(2007) 10 KL CK 0063

In the High Court Of Kerala

Case No : Crl A No''s. 345 and 346 of 2002

M.G. Valsalakumar, Formerly Special Grade — APPELLANT

Vs

State — RESPONDENT

Date of Decision : 08-10-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 313
Evidence Act, 1872 — Section 10
Penal Code, 1860 (IPC) — Section 120B
Prevention of Corruption Act, 1988 — Section 13(1), 13(2), 20, 7

Citation : (2007) 10 KL CK 0063

Hon'ble Judges : K. Thankappan, J

Bench : Single Bench

Advocate : B. Raman Pillai, for the Appellant;

Final Decision : Dismissed

Judgement

K. Thankappan, J.—Both these appeals are filed against the judgment in C.C. No. 2 of 2002 on the file of the Enquiry Commissioner and Special Judge, Thiruvananthapuram. Crl. Appeal No. 345 of 2002 is filed by the first accused and Crl. No. 346 of 2002 is filed by the second accused in the Calendar Case. Both the appellants faced trial for the offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the P.C. Act") read with Section 120B I.P.C.

2. The prosecution case against the appellants - accused was that while the accused ,who were Special Grade Auditors, were engaged in auditing the accounts of Mannancherry South Milk Producer''s Co-operatives Society (hereinafter referred to as "the Society") for the year 1995-96, they detected misappropriation of an amount of Rs. 40,000/- and in order to close the matter without reporting to the police, they demanded 50% of the misappropriated amount as bribe from PW. 2, the Secretary of the Society. It was the further case of the prosecution that though PW. 2 paid Rs. 15,000/- to the first accused on

19.3.1997, he made a demand for the balance amount of Rs. 5,000/- and that the said amount of Rs. 5000/- was received by the second accused from PW. 2 at about 2.30 p.m. on 21.3.1997. To prove the charge against the accused, the prosecution examined PWs.1 to 10 and produced Exts.P1 to P23 as well as MOs. 1 to 6.

On the side of the defence, DWs. 1 to 4 were examined and Exts. D1 to D. 11 were produced. On closure of the prosecution evidence, the accused were questioned u/s 313 Cr.P.C. They denied the charges leveled against them. However, the trial court after considering the evidence adduced by the prosecution, found both the accused guilty under Sections 7 and 13(1)(d) read with Section 13(2)of the P.C. Act read with Section 120B I.P.C., convicted them thereunder and sentenced them each to undergo rigorous imprisonment for four years each u/s 7 of the P.C. Act read with Section 120B I.P.C. and 13(1)(d) read with Section 13(2) of the P.C. Act read with Section 120B I.P.C. The first and second accused were also sentenced to pay a fine of Rs. 40,000/- and Rs. 25,000/- respectively for the offence u/s 7 of the P.C. Act read with Section 120B I.P.C. and in default of payment of fine, they were sentenced to undergo rigorous imprisonment for one year each. The substantive sentences were ordered to run concurrently. The above conviction and sentences are challenged in these appeals.

3. Heard the learned Counsel appearing for the appellants as well as the learned Public Prosecutor.

4. Learned Counsel appearing for the appellant in Crl. Appeal No. 345 of 2002 has raised the following contentions in challenging the judgment of the trial court : (i) the finding of the trial court that the appellant - first accused demanded bribe from PW. 2 is not based on any evidence as neither the evidence adduced by PW. 2 before the court nor Ext.P1 first information statement given by him would prove that such a demand was made by the first accused, (ii) the finding of the trial court that the appellant committed offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the P.C. Act read with Section 120B I.P.C. on the basis of the recovery of the tainted currency notes from the second accused is not sustainable as there is no evidence to show the involvement of the appellant at the time when the second accused accepted the money and (iii) the finding of the trial court that the appellant and the second accused had conspired together to commit the offences under Sections 7 and 13(1)(d) read with Section 13(2) of the P.C. Act is without any legally acceptable evidence.

5. Learned Counsel appearing for the appellant in Crl. Appeal No.346 of 2002 has also raised the very same contentions with regard to the finding entered by the trial court against the appellant under Sections 7 and 13(1)(d) read with Section 13(2) of the P.C. Act read with Section 120B I.P.C. Counsel further submitted that the prosecution had not proved by any records that the appellant - second accused was entrusted with the work of auditing the accounts of the Society.

Counsel further submitted that as the auditing of accounts of the said Society was not legally entrusted with the second accused, he cannot be said to have committed the offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the P.C. Act.

6. The trial court relied on the evidence of PWs. 1 and 2 to find that both the accused were entrusted with the work of auditing the accounts of the Society for the year 1995-96 as per the letter dated 19.3.1997 of the Auditor General of Co-operative Milk Marketing Department. PW. 1 was the President of the society concerned during the relevant time and this witness had given evidence before the court that both the accused came to the society on 19.3.1997 and started the auditing work and while so, PW. 2, the Secretary of the society informed him about the misappropriation of Rs. 40,000/- alleged to have been detected by the second accused appellant in Crl. Appeal No. 346 of 2002. He also stated that PW. 2 informed him that as the amount misappropriated exceeded Rs. 10,000/-, the matter has to be reported to the police and that the second accused was willing to close the matter if an amount of Rs. 25,000/- was given to him. This witness also stated that PW. 2 had informed him that he had paid Rs. 15,000/- to the second accused on 19.3.1997. He also stated that an amount of Rs. 5000/- more was paid to the second accused on 21.3.1997 at the premises of Kalathiveedu Milk Society where the accused were to audit the accounts on that day. The trial court also considered the evidence of PW. 2, the Secretary of the Society. This witness had given evidence to the effect that both the appellants were entrusted with the work of auditing the accounts of the Society. He also spoke about the demand made by the second accused for an amount of Rs. 25,000/-. Subsequently he stated that the demand was for Rs. 20,000/-.

This witness also stated that aggrieved by the above demand, he reported the matter to PW. 1, the President of the Society who advised him to wait for a while. He further stated that in the meanwhile, the second accused repeated the demand and on 19.3.1997 at about 7.30 p.m., he paid an amount of Rs. 15,000/- to the second accused and that the second accused asked him to pay the balance amount of Rs. 5000/- at the premises of Kalathiveedu Milk Society. Further, this witness stated that aggrieved by the demand made by the second accused, after consulting PW. 1, he went to the office of PW. 6, Deputy Superintendent of Police, V.A.C.B., Alappuzha and gave Ext.P1 first information statement. He then stated that on the advise of PW. 6, he produced Mo.1 series of currency notes amounting to Rs. 5000/- and that PW. 6 after noting down the number of the currency notes and applying phenolphthalein powder on the currency notes entrusted the money to him for payment to the accused on demand. This witness further stated that he went to the premises of Kalathiveedu Milk Society at about 2.30 p.m. on 21.3.1997 and handed over the marked currency notes to the second accused.

7. After considering the evidence adduced by PWs.1 and 2, the trial court found that demand for bribe was made by the second accused - appellant in Crl.Appeal

No. 346 of 2002 in the presence of the first accused - appellant in Crl. Appeal No. 345 of 2002. There is no evidence to show that the first accused had made any demand for bribe as alleged by the prosecution. From the circumstances now proved, it is necessary to find out whether the prosecution had succeeded in proving the case against the first accused - appellant in Crl. Appeal No. 345 of 2002 that he had demanded or received any amount from PW. 2 as bribe. PWs.1 and 2 had stated before the court that it was the second accused who had demanded bribe. Even though in Ext.P1 first information statement given by PW. 2 to PW. 6, there was an allegation that the first accused had demanded and accepted an amount of Rs. 15,000/- from him, he deviated from his statement when he was cross-examined by the prosecutor, as can be seen from Ext.P1(a). But, the trial court considered the statement in Ext. P1(a) as corroborative evidence of PW. 2. In this context, it has to be noted that the Apex Court in the judgments reported in Nanhku Singh and Another Vs. State of Bihar, and Hazari Lal Vs. State (Delhi Administration), considered the evidentiary value of both the first information statement and the statements recorded by the investigating officer under Sections 161 and 162 Cr.P.C. and categorically held that such statements are not substantive evidence and that they can be used only for contradicting the witness and not for corroboration. As the evidence of PW. 2 did not prove that the first accused either demanded or accepted bribe from him, the finding of the trial court against the first accused is not sustainable. It is also proved from the evidence of PW. 3, the trap witness and PW. 6, the Deputy Superintendent of Police, V.A.C.B., Alappuzha, who prepared Ext.P5 recovery mahazar that an amount of Rs. 5000/- was recovered from the second accused. PW. 3 had also stated before the court that PW. 2 had told him that the auditor would not receive money at his office and that saying so, PW. 2 went to the office of Kalathiveedu Milk Society and that after sometime both PW. 2 and the second accused came out of the office and after a brief talk with the second accused, PW. 2 handed over the currency notes to the second accused who received the same in his right hand and put it in the pocket of his shirt. PW. 3 also stated that on seeing the second accused receiving the money, he had given signal to PW. 6 and the other officials.

8. Admittedly, neither PW. 2 nor PW. 3 had a case that they had seen the first accused at the premises of Kalathiveedu Milk Society. The evidence of PW. 6 and Ext.P5 recovery mahazar would show that MO.1 series of marked currency notes were recovered from the second accused. In the light of the above evidence, this Court is of the view that the prosecution has not proved by adducing any evidence that the first accused had either demanded or received bribe. The trial court found the first accused guilty of the charges with the aid of Section 120B I.P.C. To attract an offence u/s 120B I.P.C., the prosecution should prove by direct or circumstantial evidence that the first accused conspired with the second accused to commit the offence. The evidence of PWs. 1 and 2 would show that even on 19.3.1997 when both the accused - appellants came to the Society to do the auditing work, it was the second accused who had informed PW. 2 regarding

the detection of misappropriation of the amount. There is no case for either PW. 1 or PW. 2 that the first accused had made any attempt to extract any amount from PW. 2. PW. 2 also did not say anything about any discussion between both the accused to draw a conclusion that both the accused had conspired together to demand bribe from him. As per the evidence of PW. 2, even the alleged payment of Rs. 15,000/- on 19.3.1997 was to the second accused and not to the first accused. So, the prosecution had not adduced any direct or circumstantial evidence to show that the first accused had conspired with the second accuse to commit the offences alleged against them, as now found by the trial court. The only circumstance to connect them together was that both of them were doing the auditing work of the Society. In this context, this Court has to look into the evidence of PW. 5, the Assistant Registrar/Concurrent Auditor who had stated that it was the first accused who was entrusted with the work of auditing the accounts of the Society and that the second accused who was also a Special Grade Auditor had accompanied the first accused. But, on the basis of this evidence alone, this Court is not in a position to draw the conclusion that both the accused - appellants had conspired together to commit the offences as alleged by the prosecution. In this context, learned Counsel appearing for the appellant in Crl. Appeal No. 345 of 2002 invited the attention of this Court to the decisions of the Apex Court reported in Bhagwan Swarup v. State of Maharashtra AIR 1965 S.C. 682 and E.K. Chandrasenan v. State of Kerala AIR 1965 S.C. 1066. In the former decision, the Apex Court held that unless and until all the ingredients of Section 10 of the Indian Evidence Act, 1872 is proved, an offence u/s 120B I.P.C. cannot be proved against any accused. The Apex Court further held in paragraph 8 of the judgment as follows:

(1) There shall be a prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy;

(2) if the said condition is fulfilled, anything said, done or written by any one of them in reference to their common intention will be evidence against the other;

(3) anything said, done or written by him should have been said, done or written by him after the intention was formed by any one of them;

(4) it would also be relevant for the said purpose against another who entered the conspiracy whether it was said, done or written before he entered the conspiracy or after he left it; and (5) it can only be used against a co-conspirator and not in his favour.

In the latter decision, the Apex Court considered the ingredients of conspiracy as contemplated u/s 120B I.P.C. and held that to find an accused guilty u/s 120B I.P.C., the prosecution should prove that there was direct meeting of the minds of two or more accused.

Further, in the decision reported in Ram Narain Poply, Pramod Kumar Manocha, Vinayak Narayan Deosthali and Harshad S. Mehta Vs. Central Bureau of Investigation and Others, , the Apex Court held as follows:

...The elements of a criminal conspiracy have been stated to be : (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime is designed to curb immoderate power to do mischief which is gained by a combination of the means. The encouragement and support which co- conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design....

The evidence adduced by the prosecution would not show whether there was meeting of the minds of the first and second accused and at what stage they had decided to either demand or accept bribe from PW. 2 as alleged by the prosecution. Therefore, the evidence adduced by the prosecution is not sufficient to hold that the first accused had conspired with the second accused to commit the offences as alleged by the prosecution. Hence, the finding of the trial court that the first accused also committed offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the P.C. Act with the aid of Section 120B I.P.C. is perverse and not sustainable. Accordingly, the finding of the trial court and the conviction entered and the sentences ordered against the first accused are hereby set aside. The first accused - appellant in Crl. Appeal No. 345 of 2002 is found not guilty and acquitted of all the charges levelled against him.

9. The contention of the learned Counsel appearing for the appellant in Crl. Appeal No. 346 of 2002 that the evidence adduced by the prosecution would not prove that the appellant - second accused had demanded any bribe as alleged by the prosecution has to be considered in the light of the evidence of PWs. 1 and 2. This Court had already discussed the evidence of PWs. 1 and 2. Though PW. 1 had stated in his chief examination that both the accused demanded an amount of Rs. 25,000/- as bribe, subsequently this witness stated that he was told by PW. 2 that the second accused alone had demanded an amount of Rs. 20,000/- out of which an amount of Rs. 15,000/- was paid to him on 19.3.1997. PW. 1 had further stated that PW. 2 had told him that inspite of payment of Rs. 15,000/- to the second accused, he made a further demand for Rs. 5000/- from PW. 2 which he agreed to pay on 21.3.1997 at the premises of Kalathiveedu Milk Society. This witness also stated that it was he who had advised PW. 2 to go to PW. 6 and file a complaint. The evidence of this witness was corroborated by PW. 2, the

Secretary of the Society. Admittedly, Exts.P6 and P7 proforma reports would show that both the accused were entrusted with the work of auditing the accounts of the Society. The evidence of PW. 2 also would show that both the accused came to the premises of the Society on 19.3.1997 for doing the auditing work and that it was the second accused who had demanded 50% of the alleged misappropriated amount as bribe. The evidence given by PW. 2 is similar to Ext.P1 first information statement given by him. This witness had a definite case before the trial court that the first accused never demanded any amount. Further, the evidence of PW. 3 also would prove that on 21.3.1997, he along with PWs. 2, 6 and other officials went to the premises of Kalathiveedu Milk Society where he had seen PW. 2 handing over the marked currency notes to the second accused. He also spoke about the recovery of the MO. 1 series of tainted currency notes from the pocket of the second accused and also the phenolphthalein test conducted on the hands of the second accused and MO.1 series of currency notes. It is also revealed from Ext.P5 recovery mahazar prepared by PW. 6 that the currency notes recovered from the second accused on 21.3.1997 were the same currency notes produced before him by PW. 2 at the time of giving Ext.P1 first information statement. It has been established from the evidence of these witnesses that the second accused - appellant in Crl. Appeal No. 346 of 2002 had accepted an amount of Rs. 5000/- from PW. 2 on 21.3.1997. Hence, the finding of the trial court regarding this aspect requires no interference by this Court. Even though the prosecution had a case that an amount of Rs. 15,000/- was already paid to the second accused by PW. 2 on 19.3.1997, that fact was not established by the prosecution by adducing any positive evidence.

10. The next question to be considered is whether the finding of the trial court that the second accused - appellant in Crl. Appeal No. 346 of 2002 committed offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the P.C. Act read with Section 120B I.P.C. is legally sustainable or not? In this context, this Court had already discussed the evidence regarding conspiracy alleged to have been committed by both the accused and found that there is no evidence to prove that both the accused had entered into a conspiracy to commit the offences. Hence, the evidence adduced by the prosecution would prove that the second accused committed offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the P.C. Act without the aid of any conspiracy.

11. Learned Counsel appearing for the appellant in Crl. Appeal No. 346 of 2002 had taken a further contention that the prosecution had not proved that the second accused was also entrusted with the auditing work of the Society. This Court considered Exts.P6 and P7 proforma reports which would show that during March, 1997, the auditing work was entrusted to both the accused. That apart, this Court had also found that both the accused came to the Society on 19.3.1997 and did the auditing work. If that be so, the above contention of the learned Counsel is not tenable. The trial court, considering the factum of recovery of the marked currency notes, relied on the presumption available u/s

20 of the P.C. Act to find that the second accused had committed the offences. That presumption drawn against the second accused would also show that the explanation offered by the second accused for the receipt of the amount from PW. 2 on 21.3.1997 is not acceptable. If so, the trial court was justified in finding that the second accused - appellant in Crl. Appeal No.346 of 2002 committed offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the P.C. Act. Hence, the conviction entered and the sentences imposed by the trial court on the second accused-appellant in Crl. Appeal No. 346 of 2002 require no interference by this Court.

Accordingly, Crl. Appeal No. 345 of 2002 is allowed. Crl. Appeal No. 346 of 2002 is dismissed, confirming the conviction and sentence ordered against the appellant under Sections 7 and 13(1)(d) read with Section 13(2) of the P.C. Act.