

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.07.2019

CORAM:

THE HONOURABLE MR. JUSTICE A.D. JAGADISH CHANDIRA

Crl.O.P.No.6968 of 2014

Shri.S.Vijaya Kumar

... Petitioner/Accused

Vs.

The State rep. through
The Inspector of Police,
SPE, CBI, ACB, Chennai.
R.C.No.13(A)/1996

... Respondent/complainant

PRAYER: This Criminal Original Petition has been filed under Section 482 of the Criminal Procedure Code, to call for the records in C.C.05/2002 on the file of the learned XII Additional Special Judge for CBI cases at Chennai and to quash the same.

For Petitioner : Mr.G.Saravanan

For Respondent : Mr.K.Srinivasan

Special Public Prosecutor (CBI)

ORDER

This Criminal Original Petition has been filed by the petitioner/accused seeking to quash the proceedings in C.C.05/2002 on the file of the learned XII Additional Special Judge for CBI cases at Chennai-600 104.

2.The brief facts of the prosecution case is that Shri.T.M.Selvaganapathy (A-1), Shri.C.Bomminaicken (A-2), Shri.B.Purushotham (A-3) and Shri.S.Vijay Kumar (A-4) and the petitioner herein entered into a criminal conspiracy during the period between 1994 and 1996 to commit criminal misconduct to get illegal gratification other than legal remuneration and cheated the Electronics Corporation of India Ltd.(ECIL), Hyderabad, a Government of India Enterprise, in the matter of sales and commission, and that in furtherance of the said criminal conspiracy, the petitioner while working as a part time employee under Shri.S.Duraiswamy (Approver) and close associate of Shri.T.M.Selvaganapathy (A-1) received Rs.3.60 lakhs from Shri.A.Balendran (Approver) as Pay Order and further, the petitioner also received a sum of Rs.4,95,632/- as Demand Draft in his favour and encashed the Demand Drafts issued in his name respectively from his account No. 13523 at TNSC Bank, Santhome Branch and handed over to one Shri.v.K.Kumar and Shri. Balendran

(Approver) who in turn handed over the same to one Shri.Duraisamy (approver) who in turn along with Shri.Bommanaickan (A-2) paid it to Shri.M. Selvaganapathy (A-1) as a reward to place supply order in favour of ECIL for the supply of Colour Television sets. Thus, the accused committed offences punishable under Section 120-B r/w 420 IPC, Section 7, Section 13 (2) r/w 13(1) (d) of the Prevention of Corruption Act, 1988.

3.The petitioner has stated that he was originally arrayed as A-4 in C.C.No.4/2000 on the file of the learned Principal Special Judge for CBI cases at Chennai. Since, he was not aware of the proceedings pending against him, he had gone to Qatar on employment during 1996 and he has been working there since then. Meanwhile, the final report in the case was filed before the Principal Sessions Court for CBI cases on 02.02.2000 and the petitioner was shown as absconding accused. Since the summons were unable to be served on him the trial Court issued non-bailable warrant and the case against him was split up. After a full-fledged trial, the Trial Court acquitted all the other accused in C.C.No.4/2000 by order dated 23.01.2009. After split up the case was assigned C.C.No.5/2002 in respect of the petitioner and was transferred for trial to the learned XII Additional Special Judge for CBI cases at Chennai.

4.The petitioner on coming to know about the pendency of the Non Bailable Warrant, returned to India and surrendered before the Court on 14.06.2011 and had filed a petition to recall the warrant and he is facing trial. The petitioner had earlier filed a petition in CrI.MP.No.292/2011 before the Trial Court, seeking to discharge him. While the discharge application had been pending, the Respondent had filed an appeal in CrI.A.No.340 of 2009, before this Court, against the order of the acquittal of the other accused in C.C.No.4/2000 and the appeal was pending on the file of this Court. The Trial Court finding that the appeal against the order of acquittal was pending before this Court and also finding materials for framing charges, refused to discharge the petitioner and the petition for discharge was dismissed on 30.12.2013. Meanwhile, the petitioner had preferred the present criminal original petition seeking to quash the proceedings, on the ground claiming that the other accused who have been similarly placed as that of the petitioner and against whom same set of evidence also available, have been acquitted by the trial Court.

5. The Respondent had filed a counter opposing the petition stating that the judgment of the trial Court cannot be taken into consideration in view of the fact that the appeal against the order of acquittal of other accused was pending before this Court.

6.The learned counsel for the petitioner would submit that the petitioner stands on the same footing as that of the other accused. He would submit that on the same set of evidence, a

full-fledged trial had been conducted and the trial Court acquitted the other accused and the judgment of acquittal has also been confirmed by this Court and this Court had also disbelieved the evidence let in by the prosecution and has confirmed the order of the acquittal. He would submit that the crux of the case of the Prosecution is that the accused entered into a conspiracy with the other accused and had given kickback to the main accused as bribe. When the trial Court and this Honourable Court as Appellate Court have disbelieved the evidence in respect of the conspiracy and other evidence relating to handover of the kickbacks and acquitted the co-accused, no useful purpose will be served by conducting trial in C.C.No.5/2002 on the same set of evidence.

7.He would further submit that the full-fledged trial conducted against the co-accused having ended in acquittal and when the evidence against the present petitioner cannot be different from one that was considered in the earlier trial, the second round of trial against the petitioner is a futile exercise. In support of the above contention, he would rely on the judgement reported in 2001 (4) Crimes 417 [Mohammed Ilias vs.State of Karnataka].

8.He would further submit that the evidence adduced against all the accused persons are inseparable and indivisible and thereby the petitioner could not be treated differently on the basis of the said evidence. The other accused have been acquitted after disbelieving the entire prosecution case and thereby, no useful purpose would be served in making the petitioner to undergo the ordeal of trial. In support of this contention, he would rely upon the judgment reported in (2005) 1 Supreme Court Cases 478 [Central Bureau of Investigation Vs. Akhilesh Singh].

9. The learned Special Public Prosecutor would submit that the respondent is ready to get along with the trial and would submit that witnesses and the evidence are same in both the cases.

10.When the matter was taken up earlier, this Court had directed the learned Special Public Prosecutor for CBI to get instructions whether the department had filed any Special Leave Petition against the order of acquittal passed by this Court in CA.No.340 of 2009. The learned Special Public Prosecutor for CBI, on instructions would submit that the respondent department has decided not to challenge the judgment of this Court in CA.No.340 of 2009 confirming the order of acquittal passed in C.C.No.4/2000.

11.I have carefully gone through the materials and evidences available on record.

12. The charge against the petitioner is that he entered into a conspiracy with the other accused and bribed the main accused by way of kickbacks. He stands on the same footing. In fact his role is even lesser than that of the other accused. It

is also seen that the material relied against the petitioner are the same materials which are relied against the other accused, who have been acquitted.

13. This Court as well as the Trial Court, taking into consideration the entire evidence on record disbelieved the case of the prosecution regarding conspiracy and giving bribe by way of kickbacks and had acquitted the other accused. The acquittal by both courts being not challenged has attained finality.

14. At this juncture, this Court deems it apposite to refer to the relevant paragraphs of the judgement of this Court in Criminal Appeal No.304 of 2009, confirming the order of acquittal of the co-accused.

"9. The contention of the learned Special Public Prosecutor appearing for the appellant/State that the evidence of the approver (PW-39) is corroborated through the evidence of PW-40 (K.R. Balendran), PW-41 (S. Kulandaivelu) and PW-45 (C.K. Kumar) to show that several lakhs of rupees has been transacted, is not correct.

10. PW-39 (S. Duraisamy) approver is the sheet anchor of the prosecution case. He claims that he was involved in export and import business, but no material placed by the prosecution to show that he was really involved in any export and import business or atleast a person trustworthy from A1 point of view to believe and entrust PW-39 to negotiate and act as conduit in the alleged act of crime.

11. PW-39 (S. Duraisamy) had deposed that he got acquaintance of A1 (T.M. Selvaganapathy) during his train journey from Chennai to Coimbatore, during the year 1993, when A1 (T.M. Selvaganapathy) was the Minister in the Government of Tamil Nadu. He had further deposed that A1 told him that the Government has decided to procure 4000 colour TVs and told him to contact ECIL Company and ask Rs.2,500/- commission for each TV. So, at the behest of A1, he met A2 (C. Bommanaicken) and after deliberation, A2 (C. Bommanaicken) agreed to give Rs.2,400/- as commission per colour TV. He has further deposed that the first instalment of Rs.5 lakhs was paid in cash by A2 (C. Bommanaicken) and PW-8 (Visweswaran). He received that from them and handed it over to A1 (T.M. Selvaganapathy) at his residence. The second instalment of Rs.5 lakhs was handed over to PW-39 (S. Duraisamy) by A2

(C.Bommanaicken) and PW-40 (Balendran). He in turn gave it to A1(T.M.Selvaganapathy). The 3rd instalment of Rs.10 lakhs was given to him in cash by A2(C.Bommanaicken) and PW8(Visweswaran); he in turn delivered it to A1(T.M.Selvaganapathy). His further evidence is that the cheque payments to Indshri Exports made by ECIL company under Exs.P39 to P41 for Rs.2,30,000/- dated 28.12.1995; Rs.5,80,000/- dated 09.05.1995 and Rs.1,70,000/-dated 13.10.1995 respectively were handed over to Anbuselvan (PW-44) Partner of Indshri Exports. PW-44 [Anbuselvan] encashed the cheques, brought the cash to the office of the approver and gave to him. PW-39 in turn, went to the house of A1 along with A2 and handed it over to him. He has deposed that in a similar fashion the cash withdrawn as against four cheques issued in the name of Vijayakumar were also handed over to A1 by him.

12. PW-44 (Anbuselvan) admits that he had no connection with ECIL. He has identified the statement of account No.36/92(Ex.P121) maintained by him with Catholic Syrian Bank, Purasawalkam. He also admits that he received four cheques (Exs.P39 to P41) from ECIL and encashed those cheques and handed over the cash to PW-39 (approver). In his cross examination, he reiterates that as and when he withdrew the money, he handed over the cash to PW-39 (S.Duraisamy). This witness have not spoken anything about what happened thereafter. The money so encashed and given to PW-39(S.Duraisamy), reached A1 according to the evidence of PW-39. This vital fact stands without corroboration not spoken or supported by any other witness.

13. Thus, in the chain of an alleged crime of kick back, what is proved through prosecution witnesses is, the trail of money starts from ECIL, lands in the account of Anbuselvan (PW-44), later withdrawn by PW-44 (Anbuselvan). He had handed over the money to PW-39 Duraisamy (approver). But the last link, A1 receiving it from PW-39 as bribe for purchasing colour TV from ECIL is missing. The sole deposition made by the approver that he took the cash and handed it over to A1 not only unreliable, but also unbelievable for the simple fact that the money had flown from ECIL to Anbuselvan on three different dates through three different cheques. There is no clarity from the evidence of PW-44 or PW-39 as to whether, the amount found in these three cheques

(Rs.2,30,000/-; Rs.1,70,000/- and Rs.5,80,000/-) were given to A1 by PW-39 in one instalment or in piece meal. In this regard, the contradictions of PW-40 (K.R.Balendran) also gains significance because this witness says that he received the cheque of Rs.2,30,000/- drawn in favour of Indshri Exports. He went and encashed it along with A2 (C.Bommanaicken) and gave the money to PW-39 (approver) at Sidhartha Apartment who encashed the cheques marked as Ex.P39 to Ex.P41 itself had thus become doubtful in view of PW-40 evidence. If one look at the evidence of PW-39 in isolation, the amount, which he has alleged to have given to A1 by cash does not tally with these 3 cheques or the alleged kick back of Rs.2,400/- per colour TV. Therefore, the failure of the prosecution in marshalling the evidence adequately to prove the charges has forced the trial Court to acquit the accused.

14. The law of evidence says that the statement of an accomplice is admissible in evidence but it requires strong corroboration. In this case, PW-8 (M.J.Visweswaran) has not supported the case of the prosecution and had been treated as hostile witness. PW-40 (K.R.Balendran) has not deposed anything to lend credence to the deposition of PW-39, that he along with A2 and PW-39 (approver) went to the house of A1 to deliver the cash of Rs.5 lakhs. PW-44 (Anbuselvan) who admits the encashment of the cheques Exs.P39 to 41 issued by ECIL would depose that he had encashed that cheques at the request of PW-39 and gave the cash to him. Whereas PW-40 deposes that he encashed the cheque drawn in favour of M/s Indshri. The evidence of PW-44 (Anbuselvan, Prop. M/s Indshri) definitely have some bearing in the case of the prosecution because Indshri Exports has nothing to do with ECIL. It is not in the trade of electronic goods. It is neither an agent or distributor of ECIL. The communication [Ex.P68] which discloses the decision of ECIL to give commission of Rs.2,500/- to the dealers, who had successfully procured order to the tune of Rs.1.6 cores does not show M/s Indshri Exports as one of the dealer. Both Exs.P68 and P69, which are the relevant documents in this aspect mentions only M/s Bharani Enterprises; and M/s Arun Electronics. So, there is a grave suspicion that the amounts paid by ECIL to Indshri Exports may be for kickback. However, the prosecution has miserably

failed to carry forward this chain. No material evidence to establish that the money paid by ECIL to Indshri Exports finally reached A1 (T.M.Selvaganapathy) and that payment was towards the order placed to ECIL for procuring colour TVs. But for the transaction covering Exs.P39 to P41 cheques, there is no other evidence to show, in the process of procuring around 3750 colour TVs from 3 different companies viz., ECIL, Uptron and ET & T, A1 received kickback from ECIL. "

15. As stated earlier, the petitioner stands on the same footing as that of the other accused and the materials relied on by the prosecution are one and the same. This Court is of the opinion that though the acquittal of the other accused cannot be a sole ground to quash the proceedings without there being a trial in this case however while analysing the materials on record, it is seen that the case of the petitioner is inseparable and indivisible from that of all the other accused and that the petitioner could not be treated differently, since the evidence are one and the same. Once the other accused have been acquitted after disbelieving the entire prosecution case, this Court is of the opinion that no useful purpose would be served by making the petitioner to undergo the ordeal of the trial.

16. In 2001 (4) Crimes 417 [Mohammed Ilias vs.State of Karnataka] this Court has held as follows:

".....Full-fledged trial was held against 3 accused before acquitted - Second round of trial against petitioner, evidence to be produced could not be different from one that was produced in earlier Trial -Hence, proceedings" Quashed.

17. In (2005) 1 Supreme Court Cases 478 [Central Bureau of Investigation Vs.Akhilesh Singh] this Court has held as follows:

" 5.....Once the main accused, who is alleged to have hatched the conspiracy and who had the motive to kill the deceased was discharged, and when that matter had attained finality, the learned Single Judge was fully justified in holding that no purpose would be served in further proceeding with the case against the respondent"

18. The same principle has been accepted by this Court in the judgement decision reported in 2008 (2) CTC 153 [Thamilendi Vs. State by Inspector of Police, Orathanadu Police Station, Thanjavur District (Crime No.58 of 1991) and another] wherein this Court has held as follows:

"6.The learned counsel for the petitioner placed

reliance on a decision of this Court in *Tamilmaran v. State*, 2007 (1) LW (Crl.) 514, to the proposition that in the event of acquittal of the other accused disbelieving the entire prosecution case, no useful purpose would be served for putting the petitioner to undergo the ordeal of trial. In that decision this Court placed reliance on a decision of Delhi High Court in *Sunil Kumar v. State*, 2000 (1) Crimes 73, wherein it is held as follows:

"3. The question thus is as to whether in the face of the judgment of acquittal the petitioner should still be permitted to undergo the ordeal of a trial. In *Sat Kumar v. State of Haryana*, AIR 1974 SC 294, it was held that there is no rule of law that if the Court acquits some of the accused on the evidence of a witness raising doubt with regard to them the other accused against whom there is absolute certainty about his complicity in the crime based on the remaining credible part of the evidence of that witness must be acquitted. (See also *Har Prasad v. State of Madhya Pradesh*, AIR 1971 SC 1450; *Makan Jivan v. State of Gujarat*, AIR 1971 SC 1797; *Mohd. Moin Uddin v. State of Maharashtra*, 1971 SCC (Cri.) 617). But where the evidence against all the accused persons is inseparable and indivisible and if some of the accused persons have been acquitted, the remaining accused persons cannot be treated differently on the basis of the same evidence.

4. On perusal of the judgment of acquittal dated 19.1.1998, it appears that the deceased-Balwan Singh met with a homicidal death owing to burn injuries sustained by him has not been disputed by the accused persons. The evidence against the accused persons mainly consists of the evidence of the eye-witnesses, namely, Karan Singh (PW 2) and Smt. Asha Rani (PW-5) (Wife of the deceased Balwan Singh) besides the dying declaration (Ex.PW-13/A) of the deceased Balwan Singh. Both the said witnesses have not supported the prosecution case and so they have been declared hostile by the prosecution. Eliminating the evidence of the said eye-witnesses, there remains the dying declaration (Ex.PW.13/A) of the deceased Balwan Singh, which has been disbelieved by the learned Additional Sessions Judge. It would, therefore, appear that the accused

persons, namely, Jangli Tyagi, Balbir Singh, Anil Kumar Tyagi and Sushil Kumar Tyagi were acquitted on the ground of insufficiency of evidence. Thus, the evidence adduced in the case against all the accused persons is inseparable and indivisible and that being so the petitioner cannot be treated differently on the basis of the said evidence. In this view of the matter, there is no prospect of the case ending in conviction against the petitioner and the valuable time of the Court would be wasted for holding trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date. If the Court is almost certain that the trial only would be an exercise in futility or sheer wastage of time, it is advisable to truncate or ship the proceedings at the stage of Section 227 of the Code itself."

7. This Court has also placed reliance on yet another decision of the Karnataka High Court in Mohammed Ilias v. State of Karnataka, 2001 (4) Crimes 417, taking the same view by following the decision rendered by the Delhi High Court [Tamilmaran v. State, 2007 (1) LW (Cri.) 514].

8. Therefore, this Court is of the considered view that the above settled principle of law laid down in the decisions cited supra is squarely applicable to the facts of the instant case as in this case also except the petitioner herein all the other accused, viz., A-1 to A-6, A-8 and A-9 who have been tried separately in S.C. No. 86 of 1991 have been acquitted by the learned Trial Judge disbelieving the entire prosecution case and holding that the prosecution has failed to prove the charges including the charge under Section 302, I.P.C. against A-3 who is the only accused alleged to have attacked the deceased.

9. Therefore, this Court is of the considered view that no useful purpose would be served by putting the petitioner to undergo the ordeal of trial and as such the proceedings pending against the petitioner in S.C. No. 202 of 1999 on the file of the learned Principal Sessions Judge, Thanjavur, is hereby quashed."

19. This Court following the above principles and finding that the materials available against the petitioner and the other acquitted co-accused are one and the same, and the accused being similarly placed as that of the other co-accused is of the

considered opinion that no useful purpose will be served by allowing the prosecution to be continued.

20. At this juncture, the learned Special Public Prosecution for CBI brought to the notice of this Court that the petitioner had been absconding and waited till the acquittal of the other accused and only thereafter joined the trial. Meanwhile, the respondent department had spent considerable time and painstaking efforts to secure him and that look out notice was also issued to him and only on coming to know about the issuance of the Look out Notice, the petitioner surrendered before the Trial Court hereby had taken the prosecution agency and system of judicial administration for a ride and thereby some terms have to be imposed on him.

21. Accordingly, this Criminal Original Petition stands allowed and the proceedings in C.C.05/2002 on the file of the learned XII Additional Special Judge for CBI cases at Chennai, is hereby quashed. Taking into consideration the abscondance of the petitioner and the wastage of precious judicial time, this Court, while quashing the proceedings in CC.No.5 of 2002, on the file of the XII Additional Special Court for CBI Cases, Chennai, imposes a cost of Rs.15,000/- (Rupees Fifteen thousand only) on the petitioner to be paid to the Legal Service Authority attached to this Court within two weeks from the date of copy of this order.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

jrs

To

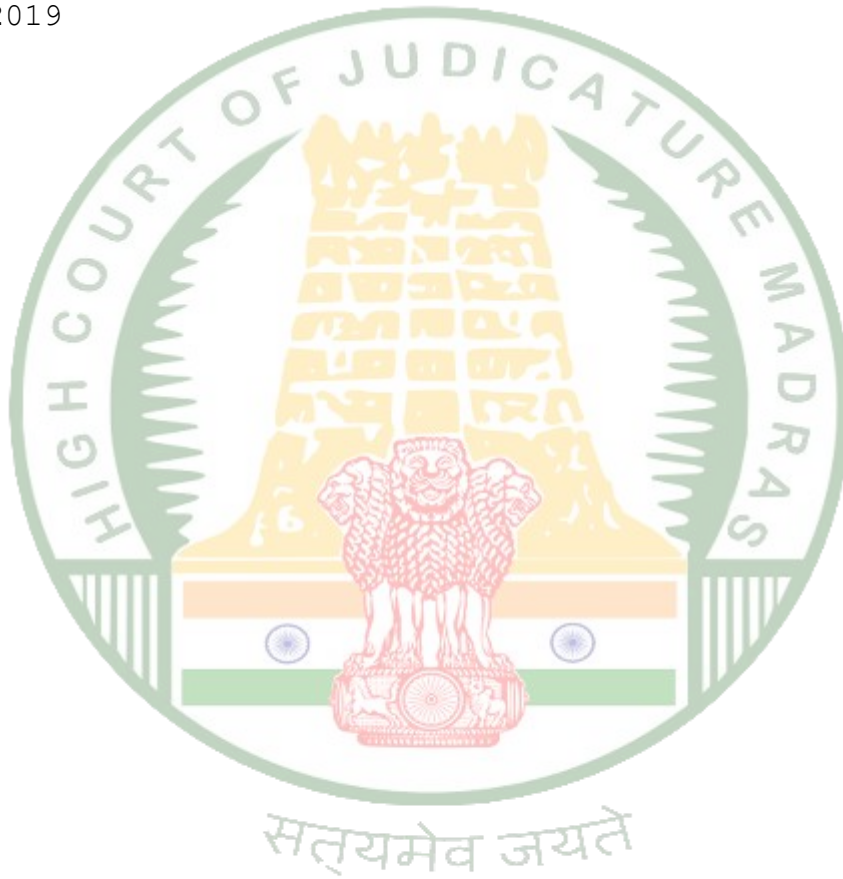
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3. The Special Public Prosecutor, (for CBI)
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