

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1299 OF 2004

Dr. Shivaji Vishnu Kachare	...	Applicant
Vs.		
The State of Maharashtra	...	Respondent

Mr. M.K. Kocharekar, Adv. for the applicant.
Mr. Y.M. Nakhawa, APP for the State.

CORAM : SMT ANUJA PRABHUDESSAI, J.
DATE : 22nd December, 2015.

P.C. :

1. Pursuant to the complaint lodged by one Imtiyaz Aziz Dorajiwala, the A.C.P. had registered Crime No.56 of 1998 against the applicant under the provisions of Prevention of Corruption Act. The investigating agency had filed an application being Criminal M.A. No.444 of 2000 to classify the said crime as 'A Summary'. The learned Special Judge by an order dated 20th February, 2004 rejected the request of the prosecution to classify the case as 'A Summary' and further gave liberty to the investigating officer to approach the government to consider the case to accord sanction to prosecute the accused. Aggrieved by the said liberty given to the prosecution the applicant / accused has filed this application under Section 482 of Cr.P.C. Seeking to quash the said direction.

2. Mr. Kocharekar, the learned counsel for the applicant has submitted that the prosecution had not challenged the order of the refusal of sanction, on the contrary had come before the Court with a prayer for classification of case as 'A Summary'. The learned counsel for the applicant submits that the learned Magistrate was therefore not empowered to direct the prosecution to approach the government with the request for sanction. Relying upon the decision of the Apex Court in the case of *State of Himachal Pradesh Vs. Nishant Sareen, (2010) 14 Supreme Court Cases 527*, the learned counsel for the applicant has submitted that it is not permissible for sanctioning authority to review or reconsider the matter on the same material and in the absence of any fresh material sanctioning authority cannot be directed to reconsider its decision. Reliance is also placed on the decision of the Apex Court in the cases of *State of Punjab & Anr. Vs. Mohammed Iqbal Bhatt (2009) 17 Supreme Court Cases 92* and *Mansukhlal Vithaldas Chauhan Vs. State of Gujarat (1997) 7 Supreme Court Cases 622*.

3. Mrs. Mulekar, the learned APP for the State has submitted that the order of the Magistrate does not indicate whether any fresh material was available before the investigating agency based on which

the order of sanction was sought to be reconsidered or reviewed.

4. I have perused the records and considered the submissions advance by the learned counsel for the applicant and the learned APP for the State.

5. A perusal of the records reveal that the applicant herein was attached to the Cooper Hospital, Andheri as a Coronar's Surgeon / Medical Officer. The complainant Imtiyaz Aziz Dorajiwala had lodged the complaint alleging that the applicant had demanded bribe of Rs.15,000/- to issue death certificate of his grandfather who had suffered severe cardiac arrest and collapsed on the railway platform Rajkot Railway Station and whose body was sent to the Cooper hospital for post mortem by Santacruz Airport Police. Pursuant to the said complaint trap was led by ACP and the applicant was caught while demanding and accepting a bribe of Rs.6,000/-.

6. The records of the investigation were sent to the Home Department for according sanction to prosecute the applicant / accused. The Additional Chief Secretary (Home) had given his concurrence to the proposal of prosecution. However vide letter

dated 27th September, 2000, the Secretary of the Public Health department of Govt. of Maharashtra informed that the government had taken a decision not to prosecute the applicant / accused and instead had decided to hold a departmental enquiry against him. Since the government had refused to accord sanction, the prosecution applied for 'A Summary'.

7. The learned Special Judge whilst declining to grant 'A Summary' held that the material forwarded by the ACP to the Home Department of Govt. of Maharashtra was sufficient to accord sanction. The learned Special Judge also observed that it was a fit case for grant of sanction to prosecute the accused. The learned Special Judge has further observed that just as charge can be framed on the basis of such suspicion, sanction to prosecute the accused can also be granted on the material which raises suspicion. The learned Special Judge therefore rejected the request to classify the case as 'A Summary' and gave liberty to the investigating officer to approach the government for consideration of the case for according sanction to prosecute the applicant.

8. In the case of *Mansukhlal Chauhan (Supra)*, the Apex

Court has held that the learned Special Judge has therefore held that the order of the competent authority was not only illogical but also illegal. The Central or State Government or any other authority (depending upon the category of the public servant) has the right to consider the facts of each case and to decide whether that “public servant” has to be prosecuted or not. It is further held that since the section clearly prohibits the Courts from taking cognizance of offence specified therein, it envisages that the Central or the State Government or any “other authority” has not only right to consider the question of grant of sanction it has also the discretion to grant or not to grant the sanction. It is further held that the grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to Government Servants against frivolous prosecutions. The validity of sanction would therefore depend upon the material placed before the sanctioning authority and the fact that all the relevant facts, material and evidence have been considered by the sanctioning authority. The Apex Court held that if it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the

authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution.

9. In the case of *State of Himachal Pradesh (Supra)* the Apex Court has held that the government in the matter of grant or refusal to grant sanction exercises statutory power and that would not mean that power once exercised cannot be exercised again or at a subsequent stage in the absence of express power of review in no circumstance whatsoever. It is held that the power of review, however, is not unbridled or unrestricted. It is held that once the statutory power under section 19 of 1988 Act or Section 197 of the Code has been exercised by the government or the competent authority, it is not permissible for the sanctioning authority to review or reconsider the matter on the same material again. It is further held that the change of opinion *per se* on the same materials cannot be a ground for reviewing or reconsidering the earlier order refusing to grant sanction. However, in a case where fresh materials have been collected by the investigating agency subsequent to the earlier order and placed before the sanctioning authority and on that basis, the matter is reconsidered by the sanctioning authority and in light of the fresh materials an opinion is formed that sanction to prosecute the

public servant may be granted, there may not be any impediment to adopt such a course.

10. From the principles led down in the aforesaid decision it is clear that it is within the domain of the authority to apply its mind to the facts of the case as also material and evidence collected during the investigation and take a decision as regards grant or refusal of sanction. Failure of the sanctioning authority to apply its independent mind for any reason whatsoever would give right to the party to challenge the validity of the decision before the criminal court.

11. In the instant case as stated earlier, the sanctioning authority after considering the material collected by the investigating agency had refused to grant sanction. The investigating agency or the aggrieved person if any, had not challenged the said decision on any ground whatsoever. The learned Special Judge, assuming the role of the sanctioning authority has rendered a finding that there was sufficient material to accord sanction. The learned Special Judge has further observed that it is a fit case to accord sanction. The learned Special Judge has further held that just as strong suspicion is sufficient to frame charge against the accused, it is also sufficient to

accord sanction to prosecute. The learned Special Judge has held that the order of refusal of sanction was illegal. In rendering such findings and directions the learned Special Judge has not only assumed the role of the sanctioning authority but also appears to have exercised appellate powers, when he was in fact not sitting in appeal. Suffice it to say that the findings as well as the directions given by the special Judge are therefore without jurisdiction.

12. It is true that if the sanction order is bad, the Court has powers to remit the matter back to the authority for reconsideration. However, in the instant case, the incident is of the year 1998 and 17 long years have lapsed. Hence it would not be just and fair to reopen the case and to keep the trial pending indefinitely for a long period and expose the applicant to a protracted trial, contrary to the right of speedy trial.

13. Under these circumstances, and in view of discussion supra the application is allowed. The impugned order dated 20th February, 2004 is quashed and set aside. Consequently the proceedings of Crime No.56 of 1998 stands closed.

(ANUJA PRABHUDESSAI, J.)