IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.UBAID

MONDAY, THE 4TH DAY OF SEPTEMBER 2015/26TH SRAVANA, 1937

CRL.A.No. 1516 of 2013 ()

AGAINST THE ORDER/JUDGMENT IN CC 2/2009 of ENQUIRY COMMISSIONER & SPECIAL JUDGE, KOTTAYAM DATED 28-09-2013

APPELLANT(S)/APPELLANT/ACCUSED:
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MOHAMMED ISMAIL
S/O MUHAMMED KUNJU
DISTRICT SURVEY SUPERINTENDENT OFFICE, ALAPPUZHA.

BY ADVS.SRI.P.N.SUKUMARAN
SRI.BIJU SUKUMARAN
SRI.K.A.ANAS
SRI.S.VISHNU (ARIKKATTIL)

RESPONDENT(S)/RESPONDENT/COMPLAINANT:

STATE OF KERALA
REP. BY THE DY.S.P, VACB, ALAPPUZHA
WHO IS REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.

R BY PUBLIC PROSECUTOR SMT. S.HYMA

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 17-08-2015, THE COURT ON 4.9.2015 DELIVERED THE FOLLOWING:

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P.UBAID, J.

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Crl.Appeal No.1516 of 2013

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Dated this the 4th day of September, 2015

JUDGMENT

The appellant herein was grade -II Surveyor in the Office of the District Survey Superintendent, Alappuzha in February-March 2006. On the allegation that he accepted an amount of Rs.500/- as illegal gratification from One Babu, on 06.03.2007, as a reward for changing the "Thandaper" number regarding the co-ownership property of the said Babu and others, the appellant faced prosecution before the learned Enquiry Commissioner and Special Judge (Vigilance), Kottayam in C.C.No.2 of 2009. The father of the complainant Babu died intestate, and the property left by him was partitioned among the legal heirs including the complainant Babu. He made complaint before the Deputy Superintendent of Police, Vigilance and Anti-Corruption Bureau (VACB), Alappuzha, that on 03.02.2007, his brother Raju was called over telephone by the appellant, and was required to come to his office in connection with Raju's application dated 08.03.2006 for "Thandaper" registration.

Accordingly, the complainant met the accused at his office at about 6.00 p.m. on that day, and the accused came along with him for site inspection. On that day, the accused received an amount of Rs.350/- from him for the works done. Thereafter, on 2.3.2007, the accused came to his Cycle shop, talked about the application, and demanded another amount of Rs.500/- as a reward for making necessary entries in the register. On 5.3.2007 also, the accused called his brother Raju over telephone, and asked him to come with the amount on 07.03.2007. As he was not inclined to make payment of illegal application further for the official duty, which the appellant is bound to do under the law, he thought of making a complaint. On getting the said complaint, the Deputy Superintendent of Police, VACB arranged a trap, he received the amount of Rs.500/- brought by the complainant Babu, as per mahazar, and after demonstrating the required phenolphthalein test, the complainant was instructed to meet the accused at his office, and make payment on demand. Accordingly, the complainant met the accused at his office, and made request again for action on his brother's application. At that time also, the accused demanded money and accordingly he paid the tainted money of Rs.500/-, as instructed by the Deputy Superintendent of Police. On getting signal, the vigilance team led by the Deputy Superintendent of Police reached there, and arrested the accused. After investigation, the VACB submitted final report before the learned trial judge.

2. The accused appeared before the trial court, and pleaded not guilty to the charge framed against him under Sections 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act (PC Act). The prosecution examined eight witnesses in the trial court, and marked Exts.P1 to P22 documents. MO1 to MO7 properties were also marked during trial. When examined under Section 313 Cr.P.C., the accused denied the incriminating circumstances, and submitted that he had not accepted any illegal gratification from the complainant on the date alleged, or on any previous date. Though opportunity was granted by the trial court, the accused did not adduce any evidence in defence. However, the Ext.D1 letter was marked on his side during trial. The complainant examined

as PW1 turned hostile to the prosecution fully, but the trap witness supported the prosecution. On an appreciation of the evidence, the learned trial judge found the accused guilty. On conviction, he was sentenced to undergo rigorous imprisonment for six months, and to pay a fine of Rs.5,000/- under Section 7 of the PC Act, and to undergo rigorous imprisonment for another period of one year, and to pay a fine of Rs.10,000/- under Section 13(2) read with Section 13(1)(d) of the PC Act, by judgment dated 28.09.2013. Aggrieved by the judgment of conviction, the accused has come up in appeal.

3. When this appeal came up for hearing, the learned counsel for the appellant submitted that the appellant was found guilty by the trial court without any basis or evidence, in spite of the fact that the complainant himself disowned his complaint, and turned fully hostile, and that no effort was made by the detecting officer to recover the tainted money, for a successful prosecution. The learned Public Prosecutor, in-charge of the case submitted that the prosecution case stands otherwise proved, though the complainant turned hostile, and that the accused cannot

claim acquittal, on the ground that the tainted money could not be recovered during the process of detection.

4. Before going to the factual aspects, let me see whether the prosecution sanction in this case stands properly proved. Of the eight witnesses examined by the prosecution, PW1 is the complainant, PW2 is the trap witness, and PW8 is the Deputy Superintendent of Police who detected the offence. PW 6 is the Director of Survey and Land Records, examined to prove the Ext.P18 sanction. In **Mansukhlal Vithaldas Chauhan v. State of Gujarat [1997(7) Supreme Court cases 622]**, the Honourable Supreme Court held that the sanctioning authority, and the prosecution will have to satisfy the Court that the required sanction was granted on an independent application of mind in the process, and on a consideration of the relevant materials. In **C.B.I. v. Ashok Kumar Aggarwal [AIR 2014 Supreme Court 827]**, the Honourable Supreme Court held that the sanctioning authority has to do complete, and conscious scrutiny of the whole record placed before it by the investigating agency, and will have to prove that he has considered all relevant facts and materials, and

that he decided to grant sanction on an independent application of his mind in the process. Now let me see what is the evidence given by PW6.

5. On an examination of the evidence given by PW6 as the sanctioning authority, I find that his evidence is quite casual, and he just marked the Ext.P18 prosecution sanction. His evidence does not satisfy the Court that he had considered all the materials or the relevant aspects placed before him by the investigating agency, or that he had applied his independent mind in the process of granting sanction. In cross-examination, he stated that he issued the Ext.P18 sanction, on the basis of a model given to him by the investigating agency. Much probe or thought is not required to find that the Ext.P18 sanction was mechanically granted by the witness. Without any application of mind, he simply put his signature on a model sanction produced by the investigating officer. Accordingly, I find that the Ext.P18 sanction in this case cannot be considered as a proper sanction as meant under Section 19 of the PC Act, and in the absence of a properly granted sanction, the Court will have to find that the whole prosecution is barred under

Section 19 of the PC Act.

6. Now let me go to the factual aspects. PW1, the complainant, who made the Ext.P1 complaint, turned fully hostile to the prosecution during trial, and he even disowned his complaint. His complaint shows that demand was first made by the accused to his brother Raju over telephone. The said Raju is seen cited as a witness by the prosecution. But, the prosecution did not care to examine the said Raju when the complainant turned hostile. The allegation in the complaint is that on 3.2.2007, the accused called Raju over telephone, and accordingly the complainant met the accused at the office on the day itself. It is also stated that at about 6.00 p.m. on that day the accused came for site inspection, and even measured the property. This is disproved by Ext.D1 letter which shows that intimation was given to the complainant and others only on 26.2.2007, requiring them to take necessary steps for measuring the property on 3.3.2007. It is not known how and why the accused contacted Raju over telephone on 3.2.2007, and asked to come to his office on that day for the purpose for measuring the property.

7. When asked about the Ext.P1 complaint, the complainant stated that he made such a complaint, with the object of traping the accused some how. He stated in evidence, ”മനഃപ്പൂർവ്വം കുടുക്കാനായി” (I deliberately made a complaint with the object of trapping the accused some how). The complainant gave the said statement, when asked, why did he make a false complaint. He stated in clear terms that he in fact made a false complaint against the accused, and his object was to trap him some how. When asked why he made such a complaint, he answered like this, “എനിക്ക് വന്ന ബുദ്ധിമുട്ട് കൊണ്ട് കള്ളം എഴുതിയതാണ്” (I made a false complaint only because I was harassed).

8. When cross-examined by the learned Public Prosecutor, the complainant stated that he had made a complaint, and he does not deny the signature, but he made such a complaint not because the accused had demanded any illegal gratification, but only to see that he is some how trapped.

9. In **Vinod Kumar v. State of Punjab [AIR 2015 Supreme Court 1206],** the Honourable Supreme Court held that merely because the complainant turned

hostile, or disowned his complaint, the prosecution would not collapse, and that the prosecution can prove the essential aspects of demand and acceptance by some other evidence. Here, the question is whether the alleged demand for acceptance stands proved. This is a case where the tainted money could not be recovered by the detecting officer. Of course, it is true that the detecting officer, and also the trap witness have given some evidence regarding payment of something by the complainant to the accused. But they are not definite whether it was money that was handed over to the accused. From some distance, they could see the complainant handing over something to the accused. They cannot definitely say whether it was money, or whether it was the tainted money entrusted by the Deputy Superintendent of Police. In the absence of definite evidence by the detecting officer, and the trap witness, that they had actually seen or witnessed. The complainant making payment of money to the accused, it cannot be said that the essential aspect of acceptance is proved.

10. This is a case where the tainted money could not be seized during the process of detection. The

detecting officer stated in evidence that when he approached the accused he saw the accused taking something from his pant's pocket, and throwing through the window. He did not care, or examine what it was, and he made search for it, after the arrest of the accused. It is really strange that even on seeing the accused throwing something through the window, the detecting officer waited to make search and phenolphthalein test. Normally, such an officer will straight away proceed to recover the object abandoned by the accused after making necessary arrangements to guard the accused. But here, strangely, the detecting officer first arrested the accused, and conducted phenolphthalein test, and only thereafter proceeded to seize the tainted money abandoned by the accused. In spite of efforts, the said tainted money could not be seized as part of the process. In a case where the tainted money could not be seized as part of the process, and where the complainant turned hostile, or the evidence of the others is not satisfactory to prove demand and acceptance, the prosecution must necessarily fail. In **B. Jayaraj v. State of Andra Pradhesh [2014**

Crl.L.J.2433], and **Sukumaran C. v. State of Kerala [2015 Crl.L.J.1715]**, and other cases the Honourable Supreme Court held that demand and acceptance are the essentials to be proved, in a prosecution under Sections 7 and 13(2) of the Prevention of Corruption Act. In the absence of any evidence to prove such essentials like demand and acceptance, the accused cannot be convicted by the Court. In this case, the complainant turned fully hostile. He has no case that he had made payment of illegal gratification, or that the accused had made any such demand. When he turned hostile, the prosecution did not care to examine the other witness to whom demand was allegedly made by the accused. As regards acceptance, the evidence given by PW2, and the detecting officer is not satisfactory at all. They are not definite that, what the complainant handed over to the accused was the tainted money. The said tainted money allegedly received by the accused could not be seized during the detection process. Thus I find that this is a case where there is no evidence to prove demand and acceptance. This is a case where the whole prosecution collapsed, when the complainant disowned the case, and the other witnesses could not satisfactorily prove the required essentials like demand and acceptance. Thus I find that on factual and legal grounds, the accused is for acquittal.

In the result, this appeal is allowed. The conviction and sentence against the appellant under Sections 7 and 13 (2) of the PC Act, made by the Court below in C.C.No.2 of 2009 will stand set aside. Accordingly, the appellant will stand acquitted and released, in appeal, under Section 386 (b)(i) Cr.P.C. The bail bond if any, executed by him will stand discharged.

Sd/-
P.UBAID
JUDGE

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//TRUE COPY//

P.A. TO JUDGE