

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Cr. Revision No. 265 of 2011

Rakesh Kumar Petitioner

Versus

The State of Jharkhand Opp. Party

With

Cr. Revision No. 185 of 2011

Ujjwal Kumar Petitioner

Versus

State of Jharkhand Opp. Party

CORAM: HON'BLE MR. JUSTICE SANJAY PRASAD

Oral Judgment in Court

16/Date: 12th January, 2024

1. Both the criminal revision being Cr. Revision No.265 of 2011 and Cr. Revision No.185 of 2011 have been heard together and are being disposed of together, since, both have arisen out of common judgment dated 21.02.2011 passed by Sri Rajesh Kumar Dubey, learned Sessions Judge, West Singhbhum at Chaibasa in Cr. Appeal No.03/2011 by which the appeal preferred on behalf of both the petitioner has been dismissed thereby affirming the judgment of conviction and order of sentence dated 10.01.2011 passed by Sri Prabhat Kumar Sharma, learned J.M., Ist Class, Chaibasa in G.R. Case No.535/2009 (Sadar P.S. Case No.73/2009) by which both the petitioners have been convicted for the offences under section 406 and 120B of the I.P.C and sentenced to undergo R.I. for two years and R.I. for six months respectively and both the sentences have been directed to run concurrently.

2. The prosecution case, in brief, is that the informant, Choudhary Satish Rai, working as Area Manager in Ashmita Microfin Limited situated at Bara Nimdihi, Chaibasa stated before the Officer In-Charge that Ujjwal Kumar (petitioner in Cr. Revision No.185 of 2011) was working as a Cashier in the said company and Rs.1,41,696.50 was kept in the locker and keys were with both the petitioners Rakesh Kumar and Ujjwal Kumar. However, when the informant returned on 25.11.2009 at 11.00 a.m then both the petitioners and one Mahboob Alam informed him that when the locker was opened, and cash of Rs.1,41,696.50 was stolen from the locker. It is alleged that the petitioners namely Rakesh Kumar and Ujjwal Kumar were the custodian of the key and occupying the office of the Company as an In-charge and no outsiders were permitted to visit the office during said period and there is no sign of breaking up of lock and hence the petitioners and one Mahboob Alam have misappropriated the amount of Rs.1,41,696.50 by hatching a criminal conspiracy.

3. Learned counsel for the petitioners has submitted that the impugned judgments of conviction and order of sentence passed by the learned Courts below are illegal not sustainable in the eye of law. It is submitted that petitioners are innocent and have committed no offence. However, it is submitted on behalf of the petitioner, Rakesh Kumar (in Cr. Revision No.265/2011) that the petitioner has remained in custody for around 18 months whereas it is submitted on behalf of learned Amicus Curiae appearing for the petitioner, Ujjwal Kumar (in Cr. Revision No.185/2011) that the petitioner has remained in custody for around 15 months and hence the petitioners are not arguing on merit and it is submitted that the Court may take lenient view

and may reduce the sentence of the petitioners. It is also submitted that the petitioner, Rakesh Kumar is unwell and even unable to walk properly and hence lenient view may be taken considering poor health.

4. On the other hand, learned APP has submitted that the judgment of conviction and order of sentence passed by the learned Courts below are fit and proper and as such no interference is required. It is submitted that both the petitioners along with one Mahboob Alam are named in the FIR and they have misappropriated and cheated the company of the informant for a sum of Rs.1,41,696.50. It is submitted that P.W-1 is the informant of this case who has fully supported the allegation made in the FIR and also about misappropriation of Rs.1,41,696.50 in question and fully stood the test of cross-examination and there is no infirmity in his evidence. It is submitted that P.W-2, Biswanath Behera is Manager In-charge who has also supported and corroborated the case of the informant and has submitted that the petitioners were the only custodian of the key and there is direct evidence against them. It is submitted that P.W-3 and P.W-4 namely, P.N Vinay Kumar and Priyabrat Sahoo have also supported the prosecution case and has supported the evidence of the informant. It is submitted that P.W-5, Sikandar Prasad Yadav is the I.O of this case who has submitted charge sheet against them and has also supported and corroborated the prosecution case and hence the trial court had rightly convicted the petitioners and which has been rightly affirmed by the learned Appellate Court.

However, on the point of sentence, it is submitted that the necessary order may be passed.

5. Perused the Lower Court Records and considered the submission of learned counsel appearing for both the sides.

6. It transpires that the informant Satish Rai has lodged the FIR against the petitioners and one Mahboob Alam for committing theft of Rs.1,41,696.50. However, FIR was lodged under Section 407/120B of the IPC.

7. It transpires that the police after investigation has submitted charge sheet under Sections 407, 120B/34 of the IPC on 23.01.2010 and the learned CJM, Chaibasa had taken cognizance against the petitioners and one Mahboob Alam under Section 407/120B of the IPC on 29.01.2010.

8. On supplying the police papers to the petitioners and one Mahboob Alam, charges were framed against the petitioners on 23.01.2010 under Section 407 and 120B of the IPC to which they pleaded not guilty and claimed to be tried.

9. During trial, the prosecution had got examined five (05) witnesses in support of its case, who are as follows:-

- (i) P.W-1 is Choudhary Satish Rai, the informant, Area Manager of Ashmita Micro Finance Ltd.,
- (ii) P.W-2 is Bishwanath Behra, Branch In-charge of Ashmita Micro Finance Ltd.,
- (iii) P.W-3 is P.N Vinay Kumar, employee of Ashmita Micro Finance Ltd.,
- (iv) P.W-4 is Priyabrat Sahoo, Auditor of Ashmita Micro Finance Ltd. and
- (v) P.W-5 is Sikandar Prasad Yadav, the I.O.

10. The prosecution had examined the following documents as exhibits which are as follows:-

- (i) Exhibit-1- Fardbeyan,
- (ii) Exhibit-2- Seizure list,
- (iii) Exhibit-2/1-Production-cum-Seizure list,
- (iv) Exhibit-2/2-Signature of PW-2 on the seizure list,

- (v) Exhibit-3- Undertaking in the writing and signature of accused Rakesh Kumar,
- (vi) Exhibit-4- Signature of P.W-3 on the seizure list,
- (vii) Exhibit-5- True copy of cash book,
- (viii) Exhibit-5/1-Entry made in one true copy of Cash book,
- (ix) Exhibit-6-Formal F.I.R,
- (x) Exhibit-7-Productin-cum-seizure list,

11. Apart from the above, prosecution had brought the following Material Exhibits i.e. Keys of Almirah, Material Exhibit-I, Material Exhibit-II and Material Exhibit-III.

12. Thereafter the petitioners along with Mahboob Alam were examined under section 313 Cr.P.C on 24.11.2010 and the circumstances were put forth before them to which they denied.

13. No defence witness was examined on behalf of the petitioners.

14. However, the following documents had been proved as the Exhibits on behalf of the defence, which are as follows:-

- (i) Exhibit-A-Page no.147 of the Petty Cash book,
- (ii) Exhibit-A/1-Page no.148 of the Petty Cash book,
- (iii) Exhibit-B-Page no.158 of the Cash book (main) and
- (iv) Exhibit-B/1-Page no.159 of the Cash book (main)

15. Thereafter, the learned Court below after hearing both the sides has convicted both the petitioners as mentioned above and sentenced to undergo R.I on different counts which have been affirmed by the learned Appellate Court below.

16. It transpires from the FIR that suspicion has been raised against the petitioners for committing theft of Rs.1,41,696.50 but FIR was lodged under 407 of the IPC which is apparently illegal.

17. It also reveals from the FIR that no one had seen the petitioner for committing any theft or taking the money whereas informant had raised suspicion against them for having

committed theft of the said amount as both were custodian of the key.

18. However, during evidence P.W-1 namely Choudhary Satish Rai, the informant has tried to support the FIR stating that petitioners had kept the said amount of Rs.1,41,696.50 on 24.11.2009 and had gone to Jamshedpur after handing over charge to Rakesh Kumar but earlier he had handed over the keys of the locker to both of the petitioners i.e. Rakesh Kumar (petitioner in Cr. Revision No.265/2011) and Ujjwal Kumar (petitioner in Cr. Revision No.185/2011). He learnt on 25.11.2009 about theft of the said amount by the petitioners and he had not found breaking of any side of Almirah.

However, during cross-examination he has admitted that he has instituted the case against the petitioner on suspicion. He also admitted that the transaction is maintained in the Entry Register and also in the Cash Book and the Petty Cash Book. He admitted that on the night of the date of occurrence he had not verified as to how much is kept in the Almirah and he had not taken any step for opening the Almirah while he was not present. He also admitted that there is no letter with regard to handing over the key to the petitioners. He also admitted that he had not given any money to the petitioners to keep the same in the Almirah.

19. On his further cross-examination after recall, he has admitted that the amount deposited to the company which is 01.04.2009 to 31.03.2010 has been maintained in the cash book and both the Registers reveals that a sum of Rs.1,41,696/- was handed over to Bishwanath Behra. The defence side has further proved Exhibit-A and Exhibit-A/1 through the Informant P.W-1 which reveals that entry has been made by petitioner Ujjwal

Kumar and the amount has been paid to Bishwanath Behra who has later on become the witness. Thus, it is evident that the amount of Rs.1,41,696.50 was not handed over to the petitioners by the informant and the informant has raised suspicion and implicated the petitioner on mere suspicion in the FIR.

20. P.W-2 is Bishwanath Behra who is the Branch In-charge of the Branch In-charge of Ashmita Micro Finance Ltd., and tried to support the prosecution case in the evidence and stated that three keys are required to for taking out money from the Almirah and after arrival his arrival to Chaibasa Branch he learnt from the petitioners that the amount of Rs.1,41,696.50 has been stolen.

However, in cross-examination, he himself admitted that the case has been instituted upon both the accused petitioners on mere suspicion. He has also not verified the amount kept in the Almirah. He admitted that he used to put his signature on cash book and petty cash book but on the date of occurrence he had not put his signature which is completely contradicted by Exhibit-A and Exhibit-A/1 respectively. He further admitted that there is no paper with regard to handing over of the keys to the petitioners.

Thus, the evidence of P.W-2 is also not reliable and the petitioners have been implicated in this case on mere suspicion.

21. P.W-3 is P.N. Vinay Kumar who is also an employee of the company-Ashmita Micro Finance Ltd. and he learnt about the occurrence on 25.11.2009 and he also tried to support the prosecution case.

However, during cross-examination, he himself admitted that he had not gone in the night of 24.11.2009 and he is not aware as to who were present in the night in the said office. He

also admitted that he had not seen any accused persons committing theft of money and he has named them on mere suspicion.

Thus, it is evident that he is not a witness of the occurrence and he implicated these petitioners on mere suspicion only and hence his evidence is not reliable.

22. P.W-4 is Priyabrat Sahoo, who is an Auditor in the said company-Ashmita Micro Finance Ltd. and has stated during his evidence that when the Branch was closed a sum of Rs.1,41,696.50 was kept there in Godrej Almirah and the keys were kept by both the petitioners and on the said night of 24.11.2009 he had also slept in the staff room along with Rakesh Kumar, Ujjwal Kumar and Mahboob Alam in which Godrej Almirah was kept. However, in the next morning when they entered inside the room they found that Godrej Almirah was opened and there was no money and he is not aware as to who had taken money from the Almirah.

During cross-examination, he admitted that he learnt about the missing of money of amount from the petitioners Rakesh Kumar and Ujjwal Kumar on 25.11.2009. He further admitted that one junior employee, Rajan Kumar Behra was also present in the night of the occurrence i.e. 24.11.2009. However, he is not aware as to where the keys were kept.

Thus, from perusal of evidence of P.W-4 it is evident that there were two groups who were found in the night in the office of the company of the informant and a suspicion has been raised by the informant only against the petitioners and Mahboob Alam.

Thus, the evidence of P.W-4 is also not reliable as he himself was present in the said office/premises in the night of

the occurrence and given evidence under the influence of the informant.

23. P.W-5 namely Sikandar Prasad Yadav is the I.O of this case, has submitted charge sheet against the petitioner and has tried to corroborate the prosecution case. He has further proved seizure of the cash book/register of the company marked as Exhibit-7. He has further proved the Material Exhibit marked as Material Exhibit-I, Material Exhibit-II and Material Exhibit-III respectively.

24. During cross examination, he has stated that except the accused persons no other persons were present in the office. However, the evidence of P.W-5 on this aspect is contradicted by the evidence of P.W-3 and P.W-4 who have stated that they were also present in the office in the night of the occurrence. He further admitted that it is not mentioned in the seizure list that as to which keys were found from whom rather keys were found kept at other places. He, however, admitted that no amount was received from the accused persons i.e. the petitioners although he had investigated them after 25.11.2009. Even he further admitted that he has not mentioned Register number, P.S Case No./Keys produced by him from Malkhana. He also admitted that the packet of the keys was not sealed and no signature of the accused person was taken by the police.

25. Thus, from the evidence of P.W-5 it is evident that he has done perfunctory investigation and his evidence is contradicted of the evidence of P.W-3 and P.W-4 have stated that they were also sleeping in the office of the informant and even P.W-2 also contradicts the evidence of the I.O on the point of seizure of the keys and even the seizure of cash book and petty cash book.

26. It appears that Exhibit-5 and Exhibit-5/1 respectively have been marked with objection and the same are the true copy of the cash book and rough cash book of Ashmita Microfin Limited but it does not contain the signature of both the petitioners namely Rakesh Kumar and Ujjwal Kumar rather it was issued in the signature of P.W-2-Bishwanath Behra, Branch Manager and the same are not reliable as the original cash book of Exhibit-5 (marked with objection) and original refund cash book of Exhibi-5/1 (marked with objection) have not been proved. Even the signature of both the petitioners namely Rakesh Kumar and Ujjwal Kumar have not been proved by the prosecution and thus, the amount mentioned in Exhibit-5 (marked with objection) and Exhibit-5/1 (marked with objection) cannot be relied upon. Exhibit-5 and Exhibit-5/1 respectively (marked with objection) are also not reliable as they do not contain the signature of both the petitioners namely Rakesh Kumar and Ujjwal Kumar.

27. On the other hand, documents marked as Exhibit-A and Exhibit-A/1 respectively reveal about the payment of loan to certain members for advance for certain expenses including the petitioners namely Rakesh Kumar and Ujjwal Kumar by Bishwanath Behra (i.e. P.W-2) on 24.11.2009 whereas Exhibit-B and Exhibit-B/1 reveal payment of certain amount to the Members and also loan to the Members on 25.11.2009.

28. Thus, there is dispute on the question of theft of amount and also on the question of payment of loan amount to the Member and the prosecution has failed to prove as to under what circumstances Exhibit-A, Exhibit-A/1, Exhibit-B and Exhibit-B/1 were issued. Exhibit-5 and Exhibit-5/1 were not admitted by the defence side but the learned Court below

wrongly and illegally held that the Exhibit-5 and Exhibit-5/1 were admitted although it reveals from the Lower Court Records that Exhibit-5 and Exhibit-5/1 were mentioned (with objection).

29. It also transpires that the learned Court below has rejected Exhibit-A, Exhibit-A/1 and Exhibit-B/1 filed by the defence by completely ignoring the fact that the P.W-2-Bishwanath Behra was the custodian of the Exhibit-A, Exhibit-A/1 and Exhibit-B/1.

30. It appears that Exhibit-3 has been issued under coercion by the petitioner-Rakesh Kumar and it does not disclose as to what amount was to be remitted. Exhibit-2 merely shows recovery of one key and Cash Locker from petitioner-Ujjwal Kumar and two (02) keys of Almirah of main door and on that basis the theft of amount cannot be proved. Both the petitioners were working as the employee and they had informed the matter of theft to the informant.

31. From perusal of the seizure list, showing recovery of key, it appears that it contains the signature of the petitioners but it does not disclose that the accused had stolen.

32. It is well settled that no person can be convicted on mere suspicion.

33. It has been held by Hon'ble Supreme Court in the case of *Ram Niwas vs. State of Haryana* reported in **2022 LiveLaw (SC) 670** that no person can be convicted on mere suspicion.

34. Considering the discrepancies and several inconsistencies in the evidence of the prosecution witnesses, it is evident that the judgments and sentence passed by the learned Courts below are not sustainable in the eye of law.

35. Under the circumstances, the judgment dated 21.02.2011 passed by learned Sessions Judge, West Singhbhum at Chaibasa

in Cr. Appeal No.03/2011 and the judgment of conviction and order of sentence dated 10.01.2011 passed by Sri Prabhat Kumar Sharma, Judicial Magistrate, Ist Class, Chaibasa in G.R. Case No.535/2009 (Sadar P.S. Case No.73/2009), are set aside and the petitioners i.e. Rakesh Kumar (in Cr. Revision No.265/2011) and Ujjwal Kumar (in Cr. Revision No.185/2011) are acquitted for the offences under Sections 406 and 120B of the I.P.C and they are also discharged from the liability of their respective bail bonds.

36. Thus, both the Cr. Revision No.265 of 2011 and Cr. Revision No.185 of 2011 are allowed.

37. Hence, fee of Rs.5500/- be paid by the learned Member Secretary, JHALSA to Mrs. Nanda Kumari, learned Amicus Curiae appearing for the petitioner in Cr. Revision No.185/2011.

38. Let the Lower Court Records be sent back to the learned Court below at once.

(Sanjay Prasad, J.)

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