

*HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

+CRIMINAL REVISION CASE No.1801 of 2014

% Dated 12.04.2017

Between:

D.Srinivasa Rao ... Petitioner/ A.2

and

\$ The State, rep.by the Special Public Prosecutor,
CBI/ SPE, High Court at Hyderabad. ... Respondent

! Counsel for the petitioner : Sri K.Sarvabhounma Rao,

^ Counsel for respondent : Public Prosecutor

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? Cases referred: :

1. 2007(1) ALD 553
2. AIR 1997 SC 568
3. 1982(2) SCC 258
4. (2014) 10 SCC 473
5. 1998 9 SCC 268
6. 1994 Cr.L.J. 753 Madras
7. 2010 SCC 450
8. AIR 1973 SC 157
9. AIR 1986 SC 3
10. 2013 10 SCC 591
11. AIR 2016 SC 4245
12. 2005(11), SCC 600
13. 1998(9) SCC268
14. 1984 Cr.L.J. 613
15. AIR 1968 SC 147
16. AIR 1971 SC 1162
17. 2015 SCC online 13647
18. 2015 SCC online 8331
19. AIR 1968 SC 147



HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL REVISION CASE No.1801 OF 2014

The revision petitioner is the accused NO.2(for short, 'A.2) in C.C.No.7 of 2011 among the two accused. The crime registered was for the offences punishable u/ sec.120-B IPC and Sections 7 and 13(1)(d) of Prevention of Corruption Act, 1988(for short, 'the Act'). The Inspector of Police, C.B.I. Visakhapatnam, after investigation filed chargesheet and the learned Special Judge taken cognizance for the offences supra. It is at the post-cognizance stage and before hearing on charges, an application in CrI.M.P.No.621 of 2013 was filed u/ sec.239 CrPC, by the A.2-the petitioner herein seeking to discharge him from the cognizance taken for the offences supra. It is after contest, since ended in dismissal by order, dt.18.07.2014 he maintained the present revision.

2. The contentions in the grounds of revision vis-à-vis the oral submissions of the learned counsel for the petitioner-A.2 are that the learned trial Judge did not decide the question of law raised by the petitioner that except the alleged and inadmissible telephonic conversation, there is no other material proposed by the C.B.I. as the prosecution agency to sustain the accusation against him to rope as A.2 and the telephonic conversation allegedly recorded by tapping phone of the petitioner is inadmissible in evidence for original not produced and there is no certificate for secondary evidence apart from the expert opinion of the CFSL to which the so called conversation sent stated not

possible to identify the voice and even the opinion not placed before obtaining the sanction and the sanction also thereby vitiated for not given after considering entire material and the trial Judge must have discharged him from the accusation with no basis for all the above.

3. Whereas, it is the submission of the learned Special Public Prosecutor for C.B.I. cases that the impugned order of the lower Court no way requires interference for framing of charge or discharge concerned it is only on the face value of accusation from the material placed on record by prosecution and no searching enquiry is contemplated at this stage and at the instance of accused and it is premature as to the evidence is ultimately admissible or not and the case be ended in conviction or not and thereby sought for dismissal of the revision.

4a). The learned counsel for the revision petitioner placed reliance on the following expressions in K.L.D. Nagasree vs Government Of India¹ particularly paras-14 to 17 placed reliance on People's Union for Civil Liberties (PUCL), v. Union of India², Rajesh Gupta Vs. State through CBI Judgment of the Delhi High Court Single Judge in CrI.A.No.89 of 2009, dt. 25.03.2014 relying and referring to the expressions of the Apex Court in Mahabir Prasad Verma Vs. Surinder Kaur³ and Anvar PV Vs. P.K.Basheer⁴ particularly on para-24, State of T.N. Vs.

¹ 2007(1) ALD 553

² AIR 1997 SC 568

³ 1982(2) SCC 258

⁴ (2014) 10 SCC 473

M.M.Rajendran⁵ and single Judge expression in Periyasamy Vs. Inspector of Vigilance⁶, and Banarsi Dass Vs. State of Haryana⁷ that is referred in para 69 sub-para 8 of S.K.Saini and another Vs. C.B.I. in CrI.A.No.159 of 2005 dated 19.08.2015 by learned single Judge of the Delhi High Court.

4b). The learned Spl. Public Prosecutor for C.B.I. placed reliance on three expressions viz; R.M.Malkani Vs. State of Maharashtra⁸, Ram Singh Vs. Col. Ram Singh⁹ and Umesh Kumar Vs. State of Andhra Pradesh¹⁰.

5). Heard both sides and perused the expressions supra and entire material on record.

6). The revision lis is outcome against the impugned order of the learned special Judge in dismissal of the discharge application of the petitioner-A.2. Though the scope of revision is limited, apart from maintainability is not in dispute, as held in the latest expression of the three judge Bench of the Apex Court in Prabhu Chawla Vs. State of Rajasthan¹¹ this Court got power if necessary to subserve the ends of justice to treat the revision by converting into one u/ sec. 482 of CrPC.

7. Now coming to the cognizance order of the learned Spl.Judge against the petitioner as A.2 for the offences u/ sec.120-B IPC and Sections 7 and 13(1)(d) of P.C. Act concerned, there is no material to show as to there is any criminal conspiracy or privy

⁵ 1998 9 SCC 268

⁶ 1994 CrI.L.J.753 Madras

⁷ 2010 SCC 450

⁸ AIR 1973 SC 157

⁹ AIR 1986 SC 3

¹⁰ 2013 10 SCC 591

¹¹ AIR 2016 SC 4245

between the accused persons *inter se* but for to infer if at all from the submissions, from the alleged outcome of the telephonic conversation between the complainant and the A.2. The law is fairly settled on the scope of Section 120-B IPC r/w Section 10 of the Indian Evidence Act (for short, 'the IE Act') that it is not the post occurrence conversation or acts that are admissible but for acts prior to the occurrence that is material to show the so called conspiracy or privy. In fact that is totally lacking in this case on hand, even to consider the same from the expression of the Apex Court in *State (NCT Delhi) Vs. Navjot Sandhu*¹². Coming to any offence made out so far as against the petitioner/A.2 either u/ sec.7 or u/ sec.13(1)(d) of P.C. Act concerned, the report of the defacto complainant in setting the law into motion, for not a case of source information, so also in the pre-trap proceedings to trap the A.1 on the ground of his alleged demand for bribe, there is no whisper of at least the name of the petitioner as to any way connected, much less with any demand or for any attempt to ask the defacto-complainant. The prosecution case is developed in the post-trap stage onwards against the A.2 in saying when the D.S.P. C.B.I, questioned the A.1, he stated it is at the instance of A.2, he demanded and accepted the bribe. It is a statement squarely hit by Section 25 of the Indian Evidence Act. As pursuant to that, there is no any discovery of a fact much less any object, for the tainted currency is seized only from A.1 and not even from A.2. It is at best the knowing of A.2 is also the privy if at all from

¹² 2005(11), SCC 600

that conversation as referred supra. The conversation mainly to connect A.2 is A.1 when stated about demand and acceptance of the bribe from the defacto-complaint, A.2 responded. The mere response cannot make him a privy much less perpetrator and accused otherwise. Further, the conversation is over the cell phone between the defacto-complainant and A.2 that is said to be intercepted. In fact as per the expression of the Apex Court in Peoples Union of Civil Liberties supra, the safeguarding rights of privacy of individual, a procedure is laid down under Rule 419-A of the Indian Telegraph Rules, 1951 that includes copy of the order u/ sec.5(2) of the Indian Telegraphic Act, 1885 (for short, 'the Act') has to be forwarded to the concerned Review Committee within a period of 7 days and that the directions from interception shall remain in force for a period of not exceeding 90 days from the date of issue and the length if any on showing cause for 180 days. It is a process subject to prior permission to be accorded from that application for the interception, that too where it is necessary or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign states or public order or for preventing incitement to the commission of an offence. It is difficult to say it comes within any of the 5 components. In K.L.D. Nagasree supra in a Writ Petition single judge of this Court observed that in view of the same, any phone conversation by interception or otherwise is totally inadmissible and cannot be relied upon and the same cannot be considered. It is the contention of the learned counsel

for the petitioner that the so called phone conversation between the defacto-complainant and the A.2 thereby is totally inadmissible by not following the procedure supra contemplated by Section 5 of the Act, and Rule 419 A. In fact, the learned Special Public Prosecutor for C.B.I. Cases placed reliance on the expression of the Apex Court in Umeshkumar supra, where at para-23 there is an observation on the question that whether proceedings should be quashed only on the ground that the prosecution is initiated to wreck vengeance or malafides or the evidence procured is by improper or illegal means. So far as procuring of evidence by improper or illegal means and its admissibility concerned, it is answered in para-34 saying the Constitution Bench expression in Periswamy supra answered the issue that therefrom the evidence otherwise admissible does not become inadmissible.

8. Even the same is admissible of the conversation, from above proposition, there must be some other material in support of it. In fact the so called conversation from the voice identification secured when sent to CFSL there is a report received dated 22.12.2010 saying the voice is not capable of identification from the sample voice secured of A.2 with the phone conversation voice. In this case, the sanction was obtained on 28.07.2010. It is before completion of the investigation, from the material sent for according sanction by the competent authority. It is because FSL report was only dated 22.12.2004 and 5 months prior to that, the sanction is accorded. It shows that

the material sent for according sanction was long prior to the receiving of the FSL report. If after considering full-fledged investigation material, the sanction is accorded that got sanctity, but in this case it is otherwise as noticed supra which is also one of the lacunae in this case. It was also held in this regard by the Apex Court in *State of T.N. Vs. M.M.Rajendram*¹³ that when the entire material is not placed of the investigation before the sanctioning authority in according sanction, the sanction is not valid and it was held by the Apex Court in *R.S.Nayak Vs. Antulay*¹⁴ that the grant of sanction is not an idle formality but a solemn and sacrosanct act which removes the umbrella of protection of Government servants against frivolous prosecutions and the requirement for sanction or not is only from entire material and by application of mind to be entire material, if at all the Court sanctions to launch prosecution. Further the Apex Court in *Mahabir Prasad Verma supra* categorically held that even telephonic conversation is admissible, it is only a weak piece of evidence to be served as collateral purpose and no way a substantive piece of evidence. Coming to the two expressions placed reliance by the learned Special Public Prosecutor for C.B.I., in *R.M.Malkani supra* which is referring to the earlier expression in *Yusufalli Esmail Nagree Vs. State of Maharashtra*¹⁵ and *N.Sri Rama Reddy v. V. V. Giri*¹⁶ these expressions say the tape recorded conversation is admissible in evidence. Admission

¹³ 1998(9) SCC268

¹⁴ 1984 Cr.L.J.613

¹⁵ AIR 1968 SC 147

¹⁶ AIR 1971 SC 1162

is somewhat different from evidentiary value and probative value. Even the three Judge Bench expression of the Apex Court in Rama Das supra says it is admissible in evidence. So far as credibility of the said evidence concerned in Mahaveer Prasad Verma supra, the Apex Court categorically held that it is only a corroborative and weak piece of evidence and not a substantive piece of evidence. Practically in the case on hand, there is no other worth material. No doubt, the defacto-complainant from the alleged conversation with A.2 covered by the interception of cell phone telephonic recording, in the subsequent events of post-trap stage stated role of A.2. Had it been, it could have been find place in the FIR from the report given by him for not a subsequent event. Thereby no credence can be attached to that version. Now even coming to that weak piece of evidence from the telephonic conversation concerned, original is not produced and certificate not obtained for adducing secondary evidence. In Anvar supra at para-24 the Apex Court observed categorically that:-

The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs of announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in Court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in Court, without due certification.

Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding paragraphs on the secondary evidence on electronic record with reference to Section 59, 65A and 65B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance of the conditions in Section 65-B of the Evidence Act.

9. Here the cell phone with original recording is not submitted along with the chargesheet but it is only a retrieved information that is sent to FSL and the opinion received of not capable of deciphering the voice identity whether that of A.2 or not. Apart from the same, not capable of identification to rope but for what happened before the Investigation Officer from the conversation said to have been made between the defacto-complainant and A.2, if at all to consider the evidence of Investigating Officer, there is no primary evidence from the electronic evidence is inadmissible, and also held in Anvar supra by production of the original cell phone with the original recording chip therein. It is not produced before the Court and no certificate even filed. It is of the year 2009, dated 10.08.2009. There is no possibility of getting even a certificate to adduce secondary evidence though with the secondary evidence produced along with chargesheet no certificate filed that is not be all and end all for certificate even, subsequently can be obtained and filed as held by the Division Bench of the Delhi High Court in

Kundan Singh Vs. State¹⁷ apart from Single Judge Bench expression, Paras Jain Vs. State of Rajasthan¹⁸ that is quoted with approval by this Court in CrI.R.C.NO.1649 of 2016 dated 15.03.2017 in T.M.S. Prakash Vs. State of Andhra Pradesh¹⁹. representing by learned Public Prosecutor, ACB Cases. Once there is no primary evidence and there no secondary evidence certificate which is mandatory as held in Anvar supra, the so called tape-recorded conversation when totally inadmissible and cannot at all be looked into for not even a case of possibility of obtaining and filing certificate for admissibility of secondary evidence. Once there is no material at all from the above to sustain the prosecution even from the very prosecution material, the accusation is unsustainable.

10. Having regard to the above, it is nothing but futility in continuing prosecution by framing charges and ask the accused to face trial when the allegation does not ultimately disclose prima facie accusation to sustain, then the proceedings in the ends of justice can be quashed at early stage rather at later stage acquittal by putting him to face unnecessary ordeal of trial.

11. In the result, the revision is allowed by setting aside the dismissal order of the discharge petition and by allowing the discharge application in CrI.M.P.No.621 of 2013 by discharging the petitioner-A.2 from the accusation.

¹⁷ 2015 SCC online 13647

¹⁸ 2015 SCC online 8331

¹⁹ AIR 1968 SC 147

Consequently, pending miscellaneous petitions, if any, shall stand closed.

Date: 12.04.2017.

Dr. B.SIVA SANKARA RAO J,

Note: L.R. Copy to be marked.
b/ o. Vvr.

