**(2021) 01 KL CK 0165**

**In the High Court Of Kerala**

**Case No :** Criminal Revision Petition No. 1297 Of 2019

Shiju S — APPELLANT

Vs

Sub Inspector Of Police And Ors — RESPONDENT

**Date of Decision :** 05-01-2021

**Acts Referred:**

Code Of Criminal Procedure, 1973 — Section 239
Indian Penal Code, 1860 — Section 34, 120(B), 201, 379, 417, 419, 420, 448, 468, 471
Information Technology Act, 2000 — Section 43(a), 43(g), 66

**Citation :** (2021) 01 KL CK 0165

**Hon'ble Judges :** Ashok Menon, J

**Bench :** Single Bench

**Advocate :** M. Rajendran Nair, A.D. Shajan, Sreejith R. Nair, C.S. Hrithwik

**Final Decision :** Dismissed

## Judgement

1. The petitioner is the 7th accused in CC No.12/2013 on the files of the Judicial First Class Magistrate's Court-II, Kollam for having allegedly committed offences punishable under Sections 417, 419, 420, 448, 468, 471, 379, 120 B, 201 and 212 read with Section 34 of the I.P.C and under Section 66 read with Section 43 (a) and (g) of the I.T. Act.

2. The prosecution case, in brief, is that the petitioner hatched a conspiracy with the remaining accused to commit malpractices in the examination conducted by the Kerala Public Service Commission on 12/10/2010 for the post of Sub Inspector of Police. The applicant as also accused numbers 4 to 6 and 11 were candidates who appeared for the examination. The conspiracy was hatched at the residence of the 1st accused at Mayyanad, on the 8th, 9th and 10th and 11th of October 2010. He was working as a Junior Superintendent in the industry department. Accused numbers 2, 3, 8, 10 and 12 agreed to obtain the question paper for the examination fraudulently and thereafter, the 1st accused obtained a hall ticket by deceit and forged an ID card for the 8th accused enabling him to

trespass into the examination centre at the Government Higher Secondary School, Sankaramangalam. It was the 1st accused who allegedly stole the hall ticket issued to witness No. 108 from his letterbox and handed it over to the 12th accused to obtain a question paper having 'A' alpha code, which he stealthily passed over through the window of the examination hall to the 3rd accused. Thereafter, A1 obtained the question paper from A3 and collected the correct answers from the 9th accused, a lawyer by profession on the understanding that A1 would be touting for him. In pursuance of the conspiracy, the petitioner was supplied answers to the questions by A1 through his mobile phone bearing No. 9746334678 stealthily concealed in his body and connected to an earphone. There are specific allegation that the petitioner had participated in the conspiracy that was hatched in the house of A1 on 11/10/2010. The understanding was that A4 to A7 and A11 had agreed to pay ☐ 500,000/- each to A1 and they had also paid ☐ 2000/-each as advance. A1 had allegedly distributed ☐ 500/- each to A3, A8 and A10 from out of the advance that he had received.

3. The petitioner states that apart from the allegations made in the final report against him, there is no material produced by the prosecution to prove his complicity. It is further stated that the petitioner had appeared for the examination but failed to clear the test and got very low marks. His result was not withheld and has not been barred for any malpractice in the examination. It is stated that had he been provided with the answers, he would have easily qualified the test. There is also no record of a material indicating payment of ☐ 2000/-by the petitioner to A1 as advance. There is no manipulation of the alpha code. It is further stated that there were only 12 candidates appearing for the exam in the examination hall where the petitioner had appeared. Any malpractice by the petitioner could easily have been detected by the invigilator. The petitioner was working as H.S.A in the Government Higher Secondary School and Anchal West. Because of the pendency of this case against the petitioner his probation in the post of H.S.A is yet to be declared. The petitioner is also eligible to apply for the post of lecturer in college. But because of the pendency of this case he has not been able to do that. There is no material to show that the petitioner had forged any document. The petitioner had filed CMP No.4109/2018 to get in discharge under Section 239 of the Cr.P.C. However the learned Magistrate dismissed the petition and proceeded to frame charges against the applicant.

Aggrieved by that, he has approached this Court by the revision.

4. Heard the learned counsel Shri M.Rajendra Nair appearing for the petitioner and Shri C.S.Hrithiwik the Senior Public Prosecutor for the State. Records perused.

5. It is the argument of the learned counsel Shri Rajendra Nair that even if the prosecution case as alleged is to be believed, at the most the petitioner could only be held for malpractices and not for an offence of cheating of forgery and theft trespass etc. as alleged by the prosecution. Hence, the learned counsel

 

submits that the trial Court went wrong in not discharging the petitioner under Section 239 of the Cr.P.C.

6. Per contra, the learned Prosecutor argues that the petitioner was an active member of the conspiracy. The petitioner had received phone call on the aforesaid phone numbwe between 8 AM and 9 AM while he was inside the examination hall. There is evidence collected to prove purchase of the mobile phone and the sim card which was used for the malpractice. The prosecution has 151 witnesses to testify apart from 146 documents and 308 material objects to prove their case against the 16 persons arrayed as accused.

7. This is a case of malpractice in a recruitment process conducted by the Kerala Public Service Commission for an important post in the Police department. Such malpractices are on the rise and the perpetrators are depriving genuine candidates who burn midnight oil to prepare for such examinations, of their chance to get selected for the post.

8. In the case of All India Railway Recruitment Board Vs. K. Shyam Sundar [2010(6) SCC 614], the Hon'ble Supreme Court while dealing with the issue of leakage of question paper, observed thus:

"50. We are also of the view that the High Court was in error in holding that the materials available relating to leakage of question papers was limited and had no reasonable nexus to the alleged large scale irregularity. Even a minute leakage of question paper would be sufficient to besmirch the written test and to go for a re-test so as to achieve the ultimate object of fair selection."

In the case of Nidhi Kaim Vs. State of Madhya Pradesh and Ors. [2016(7) SCC 615], taking note of gradual rise of malpractices, academic fraud and cheating in examination, the Hon'ble Apex Court of the land, observed thus:

"134. Examination malpractices, academic fraud or cheating in the examination is as old as the examination itself. Study made by the educationist has revealed that these malpractices are gradually on the rise across the world and has caused a threat to public trust in reliability and credibility to the system as a whole. These (CW-4521/2018) malpractices occur within and outside the examination halls and are perpetrated by the candidates, staff and other external agencies before, during and after the examination. Various kinds of strategies are innovated and then applied to enable the candidate to clear the examination any how. It has, therefore, destroyed the piousness of the examination. With a view to prohibit such activities, State of A.P. had enacted a legislation but it was found inadequate to control such activities."

Cheating is defined under S.415 of the Indian Penal Code as whoever fraudulently or dishonestly deceives a person in order to induce that person to deliver a property to any person or to consent to retain any property. If a person intentionally induces a person to do or omit to do any act which he would not have done if he was not deceived to do so and the act has caused harm to that person in body, mind, reputation or property, then the person who fraudulently, dishonestly or intentionally induced the other person is said to cheat. Any dishonest concealment of facts which can deceive a person to do an act which he would not have done otherwise is also cheating within the meaning of this section.

9. Cheating is considered as a criminal offence under the Indian Penal Code. It is done in order to gain profit or an advantage from another person by using some deceitful means. The person who deceives another knows for the fact that it would place the other person in an unfair situation. Cheating as an offence can be made punishable under S.420 of the IPC.

10. In a warrant case instituted on a police report, the Magistrate is obliged to consider the police report and the documents sent with it under S.173 of the CrPC and come to a conclusion as to whether the charge against the accused is groundless. In that event, the accused has to be discharged. In all other cases it will have to be held that there is ground to presume that the accused has committed the offence and charges must be framed under S.240 of the CrPC. I extract below S.239 and S.240 of the CrPC:

"239. When accused shall be discharged.

If, upon considering the police report and the documents sent with it under S.173 and making such examination, if any,of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the ccused, and record his reasons for so doing.

240. Framing of charge.

(1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried."

In Kuriachan Chacko and Others v. State of Kerala [2007 (3) KHC 278], this Court has held thus:

"15. A careful consideration of S.227 and S.228,S.239 and S.240 and S.245(1) and S.246 of the CrPC must show that in all these three instances if the cases do not fall under the former of the pairs it has got to fall within the latter of the pairs. Though loosely the requisite satisfaction is referred to as a prima facie case, to me, it appears that it would be idle to assume that the quality of consideration of the materials at these stages are identical in all respects. When it comes to a police charge, discharge under S.239 of the CrPC is possible only if the Court entertains the satisfaction that the charge is groundless. This is evidently a shade different from the satisfaction which must be entertained under S.245(1) of the CrPC. Both would come under the generic description of a prima facie case. The legislature appears to have realistically taken note of the fact that a police charge comes before the Court after it is vetted by the instrumentality of the police which is an indispensable part of the criminal justice delivery system.

16. To sum up, I do note that a discharge under S.239 of the CrPC is possible only when the Court entertains the satisfaction that the allegations / charge against the accused is groundless. No detailed evaluation of the materials or meticulous consideration of the possible defences need be undertaken at this stage. The exercise of weighing materials in golden scales is certainly not to be undertaken at this stage and has to be postponed to a later date. Is the allegation / charge groundless? That alone need be considered at the stage of S.239/240 of the CrPC."

In Union of India v. Prafulla Kumar Samal and Another, [1979 (3) SCC 4], the Hon'ble Supreme Court was examining a similar question in the context of S.227 of the Code of Criminal Procedure. The legal position was summed up as under:

"10. Thus, on a consideration of the authorities mentioned above, the following principles emerge :

(1) That the Judge while considering the question of framing the charges under S.227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out:

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under S.227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post Office or a mouth - piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

 

The Hon'ble Supreme Court has in State by the Inspector of Police, Chennai v. S. Selvi and Another, [2017 KHC 6899 : AIR 2018 SC 81], considered the scope of S.227 and S.239 Cr.P.C. and observed thus:

"If on the basis of the material on record, the Court would form prima facie opinion that the accused might have committed offence, it can frame charge, though for conviction it is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of charges, the probative value of the material on record has to be gone into and the Court is not expected to go deep into the matter and hold that the materials would not warrant conviction. The Court is required to evaluate the material on record at the stage of S.227 or 239 of the Code, as the case may be, only with a view to find out if the facts emerging therefrom taken at the face value discloses the existence of all the ingredients constituting the alleged offence. It is trite that at the stage of consideration of an application for discharge, the Court has to proceed with the presumption that material brought on record by the prosecution are true and evaluate such material with a view to find out whether the facts emerging therefrom taken at their face value disclose existence of the ingredients of the offence."

If on the basis of the material on record, the Court could prima facie form an opinion that the accused might have committed offence, it can frame charge, though for conviction, it is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of charges, the probative value of the material on record has to be gone into and the Court is not expected to delve deep into the accusation and hold that the materials would not warrant a conviction. The Court is only required to evaluate the material on record at the stage of S.239 of the Code, only with a view to find out whether the facts emerging therefrom taken at the face value discloses the existence of all the ingredients constituting the alleged offence. It is trite that at the stage of consideration of an application for discharge, the Court has to proceed with the prosecution and evaluate such materials only with a view to find out whether the facts emerging therefrom taken at their face value would disclose the existence of the ingredients of the offence. It has to be considered whether those materials would sustain the accusation made against the accused. The Court need not, at this stage, be convinced about the sufficiency of the evidence to enter a finding of conviction. Elaborate arguments on scanning and scrutinising the evidence and materials produced by the prosecution is not contemplated while considering the question of discharge. I would, therefore, refrain from recording any positive conclusion on the materials as it may affect the trial. Suffice it to say that a bare perusal of the judgment of the trial Court would indicate that the Court had not exceeded its jurisdiction in declining to discharge the petitioner. This Court is not sitting in appeal against an order of conviction. The nature of the allegations made against the revision petitioner appears to be much too specific to be ignored at least at the stage of framing of charges. The Court below, therefore, did not commit any mistake in refusing a discharge. Hence, the Revision is dismissed.

 