

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.UBAID

FRIDAY, THE 4TH DAY OF SEPTEMBER 2015/13RD BHADRA, 1937

CRL.A.No. 1094 of 2005 ()

AGAINST THE JUDGMENT IN CC 53/2000 of ENQUIRY COMR.& SPL.JUDGE,KZD.
DATED 25-06-2005

APPELLANTS/ACCUSED NOS.1 & 2:

1. G.SREEPADA BHAT, S/O.V.KRISHNA BHAT,
AGED 58 YEARS, RESIDING AT MAJALOODY HOUSE
KAYYAR VILLAGE, P.O.KAYYAR PANDIYAKA
KASARGODE DISTRICT, (RETD. VILLAGE OFFICER
ICHILAMCODE VILLAGE OFFICE).
2. B.M.ABDUL HAMEED, S/O.LATE
B.M.MOHAMMED, AGED 57 YEARS
RESIDING AT HIDAYATH NAGAR, UPPALA VILLAGE
HIDAYATH NAGAR, UPPALA VILLAGE, KASARAGODE
DISTRICT, (RETD. VILLAGE ASSISTANT, ICHILAMCODE
VILLAGE OFFICE).

BY ADVS.SRI.S.MUHAMMED HANEEFF
SRI.R.KRISHNAKUMAR (CHERTHALA)

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REP. BY DEPUTY
SUPERINTENDENT OF POLICE, VIGILANCE AND
ANTI-CORRUPTION BUREAU, KASARGODE (VC 8/98 OF, VACB
KASARGODE), REP. BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT.S.HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 28.7.2015,
THE COURT 04-09-2015, DELIVERED THE FOLLOWING:

P.UBAID, J.

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**Crl.A No.1094 of 2005**

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Dated this the 4th September, 2015

J U D G M E N T

The first appellant herein was the Village Officer of the Ichilamcode Village in Kasaragod District, and the 2nd appellant herein was the Village Assistant there. On the allegation that the 1st accused received an amount of ₹ 300/- and the second accused received an amount of ₹ 200/- from one Mohammed Kunhi on 26.11.1998, as a reward for issuing possession certificate and village sketch, as requested by the mother of the said Mohammed Kunhi, the two accused faced trial before the learned Enquiry Commissioner and Special Judge (Vigilance), Kozhikode in C.C. 53 of 2000. They appeared before the learned trial Judge and pleaded not guilty to the charge framed against them under Sections 7 and 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act (for short “the P.C Act”).

2. The Deputy Superintendent of Police, Vigilance and Anti Corruption Bureau (VACB) registered the crime in

this case against the two appellants on the complaint of Mohammed Kunhi dated 26.11.1998. The Dy.S.P arranged a trap on the same day, received the amount of ₹ 500/- brought by Mohammed Kunhi as per mahazar, demonstrated the required phenolphthalein test to the complainant and the others, and instructed the complainant to approach the accused, and make payment, if they made demand again. Accordingly, it is alleged, the complainant approached the two accused at their office in the afternoon of 26.11.1998, received the required possession certificate from the 1st accused and the required sketch from the second accused, and made payment of the tainted money of ₹ 300/- to the 1st accused and ₹200/- to the 2nd accused. Within no time, on getting signal, the vigilance team led by the Dy.S.P. reached the village office, seized the phenolphthalein tainted currency from the possession of the two accused, and arrested them on the spot. After investigation, the VACB submitted final report before the learned trial Judge.

3. The prosecution examined six witnesses and marked Exts.P1 to P20 documents. MO1 to MO7 properties were also identified and marked, including MO1 series tainted money. When examined under Section 313 Cr.P.C, the two accused stated that the trap in this case was viciously arranged at the instigation of one Abdul Majeed who is the cousin of the complainant. Their explanation is that the said Abdul Majeed had once made an application through his wife for legal heir ship certificate, claiming some benefits on the death of his brother Kasim Rahiman, who in fact died without wife and children, and on an enquiry made by the Village Officer, it was found that the said application was in fact false. There was some revenue recovery proceeding against the said Abdul Majeed at that time. Under the pretext of making payment in the said proceeding, the complainant made payment on behalf of the said Abdul Majeed, and the accused received the amount under the bona fide belief that it was the amount paid on behalf of Abdul Majeed towards the debt. To substantiate the defence case, the accused examined DW1 to DW3 and

marked Ext.D1. Exts.X1 to X4(a) were also marked during trial. On an appreciation of the evidence, the trial court found both the accused guilty. On conviction, they were sentenced to undergo rigorous imprisonment for two years each and to pay a fine of ₹ 10,000/- each under Section 7 of the P.C Act and to undergo another term of rigorous imprisonment for two years each and to pay a fine of ₹ 10,000/- each under Section 13 (1) (d) read with Section 13 (2) of the P.C Act by judgment dated 25.6.2005. Aggrieved by the said judgment of conviction, the two accused have come up in appeal.

4. When this appeal came up for hearing, the learned counsel for the appellants submitted that the prosecution case is really doubtful, that the complainant is not consistent regarding the date of demand and the date of complaint, that a vicious trap was in fact arranged against them at the instance of one Abdul Majeed, who is the first cousin of the complainant, and that on legal grounds also the accused are entitled for acquittal, because the prosecution sanction granted under Section 19 of the P.C

Act stands not proved in any manner. On the other hand, the learned Public Prosecutor submitted that Ext.P20 prosecution sanction was marked with the consent of the defence during trial, and that the evidence given by the complainant in this case is really blemishless.

5. Before going to the factual aspects, let me see whether the prosecution sanction in this case stands properly and legally proved. The impugned judgment shows that Ext.P20 prosecution sanction was marked with the consent of the parties during trial. On a consideration of the different decisions on the point, this Court has recently settled the position that the prosecution sanction granted under Section 19 of the P.C Act will have to be properly and legally proved, and in the absence of such proof, the court will have to apply the bar of cognizance under Section 19 of the P.C Act. In this case, the prosecution did not examine anybody to prove the sanction. Ext.P20 sanction was granted by the Commissioner of Land Revenue, who is the competent authority to remove the accused from service. He was also cited a witness by the prosecution. It is not

known why the witness was not examined to prove the sanction. Ext.P20 prosecution sanction is not a public document as defined under the Indian Evidence Act, and it cannot also claim any immunity or privilege under the Constitution, or under any other law including the Rules relating to division of governmental functions.

6. Of course, the judgment shows that the sanction was marked with the consent of the defence. In a case where a document is of such a nature that it requires to be proved as provided under the law, the consent of the parties given during trial will not amount to such proof. A document which is required to be proved under the law must be proved according to law. Some arguments were made regarding Section 293 Cr.P.C. Documents like Ext.P20 sanction will not come within the purview of Section 293 of Cr.P.C. The documents covered by Section 293 Cr.P.C are only reports of authorities like Chemical Examiners or other Experts. and only such documents will get protection under Section 293 Cr.P.C, as documents that can be proved without examining anybody. Under Section 294 Cr.P.C,

some procedure is prescribed for marking a document which is sought to be read in evidence without proof of signature. A prosecution sanction granted under Section 19 of the P.C Act cannot be marked under Section 293 Cr.P.C on consent. This Court has settled the legal position recently, that a prosecution sanction granted under Section 19 of the P.C Act will have to be proved properly according to law, by the person who granted the sanction, and it is for him to prove to the satisfaction of the court that he had considered all the relevant materials and applied his independent mind in the process of granting sanction. This Court has settled that those responsibilities cannot be taken over by somebody else, and has made it clear that a deviation is possible only when the sanction can claim any privilege or sanctity or immunity under the law as a public document or otherwise. In this case, there is no explanation why the prosecution did not examine the sanctioning authority to prove the sanction according to law. I find that on this ground itself, the accused are entitled for acquittal. In the absence of a properly and legally proved sanction, the very

cognizance is barred under Section 19 of the P.C Act.

7. Now let me come to the factual aspects. In the Ext.P1 complaint dated 26.11.1998, the case of the complainant is that the two accused jointly demanded an amount of ₹ 500/- from him as a reward for issuing the possession certificate and the village sketch as requested by his mother in Ext.P5 application dated 5.11.1998. What is stated in the complaint is that such an application was made on 9.11.1998. Anyway, the complaint does not disclose the date on which such demand was made by the appellants. In evidence, the complainant stated that he made Ext.P1 complaint on 25.11.1998. In cross-examination, he stated that he made the complaint after two days from the date on which the mother's application for possession certificate was made. Thus the complainant is not consistent regarding the date of complaint. As regards the date of demand, there is nothing in his evidence. He does not say when or on what date the demand was made by the Village Officer and the Village Assistant. Of course, it is true that the complainant and the trap witness have given evidence regarding

recovery of the tainted money from the possession of the accused.

8. It is well settled that merely on the basis of recovery of tainted money, an accused cannot be convicted by the court. In **Meena W/o.Balwant Kemke v. State of Maharashtra [2000 SC (Cri) 878]**, and in other decisions including **State of Punjab v. Madan Mohan Lal Verma [(2013) 14 SCC 153]**, the Hon'ble Supreme Court has settled the position, that in the absence of evidence to prove the necessary elements like demand and acceptance, a conviction under Sections 7 and 13 (2) of the P.C Act is not possible merely on the basis of recovery of tainted money. Detection in this case was made by PW6, and investigation was made by PW4. The evidence of PW4 shows that there was no flaw or irregularity or illegality in the investigation conducted by him. As regards the alleged recovery of tainted money, the evidence of PW6 and the trap witness examined as PW2 is satisfactory. But such evidence alone is not sufficient for a conviction in this case. Of course, it is true that the defence pleaded by the accused stands not

properly and effectively proved by the evidence of DW1 to DW3. The evidence of the defence witnesses will show that one Abdul Majeed, who is said to be the first cousin of the complainant in this case, had made a false application through his wife, for legal heirship certificate, claiming some benefits on the death of his brother, who died unmarried. The said Abdul Majeed made his wife to claim that she is the widow of his deceased brother.

9. On enquiry, the revenue officials found that it was a false claim, and report was accordingly sent by the 1st accused. This fact alone will not prove the defence case that the trap in this case was falsely arranged by the said Abdul Majeed through PW1. Anyway, I find on an appreciation of the evidence of the complainant, that his complaint is not fully satisfactory, or beyond reasonable doubts.

10. The case of the complainant in Ext.P1 is that he paid ₹ 300/- to the 1st accused and ₹ 200/- to the 2nd accused. It is not specifically stated so in the complaint. What is stated in the complaint is that the two accused

jointly demanded ₹ 500/-. However, the date of such demand is not mentioned in the complaint or in his evidence. It is well settled that for a conviction under Sections 7 and 13 (2) read with Section 13 (1) (d) of the P.C Act, the prosecution must prove demand and acceptance beyond reasonable doubt. The trap witness in this case is not a witness to the payment of bribe or acceptance of bribe. He only witnessed the process of recovery. When the evidence of the complainant is not satisfactory regarding the essential elements of demand and acceptance, it cannot be accepted without independent corroboration. In **B.Jayaraj v. State of Andhra Pradesh**[2014 Crl.L.J 2433], a three Judge Bench of the Hon'ble Supreme Court held that in the absence of proof of demand and acceptance, a conviction is not possible under Section 7 of the P.C Act. Here, the complainant says about demand in his complaint and in his evidence. But he does not say, when such demand was made, or on what date the accused jointly or separately made such a demand. In the absence of satisfactory evidence proving demand, it would be unsafe to find the

accused guilty.

11. On an appreciation of the evidence as discussed above, I find that the evidence of the complainant in this case is not acceptable without independent corroboration. I also find that the defence pleaded by the accused is not in any manner proved. The evidence given by the complainant is not free from doubts. When he does not say anything about the date of demand, or the nature of demand, his evidence cannot be accepted without independent corroboration, and on the basis of such evidence, it cannot be found that the prosecution case is proved beyond reasonable doubt. Thus, I find that the appellants are entitled for acquittal on the benefit of doubt, and also on the legal ground that the very cognizance is barred under Section 19 of the P.C Act.

In the result, this appeal is allowed. The conviction and sentence against the appellants under Sections 7 and 13 (2) read with 13 (1) (d) of the P.C Act and 34 of Indian Penal Code made by the court below in C.C No.53 of 2000 will stand set aside, and the appellants will stand acquitted

and released in appeal under Section 386 (b) (i) of Cr.P.C.
The bail bond, if any, executed by them will stand
discharged.

**Sd/-
P.UBAID
JUDGE**

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/True copy/

P.S to Judge