

IN THE HIGH COURT OF DELHI AT NEW DELHI

Crl. Rev. P. No.286/2009

Reserved on _____ : 09.07.2010

Date of Decision : 12.08.2010

STATE (GOVT. OF NCT DELHI) Petitioner
Through : Mr. Sanjeev Bhandari, ASC

versus

RAJESH Respondent
Through : Mr. D.S. Dalal, Advocate

CORAM

HON'BLE MS.JUSTICE HIMA KOHLI

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| 1. Whether Reporters of Local papers may be allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

HIMA KOHLI, J.

1. The present petition is filed by the petitioner under Section 397 read with Section 401 Cr.P.C. praying *inter alia* for setting aside the order dated 5.2.2008 passed by the learned Additional Session Judge in a case on the basis of an FIR No.319/2005 holding inter alia that no case under Section 25 of the Arms Act, 1959 (in short '**the Act**') was made out against the respondent, as sanction was obtained at a subsequent date after filing of the charge sheet.

2. The facts of the present case are undisputed and lie in a narrow compass. The allegations made in the petition are that the respondent, who is a life convict and was undergoing sentence

in some other case at Rohtak Jail, upon getting parole, made a plan to commit robbery in a bank, for which purpose, he engaged two other accused, namely, Ram Kishore and Raj Kumar, and went to Allahabad Bank, Outer Ring Road, Hira Enclave, where one of the customers, namely, Chand Kumar Dham, the complainant, was trying to deposit Rs.7,10,000/- at the bank counter. The respondent approached the complainant and pointed a pistol towards him and asked him to handover the money to him or otherwise, he would shoot the complainant. The respondent took away the money and went out the bank by pulling down the shutter of the bank and fled away in a Maruti Car with his two accomplices. Later on, during investigation, on secret information, the respondent and another accused were nabbed at Peera Garhi Chowk, New Delhi while sitting in a Maruti Car. On checking, one loaded pistol was recovered from the respondent, whereas one loaded country made revolver was effected from the accused, Raj Kumar. A briefcase containing currency notes worth Rs.4.25 lacs was also recovered from the accused persons. The respondent, who was declared a Proclaimed Offender, refused to take part in the Test Identification Parade, but his case was not considered in the order dated 31.8.2006 passed by the learned ASJ, whereby both the other accused persons, namely, Ram Kishore and Raj Kumar were charged under Section 411 IPC. Additionally, the accused Raj Kumar was charged for the offence under Section 25

of the Act.

3. When the respondent was again re-arrested, arguments on charge against the respondent were heard. In the course of the arguments, counsel for the respondent conceded framing of charges under Section 392/397/411/34 IPC, but opposed framing of charges under Section 25 of the Act on the ground that no prior sanction was obtained from the competent authority before filing of the charge sheet against the accused and the sanction was only taken after his re-arrest when he had absconded from custody. The aforesaid plea of the respondent was accepted by the learned ASJ, who, vide order dated 5.2.2008, held that as sanction was obtained at a subsequent date after filing of the charge sheet, no case was made out against the respondent under Section 25 of the Act. Hence, the present petition.

4. Learned ASC for the petitioner/State submitted that while passing the impugned order dated 5.2.2008, the learned ASJ failed to appreciate the fact that a supplementary charge sheet dated 30.12.2006 contained the sanction under Section 39 of the Act. He drew the attention of this Court to a copy of the sanction order dated 29.9.2006, under Section 39 of the Act as also the report of the CFSL dated 30.9.2005. He also pointed out the endorsement of the learned Metropolitan Magistrate dated 31.1.2007 on the supplementary charge sheet to contend that when there was already a sanction under Section 39 of the Act on

the judicial record, there was no occasion to hold that no case under Section 25 of the Act was made out against the respondent. In support of the aforesaid submission, learned ASC relied upon the case of Ramesh Sharma vs. State reported as **95 (2002) DLT 267**.

5. On the other hand, counsel for the respondent supported the impugned order and submitted that the charge under Section 25 of the Act was rightly not framed as no prior sanction was obtained from the competent authority before filing the original charge sheet and that the subsequent sanction cannot cure the defect. In support of his submissions, he relied on the following judgments :

- i). Nagraj vs. State of Mysore **AIR 1964 SC 269 (V 51 C 29)**
- ii). Smt. Javitri Devi vs. State **1971 CrI.L.J. 1340 (V 77 C 384)**
- iii). Nanhey vs. State **1978 CrI.L.J. 1001**
- iv). Om Prakash vs. State **1980 RLR 649**
- v). Sukhlal & Anr. vs. State of Madhya Pradesh **1998 CrI.L.J. 1366**
- vi). Narsi vs. State of Haryana **1999 CrI.L.J. 271.**
- vii). Ashish Sinha & Ors. vs. State of Chhattishgarh **2009 CrI. L.J. 184.**

6. This Court has heard the learned ASC for the State/petitioner as also learned counsel for the respondent. The focus of the present petition is on whether valid cognizance could

be taken by the learned ASJ on the basis of a supplementary charge sheet dated 3.1.2007, upon grant of sanction, vide order dated 29.12.2006, in the light of Section 39 of the Act. Section 39 of the Act is reproduced hereinbelow for ready reference :

"39. Previous sanction of the district magistrate necessary in certain cases – No prosecution shall be instituted against any person in respect of any offence under section 3 without the previous sanction of the district magistrate."

7. As is apparent from the aforesaid provision, there can be no institution of prosecution without a valid sanction. It has been held in the decisions by the Supreme Court as also by the High Court that obtaining of sanction is not a mere formality and it has to be proved that it was granted by the competent authority after applying his mind. It should be demonstrated that the fire arms or the weapon pertaining to which sanction was prayed for, was actually taken to the concerned authority and that the said authority after looking at all the relevant papers and applying his mind, granted the necessary sanction.

8. In the present case, the original challan was filed on 23.6.2005 and cognizance was taken by the learned Metropolitan Magistrate on the same date. On the facts of the present case where Section 39 of the Act is applicable, institution of a prosecution would have to mean "institution of a charge sheet". As the sanction order in the present case was dated 29.12.2006, there was no question of a sanction being available earlier thereto,

on 23.6.2005, when the charge sheet was filed and cognizance thereof taken by the learned Metropolitan Magistrate. Hence, on 23.6.2005, when prior sanction under Section 39 of the Act was not available, no cognizance could be taken by the trial court and consequently, no case under Section 25 of the Act could have been initiated against the respondent. On the aforesaid point, the judgment in the case of Smt. Javitri Devi (supra) is apposite. In the aforesaid decision, a Single Judge of this Court relied on a decision of the Supreme Court in case of Nagraj (supra), where notice was taken of the provisions of Section 132 of the Cr.P.C., which mandates that no prosecution against any person for any act under Chapter III of the Cr.P.C. could be instituted in any criminal court, except with the sanction of the State Government. The Supreme Court held that proceedings on a complaint instituted without obtaining sanction of the Government under Section 132 Cr.P.C., would be void and the court would have no jurisdiction to take those proceedings. Drawing an analogy between Section 132 Cr.P.C. with Section 39 of the Act, the court in the case of Smt. Javitri Devi (supra) held as below :

"4. xxxx

The rule laid down by the Supreme Court in the above case is fully applicable to the facts of the present case and as admittedly the sanction of the District Magistrate was not obtained prior to the filing of the challan against the petitioner, the prosecution of the petitioner was not properly instituted and the Court did not have any jurisdiction to take cognizance of the case filed against the petitioner. In such cases where

want of sanction takes away the jurisdiction of the Court, the defect is not curable under Section 537, Code of Criminal Procedure and the entire proceedings are vitiated."

9. In the case of Nanhey (supra), relied upon by the counsel for the respondent, it was observed that sanction was not intended to be an automatic formality and the object of the provision of sanction was that the authority giving the sanction, should be able to consider for itself the evidence, before it comes to a conclusion that the prosecution in the circumstances be sanctioned or forbidden.

10. In the case of Om Prakash (supra), the court held that sanction of the District Magistrate was a condition precedent for launching the prosecution under Section 25 of the Act and in the absence of a prescribed sanction, the trial magistrate does not have the jurisdiction to investigate the charge. In the case of Ashish Sinha (supra), a Single Judge of the Chhattisgarh High Court reiterated that for prosecution under the Act relating to fire arms, previous sanction of the District Magistrate is the condition precedent and in the absence of any sanction accorded by the sanctioning authority, conviction and sanction imposed under Sections 25 & 27 of the Act are not sustainable.

11. It is well settled that as soon as the court comes to the conclusion that there is no valid sanction for prosecuting the accused under Section 25 of the Act, the court becomes

incompetent to proceed further with the matter and has to discharge or acquit the accused. However, such an acquittal or discharge cannot bar a second trial of the same accused on the same facts. In the case of Yusofalli Mulla vs. The King reported as **AIR (36) 1949 Privy Council 264**, while holding that a prosecution instituted without a valid sanction was a nullity, it was observed that fresh institution after valid sanction was permissible. The relevant observations of the Privy Council are reproduced herein below :

“16. The next contention was that the failure to obtain a sanction at the most prevented the valid institution of a prosecution, but did not affect the competency of the Court to hear and determine a prosecution which in fact was brought before it. This suggested distinction between the validity of the prosecution and the competence of the Court was pressed strenuously by Mr. Page, but seems to rest on no foundation. **A Court cannot be competent to hear and determine a prosecution the institution of which is prohibited by law and Section 14 prohibits the institution of a prosecution in the absence of a proper sanction.** The learned Magistrate was no doubt competent to decide whether he had jurisdiction to entertain the prosecution and for that purpose to determine whether a valid sanction had been given, but as soon as he decided that no valid sanction had been given the Court became incompetent to proceed with the matter. **Their Lordships agree with the view expressed by the Federal Court in Agarwalla’s case: AIR (32) 1945 F.C. 16:46 Cr.L.J.510, that a prosecution launched without a valid sanction is a nullity.”** (emphasis added)

12. In the case of L.D. Healy vs. State of Uttar Pradesh reported as **(1969) 2 SCR 948**, the Supreme Court held that a

fresh trial of the same accused on the same set of facts was not barred, when the earlier order of acquittal was passed in the absence of proper sanction. The observations of the Supreme Court in the aforesaid case are as under :

“Para 4(i) The Court may take cognizance of an offence against a public servant for the offences set out in Section 6 of the Prevention of Corruption Act only after the previous sanction of the specified authority is obtained. The Special Judge who had taken cognizance of the case on a sanction given by the Deputy Chief Commercial Superintendent was incompetent to try the case, and **an order of acquittal passed by a Court which had no jurisdiction does not bar a retrial for the same offence. It is unnecessary, therefore, to consider whether the order quashing the proceeding amounted to an order of acquittal.**” (emphasis added)

13. In the case of Ramesh Sharma (supra), a Single Judge of this Court, after taking note of the aforesaid judgments as also the judgments in the case of Om Prakash (supra), arrived at a conclusion that there was no prohibition in law in filing fresh/supplementary charge sheet after obtaining sanction in accordance with law.

14. This Court finds no reason to differ with the aforesaid view. While there can be no quarrel with the proposition that mandate of Section 39 of the Act requires a previous sanction for prosecution to be instituted against a person in respect of an offence under Section 3 of the Act, once such a sanction is obtained by the concerned authority, there is no bar on proceeding

against the same person in respect of the same offence on the same sets of facts. In the present case, originally, there was no sanction order for prosecuting the respondent under Section 25 of the Act. The first charge sheet was filed on 23.6.2005 and the records reveal that a supplementary charge sheet filed by the State/petitioner on a subsequent date, i.e., on 30.12.2006, was taken on the record on 3.1.2007. Hence, the learned ASJ could have entertained the supplementary charge sheet by treating the same as a fresh charge sheet from the date of its institution, i.e., 30.12.2006/3.1.2007. At the said stage, the documents enclosed with the supplementary charge sheet including the sanction order dated 29.12.2006 as also the examination report of the CFSL dated 13.9.2005 could be considered.

15. As the parties are still at the stage of framing of charges against the respondent, the present petition is disposed of with directions to the learned ASJ to treat the supplementary charge sheet as a fresh charge sheet from the date of its institution and to proceed further in the matter. The date of the incident is 21.4.2005 and 5 years have since expired. The learned ASJ is therefore requested to proceed further in the matter as expeditiously as possible.

16. The petition is allowed on the aforesaid lines.

HIMA KOHLI,J

AUGUST 12, 2010/sk