

NOTES

Scope. Section 402-B provides punishment for hijacking. Any person who conspires or attempts or abets the commission of the offence of hijacking would alike inker criminal liability and entail punishment with death or imprisonment for life and also forfeiture of property and fine. Proof of conspiracy needs evidence with regard to a particular design and then the Court has to look towards express, implied or tacit agreement between such participants and in that event even utterance would be relevant. [PLD 2002 Kar 152]

402-C. Punishment for harbouring hijacker, etc. Whoever knowingly harbours any person whom he knows or has reasons to believe to be a person who is about to commit or has committed or abetted an offence of hijacking, or knowingly permits any such persons to meet or assemble in any place or premises in his possession or under his control, shall be punished with death or imprisonment for life, and shall also be liable to fine"]

Of Criminal Misappropriation of Property

403. Dishonest misappropriation of property.—Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustration

(a) A takes property belonging to Z out of Z's possession in good faith believing at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use he is guilty of an offence under this section.

(b) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away book without Z's express consent. Here if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

(c) A and B, being joint owners of a horse. A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1. A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2. A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it, for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it, it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believes that the real owner cannot be found.

Illustrations

- (a) A finds a rupee on the high-road, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in this section.
- (b) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note.
- (c) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person who has drawn the cheque, appears. A knows that this person can direct him to the person on whose favour the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this section.
- (d) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this section.
- (e) A finds purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this section.
- (f) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this section.

SYNOPSIS

- 1. Scope—Criminal misappropriation of property.
- 2. Charge.
- 3. Procedure.
- 4. Dishonestly.
- 5. Proof.
- 6. "Misappropriates or converts to his own use".
- 7. Taking cattle's to cattle pond.
- 8. "Any movable property".
- 9. Explanation 1—temporary misappropriation.
- 10. Explanation 2.
- 11. Partner.
- 12. Liability of corporate body.
- 13. Misappropriation, criminal breach of trust, theft, cheating—Distinction.
- 14. Attempt and preparation.
- 15. Section 403 read with S. 5-A, Prevention of Corruption Act, 1947.

1. **Scope—Criminal misappropriation of property.** Section 403 of the Code defines criminal misappropriation and prescribes penalty thereto. Criminal misappropriation is not only an offence under the Penal Code but also is considered to be a sinful act in Islam. Whenever a person innocently comes into possession of a property, knowingly not to be his own, it becomes his sacred duty to search for its true owner and restore the property to him, as an honest and prudent person faithfully discharging his trust. But if he misappropriates it dishonestly to his own use without making search for the true owner he is said to have committed offence of misappropriation of the property under this section. Section 403 entails punishment with imprisonment of either description for a term extending to two years, or fine or both. The essence of the offence of criminal appropriation is that the property of another person comes into the possession of the accused in some neutral manner and is misappropriated or converted to his own use by the accused. No entrustment is required for this offence to be constituted. [(1965) 2 Cri.L.J. 562]

In order that an offence u/s 403 or 406 of the Penal Code 1860 be made out the two things that are necessarily required to be proved are the entrustment of the property and dishonest misappropriation or conversion to one's own use or disposal of property. where, the complainant in his evidence merely wished to show that money had been entrusted to accused and on account of his non-accounting for them the Court should draw an inference that they had been misappropriated, no charge could be validly framed against the accused. In order to prove a criminal offence the specific evidence has to be brought on record proving the ingredients of the offence very strictly. [PLD 1960 Kar. 926]

In order to prove an offence u/s 403, Penal Code, the prosecution has to prove:-

- 1) That the property was the property of the complainant;
- 2) That the accused misappropriated that property or converted it to his own use, and
- 3) That he did so dishonestly.

404. Dishonest misappropriation of property possessed by deceased person at the time of his death.—Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person's legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

SYNOPSIS

1. Scope.
2. Charge.
3. Procedure.
4. Property.
5. Partnership property.
6. Legally entitled to such possession.
7. Appreciation of evidence.

1. Scope. Section 403, relates to dishonest misappropriation or conversion of movable property possessed by deceased person at the time of his death, by the offender to his own use. It says, whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person's legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and also fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years. The object of this section is to afford protection of property which by reason of its being peculiarly placed needs protection where the person who could look after it is dead and the person who is expected and entitled to look after it after the death of such person has not appeared on the scene. [AIR 1956 Madh B 49] This section is intended only to punish servants and strangers who could possibly have no right to, or interest in, the effects of a dead man and who misappropriate such effects, but not to punish near relations who take possession of an deal with the deceased's effects under a claim of independent ownership or a claim to succeed as heir to the deceased. [AIR 1914 Mad. 506]

This section relates to the aggravated form of the offence of dishonest misappropriation u/s. 403. Hence all the elements necessary to constitute the offence u/s. 403 are also necessary to constitute an offence under this section. It is necessary that the property should have been in the possession of a deceased person at the time of his death and should not have since come into the possession of any person legally entitled to such possession. It is also necessary that the accused should have been aware of these facts. [AIR 1949 Cal 171] It is an essential ingredient of the offence u/s. 404, that the accused must have done the act of misappropriation or conversion "dishonestly". The section can have no application where persons such as near relatives of the deceased take possession of the property under a *bona fide* claim of right. [AIR 1956 Madh B 49]

2. Charge. I (name and office of the Magistrate, etc.) hereby charge you (name of the accused) as follows:-

That you, own or about the _____ day of _____ at _____ dishonestly misappropriated (or converted to your own use) certain movable property namely _____ knowing that such property was in the possession of XY a deceased person at the time of the said XY's death and had not since been in the possession of any person legally entitled to such possession; and thereby committed an offence punishable under section 404 of the Pakistan Penal Code and within my cognizance.

And I hereby direct that you be tried by me on the said charge.

[S. 405]

Where the evidence establishes that it is the accused who murdered his step-mother and removed the jewels from her immediately after the murder, the conviction of the accused on charge of murder and u/s. 404 was held to be proper. [1956 Mad WN 805 (DB)] It is not desirable to charge an accused in a murder case with an offence u/s. 404 for misappropriating the articles of the deceased in absence of evidence of misappropriation. [AIR 1941 Mad 306]

3. Procedure. Offence u/s 404 has two parts, both are non-cognizable, not bailable, not compoundable, entails punishment for imprisonment upto 3 years and fine or upto 7 years and fine. Court of Sessions or Magistrate of the First or Second Class.

4. Property. The property as used in this section connotes movable property. However, criminal misappropriation and conversion is possible of immovable property such as a building where the materials have been severed from the building and removed. [AIR 1925 All 673] In the case of immovable property there cannot be misappropriation or conversion. [AIR 1956 Madh B 49] The latest view is that, there is no good reason to restrict the meaning of the word 'property' to movable property only when it is used without any qualification in s. 405 or in other sections of the Penal Code. Whether the offence defined in any particular section of the Penal Code can be committed in respect of any particular kind of property will depend not on the interpretation of the word 'property' but on the fact whether that particular kind of property can be subject to the acts covered by that section. [AIR 1962 S.C. 1821] The word 'property' used in s. 409 means the property which can be entrusted or over which domination may be exercised. [(1999) 4 Scale 354 (S.C.)] A mortgaged immovable property to B in the English form, but was in possession. He willfully defaulted in payment of revenue and caused the property to be sold at a revenue sale for the purpose of defrauding B and purchased *benami* in the name of another person. It was held that B being the legal owner, must be held to have entrusted. A with dominion over the property and that A was guilty of criminal breach of trust u/s. 405 of the Code. [(1866) 5 Suth WR 230]

5. Partnership property. Property of a partnership concern is never in the possession of any individual partner. It is partnership property and every partner is an agent of the other. A necessary incident of every dissolution of partnership is setting of accounts and unless that is done none can say which assets belonged to the deceased partner. The possibility of inheriting deceased partner's property can arise only after accounts are settled. [1976 Chand LR (Cri) 67 (Delhi)]

6. Legally entitled to such possession. In order to find a person guilty under this section, the prosecution has to prove that the property was in the possession of a deceased person at the time of his deceased and that it is not since been in the possession of any person legally entitled to such possession. [AIR 1949 Cal 171] If the accused took possession of the property from a person who was entitled to be in possession and who was in possession of it at the time of the death of the deceased the section will not apply. [AIR 1956 Madh B 49] Where the District Judge appoints, u/s. 196 of the Succession Act, a Curator to take possession of the property of the deceased and he takes possession he is a person legally entitled to the possession of the property and if the property is misappropriated in such a case, s. 404 has no application. [AIR 1949 Cal 171]

7. Appreciation of evidence.

7.1 Circumstantial evidence. Circumstantial evidence should be so interconnected as to form a continuous chain one end of which touches the dead body and the other touches the neck of the accused thereby excluding all hypothesis of his innocence. [1996 SCMR 188]

Of Criminal Breach of Trust

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 use 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) A, being executor to the will of a deceased person, dishonestly disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(b) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods. A has committed criminal breach of trust.

(c) A, residing in Dacca, is agent for Z, residing at Lahore. There is an express or implied contract between A and Z, that all sums remitted by Z to A shall be invested by A, according to Z's direction. Z remits a lakh of rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions and employs the money in his own business. A has committed criminal breach of trust.

(d) But if A, in the last illustration, not dishonestly but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and buys shares in the Bank of Bengal, for Z, instead of buying Company's paper, here, though Z should suffer loss, and should be entitled to bring a civil action against A, on account of that loss yet A, not having acted dishonestly, has not committed criminal breach of trust.

(e) A, a revenue-officer is entrusted with public money and is either directed by law, or, bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(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.

SYNOPSIS

1. Criminal breach of trust.
2. Entrustment.
3. Dominion over property.
4. Dishonest misappropriation.
5. Converts to his own use.
6. Absence of rules.
7. In any manner.
8. Criminal breach of trust and cheating.
9. Misappropriation.
10. Trust and loan.
11. Property.
12. In violation of any legal contract.
13. Failure to return article hired.

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1. Criminal breach of trust. Section 405 of the Code deals with a species of criminal misappropriation dealt with by s. 403 ante, namely, dishonest misappropriation by persons entrusted with property or with dominion over property. It speaks of a legal contract express or implied but it does not envisage by any stretch of imagination the breach of contract minus entrustment. The only difference between breach of trust and breach of contract is that in former there is intention to dishonestly embezzle the amount whereas in the later this important ingredient is missing and is substituted by inactivity on part of one party to honour terms and conditions of the contract. [2003 Cr.L.J. 608] This section provides, 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 use 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". The section has been illustrated by as many as six illustrations depicting modes of various cases falling within the ambit of this section. The section consists of two parts; the first part consists of criminal misappropriation or conversion of the property and the second part consists of dishonestly using or disposing of the property in violation of any direction of law or of any legal contract. In order that an offence u/s. 405 is committed two elements are essential, namely, entrustment with property or dominion over any property and dishonest misappropriation or conversion of such property. The offence is completed only when the second ingredient is completed and not before that. Mere entrustment does not make an offence. From the bare reading of the definition of the criminal breach of trust following ingredients are essential to constitute the offence under this section.

(2) (Pat)] Mere disposal of a property entrusted to a person in violation of a legal contract without any dishonest intention would not amount to an offence of criminal breach of trust. [(1996) 2 Gau LR 74] Where accused was required by complainant under a contract to print and hand over certain number of copies of the book and in breach of the same the accused did not make available 800 copies though he passed on 300 copies, such facts may not constitute offence u/s. 406. At best the case might be considered as breach of contract. [1983 All Cri R 317] Where a jewel was taken from a goldsmith for a particular purpose under a promise to return it, and the person, instead of returning it, claimed to retain it in lieu of a debt due to him and claimed the jewel as his own, he was held guilty of an offence u/s. 406. [AIR 1950 Mad 49] An officer who is engaged on contract for collecting land revenue on commission basis and converts the collections to his own use is guilty under this section. [ILR (1937) 1 Cal 272 (DB)] Taking ornaments only for the purpose of approval but retaining the same dishonestly is an offence under this section. [1904 (2) Cri LJ 117 (Raj)] The contract must be legal. If the contract is illegal, the violation is not an offence. [ILR (1953) 2 Cal 133] Where accused had sold residential flat in building under construction to complainant for which amount was deposited in installments but later on sold the building to another company and as the agreement to sale was not registered it was found to be void and as per clause of agreement, petitioner became entitled to refund of moneys paid, which accused were willing to pay along with compensation, it could not be stated accused had dishonestly used or disposed of that property in violation of law or agreement entered into between parties, charge of criminal breach of trust not made out. [(1987) 1 Bom CR 327]

12.1 Rendering of accounts. Where the case was one of non-remission of accounts and on the face of the complaint itself a clear allegation in regard to the conversion has not been made, a criminal procedure or abuse of a process of Court. [1972 P.Cr.L.J. 671 (Kar)]

13. Failure to return article hired. The mere failure to return the article hired does not prove dishonestly, not does the mere failure to deliver possession of the property to the lessor on the expiry of the lease amount to criminal breach of trust. There was no evidence in this case to show that the lessor or the new allottee ever demanded the return of the engine from the petitioner or that the petitioner ever denied possession of the engine or that he refused to return it. Retention of the engine in dispute by the petitioner's firm for a few months after the termination of their lease, i.e., from 1st October 1948 to 24th January, 1949, in the absence of any proof of *mense rea*, does not amount to criminal breach of trust. [PLD 1951 Lah. 342]

406. Punishment for criminal breach of trust.—Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to ²[seven] years, or with fine, or with both.

SYNOPSIS

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|---|---|
| 1. Criminal breach of trust—Ss. 406-409. | 10. Quashment of FIR. |
| 2. Charge. | 11. Stay of criminal proceedings pending civil litigation. |
| 3. Procedure. | 12. Liability of <i>supurdar</i> as surety. |
| 4. Cognizance. | 13. Complaint u/s. 406/409/109/34—Procedure. |
| 5. Licensees of Government—Trustee of goods. | 14. Section 406/408/420/468 & 471—Discharge of accused. |
| 6. Retention of money without dishonest misappropriation. | 15. Section 406/409/420/468 & 471—Read with S. 5(2), Prevention of Corruption Act, 1947 (Azad Jammu and Kashmir). |
| 7. Permissible possession. | |
| 8. Allegation of fake and fraudulent insurance claim. | |
| 9. Appreciation of evidence. | |

407. Criminal breach of trust by carrier, etc.—Whoever, being entrusted with property as a carrier. Wharfinger or ware house-keeper, commits criminal breach of trust in respect of such property shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

SYNOPSIS

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| 1. Scope. | 5. "Wharfinger". |
| 2. Charge. | 6. "Warehouse". |
| 3. Procedure. | 7. Short delivery of goods—Benefit of doubt. |
| 4. Carrier. | |

1. Scope. Section 407 of the Code deals with criminal breach of trust by carrier, wharfinger or ware house keeper. It provides, whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. To establish a charge of criminal breach of trust the prosecution must prove not only entrustment but also that the accused dishonestly misappropriated the property. [PLD 1956 S.C. 417; 1980 SCMR 402] Absence of money is not sufficient to establish offence. [PLD 1962 S.C. 489]

Dishonest intention is an essential element of the offence of criminal breach of trust and therefore where the act of the accused is not "dishonest" as defined in s. 24 ante no offence under this section is committed. [1979 TAC 79 (DB) (Ker)] Where a corporate body is carrier, it cannot be prosecuted for an offence under this section, as it cannot be said to have the necessary *mens rea*. [(1972) 1 Cal HCN 400 (DB)] Where a carrier firm is accused of an offence under this section the necessary ingredients of the offence of criminal breach of trust as defined in s. 405 must be established. [(1976) 78 Bom LR 677] The offence under this section corresponds to the offence known in English law as larceny by bailee. [(1866) 14 LT 491] Normally a criminally breach of trust would be where a trust is created. In the absence of any communication between a complainant and an accused no question of trust can arise, and s. 407 will not be attracted. [1981 Cri LR (Guj) 151]

1.1 Company's liability. Although the company is a distinct legal entity which quite difference from its members, including its Directors, as [1897 AC 22] this does not alter the fact that a company can only act through its Directors and Officers therefore an allegation of criminal offence against company. Can only mean alleged offence having been committing by its Directors or Officers. Court in order to decide as to who committed such offence always required to pierce veil of in corporation. Commission of criminal offence by a company not in consistent with *mens rea* on part of its Directors. [1981 SCMR 573; PLD 1971 S.C. 585]

1.2 Compromise. Offence not compromisable. [PLD 1962 S.C. 97]

1.3 Conviction. Accused convicted under this Section cannot be convicted under s. 411. [PLD 1983 FSC 204]

2. Charge. I (name and office of the Magistrate, etc.) hereby charge you (name of the accused) as follows:-

That you, on or about the _____ day of _____ at _____ being entrusted with certain property to wit _____ (mention property) as a carrier or wharfinger or warehouse-keeper committed criminal breach of trust in respect of it and thereby committed an offence punishable under section 407 of the Pakistan penal Code, and within my cognizance.

And I hereby direct that you be tried by me on the said charge.

3. Procedure. The offence u/s 407 cognizable, warrant case, not bailable, not compoundable, imprisonment upto 7 years and fine, Court of Sessions or Magistrate of the First Class.

The Where 3 persons were jointly tried, one for the offence u/s. 407 and the other two u/s. 411 and convicted respectively for the said offences, it was held that, in the absence of prejudice to the accused, the convictions need not be set aside. [(1901) ILR 28 Cal 7 (DB)]

4. **Carrier.** A carrier is a person who undertakes for hire the conveyance of parcels or goods. [(1849) 154 ER 1254] A common carrier is defined in s. 2 of the Carriers Act (III of 1865) as denoting a person, other than the Government, engaged in the business of transporting for hire property from place to place by land or inland navigation for all persons whatsoever. [(1710) 91 ER 220] Expression 'Carrier' includes all types of carriers including a common carrier or a private carrier. Section does not make any distinction between a 'carrier' and a 'common carrier'. [1981 Cri LJ 824] The property must, in order that the section may apply, have been entrusted to the accused as a carrier. Where the entrustment was made to a company appointed by the Government as carriers of building materials for a whole year, the entrustment was held to be in the character of an agent and therefore the offence of misappropriation by the company was held to fall under s. 409 and not under this section. [1957 Cri LJ 124 (Cal)] A person whose calling is not that of a carrier for hire, cannot be said to be a 'carrier' merely because he has agreed to carry goods to some place. [1 Weir 436]

Conducting of sale in violation of the direction of the competent authority, false within definition of criminal breach of trust given in S. 405, Cr.P.C. [1970 SCMR 107] Paddy entrusted to accused by food Department for crushing. Disappearance for stock from godown. Accused liable for criminal breach of trust not withstanding civil liability. [1971 SCMR 116]

5. **"Wharfinger"**. According to *Wharton* Dictionary, The terms means a person who owns or keeps a wharf, which is brought plain place, near some creek or haven, to lay goods and wares on it that or brought to or from the water.

6. **"Warehouse"**. Structure use for the reception of storage of goods and merchandise. The term may include any structure use to hold goods, stores, or wares temporarily or for a length of time.

7. **Short delivery of goods—Benefit of doubt.** If a person is entrusted with the goods and fails to deliver them the onus will be on him to show that he was not himself retaining the goods. If he gives an explanation and that explanation may be true, he cannot be convicted of misappropriation. Even if he himself does not give the explanation, but the circumstances suggest that he may not be in possession of the goods and that the goods may have been lost otherwise, he still cannot be convicted. The onus of proving misappropriation is on the prosecution and, though in the absence of explanation, there may be a presumption from non-delivery that the goods have been misappropriated, the existence of facts which suggest an explanation would be sufficient for giving the accused benefit of the doubt. [PLD 1962 S.C. 128]

408. Criminal breach of trust by clerk or servant.—Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall be liable to fine.

SYNOPSIS

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| 1. Scope. | 9. Onus of proof and appreciation of evidence. |
| 2. Charge. | 10. Conviction. |
| 3. Procedure. | 11. Abetment. |
| 4. Clerk and servant. | 12. Simultaneous sentence. |
| 5. Partner. | 13. Cognizance. |
| 6. "In such capacity". | 14. Jurisdiction to try offence u/s 408. |
| 7. "In respect of that property". | 15. Quashment. |
| 8. Entrustment with two or more persons. | |

12. Simultaneous sentence. Though it is permissible under section 408 of the Pakistan P.C. to inflict sentence of fine simultaneously with the substantive sentence of imprisonment, ordinarily the double sentence should not be inflicted unless necessary in the interest of justice. [PLD 1952 Dacca 266]

13. Cognizance. Offences of criminal misappropriation and breach of trust. Triable within territorial jurisdiction of Court within which any part of property received or retained by accused or where offence committed. Property taken by complainant to K and left in trust with accused. Offence of criminal misappropriation or breach of trust if committed by accused in respect of machinery triable at K. By section 181(2), Cr.P.C., offences of criminal misappropriation and breach of trust have been expressly made triable by a Court within the territorial jurisdiction of which any part of the property in question was received or retained by the accused persons or where the offence was committed. [1974 P.Cr.L.J. Note 82 p. 51] Offence committed by public servant triable exclusively by Special Judge appointed under Act XLIX of 1958. [1974 P.Cr.L.J. Note 9 p. 6]

13.1 Complaint against a Company. Non payment of profits by company to its shareholders, complaint brought under Ss. 408 and 420, P.P.C. In the absence of allegation of cheating as defined u/s 415, P.P.C., no case of cheating made out. The same would be true with regard to the purchase of share. The remedy for the complainant was to either file a suit for its recovery and if the company was unable to pay its debts to file a petition under the Companies Act. Further *held*, that a Managing Director or Director of the Company not liable to render any accounts to the complainant except annual balance sheet along with profit and loss account. As to allegation of misfeasance a complaint can be moved for a direction to the Liquidator either to prosecute himself the Managing Director/Director or to refer the matter to the Registrar, Joint Stock Companies as provided in the Companies Act but complaint u/s 408/420 held not competent. [PLD 1989 S.C. 435]

13.2 Agent—Not servant. Where a person who was really an agent was charged for breach of trust u/s. 408 and on conviction was awarded a sentence of 4 years' imprisonment, it was held that though the case fell u/s. 409 of the Code, the question became of no importance in view of the fact that the sentence awarded could be maintained under either section. [AIR 1956 S.C. 149]

14. Jurisdiction to try offence u/s 408. Where, in a case for prosecution under section 408 of the Penal Code, there is doubt as to when the idea of embezzlement took root, the only course for the prosecution is to apply the provisions of section 182 of the Criminal Procedure Code and file a charge-sheet basing the same on uncertainty. [PLD 1957 S.C. (Ind.) 176]

15. Quashment. Powers conferred u/s 561-A, Cr.P.C., though were far and wide, but resort to said powers could be had in exceptional cases, when it was necessary to prevent abuse of the process of the Court or to secure ends of justice. If application filed by applicant u/s 561-A, Cr.P.C. was allowed, same would tantamount to entertaining a second revision against order of Sessions Judge passed u/s 439-A, Cr.P.C. High Court u/s 561-A, Cr.P.C., could only interfere with order/judgment passed by Sessions Judge u/s 439-A, Cr.P.C., when extraordinary circumstances *i.e.*, finding conviction based on no evidence at all *etc.*, were brought to the knowledge of the Court. [2004 P.Cr.L.J. 749]

409. Criminal breach of trust by public servant or by banker, merchant or agent.—Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

SYNOPSIS

1. Scope—Criminal breach of trust by public servant.
2. Charge.
3. Procedure.
4. Trial.
5. Jurisdiction.
6. "Being entrusted with property".
7. "With property".
8. "In any manner".
9. In his capacity of a public servant.
10. "In the way of his business as banker, etc."
11. "Dominion over property".
12. "Banker".
13. Not Banker.
14. "Commits criminal breach of trust".
15. Appreciation of evidence.
16. Misappropriation.
17. Abetment.
18. Dishonest intention.
19. Conviction/Sentence.
20. Vicarious liability.
21. Civil liability—Not effected.
22. Taccavi sum.
23. Revenue collected from landowners.
24. Public servant.
25. Section 409 read with Prevention of Corruption Act, 1947.
26. Section 409 read with Offence in Respect of Banks (Special Court) Ordinance, 1984.
27. Sanction.
28. Retention of Government money.
29. Section 409 read with National Accountability Ordinance (XVIII of 1999).
30. Section 409 read with Sindh Enquiries and Anti-Corruption Rules 1993—Jurisdiction of Special Judge.
31. Sindh Province.
32. Acquittal in criminal case—No bar to proceed under Efficiency and Discipline Rules.
33. Section 409 read with offences in Respect of Banks (Special Courts) Ordinance, 1984—Jurisdiction of Special Court.
34. Sections 409/468/34, P.P.C.
35. Photocopies of forged document.
36. Principle of double jeopardy.
37. Sections 419/420/467 etc—Transfer of property through cancelled power of attorney.
38. Jurisdiction.
39. Sentence.

1. Scope—Criminal breach of trust by public servant. Section 409 of the Code deals with criminal breach of trust by public servant or by Banker, merchant or agent which have been classed together in this section. It provides whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and also fine. The word 'trust' is a comprehensive expression which has been used in s. 409 on covering not only relationship of trustee and beneficiary but also that of bailor and bailee, master and servant, pledger and pledgee, guardian and ward, and all other relations which postulates fiduciary relationship between the complainant and the accused without existence of such relationship there cannot be an offence u/s. 409. [1984 Cri LJ 76] In the case of a public servant the property must have been entrusted to him in his capacity as a public servant. In the case of others i.e., bankers, merchants, factors, brokers, attorneys and agents, the entrustment must have been made in the way of their respective business. [(1980) 82 Pun LR 435]

The essential ingredients to be established in a charge against a public servant, of an offence under this section, are:

- i) that the accused was a public servant;
- ii) that he was entrusted, in such capacity, with property;
- iii) that he committed breach of trust as defined in s. 405.

For the application of S. 409, P.P.C., it is absolutely necessary to show that entrustment of property is made within the meaning of such provision. No specific mode is prescribed for creating a trust under S. 409, P.P.C., and the same, therefore, can be created

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