



**IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.1432 OF 2019

**RAMKRUSHNA PRAHLAD
DONGARDIVE**

APPELLANT

VERSUS

THE STATE OF MAHARASHTRA

RESPONDENT

J U D G M E N T

ATUL S. CHANDURKAR, J.

1. Reversal of the appellant's acquittal for the offence punishable under Section 409 of the Indian Penal Code, 1860¹ is questioned in this criminal appeal. The appellant, on being tried for the offence punishable under Section 409 of the Penal Code was acquitted by the trial Court. The Bombay High Court, Bench at Aurangabad², however, reversed the said acquittal. After convicting the appellant for the offence punishable under Section 409 of the Penal Code, he has been sentenced to suffer rigorous imprisonment for one year and to pay fine of ₹5,000/-. In default

payment of fine, he was required to undergo further

¹ For short, 'the Penal Code'

² For short, 'the High Court'

imprisonment for one month.

2. According to the prosecution, the appellant was serving as Cashier-cum-Counter Clerk with the Telephone Department at Aurangabad. During the period from 01.07.1993 to 09.10.1993, the appellant had collected telephone charges from customers amounting to ₹8,73,737/-. It was alleged that from the said amount, ₹3,88,035/- was credited to the account of the Government belatedly and, thus, the appellant had committed temporary criminal breach of trust. It was also alleged that the appellant had not credited an amount of ₹4,75,702/- in the account of the Government despite being entrusted with the said amount. On a complaint being lodged by the Assistant Accounts Officer on 11.10.1993, offence under Sections 409, 477 and 420 of the Penal Code was registered. After completion of the investigation, charge under Section 409 of the Penal Code was framed. The appellant denied the said charge and claimed to be tried.

3. To bring home the aforesaid charge, the prosecution examined various witnesses. PW1-Ashok Joshi was working as Assistant Accounts Officer at the Telephone Centre at Aurangabad. He stated that as a Cash Counter Clerk, it was the duty of the

appellant to receive the billing amount from customers as per the amount mentioned in the telephone bills. The amount collected up to 01.00 p.m. was to be credited in the bank on the same day, while the balance amount was to be given to the Head Cashier. This witness stated that a notice was given to the appellant vide Exhibit-7 enquiring as to why the amount received from various customers had not been deposited. The appellant failed to reply to the said notice. He referred to the concerned receipt books signed by the appellant at Exhibit-8 and a list indicating credit of amount of ₹4,75,700/- at Exhibit-9. One of the customers had deposited an amount of ₹4,930/- on 21.08.1993 but the said amount was actually credited to the account of the Government on 25.09.1993. In his cross-examination, this witness admitted that Exhibit-9, which was a list indicating credit of various amounts, did not bear the signature of the appellant nor was there any handwritten portion on the same. He further admitted that Exhibit-8, which was a receipt book, had not been signed by the Accounts Officer or the Junior Accounts Officer or the Assistant Accounts Officer. He further stated that if the payment of any telephone bill was not made by a customer for thirty-five days, his connection would be disconnected. However, no complaint of any disconnection was

received from any customer. He further stated that no notice was served on the appellant with regard to any difference in the receipt books and the list prepared by him. He also did not find any entry to be missing in the list as per the receipt books. He admitted that he had not produced any record to show the details of the receipt books supplied to the appellant. The daily lists were tallied as per the receipts in the receipt books supplied to the appellant on day-to-day basis, regularly. He also admitted that till the lodging of the report, not a single complaint from any customer as regards disconnection of the telephone line was received despite having paid the dues. No audit report was prepared before filing the complaint.

4. PW2-Ramkrishna Kshirsagar serving as Accounts Officer was examined at Exhibit-14. In his deposition, the daily list dated 25.08.1993 was exhibited at Exhibit-15. According to this witness, on 30.09.1993, a subscriber, namely Mr. Udawant had come to the office along with a receipt of having paid his telephone bill on 25.08.1993. However, the amount paid by him was shown to be entered in the record on 21.09.1993. In his cross-examination, he stated that if any entry from the daily list was not recorded in a subscribers' record card, bills were again demanded for the

amount deposited by the subscriber. The entries made in the daily list were taken in the subscribers' record card. He further stated that no complaint had been received against the appellant till 01.10.1993. He also stated that no difference or fault was found in the daily list and the receipt books produced by the appellant. He further admitted that the daily list and receipt books prepared by the appellant were verified daily. As regards collection of the amount from Mr. Udawant on 25.08.1993 was concerned, he stated that he could not point out the office copy of the receipt that was issued to Mr. Udawant on 25.08.1993 from the receipt book at Exhibit-8. He further admitted that there was no documentary evidence to show which receipt books were supplied to the appellant.

5. PW3-Bharat Kawde serving as a Clerk in the Telephone Department was examined at Exhibit-21. PW4-Deepak Sonwane was examined at Exhibit-22. Though the prosecution claimed that he had acted as a panch witness, he stated that his signature was obtained on a blank paper. He was, thus, declared hostile. PW5-Lata Kolhe serving as Junior Accounts Officer was examined at Exhibit-23. She admitted that no complaint was received against the appellant to the effect that despite recovering an

amount, the same was not deposited by him with the office. PW6-Murlidhar Dolas, a panch witness, was examined at Exhibit-24. He too was declared hostile. Similarly, PW7-Rahul Magare, who was another panch witness was also declared hostile. PW8-Bhaurao Pradhan was working as a receptionist at Hotel Meghdoot. He, however, denied having made any statement to the police. He was also declared hostile. PW9-Premnarayan Goyal was dealing with sales of tea powder. He was examined to indicate payment being made by him against the telephone bill. He, however, stated that whenever he used to pay the telephone bills, he used to receive the receipts and his telephone was never disconnected. He also did not receive any notice for disconnection. The amounts paid by him were credited on the same day. PW10-Baban Wani was examined at Exhibit-36. He was working as a Section Supervisor in the Telephone Department. He stated that it was not his duty to issue any receipt book and that on the oral instructions of the Accounts Officer, he had issued ten receipt books to the appellant. He admitted that with regard to the present proceedings, a departmental enquiry had been initiated against him as well as against other staff members. PW11-Parshuram Dhotre was examined at Exhibit-41. He was working as Exa miner

of Documents. After examining various documents sent to him, he had sent his opinion on 31.12.1997 at Exhibit-78.

6. PW12-Adinath Gore was the initial Investigating Officer³. He was examined at Exhibit-85. Before completion of the investigation, he was transferred to another police station. He admitted that though he had seized the documents as per the seizure panchnama at Exhibit-86 from the appellant, he did not obtain the appellant's signature on the same. Similarly, he had not put any date below his signature on Exhibit-86. Digambar Gadekar was examined at Exhibit-90 as PW13. He too undertook investigation for some duration. He stated that he had taken the specimen handwriting and signatures of the appellant in presence of two witnesses. The same were at Exhibit-91. He, however, admitted that he did not obtain the signature of the appellant on Exhibit-91. PW14-Shrikant Mahajan was examined at Exhibit-93. He stated that except filing of the chargesheet, he did not undertake any investigation. PW15-Diwakar Padalkar was examined at Exhibit-108. He was serving as a Clerk at the Telephone Office. He stated that he had imposed penalty of ₹10/- on Mr. Udawant, a subscriber, as he had paid his bill late.

³ For short, 'IO'

According to him, he was shown the receipt of payment of the bill by Mr. Udawant. In his cross-examination, he stated that no telephone connection of any subscriber was disconnected. He further admitted that there was no record to indicate penalty being imposed on Mr. Udawant.

Mr. Prabhakar Udawant, a subscriber, was examined at Exhibit-109. He stated that bill dated 15.07.1993 for ₹3,903/- was paid on time. On receiving a notice from the Telephone Department that the bill had not been paid, he showed the receipt of payment. In his cross-examination, he stated that he had no grievance against the Telephone Department. Receipt No.31 had been handed over to the police.

7. The statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure, 1872⁴. While answering Question No.46, the appellant stated that a false case had been filed against him and he was submitting an application for calling two registers to show that the entire amount was paid to the Accounts Officer, Mr. Kshirsagar. The records sought by the appellant were the daily cash handover register for the period from 01.02.1993 to 05.10.1993 and the stock register regarding supply of receipt books to the Cash Counter Clerk, being the appellant

⁴ For short, 'the Code'

himself, for the period from 01.02.1993 to 05.10.1993. The appellant also stated that the case of the prosecution was false.

8. The learned Judge of the trial Court after considering the entire evidence on record was of the view that the evidence led by the prosecution was not specific and clear. The exact amount collected by the appellant as well as the amount credited by him thereafter had not been stated with any particulars. It was further observed that the evidence on record was vague and general in nature. The registers stated to be seized by the prosecution could not be exhibited as the witnesses did not support the prosecution. The procedure laid down in Section 100(7) of the Code while effecting seizure of forty-six articles from the house of the appellant had not been followed. For all these reasons, the trial Court held that the prosecution had failed to prove the charge against the appellant. It, accordingly, acquitted him of the said offence.

9. Mr. B.H. Marlapalle and Mr. Sudhanshu S Choudhari, learned Senior Advocates for the appellant, in support of the appeal submitted that the High Court committed an error in reversing the judgment of the trial Court and convicting the appellant for the offence punishable under Section 409 of the Penal Code. It was submitted that the trial Court having appreciated the

evidence in the correct perspective and having thereafter concluded that the prosecution had failed to prove the charge beyond reasonable doubt, the High Court by ignoring the settled principles as regards interference with an order of acquittal proceeded to set aside the judgment of the trial Court. Merely because the High Court was of the opinion that another view was possible on the basis of the same evidence, it chose to reverse the acquittal of the appellant. Reference in this regard was made to the decision in **Chelloor Mankkal Narayan Ittiravi Nambudiri Vs. State of Travancore-Cochin**⁵. It was then urged that on a proper consideration of the entire prosecution material, it was clear that the offence of criminal breach of trust was not made out. The necessary ingredients to make out such offence being entrustment of property and dishonest intention while misappropriating the same had not been proved. The manner in which there had been actual entrustment of the amount of ₹8,73,737/- was not proved. Similarly, the belated credit of the amount of ₹3,88,035/- was also not proved. Moreover, there was no evidence on record to indicate any dishonest intention on the part of the appellant. Unless these material aspects were duly proved, conviction for the offence

⁵ AIR 1953 SC 478

punishable under Section 409 of the Penal Code would not be possible. To substantiate the contention that the offence under Section 409 of the Penal Code had not been made out, reliance was placed on the decision in **R. Venkatakrishnan vs. Central Bureau of Investigation**⁶. It was pointed out from the record that the appellant had filed applications seeking production of the relevant records maintained by the Telephone Department. Despite being ordered to produce that record, the prosecution failed to do so. The trial Court rightly drew adverse inference against the prosecution for that reason. The High Court, however, failed to give due importance to this aspect. It was then submitted that the High Court sought to shift the burden of proof on the appellant when it observed that it was for the appellant to prove his innocence. It was, thus, submitted that on an overall consideration of the entire material on record, it was clear that the prosecution had failed to bring home the charge of criminal breach of trust against the appellant. The trial Court having rightly acquitted the appellant, the judgment of the High Court reversing the appellant's acquittal ought to be set aside.

⁶ 2009 INSC 1037

10. Per contra, Mr. Shrirang B. Varma, learned counsel representing the State of Maharashtra, supported the impugned judgment. He submitted that the High Court rightly found that there had been entrustment of an amount of ₹8,73,737/- to the appellant, who was serving as Cashier-cum-Counter Clerk. An amount of ₹3,88,035/- had been belatedly credited to the account of the Government while an amount of ₹4,75,702/- had not been so credited. The various documents on record including Exhibits 7 to 9, as well as the opinion of the handwriting expert had not been properly considered by the trial Court. The High Court took into consideration this material to conclude that the appellant was, in fact, guilty of the offence of criminal breach of trust. The conduct of the appellant, as was evident from record also pointed out to his dishonest intention. All necessary ingredients constituting an offence punishable under Section 409 of the Penal Code had been duly proved. The High Court, therefore, rightly concluded that the acquittal of the appellant by the trial Court was not at all justified and that his guilt had been proved beyond reasonable doubt. He, therefore, submitted that the judgment of conviction passed by the High Court did not call for any interference. The appeal was liable to be dismissed.

11. Since the impugned judgment is one of reversal of acquittal, the broad principles to be borne in mind by an appellate Court when it considers an appeal from an order of acquittal are required to be noted. In this regard, we may refer to the observations in paragraph 20 of the judgment in **Chelloor Mankkal Narayan Ittiravi Nambudiri** (*supra*) which reads as under:

“20. It cannot be disputed that the High Court, even though it was hearing an appeal from an order of acquittal, had full powers to review the entire evidence on the record and reach its own conclusion that the acquittal order should be set aside. But as the Privy Council pointed out in --'Sheoswarup v. Emperor' , in exercising these powers the High Court should and will always give proper weight and consideration to such matters as: (1) the views of the trial court as to the credibility of witnesses; (2) presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he had been acquitted at the trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.”

12. The appellant was charged for the offence punishable under Section 409 of the Penal Code. In this regard, we may note that Section 405 of the Penal Code defines ‘criminal breach of trust’. Under this provision, there has to be entrustment of any property to a person or such person should have dominion over property. That person, who has been so entrusted with property, may have either dishonestly misappropriated or converted that property to his own use or dishonestly used or disposed of that property in violation of any direction of law prescribing the mode in which

such trust has to be discharged. Section 406 of the Penal Code provides for criminal breach of trust. Section 409 of the Penal Code deals with criminal breach of trust wherein property is entrusted to enumerated category of persons. It is also important to note that ‘dishonest intention’ is an essential element for constituting an offence of criminal breach of trust. This aspect has been considered in detail in **R. Venkatakrishnan** (*supra*) that was relied upon by the learned Senior Advocates for the appellant. It was observed therein that breach of trust simplicitor would not be an offence as long as it was not associated with an intention that was dishonest. Referring to the term ‘dishonest’ as defined in Section 24 of the Penal Code, it was held that an offence of breach of trust would be complete only when the misappropriation of such property had been made dishonestly. Even temporary misappropriation would fall within the ambit of the said offence. It would, therefore, be necessary to examine as to whether the prosecution has brought on record any material to indicate entrustment of property to the appellant as well as the element of ‘dishonest intention’ on his part leading to misappropriation of property. Reference may also be made to the decision of this Court in **Chelloor Mankkal Narayan Ittiravi Nambudiri** (*supra*) wherein

it was observed as under:

“21. The other point that requires consideration is, whether on the prosecution evidence as it stands, the accused can be held guilty of criminal breach of trust? As laid down in Section 385, Cochin Penal Code, (corresponding to Section 405, Indian Penal Code) to constitute an offence of criminal breach of trust it is essential that the prosecution must prove first of all that the accused was entrusted with some property or with any dominion or power over it. It has to be established further that in respect of the property so entrusted, there was dishonest misappropriation or dishonest conversion or dishonest use or disposal in violation of a direction of law or legal contract, by the accused himself or by someone else which he willingly suffered to do.”

13. While considering the aspect of entrustment of property, which in the present case is in the form of receipt of cash from customers, the deposition of PW12, the IO who had initially investigated the crime and had effected seizures is material. In paragraph 3 of his deposition on cross-examination, PW12 stated as under:

“3/- The complainant had not produced the cashbook alongwith the documents produced with the first information report. At the time of filing complaint, complainant did not produce balancesheet, daily register, audit report, and rough cashbook. Not a single telephone subscriber stated before me alleging that he did not receive receipt on payment of the amount and that his telephone connection was disconnected. The Officers of Telephone Department did not show subscribers' individual card. I told the complainant Ashok Joshi and Shri Bhat to show me original cashbook, audit report and relevant documents about collection of the amount but the aforesaid documents and cashbook were not shown to me till I was transferred.”

The aforesaid admissions clearly indicate that despite being called upon by the IO to produce the original cashbook, audit report and other relevant documents including collection of

amounts from subscribers, the same were not produced by the complainant, PW1 and other officers of the Telephone Department. These documents formed the basis of entrustment of property to the appellant. However, in the absence of these material documents, it would be difficult to hold that there was, in fact, entrustment of the amount of cash to the appellant, which is one of the basic ingredients for constituting breach of trust. The original cashbook or the daily register or the rough cashbook would have indicated the collection of cash by the appellant. This would have led to the position that despite receiving the said amounts, the same were either not deposited by him or were temporarily misappropriated. When it was the specific charge against the appellant that he had collected an amount of ₹8,73,737/- from various customers during the period from 01.07.1993 to 09.10.1993 and that an amount of ₹3,88,035/- was credited to the account of the Government belatedly while the amount of ₹4,75,702/- had not been credited, the aforesaid documents would have been very relevant to prove the same. The same are, however, not on record.

14. Pertinently, the appellant, in defence had sought production of the daily cash handover register for the period from 01.02.1993

to 05.10.1993 and the stock register of supply of receipt books to him. However, the aforesaid documents sought by the appellant were not produced before the trial Court. In paragraph 21 of the judgment of the trial Court, it was observed as under:

“21. In this case I have to mention here that, on behalf on accused his learned counsel Shri. H.M. Dongre has repeatedly filed application to call the concern registers and documents from the telephone office to ascertain what amount was misappropriated by accused and on which dates the amounts were collected but the telephone office, A'bad has not produced the same documents, therefore with holding the documents by one party in such type of serious case, court can draw an adverse inference U/s. 114(g) of Indian Evidence Act against the party who with held the documents.”

This relevant aspect, however, has been ignored by the High Court while overturning the judgment of the trial Court. It observed in paragraph 9 of the impugned judgment that the appellant ought to have produced the daily registers if he had credited the amount with the Government or had handed over the amount to the main cashier. In our view, the trial Court was justified in drawing an adverse inference against the prosecution for its failure to place on record the relevant material that was in the custody of the Telephone Department, the complainant. The non-production of the concerned register and documents when considered along with the admissions of the IO would lead to an inference that such material was not at all available with the complainant. The said material was necessary to prove the aspect

of entrustment to the appellant.

15. Yet another relevant circumstance relied upon by the prosecution is the seizure of forty-six items of documentary nature from the house of the appellant. According to the prosecution, during the course of investigation, the house of the appellant was searched and about forty-six articles referred to in the seizure panchnama at Exhibit-86 were seized. PW12, Mr. Aadinath Gore, who was working as a Police Inspector at the relevant time, deposed at Exhibit-85 that on 13.10.1993, he had taken search of the residential house of the appellant and had seized receipt books, duplicate copies of telephone bills and other documents mentioned in the seizure panchnama. In his cross-examination, this witness stated that the records had been seized by the concerned Head Constable, but the witness was not knowing his whereabouts. He further stated in his cross-examination that he did not obtain the signatures of the appellant on the seizure panchnama. He also stated that Exhibit-86 was not in his handwriting and that he had not put a date below his signature thereon.

16. The seizure was effected in the presence of two witnesses. PW6, Mr. Murlidhar Dolas was examined at Exhibit-24. This witness stated that he did not know the contents of the seizure

panchnama and was, thus, declared hostile. In his cross-examination by the appellant, he stated that when he had gone to the police station for his work, his signatures were obtained by the police. The other witness, Mr. Rahul Magare was examined as PW7 below Exhibit-25. This witness was also declared hostile and in his cross-examination by the appellant, he stated that when he was with his auto-rickshaw in front of the police station, he was called and his signatures were obtained on some documents.

17. The trial Court on considering this evidence found that while effecting seizure of the aforesaid articles from the house of the appellant, the IO failed to follow the procedure laid down in Section 100(7) of the Code. It, further, found that the seizure of the forty-six articles was not supported by the two witnesses examined by the prosecution. It, therefore, held that merely on the basis of the evidence of the police officer at PW12, the same was not sufficient to prove the seizure panchnama and seizure of documents from appellant's house.

The High Court, however, held that though both the panch witnesses had turned hostile, there was no reason for PW12, the police officer, to give false evidence. On this basis, it proceeded to uphold the seizure of the forty-six articles mentioned in Exhibit-

86. It, further, held that mere absence of the appellant's signature on the seizure panchnama indicating its copy being supplied to him as required by Section 100(7) of the Code was not very relevant. The said aspect was brushed aside by observing that the requirement in that regard was not mandatory in nature and that if there was convincing evidence, the IO could be believed in such circumstances.

18. In our view, this line of reasoning by the High Court while overturning the judgment of acquittal recorded by the trial Court cannot be accepted. The entire case of the prosecution rests on documentary evidence and Exhibit-86, on the basis of which forty-six articles were seized, constitutes a material part thereof. There are serious infirmities in proving the seizure with both the seizure witnesses not having supported the prosecution. Further, there was infraction of the requirements of Sections 100(4) and 100(7) of the Code due to its non-compliance. In this scenario, the seizure could not be held to be duly proved solely on the basis of deposition of the IO without any further corroboration. There is no explanation given by the IO as to why a list of the articles seized from the appellant's house was not furnished to him.

We, therefore, find that the High Court erred in relying upon

the seizure of the said articles and further observing that the same was an incriminating circumstance against the appellant, for which he had not furnished any explanation. The burden of proving a valid seizure of the articles was on the prosecution, but it failed to prove the same, in accordance with law.

19. It is true that non-compliance of the requirements of Section 100 of the Code by itself would not vitiate a seizure and the same would be an irregularity in the investigation. However, when this factor is considered cumulatively with other factors that contribute to doubting the prosecution case, the same would weigh in favour of the appellant, especially in an appeal against acquittal. In this regard, we may refer to two decisions of this Court. In **Sunder Singh Vs. State of Uttar Pradesh**⁷, it was held as under:

“In respect of the search of the room occupied by the appellant and the recovery of the bloodstained shirt and bloodstained pants aforesaid it was necessary to have at least two search witnesses as required by Section 103. Assuming that the two rickshaw-wallahs who actually witnessed the search as found by the Courts below were not respectable inhabitants of the locality, that circumstance would not invalidate the search. It would only affect the weight of the evidence in support of the search and the recovery. Hence at the highest the irregularity in the search and the recovery in so far as the terms of Section 103 had not been fully complied with would not affect the legality of the proceedings. It only affected the weight of evidence which is a matter for courts of fact and this Court would not ordinarily go behind the findings of fact concurrently arrived at by the courts below.”

Similarly, in **State of Punjab Vs. Balbir Singh and others**⁸,

⁷ AIR 1956 SC 411

⁸ 1994 INSC 96

this Court held as under:

“At this juncture we may also dispose of one of the contentions that failure to comply with the provisions of Cr.P.C. in respect of search and seizure even upto that stage would also vitiate the trial. This aspect has been considered in a number of cases and it has been held that the violation of the provisions particularly that of Sections 100, 102, 103 or 165 Cr.P.C. strictly *per se* does not vitiate the prosecution case. If there is such violation, what the courts have to see is whether any prejudice was caused to the accused and in appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and from that point of view evaluate the evidence on record.”

In the light of the aforesaid position, weightage to be given to the articles stated to be seized from the house of the appellant would have to be cumulatively assessed with the other material on record.

20. Exhibit-8 comprises various receipt books indicating receipt of amounts towards telephone bills. PW1, the Assistant Accounts Officer, admitted that there was no record produced that the receipt books at Exhibit-8 were supplied to the appellant. He admitted that he had personally not seen the said receipt books being supplied to the appellant. No record was produced to show details of the receipt books supplied to the appellant. Exhibit-9 was claimed to be a list comprising ten pages submitted by the appellant indicating credit of an amount of ₹3,88,035/- and non-payment of ₹4,75,702/-. PW1 admitted that Exhibit-9 did not bear the signature of the appellant nor was there any handwritten portion thereon. We have perused Exhibit-9. It is a printed

document running into ten pages containing telephone numbers, the amount paid/unpaid towards each telephone number. There is nothing to connect the appellant with the figures mentioned in Exhibit-9 and it could not have been relied upon by the High Court. It would have been a different matter if the entire chain indicating receipt of amounts by the appellant being shown followed by short deposit or non-deposit of such amounts through the daily deposit registers. However, the prosecution failed to bring on record the relevant documents/registers to prove the same. In fact, PW12, the IO also admitted that despite telling the complainant and other officers to show him the original cashbook, audit report and other documents indicating collection of amounts, this record was not produced.

21. We find that there is yet another material infirmity in the impugned judgment of the High Court. The appellant had been acquitted by the trial Court and his acquittal was the subject matter of challenge before the High Court. After setting aside the judgment of the trial Court and convicting the appellant for the offence punishable under Section 409 of the Penal Code, it was necessary for the High Court to have heard the appellant on the quantum of sentence. In other words, before sentencing him for

the first time for the offence punishable under Section 409 of the Penal Code, the appellant ought to have been heard. The record, however, indicates that without hearing him, the appellant was sentenced to suffer rigorous imprisonment for a period of one year and to pay fine of ₹5,000/-. After the arguments of counsel were heard by the High Court on 29.09.2017, the judgment was reserved. It was pronounced on 12.10.2017 and the appellant was sentenced in the aforesaid manner.

22. We may in this context refer to a recent decision of this Court in **Mukesh Kumar Yadav Vs. The State (UT of Andaman & Nicobar Islands) Etc.**⁹. After referring to the provisions of Section 386 of the Code, this Court held in paragraphs 12 to 17 and 19 as under:

“**12.** Equally, situations may arise where the trial court acquits the accused. In an acquittal, the question of hearing on sentence will not arise. On appeal by the State or by the victim/informant, what should be the position if the higher court reverses the acquittal and for the first time convicts the accused. To appreciate this position, a reference needs to be made to Section 386, Cr.P.C. (equivalent to Section 427, BNSS). Section 386(a), Cr.P.C., which is relevant for our purpose reads as under:-

“**386. Powers of the Appellate Court.**—After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case

may be, or find him guilty and pass sentence on him according to law;
.....”

13. It can be seen from Section 386(a), Cr.P.C., that where in an appeal from an order of acquittal, the court hearing the appeal finds the accused guilty it is required to pass a sentence on him according to law.

14. In *Kumar Exports Vs. Sharma Carpets*¹⁰, this Court interpreting Section 386(a), Cr.P.C., while holding that appellate court ought not, after recording conviction, remit the matter to the trial court and that the appellate court is obligated to impose an appropriate sentence, held as under:-

“26. This Court has also noticed a strange and very disturbing feature of the case. The High Court, after convicting the appellant under Section 138 of the Act, remitted the matter to the learned Magistrate for passing appropriate order of sentence. This course, adopted by the learned Single Judge, is unknown to law. The learned Single Judge was hearing an appeal from an order of acquittal. The powers of the appellate court, in an appeal from an order of acquittal, are enumerated in Section 386(a) of the Code of Criminal Procedure, 1973. Those powers do not contemplate that an appellate court, after recording conviction, can remit the matter to the trial court for passing appropriate order of sentence. The judicial function of imposing appropriate sentence can be performed only by the appellate court when it reverses the order of acquittal and not by any other court. Having regard to the scheme of the Code of Criminal Procedure, 1973 this Court is of the view that after finding the appellant guilty under Section 138 of the Act, the judicial discretion of imposing appropriate sentence could not have been abdicated by the learned Single Judge in favour of the learned Magistrate. Having found the appellant guilty under Section 138 of the Act it was the bounden duty of the High Court to impose appropriate sentence commensurate with the facts of the case. Therefore, we do not approve or accept the procedure adopted by the High Court. Be that as it may, in this case, we have found that reversal of acquittal itself was not justified.”

[Emphasis supplied]

15. Not only should the appellate court not remand the matter to the trial court only for the purpose of imposing a sentence, after it finds accused guilty, it has a bounden duty to hear and impose an appropriate sentence.

16. The appellate court which will include the High Court, in a given scenario, while recording a conviction after reversing the acquittal,

¹⁰ 2008 INSC 1437

should adjourn the matter to a suitable date, hear the convicts, and impose an appropriate sentence itself.

17. In fact even this Court has, while convicting the accused for the first time, after recording the conviction, adjourned the matter to a particular date to hear the accused on the question of sentence. In *Suryamoorthi and Another v. Govindaswamy and Others*¹¹, this Court held as under:-

“14. Since we are convicting Accused 1, 4 and 7 for the first time in this Court we would like to give them an opportunity of being heard on the question of sentence as required by Section 235(2) of the CrPC. The case will be put up before us after 10 days for hearing the accused on the question of sentence. The acquittal of the rest of the Accused 2, 3, 5 and 6, is however, confirmed. The sums recovered from the possession of the convicted accused will be made over to PW 2. As regards the amount of Rs 33,600 recovered from PW 2, since the High Court has already given appropriate directions, we need not make further orders.”

19. What is clear from the above discussion is that, a court which convicts the accused for the first time has to hear the accused on sentence. If it is a trial court then Section 235(2), Cr.P.C., will apply. If it is the appellate court which is convicting the accused for the first time after reversing the acquittal, the appellate court has to hear the convict on sentence. The appellate court cannot relegate the matter to the court below only for the purpose of imposing a sentence after the appellate court had recorded a conviction. That will be contrary to Section 386(a), Cr.P.C., and the judgments of this Court.”

23. Since we are of the view that the prosecution had failed to bring home the charge against the appellant and that reversal of the appellant’s acquittal by the High Court was unwarranted in the facts of the present case, nothing much would turn on this aspect. However, since it is clear from the record that the High Court had failed to hear the appellant before proceeding to sentence him for the first time, reference has been made to this infirmity.

24. Before parting, we note that the High Court while reversing

¹¹ (1989) 3 SCC 24

the acquittal of the appellant has given undue importance to the alleged inability of the appellant to explain circumstances relating to documents shown to have been seized during investigation. The seizure, as found earlier, has been rendered doubtful due to various shortcomings. We may in this context gainfully refer to the following observations of this Court in **Rabindra Kumar Dey Vs. State of Orissa**¹².

“The Courts below appear to have convicted the appellant on the basis of the decision referred to above and have held that since the explanation given by the appellant was false, an inference of misappropriation could reasonably be drawn against him. This proposition cannot be doubted. But the question is whether the explanation given by the appellant in this case can be said to be absolutely false? Another question that arises is what are the standards to be employed in order to judge the truth or falsity of the version given by the defence? Should the accused prove his case with the same amount of rigour and certainty, as the prosecution is required, to prove a criminal charge, or it is sufficient if the accused puts forward a probable or reasonable explanation which is sufficient to throw doubt on the prosecution case? In our opinion three cardinal principles of criminal jurisprudence are well-settled, namely:

- (1) that the onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from weakness or falsity of the defence version while proving its case;
- (2) that in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and
- (3) that the onus of the prosecution never shifts.

It is true that under section 105 of the Evidence Act the onus of proving exceptions mentioned in the Indian Penal Code lies on the accused, but this section does not at all indicate the nature and standard of proof required. The Evidence Act does not contemplate that the accused should prove his case with the same strictness and rigour as the prosecution is required to prove a criminal charge. In fact, from the cardinal principles referred to above, it follows that, it is sufficient if the accused is able to prove his case by the standard of preponderance of probabilities as envisaged by section 5 of the Evidence Act as a result of which he succeeds not because he proves

¹² 1976 INSC 204

his case to the hilt but because probability of the version given by him throws doubt on the prosecution case and, therefore, the prosecution cannot be said to have established the charge beyond reasonable doubt. In other words, the mode of proof, by standard of benefit of doubt, is not applicable to the accused, where he is called upon to prove his case or to prove the exceptions of the Indian Penal Code on which he seeks to rely. It is sufficient for the defence to give a version which competes in probability with the prosecution version, for that would be sufficient to throw suspicion on the prosecution case entailing its rejection by the Court.”

[emphasis supplied by us]

These observations are sufficient for us to conclude that the High Court erred in shifting the burden on the appellant.

25. Thus, having considered the entire material on record, we are of the considered view that the trial Court had rightly acquitted the appellant. The prosecution had failed to prove entrustment of property to the appellant. The material on record is insufficient to conclude that the appellant was guilty of misappropriation of that property. There is also no evidence whatsoever to indicate any dishonest intention on the part of the appellant that would have resulted in commission of an offence punishable under Section 409 of the Penal Code. The High Court committed an error in reversing the judgment of acquittal. It failed to give due weightage to the fact that the trial Court had an opportunity to consider the demeanour of witnesses after which on assessing the entire evidence, it acquitted the appellant. Ignoring the absence of material documents and the failure of the complainant to produce

the relevant records despite being required to do so by the IO, the High Court accepted the insufficient material on record to overturn the acquittal of the appellant. On reassessing the entire evidence on record, it can be concluded that the trial Court had rightly acquitted the appellant. Its judgment, therefore, deserves to be restored.

26. Accordingly, the judgment dated 12.10.2017 passed by the High Court in Criminal Appeal No.278 of 2002 is set aside. The acquittal of the appellant as recorded by the learned Chief Judicial Magistrate, Aurangabad in RCC No.80163 of 1996 dated 20.02.2002 is restored. The appellant is, accordingly, acquitted for the offence punishable under Section 409 of the Penal Code. His bail bonds stand cancelled. The Criminal Appeal is allowed in the aforesaid terms. Pending Interlocutory Application is also disposed of.

.....**J.**
[**UJJAL BHUYAN**]

.....**J.**
[**ATUL S. CHANDURKAR**]

NEW DELHI,
OCTOBER 8, 2026.