

(2009) 05 J&K CK 0011
In the Jammu And Kashmir High Court

Mushtaq Ahmad Bhat

APPELLANT

Vs

State of J. and K. and Others

RESPONDENT

Date of Decision : 02-05-2009

Acts Referred:

Jammu and Kashmir Prevention of Corruption (Amendment) Act, 2006 — Section 5(1)(d), 5(2)
Ranbir Penal Code, 1989 — Section 120B, 420, 467, 468

Citation : (2009) 2 JKJ 362

Hon'ble Judges : Sunil Hali, J

Bench : Single Bench

Judgement

Sunil Hali, J.—A charge sheet came to be filed before the Special Judge, Anti-Corruption, Srinagar on 27-12-2004 u/s 120-B read with

420, 467 and 468 RPC and u/s 5(1)(d) read with 5(2) of J&K, Prevention of Corruption Act, 2006. The allegation contained in the charge sheet

are that on application of one Smt Jehan Ara W/o Ab. Rashid Khan R/o 2/F Tulsi Bagh, who had dully filled up and signed the form, for STD

PCO, same was sanctioned under STD phone No. 437015 and was installed at the address of respondent No. 2, who is accused No. 1 in the

case, on a shop adjoining Gowher Book Depot, Radio Colony, Rajbagh on 20.03.1998. Payments of bills were made on regular basis till 02-04-

1999.

2. On 22-04-2009, the indicator No. 437015 was changed to indicator No. 457213 without any change in its location and the installation of PCO

consequent to the change of exchange area from Barzulla to Srinagar Exchange. On its shifting to Srinagar Exchange the indicator No. 457213

was created as an ordinary telephone connection and not as STD PCO connection

from 22-04-1999, result thereof was that the said number was not included in the regular fortnightly meter reading applicable for STD PCOs. The said number exists in the monthly/by monthly meter reading statement lists of ordinary telephones for the period from 04/1999 to 08/2002. The meter reading of the said STD PCO were not being sent to AO(TR), Srinagar due to absence of TTX category. However, regular fortnightly meter reading were being sent to AO(TR), Srinagar for billing as STD PCO Telephone for onward transmission to DOT Soft, Jammu.

3. The fact was that from 22-04-1999 the telephone No. 457213 Which was originally 437015 was not included in fortnightly meter reading applicable for STD PCO, obviously for the reason of it not being included in STD PCO Category. It was detected after the billing system was changed to DOT SOFT that amount of Rs. 8,56,173/- was pending payment by the franchisee. Accordingly the consolidated bill was raised and issued to Smt Jehan Ara, who refused to pay the bill by saying that no STD PCO was sanctioned or run by her.

4. The prosecution case is that the signatures were of Smt Jehan Ara in whose favour STD PCO was sanctioned and later on shifted to another premises on the application of respondent No. 2 by having forged signatures of the original franchisee, Smt. Jehan Ara.

5. It is further revealed by prosecution story that the present petitioner was responsible for making entries with regard to the meter reading received in the STD section did not raise any bill against No. 437017 changed to 457213 for more than three years and thereby caused wrongful loss of Rs. 10,39,949/=.

6. The trial court after hearing the parties has framed charge against the accused No. 1- Mohammad Aslam sheikh and accused No. 4-Mushtaq

Ahmad Bhat discharged accused No. 2 on the basis of the report submitted by the prosecution that he was not involved in the conspiracy hatched

long before he had un-authorizedly obtained the connection from Shri Surinder Singh Sethi, who too has been let off in the case by the CBI.

Accused No. 3 had died, as such, proceedings against him also stood abated. It is against this order of charge sheet that the present petition has been filed by the petitioner.

7. I have heard Learned Counsels for the parties. The grievance of the petitioner

is that on 24-07-2000, an order came to be issued by Senior

Accounts officer, whereby he was charged with the duties of raising bills of charge based on the meter readings received from main exchange in respect of STD PCO telephone connections.

Bi-monthly bills are issued to the telephone subscribers comprising of bi-monthly rental for the subsequent two months and the local and trunk call charges relating to the past two months.

8. The bills are issued as per billing cycle fixed for the same. Local call charges are included on the basis of meter reading statements received from the exchange concerned and the trunk call charges are based on the trunk call tickets received, which are duly valued by TRA branch-Exchange.

9. As stated by the prosecution due to oversight of the JTOs of OCB Exchange, Srinagar the indicator No. 457213 was created as an ordinary telephone connection and not as STD PCO connection from 20-04-1999. Secondly the said number was not included in the regular fortnightly

meter reading applicable for STD PCO, but the said number exists in the monthly/bi-monthly meter reading statement lists of ordinary telephone

for the period 04/1999 to 08/2002. It is further stated that statements of Sh. Ravinder Kumar Gupta, Sub Divisional Engineer, OCB Barzulla and

Sh. Roshan Lal Handu, conclusively establish that telephone number originally 437015 on diversion in the month of December-1998 from Barzulla

OCB Srinagar was allotted telephone No. 457213 and on such diversion had been changed from the category of STD PCO to STD

normal/General.

10. In nutshell the case of the petitioner is that on its own saying the prosecution has stated that due to oversight of JTO of OCB, Srinagar

Exchange indicator No. 457213 was created as an ordinary Telephone connection not as STD PCO connection from 22-04-1999. The petitioner

had not raised any bill in respect of this number as on date it was not included in the regular fortnightly meter applicable to STD PCO.

11. I have perused the report u/s 173 and the documents appended thereto. The FIR filed by Divisional Engineer (Vigilance) indicates that on 22-

04-1999 indicator No. 437015 was changed to 457213 without any change in location of the installation of the PCO with change of exchange

from Barzulla to Srinagar Exchange. It is further mentioned that due to apparent

oversight of JTOs of the OCB Exchange, Srinagar the indicator

No. 457213 was created as an ordinary telephone connection and not as STD PCO connection from 22-04-1999 consequently the said number

was not included in the regular fortnightly meter reading applicable for STD PCO. It is also mentioned in FIR that Sh. Nazir Ahmad Mir, the then

Sub-Inspector, BSNL, Rajbagh was responsible for installation of the second STD PCO No. 437015 in the same shop of Sh. Bilal Ahmad Wani

on 20-03-1998, which is not permissible under rules. It also reveals that FIR does not reflect the name of present petitioner. Another

communication on the accompanying report under article 173 written by Sub-Divisional Engineer to the Divisional Engineer reveals that category

(TTX) is given for STD ISD PCOs. It further states that at the time of creation of new number TTX category is given for STD, ISD and PCOs.

The time of creation of new number TTX category was not given to telephone No. 457213 and as per information gathered from the computer

status the said Telephone No. 457213 was not created as STD PCO. It is further stated that the official who created the said telephone No.

457213 on 21-04-1999 has not put his signatures on it.

12. As per records command mentioned against telephone No. 457213 has been created as STD/General and not STD PCO. The said number

has been created by Ms. Ishrat Jan the then JTO, Srinagar.

13. It is given in the statement of witnesses Sh. Roshan Lal Handoo that the command given to 457213 STD PCO number is purely a mistake and

not a deliberate attempt.

14. Analyzing the aforementioned facts as revealed from the report along with statement of the witnesses, it is clearly mentioned that the command

given to telephone No. 457213 is SR3 which means STD General. The command has been given by Ms. Ishrat Jan the then JTO. Since the

command given to the aforementioned telephone number was STD General, it could not be enlisted in the category of STD PCO for which

command MOD is required to be given. Once the command to the present number has been given as SR3 meaning STD General no bills have

been raised against it as being STD ISD. The bills can be raised only against this telephone if the command was MOD. The petitioner role was

purely to raise bills on the basis of the categorization of the telephone which

were enlisted as STD PCO. I fail to understand on what basis the present petitioner has been included in the array of accused. His role according to the prosecution was to have raised the bill of the telephone number in question in the category of STD PCO and not as general STD per se. It cannot be said that he was a part of the conspiracy alleged to have been hatched by accused No. 1 who was the ultimate beneficiary of said wrong act.

15. The investigation conducted by the CBI is not only faulty but contrived. The investigation has not been conducted in the manner in which it was required to be done, that is to detect the mistake at the time of enlisting this telephone number in the general STD category instead of STD PCO.

The whole problem has been created only at this stage. Unfortunately this angle has not been investigated by the prosecution. The prosecution has

returned the finding that due to apparent oversight of JTO of OCB exchange, Srinagar in the indicator No. 457312 was created as an ordinary

telephone connection and not STD PCO from 22-04-1999 and consequently no fortnightly bills can be issued. The shifting of this responsibility on

the staff of telephone Revenue Unit, who did not raise this bill is not only surprising but an effort has been made to rope in the present petitioner

only. As a matter of fact the investigating agency has exonerated people more particularly the JTO of OCB, Exchange Srinagar, who created

457312 as an ordinary telephone connection and not STD PCO. Their role has not been probed at all.

16. The trial court also has not addressed itself to this issue and has in a mechanical manner framed the charge against the present petitioner. He

had the option at the time of presentation of the charge sheet to direct the investigation of the offence and order further investigation in respect of

the offence after the report was forwarded to it. If on examination of the report it is revealed to the Magistrate that offence has been committed by

some other person it has the power to ignore the conclusion made by the investigating officer in the official reporting. The court can independently

apply its mind to the facts of the case and order the investigation. This course has not been applied by the court even though there was sufficient

material to proceed in the matter under the aforementioned provision.

17. The allegations against the petitioner are that he has entered into a criminal

conspiracy with the accused No. 1 by not raising bill against the telephone No. 437015 in the STD PCO category. In order to appreciate this controversy it is important to give definition of Section 120-A and 120-B of IPC, which reads as under:

120-A. When two or more persons agree to do, or cause to be done-

(1) an illegal act, or

(2) an act, which is not illegal by illegal means, such agreement is designated a criminal conspiracy,

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

120-B(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment

for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such conspiracy, be punished in

the same manner as if he had abetted such offence....

18. The gist of the offence of criminal conspiracy created u/s 120-A is a bare agreement to commit an offence. It presupposes that there has been

an agreement between the two or more persons to do or cause to be done an illegal act, or an act which is not illegal by illegal means. It has to be

an agreement to commit an offence which shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more

parties to such agreement in pursuance thereof. The section mainly could be divided into two parts: the first part talks of where there is reasonable

ground to believe that two or more persons have conspired to commit an offence or an actionable wrong and it is only when this condition

precedent is satisfied that the subsequent part of the section comes into operation. It is material to note that this part of section talks of reasonable

grounds to believe that two or more persons have conspired together. It is well settled law that act or action of one of the accused could not be

used as evidence against the other but an exception has been carved out in Section 10 in cases of conspiracy. The second part operates only when

the first part of the Section is clearly established i.e., there must be reasonable ground to believe that two or more persons have conspired together

in pursuance to Section 120-A. It is only then the evidence of statement made by one of the accused can be used as evidence against the other.

19. Applying this principle to the present case the category of telephone connection in question was changed in April, 1999 when admittedly the

petitioner was not working in the Billing Section regarding STD PCO. He came to be transferred there in July 2000, which is clearly born by an

order dated 24th of July, 2000. If the petitioner was not working in the said Billing section in April, 1999 how could he have entered into the

conspiracy with the accused No. 1 on that date. The very foundation of the conspiracy is displaced in the present case.

20. On the question of framing charge it has to be seen as to whether there is prima facie material on the basis of which the accused can be put to

trial.

21. This Court cannot ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable

appreciation of it accusation would not be sustained. This is the function of the trial court. Inherent jurisdiction under the section though wide has to

be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. It is

to be exercised ex-debi to justitiae to do real and substantial justice for the administration of which alone courts exist.

22. Applying the aforementioned principle to the present case, it will be seen that on the facts alleged and material produced no offence is made

out.

23. From the facts emerging from herein above, I find that the petitioner's role was to raise bills in respect of the telephone numbers which were

enlisted as STD PCO. Enlisting was to be done by the JTOs of the OCB exchange and not by the petitioner. I do not find the petitioner has played

any role in the alleged conspiracy as revealed from the record.

24. It would be an abuse of the process of the court to allow any action, which would result in injustice and prevent promotion of justice. In

exercise of the powers court would be justified to quash any proceeding if it finds that initiation or continuance of it amounts to abuse of the

process of court or quashing of such proceedings would meet the ends of justice. Court, therefore, have inherent powers apart from express

provisions law which are necessary for proper discharge of functions and duties imposed upon them by law. While exercising powers under the

section, the court does not function as court of appeal or revision. When no offence is disclosed by the complaint or report in article 173 it is

permissible to look into the materials to assess what the complaint has alleged and whether any offence is made out even if the allegations are

accepted in toto.

25. For the reasons stated herein above, the charge framed against the petitioner is quashed and he stands discharged. It is left for the trial court to

take necessary steps to order for re-investigation of the matter in light of the observations made hereinabove.

Revision petition is disposed of. The file of the trial court be sent back.