
(1989) 02 KL CK 0051

In the High Court Of Kerala

Case No : Criminal A No's. 406 A 434 of 1987

Purushothaman and Others

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 14-02-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 162
Penal Code, 1860 (IPC) — Section 107, 120B, 441
Prevention of Corruption Act, 1988 — Section 5(2)

Citation : (1989) 1 KLJ 340

Hon'ble Judges : K.T. Thomas, J

Bench : Single Bench

Advocate : M.N. Sukumaran Nair, O.V. Radhakrishnan, Pirappancode V. Sreedharan Nair and . B. Raghunathan, for the Appellant; Chincy Gopakumar Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

K.T. Thomas, J.—Some students of the Engineering College, Trivandrum, were lured into paying gratification money to the Examiner for giving them pass marks, but the bribe receivers were caught red-handed by the Vigilance officers. This is the gist of the case in which three accused were convicted and sentenced to different terms of imprisonment and fine. These appeals are in challenge of the said conviction and; sentence. The examination (called Survey Practical Examination) was held on 24-11-1983 for which the second accused was the "External Examiner" and the third accused was the "Internal Examiner". Some of the participants in the examination were appearing for the third chance in the examination and a failure this time would have resulted in losing one year in their academic course. For such students, the examination held on 24-11-1983 was termed as "critical examination". The second accused was, at the relevant time working on deputation as Controller of Examinations in Gandhiji University and the third accused was then working as Assistant Professor of Civil Department in the Engineering College, Trivandrum. Altogether

twenty students: appeared for the practical examination, but only three of them secured pass marks. The prosecution case can now be narrated in the aforesaid background.

2. P. W. 1, a student in the Vth Semester came to know that the second accused would add up marks to those who approach him with money and that the first accused would act as go between. (First accused was the second grade Skilled Assistant of the Engineering College). Other students who were anxious to have more marks also had the same information. A few among them met the third accused for advice, but he told them that only way to get out of the situation was to meet the second accused who is "a money minded man". Taking the cue from the third accused, those students decided to approach the second accused. The guardians of some of them directly approached the second accused and paid him rupees one thousand each. Some of the students used the services of the first accused to hand over the cash to the Examiner. P. Ws. 1 and 4 were classmates who did the survey practical examination. They ventured to elicit from the second accused the result of the examination. But the second accused declined to divulge, the results to them but told them that they had sufficient time to "co-operate". However, they collected information from the first accused that P. W. 4 was among the failed candidates. First accused gave them sufficient hint that if the amount demanded was paid to him, the second accused would do the needful. Third accused advised them to act in the same way as the other students did.

3. The crucial events happened on the following two days. P. W. 1 met the first accused during evening on 7-12-83 in front of Arts College, Trivandrum, and handed over Rs 500/-. With that money the first accused in the company of P.W.1 and another friend (P. W. 5) proceeded to the second accused's residence. First accused, who alone went inside the house, reported to P. W. 1 later that the cash was paid to the second accused. However, the first accused told them that the balance must be paid at least on the next day. P. W. 1 was then convinced that the second accused receives money to add more marks to the losers. The idea then occurred to him that the Vigilance Officers should be informed about it. On the next day P. W. 1 went to the vigilance office and gave a statement to the Dy S.P. (Ext.PI). He mentioned the numbers of currency notes already given to the second accused and also the numbers of the five other hundred rupees notes which he proposed to give to the first accused to be passed on to the second accused. The Dy. S.P. wanted to arrange a trap to catch the bribe receivers. On his request the District Collector deputed two responsible officers as witnesses for the trap. Phenolphthalein powder was smeared on the currency notes. Thereafter P.W 1 accompanied by P.W 2, proceeded to Arts College junction and handed over the amount to the first accused who was waiting there as agreed previously. The first accused put the currency notes into his pocket. They then proceeded to the second accused's house, but this time also the first accused alone went inside the house while others remained outside the gate watching the movements inside. As the first accused came out, he was decoyed to a hotel

where the vigilance party was waiting. The Dy. S. P. intercepted him and phenolphthalein test was conducted on his fingers and shirt's pocket. The test turned out to be positive.

4. The vigilance party then went to the second accused's house. After informing him of the purpose of their visit, the Dy. S. P. conducted phenolphthalein test on the fingers of the second accused. Here also the result of the test was positive. The second accused took out the currency notes from the table drawer. He also produced Rs. 3,600/- as the balance amount available with him from out of the collections received from other students.

5. Learned Special Judge found that the prosecution story regarding payment of Rs. 1,000/-, in two installments, to the second accused has been established. However, learned Special Judge did not fully accept the prosecution story regarding the other payments. He concluded that the case of criminal conspiracy between the three accused and the indictment regarding receipt of illegal gratification has been proved. Accordingly, he convicted all the three accused for the offence under Sec. 120B of the Indian Penal Code. The first and second accused were also convicted for the offences under S 161 of the Code and Sec. 5 (2) of the Prevention of Corruption Act, while the third accused was convicted for the offence under the Code.

6. The stand adopted by the first accused is that some currency notes were thrust into his pocket which were later taken out to be planted inside the table drawer of the second accused. According to the second accused, some interested persons had planted the currency notes inside the drawer without his knowledge. The third accused denied his complicity in this episode.

7. There is no dispute that the currency notes were recovered from the table drawer. The numbers of those currency notes have been separately noted in Ext. P1 (a) mahazar attached to the First Information Statement. P. W. 1 has explained that he had noted those numbers in Ext. P2 book even before he proceeded to give them to the first accused. It was contended that the First Information Statement and the attached mahazar would have been written up only after collecting currency notes from the residence of the second accused.

8. P. W. 2, a Deputy Collector and P. W. 2, an Assistant Collector of the Revenue Department have stated in their evidence that they were present in the vigilance office when the last portion of Ext. P1 was recorded and that one among them (P.W.2) went along with P. W. 1 to hand over the second installment. P. W. 2 said that he had witnessed the act of passing the currency notes to the first accused. Those two witnesses have further said that they were present when the Dy. S P. conducted the first phenolphthalein test on the fingers of the second accused, and also when the currency notes were recovered from the table drawer. If the evidence of P.Ws. 2 and 3 is found reliable it takes a long way off in establishing the prosecution case against the first and second accused. The fact spoken to by them that when phenolphthalein test was conducted on the fingers of the second

accused is sufficient to smash the second accused's strategy that the currency notes were planted inside the drawers by some one without his knowledge. He has no other explanation at all for the presence of phenolphthalein on his fingers even before he took out the currency notes from the table drawers.

9. The evidence of those two attesting witnesses was attacked on the ground that the vigilance officers had pinned them down by obtaining their signature in the mahazars prepared as contemporaneous records and hence they have no freedom to speak differently. Learned counsel criticised the practice of taking signatures of the witnesses in mahazars as disfavored by legislative indications. There is an interdict in Sec.162 of the Code of Criminal Procedure that no statement made by a person to a police officer in the course of investigation shall be signed by the person making it. But a Punchnama or a Mahazar is not a record of the statement made by the attesting witness. It is intended to contain the minutes or record of what the investigating officer sees or witnesses. What he sees can be seen by the persons present with him as well. So long as a mahazar does not contain the statement of the attesting witnesses, there is nothing legally wrong in collecting their signatures therein. The purpose in collecting such signatures is to give assurance to all concerned that contemporaneous records have been prepared truly and correctly. The embargo contained in S. 162 does not apply to such records prepared by the investigating officers. If the evidence of the attesting witnesses is otherwise reliable, it would not get weakened merely because of their signatures in the records.

10. It was pointed out by a Division Bench of the Bombay High Court in *Ramchand Tolaram v. State* (AIR 1956 Bombay 287) that if the "panchas" are not parties to the trap and do not share in the intention of the decoy or the trap witness or the police who raid with the objective of trapping and are there only for the purpose of witnessing what was taking place, there is no reason to treat them as not independent witnesses. The learned Judges observed thus: "To put the matter in a nutshell, the police take the panchas with themselves so that they should watch what happens. They are not interested in what happens nor are they parties to the trap. The law of the land requires that certain things should be done by the police in the presence of independent respectable persons so that the presence of the said persons may put the particular transaction beyond the pale of suspicion. In these circumstances to construe the conduct of independent and respectable people, who accompany the police at the asking of the police to serve as panchas, as being the conduct of partisan persons would be grossly unfair to these people". In *Ramanlal v. State of Bombay* (AIR 1960 S. G 961) panchas who were responsible officers chosen by a Dy. S. P. to witness the trap gave evidence in court. While considering the evidence their lordships referred to the status of those two witness, the absence of any connect on between them and the complainant, the improbability of their being willing tools in fabricating false evidence against an innocent person—Those considerations weighed with the Supreme Court in accepting the evidence of those witnesses, though they had given their signatures in the mahazar. A. Division Bench of the

Gujarat High Court in *M. H. Mehta v. State* (ILR 1967 Gujarat 386) has observed that the mere fact that the witnesses were panch witnesses does not make them interested witnesses.

Their status, the presence or absence of any motive to favour or disfavour a party, the dispassionate nature of their evidence and all other factors bearing on their independence and reliability and the probabilities of their story may be taken into account.

11. The evidence of P. Ws. 2 and 3 does not suffer from any blemish. There is no reason to think that those responsible officers would have said anything which is untrue in court. They have obviously no prejudice against the accused and the defence did not even suggest anything like that against them

12. The decision in *Suraj Mal v. State* (AIR 1979 S. C. 1408) was cited by the learned counsel to contend that mere recovery of money divorced from the circumstances under which it is paid is not sufficient to convict accused when the substantive evidence in the case is not reliable. True, the evidence of P. Ws. 2 and 3 is not sufficient to prove the guilt of the accused. But their evidence lends assurance to the truth of the evidence given by P.Ws. 1, 4 and" 5. It may be that those three students had the intention to book the accused. Though the genesis of the episode is the failure of those students to secure pass marks, it snowballed into the present shape, on account of the greed of the second accused as also the enthusiasm of some students to book him up. This antecedent attitude of the witnesses, no doubt, sounds caution that their evidence needs careful scanning. Having done so, I feel confident that the said evidence deserves acceptance I do not find any reason to disturb the finding made by the lower court as against the first and second accused.

13. The evidence against the third accused consists of the testimony of PWs 6,7,9 and 13 besides the evidence regarding the method of valuation and awarding marks in the examination. What has come out in evidence against the third accused is that he had suggested to some students that since the second accused is a money minded man they should approach him and tackle him by any means necessary.

14. The evidence is hardly sufficient to draw the inference that there was criminal conspiracy involving the third accused. As he was convicted for the offence under Sec.165A of the Code which involves abetment, the question has to be considered whether the role attributed to him will amount to abetment.

15. Sec. 107 of the IPC which contains the definition of abetment has three clauses, and if an act of a person falls within the purview of any of them it would amount to abetment. The first and second clauses are not germane in this context and hence the third clause is reproduced here. "A person abets the doing of a thing who intentionally aids, by any act or illegal omission, the doing of that thing". The scope of the word "aids"" has been clarified in Explanation-2 which reads thus: "Whoever, either prior to or at the time of commission of an act,

does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act". The said explanation does not say what would or would not amount to "intentionally aids". It only explains what is meant by aiding simpliciter. This means that an act which merely amounts to aid in the commission of an offence is not abetment. The aiding must snow-ball into "intentionally aiding" the doing of a thing. When can you say that a person has intentionally aided the commission of an offence? The commission of the act must be the dominant intention of the person who aids it. Then only it can be said that he "intentionally" aided it. If there is community of interest between the aiding person and the one who commits the offence, there is possibility to draw the inference that the dominant intention was to aid the doing of that particular act. If the person only knows or has only the reason to believe that his act would facilitate the commission of offence, it cannot be said that his dominant intention was that. EX:-A tells his brother B who is to undergo a surgery that the surgeon concerned (C) is a greedy person and hence the surgeon must be paid some amount in advance to have the surgery properly done. B pays the amount to C. If the acceptance of the money would amount to an offence, the act done by A in telling his brother is doing something in order to facilitate the commission of the offence. But the intention of A is to have his brother's surgery performed properly although A knows that acceptance of the money by the surgeon is an offence. Here A's suggestion cannot be said to be an act which intentionally aids the commission of the offence. Mukerji, J. has observed in *Emperor v. Ram Nath* (ILR 1925 Vol. XLVII Allahabad 268) "The intention should be to aid the commission of a crime. A mere giving of an aid will not make the act an abetment of the offence.....". The observation made by Batty, J. in *Bhagwant Appaji v. Kedar Kashinath* (ILR 1901 Vol. XXV 202) is considered to be "one of the best expositions of the meaning of the word intent as used in the Indian Penal Code". The learned Judge has stated thus (at page 226): "The word intent by its etymology seems to have metaphorical allusion to archery and implies aim and thus connotes not a casual or merely possible result-foreseen perhaps as a not improbable incident, but not desired-but rather connotes the one object for which the effort is made-and thus has reference to what has been called the dominant motive without which the action would not have been taken". This was followed in *Phul Kumari Vs. Sheodahin Tiwary and Another*, . While dealing with the expression "with intent" in Sec. 441 of the IPC the Supreme Court has said that it means the dominant intention (Vide *Mathuri and Others Vs. State of Punjab*,). The same interpretation can be imported to the similar expression employed in Sec. 107 of the IPC. In this case the third accused would only have intended that deserving students should not suffer on account of the money thirst of the second accused. Hence his suggestion will not amount to abetment of the commission of the offence. In this view the third accused cannot be convicted for any of the offences. His conviction and sentence are hence set aside and he is acquitted. But, I confirm the conviction and sentence passed on the first and second accused and dismiss the appeals filed by those accused.