

47A/128

9-5112

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT: MR. JUSTICE MANZOOR AHMAD MALIK
MR. JUSTICE SAJJAD ALI SHAH
MR. JUSTICE QAZI MUHAMMAD AMIN AHMED

(AFR)

Crl. Petition No. 490 of 2019

*(Against the judgment of the Lahore High Court,
Lahore dated 25.03.2019 passed in Crl. Appeal
No. 81060 of 2017 and Crl. Appeal No. 75589 of
2017)*

Dr. Waqar Hameed

... Petitioner(s)

VERSUS

The State & another

... Respondent(s)

For the Petitioner(s): Ch. Muhammad Zahoor Nasir, ASC

For the Respondent(s) M. Shaukat Khan, Computer Operator in
person.

For the State: Mirza Abid Majeed, DPG Punjab

Date of Hearing: 09.10.2019

...
ORDER

Manzoor Ahmad Malik, J.-

Dr. Waqar Hameed,

petitioner and his co-accused Farrukh Abbas were accused in case
FIR No. 17 dated 02.08.2010, registered at Police Station ACE,
Sargodha under sections 409, 420, 468, 471 PPC read with section
5(2) of the Prevention of Corruption Act, 1947. Briefly, the allegations
against the petitioner and his above-named co-accused were that
they fraudulently withdrew the salaries of complainant Muhammad
Shaukat Khan (for the period from March 2008 to November 2008)
from Treasury with the intention to misappropriate the same.
However, when the matter came into the knowledge of the higher-
ups, they deposited the amount of Rs. 80,645/- in the Treasury.

2. After investigation, challan was submitted and following charge was framed by the trial court against the petitioner and his co-accused:-

"1.Firstly, that you above named accused on 16.1.2009 in the area of Mich Ranjha while posted as Accountant and Senior Medical Officer in Rural Health Centre respectively being public servant with the connivance of each other cheated Muhammad Shaukat Khan for obtaining and misappropriating his salary from March 2008 to November 2008. Thus you committed an offence punishable under section 420 PPC.

Secondly, that you above named accused in the same date, time and place with the connivance of each other prepared forged documents for salary of above named Muhammad Shaukat Khan for the purpose of cheating. Thus you committed an offence punishable under section 468 PPC.

Thirdly, that you above named accused in the same date, time and place with the connivance of each other used the above mentioned forged documents as genuine knowing the same to be forged one. Thus you committed an offence punishable under section 471 PPC.

Fourthly, that you above named accused in the same date, time and place with the connivance of each other drew an amount of Rs.80645/- from the government treasury as salary of Muhammad Shaukat Khan Computer Operator for the period from March to November 2008 but did not disburse the same to him and misappropriated the said amount and on sensing action against you deposited the said amount in the government treasury on 30.5.2009 after four and a half month. Thus you committed an offence punishable under section 409 PPC read with section 5(2) of Prevention of Corruption Act, 1947 which are within the cognizance of this court.

And I hereby direct that you above mentioned accused be tried by this court on the above said charge."

So far as charges under sections 420, 468, 471 PPC are concerned, the learned trial court, on conclusion of trial, acquitted the petitioner and his co-accused of the said charges. They were, however, convicted under section 409 PPC and sentenced to 03 years RI each, *with a direction to pay fine of Rs.100,000/- each. They were further

convicted under section 5(2) of the Prevention of Corruption Act, 1947 and sentenced to 03 years RI each, with a fine of Rs.100,000/- each. The learned trial court further directed that if the amount of fine as a whole is not recoverable from the properties owned by the convicts, they shall suffer SI for three months each. Both the sentences were ordered to run concurrently and benefit of section 382-B, Code of Criminal Procedure was extended to them. Aggrieved of their convictions and sentences, the petitioner and his co-convict filed criminal appeals before the learned Lahore High Court, Lahore. Through the impugned judgment, the learned appellate court dismissed the criminal appeal filed by the petitioner by upholding his convictions and sentences, whereas the criminal appeal filed by co-convict was allowed and by extending him benefit of doubt, he was acquitted of the charge. Hence, the instant criminal petition for leave to appeal by the petitioner.

3. Learned counsel for the petitioner as well as learned Deputy Prosecutor General, Punjab have been heard at length and with their assistance, record has been perused.

4. Since the petitioner and his co-accused (since acquitted by the learned High Court) have been acquitted by the trial court for charges under sections 420, 468, 471 PPC and that acquittal has not been challenged by the State or the complainant any further, therefore, in the circumstances of the case, the main question before this Court is whether the provisions of section 409 PPC are attracted to the facts and circumstances of the case; and if the answer is in the affirmative, what evidence is available on the record justifying the conviction of petitioner under the said provision of law. It is well settled proposition of law that cheating and criminal breach of trust

are two distinct offences. Both these offences cannot be alleged simultaneously. Through cheating/fraud, money or property is grabbed or obtained through deceitful means, whereas in case of criminal breach of trust, the property is entrusted voluntarily. Section 405 PPC defines the offence of criminal breach of trust. Its important ingredients are entrustment of property and its dishonest misappropriation. In the instant case, as is clear from the allegations levelled in the FIR and through the statements of prosecution witnesses recorded during trial, it was all along the case of prosecution that salaries were withdrawn fraudulently by the petitioner and his co-accused by preparing forged documents and using the same as genuine. Nevertheless, petitioner and his co-accused stood acquitted by the learned trial court for charges under sections 420, 468, 471 PPC and that acquittal has not been challenged any further.

5. So far as applicability of section 409 PPC is concerned, it is not the case of prosecution that any property was ever entrusted to the petitioner, which was misappropriated by him. The evidence brought on record in this regard by the prosecution mainly consists of two pieces: (i) withdrawal of salaries of Muhammad Shaukat Khan; and (ii) its re-deposit in the Treasury. With regard to first part, the complainant Muhammad Shaukat Khan in his Court statement stated as under:-

"...In the end of August 2008 I came to know that my salaries amounting to Rs.80,645/- for the period from 1.3.2008 to 1.11.2008 have been drawn from the Treasury through token 9994....."

6. The complainant, however, did not disclose as to how he came to know that his salaries had been withdrawn. Though, a

reference to Token No. 9994 has been given by the complainant in his statement recorded during trial regarding the withdrawal of his salaries but there is nothing on record to show in whose favour said token was issued by the concerned office. Coming to the second part i.e. re-deposit of salaries of Muhammad Shaukat Khan, it is the case of prosecution that same were deposited through *Challan* form (Ex.PB). The investigating officer Haji Ikram Ullah Khan (PW5) stated in his cross examination as under:-

"Challan form P4 contains the stamp and signatures of accused Dr. Waqar Hameed Medical Officer Midh Ranjha so I presumed that the said amount was deposited by accused Dr. Waqar Hameed."

No effort was made by the investigating agency for getting the opinion of handwriting expert regarding alleged signatures of petitioner on *Challan* form (Ex.PB).

7. It is by now well settled that a piece of evidence which is not put to an accused while recording his statement under section 342, Code of Criminal Procedure cannot be used against him. For convenience of reference, the statement of petitioner recorded by the trial court under section 342, Code of Criminal Procedure is reproduced as under:-

"Q. No.1. Is it correct that in the year 2009 you were posted as Senior Medical Officer RHC Midh Ranjha?"

Ans. It is correct.

Q. No. 2. It is in the prosecution evidence that you, in connivance with your co-accused, made forged drew the salary of Muhammad Shaukat Khan complainant by preparing forged bills of his salary amounting to Rs.80645/- and misappropriated the same. What do you say about it?"

** Ans. It is incorrect.*

Q. No.3. Why this case and why PWs have deposed against you?

Ans. Complainant in connivance with PWs involved me in this case because complainant was appointed illegally and was terminated by the competent authority. Complainant only to save his skin made a false case against me. Moreover I informed the competent authority about the withdrawal of pay of said complainant but no action was taken in this regard. This case was also recommended for cancellation by Ghulam Shabbir Qureshi the then DDI/ACE Khushab but complainant with the connivance of ACE authorities got approved judicial action in this case.

Q. No. 3. Will you appear as witness u/s 340(2) Cr.P.C.?

Ans. No.

Q.No. 4 Will you produce evidence in defence?

Ans. Yes.

Q. No. 5. Have you anything else to say?

Ans. I am innocent."

8. Perusal of aforesaid statement clearly shows that the learned trial court asked only one incriminating question i.e. Question No. 2 and in that question, the petitioner was questioned that he, in connivance with his co-accused had withdrawn the salary of Muhammad Shaukat Khan by preparing forged bills of salary amounting to Rs.80,645/- and its misappropriation. At the cost of reiteration, it is observed that the petitioner and his co-accused have already been acquitted by the learned trial court for charges under sections 420, 468, 471 PPC and said acquittal remained unchallenged. There is no question as to how and from where this salary was withdrawn. As already pointed out in Para 6 above, though the complainant Muhammad Shaukat Khan (PW1) in his Court statement mentioned that his salaries were withdrawn through Token No. 9994, but NO question regarding said token was asked

from the petitioner. So far as re-deposit of salaries (Rs.80,645) of Muhammad Shaukat Khan is concerned, it has been noted that NO question whatsoever was asked from the petitioner in this regard nor *Challan* form (Ex.PB) was put to him. It has also been noted that during investigation a number of documents were taken into possession by the investigating agency, but petitioner was not confronted with a single one (in order to know his version) by the trial court while recording his statement under section 342, Code of Criminal Procedure.

9. It has also been observed that the learned trial court did not frame any separate charge against the petitioner for offence under section 5(2) of the Prevention of Corruption Act, 1947 and as is evident from Para 2 above, the trial court mentioned in the Charge *"Thus you committed an offence punishable under section 409 PPC read with section 5(2) of Prevention of Corruption Act, 1947"*. This approach of learned trial court is not legally correct, as the learned trial court was required to frame separate charge for each distinct offence. Moreover, while convicting the petitioner under section 5(2) of the Prevention of Corruption Act, 1947, the learned trial court has not discussed a single piece of evidence to reach the conclusion that petitioner has committed criminal misconduct. This aspect of the matter has also been ignored by the learned appellate court in the impugned judgment. In these circumstances, the conviction of petitioner under section 5(2) of the Prevention of Corruption Act, 1947 is hardly justified.

10. For what has been discussed above, it is observed that prosecution has not been able to prove its case against the petitioner ~~x~~ beyond reasonable doubt. Therefore, the instant criminal petition is

converted into an appeal and the same is hereby allowed. The convictions and sentences of appellant Dr. Waqar Hameed are set aside. He is acquitted of the charge framed against him. He is behind the bars and is ordered to be released forthwith, if not required to be detained in any other case.

I Could not persuade myself to agree with the ~~Self~~ JUDGE
 Opinion of my learned Brother Manzoor Ahmed Malik,
 and therefore have written my dissenting opinion
 dismissing the petition by declining leave. ~~Self~~ JUDGE

I have gone through the judgment authored
 by my learned brother Sajjad Ali Shah, J ~~Self~~ JUDGE
 and find myself with no option but to be in unison with
 ANNOUNCED IN OPEN COURT AT LAHORE ON 01-11-2019.

By majority of Two to one, the
 instant petition is dismissed

~~Self~~ - JUDGE

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 Good Ship

Bench V
Islamabad, the
 09.10.2019
 Approved For Reporting
 K.Anees/

md
 09/11/19

Sajjad Ali Shah, J. I have gone through the opinion of my learned brother Manzoor Ahmad Malik, J. but unfortunately was not able to persuade myself to concur with it and, therefore, I am writing my reasoning for reaching to a different conclusion. The facts of the case have been comprehensively narrated by my learned brother, therefore, I would, for the sake of brevity, avoid to repeat the same unless felt necessary to support my dissent.

2. The allegation against the present petitioner is that he while posted as Senior Medical Officer at RHC Midh Ranjha, by exercising the powers of Drawing & Disbursing Authority, in collusion with his Accountant, the co-accused, withdrew an amount of Rs.80645/- against the salary of Shaukat Khan, Computer Operator (Complainant) for the months of March to October 2008 which was not paid to him and was misappropriated to their own use, however, on his complaint and after initiation of inquiry his salary amount was deposited in government treasury on 30.5.2009.

3. The petitioner consequently, alongwith his co-accused was charged for offences under Section 409, 420, 468 and 471 PPC. Both the accused, after a full dressed trial, were acquitted for the offences under section 420, 468 and 471 PPC but were convicted under Section 409 and 5(2)47 PCA and were sentenced on both the counts for a period of three years with a fine of Rs.1,00,000/- each. Both sentences were ordered to run concurrently and the benefit of Section 382-B Cr.P.C. was also extended to them. Both the accused appealed against their conviction and the appeal of the co-accused was accepted. He consequently was acquitted from all charges whereas the petitioner's appeal was dismissed maintaining the sentence passed by the trial Court.

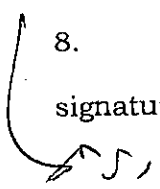
4. In the circumstances, at present the only question before this Court is whether the petitioner was rightly convicted under section 409 PPC and if so, what evidence material is available on record to justify his conviction under the said provisions of law.

5. To begin with, the prosecution, in order to prove the offence of criminal breach of trust, has to establish that the accused belonged to one of the categories enumerated in section 409 PPC, (in the instant case, a "public servant") and that he had been entrusted with property or with dominion over property in that capacity and that he had dishonestly misappropriated or converted that property to his own use or dishonestly used or disposed of that property in violation of any direction prescribing the mode in which trust was to be discharged. The very fact that the petitioner as a Senior Medical Officer was vested with the powers of Drawing and Disbursing Authority made a case of statutory entrustment over all the amounts which were entrusted to him by the government and which could be withdrawn under his signatures for payment to the employees working under his control. Therefore, the statutory entrustment with prescribed directions for the discharge of trust by payment of salaries to the employees of Rural Health Centre Midh Ranjha is proved beyond shadow of doubt.

6. As to the second limb i.e. dishonest misappropriation of the entrusted money, the prosecution in all examined 12 witnesses and produced 8 documents.

7. Ex.P1/1-2, Ex.P2/1-4, Ex.P3/1-6, the inquiry reports were produced to show that the misappropriation of the stated amount by the petitioner was proved beyond doubt.

8. Ex.P4 challan dated 30.5.2009 containing the signatures and stamp of Senior Medical Officer RHC Midh Ranjha



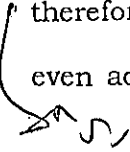
District Sargodha was produced to show the deposit of misappropriated amount into the government treasury.

9. Ex.P5/1-9 acquaintance roll register through which salary was to be paid to the employees of rural health centre Midh Ranjha was produced to show that neither name of the complainant appeared in that registered nor any salary was paid to him.

10. Ex.P6 and Ex.P7 the photo copies of the attendance registers were produced to show that the complainant's name did not appear in the attendance roll.

11. Ex.P8 the pay bill No.9994 was produced to prove that the salary of the complainant amounting to Rs.80645/- was withdrawn under the signatures of Senior Medical Officer RHC Midh Ranjha District Sargodha.

12. The complainant appeared as PW-1 and stated that he had produced his appointment letter before the petitioner but neither he was allowed to join nor his name was entered in the attendance register. He stated that he came to know that his salary for the period from 1.3.2008 to 1.11.2008 amounting to Rs.80645/- was withdrawn from the government treasury through token 9994 but was not paid to him. He further stated that on his complaint, inquiry was conducted and the petitioner was found guilty and ultimately in December, 2009 the petitioner deposited back his salary in government treasury which subsequently was paid to him through a refund voucher. There was no suggestion from the side of petitioner that the said amount was not withdrawn or that it was not subsequently deposited in treasury. The complainant had neither any enmity nor any motive to falsely implicate the petitioner, therefore, his testimony has to be given due weight. The petitioner even admitted the withdrawal of the said amount in his statement



under section 342 Cr.P.C. and rightly so for the simple reason that the said amount could not be withdrawn by anyone else but the DDO which in the present case was the petitioner and keeping his competence and authority to withdraw this amount lawfully vide Ex.P8 the petitioner was acquitted from charges for the offence under sections 420, 468 and 471 PPC. Even the case of the petitioner before the trial Court was that he has withdrawn the salaries of the complainant and because the complainant was absent from duty, he did not deliver it to the complainant rather he had deposited in the treasury thus he had caused no loss to the treasury. That he had retained the amount temporarily out of misunderstanding and due to rush of work as well and deposited the amount prior to registration of case.

13. Beside Sajjad Hussain Shah PW-4 from National Bank of Pakistan stated that on 30th May, 2009 a sum of Rs.80645/- relating to RHC Midh Ranjha was deposited in government treasury vide challan P4 and further admitted that said challan was signed by petitioner Dr. Waqar Hameed. Likewise, PW-5 Haji Ikramullah CO/ACE also stated that Rana Dilawar Accountant had produced a copy of challan P4 before him whereby an amount of Rs.80645/- was deposited by petitioner Dr. Waqar Hameed. The Investigating Officer PW-8 in his statement categorically asserted that the accused deposited Rs.80645/- in the government treasury vide challan P4 and this aspect of statement was not challenged. In the same manner Sajjad Azhar PW-12 Additional Commissioner Income Tax stated that he conducted inquiry and found that both the accused in connivance with each other embezzled Rs.80645/- which was the salary of complainant for nine months. The petitioner throughout did not render any explanation for retaining the amount

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from August, 2008 when the amount was withdrawn till May, 2009 when it was deposited back in the government treasury.

14. It is to be kept in mind that it is difficult for the prosecution to give any direct evidence of committing of the criminal breach of trust by the accused for the reason that the manner in which the goods or the money are misappropriated are generally within the special knowledge of the accused and it is for him to establish how he has dealt with the goods or the money which he was holding in trust for the principal and in the instant case this element is totally missing.

15. I am of the clear mind that the prosecution has produced ample documentary as well as oral evidence to prove that on the one hand the petitioner did not allow the complainant to join his duties or mark his presence in the attendance register and on the other hand, withdrew his salary and dishonestly misappropriated the amount to his own use.

16. As to the making up of losses by the petitioner by depositing the dishonestly misappropriated amount back into the government treasury, that too after the initiation of inquiry, in my opinion hardly affects the offence or the guilt and has been rightly considered by the trial Court while inflicting lesser sentence. Consequently, no case for interference is made out and the present petition stands dismissed. Leave refused.

Sd/- J

Sd/-
06/11/19