

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.UBAID

MONDAY, THE 29TH DAY OF JUNE 2015/8TH ASHADHA, 1937

CRL.A.No. 2294 of 2006 ()

AGAINST THE JUDGMENT IN CC 52/2000 of ENQUIRY COMMISSIONER AND
SPECIAL JUDGE, KOZHIKODE DATED 14-11-2006

APPELLANT(S)/ACCUSED::

DR.H. PRAKASH PAI,
S/O.LAKSHMA RAM PAI, `RAM NIVAS', KRISHNA MANDIR RD
KANHANGAD, NEAR HEAD POST OFFICE, KANHANGAD.
(ASST.SURGEN DIST.HOSPITAL, KANHANGAD.

BY ADV. SRI.S.RAJEEV

RESPONDENT(S)/COMPLAINANT::

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA
(VC-4/98 OF VIGILANCE AND ANTI-CORRUPTION, BUREA
KASARGOD).

BY PUBLIC PROSECUTOR SRI.N.SURESH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 27.05.2015,
THE COURT ON 29-06-2015 DELIVERED THE FOLLOWING:

“C.R”

P.UBAID, J.

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**Crl.A No.2294 of 2006**

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Dated this the 29th June, 2015

J U D G M E N T

The appellant herein was General Surgeon in the District Hospital, Kanhangad in July-August, 1998. One Lakshmi was under his treatment in July 1998 for some gynecological problems. Lakshmi was admitted in the hospital on 26.7.1998 as advised by the appellant herein. She was also advised to undergo an operation. The prosecution case is that for conducting the said operation, the appellant demanded an amount of ₹ 2000/- from Lakshmi and her relatives including her husband, and accordingly at about 3.25 p.m. on 3.8.1998 at his house, the appellant received ₹ 1000/- as illegal gratification from Madhavan, the brother of Lakshmi. A trap was arranged by the Deputy Superintendent of Police, VACB, Kasaragod on the complaint of Madhavan. After investigation, the VACB submitted final report before the Enquiry Commissioner and Special Judge (Vigilance), Kozhikode. After complying with the procedural formalities under the law, the learned

trial Judge framed a charge against the accused under Sections 7 and 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act ('P.C Act' for short) to which the accused pleaded not guilty. The prosecution accordingly examined 8 witnesses in the trial court and marked Exts. P1 to P16 documents, and also the MO1 to MO6 properties including the currency seized from the consulting room of the accused. When examined under Section 313 Cr.P.C, the accused denied the incriminating circumstances and projected a defence that he had no reason or occasion to receive illegal gratification for operation because he was on duty off on 30.7.2008, and that operation was in fact conducted by the Gynaecologist much later. The case of the defence is that operation could not have been fixed before pre-anesthetic test and other tests. She was detected as a case of ovarian cyst, and even gynaecological test was conducted on 3.8.1998. In such a circumstance, it is quite unbelievable and unacceptable that the appellant received illegal gratification on 3.8.1998 for conducting operation. No oral evidence was adduced from the side of the defence. But Exts.D1 and D1 (a) were marked during trial.

2. On an appreciation of the evidence adduced by the prosecution, the learned trial Judge found the accused guilty under Sections 7 and 13 (2) read with Section 13 (1) (d) of the P.C Act. On conviction, he was sentenced to undergo rigorous imprisonment for 2 years each and to pay a fine of ₹ 5000/- each under Sections 7 and 13 (2) of the P.C Act by judgment dated 14.11.2006 in C.C No.52 of 2000. Aggrieved by the conviction and sentence, the accused has come up in appeal.

The points for decision are :

(i) Whether the appellant herein was on duty on the District Hospital, Kanhangad on the relevant dates?

(ii) Whether the appellant had any reason or occasion to receive illegal gratification from PW1 as alleged by the prosecution?

(iii) Whether the appellant herein had in fact received ₹1000/- as illegal gratification from PW1, as alleged by the prosecution?.

(iv) Whether the sentence imposed by the court below requires interference in case the conviction is confirmed in appeal?

3. In fact, the appellant has no dispute regarding the

prosecution case that he was on duty in the District Hospital, Kanhangad as General Surgeon from 26.7.1998 to 3.8.1998. However, the prosecution examined one Assistant Surgeon (PW-6) to prove the necessary documents. Exts.P8 to P10 documents will prove that the appellant herein was on duty in the hospital on the relevant dates, and that PW2 , Lakshmi was admitted in the hospital on 26.7.1998 by the Duty Medical Officer as advised by the appellant herein, after private consultation at his residence. The prescription issued by the appellant, contained in Ext.P10 series, will show that it was the appellant, who advised admission in the hospital. On the basis of the medical documents, Pw6 has given evidence that Lakshmi was initially treated by the appellant herein, and that operation was in fact conducted on 14.8.1998. That part of the evidence of PW6 regarding the appellant's duty in the hospital on the relevant dates is not challenged in cross-examination.

4. PW1 is the brother of Lakshmi, who lodged Ext.P1 complaint. But in court, he fully turned hostile to the prosecution. When cross-examined by the learned Public Prosecutor, he stated in clear terms that one Bhaskaran was

in fact behind the complaint, and Bhaskaran had told him that the complaint was being made for the benefit of the other Doctors in the hospital. This will have to be read along with the defence version that there was a gang of doctors in the hospital against the appellant herein, for some reason or the other. Of course, this is not a very strong circumstance, but a circumstance that will have to be considered by the court in appreciating the other evidence adduced.

5. PW2 is the patient Lakshmi who was admitted in the hospital on 26.7.1998, and who underwent an operation on 14.8.1998. She stated that she was admitted by the appellant herein and she was examined by the Doctor. But she has no case that necessary steps for operation were taken by the appellant herein, or that the appellant herein had any role in her operation. Thus, she also turned fully hostile to the prosecution.

6. PW3 is the sister of Lakshmi and PW4 is the husband of Lakshmi. These two witnesses also turned hostile to the prosecution. The learned Additional Legal Advisor representing the VACB could not bring out anything in the cross-examination of PW1 to PW4 to incriminate the accused

in any manner except that the appellant was on duty at the relevant time in the District Hospital.

7. The prosecution case is that the phenolphthalein tainted currency of ₹ 1000/- was handed over to the appellant herein by PW1, after registration of the crime on his complaint. PW1 stated in evidence that he had made such a complaint and that he had also consultation with the Doctor for some decease. His evidence in court is that the amount of ₹ 1000/- brought by him and on which the Dy.S.P. applied phenolphthalein was placed by him on the Doctor's table during the consultation, and that the said amount was not in fact received by the Doctor. He has no case in evidence that the Doctor had at any time demanded bribe or excess fee, or that the amount was in fact paid by him or placed on the table as demanded by the Doctor. He even stated that the amount of ₹ 1000/- placed by him on the table was the amount given to him by the Dy.S.P, and it was not the amount brought by him. This aspect also will have to be read along with the other aspect that one Bhaskaran was behind the complaint as stated by PW1 in cross-examination by the learned Additional Legal Advisor. PW1 is definite that he had

not brought any amount for payment to the Doctor. He does not know who brought the amount. He simply placed it on the table as instructed by the Deputy Superintendent of Police. Thus, I find that the evidence of PW1 is fully against the prosecution, and it does not contain anything except that the phenolphthalein tainted currency of ₹ 1000/- entrusted by the Deputy Superintendent of Police was just placed by him on the consultation table of the accused during his consultation with the doctor.

8. The evidence of PW2 to PW4 including the patient Lakshmi does not contain any material against the accused. They have not stated anything about any demand by the Doctor for money or about acceptance of any amount by the Doctor. They have also no case that the appellant herein had any involvement in the operation undergone by PW2.

9. PW7 is the Deputy Superintendent of Police who detected the offence, and PW5 is the Additional Tahsildar brought by the Police to accompany the complainant to the consulting room of the Doctor and to witness the payment of illegal gratification. The Dy.S.P has given evidence that on the complaint of PW1, he registered the Ext.P1 (d) F.I.R and

the amount of ₹ 1000/- brought by the complainant for payment of illegal gratification was seized by him as per Ext.P6 mahazar at about 3.15 p.m on 3.8.1998. He applied phenolphthalein on the currency, demonstrated the test to the complainant and the other witnesses, and instructed the complainant to hand over the currency to the accused. The complainant and PW3 were sent in advance, and the police party led by Dy.S.P followed them. On getting signal after payment of the amount, he proceeded for search in the consultation room of the accused, he seized the currency, which was seen on the table, and he arrested the accused on the spot. Ext.P7 recovery mahazar was prepared on 3.8.1998 at about 3.30 p.m. Thus, recovery of the phenolphthalein tainted currency from the consultation room of the appellant stands proved by PW7. The question is whether this evidence is sufficient to convict the accused, when all the material witnesses turned hostile to the prosecution, except on one aspect that the currency was placed on the table by PW1. The court below relied on the evidence of PW5 and 7 and also applied the presumption under Section 20 (1) of the P.C Act to convict the appellant.

10. Of course, it is true that recovery of the MO1 series currency from the consultation room of the accused stands proved by the evidence of PW7. It has also come out in evidence that the phenolphthalein test conducted on the right hand of the accused also was positive. PW1 has no case that the amount was accepted by the doctor as gratification, or that the Doctor had in any manner, dealt with the amount at the consultation room. Thus, the only material or circumstance against the appellant herein, in the evidence of the detecting officer is that when his finger was put in the solution, the colour turned pink, and thus the phenolphthalein test turned positive.

11. PW5 stated in evidence that he had accompanied the complainant as instructed by the Dy.S.P, VACB, and that he had over-heard the conversation between PW1 and the accused from outside. He has no case anywhere in evidence that he had seen the complainant handing over the currency to the accused or the appellant receiving or accepting the currency at the consultation room. On an appreciation of the evidence, I find that PW5 was in fact with the police party, and that PW1 alone had gone to the consulting room of the

doctor. Even according to PW5, he remained outside and he had not in fact seen the complainant handing over the currency. His evidence is that he overheard the conversation from outside. Thus, I find that the evidence of PW5 is only regarding the seizure of tainted currency from the consulting room of the appellant. His evidence does not prove payment of currency by the complainant to the doctor, or acceptance of the amount by the doctor. Even according to the Dy.S.P, he saw the tainted currency on the letter pad of the doctor, with a paper weight on it. Admittedly, the currency was not seized from the hands of the doctor, or from his shirt pocket, or from the drawer of his table. It was found on the table with a paper weight on it, and there is nothing to show that the amount was actually accepted by the Doctor. It is here, the evidence of PW1 assumes importance, that one Bhaskaran was behind the complaint, that he had not in fact brought any amount for payment to the doctor, that he acted as instructed by the police, and that the amount was only placed on the table by him as instructed by the police.

12. In **State of Punjab v. Madan Mohan Lal Verma** [(2013) 14 SCC 153], the Hon'ble Supreme Court held that

mere recovery of tainted money from the possession of the accused is not enough to enter a conviction under Section 7 of the P.C Act, and that for the application of the presumption under Section 20 (1) of the Act, there must be evidence of payment of gratification or acceptance of gratification, and the presumption will have to be rebutted by the accused in such a situation. 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 without the evidence of demand of illegal gratification, there cannot be a conviction under Section 7 of the P.C Act. In the absence of proof of demand and acceptance, mere recovery of tainted money from the accused will not suffice for a conviction under Section 7 or 13 of the P.C Act. The Hon'ble Supreme Court also held that proof of acceptance of illegal gratification is essential to apply the presumption under Section 20 (1) of the P.C Act. In **C.Sukumaran v. State of Kerala [2015 Crl.L.J.1715]**, the decision in **B.Jayaraj v. State of Andhra Pradesh** was followed, and the Hon'ble Supreme Court held in the said case that demand of illegal gratification by the accused is the *sine qua non* for constituting an offence under Section 7 of the P.C

Act. That is a case where all the material witnesses turned hostile, but the detecting officer proved the recovery of tainted notes and the positive result of the phenolphthalein test. But the Hon'ble Supreme Court held that in the absence of positive evidence proving demand of bribe and acceptance of bribe, the accused cannot be found guilty simply on the basis of the evidence given by the detecting officer.

13. It is true that there must be evidence to prove demand and acceptance for a conviction under Section 7 of the P.C Act. When direct evidence is not possible and when the material witnesses turned hostile, the prosecution can very well prove demand or acceptance by other circumstances. This position is cleared by the Hon'ble Supreme Court in the reported decisions. If demand or acceptance is proved by satisfactory materials and circumstantial evidence, the court can rely on the evidence of the Detecting Officer and other witnesses, for entering a conviction. But, in this case there is absolutely no material or circumstance to prove the essential elements of demand or acceptance.

14. Now let me examine whether the prosecution case is probable and acceptable, that the appellant herein demanded or received some amount for conducting an operation, as alleged by the prosecution. The definite case of the prosecution is that while admitting Lakshmi on 26.7.1998, the appellant herein had advised her to undergo an operation on 30.7.1998. The appellant had made a demand, and he had asked PW2 to make payment before 30.7.1998. As the amount was not paid before 30.7.1998, the appellant postponed the operation to the next week (next Thursday, being the day allotted to him). When the appellant thus postponed the operation, the complainant decided to pay the amount and arranged a trap with the help of the Police, and thus on 3.8.1998, the Doctor was trapped while receiving the amount of ₹ 1000/-.

15. The evidence of PW6 proves that Lakshmi was in fact admitted by the duty Doctor on 26.7.1998. Pre-anesthetic test was conducted on 28.7.1998 and gynaecological test was conducted on 3.8.1998. Pw6 affirms in evidence that operation cannot be decided, and date of operation cannot be fixed without and before conducting the pre-requisite test like

pre-anesthetic test and gynaecological test. In this case, Lakshmi underwent pre-anesthetic test on 28.7.1998 and she underwent gynaecological test on 3.8.1998. PW6 has stated in evidence that the appellant had night duty on 29.7.1998 and so he was on duty off on 30.7.1998. In such a circumstance, it is unbelievable that the doctor advised the patient to undergo operation on 30.7.1998, the day on which he was on duty off. If the gynecological test could be conducted only on 3.8.1998, it is impossible to believe that on 30.7.1998, the appellant postponed the operation and received amount on 3.8.1998. These are the improbabilities argued. It is impossible to believe that without and before conducting the pre-requisite test and before coming to a finding on scientific investigation what exactly was the problem of Lakshmi, the appellant decided an operation on 26.7.1998 itself, it was scheduled to 30.7.1998, and on 3.8.1998 he received the amount for an operation, which was not definite. The evidence of PW6 is that later, the Gynaecologist conducted operation on 14.8.1998. His evidence shows that Lakshmi was identified as a case of ovarian cyst. Normally, operation in such cases will be

conducted by the Gynaecologist. Here also, it was conducted by the Gynaecologist on 14.8.1998. It is impossible to believe that before identifying what exactly was the problem of Lakshmi, or whether she was a case of gynaec surgery or general surgery, the appellant advised operation, or received amount on 3.8.1998.

16. On an examination of the materials, including the mahazars, I find that PW5 had no occasion to witness the incident, or even to overhear the conversation between the accused and the complainant. Thus, practically, the only piece of evidence available in this case is recovery of the amount by the Deputy Superintendent of Police from the consulting room of the accused.

17. The learned trial Judge relied on some decisions of the Hon'ble Supreme Court to apply the presumption under Section 20 (1) of the P.C Act. The Hon'ble Supreme Court has explained in so many decisions that the pre-requisite to apply the said presumption is that there must be evidence to show acceptance of illegal gratification by the accused. Even when such demand and acceptance is proved, what is presumed under Section 20 (1) of the P.C Act is not the guilt

of the accused. What is presumed is only the purpose for which the gratification was received by the accused. But here, even the purpose cannot be presumed, because the whole prosecution case is doubtful. Lakshmi underwent the pre-requisite tests only on 28.7.1998 and 3.8.1998. PW6 is definite in evidence that there is no question of scheduling an operation or deciding an operation in such cases, without and before conducting the pre-requisite anesthetic test and gynaecological test. In such a situation, where the Doctor had no occasion to demand gratification or receive gratification before and without conducting the pre-requisite tests for scheduling the operation, or without identifying Lakshmi as a case of ovarian cyst requiring an operation, the court cannot presume that anything was received or demanded by the accused as a motive or reward for conducting an operation. The prosecution case is really doubtful. The evidence of PW1 assumes importance that one Bhaskaran was in fact behind the complaint, that he had not brought any amount for payment to the Doctor, and that the amount he actually placed on the table of the Doctor was arranged by somebody. A vicious trap will have to be

doubted in the above circumstances. When the prosecution is based on a trap, it must be the concern of the court to examine the whole materials, and find whether the trap is a genuine trap arranged by the police on a genuine complaint or whether it is a vicious trap which the police happened to make on a mischievous complaint by somebody to trap the public servant.

18. In the above circumstances, I find that on the basis of recovery of the phenolphthalein tainted currency alone, the appellant herein cannot be found guilty. The evidence of PW7 is only regarding the recovery of the currency from the consulting room of the doctor. No doubt, such evidence will have only supportive value. There must be some direct and positive evidence proving the fact of acceptance of illegal gratification by the accused. In the absence of any sort of evidence to prove demand and acceptance, the supportive evidence of the police regarding trap and recovery of amount cannot be the basis for a finding against the accused under the P.C Act. This is the position settled by the Hon'ble Supreme Court in various decisions including the three decisions cited supra.

19. On an appreciation of the entire evidence as discussed above, I find that the prosecution has not proved the case against the appellant beyond reasonable doubt. The prosecution case is really tainted with doubts regarding the the role or involvement of somebodyelse as the person behind the complaint. I find that the conviction against the appellant is liable to be set aside.

20. In fact, on legal ground itself, the appellant herein is entitled for acquittal, because the prosecution sanction in this case stands not properly proved by the person who granted sanction. Ext.P16 is the prosecution sanction granted under Section 19 of the P.C.Act. This sanction was marked in evidence as Ext.P16 by the investigating officer, examined as PW8. The learned Public Prosecutor would submit that prosecution sanction is a public document, and so, it need not be formally proved as provided under the Indian Evidence Act. Now, the question is whether such a sanction granted by a public officer requires to be proved by examining the person who granted sanction, or by examining somebody who is familiar with the handwriting and signature of the authority in the discharge of his normal official functions. Section 67 of

the Indian Evidence Act provides the procedure for proof of a document. When a document is said to be in the handwriting of a particular person, or if the signature therein is claimed to be that of a particular person, contents of the said document should be proved as provided under Section 67 of the Indian Evidence Act. Section 74 of the Indian Evidence Act defines what is a public document. For a prosecution sanction under Section 19 of the P.C. Act to claim sanctity as a public document under Section 74(1)(iii) of the Indian Evidence Act, it must be something done or made by the authority in the discharge of his normal official functions as Government servant. If the document is something coming within the said category as a document made or written or signed in the discharge of the normal official functions as an officer of the Government, the said document will have sanctity as a public document. The mode of proving a document other than public document is to examine the person who issued the document, or somebody who is familiar with the handwriting or signature of the person, who issued the document.

21. Following a Division Bench decision of the Calcutta High Court in **S&R of Legal Affairs v. Moazzem Hossain**

[AIR 1947 Cal 318], a learned Single Judge of the Andhra Pradesh High Court held in **Central Bureau of Investigation SPE Hyderabad v.20 P. Muthuraman** reported in **LAWS(APH)-1996-3-13** that the signature in the prosecution sanction granted under Section 19 of the P.C.Act should be proved either by the sanctioning authority, or by his subordinate officer, or the clerk who has seen the sanctioning authority signing the sanction order, or who is acquainted with the signature of the sanctioning authority, and that merely producing or marking the document, purported to be the sanction signed by the authority, will not discharge the burden of the prosecution in proving sanction, according to law. The investigating officer can never be the competent person to prove the prosecution sanction issued by some other authority, with whose signature the investigating officer cannot have familiarity or acquaintance in the discharge of his normal official functions. I am fully in agreement with the view of the Andhra Pradesh High Court on the subject. In **Antony Cardoz v. State of Kerala (2011 (1) KLT 946)**, this Court held that independent application of mind and consequent satisfaction arrived at,

for granting sanction under Section 19 of the Prevention of Corruption Act, are matters which could be proved only by the sanctioning authority and nobody else. In the said case, the prosecution sanction was not proved by the person who granted sanction. This Court observed that when prosecution sanction including independent application of mind is not proved by the sanctioning authority, it cannot be said that the prosecution sanction is properly and legally proved. It is true that a document can be proved even by a person familiar with the handwriting of the person who issued the document. But when application of mind in the process of granting sanction itself is an issue somebody cannot come and prove the sanction claiming to be the person familiar with the handwriting or signature of the sanctioning authority. In such circumstances where application of mind itself is to be proved as part of proving a legal sanction granted under Section 19 of the P.C Act, the decision of this Court in Antony Cardoz v. State of Kerala will have application. Following the said decision, I find that the sanctioning authority himself will have to be examined to prove the sanction in a case where independent application

of mind in the process of granting sanction itself is in issue. In this case, Ext.P16 sanction is not proved by the prosecution by examining the person who granted sanction, or somebody who could identify the signature of the sanctioning authority. His act of granting sanction under Section 19 of the P.C. Act cannot be said to be an official act done in the discharge of his normal official functions. Thus, I find that the appellant is entitled for an acquittal on the legal ground also, that the prosecution sanction stands not properly proved according to law. Of course, even otherwise, on facts he is entitled for acquittal. As already found by me, the whole prosecution case is tainted with genuine suspicion regarding the genuineness of the complaint and also the genuineness of the trap. A trap for a trap at the instigation, or at the instances of somebody who is interested in such a trap, or who is for his own reasons, interested to see that a particular public servant is trapped, cannot be said to be a genuine or legitimate trap. Such a trap is a vicious one or an illegitimate one, as held by this Court in **Cheriyam Lukose v. State of Kerala**[AIR1968 Kerala 60], following a decision of the Honourable Supreme Court in **Ramjanam Sing v.**

State of Bihar [AIR 1956 SC (643)]. In view of the findings on the factual and legal aspects, the appellant herein is entitled for acquittal.

22. In the result, this appeal is allowed. The appellant herein is found not guilty of the offence punishable under Sections 7 and 13 (2) (d) of the P.C Act, and accordingly he is acquitted of the said offence in appeal under Section 386 ((i) (b) of Cr.P.C. The conviction and sentence against the appellant in C.C No.52 of 2000 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**

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/True copy/

P.S to Judge