

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. 649 OF 1996
IN
SPECIAL CASE NO. 2 OF 1988**

SHRI. SURESH DAMODAR KAGNE,
Since deceased through his
Legal Heirs :

1. SMT. SUNANDA SURESH KAGNE

Age: 71 years, Occ : Nil.

2. SHRI. RAVINDRA SURESH KAGNE

Age : 47 years, Occ : Service
of Dhule, Indian Inhabitant,
presently R/at: 18, Wankhedkar
Nagar, Ambaji Nagar, Deopur,
Dhule-5.

...Appellants
(Appellant no.1-
original accused no.1)

V/s.

The State of Maharashtra,
(Spl. Case No.2/88, A.C.B.
Solapur, decided on 30.9.1996,
Spl. Judge, Solapur)

...Respondent

* * * *

Mr. Kartik Garg, Advocate for the appellant
(appointed).

Mr. S.R. Agarkar, APP for State.

CORAM : SANDEEP K. SHINDE, J.

Tuesday, 19th January, 2021.

ORAL JUDGMENT :

1. Suresh Damodar Kagane, accused no.1 in Special Case No.2 of 1988 was convicted and sentenced, by the Learned Special Judge, Solapur, for the

(i) offence punishable under Section 120-B of the Indian Penal Code ("IPC" for short) and sentenced to suffer rigorous imprisonment for the period of one year and to pay fine in sum of Rs.5,000/- in default to suffer further rigorous imprisonment for six months.

(ii) convicted for the offence punishable under Section 409 of Indian Penal Code and sentenced to suffer rigorous imprisonment for the period of one and half year and to pay fine in sum of Rs.7,500/- in default to suffer further rigorous imprisonment for nine months.

(iii) convicted for the offence punishable under Section 420 of the IPC and sentenced to suffer rigorous imprisonment for the period of one and half year and to pay fine of Rs.7,500/-, in default to suffer further rigorous imprisonment for nine months.

(iv) convicted for the offences punishable under Sections 468, 471, 477-A read with Section 109 of the Indian Penal Code and for each of the offence, he is sentenced to rigorous imprisonment for the period of one year and to pay fine in the sum of Rs.2,000/-, in default, to suffer further rigorous imprisonment for three months.

(v) convicted for the offence punishable under Section 5(2) read with section 5(1)(d) of the Prevention of Corruption Act, 1947 and sentenced to rigorous imprisonment for the period of one year and to pay fine in sum of

Rs.4,000/-, in default, to suffer rigorous imprisonment for nine months.

(vi) convicted for the offence punishable under Section 5(2) read with Section 5(1)(c) but no separate sentence is inflicted and directed further that, all substantive sentences shall run concurrently.

2. Suresh Kagane, was a Sales Tax Officer, a public servant.

3. Pending Appeal, he passed away on 30th November, 2001. His legal heirs, sought leave to contest the Appeal filed by Suresh Kagane. As such, leave was granted by the learned Judge of this Court vide order dated 10th March, 2015. In para-2 of the order, the learned Judge has observed thus : “I find the sentence imposed upon the original appellant was also of fine. As such, appeal would not abate in view of the

provisions of Section 394 of the Code of Criminal Procedure. Appeal would, in any way, would be required to be decided on merits. As such, application needs to be allowed”.

4. Heard Mr. Garg, learned Counsel (appointed) for the applicant and Mr. Agarkar, learned APP for the State.

5. Before adverting to the arguments advanced by the learned Counsel, it may be stated that, Suresh Kagane-accused no.1 was tried alongwith accused nos.2, 3, 4 and 5. Accused no.2 was a Sales Tax Officer; accused no.3-Sales Tax Inspector, accused no.5 was a registered ‘dealer’ within the meaning of the Bombay Sales Tax Act and accused no.4 is the son of accused no.5.

6. Gist of prosecution's case unfolded in evidence is; that, Suresh Kagane (hereinafter called as "the deceased") and co-accused in connivance, made a false claim for set-off (refund of sales tax) admissible to dealers, engaged in the business of extracting oil from power oil ghanas, whose sales were exempted under Entry No.39, Schedule 'A' appended to the Bombay Sales Tax Act. Accused no.5, Mallikarjun Chanbasappa, proprietor of M/s. M.C. Dhangapure, was a registered dealer. Likewise, was Vishwanath Kalshetti, also registered dealer, was engaged in the business of extracting oil from oilseeds. It is alleged, accused no.4, son of accused no.5 forged bills/vouchers with an intention to claim erroneous-false, a set-off claim, admissible to dealers, engaged in the business of extracting oil from oilseeds of tel ghanies. Accordingly, accused no.4 produced forged sales invoices of M/s. V.M. Dhangapure (Commission Agent) and on the

strength of such bills, secured registration under the Bombay Sales Tax Act, under the trade name “V.S. Kalshetti”, of which Mr. Kalshetti was projected as proprietor. The registration was allegedly granted by Trimbakrao Govindrao Bhawe, Sales-Tax Officer (accused no.2). It is unfolded in evidence that, on the basis of such other bills/forged invoices, accused no.4, sought set-off (refund of tax), on behalf of and in the names of accused no.5 (M/s. M.C. Dhangapure) and M/s. V.S. Kalshetti. Mr. Kangane, Officer (accused no.1) without following the due procedure, accepted claims for set-off made by M/s. V.S. Kalshetti and M/s. M.C. Dhangapure. In other words, it is prosecutions’s case that deceased Mr. Kangane, in connivance with the co-accused, knowingly granted set-off on the basis of forged invoices by passing assessment orders which resulted wrongful loss to the State and wrongful gains to conspirators. The high rank officer

under the Sales Tax Act, when noticed this fact, initially had decided to revise the assessment orders passed by Suresh Kagane. However, later department had directed Kagane to re-open the original assessment orders and re-assess both the entities i.e. M/s. M.C. Dhangapure (accused no.5) and M/s. V.S. Kalshetti to whom the refund orders were issued pursuant to assessment orders passed by him. It appears, Mr. Kangane had passed the re-assessment orders for the period 8th November, 1980 to 27th October, 1981. It is further unfolded in evidence that, for this period, Rs.61,000/- were refunded to accused no.5, M/s. M.C. Dhangapure and Rs.60,000/- to Mr. Kalshetti.

7. Sales Tax Department, held enquiry which culminated into First Information Report lodged against the deceased-appellant and the co-accused for the offences punishable under Sections 120-B, 409, 420,

468, 471, 477-A read with Section 109 of the Indian Penal Code and under Sections 5(2) read with Section 5(1)(d) and 5(1)(c) of the Prevention of Corruption Act, 1947.

8. Prosecution in support of the charge had examined, as many as, 94 witnesses.

9. Investigation and evidence unfolded the fact that, accused no.4 (son of accused no.5) was a lead person in forging the sales invoices; seeking new registration in the trade name of “M/s. V.S. Kalshetti” and making claim for set-off in the names of M/s. V.C. Kalshetti and M/s. M.C. Dhangapure. Investigation further revealed that, accused no.4 without the knowledge of Mr. V.S. Kalshetti (P.W.83), not only secured his registration as a ‘dealer’ with the Sales Tax,

but also opened a bank account and deposited the refund advice and appropriated money to himself.

10. Prosecution, to prove the charge, had examined, Assistant Commissioner of Sales Tax-P.W.71. The evidence of this witness, clearly suggests that the Sales Tax Department held Kagane and other public servants, guilty of dereliction of duty, for failing to follow the procedure while passing tax assessment orders. It is evident from the evidence of Assistant Commissioner of Sales Tax, that the deceased had passed the assessment orders without there being tax returns on the file and without first verifying or cross checking the vouchers, purchase bills produced by the dealers for claiming the set-off. The tenor of the evidence of this witness, therefore suggests that Mr. Kagane had overlooked the norms while issuing refund orders. Suffice to say, Sales Tax Department did not

deliberate on issue whether Mr. Kagane and other public servants, knowingly overlooked and jumped the procedure and norms while granting set-off claim.

11. Faced with this kind of evidence, after examining 92 witnesses, pardon was tendered to the accused no.4 and he was examined as a 'prosecution witness'. Though, order granting pardon was challenged before this Court and the Apex Court, the challenge was not entertained.

12. Be that as it may, fact remains that, the learned trial Court relied on the evidence of approver-P.W.93 and reached the conclusion of guilt, culminating into conviction of accused nos.1, 2, 3 and 5.

13. Bhave-accused no.2 was a Sales Tax Officer and Joshi-accused no.3, a Sales Tax Inspector had preferred Criminal Appeal No. 634 of 1996 against the judgment of conviction and sentence. Their Appeal was heard by the learned Judge (Coram : Hon'ble Justice M.L. Tahilyani) who by order dated 26th November, 2013 set aside the judgment of the trial Court and acquitted them of the offences punishable under the Indian Penal Code and Prevention of Corruption Act, 1947. In para-13, the learned Judge has held thus;

“In the present case, it is possible to say that, the evidence of P.W.93 (approver) has been corroborated to some extent by other witness. However, basic question is whether the approver himself was a reliable witness or not. If the approver's evidence was found to be unreliable evidence, it would not help the prosecution in any manner”.

14. This issue has been discussed by the learned Judge in its judgment and learned trial Judge has

stated that, basically, the approver has to be a reliable witness. In the present case, accused no.4 has accepted tender of pardon, after recording of 80% of the evidence. In paras-15 and 16, it is observed thus :

“15. In the present case, star prosecution witness (approver) had occasion to hear evidence of 92 witnesses. He had accepted tender of pardon at the fag-end of the trial when the evidence was about to be closed for recording statement of the accused under Section 313 of Cr.P.C.

16. It is possible that P.W.93 might have accepted tender of pardon when he realised that some heat may also turn upon him. In my opinion, it was highly risky to rely upon such a witness. The learned trial Court should not have believed evidence of such a witness particularly when almost all prosecution witness were cross-examined on behalf of him when he was sitting in the dock of the accused. Learned counsel for the appellants have rightly criticised that the pardon should not have been tendered to P.W.93 when the case was about to be closed. The criticism on behalf of the appellants is well founded in as much

as P.W.93 has filled up the wide gap in the prosecution case. The ultimate aim of the trial is quest for truth and the prosecution has to stand on his own legs. No doubt, the judge is not a silent spectator in the whole trial, however, the Judge has to be very circumspect in the delicate situation like the one which has arisen in the present case after completion of prosecution evidence. Had the Judge used his discretion judiciously, he probably would not have tendered pardon, to a person of highly dubious character. Had the pardon not been granted to accused no.4 who has been examined as P.W.93, the prosecution obviously would have failed miserably.”

15. The learned Counsel for the appellant, has relied on this judgment and observations made therein, to contend that, since the State has not challenged the judgment of this Court in Criminal Appeal No. 634/1996 passed in November, 2013, it has attained finality. Learned Counsel has also relied on the judgment of the Apex Court in the case of **Babuli alias Narayan Bahera Versus. The State of Maharashtra,**

reported in (1974) 3 Supreme Court Cases page 562. In the said case, in para-6, Apex Court has observed thus :-

“6. The approver was tendered pardon at a very late stage of the trial, that is, after 31 witnesses were examined. Those witnesses were cross-examined on behalf of the approver and he had the dubious privilege of being able to hear closely almost the entire evidence led by the prosecution. The High Court has observed with plausibility that the prosecution has laid itself open to the criticism that pardon was tendered to one of the accused at the fag end of the trial in an effort to fill up the lacunae in its case.”

. In the case in hand, approver tendered pardon after examining 93 witnesses, i.e. at the fag end of the trial, obviously to fill up the lacunae in this case.

16. Learned Counsel, has taken me through the impugned judgment to contend that the trial Court to great extent, relied on the testimony/evidence of the approver to conclude the guilt of accused, but since now, approver's evidence has been discarded, being worthless by this Court in the appeal filed by the co-accused, approver's evidence is to be kept out of consideration even while deciding this Appeal.

17. I have no reason to reject this contention of the learned Counsel for the appellant. Thus, having accepted this contention, I am left with the evidence of the other prosecution witnesses to ascertain whether the order of conviction is sustainable.

18. As stated above, the prosecution had examined the officers of the Sales Tax Department. The tenor of the evidence of Assistant Commissioner is

not suggesting that the assessment orders passed by Mr. Kagane, which resulted in refund-set-off, were ill-motivated; but were incorrect and illegal orders due to procedural irregularity committed by him. Therefore, it is to be said that the conviction recorded by the learned trial Court was to a great extent, based on the evidence of the approver.

19. Thus, taking into consideration the facts of the case; evidence on record and the order passed by this Court in Appeals preferred by the co-accused, in my view, upon excluding approver's evidence, the remaining evidence was not sufficient to establish beyond reasonable doubt that the deceased had committed the offences for which he was charged and tried.

20. In the result, the Appeal is allowed and hence the following order :

ORDER

(i) The judgment of the trial Court dated 30.09.1996 in Special Case No. 2/1988 is set aside. Appellant (deceased), Suresh Damodar Kagane is acquitted of the offences punishable under Sections 120-B, 409, 420, 468, 471, 477-A read with Section 109 of the Indian Penal Code and under Sections 5(2) read with Section 5(1)(d) and 5(1)(c) of the Prevention of Corruption Act, 1947.

(ii) Fine, if any, paid by the deceased-appellant be refunded to his legal heirs (applicant).

(iii) Appeal is disposed off accordingly.