IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.UBAID

TUESDAY, THE 29TH DAY OF SEPTEMBER 2015/7TH ASWINA, 1937

CRL.A.No. 821 of 2007 ( )

AGAINST THE JUDGMENT IN CC 19/2002 of ENQ.COMMR. & SPL.JUDGE,THIRUVANANTHAPURAM

APPELLANT(S)/ACCUSED NO.1:

DR.SULEKHA BEEVI, D/O.AYSHA BEEVI,
FORMERLY CIVIL SURGEON, GOVERNMENT HOSPITAL
NEENDAKARA.

BY ADVS.SRI.M.BALAGOVINDAN
SRI.M.R.SASITH
SRI.M.K.DAMODARAN (SR.)

RESPONDENT(S)/COMPLAINANT & STATE.:

----

1. STATE OF KERALA REPRESENTED BY
DEPUTY SUPERINTENDENT OF POLICE, VACB, KOLLAM UNIT.

2. PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

R1 & R2 BY PUBLIC PROSECUTOR SMT.S.HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 10.08.2015, THE COURT ON 29-09-2015, ALONG WITH CRA. 862/2007, DELIVERED THE FOLLOWING:

P.UBAID, J.
~~~~~~~~~~~~
Crl.A Nos.821 & 862 of 2007
~~~~~~~~~~~~~
Dated this the 29th September, 2015

J U D G M E N T

The appellant in Crl.A No.821 of 2007 was the Superintendent (Gynaecologist-II) at the Neendakara Government Hospital in August, 2000, and the appellant in Crl.A No.862 of 2007 was the Staff Nurse there. On the allegation of acceptance of illegal gratification for conducting termination of pregnancy, from a couple on 30.8.2000, the two appellants faced prosecution before the learned Enquiry Commissioner and Special Judge (Vigilance) Thiruvananthapuram in C.C No.19/2002. Crime in the said case was registered by the Deputy Superintendent of Police, Vigilance and Anti Corruption Bureau (VACB), Kollam Unit on the complaint of one Shan, that when he and his wife Sreeja approached the 1st accused for medical termination of pregnancy on 21.8.2000, the Doctor demanded money (₹ 600/-) saying that termination of pregnancy was not legally possible at that time as it was at a slightly advanced stage. She meant ₹ 500 for herself and

₹ 100/- for the Staff Nurse. When the couple approached the Doctor on 28.8.2000, the Doctor repeated demand and enhanced the claim to ₹ 1000/-. She meant ₹ 800 for herself and ₹ 200/- for the Staff Nurse. The couple was accordingly directed to come on 30.8.2000. As they were not inclined to make payment, Shan made a complaint on 30.8.2000, and the Deputy Superintendent of Police, Vigilance and Anti Corruption Bureau (VACB) arranged a trap. The amount of ₹ 600/- brought by the couple was received as per mahazar by the Dy.S.P., and after demonstrating the required phenolphthalein test, the complainant was instructed to approach the Doctor and make payment at the hospital. Accordingly, Shan and his wife went to the Government Hospital, Neendakara, met the 1st accused at the hospital, and when she made demand again, Sreeja paid the tainted money of ₹ 600/- to the Doctor. On getting signal, the vigilance team reached there, seized the phenolphthalein tainted currency of ₹ 500/- from the possession of the Doctor, and seized the amount of ₹ 100/- from the possession of the Staff Nurse. They were arrested on the spot by the Dy.S.P. After investigation, the vigilance submitted final report before the learned Enquiry Commissioner and Special Judge (Vigilance), Thiruvananthapuram.

2. The two accused entered appearance and pleaded not guilty to the charge framed against them under sections 7 and 13 (2) read with 13 (1) (d) of the Prevention of Corruption Act (for short “the P.C Act”).

3. The prosecution examined eight witnesses in the trial court including the couple, the trap witness arranged by the Detecting Officer, and also the Dy.S.P who laid the trap and detected the offence. The prosecution also proved Exts.P1 to P18 documents including the Ext.P8 prosecution sanction in respect of the 2nd accused.

4. As the 1st accused retired by the time, prosecution sanction in respect of the 1st accused was not obtained. When examined under Section 313 Cr.P.C, both the accused denied the incriminating circumstances, and maintained the stand that they had not received anything as illegal gratification, and that a vicious trap was arranged at the instance of PW1 and PW2 for the reason that the Doctor declined to conduct medical termination of pregnancy at an

advanced stage. The defence also examined five witnesses as DW1 to DW5 and marked Exts.D1 to D8 documents. The couple, who in fact made complaint in this case turned hostile to the prosecution. They did not in any manner support the prosecution as regards the alleged demand or acceptance. Demand was allegedly made to the wife, and not to the husband. But complaint was filed by the husband, and the allegation is that the amount of ₹ 600/- meant for the trap was handed over to the wife by the husband, and in turn the wife entered the labour room at the hospital and made payment to the Doctor. Within no time, the vigilance party reached there. It is not known how the Doctor immediately divided the amount, and made payment to the Staff Nurse. Nobody has got a case that the Staff Nurse was also present at the labour room when payment was made. Anyway, the learned trial Judge relied on the evidence proving recovery of tainted money and found the two accused guilty. On conviction, the 1st accused was sentenced sentenced to undergo rigorous imprisonment for three years, and to pay a fine of ₹ 7500/- under Section 13 (2) read with 13 (1) (d) of the P.C Act, and to undergo rigorous imprisonment for two years under Section 7 of the P.C Act. The 2nd accused was sentenced to undergo rigorous imprisonment for one year under Section 7 of the P.C Act. The said judgment of conviction dated 28.4.2007 is under challenge in this appeal. Crl.A No.821 of 2007 is the appeal brought by the 1st accused and Crl.A No.862 of 2007 is the appeal brought by the 2nd accused, challenging the conviction and sentence.

5. When the two appeals came up for hearing, the learned counsel for the appellants submitted that the conviction made by the court below is liable to be set aside, because there is absolutely no evidence to prove the case. The learned Public Prosecutor submitted that though the material witnesses turned hostile, the prosecution could bring out something against the accused in the cross-examination of the material witness, and that the recovery of tainted money, proving acceptance, stands well proved.

6. Of the eight witnesses examined by the prosecution, PW1 is the person who made complaint in this case and PW2 is his wife who allegedly made payment of bribe to the Doctor and the Nurse. PW3 is the trap witness

and PW7 is the Deputy Superintendent of Police, who detected the offence and recovered the tainted money. The fact of recovery stands well proved by the evidence of PW3 and PW7. PW3 has no case that he had witnessed payment of money by PW2 to any of the accused. Even according to the prosecution, payment of money was made by PW2 at the labour room attached to the hospital. Of course, it is really unbelievable that at the labour room where other patients also would be there, a person could conveniently pay bribe to the Doctor and the Nurse. Nobody has got a case that the second accused had made any demand at any time. It is not known how she was convicted under Section 7 of the P.C Act. PW1, the complainant has no case that the money was paid by him, or that he had witnessed payment of money to the Doctor by his wife. He was admittedly outside the labour room, when money was allegedly paid by his wife. The evidence of PW3 is only regarding the recovery of tainted money and the arrest of the accused on the spot. He has given evidence regarding the pre-trap and post-trap procedures. But he did not witness the actual trap. Thus, I find that there is nothing material in the evidence of PW3 to prove the prosecution case as regards acceptance of illegal gratification. PW7 has also given evidence regarding the trap arranged by him, the pre-trap and post- trap procedures adopted by him, the recovery of tainted money, and also the arrest of the accused. But the defence is mainly on the acceptability of the evidence of PW1 and PW2 regarding payment of bribe. Of course, it is true that these two witnesses turned hostile, but the prosecution claims that something could be brought out in their cross-examination to incriminate the accused.

7. In **Vinod Kumar v. State of Punjab [AIR 2015 SC 1206]** the Hon'ble Supreme Court held recently that the prosecution case would not collapse just because the complainant turned hostile. The Hon'ble Supreme Court held that the essential ingredients like demand and acceptance can be prove by the prosecution by other evidence possible, and the court can rely on that evidence and enter a conviction, if that evidence adduced by the prosecution is acceptable and believable. Just because the complainant turned hostile, the accused cannot be acquitted by the court, if the other evidence adduced by the

prosecution well proves the case to the satisfaction of the court. Here, the question is whether there is any other evidence, than that of PW1 and PW2, to prove the essentials like demand and acceptance.

8. In **Meena W/o.Balwant Kemke v. State of Maharashtra [2000 SC (Cri) 878]**, and other decisions including the recent one in **C.Sukumaran v. State of Kerala [2015 Crl.L.J 1715],** the Hon'ble Supreme Court held that mere recovery of tainted currency from the possession of the accused will not be enough to establish the guilt of the accused. 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, mere recovery of tainted money from the accused will not be sufficient for a conviction under Section 7 of the P.C Act. In this case, the prosecution relies on the recovery of tainted money from the possession of the accused. The question is whether, on the said evidence alone, the accused in this case can be convicted by the court.

9. PW1 has no case anywhere in his complaint or in

evidence, that the amount was paid by him to the Doctor and the Nurse. His complaint is that demand for bribe was first made by the Doctor on 21.8.2000 and payment was made on 30.8.2000. It is also the prosecution case that on 28.8.2000, the Doctor demanded ₹ 1000/- In evidence, PW1 turned fully hostile to the prosecution. He stated in definite terms that the Doctor had not demanded anything from him as illegal gratification for conducting medical termination of his wife's pregnancy. In fact, the prosecution case of demand made on 21.8.2000 stands disproved by the evidence of PW4 and also Exts.D7 and D8 documents. The evidence of PW4 well satisfies this Court that on 21.8.2000, the first accused was in fact at the Government Hospital, Karunagappally in connection with an enquiry. If so, the Doctor could not have made demand for illegal gratification from PW1 or PW2 at the Government Hospital, Neendakara on 21.8.2000. There is absolutely nothing to doubt the evidence of PW4 or the Exts.D7 and D8 documents. The prosecution also would not doubt the truth of this evidence given by PW4 and the genuineness of Exts.D7 and D8 documents. Thus, it is really false that on

21.8.2000, the 1st accused had made a demand for illegal gratification. Anyway, the person who made complaint regarding such demand did not support the prosecution. Even according to the prosecution, payment of bribe was made by PW2, the wife of PW1, at the labour room attached to the hospital. As already observed, the very allegation is suspicious and unbelievable because at a labour room where there would be so many patients admitted for delivery, payment of bribe cannot be conveniently and secretly made to a Doctor or a Nurse. Anyway, PW2 also turned hostile during trial. She is definite in her evidence that she had not made payment of anything to the Doctor or the Nurse at the hospital. On the other hand, her evidence convinces the court to an extent that the Doctor had in fact declined to conduct abortion on the ground that the pregnancy of PW2 had crossed the permissible stage for medical termination. The defence case is that PW1 and PW2 arranged a vicious trap just because the Doctor declined to conduct abortion for sufficient reason. That there was some exchange of words of dispute between the Doctor and the material witness (PW1 and PW2) is well brought out in evidence, though it stands not fully and satisfactorily proved that the trap in this case was a vicious or illegitimate trap. Anyway, the prosecution does not have any evidence to prove the demand and acceptance. The prosecution claims that something could be brought in the cross-examination of PW1 and PW2 to incriminate the accused, but I could not find anything on examination of their evidence. PW1 cannot in fact prove acceptance because, even according to the prosecution, payment was made by his wife to the Doctor at the labour room. His case is that money was entrusted by him, and accordingly, his wife entered the labour room, met the doctor there and made payment. It is true that the prosecution could bring out something in the evidence of PW1 in cross-examination, but that will not in any manner help the prosecution. He does not say that he had seen his wife making payment to the Doctor. PW2 turned fully hostile and stated in definite terms that she had not paid anything to the Doctor at the labour room or anywhere at the hospital. The prosecution could not bring out anything in cross-examination to incriminate the accused.

10. In the absence of any evidence to incriminate the

accused, as regards the essentials like demand and acceptance, it would be really illegal and unsafe to convict the accused simply on the basis of recovery of the tainted money. It is settled that just because the complainant turned hostile, the prosecution case would not collapse. But in this case, there is no other evidence or material or circumstance to prove the alleged demand and acceptance. It is well settled that merely on the basis of recovery of the tainted money, an accused cannot be convicted by the court, and that even to apply the presumption under section 20(1) of the P.C Act, the prosecution will have to prove acceptance. This is settled by the Hon'ble Supreme Court in **C. Sukumaran's** Case and also in **B.Jayaraj's** case. In the absence of any evidence proving acceptance, the presumption that the accused accepted money as a reward as mentioned under Section 7 of the P.C Act cannot be applied by the court. This is a case where there is absolutely no evidence to prove the alleged demand and acceptance. In such a situation, there is no question of applying the presumption under Section 20 (1) of the P.C Act. In fact, what is presumed under the law is not the guilt of the accused. It is only a presumption regarding the purpose of acceptance of money. The question of such presumption comes only when acceptance is proved, as held by the Hon'ble Supreme Court.

11. Of course, it is true that PW3 has stated in evidence that he had seen the complainant handing over money to his wife (PW2), but he does not say what amount was in fact handed over to her. In fact, this evidence is of no use when PW2 says that she had not made payment of anything to the Doctor. As regards the 2nd accused, Ext.P8 prosecution sanction stands proved by PW4. The evidence of PW4 will show that sanction to prosecute the 2nd accused was granted on a consideration of all the relevant materials and on an independent application of his mind. As regards the 1st accused, the prosecution did not obtain sanction because she retired by the time, the final report was submitted.

12. On an appreciation of the evidence as discussed in the foregoing paragraphs, I find that the prosecution case stands not proved by satisfactory evidence. The material witnesses including the complainant turned hostile, but the

prosecution did not adduce any other evidence to prove the case on facts. In the absence of any such evidence, the prosecution will not get the benefit of the decision of the Hon'ble Supreme Court in **Vinod Kumar's** Case. So also, in the absence of anything to prove the alleged acceptance, the prosecution will not get the benefit of the presumption under Section 20 (1) of the P.C Act. When there is nothing to prove the alleged demand and acceptance, a conviction cannot be made by the court simply on the basis of recovery of tainted money. The first demand was made by the accused, according to the prosecution on 21.8.2000. This case stands disproved by the evidence of none other than PW4 examined by the prosecution, read along with Ext.D7 and D8 documents. Thus, I find that in the absence of any evidence to prove the prosecution case including the very essentials like demand and acceptance, the conviction made by the court below is liable to be set aside, and the two appellants are entitled to be acquitted.

In the result, the two appeals are allowed. The conviction and sentence against the appellants made by the court below in C.C 19/2002 will stand set aside on the finding that they are not proved to be guilty of the offence alleged against them under Sections 7 and 13 (2) read with 13 (1) (d) of the P.C Act, and the two appellants are acquitted 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

ma

/True copy/

P.S to Judge