under s. 409 of the Indian Penal Code is not

necessary since the public servant is not acting in his official capacity in committing criminal breach of trust. In the other case, Satwant Singh v. The State of Punjab(5), the appellant-Satwant Singh-submitted claims totalling several lakhs of -rupees to the Government of Burma on the allegation that he had executed works and supplied materials. These claims were sent by the Government of Burma to Major Henderson at (1) [1939] F.C.R. 159.

(3) [1955] 1 S.C.R. 1302.

(5) [1960] 2 S.C.R. 99.

(2) [1948] F.C.R. 19.

(4) [1957] S.C.R. 423.

Jhansi in March and May, 1943, for verification as he was the officer who had knowledge of these matters. The officer certified many of these claims to be correct and sent the papers back to Simla. On the certification of the claims by Henderson, the Finance Department of the Government of Burma sanctioned the same and the Controller of the Military Clain-is at Kolhapur was directed to pay the amounts sanctioned. On the request of Satwant Singh cheques were drawn on the Imperial Bank of India at Lahore and these cheques were encased at Lahore. In all Satwant Singh was paid Rs. 7,44,865 and odd. Subsequently, suspicions of the Government of Burma were aroused and it was discovered that many of the claims, including some of those of Satwant Singh, were false. According to the prosecution, Satwant Singh had committed the offence of cheating punishable under s. 420, Indian Penal Code and Henderson had abetted him in the commission of that offence by falsely certifying Satwant Singh's claims to be true, knowing that they were false and there by had committed an offence punishable under s. 420/109, Indian Penal code. It was argued before this Court that no sanction under s. 197 of the Criminal Procedure Code by the proper authority had been given for the prosecution of Henderson and he could not be tried without such a sanction and that the joint trial of Henderson and the appellant without such a sanction vitiated the trial. The argument was rejected by a Bench of 5 Judges of this Court on the ground that if a public servant commits the offence of cheating or abets another so to cheat, the offence committed by him is not one while he is acting or purporting to act in the discharge of his official duty. It was urged on behalf of the apellant that the act of Henderson in certify in the appellant's claims as true was an official act because it was his duty either to certify or not to certify a claim as true and that if he falsely certified the claim as true he was acting or purporting to act in the discharge of his official duty. The argument was rejected by this Court for the reason that Henderson was not prosecuted for any offence concerning his act of certification but that he was prosecuted for abetting the appellant to cheat. At page 100 of the Report Imam, J. has stated :

> "We have no hesitation in saying that where a public servant commits the offence of cheating or abets another so to cheat, the offence committed by him is not one while he is acting or purporting to act in the discharge of his official duty, as such offences have no necessary connection between them and the performance of the duties of a public servant, the official status furnishing only the occasion or opportunity for the

> commission of the offences (vide Amrik Singh's case-1955 1 S.C.R. 1302). The Act of cheating or abetment thereof has no reasonable connection with the discharge of official duty. The act must bear such relation to the duty that the public servant could lay a reasonable but not a pretended or fanciful claim, that he did it in the course of the performance of his duty [vide Matajog Dobey's case-[1955] 2 S.C.R. 925]. It was urged, however, that in the present case the act of Henderson in certifying the appellant's claims as true was an official act because it was his duty either to certify or not to certify a claim as true and that if he falsely certified the claim as true he was acting or purporting to act in the discharge of his official duty. It is, how- ever, to be remembered that Henderson was not prosecuted for any offence concerning his act of certification. He was prosecuted for abetting the appellant to cheat. We are firmly of the opinion that Henderson's offence was not one committed by him while acting or purporting to act in the discharge of his official duty."

We consider that the present case falls within the principle laid down by this Court in Satwant Singh v. The State of Punjab(1) by which we are bound and the view we have taken is supported by the decisions of the Federal Court in Hori Ram Singh v. Emperor(1) and of the Judicial Committee in Gill v. The King(1).

It was argued by Mr. Shroff on behalf of the respondent that sanction of the State Government was given for the prosecution of the appellant on July 1, 1953 and the prosecution witnesses were examined by the Magistrate in the case against the appellant after that date and that, therefore, the conviction of the appellant under s. 477-A of the Indian Penal Code cannot be held to be legally invalid. We do not think there is justification for this argument. It appears from the Order Sheet that the police submitted charge-sheet against the appellant on April 4, 1953. The Order sheet shows that on April 6, 1953 the Additional City Magistrate, Indore City made the following order :

> "Challan be recorded in R. Register. Accused no. 1 & 2 will be present in the Court from the Central Jail (1) [1960] 2 S.C.R. 89.

(2) [1939] F.C.R. 159.

(3) [1948] F.C.R. 19.

on 15-4-53. Prosecution witnesses according to challan no. 1, 2, 3, 4 be summoned on date 15-4-53. 'Me file be put up at the time of evidence of prosecution on 15-4-53."

For some reason or the other the witnesses were not present on April 15, 1953 and the case was adjourned for several dates and the, evidence of the witnesses was recorded for the first time on July 6, 1953, but there is no doubt that the Additional City Magistrate took cognizance of the offence on April 6, 1953 when he ordered that the prosecution witnesses should be summoned and the appellant should be produced in the Court from the Central Jail on April 15, 1953. The legal position is not seriously disputed on behalf of the respondent and Mr. Shroff frankly conceded that cognizance was taken by the Additional City Magistrate on April 6, 1953. It follows, therefore, that

there is no proper sanction for the prosecution of the appellant with regard to the charge under s. 477-A, Indian Penal Code and the conviction of the appellant on that charge must be quashed.

For the reasons expressed, we partly allow these two appeals and quash the conviction of the appellant--Gupta--of the charge under S. 477-A of the Indian Penal Code and sentence imposed on that charge in both these cases. With regard to the charge under S. 409, Indian Penal Code, we maintain the conviction and sentence imposed by the lower Courts in both the cases.

Criminal Appeals nos. 162 & 163 of 1962.

On behalf of the appellant-Kale-it was submitted by Mr. Barlingay that though the false entries in the rough cash- book dated September 29, 1950 and August 25, 1950 were made by the appellant, he was not criminally liable under s. 477- A or ss. 409/ 109 of the Indian Penal Code as the entries were made by him at the instance of the appellant Gupta who was Superintendent of his office and superior to the appellant in official position. It was also contended on behalf of the appellant that he did not make the false entries wilfully and with intent to defraud the Power House and that he had no knowledge of the criminal intent of appellant Gupta. The case of the appellant has been rejected by the lower Courts and we do not propose to review the evidence on this aspect of the case because the question raised is essentially one of fact and there is a concurrent finding of the lower Courts that the appellant made the false entries in the account-books wilfully and with intent to defraud the Power House and that he abetted appellant Gupta in committing criminal breach of trust with regard to both the amounts in question. It also appears from the evidence of Laxman, P.W. 6, and Joshi, P.W. 3, that when the audit party arrived the appellant Kale approached Mhaskar for the issue of a blank cash book without any indent. The evidence of Joshi-P.W. 3- also shows that Gupta had, in the presence of the appellant, asked the witness to write the accounts in the rough cash book newly issued. 'The evidence of these two witnesses has been accepted by the lower Courts as true and it has been found that the appellant and Gupta jointly made an attempt to have the accounts rewritten and manipulated. In our opinion, no case is made out for interfering with the conviction and sentence imposed on the appellant under s. 409/109 or s. 477-A of the Indian Penal Code and these appeals must be dismissed.

ORDER In Criminal Appeals Nos. 77 of 1962 and 74 of 1965. In accordance with the majority Judgment, these appeals are partly allowed.