

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.UBAID

MONDAY, THE 6TH DAY OF JULY 2015/15TH ASHADHA, 193

CRL.A.No. 2109 of 2004 ()

**-----
CC.NO. 7/2002 OF ENQUIRY COMMISSIONER & SPECIAL JUDGE,THRISSUR
DATED 30/11/2004
-----**

APPELLANT/ACCUSED :

**-----
DR.N.GURUDAS,
FORMER ASSOCIATE PROFESSOR (SURGERY)
MEDICAL COLLEGE HOSPITAL, KOTTAYAM.**

**BY ADVS.SRI.B.RAMAN PILLAI
SRI.GEORGE PHILIP
SRI.R.ANIL
SRI.RAJU RADHAKRISHNAN
SRI.ANIL K.MOHAMMED
SRI.DELVIN JACOB MATHEWS**

RESPONDENT/COMPLAINANT :

**-----
STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT. V.H. JASMINE

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06-07-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

Mn

'C.R.'

P.UBAID, J.

~~~~~

**Crl.A No.2109 of 2004**

~~~~~

Dated this the 6th July, 2015

J U D G M E N T

The appellant herein was Associate Professor of Surgery in the Medical College Hospital, Kottayam in January, 2001. On the allegation that he received an amount of ₹ 500/- as illegal gratification at his residence on 31.1.2001 from one Shaji for conducting an operation, the appellant faced prosecution before the Enquiry Commissioner and Special Judge (Vigilance), Thrissur in C.C No.7 of 2002. Crime in this case was registered by the Deputy Superintendent of Police, Vigilance and Anti Corruption Bureau (VACB) on the complaint of Shaji, made on 31.1.2001. The amount of ₹ 500/- brought by him was received by the Dy.S.P., phenolphthalein was applied on the currency, and after demonstrating the required phenolphthalein test to Shaji and the other witnesses including the public servants arranged by the Dy.S.P. to witness the trap, Shaji was instructed to hand over the currency to the appellant at his residence. Accordingly,

Shaji handed over the phenolphthalein tainted currency, and within no time, the vigilance team led by the Dy.S.P reached there, seized the phenolphthalein tainted currency and arrested the appellant on the spot. After investigation, the vigilance submitted final report in court under Sections 7 and 13 (2) read with 13 (1) (d) of the Prevention of Corruption Act, 1988 (for short " P.C Act").

2. The appellant/accused pleaded not guilty to the charge framed against him under Section 13 (2) read with 13 (1) (d) of the P.C Act and claimed to be tried. The prosecution examined eight witnesses in the trial court and also marked Exts.P1 to P9 documents. The prosecution also marked MO1 to MO6 properties including the tainted currency of ₹ 500/- seized from the possession of the accused.

3. When examined under Section 313 Cr.P.C, the accused denied the incriminating circumstances and maintained a defence that he had not in fact received anything illegally from the complainant and that the trap in this case is a vicious one. In defence, the accused

examined two witnesses as DW1 and DW2 and also marked Exts.D1 to D12 documents.

4. On an appreciation of the evidence, the trial court found that the prosecution case is true, that the accused had accepted an amount of ₹ 500/- from PW2, the complainant, as illegal gratification for conducting an operation. Accordingly, the accused was convicted by the trial court under Section 7 of the P.C Act. However, he was found not guilty under Section 13 (2) read with 13 (1) (d) of the P.C Act. On conviction under Section 7 of the P.C Act, he was sentenced to undergo rigorous imprisonment for one year and also to pay a fine of ₹ 20,000/- by judgment dated 30.11.2004. Aggrieved by the judgment of conviction, the accused has come up in appeal.

5. When the appeal came up for hearing, the learned counsel for the appellant submitted that the appellant is entitled for acquittal on factual as well as legal grounds. It was submitted that the complainant himself turned fully hostile to the prosecution during trial, and practically there is nothing to prove the alleged demand and

acceptance, except recovery of the tainted currency seized by the Dy.S.P. On the important legal aspect, the learned counsel submitted that the very cognizance in this case is barred and bad under Section 19 of the P.C Act because Ext.P1 sanction granted by the competent authority stands not properly proved according to law.

6. Before going to the legal aspects, let me discuss the evidence on facts and find whether the prosecution case stands proved beyond reasonable doubt. Of the eight witnesses examined in the trial court, PW2 is the complainant Shaji, PW3 is the trap witness arranged by the vigilance to witness the trap and PW7 is the Deputy Superintendent of Police who detected the offence. The case was investigated by PW6 and final report was submitted by PW8. PW1 is the Under Secretary to the Government, examined to prove Ext.P1 sanction granted by the Principal Secretary, Vigilance. PW2, the complainant turned hostile to the prosecution during trial. Except some contradictions marked during his cross-examination by the learned Public Prosecution, there is nothing in his evidence

to incriminate the accused. He is definite in evidence that the appellant had not demanded anything from him as illegal gratification and that he had also not paid anything to the Doctor for conducting his operation. PW3, the trap witness does not claim to have witnessed the acceptance of money by the accused from the complainant, or payment of money by the complainant to the accused. He only accompanied the Vigilance Dy.S.P. and witnessed the process of seizure of tainted currency from the possession of the accused. Practically there is only the evidence of the complainant to prove the alleged demand.

7. The case of the prosecution is that the appellant herein demanded an amount of ₹ 2000/- for conducting surgery and as first installment, the complainant made payment of ₹ 500/-. When the accused repeated the demand, the complainant got admitted in the hospital on 31.1.2001, and on that day itself, he approached the vigilance to lodge a complaint. Ext.P2 complaint was made by him on 31.1.2001 while he was undergoing treatment in the hospital as inpatient. It is not known how he could leave

the hospital while undergoing treatment or whether he had obtained the permission of the unit chief for going outside. This makes things suspicious. Anyway, he fully turned hostile during trial, and did not in any manner help the prosecution. As already stated, PW3 is not a witness to the alleged acceptance of gratification. Now what remains is only the evidence regarding the seizure of tainted money.

8. It is well settled that for a conviction under Section 7 of the P.C Act, the prosecution must necessarily prove demand, and even in a case where the complainant turned hostile, the prosecution can prove demand by other evidences and circumstances possible. 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, mere recovery tainted money from the accused will not suffice for a conviction under Section 7 of the P.C Act. In **C.Sukumaran v. State of Kerala [2015 Crl.L.J 1715]**, the Hon'ble Supreme Court held that demand of illegal gratification by the accused is the *sine qua non* for constituting the offence punishable

under Section 7 of the P.C Act. In **Meena W/o.Balwant Kemke v. State of Maharashtra** [2000 SC (Cri) 878], the Hon'ble Supreme Court held that mere recovery of phenolphthalein tainted currency and positive result of the phenolphthalein test will not be enough to establish the guilt of the accused, and that acceptance of illegal gratification must be properly proved. In **B.Jayaraj v. State of Andhra Pradesh** [2014 Crl.L.J.2433], the Hon'ble Supreme Court further held that proof of acceptance of illegal gratification is a pre-condition for applying the presumption under Section 20 (1) of the P.C Act. In **T.Shankar Prasad v. State of Andhra Pradesh** [2004 SCC (Cri) 870], the Hon'ble Supreme Court held that the court is bound to apply the presumption under Section 20 (1) of the P.C Act in a case where acceptance of illegal gratification is proved, and that for proving acceptance of illegal gratification, the court can even accept factual presumption.

9. In **Vinod Kumar v. State of Punjab**[AIR 2015 SC 1206], the Hon'ble Supreme Court very recently

settled the position, that the mere fact that the complainant turned hostile would not result in collapse of the whole prosecution case. The position settled is that even in a case where the complainant turned hostile, the prosecution can prove the case of demand and acceptance by other evidences and circumstances possible, provided such evidences or circumstances are strong enough to prove the essentials.

10. On an appreciation of the evidence as discussed above, I find that there is no satisfactory evidence to prove the alleged demand. The prosecution does not have any other evidence to prove the alleged demand. When there is absolutely no material other than the complainant's versions to prove the alleged demand, and when the complainant turned hostile fully during trial, a conviction is not possible under Section 7 of the P.C Act, as held on many occasions by the Hon'ble Supreme Court and this Court. It is true that seizure of the phenolphthalein tainted currency of ₹ 500/- stands proved by the evidence of the detecting officer and PW3, but merely on the basis of such evidence,

a conviction cannot be made by the court when the essential element of demand stands not proved by any evidence or circumstance.

11. As already observed, Ext.P2 complaint is suspicious because the complainant made Ext.P2 complaint while he was undergoing treatment as inpatient in the hospital. His evidence in cross-examination will show that he had some psychic problems at the relevant time. Ext.D1 marked at the instance of the defence during trial is a letter written by the complainant directly to the court, after the registration of the crime in this case. This letter contains his remorse on what he did against the doctor. It appears that no importance was given to this letter by the trial court. There is reason to believe that there was somebody behind the complaint. I am inclined to believe that the trap in this case was a vicious trap, and not a genuine trap on a genuine complaint. I find that the prosecution case is really suspicious. Even otherwise, on facts, the appellant is entitled for acquittal because the very essential element of demand of illegal gratification under Section 7 of the P.C

Act stands not proved.

12. The learned Public Prosecutor strenuously argued that the evidence given by the complainant is well acceptable, and it must be read along with the evidence of PW3 and PW7 proving seizure of tainted money. I find that on the basis of seizure of the phenolphthalein tainted money alone, a conviction is not possible, as held by the Hon'ble Supreme Court in the decisions cited supra. Thus, I find on facts that the prosecution case stands not properly and satisfactorily proved beyond reasonable doubt, and so the appellant is entitled for acquittal.

13. Now let me discuss the legal aspect raised by the defence. Section 19 of the P.C Act bars even cognizance in the absence of the required sanction granted by the competent authority. In this case, Ext.P1 is the sanction granted by the Principal Secretary to the Government, Vigilance Department.

14. Paragraph 9 of the trial court judgment shows that the very acceptability of Ext.P1 sanction was disputed by the defence in the trial court. The prosecution brought

the Under Secretary (PW1) to prove the prosecution sanction granted by the Principal Secretary. The question of law raised is whether a sanction granted under Section 19 of the P.C Act requires proper proof as prescribed under the Indian Evidence Act.

15. The learned Public Prosecutor argued that Ext.P1 sanction will have sanctity as a public document, being a sanction granted by way of a Government Order. As regards proof of sanction under Section 19 of the P.C Act, a learned Single Judge of the Andhra Pradesh High Court held in **Central Bureau of Investigation SPE Hyderabad v. P.Muthuraman** reported in **LAWS (APH)-1996 3-13**, relying on a Division Bench decision of the Calcutta High Court in **S & R of Legal Affairs v. Moazzem Hossain [AIR 1947 Cal 318]**, that the signature in the prosecution sanction will have to be proved either by the person who granted sanction, or by somebody who can identify the signature of the sanctioning authority.

16. In **Antony Cardoza v. State of Kerala [2011 (1) KLT 946]**, the question of acceptability of a prosecution

sanction came up for consideration before this Court. It was a case where the prosecution sanction under Section 19 of the P.C Act was granted by the Principal Secretary to Government (Vigiance), and it was proved by an Under Secretary during trial. A learned Single Judge of this Court held in the said case that in such a circumstance where the prosecution is bound to prove proper and independent application of mind to the process of granting sanction, the sanction cannot be said to have to been properly proved by another person, who claims to have familiarity with the hand writing or signature of the person who granted sanction. The position here exactly are identical.

17. On a consideration of the different rulings on the point, I have settled the legal position in another case as follows:

(a) In a case where prosecution sanction will have sanctity and acceptability as a public document under Section 74 of the Indian Evidence Act, or in a case where it is a sanction granted by order of the Governor of Kerala and

published as Government Order in the gazette, only formal proof of the sanction is required.

(b) Even in a case where the sanction is granted by the Government by order of the Governor, the person who granted the sanction will have to prove it, if proper and independent application of mind in the process of granting sanction is challenged during the trial process.

(c) In other cases where sanction is granted by some other authority, the sanction will not have sanctity as a public document, and the sanction will have to be proved by the person who granted the sanction, as provided under the Indian Evidence Act.

18. In this case, I find that the decision of this Court in **Antony Cardoza v. State of Kerala** is very much applicable. Paragraph 9 of the trial court judgment shows that the question of independent and proper application of mind to the facts of the case was very much in issue during trial, and it was considered and decided by the learned trial

Judge as a legal issue. However, the learned trial Judge found that the prosecution sanction in this case stands properly proved. This is not acceptable at all in view of the decision of this Court in **Antony Cardoza v. State of Kerala**, and also the position later settled by this court. True it is, that somebody who is familiar with the signature of the sanctioning authority, can prove the sanction, if only a formal proof is required. Marking of a document on formal proof is entirely different from accepting a material document in evidence on proper and legal proof, as required and prescribed under the Indian Evidence Act. Here is a case where the acceptability of the prosecution sanction was challenged by the defence during trial on the ground that it was granted by the authority without properly verifying and appreciating the materials collected by the Investigating Officer during the process. No doubt, in such a case, the prosecution sanction granted under Section 19 of the P.C Act will have to be proved by the person who granted sanction. That function cannot be discharged by somebody else. I am fully in agreement with **Antony**

Cardoza v. State of Kerala and also the learned Single Judge of the Andhra Pradesh High Court.

18. In this case, I find that Ext.P1 prosecution sanction stands not properly and legally proved by examining the right person who granted sanction. He will have to give evidence and prove that sanction was granted after proper and independent application of mind to the process. An Under Secretary cannot come and prove those aspects which will have to be proved by the Principal Secretary who granted sanction. This is what this Court held in **Antony Cardoza v. State of Kerala also.** I find that the appellant herein is entitled for acquittal on the legal ground itself, that there is no proper and valid sanction in this case proved according to law, and that the very cognizance was barred under Section 19 of the P.C Act. I find that the conviction is legally unsustainable, and is liable to be set aside.

In the result, this appeal is allowed. The appellant herein is found not guilty of the offence punishable under Section 7 of the P.C Act and he is acquitted of the said

offence in appeal under Section 386 (b) (i) of Cr.P.C. Accordingly, the conviction and sentence against the appellant in C.C No.7 of 2002 of the court below will stand set aside, and the appellant will stand released from prosecution. The bail bond, if any, executed by the appellant will stand discharged.

**SD/-
P.UBAID
JUDGE**

ma

/True copy/

P.S to Judge