

**(1994) 02 P&H CK 0019**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Criminal Appeal No. 344-DBA of 1989

State of Haryana

APPELLANT

Vs

Parmanand

RESPONDENT

**Date of Decision:** Feb. 1, 1994

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 107, 108, 109, 111, 110
- Penal Code, 1860 (IPC) - Section 408, 467, 471, 477A

**Citation:** (1995) CriLJ 396

**Hon'ble Judges:** Jai Singh Sekhon, J; Jag Bhushan Garg, J

**Bench:** Division Bench

**Advocate:** Sunil Gour, for the Appellant; R.S. Sihota and C.L. Verma, for the Respondent

**Final Decision:** Dismissed

**Judgement**

Jai Singh Sekhon, J.

Parmanand, accused-respondent, while posted as a Secretary of Lehdola Co-operative Credit and Service Society from Apr. 1976 to Oct. 1980 is alleged to have recovered a total of Rs. 17864-64 paise on behalf of the Society from its different members and failed to deposit the same in the account of the Society, but embezzled the same by creating false record. It is further averred that the accused had received Rs. 2612/- from Shiv Charan son of Munsi against a kacha receipt and after making an entry in the personal ledger of this member. On 17-5-1980, the accused also received a sum of Rs. 1300/- from Ganga Lal son of Teja and made an entry in his pass-book. He also alleged to have received Rs. 200/- from Data Ram and an entry in his pass-book was also made. This amount was neither reflected in the cash-cum-day book of the society, nor deposited in the Bank. The case against the appellant was registered On the report of the Vigilance Department. After completion of investigations he was arraigned for trial on such like allegations. During the investigation of the case, the accused is alleged to have made confessional statement Exhibit PB before Sh. Vishnu Dutt Gaur, Executive

Magistrate-cum-Tehsildar(PW1).

2. The trial Court framed charges for offences under Sections 408, 467, 471, 477A of the IPC. The accused, however, pleaded not guilty of the charge and claimed for trial.

3. Before the trial Court in order to prove its above referred case, the prosecution examined twelve witnesses. Thereafter, the trial court closed the evidence of the prosecution vide order Dt. 31-10-1988.

4. The version of the accused-appellant at the trial stage was that of innocence and false implication. He led no evidence in defence.

5. The" trial Court did not take into consideration the confessional statement of the accused as it was not recorded by the Judicial Magistrate, but by an Executive Magistrate. The trial Court also did not believe the sole testimony of Inspector Ved Prakash (PW4) qua the identity of the signatures of the accused-respondent on the relevant documents, especially when Dharambir Singh Rawat (PW8) had filed to identify his signatures on the entry Exhibit PW 5/A and Exhibit PW 8/A in the relevant register.

6. Being aggrieved against the order of acquittal of the trial Court, the State of Haryana had filed this leave to appeal, which was granted by the Division Bench of this Court and the appeal was admitted.

7. We have heard the learned Counsel for the parties, besides perusing the record.

8. The trial Court in later part of para 12of the judgment had discarded the confessional statement of the accused before Sh. V.D. Gaur by holding as under:--

...

The contention of learned Counsel for accused can be accepted in view of the fact that Section 164 of Criminal P.C. specifically prescribes that any Metropolitan Magistrate or Judicial Magistrate may whether or not he had jurisdiction in the case record any confession or statement made into him in the course of investigation. In such like circumstances, Executive Magistrate has no power to record confession. Therefore, the alleged confession of accused Parmanand recorded by P.W. Sh. V.D. Gaur is not in accordance with law.

9." Mr. Gaur, the learned Counsel for the appellant, contends that this statement should be treated as admission before an Executive Magistrate and there is no legal bar of proving such admission. There is no force in this contention as the perusal of copy, Exhibit PB of the confessional statement leaves no doubt that it is not an \* admission but a confession and that too during the investigation of the case. The provisions of Section 164, Cr PC read as under:--

164. Recording of confessions and statements.-- (1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in Section 281 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:--

I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A.B.

Magistrate

(5) Any statement (other than a confession) made under Sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

10. A bare glance through Sub-section (1) reproduced above leaves no doubt that the Legislature in its wisdom had empowered the Metropolitan Magistrate or Judicial Magistrate for recording the statement. The proviso to Sub-section (1) further reveals that the anxiety of the Legislature in barring other person than the Metropolitan Magistrate or a Judicial Magistrate from recording the confessions is

well apparent as even a police officer on whom powers of the Magistrate have been conferred under any law for the time being in force has been debarred from recording such confessions. The scheme of the Cr PC, 1973, itself provides that the Legislature in its wisdom has classified courts of Executive Magistrate separately than those of the Judicial Magistrate as is apparent from the provision of Section 6 of the Code, which reads as under:--

6. Classes of Criminal Courts.--Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely--

- (i) Courts of Session;
- (ii) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrate;
- (iii) Judicial Magistrates of the second class; and
- (iv) Executive Magistrates.

Under Section 11, the State Government has been given power after consultation with the High Court to establish as many as courts of Judicial Magistrate of the 1st Class and of the 2nd Class, as it deems fit while Section 20 deals with the conferring of powers on Executive Magistrates and Section 22 pertains to the local jurisdiction of Executive Magistrates. The Executive Magistrates under the new Code had not been given any powers to try any offence under the Penal Code. Under Chapter VIII of the Code, the Executive Magistrates have been given powers to entertain proceedings under Sections 107, 108, 109 and 110 of the Code. Specific provision is also prescribed there for conducting these proceedings. Similarly, the Executive Magistrates are given exclusive powers to pass orders for conditional removal of nuisance u/s 133 as well as for deciding urgent disputes. Section 3 of the Code further provides that any reference to a Magistrate without any qualifying words unless the context otherwise requires shall be construed in relation to a metropolitan area to a Metropolitan Magistrate and in any area outside metropolitan to a Judicial Magistrate. Similar is the situation regarding Magistrate 2nd Class and 1st Class and Chief Judicial Magistrate. Sub-section (4) of this section further classifies that where, under any law, other than this Code, the functions exercisable by a Magistrate relate to matters which involve the appreciation or sifting of evidence, which exposes any person to any punishment or penalty or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any Court, be exercisable by a Judicial Magistrate, but these functions which are administrative or executive in nature, such as, the granting of a licence, the suspension or cancellation of a licence, sanctioning a prosecution or withdrawing from a prosecution, they shall, subject as aforesaid, be exercisable by an Executive Magistrate.

11. The provisions of Section 164 of the Code, reproduced above absolutely leave no scope of doubt that the recording of a confession of the accused person during investigation of the case, has been left exclusively to the Judicial Magistrate or Metropolitan Magistrate and not to any Executive Magistrate. Thus, there is no force in the contention of Mr. Gaur that the confessional statement of the accused recorded by Executive Magistrate-cum-Tehsildar should be relied upon as it is not admissible in evidence. It cannot be said to be a mere irregularity, especially when it has certainly resulted in prejudice to the accused because the Legislature itself had kept the Judicial Magistrate on better footing than Executive Magistrate qua the recording of such statement.

12. Regarding the other aspects of the matter, it transpires that none of the members of the society who had allegedly returned the loan to the accused-respondents were examined by the prosecution.

13. The only other evidence was that of certain entries in the hands of the accused in the relevant record bearing his signatures. The trial Court in para 13 of the judgment, have rightly held that the evidence of Inspector Ved Prakash was not sufficient to prove the handwriting and signatures of the accused on these documents, because this Inspector only used to visit the society off and on in connection with the inspection of the record. The trial Court has dealt with this matter in para 13 of the Judgment, which reads as under:--

Learned Counsel for accused has further contended that in the present case there is solitary testimony of PW Ved Prakash Tyagi to the effect that accused Parmanand had committed embezzlement of Rs. 17867-64 ps. and the entry on Cash Book Ex. PW5/A was in the handwriting of Parmanand. He further argued that no other witness had corroborated his testimony while PWs. Dharambir Singh, Jeet Ram, Bahadur Singh and Dharam Pal Solanki have failed to identify the handwriting and signatures of accused on the relevant documents. He further argued that in such like circumstances, it was imperative on the part of prosecution that specimen signatures and handwriting of accused Parmanand should have been taken during the course of investigation and those must have been examined by handwriting expert in order to substantiate the prosecution version. He further argued that in the present case, there is solitary testimony of PW Ved Prakash Tyagi to the effect that he was able to identify the handwriting of accused Parmanand. He also argued that in such like circumstances, prosecution has failed to bring home the guilt to accused beyond all reasonable doubt. The contention of the learned Counsel for accused can be accepted in view of the fact that PW Jeeet Ram, who was working as President of the Society at the relevant time had failed to identify the signatures and handwriting of accused Parmanand. Further-more, other witnesses namely Dharambir Singh, Bahadur Singh and Dharam Pal Solanki have also failed to substantiate the prosecution version. With the sole testimony of PW Ved Parkash Tyagi, it would be difficult to raise an opinion that the alleged entry was in the

handwriting of accused Parmanand. In order to substantiate a case under Sections 408/467/ 471/477A of IPC, the duty of prosecution becomes heavier that the alleged handwriting and signatures of accused must be duly examined by a handwriting expert. In view of aforesaid discussion and the testimony on the record, it can be observed that in the present case, prosecution has failed to prove the handwriting and signatures of accused Parmanand beyond all the shadow of doubt.

We find no justification in taking a different view of the evidence of the witnesses than the one taken by the trial Court.

14. Regarding the closure of the prosecution evidence, it transpires that the charge was framed on 11-3-1985. Thereafter, the case continued hanging for recording prosecution evidence, till it was closed vide order Dt. 31-10-1988. Thus it cannot be said that the trial Court has shut out the prosecution evidence in hot haste.

15. For the-foregoing reasons, we find no merit in this appeal against acquittal. It is ordered to be dismissed.