
(2015) 08 KL CK 0067

In the High Court Of Kerala

Case No : Criminal Appeal Nos. 1066 and 1157 of 2005

P. Alikoya

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 07-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 313, 386(b)(i)

Penal Code, 1860 (IPC) — Section 120, 120B, 420, 468, 471

Prevention of Corruption Act, 1988 — Section 13(1)(d), 13(2), 19

Citation : (2015) 08 KL CK 0067

Hon'ble Judges : P. Ubaid, J

Bench : Single Bench

Advocate : V.H. Jasmine, Public Prosecutor, Advocates for the Respondent

Final Decision : Allowed

Judgement

P. Ubaid, J—The judgment of conviction of the Enquiry Commissioner and Special Judge (Vigilance), Kozhikode in C.C. No. 11/2001 is under challenge in these two appeals. The appellant in CrI.A. No. 1157/2015 is the first accused in the said case, and the appellant in CrI.A. No. 1066/2015 is the 2nd accused. The Vigilance and Anti Corruption Bureau (VACB), Kozhikode brought the said prosecution against three persons alleging falsification of registers and accounts, and misappropriation of amount allotted by the Kadalundy Grama Panchayath to the Government Fisheries Lower Primary School, Chaliyam, for the purchase of furniture. The first accused was the Headmistress of the said Lower Primary School from 12.06.1997 to 03.06.1998, and the 2nd accused was the President of the Parents and Teachers Association (PTA) of the said school during the said period. The 3rd accused, whose case was split up in the trial court, was a member of the PTA, and he was also the member of the Ward No. 1 of the Kadalundy Grama Panchayath. The Government Fisheries Lower Primary School is situated in the said Ward No. 1. The Kadalundy Grama Panchayath had allotted an amount of Rs. 20,000/- to the said school for purchasing furniture in the financial year 1997-1998. Quotations were invited by the Panchayath, but later,

the Panchayath took a decision by resolution to entrust the PTA to make furniture, or to purchase furniture worth Rs. 20,000/-. Accordingly, the 2nd accused took up the responsibility, and he agreed to purchase the required furniture, and supply it to the School before 31.03.1998. The prosecution case is that the 2nd accused purchased some furniture, much less in quantity, and worth much less than the sanctioned amount, but accepted the amount of Rs. 20,000/- from the Panchayath on the basis of a false letter and certificate issued by the 1st accused to the effect that all the required items of furniture worth more than Rs. 20,000/- were received in the School, and to issue such a certificate, some false entries were also made in the furniture stock register maintained in the school. It is alleged that without purchasing the required furniture, the three accused misappropriated the funds allotted by the Panchayath by using false certificates and making false entries in the records, as part of a conspiracy hatched by them.

2. The present prosecution originated from a complaint received by the VACB, Kozhikode, in August, 1998 from the President and the Secretary of a political organisation alleging misappropriation of Panchayath funds without purchasing the required furniture. On the basis of the said complaint, the VACB conducted a fact finding enquiry, and the Dy.S.P. Shri. N. Chandran submitted a report to the Superintendent of Police, VACB, Kozhikode. As directed by the District Superintendent, the Dy.S.P., VACB registered a crime against the three accused on the basis of the said report of enquiry. After investigation, VACB submitted final report in the trial court.

3. These two appellants entered appearance in the trial court and claimed to be tried by pleading not guilty to the charge framed against them by the trial court, under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (for short, "the P.C. Act"), and also under Sections 420, 468, 471 and 477A read with Section 120B IPC. The case against the 3rd accused was split up and refiled when he absconded. The prosecution examined five witnesses in the trial court, and marked Exts. P1 to P16 documents. Many of the documents like certificates and letters, on which the prosecution relies to prove the case, were not properly and legally proved during the trial process. The prosecution only marked some files containing the said letters and certificates. Even the prosecution sanction granted by the competent authority to prosecute the 1st accused as a public servant was not proved during the trial process by the person who granted the sanction. When examined under Section 313 Cr.P.C., the two accused denied the incriminating circumstances and submitted that all the required items of furniture were later received in the School, that they had not appropriated any amount from public funds, that they had not hatched any conspiracy in the matter of purchasing furniture, and that a certificate happened to be issued by the Headmistress with the object of avoiding lapse of the funds allotted by the Grama Panchayath. Their case is that as the furniture items were not ready by 31.03.1999, the 2nd accused received the funds with the hope that all the required items of furniture could be made available within a few days, so

that lapse of the funds on account of failure to purchase furniture before 31.03.1999 could be avoided. This explanation was not acceptable to the trial court. The accused did not adduce any evidence in defence. On an appreciation of the evidence adduced by the prosecution, the learned trial Judge found the accused Nos. 1 and 2 guilty of having misappropriated public funds by falsification of account and registers. On conviction, the first accused was sentenced to undergo rigorous imprisonment for two years, and to pay a fine of Rs. 5,000/- under Section 13(2) read with 13(1)(d) of the P.C. Act, to undergo rigorous imprisonment for two years each, and to pay a fine of Rs. 5,000/- each under Sections 420 and 468 IPC, and also to undergo rigorous imprisonment for a period of one year each under Sections 471 and 477A IPC. No separate sentence was imposed under Section 120B IPC, in view of the sentence under Section 13(2) of the P.C. Act. The 2nd accused was sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs. 5,000/- under Section 13(2) read with 120B IPC. He was also sentenced to undergo rigorous imprisonment for two years each under Sections 420 and 468 IPC, and to undergo rigorous imprisonment for one year each under Sections 471 and 477A IPC. Aggrieved by the judgment of conviction dated 14.06.2005 the two accused have come up in appeal.

4. When the two appeals came up for hearing, the learned counsel for the appellants submitted that the prosecution as against the 1st accused in this case is barred under Section 19 of the P.C. Act for the reason that the prosecution sanction stands not properly and legally proved, that many of the documents on which the prosecution relies are either not produced in court, or not properly and legally proved, that there is absolutely no material to prove the alleged conspiracy, that there is absolutely nothing to show that the 2nd accused, as the President of the PTA or otherwise, had taken up the responsibility of providing or purchasing furniture to the School, and that in the absence of anything to prove such a conspiracy, the 2nd accused cannot be punished under Section 120 IPC, or under the other Sections of IPC, because he was not the person in charge of accounts and registers alleged to have been falsified. On the other hand, the learned Public Prosecutor submitted that the case on facts stands properly proved, though there are some infirmities or shortcomings here and there, and that no formal proof of the prosecution sanction is required.

5. Before going to the factual aspects concerning the alleged falsification of accounts and misappropriation, let me analyse the evidence, and see whether there is anything in this case to prove a conspiracy as alleged by the prosecution, and also whether the prosecution has the required legal materials to prove the case. If the prosecution as against the 1st accused is really barred, as submitted by the learned counsel, or if the prosecution does not have any material to prove the alleged conspiracy, or if the very necessary and material documents like letters and certificates on which the prosecution relies to prove the case on facts, are not properly and legally proved, the court need not venture to discuss the evidence otherwise, and thus waste the precious time. Let me first see whether

the prosecution sanction granted by the competent authority to prosecute the 1st accused is properly and legally proved in this case.

6. Ext. P16 is the prosecution sanction granted by the Deputy Director of Education, Kozhikode. This was marked during trial by the Investigating Officer. There is no explanation why the prosecution did not examine the Deputy Director of Education to prove the prosecution sanction. As regards the necessity of proof of sanction granted under Section 19 of the P.C Act, this Court has settled the legal position, relying on various earlier decisions, that except in cases where the prosecution sanction will have sanctity or immunity under the law, the prosecution sanction will have to be proved by the person who granted the sanction. In *Antony Cardoza Vs. State of Kerala*, (2011) CriLJ 2107 : (2011) 1 ILR (Ker) 530 : (2011) 1 KLJ 500 : (2011) 1 KLT 946 , this Court held that the essentials regarding prosecution sanction including independent application of mind in the process of granting sanction will have to be proved by the person who granted it, and this responsibility cannot be taken over by somebody else. This Court observed that when the prosecution sanction including independent application of mind is not proved, by the sanctioning authority, it cannot be said that the prosecution sanction is properly and legally proved. Ext. P16 is not a sanction granted by the Government, or by order of the Governor of Kerala. This is not something issued or granted as part of the administrative business of the Government on the executive side, delegated under Rules of Business. Such a sanction will not have sanctity or immunity under the law, and it will have to be proved by the person who granted the sanction. In *Antony Cardoza Vs. State of Kerala*, (2011) CriLJ 2107 : (2011) 1 ILR (Ker) 530 : (2011) 1 KLJ 500 : (2011) 1 KLT 946 , the prosecution brought an Under Secretary to the Government to prove the prosecution sanction granted by the Principal Secretary. The Investigating Officer is not the competent person to prove a prosecution sanction issued by some other authority under Section 19 of the P.C Act. Section 19 of the P.C Act even bars cognizance in the absence of a proper prosecution sanction granted by the competent authority. Such sanction granted by the authority competent to remove the public servant from service must be proved by the said authority during the trial process. If not so proved, as prescribed under the Indian Evidence Act, such a sanction simply marked by the Investigating Officer cannot be accepted as a proper and legal sanction. In such a situation, the bar of cognizance under Section 19 of the P.C Act would apply, and the accused will have to be acquitted on the ground that the whole prosecution is barred. In this case, I find that the 1st accused is entitled for acquittal on this legal ground, whatever be the evidence on facts.

7. Now let me see whether the prosecution in this case has any basis. Every edifice will collapse if not built on strong basis. If the prosecution does not have solid basis, necessarily it must collapse. Section 154 of the Cr.P.C deals with First Information Report. The F.I.R in this case was registered by the vigilance on the basis of a report of enquiry. What led to such an enquiry is in fact a complaint made by two persons as office bearers of a political organization. Thus,

practically the basis of the prosecution is in fact the complaint made by those two persons on 31.8.1998. The said complaint is not seen proved in evidence, and the report of enquiry is also not seen proved in evidence. The Deputy Superintendent of Police simply marked the F.I.R during trial.

8. First Information Report can be registered under Section 154 of Cr.P.C only on the basis of some material revealing the commission of a cognizable offence. That material can be either a written or an oral complaint, or any other material revealing the commission of a cognizable offence, and it can even be the information directly received by the person, who registered the F.I.R. Whatever be the material that revealed the commission of a cognizable offence, that material must be proved in evidence as part of proof of the F.I.R. Here, the F.I.R was registered on the basis of a report of enquiry. The Dy. SP, who registered the F.I.R does not say in evidence that the enquiry was conducted by him. The original complaint is before the court as part of the files, but that was also not proved in evidence. None of the complainants, who made such a complaint was examined by the prosecution during trial. When investigation in a case proceeded on the basis of a First Information Report regarding the commission of a cognizable offence registered on the basis of a definite complaint revealing the commission of a cognizable offence, the complainant or the person who knows about such materials revealing the commission of a cognizable offence must be examined to prove the complaint. This is the law applicable to all the prosecuting agencies. The Vigilance in Kerala cannot have any other law. Whether it is Kerala Police, or any other wing of the Police, or the vigilance or the CBI, all prosecuting agencies are governed by the provisions of the Code of Criminal Procedure and also by the provisions of the Indian Evidence Act. The vigilance or the CBI cannot make or evolve their own procedure in the matter of investigation or trial. In this case, the prosecution does not have any explanation why any of the complainants was not examined, or why the complaint was not proved or marked during trial, or why even the report of enquiry that led to registration of crime was not marked and proved by the person who conducted the enquiry. In short, I find that this prosecution does not have any basis. So the prosecution built without solid basis must necessarily collapse. Consequently, the accused will have to be acquitted.

9. To prove the case on facts including the alleged criminal conspiracy, the prosecution in this case relies on three important materials. One of the materials is a letter given by the 1st accused to the Secretary of the Grama Panchayat regarding receipt of all items of furniture in the school when all items were not, in fact, received in the school. The other material is a letter or certificate given by the successor Headmistress to the Secretary of the Panchayat that such items are not in fact received in the school, and the third material is the report of inspection submitted by the Assistant Educational Officer. The said report of inspection is seen marked as Ext. P10. There is no explanation why the Assistant Educational Officer, who prepared the said report was not examined to prove the report. What is very interesting in this case is, that the prosecution simply

proved some files containing some material documents, but did not properly prove the material documents contained in the files. This practice as part of trial process must be stopped. Simply marking a file containing material documents will not amount to proof of the materials contained in the file. Ext. P2, P6 and P7 are some files produced by the prosecution and marked during trial. All these files contain some very important materials like Minutes of the Panchayath meeting, certificates, etc.

10. The prosecution case is that as part of a conspiracy hatched by the three accused to receive funds from the Panchayat before actually providing the entire quantity of furniture, the 1st accused made false entries in the furniture register showing receipt of all the items, she even gave a letter to the Panchayat Secretary that all the items are received in the school and on the basis of this letter, the 2nd respondent received the funds from the Panchayat. Of course, the furniture register is produced in court and this register contains the relevant entries also. The most important document to prove the case against the 1st accused is the certificate or the letter given by her to the Secretary of the Panchayat, that all the items of furniture are received in the school. But this specific certificate is not seen proved in evidence by anybody. It is contained in the files. What is marked is only the file, and nobody proved the very material certificate issued by the first accused. Yet another document is contained in Ext. P7 file. This is the certificate issued by the successor Headmistress, that all the required items are not seen received in the school, though such entries are seen wrongly made in the furniture register. This particular certificate, which is a very material document, is also not seen proved in evidence. As already stated, simply marking a file will not prove the material document contained in the file. A document which requires proof under the Indian Evidence Act must be properly and legally proved by the person who issued the document. There is no explanation why the prosecution did not examine the successor Headmistress to prove this very material certificate, which will definitely prove the prosecution case.

11. It appears that our prosecuting agencies are not aware of the rules of procedure, and also the provisions of the Indian Evidence Act regarding proof of documents. The prosecution in this case simply marked some files containing very material documents like certificates. But the prosecution did not venture to prove the very material documents like certificates which will definitely prove the prosecution case. The very allegation against the 1st accused is that she made false entries in the furniture account and issued a false certificate to enable the other accused to receive the funds from the Panchayat. When the prosecution relies on such a false certificate issued by the 1st accused, and another certificate issued by the successor Headmistress containing the true facts, the prosecution is bound to prove both the certificates during trial, and only these certificates will prove the prosecution case. These material certificates are there in the files, not being in any manner proved by anybody during trial. Those certificates or documents will safely remain in the files without forming part of

the evidence. So long as those documents do not form part of the evidence, no value can be attached to these papers in the decision making process. The learned Director General of Prosecutions, Kerala will have to instruct all the prosecuting agencies properly in view of this judgment, as to how documents relied on by the prosecution must be proved according to law.

12. It was submitted by the learned counsel for the second accused that the prosecution does not have any material to implicate him. The prosecution case is that as resolved by the Panchayat in a meeting, the work of making furniture or purchase of furniture was entrusted to the 2nd accused as President of the P.T.A. The decision of the P.T.A committee to take up such a work, or the minutes of such a meeting, is not seen produced in court. The Investigating Officer did not seize any document or material proving the fact that the work of making furniture or purchase of furniture was taken up by the second accused. If some work is entrusted to a particular person in some capacity by resolution, there will be such resolution in the Minutes Book of the Panchayat. Such a resolution is also not seen proved in this case. There is nothing to show that the 2nd accused was in fact the President of the P.T.A. The Investigating Officer did not seize any material relating to the Parents and Teachers Association, or anything to prove that the 2nd accused was President of the Association, or that the required work was taken up by him in his capacity as President of the P.T.A. It was submitted that the original document proving the said fact has been produced in a civil suit. If it is true, there is no explanation why the prosecution did not obtain a copy of the said material document from Civil Court and produce it in this case. In the absence of any material or document, implicating the 2nd accused or proving that the work of making furniture or purchase of furniture was taken up by him from the Panchayat in his capacity as President of the P.T.A, the 2nd accused cannot be found guilty or punished. In the absence of anything to prove the alleged offence against the 1st accused, or in the absence of anything to prove that the required items of furniture were not in fact received in the school, there is no question of the 2nd accused being punished for having made criminal conspiracy also.

13. On an examination of the whole files, and on an appreciation of the entire evidence, I find that the way in which the VACB made investigation in this case and conducted prosecution deserves comments. I restrain myself from making harsh comments, with the hope that the learned Director General of Prosecutions will properly instruct all concerned, and our Vigilance will mend its ways taking guidance from the observations made in this judgment. It is pertinent to note that in *Antony Cardoza v. State of Kerala*, this Court has made some remarks and observations regarding the ways in which cases are being prosecuted by the vigilance. The Vigilance Department cannot have its own procedure for trial. Every case; be it a police case, or vigilance case, or CBI case, will have to be properly and legally proved, and every material or document will have to be proved properly as prescribed under the Indian Evidence Act. If the necessary things forming the basis of a prosecution are not there, the prosecution will

collapse.

14. On an appreciation of the entire evidence, I find that the prosecution has miserably failed to prove the case against the appellants. Just because the second accused received some amount from the Panchayat and utilised it for his own purposes, he cannot be found guilty or punished by the court. There is evidence to show that the 2nd accused had received an amount of Rs. 20,000/- from the Kadalundy Grama Panchayat. This will not by itself make him liable under the Penal Law. If the prosecution alleges that it was received under an obligation to do something, and that the accused misappropriated the amount without discharging his obligation or liability, the prosecution must have definite material to prove the essentials. Simply proving receipt of money from the Panchayat will not prove the essentials of the offence alleged. In the absence of proof of the material documents, against the 1st accused, there cannot be any finding against the 1st accused, and she cannot be found guilty or punished. In fact, even otherwise the 1st accused is entitled for an acquittal because in the absence of a properly proved prosecution sanction, the prosecution against the 1st accused is barred under Section 19 of the P.C Act. When there is no material to prove the guilt of the 1st accused, the 2nd accused also will have to be acquitted. Even otherwise, I find that the prosecution does not have any definite material against the 2nd accused, except some documents showing that he had received an amount of Rs. 20,000/- from the Panchayat. Thus, as discussed above, I find failure on the part of the prosecution to prove the case against these two appellants.

15. In the result, these two appeals are allowed. The conviction and sentence against the appellants in these two appeals, made by the court below in C.C No. 11 of 2001 will stand set aside, and the two appellants will stand acquitted in appeal under Section 386(b)(i) of Cr.P.C on the finding that they are not guilty of the offences alleged against them in the court charge. Accordingly, they will stand released from prosecution, and the bail bond, if any, executed by them will stand discharged.