

(2009) 07 MAD CK 0381

In the Madras High Court

Case No : Criminal R.C. No. 404 of 2006

Kumar @ Puli Kumar

APPELLANT

Vs

State by Inspector of Police

RESPONDENT

Date of Decision : 15-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 190, 193, 197, 300
Penal Code, 1860 (IPC) — Section 153B(1)
Unlawful Activities (Prevention) Act, 1967 — Section 10, 13, 17, 19(2), 19(3)

Citation : (2009) 07 MAD CK 0381

Hon'ble Judges : G. Rajasuria, J

Bench : Single Bench

Advocate : N. Manokaran, for the Appellant; R. Muniyapparaj, G.A. (Crl. Side), for the Respondent

Final Decision : Allowed

Judgement

G. Rajasuria, J.—Animadverting upon the judgment dated 17.02.2006 made in C.A. No. 367 of 2003 on the file of the Additional District Court/Fast Track Court No. I, Coimbatore partly confirming the conviction imposed in the judgment dated 15.10.2003 made in CC. No. 93 of 2003 on the file of the Judicial Magistrate No. II Coimbatore, this criminal revision is focussed.

2. Tersely and briefly, pithily and precisely the relevant facts which are absolutely necessary and germane for the disposal of this revision would run thus:

(a) The police laid the police report in terms of Section 173 of Cr.P.C. as against two accused for the offences under Sections 10 and 13 of Unlawful Activities (Prevention) Act, 1967 and 153B(1)(c) IPC.

(b) Inasmuch as the accused pleaded not guilty, the trial was conducted. During trial, on the prosecution side, P.Ws.1 to 8 were examined, Exs.P1 to P7 and M.Os.1 to 14 were marked. No oral or documentary evidence was adduced on the side of the accused.

(c) Ultimately, the trial Court acquitted both the accused u/s 153B(1)(c) IPC and recorded conviction and imposed sentence as under:

Punishment imposed	Case	Accused	Offence
C.C. A1 and u/s 10 U.A.P. Two years R.I. and fine No.93/03 A2 amount of Rs.1,000/- i/d R.I. for three months to each accused u/s 13 U.A.P. Three years R.I. to each accused. (These sentences to run concurrently.)			

Both the accused preferred appeal and the appellate Court acquitted the accused of the offences u/s 10 of the Unlawful Activities (Prevention) Act, 1967 but found them guilty u/s 13 of the said Act and reduced the imprisonment from three years R.I. to one year R.I.

3. Challenging and impugning the judgments of both the Courts below, this revision is focussed on various grounds, the gist and kernel of them would run thus:

Even though the Government granted sanction to prosecute the accused for the offence u/s 10 of the Unlawful Activities (Prevention) Act, 1967 (for short "The Act"), the police did choose to lay the police report as against both the accused for the offence u/s 13 of the Act also illegally. The appellate Court after acquitting the accused u/s 10 of the Act was not justified in convicting the accused u/s 13 of the Act because it is not backed by any sanction granted by the State Government.

4. Heard both sides.

5. The point for consideration is as to whether the conviction recorded by the First Appellate Court for the offence u/s 13 of the Act is bad for want of sanction to prosecute the accused. The learned Counsel for the revision petitioner reiterating the grounds of revision would develop his argument to the effect that this a peculiar case in which the State Government itself thought fit to grant sanction u/s 17 of the Act to prosecute both the accused for the lighter offence contemplated u/s 10 and dropped the intended prosecution u/s 13 of the Act; however, shockingly and surprisingly, the police did choose to file the charge sheet both under Sections 10 and 13 of the Act, wherefore, the accused are very much prejudiced by it and they deserve acquittal.

6. Whereas, the learned Government Advocate (Crl. Side) would submit that the plea based on want of sanction for prosecuting the accused u/s 13 of the Act was not raised either before the trial Court or the appellate Court, and before the revisional Court such a plea cannot be raised. In support of his proposition he cited the following decisions of the Hon"ble Apex Court:

1. (2007)1 SCC (cri) 193 [Prakash Singh Badal and Anr. v. State of Punjab and Ors.]. An excerpt from it would run thus:

29. The effect of Sub-sections (3) and (4) of Section 19 of the Act are of considerable significance. In sub section (3) the stress is on "failure of the justice" and that too "in the opinion of the court". In sub section (4), the stress is on raising the plea at the appropriate time. Significantly, the "failure of justice" is relatable to error, omission or irregularity in the sanction. Therefore, mere error, omission or irregularity in sanction is (sic not) considered fatal unless it has resulted in failure of justice or has been occasioned thereby. Section 19(1) is a matter of procedure and does not go to the root of jurisdiction as observed in para 95 of Narsimha Rao case. Sub-section (3) (c) of Section 19 reduces the rigour of prohibition. In Section 6(2) of the old Act [Section 19(2) of the Act] question relates to doubt about authority to grant sanction and not whether sanction is necessary.

38. The question relating to the need of sanction u/s 197 of the Code is not necessarily to be considered as soon as the complaint is lodged and on the allegations contained therein. This question may arise at any stage of the proceeding. The question whether sanction is necessary or not may have to be determined from stage to stage.

2. 1999 SCC (Cri) 1494 [Central Bureau of Investigation v. V.K. Sehgal and Anr.]. An excerpt from it would run thus:

17. It is a further inroad into the powers of the appellate court over and above the trammel contained in Section 465 of the Code which has been dealt with supra. u/s 19(3)(a) no order of conviction and sentence can be reversed or altered by a court of appeal or revision even "on the ground of the absence of sanction" unless in the opinion of that court a failure of justice has been occasioned thereby. By adding the explanation the said embargo is further widened to the effect that even if the sanction was granted by an authority who was not strictly competent to accord such sanction, then also the appellate as well as revisional courts re debarred from interfering with the conviction and sentence merely on that ground.

7. Whereas, the learned Counsel for the revision petitioner would cite the following decisions of the Hon"ble Apex Court:

1. 2005 SCC (Cri) 1291 [K. Kalimuthu v. State]. An excerpt from it would run thus:

9. ...The section falls in the chapter dealing with conditions requisite for initiation of proceedings. That is if the conditions mentioned are not made out or are absent then no prosecution can be set in motion. For instance no prosecution can be initiated in a Court of Session u/s 193, as it cannot take cognizance, as a court of original jurisdiction, of any offence unless the case has been committed to it by a Magistrate or the Code expressly provides for it. And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received from any person other than a police offer, or upon his

knowledge that such offence has been committed. So far public servants are concerned the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression "no court shall take cognizance of such offence except with the previous sanction". Use of the words "no" and "shall" make it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete. Very cognizance is barred. That is the complaint, cannot be taken notice of. According to Black's Law Dictionary the word "cognizance" means "jurisdiction" or "the exercise of jurisdiction" or "power to try and determine causes". In common parlance it means "taking notice of". A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty.

2. (2006) 1 MLJ (Crl.) 19 [State of Karnataka through C.B.I. v. C. Nagarajaswamy]. An excerpt from it would run thus:

15. Grant of proper sanction by a competent authority is a sine qua non for taking cognizance of the offence. It is desirable that the question as regards sanction may be determined at any early stage. (see Ashok Sahu v. Gokul Saikia 1990 S.C.C. (Crl.) (Supp.) 611 and Birendra K. Singh Vs. State of Bihar, .

16. But, even if a cognizance of the offence is taken erroneously and the same comes to the Court's notice at a later stage a finding to that effect is permissible. Even such a plea can be taken for the first time before an appellate Court (See B. Saha and Others Vs. M.S. Kochar, and K. Kalimuthu Vs. State by D.S.P., .

19. The question came up for consideration before the Federal Court in AIR 1945 16 (Privy Council) , wherein it was held that if a proceeding is initiated without sanction, the same would be null and void.

25. In view of the aforementioned authoritative pronouncements, it is not possible to agree with the decision of the High Court that the trial Court was bound to record either a judgment of conviction or acquittal, even after holding that the sanction was not valid. We have noticed hereinbefore that even if a judgment of conviction or acquittal was recorded, the same would not make any distinction for the purpose of invoking the provisions of Section 300 of the Code as, even then, it would be held to have been rendered illegally and without jurisdiction.

8. Placing reliance on the judgments cited, the learned Government Advocate (crl.side) would advance his argument to the effect that once trial proceeded

without any objection on the part of the accused concerning want of sanction or absence of sanction, it would be impermissible for him to raise it for the first time before the revisional Court. In this case, before this revisional Court alone the accused raised such a plea and according to the learned Government Advocate (Crl. Side), in view of the judgment cited supra by him, the said plea should be rejected.

9. Whereas, the learned Counsel for the revision petitioner placing reliance on the judgments cited by him would develop his argument that the three Bench decision of the Hon"ble Apex Court reported in (1979) 4 SCC 177 [B. Saha and Ors. v. M.S. Kochar] held that at any stage of the proceedings, absence of sanction could be raised by the accused and the same has to be considered by the Court.

10. Placing reliance on K. Kalimuthu's case, referred to supra, he would state that in the said case, the Hon"ble Apex Court relied on the aforesaid three Bench decision.

11. This Court, in the peculiar circumstances of the case is not bound to consider the larger issue as to whether sanction should be raised at any stage, so to say whether at the revisional stage for the first time or not. The real question arises for consideration here is as to whether the accused were in any way prejudiced by such want of sanction to prosecute them u/s 13 of the said Act and whether such want of sanction resulted in failure of justice.

12. This is a singularly singular case where the police authorities approached the Government u/s 17 of the Act for getting sanction to prosecute both the accused u/s 10 as well Section 13 of the said Act. After narrating the facts in the Sanction order, the Government exercised its discretionary power to prosecute the accused only u/s 10 of the Act which is a lighter offence than Section 13 of the Act. As such, by virtue of the sanction order itself the accused got the mercy from the State Government that the accused should not be subjected to prosecution for the severe offence u/s 13 of the Act.

13. The core question arises as to what authority the police had to lay the police report quite antithetical or in excess of the discretionary power exercised by the State Government itself. It is therefore apparently and pellucidly, palpably and axiomatically clear that the police exceeded its power in laying the charge sheet invoking Section 13 of the Act. Once a citizen is enjoying the protection of the State's discretion that he should not be prosecuted for a severe or serious offence, it is not open for the police to over reach itself by prosecuting the accused u/s 13 of the Act. On that ground itself the conviction recorded u/s 13 of the Act by the Courts below is liable to be set aside and the question of not raising the absence of sanction to prosecute u/s 13 of the Act before the trial court or the appellate Court in this case, dies down in oblivion. This Court has to necessarily consider the plea of the accused for the reason that Section 397 read with Section 401 clearly contemplates that if the order of the lower Court is

perverse or emerged due to non-application of mind or non-application of correct provision of law, it has to be interfered with. It is pellucidly clear that both the Courts below exceeded their power in entertaining the case u/s 13 of the Act and in recording conviction there under.

14. Accordingly the conviction recorded u/s 13 of the Act is set aside and correspondingly the sentence imposed also is set aside and both the accused are acquitted and ordered to be set at liberty. In the result, the criminal revision case is allowed.