IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO. 889 OF 2013

Liyaqatali s/o Bademinya Shaikh & Anr. Applicants
vs.
The State of Maharashtra & Anr. ... Respondents

Ms. Manjula Rao i/b. Mr. C.P.Shengaokar, Advocate,for the applicants.
Smt. Kalpana K. Shah for respondent No.2.
Mr. Arfan Sait, APP, for the State.

CORAM: SMT.SADHANA S.JADHAV,J.
DATE : 4th September, 2015.

P.C.

Rule. Rule made returnable forthwith with consent of the parties. Heard forthwith.

2. The applicant No.1 herein happens to be public servant. Applicant No.1 was working as Senior Police Inspector attached to Borivali Police Station and applicant No.2 happens to be a common citizen, who was running a mobile shop in the vicinity of Borivali Railway Station, Borivali.

3. It is the case of the prosecution that on 10.10.2007, one Neerav Vipul Shah lodged a report at the police station alleging therein that he also runs a shop and sells mobile phones. That about 20 days prior to lodging of the report, one person had been to his shop and wanted to change body of his cellphone. That the said customer refused to pay the bill and had threatened the complainant. The complainant insisted upon the bill. Thereafter he gave Rs.150/- to the complainant. He had induced himself as Baba @ Yuvraj and had threatened him of dire consequences. After two days, the said Baba had re-visited the shop of the complainant and had started inspecting the computer and other articles in his shop. The said person had informed the complainant that he is trying to search as to whether he has pornography CDs. The said person did not find anything incriminating in the said shop had and had therefore left the shop. He revisited the shop on the next day and told him that if he wants to continue with his shop, he should meet Senior Inspector Mr. Shaikh. The said person visited him on the third occasion and told him to attend Borivali police station. The complainant agreed to visit the police station. On the way, the other shopkeepers were also asked to accompany the complainant to the police station. They all were present before the Senior Inspector Mr. Shaikh. At that juncture, Mr. Shaikh had told all the shopkeepers that in the eventuality that they want to conduct the business peacefully, in that region, they would have to shell out Rs.5,000/- each. There was negotiation and the amount was reduced to Rs.4,000/-. That they had started collecting amount from the shopkeepers at the rate of Rs.4,000/-. The shopkeepers were told that before 10th of each moth, they would have to pay Rs.4,000/- to Senior Inspector Mr. Shaikh. The complainant did not wish to shell out the amount and, therefore, he approached the office of the Anti-Corruption Bureau on 9.10.2007. He lodged a report with Anti-Corruption Bureau. The ACB had decided to trap the accused and therefore, two panchas were called. The trap was to be laid subsequently. On the basis of the report of the complainant, Crime No.74 of 2007 was registered at Borivli Police Station against the proposed accused for the offences punishable under Sections 7 and 8 of the Prevention of Corruption Act, 1988.

4. On 10.10.2007, and on 11.10.2007, the trap was laid. The accused did not accept the gratification from the complainant. What was disclosed in the FIR was only the demand of the said gratification. However, on the basis of the said report that there was demand of gratification, the accused were arrested on 12.10.2007. They were produced before the Special Judge and were enlarged on bail.

5. After withdrawal of the trap panchnama, it was noticed that the accused No.1 i.e. applicant No.1 was carrying Rs.1,50,300/- in his briefcase. That a departmental enquiry was initiated against the accused

No.1. Applicant No.1 was exonerated in the departmental enquiry. That the complainant had specifically stated that the applicant No.1 had made the demand for gratification on the cellphone and therefore, voice samples were taken. The samples were sent for analysis and the report was negatived.

6. The Investigating Officer of Anti-Corruption Bureau could not collect sufficient material to file charge-sheet against the accused and, therefore, Anti-Corruption Bureau had filed a “C” Summary report before the Special Judge. The learned Special Judge had issued notice to the original complainant on whose behalf Crime No.74/2007 was registered. The learned Special Judge, by an order dated 28.7.2010, was pleased to reject the “C” Summary report after hearing the contentions of the first informant.

7. The learned Special Judge has observed that the crucial question is whether there is prima facie evidence to show that accused Nos. 1 and 2 had demanded bribe from the complainant and other shop-owners. *The* learned Special Judge was of the opinion that there was sufficient evidence of demand, acceptance of bribe by accused No.1 through accused No.2 and, therefore, the “C” Summary was rejected. The learned Special

Judge had directed the complainant Vipul Shah to obtain sanction from the competent authority and the Investigating Agency was directed to place all the relevant papers before the Court to enable the Court to take cognizance.

8. Under Section 19 of Prevention of Corruption Act, 1988, any Court cannot take cognizance in the absence of a valid sanction which is to be obtained by the Investigating agency. It was utterly erroneous on the part of the learned Special Judge to direct the complainant to obtain sanction.

9. In the case of **Abhinandan Jha and others vs. Dinesh Mishra AIR 1968, SC 117,** the Hon'ble Apex Court has held :-

> *"that this is not to say that the Magistrate is absolutely powerless, because, as will be indicated later, it is open to him to take cognizance of an offence and proceed, according to law."*

The Hon'ble Apex Court has further held :-

> *"It is no doubt open to the Magistrate, as we have already pointed out, to accept or disagree with the opinion of the police and, if he disagrees, he is entitled to adopt any one of the courses indicated by us. But he cannot direct the police to submit a charge-sheet, because the submission of the report depends upon the opinion formed by the police, and not on the opinion of the Magistrate. The Magistrate cannot compel the police to form a particular opinion, on the investigation, and to submit a report,*

according to such opinion. That will be really encroaching on the sphere of the police and compelling the police to form an opinion so as to accord with the decision of the Magistrate and send a report either under S. 169, or under section 170, depending upon the nature of the decision. Such a function has been left to the police under the Code."

The learned Magistrate is empowered to reject `C' Summary Report but then the Magistrate is to proceed in accordance with law. Hence, the order directing the complainant to obtain sanction is bad in law.

10. After three years, the Anti-Corruption Bureau had again filed a "C" Summary before the Special Judge. The learned Special Judge observed as follows :-

"Though in the trap arranged, the accused Nos. 1 and 2 have not accepted bribe amount, the accused No.1 was found in his possession the amount of Rs.1,50,300/-. During the investigation, statement of witnesses were recorded under Section 164 of the Code of Criminal Procedure. Specimen voice of accused Nos. 1 and 2 were also recorded. Recorded conversation and voice samples were forwarded to Analyzer, Forensic Science Laboratory for analysis. The report of FSL was received. It was opined by the Analyzer that the specimen voice of the accused No.1 were distorted and therefore, identification could not be concluded and that specimen voice of accused No.2 did not contain any speech sample."

The learned Special Judge has also observed that the court had not heard the accused persons at the time of rejecting "C" Summary and in the eventuality that the accused were heard, probably justice would have been done. In any case, there was no occasion to hear the accused since "C" Summary was filed by the prosecution and the complainant was heard. In the subsequent application seeking C Summary, the accused had participated in the said proceedings and had filed written arguments. It was specifically contended by the prosecution as well as the accused that there was no impediment in filing `C' Summary on the second occasion. The learned Special Judge had observed that “fairness in investigation as also trial is a human right of an accused”. The learned Special Judge had relied upon the evidence in the form of written complaint, FIR, Verification panchnama and the statements of witnesses to arrive at conclusion that the accused No.1 had demanded through accused No.2. In view of this conclusion, “C” Summary was rejected. The protest petition as well as other documents were treated as part of investigation papers and the learned Special Judge had directed that the said case be registered against the accused persons for dealing with the matter.

11. The learned counsel for the applicant submits that in view of Section 19 of the Prevention of Corruption Act, the present applicant No.1 could not have been prosecuted for want of sanction, apart from the fact that the investigating agency did not have sufficient material to file charge-sheet against the accused persons. It is a matter of record that the applicant had retired on superannuation on 31.7.2010 and therefore the said issue of

grant of sanction was not of any significance when the second "C" Summary was rejected by an order dated 20.7.2013 and, therefore, the issue of grant of sanction was never considered.

12. Section 19 of the Prevention of Corruption Act contemplates as follows :-

> **"19. Previous sanction necessary for prosecution** *(1) No Court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction [save as otherwise provided in the Lokpal and Lokayuktas Act, 2013 (1 of 2014)]*
>
> *(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;*
>
> *(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with sanction of the State Government, of that Government;*
>
> © *in the case of any other person, of the authority competent to remove him from his office.*
>
> *(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed."*

In the present case, there was no sanction to prosecute the accused and the applicant No.1 being a public servant, could not have been prosecuted or that the court could not have taken cognizance of the offence punishable under Sections 7, 8, 12, 13(1)(d) read with Section 13(2) of the said Act against the accused.

13. This is a peculiar case, where right from the inception, the procedure as laid down by the statute as well as the guidelines laid down by the Hon'ble Apex Court in a catena of decisions were never followed. This is a peculiar case where the report of the original complainant was reduced into report under Section 154 of Cr.P.C. The applicant was being prosecuted only for demanding the gratification. In fact, the contents of the FIR would clearly show that all that was spelt out by the original complainant was that there was a demand by accused No.1 and he was soliciting gratification through the accused No.2. It is also contended in the FIR that he had lodged a report before the Anti-Corruption Bureau which was recorded in the presence of the Panchas. It was decided that the trap would be laid subsequently. The panchas were known and the date and time of the trap. The Court cannot be oblivious of the fact that the present applicant No.1 also happens to be the police officer. On the scheduled date

and time when the trap was laid, it was apparent that the accused had not accepted the gratification and, therefore, naturally the trap had failed. The Investigating Officer in the "C" Summary report had filed the first information report lodged by the complainant and the pre-trap panchnama. In normal course, in a case under the Prevention of Corruption Act, the prosecution is to be initiated by the Anti-Corruption Bureau only after recording the pre-trap panchnama and the post-trap panchnama. The original complainant is the only person who sets law into motion and helps the investigating agency to make the trap successful. That before laying the trap, the facts were already known to one and all. Naturally, the investigating agency did not have sufficient material even to prove that there was demand because the analysis report in respect of the voice samples do not support the case of the complainant. The voice of accused No.1 was distorted and therefore there was no evidence to prove the demand of gratification.

14. It is true that the Court cannot take upon itself the onus of an investigating agency and has to rely upon the conclusion drawn by the investigating agency to ascertain as to whether an offence is made out or not. In the present case, it was the specific case of the investigating agency that no offence is made out. It is true that in the case of **Abhinandan Jha**

(cited supra), the Hon'ble Apex Court has held that it is the discretion of the concerned Court as to whether a "C" Summary report should be accepted or not or that the Court can take cognizance on its account. Prevention of Corruption Act, 1988, being the special statute, the requirement of the statute is that no Court shall take cognizance of the offence punishable under the Prevention of Corruption Act unless the appropriate authority has granted sanction to prosecute the public servant. This was in order to safeguard the dignity and honour of a public servant from the tell-tale of people who would be dissatisfied with discharge of functions by the public servant. The intention of the legislature was that the public servant should be protected from the whistle-blower. In the present case, the FIR itself was lodged only on the ground that the public servant had demanded the amount. The demand was not proved and, according to the investigating agency, there was no sufficient material to prosecute the accused.

15. The learned counsel for the applicants also submits that in the absence of sanction to prosecute, the Court could not have taken cognizance of the case. This Court cannot be oblivious of the fact that in 2013, the applicant was not a public servant and therefore, the issue of sanction was not taken into consideration. The learned Special Judge had observed that

it can be demonstrated from the record that it is the investigating officer who has not asked for according sanction to prosecute accused No.1 from the competent authority and has submitted the "C" Summary report in the Court. In fact, in 2013, there was no necessity for seeking sanction to prosecute as the public servant had retired. It is a matter of record that in the year 2010 also the investigating agency had made no efforts to present the record before the sanctioning authority in order to get sanction from from the inception. It was the opinion of the investigating agency that no evidence has been made out and therefore they had not laid the papers for seeking sanction to prosecute the accused.

16. In the case of **Mohd. Iqbal Ahmed vs. State of Andhra Pradesh (1979) 4 SCC 172**, the Apex Court has held as follows :-

> *"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 and must therefore be strictly complied with before any prosecution can be launched against the public servant concerned."*

That the sanction to prosecute is not an idle formality and that it has to be followed in letter and spirit as it is a safeguard for the public servant. The learned Special Judge has rightly considered in the year 2013 that since the public servant has retired, it is not necessary for seeking sanction from the sanctioning authority. However, the “C” Summary report filed earlier which was rejected in 2010 was also without sanction. The case has to be related to the date of the incident and not to the date when the cognizance has to be taken. In the present case, surprisingly, there are two “C” Summary reports. The earlier 'C” Summary report was rejected on 29.7.2010 i.e. two days prior to the retirement of the present applicant and at that time, sanction was necessary. A case cannot be re-opened only because the Presiding officer (Special Judge) has changed. That the second “C” Summary report was filed practically after interval of three years. It is not known as to why the prosecution had not proceeded with the trial after rejection of the first “C” Summary report. In the first order rejecting the “C” Summary, the Special Judge had directed the investigating agency to obtain sanction. It is pertinent to note that despite the fact that “C” Summary has not been accpeted and was rejected in 2013, till today, the case is not registered as a special case.

17. The learned counsel for the applicant rightly submits that the applicant herein has gone through the ordeal of criminal proceedings for more than 8 years only because the “C” Summary report was rejected. According to the learned counsel, there was no material to file charge-sheet

and the Court cannot take cognizance of its own.

18. In the case of **Mansukhlal Vithaldas Chauhan vs. State of Gujarat 1997 Cri.L.J.4059**, the Hon'ble Apex Court has reiterated the importance of sanction. The Hon'ble Apex Court has held as follows :-

> *Since the validity of “Sanction” depends upon the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows that the sanctioning authority was to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not.”*

The Hon'ble apex Court has further held :-

> *“In the performance of this duty, if the authority in whom the discretion is vested under the Statute, does not act independently and passes an order under the instructions and orders of another authority, the Court would intervene in the matter, quash the order and issue a mandamus to that authority to exercise its own discretion.”*

Hence, the Hon'ble Apex Court has allowed the petition and has held that the Court cannot assume the authority of sanctioning authority and cannot issue a mandamus to obtain sanction to prosecute the public servant.

19. In view of the fact that the statute contemplates that no cognizance can be taken in the absence of sanction and that the investigating agency did not have sufficient material to prosecute the case, this Court is of the opinion that the proceedings initiated against the

applicants under the Prevention of Corruption Act deserve to be quashed**.**

O R D E R

(i) The application is allowed.

(ii) The proceedings in Crime No.74/2007 against the applicants deserve to be quashed.

Application is allowed. Rule is made absolute in the above terms.

(SMT.SADHANA S.JADHAV, J.)