

JETHSUR SURANGBHAI

v.

STATE OF GUJARAT

November 9, 1983

[S. MURTAZA FAZAL ALI, R.B. MISRA AND M.P. THAKKAR, JJ.]

Indian Penal Code 1860, Ss. 120 B, 109, 408, 467 and 471.

Chairman of Co-operative Society along with others charged with conspiracy to commit criminal breach of trust—Charge of conspiracy having failed—Sessions Court acquitting all but one accused—Appeal by State—High Court convicting Chairman—Conviction whether valid and legal.

Defalcation of properties—Several accused charged with conspiracy—Prosecution to prove collusion and cohesion among all accused—Mens rea not to be excluded—If charge of conspiracy fails—Prosecution to prove affirmatively that accused directly and personally connected with acts or omissions.

The appellant was the Chairman of an autonomous cooperative society under the control and supervision of the State Government. On receipt of complaints about the financial management of the Society, the Registrar of Cooperative Societies appointed a special auditor to audit the Society's accounts. On the basis of the audit report a charge-sheet was filed against all the accused for entering into a conspiracy to commit criminal breach of trust. The conspiracy charge having failed, all the accused except one were acquitted by the Sessions Judge.

On appeal by the State, the High Court convicted the appellant in respect of three items, namely, purchase of fertilisers involving two transactions and missing of certain oil engines, on the ground that as Chairman of the Managing Committee he must be held to be vicariously liable for any order given or misappropriation committed by the other accused.

In appeal to this Court it was contended on behalf of the appellant that no case of defalcation had been made out against the appellant.

Allowing the appeal,

HELD : 1. There was no justification for the High Court to interfere with the appellant's acquittal. The case against the appellant had not been proved beyond reasonable doubt and he was wrongly convicted by the High Court. [802 D-E]

A 2. In a case where there was serious defalcation of the properties, unless the prosecution proved that there was a close cohesion and collusion between all the accused which formed the subject matter of a conspiracy, it would be difficult to prove the charges against the appellant. The charge of conspiracy having failed, the most material and integral part of the prosecution story against the appellant disappeared. [801 B-C]

B 3. In a criminal case of such serious nature *mens rea* cannot be excluded. Once the charge of conspiracy has failed the onus lay on the prosecution to prove affirmatively that the appellant was directly and personally connected with acts or omissions pertaining to the items purchased. [801 E]

C 4. In the absence of a charge of conspiracy the mere fact that the appellant happened to be the Chairman of the Committee would not make him liable in a vicarious sense. There is no evidence either direct or circumstantial to show that apart from approving the purchase of fertilisers he knew that the firms from which the fertilisers were purchased did not exist. If the Chairman was to be made liable then all members of the Committee, viz. Tehsildar and other nominated members would be equally liable because all of them participated in the deliberation of the meetings of the Committee. The appellant as Chairman of the Sangh, had to deal with a large variety of matters and it would not be humanly possible for him to analyse and go into the details or every small matter in order to find out whether there has been any criminal breach of trust. [801 G-H; 802 A-B]

E CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 260 of 1972.

Appeal by Special leave from the Judgment and Order dated the 22.3.1972 of the Gujarat High Court in Criminal Appeal No. 171 of 1971.

F *R.L. Kohli, Ramesh Kohli, Naresh K. Sharma and Vineet Kumar* for the Appellant.

M. N. Phadke, H. R. Khanna and R. N. Poddar for the Respondent.

G The Judgment of the Court was delivered by

H FAZAL ALI, J. After hearing counsel for the parties, by virtue of our Order dated October 4, 1983, we had allowed the appeal and acquitted the accused-appellant. We now proceed to give the reasons for the said Order.

The appellant was convicted by the High Court under s. 408 read with s. 109, Indian Penal Code in respect of criminal breach of

trust with regard to several items which have been detailed in the judgment of the High Court. The appellant was also convicted under ss. 471 and 467 read with s. 109 of the I.P.C. Under the first count (s. 408) the appellant was sentenced to two years R.I. and a fine of Rs. 1000, in default of payment of fine, further six months R.I. Under the second count (s. 471) he was sentenced to imprisonment for one year. The High Court further convicted the appellant under s. 409 I.P.C. for having committed breach of trust in respect of certain oil engines and sentenced him to 3 years R.I. and a fine of Rs. 1000, in default of payment of fine, imprisonment for six months. Thus, the sum total of the sentences under various sections mentioned above comes to five years but as the sentences have been made to run concurrently, the total sentences would be three years apart from the fine.

The learned Sessions Judge had acquitted the appellant holding that the charges framed against him were not proved but the High Court in an appeal by the State of Gujarat reversed the decision of the Sessions Judge and set aside the appellant's acquittal and convicted him as aforementioned.

The facts of the case have been detailed in the judgments of the High Court and the Sessions Judge with clarity and lucidity and need not be repeated all over again except so far as they are relevant for the purpose of deciding the appeal. There was an organisation known as 'Jasdan Taluka Sahkari Kharid Vechan Sangh Ltd. (hereinafter referred to as the 'Sangh') which was like an autonomous cooperative society directly within the control and supervision of the Government. The appellant was the chairman of the Sangh and the other members of the Sangh consisted of two categories, viz., members nominated by the Registrar of Cooperative Societies and those elected by the Sangh itself. The managing Committee of the Sangh consisted of 8 members out of whom the appellant was the Chairman and A-2 was the Manager while the Tehsildar was the ex-officio Member of the Sangh. Having received a number of complaints against the Sangh, the Registrar of Cooperative Societies ordered one V. B. Shah to act as special auditor and examine and audit the accounts of the Sangh for the year 1965-66. On the basis of the audit report, the Managing Committee was superseded and an administrator was appointed. Meanwhile the Sangh moved the High Court to obtain a stay order against the appointment of the

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A administrator as a result of which the appointment of the administrator was stayed for some time and the stay was vacated in July 1966. Subsequently, one M. K. Parikh was appointed an administrator.

B The police after usual investigation submitted chargesheet under s. 120B, IPC against all the accused for entering into a conspiracy to commit criminal breach of trust. So far as the appellant is concerned he was never charged under the sections mentioned earlier. The charge of conspiracy failed and the Sessions Judge acquitted all the accused except A-3 who was convicted under s.408 to R.I. for two years and a fine of Rs.1000. In the instant case, we are only
C concerned with the appellant who was Chairman of the Managing Committee.

D Mr. Phadke, learned counsel for the respondent, has very fairly conceded that excepting 3 items he would not press the case of the prosecution against the appellant. These items are mentioned at page 154 of the paperbook and may be extracted as follows :

- (1) Item about purchase of the truck;
- (2) Item about purchase of fertilisers;
- E (3) Items of the amounts of Rs. 600 and 1100 received by accused No. 3 after the audit was done;
- (4) non-finding of five oil engines by the administrator when he took over charge.

F So far as item No.(1) is concerned, the High Court itself found that there was absolutely no legal evidence to connect the appellant with the purchase of the truck and so far as misappropriation by the appellant in regard to this item is concerned that stands
G disproved.

H Coming to the other three items, viz., purchase of fertilisers, the amounts of Rs. 600 and Rs. 1100 and the missing of five oil engines, these formed the basis of the conviction of the appellant by the High Court. Mr. Phadke conceded that he would not press the case with respect to item No. (1) but would try to show that so far as items (2) to (4) are concerned the case has been fully proved against the appellant.

Having gone through the judgment of the High Court we find ourselves unable to accept the argument of Mr. Phadke. The counsel for the appellant rightly argued with great force and vehemence that taking the findings of the High Court *ex facie* no case of defalcation of Items (2) to (4) has been made out. In our opinion, the contention raised by the counsel for the appellant is well-founded and must prevail. With due respect what the High Court seems to have missed is that in a case like this where there was serious defalcation of the properties of the Sangh, unless the prosecution proved that there was a close cohesion and collusion between all the accused which formed the subject matter of a conspiracy, it would be difficult to prove the dual charges particularly against the appellant (A-1). The charge of conspiracy having failed, the most material and integral part of the prosecution story against the appellant disappears. The only ground on the basis of which the High Court has convicted him is that as he was the chairman of the Managing Committee, he must be held to be vicariously liable for any Order given or misappropriation committed by the other accused. The High Court, however, has not referred to the concept of vicarious liability but the findings of the High Court seem to indicate that this was the central idea in the mind of the High Court for convicting the appellant. In a criminal case of such a serious nature *mens rea* cannot be excluded and once the charge of conspiracy failed the onus lay on the prosecution to prove affirmatively that the appellant was directly and personally connected with acts or omissions pertaining to items 2, 3 and 4. It is conceded by Mr. Phadke that no such direct evidence is forthcoming and he tried to argue that as the appellant was chairman of the Sangh and used to sign papers and approve various tenders, even as a matter of routine he should have acted with care and caution and his negligence would be a positive proof of his intention to commit the offence. We are however unable to agree with this somewhat broad statement of the law. In the absence of a charge of conspiracy the mere fact that the appellant happened to be the Chairman of the Committee would not make him criminally liable in a vicarious sense for items 2 to 4. There is no evidence either direct or circumstantial to show that apart from approving the purchase of fertilisers he knew that the firms from which the fertilisers were purchased did not exist. Similar is the case with the other two items. Indeed, if the chairman was to be made liable then all members of the Committee, viz, Tehsildar and other nominated members, would be equally liable because all of them participated in the deliberations of the meetings of the Committee, a conclusion

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A which has not even been suggested by the prosecution. As chairman
of the Sangh the appellant had to deal with a large variety of matters
and it would not be humanly possible for him to analyse and go
into the details of every small matter in order to find out whether
there has been any criminal breach of trust. In fact, the hero of the
entire show seems to be A-3 who had so stage-managed the drama
as to shield his guilt and bring the appellant in the forefront. But
B they by itself would not be conclusive evidence against the appellant.
There is nothing to show that A-3 had either directly or indirectly
informed the appellant regarding the illegal purchase of fertilisers or
the missing of the five oil engines which came to light much later
during the course of the audit. Far from proving the intention the
C prosecution has failed to prove that the appellant had any knowledge
of defalcation of items 2 to 4. In fact, so far as item 3 is concerned,
even Mr. Phadke conceded that there is no direct evidence to connect
the appellant.

D In these circumstances, we do not find any justification for the
High Court to have interfered with the order of acquittal passed by
the Sessions Judge in favour of the appellant and having considered
the facts and circumstances of the case, we are clearly of the opinion
that the case against the appellant has not been proved beyond
reasonable doubt and he was wrongly convicted by the High Court.
E Even putting the prosecution case at the highest it cannot be said
that two views are not reasonably possible,

F For the reasons given above, we allow the appeal, set aside the
conviction and sentences imposed by the High Court and acquit the
appellant of the charges framed against him. The appellant will
now be discharged from his bail-bonds and need not surrender.

N.V.K.

Appeal allowed.