

(2011) 07 KAR CK 0272

In the Karnataka High Court

Case No : Criminal Appeal No. 457 / 2004 C/W

Ismail Khan Shah @ I.K. Shah, M. Ibrahim Khan and I.K.
Feju Shah

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 21-07-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 120 B, 420, 467, 468

Citation : (2011) 07 KAR CK 0272

Hon'ble Judges : V. Jagannathan, J

Bench : Single Bench

Advocate : C.V. Nagesh, in CrI.A. No. 457/2004 and Sri N.S. Sangolli and Sri C.N. Sangolli, in CrI.A. No. 490/2004, for the Appellant; C.H. Jadhav, for the Respondent

Judgement

V. Jagannathan

1. These two Criminal Appeals are by A-2 to A-5 in the trial court and they call in question their conviction and sentence passed in respect of Sections 120B and 420 of the I.P.C. Criminal Appeal No. 457/2004 is by A-2, A-4 and A-5 and I have heard learned senior counsel Shri C.V.Nagesh for the appellants and learned counsel Shri C.H.Jadhav for the respondent C.B.I. CrI.A.490/2004 is by A-3.

2. The case of the prosecution in short is that, A-2 to A-5 entered into a criminal conspiracy with A-1 (whose case was split up and charge sheet was submitted only against A-2 to A-5) and during March 1991, appellants A-2 to A-5 availed cash credit facility to the extent of Rs. 1,00,000/- each in respect of 14 units and thereby caused wrongful loss to the State Bank of Travancore to the extent of Rs.22,09,435.40 as this was the amount which was outstanding from all the fourteen accounts which had been opened by the accused A-2 to A-5 in the names of (1) Venus Electronics, (2) Reliance Electronics, (3) Esquire Chitra Video Cassette Services, (4) Maruthi Agencies, (5) Spencer Enterprises, (6) Audio International Industries, (7) Excel Electronics, (8) Brindavan Enterprises, (9)

Safari Enterprises, (10) Singer Audio Cassette Manufacturing Company, (11) Top Video, (12) Sun Enterprises. (13) Best Video, and (14) Welcome Video, and the said accounts were also found opened by putting the signatures of different fictitious persons viz., Miss Farzea Haseena, S.K.Shah, Alfaq Ali. Miss I.K.Parshana Shah, Safiulla, I.K.Saif Ali Shah and Aziz Khan respectively.

3. It is the case of the prosecution that A-1 had opened the accounts in the names of the units viz., Maruthi Agencies, Esquire Chitra Video and Audio International. A-4 had obtained cash credit facility in respect of Excel Electronics. Safari Electronics and Welcome Video Agency, and A-5 in respect of Reliance Electronics and the amount obtained was Rs. 1,00,000/-each in respect of the aforesaid units. It is also the case of the prosecution that A-2 to A-5 introduced 12 accounts and they also stood as guarantors among themselves for the loans taken by them and they submitted fabricated lease agreements by forging the signatures of the owners of the premises wherever existing and putting the signatures in respect of the fictitious units and they had furnished bogus residential addresses of the proprietors and had defrauded Rs.13.4 lakhs for the purpose of house building bearing No. 731, Chinmaya Mission Hospital Road, Indiranagara, Bangalore, in the name of A3 and A-5 and all the 14 accounts had become irrecoverable and thereby the State Bank of Travancore had suffered loss to the extent of Rs.22,09,435.40. Based on the aforesaid charge, A-2 to A-5 were tried in respect of the offences punishable under Sections 120B and 420 of the I.P.C., Sections 419 and 468 of the I.P.C. and also under Sections 467, 468 and 471 of the I.P.C.

4. Following the accused pleading not guilty to the aforesaid charges, the prosecution examined 31 witnesses and produced 738 documents. The accused statement was recorded and the accused, in their support, marked 4 documents, Exs.D-1 to D-4, but did not lead any oral evidence.

5. The learned trial judge, after appreciating the evidence on record, held that the prosecution had failed to bring home the guilt of the accused in respect of the offences punishable under Sections 419, 468, 467 and 471 of the I.P.C. and found the evidence on record establishing the commission of the offences under Sections 120B and 420 of the I.P.C. A-2 to A-5 were sentenced to three years rigorous imprisonment and to pay fine of Rs. 15,000/- each and in default; to undergo six months simple imprisonment for the offence punishable u/s 120B of the I.P.C. and similar period of imprisonment and fine in respect of Section 420 of the I.P.C. as well and ordered the substantial sentences to run concurrently.

6. Learned senior counsel Shri C.V.Nagesh for A-2, A-4 and A-5, who are the appellants in CrI.A.No. 457/2004, while challenging the judgment of conviction and sentence passed, put forward two main contentions after taking this court through the entire evidence on record as well as the reasoning given by the learned trial judge.

7. The first of the contentions put forward is that the trial court committed

serious jurisdictional error in trying the appellants only in respect of the offences punishable under the I.P.C. and being a special court constituted to try the offences punishable under the P.C. Act, 1988, ("the Act" for short) the trial court could not have tried the appellants exclusively in respect of the offences punishable under the I.P.C. Therefore, referring to the provisions of law contained in Sections 3 and 4 of the Act, it is argued that the Special Judge could not have tried the accused-appellants only for the I.P.C. offences and, therefore, for want of jurisdiction to try the appellants in respect of the I.P.C. offences only, the judgment of the court below is liable to be set aside.

8. The aforesaid submission is sought to be supported by relying on the decisions reported in 2003 Cr.L.J. 2261, (1999)6 SCC 559 and (2003)8 SCC 628. Particular reference was made to the decision of the Apex Court in the case of Vivek Gupta Vs. Central Bureau of Investigation, reported in (2003)8 SCC 628, and my attention was drawn to paragraphs-13 to 17 of the said decision to submit that the trial court could have tried the appellants also in respect of the I.P.C. offences but this could have been done only while trying A-1 under the P.C. Act. Since A-1 was not put on trial and as the case against A-1 had been split up, the charge sheet submitted being confined to A-2 to A-5 only in respect of I.P.C. offences, under such circumstances, the trial court could not have had the jurisdiction to try the accused-appellants only in respect of the offences punishable under the I.P.C.

9. The next contention put forward is that, the trial court, after carefully examining the entire evidence on record, had drawn the conclusion that the evidence of P.Ws.9, 11, 12, 13, 14 and 16 is of no use to the prosecution to bring home the guilt of the accused and, therefore, the evidence of the said witnesses was discarded and likewise, the evidence of the postmen viz., P.Ws. 10, 15, 17 and 18, was also found not reliable and, therefore, their evidence was also not taken note of, What remained was the evidence of P.W.2. who spoke to the sanction order, P.W.4 clerk, who spoke about opening of the accounts in the bank and. P.W.5 typist, who also worked as cashier-cum-clerk, and P.W.9 peon, who had seen the accused coming to the bank, and P.W.20 head cashier. Their evidence also does not help the prosecution to prove the case against the appellants and finally, P.Ws.24, 25 and 27 are the investigating officers and P.W.26, the handwriting expert. Thus, the evidence of the aforesaid witnesses, even if considered, would not help the prosecution to bring home the guilt of the accused insofar as the offence u/s 420 of the I.P.C. is concerned.

10. It is argued by the learned senior counsel that, when the trial court did not find the addresses given by the appellants in respect of the firms they had opened as not genuine, it obviously means that the trial court had accepted the case of the appellants that they did represent the units in respect of which they had taken the credit facility by making applications to the bank. As the trial court did not find the existence of these units as fictitious or bogus one, it therefore, implies that the accused person did make genuine applications in respect of the

units they represent while seeking cash credit facility. Having thus recorded a finding in favour of the accused, the trial court could not have held them guilty for the offence punishable u/s 420 of the I.P.C. as there was no evidence placed by the prosecution to show that the appellants had the Intention to cheat the bank when they had made the applications for credit facility. Merely because the appellants were not able to repay the loan, that itself will not bring the case within the ambit of Section 420 of the I.P.C. as the ingredient of the intention to cheat was found absent.

11. Referring to the observations of the trial court in this regard, the learned senior counsel pointed out that the only reason that led the trial court to convict the appellants u/s 420 of the I.P.C. is that the appellants had not repaid the loan amount even when the matter was pending trial. Therefore, it is argued by him that the necessary ingredients of Section 420 of the I.P.C. are not made out and, as such, the question of the appellants acting fraudulently or dishonestly does not arise.

12. Yet another contention put forward by the learned senior counsel is that, the trial court had framed the charge against the accused-appellants under Sections 120B read with 420 of the I.P.C. implying thereby that the appellants are charged for an offence of conspiracy u/s 120B with the aid of Section 420 of the I.P.C. But the trial court had convicted the appellants separately in respect of Section 120B and also u/s 420 of the I.P.C. and, therefore, without a charge being framed against the appellants in respect of the offence u/s 420 of the I.P.C. independently, even the conviction and sentence under two separate sections of the I.P.C. also cannot be sustained in law.

13. On the other hand, the submission of Shri C.H.Jadhav, learned counsel for the respondent C.B.I., is that, the trial court had the necessary jurisdiction to try the offences against the appellants though falling under the I.P.C. and in this connection, the learned counsel also placed reliance on the very same provisions viz., Sections 3 and 4 of the Act, and contended that the offence specified in sub-section (1) of Section 3 of the Act shall be tried by Special Judge only. Emphasizing on the word "only", it is argued by him that, even in respect of the offence of conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a), it is the Special Judge who alone has got jurisdiction and consequently, in the instant case, as these appellants had conspired with A-1 and A-1 being a public servant, the trial court, therefore, committed no jurisdictional error in trying the appellants herein in respect of the I.P.C. offences only.

14. It is his further argument that Section 4(1) of the Act is mandatory in nature, whereas Section 4(3) of the Act is directory in nature. To support the aforesaid submission, learned counsel Shri Jadhav placed reliance on the decision reported in (2003)8 SCC 628, a decision of the High Court of Judicature at Bombay in Crl.R.P.No. 389/2009 between C.B.I. and Shri Sham B.Bhatia, and also relied on a decision of the Kerala High Court reported in 2003 Crl.L.J. 2261, and (1999)6

SCC 559.

15. As far as the merits of the case is concerned, learned counsel Shri Jadhav argued that the conviction of the appellants under Sections 120B and 420 of the I.P.C. is just and proper as the evidence on record reveals that the appellants had availed cash credit facility and had not repaid the amount to the bank but bought a house in the names of A-3 and A-5 and, as such, the judgment of conviction and sentence passed by the trial court is in order.

16. In the light of the aforesaid contentions put forward, the following points arise for consideration:

(i) Whether the trial court had jurisdiction to try the appellants herein only in respect of I.P.C. offences?

(ii) Whether the conviction of the appellants under Sections 120B and 420 of the I.P.C. can be sustained in law in the light of the evidence on record?

Point No. (i)

17. As the answer to this point revolves on the interpretation of Sections 3 and 4 of the Act, it is necessary to refer to the said provisions before proceeding further and they are as under:

3. Power to appoint Special Judges. - (1) The Central Government or the State Government may by notification in the Official Gazette, appoint as many Special Judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely:-

(a) any offence punishable under this Act: and

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).

(2).....

4. Cases triable by Special Judge. - (1) Notwithstanding contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, the offences specified in sub-section (1) of Section 3 shall be tried by Special Judges only.

(2) Every offence specified in subsection (1) of Section 3 shall be tried by the Special Judge for the area within which it was committed, or, as the case may be, by the Special Judge appointed for the case, or where there are more Special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.

(3) When trying any case, a Special Judge may also try any offence, other than an offence specified in Section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(4).....

18. No doubt, as has been mentioned in sub-section (1) of Section 4, the offence specified in sub-section (1) of Section 3 can be tried by the Special Judge only and by none else. The Special Judge is constituted under the Act basically to try the offences falling under the P.C.Act. At the same time, sub-section (b) of Section 3 further makes it clear that a Special Judge can also try the offence that fall under clause (b). Clause (b) clearly mentions that any conspiracy to commit or any attempt to commit or any abetment must be in relation to any of the offences specified in clause (a), meaning thereby, the offences under the P.C.Act. Sub-section (3) of Section 4 further makes it clear that, while trying a case, the Special Judge may also try any offence other than an offence specified in Section 3, with which the accused may, under the Cr.P.C., be charged at the same trial.

19. Therefore, it is clear from the aforesaid provisions of law that the jurisdiction to try any other offence not falling under the P.C.Act is vested with the Special Judge, provided the Special Judge is also trying the accused in respect of any offence punishable under the P.C.Act.

20. The Apex Court, in the case of Vivek Gupta Vs. Central Bureau of Investigation, reported in (2003)8 SCC 628, has held that the appellant before it, though had not been charged under the P.C.Act but under Sections 420 and 120B of the I.P.C., yet, by applying the provisions of Sections 3 and 4 of the Act and Sections 220 and 223 of the Cr.P.C., the Special Judge can try the appellants along with two co-accused and as it was found on facts in the said case that the two co-accused had been tried for the offence under the P.C.Act, the Apex Court, therefore, held that the appellant before it, though was not charged under the P.C.Act, could be tried along with the co-accused as the said co-accused were charged under the P.C.Act. Paragraphs-13 and 17 of the aforesaid decision make this position very clear and the said paragraphs are as under:

13. Section 223 of the Code of Criminal Procedure has not been excluded either expressly or by necessary implication nor has the same modified in its application to trials under the Act. The said provision therefore is applicable to the trial of an offence punishable under the Act. The various provisions of the Act which we have quoted earlier make it abundantly clear that under the provisions of the Act a Special Judge is not precluded altogether from trying any other offence, other than offences specified in Section 3 thereof. A person charged of an offence under the Act may in view of sub-section (3) of Section 4 be charged at the same trial of any offence under any other law with which he may, under the Code of Criminal Procedure, be charged at the same trial. Thus a public servant who is charged of an offence under the provisions of the Act may be charged by the Special Judge at the same trial of any offence under IPC if the same is committed in a manner contemplated by Section 220 of the Code.

XXX XXX XXX

17. We are, therefore, of the view that in the facts and circumstances of this

case, the Special Judge while trying the co-accused of an offence punishable under the provisions of the Act as also an offence punishable u/s 120B read with Section 420 IPC has the jurisdiction to try the appellant also for the offence punishable u/s 120B read with Section 420 IPC applying the principles incorporated in Section 223 of the Code. We, therefore, affirm the finding of the High Court and dismiss this appeal.

21. As far as the decision of the Bombay High Court, referred to by learned counsel Shri C.H.Jadhav is concerned, the facts and circumstances of the said case indicate that the respondents before the court were charged along with certain other accused for the offences punishable under Sections 120B and 420 of the I.P.C. and Sections 5(2) read with 5(1)(b) of the P.C.Act. As the public servants, who were charged in the said case under the P.C.Act had died and the prosecution of the case against the said dead persons under the P.C.Act, therefore, did not survive, the High Court of Bombay, therefore, held that the other accused persons, who are not public servants, can be tried by the Special Court. Therefore, the court went on to hold that the Magistrate was impliedly barred to determine any offence under the P.C.Act and consequently, there is also bar from determining the conspiracy to commit any offence under the P.C.Act.

22. The facts and circumstances of the aforesaid case are, therefore, entirely different from the one with which we are concerned in these appeals. As far as the decision in the case of P.Nallammal Vs. State, reported in (1999)6 SCC 559. is concerned, the question before the Supreme Court was whether some of the kith and kin of the former ministers, who had been arraigned as co-accused, could be tried for abetment of the offence u/s 13(1)(c) along with the public servants, and the Apex Court held that, if such non-public servants have abetted any of the offence which the public servant committed, such non-public servants are also liable to be tried along with the public servant before the court of the Special Judge.

23. The decision of the Kerala High court in the case of N.P.Prabhu Vs. Union of India, reported in 2003 CrI.L.J. 2261, referred to by learned counsel Shri Jadhav, is also on the same point inasmuch as the court has held that, when the offence under Sections 7 or 11 of the P.C.Act is abetted by the accused, a non-public servant, the accused can be tried by a Special Judge, even if the offence abetted is not committed by a public servant.

24. Thus, it is clear from the aforesaid position in law laid down by the Apex Court in particular in Vivek Gupta's case that the trial court in the instant case could have tried the appellants herein in respect of the offences under the I.P.C. along with A-1. a public servant, against whom the offences under the P.C.Act are triable. Since the charge sheet in the instant case was filed only against A-2 to A5, and A-1 public servant was not put on trial as the case against him had been split up, the Special Court, therefore, could not have tried the appellants herein only in respect of the I.P.C. offences without the offences under the

P.C.Act in respect of A-1 also being tried simultaneously.

25. Thus, the trial court had no jurisdiction to try the appellants herein only in respect of I.P.C. offences and though the appellants had raised this issue of jurisdiction before the trial court, the learned trial judge had not considered the provisions of Sections 3 and 4 of the Act in proper perspective and in the light of the law laid down by the Apex Court in various cases and particularly in the case of Vivek Gupta Vs. C.B.I. Hence, point No.(i) is accordingly answered.

Point No. (ii)

26. As I have held that the trial court had no jurisdiction at all to try the appellants in respect of I.P.C. offences alone, the judgment of conviction and sentence passed by the trial court also will be without jurisdiction. Nevertheless, in the light of the arguments addressed by the learned counsel for the parties and having gone through the evidence on record and the reasoning of the learned trial judge, the trial court has categorically held that the appellants, when they made applications seeking cash credit facility, had not given any documents which would go to show that the units which they represent were not in existence but, on the other hand, after going through the entire evidence on record, the learned trial judge himself has held that the prosecution case that the accused had furnished wrong addresses or had fabricated the documents to show non-existing units as in existence, therefore, was not established by the prosecution. Having thus held that the addresses furnished by the accused being not found to be fabricated one nor the court having doubted the existence of the units which the appellants have represented while making the applications for cash credit facility, the trial court, therefore, rightly did not accept the prosecution case and the appellants were acquitted in respect of all the I.P.C. offences except Sections 120B and 420.

27. In order to attract Section 420 of the I.P.C., it is incumbent on the part of the prosecution to establish that the accused had deceived the bank while taking loan or that they had acted dishonestly or fraudulently. When the trial court itself did not find any convincing material being placed by the prosecution to show that the accused had either given wrong addresses or that the units in question were not in existence, the question of the appellants deceiving the bank when they made the applications for cash credit facility, therefore, does not arise. The intention on the part of the appellants to cheat the bank had to be established and the prosecution fails in its attempt to prove this and consequently, as rightly argued by learned senior counsel C.V.Nagesh, mere non-payment of the loan amount itself cannot be construed as satisfying the ingredients of Section 420 of the I.P.C.

28. The learned trial judge has also observed in the course of his judgment that, even if the accused had repaid the loan amount during the course of the trial, that would have not attracted Section 420 of the I.P.C. Merely because the accused had not repaid the loan amount, the court, therefore, inferred from this

act that the accused had committed the offence of cheating. The said reasoning of the trial court cannot be accepted as the essential ingredient of Section 420 of the I.P.C. viz., to cheat, was found missing in the instant case.

29. Apart from that, the learned senior counsel for the appellant is also justified in pointing out that the trial court could not have convicted the appellants separately under Sections 120B and 420 of the I.P.C. as if the accused were tried in respect of these two offences separately when the charge against the accused was to the effect that they had committed the offence under Sections 120B read with 420 of the I.P.C. Therefore, point No.(ii) also stands answered accordingly.

30. Since I have answered point No.(i) in favour of the contention urged by the learned counsel for the appellants and as I have taken the view that the trial court had no jurisdiction at all to try the appellants in respect of the I.P.C. offences alone, the conviction of A-3 also, therefore, cannot be sustained in law and though the learned counsel for the appellant in CrI.A.No. 490/2004 is not present before the court, the conclusion reached by me in the light of the arguments put forward by learned senior counsel Shri C.V.Nagesh would equally apply to the appeal filed by A-3 as well. Moreover, learned senior counsel Shri C.V.Nagesh took this court through entire evidence on record, even though he represented A-2, A-4 and A-5. For the aforesaid reasons, both the appeals are allowed and the judgment of conviction and sentence passed by the trial court cannot be sustained in law and accordingly it is set aside and all the appellants herein are acquitted of the offences with which they were charged. Their bail bonds shall stand cancelled. The fine amount, if any deposited by the appellants herein shall be refunded to them.