

**IN THE HIGH COURT OF MADHYA PRADESH  
AT GWALIOR**

**BEFORE**

**HON'BLE SHRI JUSTICE ATUL SREEDHARAN  
ON THE 14<sup>th</sup> OF MARCH 2023**

**CRIMINAL REVISION. NO. 43/2022**

**Between: -**

**1. MUNIR @ MEENU KHAN S/O SHRI AJEEM  
UDDIN KHAN, AGED ABOUT 47 YEARS,  
OCCUPATION- BUSINESS, RESIDENT OF  
EKTA COLONY BAHODAPUR DISTRICT  
GWALIOR (MADHYA PRADESH)**

**2. ARVIND SHARMA S/O SHRI SHIVCHARAN  
SHARMA, AGED ABOUT 44 YEARS,  
OCCUPATION PRIVATE JOB, RESIDENT OF  
NEW COLONY NUMBER 2 GRID GWALIOR  
(MADHYA PRADESH)**

**.... PETITIONERS**

**(BY SHRI F.A. SHAH – ADVOCATE)**

**AND**

**THE STATE OF MADHYA PRADESH  
1. THROUGH POLICE STATION KAMPOO  
DISTRICT GWALIOR (MADHYA PRADESH)**

**.... RESPONDENTS**

**(BY SHRI RAJEEV UPADHYAY – PUBLIC PROSECUTOR  
SHRI M.M. TRIPATHI – ADVOCATE FOR COMPLAINANT)**

*These appeals coming on for **admission** this day, the court passed  
the following:*

**ORDER**

Present petition has been filed by the petitioners herein against

the order dated 08/12/2021 passed by the Court of Tenth Additional Sessions Judge, Gwalior in Sessions Trial No. 497/2021.

2. Ld. Counsel also submits that a discharge application was filed before the learned Court of Sessions but the same was not considered and it was perfunctorily dismissed and therefore, the present revision petition has been filed. According to learned counsel for the petitioners, even if the entire case of the prosecution is take as the gospel truth, prima-facie offences under Section 406/34, 435/34 and 427/34 of the IPC are not made out.
3. Brief facts of this case are as follows. Complainant in this case is one Rakesh Kumar Choubey. He got registered an FIR against the petitioners on 15/03/2021 for the offences under Sections 406 and 435 of the IPC for an incident that is stated to have taken place between 12/03/2021 and 13/03/2021. The FIR in question is Crime No. 159/2021 registered at P.S Kampoo, District Gwalior. A copy of the same is Annexure P-4 on Page No. 17 to 19 of the petition. In the FIR, Rakesh Kumar Choubey states that his company Shyam Road Carrier transported 223 pieces of truck tyres manufactured by MRF Company on a bill of lading bearing No. 108092172. The tyres were loaded on to the truck of the petitioners which is owned by the BGRL Logistic Private Limited bearing No. RJ-11-GB 3835. The tyres were loaded at Goa to be transported to Agra. The tyres were to be delivered at their destination by 13/03/2021. However, the truck was found abandoned on 12/03/2021 before Naugaon, which information was received by the complainant upon which, he contacted BGRL Logistic Private Limited and spoke to the Manager Arvind Sharma,

petitioner No.2 herein, who informed him that truck has been kept in the safe custody of Police Station Kampoo. He further states that in the FIR that when he reached the Police Station in the morning, the lock of the truck was opened in the presence of complainant and petitioner No.2 and when tyres were counted, 207 tyres were found in a fit and proper condition, 14 tyres were found in burnt condition and two tyres were not accounted for. Complainant states in the FIR that in all they had loaded 223 truck tyres on to the truck owned by the petitioners. He further states that upon his repeated entreaties to the petitioners to return the tyres that were missing and lost in fire, petitioners refused to do so, therefore, he has got registered the FIR against them.

4. Learned counsel for the petitioners further submits that post investigation, charge sheet was filed against the petitioners for offence punishable under Sections 406, 435 and 427 of the IPC. A copy of the same is from page No. 24 onwards of the petition.
5. Attention of this Court has been drawn to Page No. 49 which is the Panchnama stated to have been prepared on 12/03/21, by the Police upon the statement given by the petitioner No.2. However, there is no date given on the Panchnama. In the Panchnama, statement of petitioner No.2 has been recorded to the effect that truck bearing No. RJ 11 GB 3835 belonging to his company was transporting 223 truck tyres of the complainant which caught fire and which has thereafter shifted to Police Station Kampoo on 12/03/2021 and 207 of those tyres were found in proper condition while 14 of them were found in a burnt condition and two tyres were unaccounted for.

Further, it is noted that petitioner No.2 sought action from the police on the basis of his statement. By referring to the said statement, counsel for the petitioners have tried to emphasize that there was no *mens rea* on the part of the petitioners as when they got information relating to the incident, they took prompt action of taking the abandoned the truck to the nearest Police Station which is Police Station Kampoo and there, the truck was opened in the presence of complainant and petitioner No.2.

6. As regard the uncounted tyres, learned counsel for the petitioners has drawn attention of this Court to the document on Page No. 48 of the petition which is a part of the charge sheet and is a memorandum of loss prepared by the police where the police itself has noted that 16 tyres were damaged on account of fire and not 14 as was initially believed when the truck was opened, therefore, two tyres which were presumably unaccounted for were also in burnt condition which is reflected in the memorandum of loss dated 23/02/2021. Learned counsel for the petitioners thereafter has referred the Section 405 of IPC which reads as hereunder:-

*405. Criminal breach of trust.—Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any*

*other person so to do, commits “criminal breach of trust”.*

*Illustrations*

*(a) xxx*

*(b) xxx*

*(c) xxx*

*(d) xxx*

*(e) xxx*

*(f) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.*

7. Section 405 of IPC is the substantive provision which lays down the ingredients which are essential for constituting an offence of criminal breach of trust. Section 406 is the punitive section providing punishment for the offence of criminal breach of trust. Section 405 of IPC requires the following: -

1. An entrustment of property by the complainant to the accused which gives the accused a dominion over the property.
2. The accused must dishonestly, misappropriate or convert to his own use that property which has been entrusted to the accused by the complainant or the accused dishonestly uses or dispossess of the property in violation of any direction of law prescribing the mode in which the trust is to be discharged or, where he acts in violation of

any legal contract expressed or implied which involves the manner in which the trust is to be discharged specifically, commits criminal breach of trust. In the illustrations, the illustration F which is “ A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly, misappropriates the property. A has committed criminal breach of trust.” This illustration is relevant in the facts and circumstances of this case which shall be referred to later in this judgment.

8. The contention of learned counsel for the petitioner is that instrument is not in doubt the fact that the complainant loaded the 223 tires on the truck belonging to the petitioners' company is not disputed by the petitioners. He however, states that the offence under Section 405 of IPC is not an offence of strict liability or in other words, a criminal liability under Section 405 of IPC does not arise merely because the articles were not delivered to the complainant as per the terms of the transportation agreement. He states that there must be a *mens rea* which prima facie appears from the facts and circumstances of the case that the petitioners dishonestly misappropriated the property or converted the same to their own use or benefit, and thereby caused loss to the complainant. He further states that Section 405 of IPC cannot be applied in a case where there is accidental loss of the property in transit or loss which is not explained for of the property by way of fire, as in this case, while the property is accounted for otherwise but in a damaged condition. He further states that out of the 223 tires being transported, 207 were found in proper condition and it was 16 tyres which were damaged on account of fire. As reflected in the memorandum of loss prepared

by the police itself on 23.03.2021. In other words, learned counsel for the petitioner submits that all the 223 tires were accounted for except that 16 of them were in damaged condition.

9. Learned counsel for the State and objector have submitted that the impugned order framing charge against the petitioners is just and proper and that the facts and circumstances of this case *prima facie* raise a strong suspicion that the petitioners have committed the offence. In this regard, learned counsel for the State has referred to the FIR registered by the Rakesh Kumar Chaubey the complainant, in which he clearly states that upon his repeated entreaties to the petitioner to return the tires and make good his loss, the same was refused by them and that is why he was compelled to register the FIR. Learned counsel for the State, has also drawn attention of this Court to Page No.38 of the petition which is the statement u/s. 161 Cr.P.C of complainant. He has relied upon that portion of the statement of the complainant wherein it is stated that the petitioner No.1 had assured the complainant that he would take action against the driver of the vehicle and get the two unaccounted tyres recovered from him but no action was taken by the petitioner No.1. Learned counsel for the State has also referred to the statement of petitioner No.1 which was recorded by the police on 24.03.2021 where the petitioner No.1 informed the police that petitioner No.2 had been contacted by the driver who informed the petitioner No.2 that he had fallen asleep and was later informed by the people that his truck was on fire. The driver is stated to have unlocked the truck and found that some of the tyres were smouldering but the fire had died. Out of fear, he locked the truck and abandoned it. The statement of petitioner

No.1 at Page No.37 and the initial Panchnama at the behest of the petitioner No.2 can no longer be considered as they have been made accused. It is also contended by the counsel for the objector and the State that the driver of the vehicle was never arrested and his statement was not recorded as to what actually happened and therefore, as a driver was acting at the behest of the petitioners, the petitioners are liable. In other words, learned counsel for the State and the objector have submitted that petitioners herein are vicariously liable for the offence committed by the driver.

10. Heard the learned counsels for the parties and perused the documents filed with the charge-sheet.
11. It is trite law that at the stage of framing charges the learned trial Court only has to see whether a *prima facie* case is made out against the accused persons. However, it is also settled law that at the stage of framing of charges, the trial Court is not merely a post office or a mouth piece of prosecution that it accepts the contention of prosecution without scrutiny of the material on record and proceed to frame charges. Undoubtedly, at this stage the trial Court is not required to carry out a roving inquiry or a threadbare assessment of the evidence on record and it most certainly is not the task of trial Court at this stage to assess whether the case can end in a conviction of the accused. All that the learned trial Court has to see, is whether a strong suspicion of the accused having committed the offence exists at the stage of framing of charge. (**Union Of India vs Prafulla Kumar Samal & Anr. (1979) 3 SCC 4**).
12. The undisputed facts in this case is that 223 tyres were entrusted for



transportation to the petitioners by the complainant at Goa, to be transported and delivered at Agra on 13.03.2021. It is also undisputed that the vehicle was found abandoned on 12.03.2021 before Naugaon. It is also undisputed that it is the petitioner No.2 who recovered the vehicle and took it to the police for safe keeping and therefore, *prima facie*, the action on the part of the Petitioners reflect an absence of malice or *mens rea* of misappropriating the property of the complainant. As already stated hereinabove, the statement of the petitioners herein can no longer be considered as they have been made accused. In the absence of the said evidence, the only evidence on record which can be taken into consideration is the statement of complainant and the FIR registered by him against the petitioners.

13. The contention of the counsel for the State and the objector that the driver was never arrested and neither his statement was recorded. This, however is a lacuna of the investigating agency and the same cannot be attributed to the petitioners herein. Nowhere in the charge-sheet has the police made out a case that the petitioners have not cooperated with the Investigating Officer in tracing out the driver. It was the duty of the police to trace the driver and record his statement in order to arrive at a finding as to what happened on 12.03.2021.
14. The contention of the State and the objector that the petitioners are vicariously liable for the loss on account of the negligence/malice of the driver is unacceptable. The concept of *vicarious liability* is alien to criminal law. It is totally opposed to *constructive liability* which has great relevance in criminal law. In criminal law, vicarious

liability only arises in those statutory offences where an offence committed by a company shall make the Directors of that company also punishable which is specifically provided by the statute such as the Negotiable Instruments Act. Vicarious liability is statutorily created where the offending party, though a *juristic person* is an *incorporeal entity* which cannot be subjected to a *corporal punishment* and therefore, those who are responsible for the day to day affairs of such an incorporeal entity are made liable specifically by the statute.

15. In contradistinction to the same, *constructive liability* can be understood with reference to offence u/s. 34, 120-B and 149. In constructive liability, the presence of the accused in the chain of causation is mandatory while a person could be liable vicariously based on the doctrine of agency even though absent in the chain of causation. Constructive liability requires an *actus reus* coupled with *mens rea*, irrespective of the degree of involvement in the crime. Thus, a person may be guilty of murder by application of section 120-B where he was neither the principal in the first or second degree or, he may be guilty of murder by application of s. 34 or 149 of the IPC though it was not his direct act that resulted in the death of the victim but whose presence at the scene of crime along with participation, howsoever remote or minimal, coupled with *mens rea*, is proved. In offences of strict liability, a person may be made criminally liable only on the happening of an event without there being any act, intent or knowledge on his part, such as an accident under the factories act. Constructive liability applies in offences created by common law, of general application, and subsequently

codified, as in the Indian Penal Code. Offences of strict liability and vicarious liability can only be created by statutes, promulgated to deal with specific situations where the legislature feels that certain acts or events must be made punishable even in the absence of the fault element.

16. In this case, the offences are under the IPC and therefore, the question of vicarious liability does not arise. Constructive liability under Section 34 of the IPC can only arise where the offender's participation is at the scene of occurrence when the offence is committed. The petitioners herein are sought to be roped in by ways of Section 34 of IPC, undisputedly it is not the case of prosecution that the petitioners were present at the scene of occurrence when the incident of fire had broken in the truck or when the truck was abandoned by the driver. Therefore, Section 34 of IPC does not apply. Neither is it the case of prosecution that the petitioners conspired to commit the offence along with the driver.
17. Thus, from the above it is clear that the incident *prima facie* gave rise to a civil liability where loss of 16 tyres in a fire which had taken place inside the truck while transporting the tyres belonging to the complainant. The complainant certainly would have the right to file a suit for damages and recover the loss suffered by him on account of the loss of 16 tyres in the fire.
18. As the memorandum of loss accounts for each and every tyre, the 207 tyres were never seized by the police, it is within the right of the complainant to take possession of the same and thereafter, he is at liberty to file a civil suit for the damages on account of loss of the

16 tyres. However, this court is of the opinion that the offences for which the petitioners have been charged for is misplaced as the evidence on record does not even raise a *prima facie* case of the said offence against the petitioners much less raise a grave suspicion.

19. Under the circumstances, this petition is **allowed**. The impugned order framing charges is set aside and the petitioners are discharged.
20. With the above, this petition is finally **disposed of**.

(ATUL SREEDHARAN)  
JUDGE