

(2006) 09 MAD CK 0089

In the Madras High Court

Case No : Criminal Appeal No's. 719 and 720 of 2000

S.P. Meiappan and G. Chandragiri

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 14-09-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 360, 360(10), 433, 562, 562
Defence of India Act, 1962 — Section 43
General Clauses Act, 1897 — Section 8
Penal Code, 1860 (IPC) — Section 120B, 304A, 409, 467, 471
Prevention of Corruption Act, 1947 — Section 5(1), 5(2)
Prevention of Corruption Act, 1988 — Section 13(1), 13(2), 7
Probation of Offenders Act, 1958 — Section 18, 19
Reformatory Schools Act, 1897 — Section 31

Citation : (2007) 1 LW(Cri) 124

Hon'ble Judges : S. Ashok Kumar, J

Bench : Single Bench

Advocate : S. Ashok Kumar S.C. for A. Sasidharan, in Crl.A. No. 719/00 and V. Srinivasan, in Crl.A. No. 720/00, for the Appellant; N. Chandrasekaran, Spl. Public Prosecutor, for the Respondent

Judgement

S. Ashok Kumar, J.—These Criminal Appeals are directed against the judgment and conviction of the accused 1 and 2 for the offences u/s

120-B r/w. 409 IPC and u/s 13(1)(c) r/w. 13(2) and 13(1)(d) r/w. Section 13(2) of the Prevention of Corruption Act, 1988 and sentenced u/s

120-B IPC to undergo rigorous imprisonment for two years and to pay a fine of Rs. 1000/= i.e., to undergo three months rigorous imprisonment,

u/s 409 IPC to undergo rigorous imprisonment for two years and to pay a fine of Rs. 1,000/= i.e., to undergo three months rigorous imprisonment,

u/s 13(1)(c) r/w. Section 13(2) of the Prevention of Corruption Act, 1988 to undergo rigorous imprisonment for two years and to pay a fine of Rs.

1,000/= i.e., to undergo three months rigorous imprisonment and u/s 13(1)(d) r/w. 13(2) of the Prevention of Corruption Act to undergo rigorous imprisonment for two years and to pay a fine of Rs. 1,000/= i.e., to undergo three months rigorous imprisonment. The above sentences of imprisonment shall run concurrently.

2. The brief facts of the case are as follows:

A.1 was Officer of the Indian Bank, at Fort Branch, Salem. A.2 was also in charge of the currency chest of the same Branch. There were two

keys for the currency chest. The first key is with A.2 and the second key is with A.1. The keys were kept by different different officers by rotation.

On 21.12.1990 when the currency chest was verified by one M. Balraj, Senior Manager, 48 numbers of 100 Rupee notes totalling Rs. 4,800/=

were missing in Bin No. 23 and a mahazar was prepared by P.W.1. On the same day a sum of Rs. 1,00,000/= all hundred rupee notes were

found missing in Bin No. 87 also. On the same day on physical verification it was found that another sum of 20,000/= was missing in Bin No. 30 of

the currency chest. Though the currency chest key was kept by rotation by several officers as per the currency chest key register, responsibility

was fixed on A.1 who gave two letters viz., Exs.P.7 and P.13 admitting that he has misappropriated the amount and he also repaid the entire

deficient amount. Under Ex.P.14 to P.21, the entire amount was repaid by A.1 and thus there was no loss to the Bank. While so, on 13.1.1991 on

some information, the Central Bureau of Investigation registered a case under Sections 120-B r/w. 409 IPC, u/s 409 IPC, u/s 13(2) r/w. 13(1)(c)

and (d) of the Prevention of Corruption Act, 1988 and the FIR is Ex.P.27. There was no complaint from the Bank. But through some information

received from some other source, the case was registered against three persons, the appellants herein and one Chidambaram, who verified the

currency chest on 21.11.1990. However, the said Chidambaram filed CrI.R.C. No : 217 of 1997 before this Court and got himself discharged.

After investigation, final report was filed against these two appellants/accused for the offences mentioned supra and the Special Court for CBI

Cases at Coimbatore convicted both the accused as mentioned above. Aggrieved over the said conviction and sentence, these two appeals are

preferred by A.1 and A.2.

3. As far as A.2 is concerned, appellant in CrI.A. No : 720 of 2000, Mr. N. Chandrasekaran, learned Special Public Prosecutor for CBI would

fairly concede that there is no evidence at all against A.2 and therefore he could be acquitted. Except the fact that A.2 was also having the first

key, which was also kept in rotation by several officers, there is no evidence to show that A.2 had any role in the misappropriation of the amount.

Therefore, A.2 is entitled for acquittal and he is acquitted as conceded by the learned Special Public Prosecutor.

4. As far as A.1 is concerned, as pointed out by Mr. S. Ashok Kumar, learned Senior Counsel, there are several holes in the case of the

prosecution. For example, if the shortage of Rs. 4,800/= was made good as only on 11.1.1991, how could there be an averment in the sanction

order which contains that everything was all-right even as on 4.1.1991. Under Ex.P.2, shortage of Rs. 4800/= was noticed. Under Ex.P.5,

shortage of Rs. 1 lakh was noticed. Under Ex.P.8, shortage of Rs. 20,000/= was noticed. The case of the prosecution is that it was A.1 who

misappropriated the shortage amounts found in Ex.P.2, P.5 and P.8. Ex.P.1 is the Register showing the surprise verification and excess/shortage

recordings which would show at pages 10,11,13,14,15,17 and 18 that for all these days there was shortage of money and relevant entries were

also made with regard to the amount of shortage. But the prosecution has not fixed any responsibility of the persons who were in-charge of the first

and second keys at the relevant point of time when the above said entries of shortages were made as to who misappropriated the amounts

mentioned in those pages. A perusal of Exs.P.23 and P.24, the Key Movement Registers would show that the key of the currency chest was kept

by several officers by rotation. In fact on the date of verification, A.1 was on leave in view of his daughter's marriage. But in spite of all these

defects in the prosecution case, A.1 has submitted Exs.P.7 and P.13 letters admitting that he had misappropriated the amount for the performance

of his daughter's marriage and gave an undertaking to pay the amounts and as per Exs.P.14 to P.21, he has made good the loss.

5. As regards the conviction u/s 120-B IPC is concerned when there is no case as against A.2 then there is no question of conspiracy by A.1. One

person cannot have conspired by himself without consulting another person and therefore when A.2 is found innocent, the question of conspiracy

does not arise and therefore A.1 is entitled to be acquitted u/s 120-B IPC.

6. As far as charges u/s 13(1)(d) of the Prevention of Corruption Act, Section 13(1)(d) deals with obtaining pecuniary advantage i.e., corruption.

This is not a corruption case and therefore Section 13(1)(d) is also not applicable in the instant case and therefore the A.1 is entitled to be

acquitted for the offences u/s under Section 13(1)(d) of the Prevention of Corruption Act.

7. Learned senior counsel would also contend that Exs.P.7 and P.13 letters given by A.1 were obtained under coercion and threat that unless he

gives such letters and repay the money, a Police complaint would be made which will result in stopping the marriage of his daughter which was

scheduled within few days. If the accused was threatened to give such letter viz., Exs.P.7 and P.13 under coercion and threat, he should have

preferred a complaint that he was being threatened to do so, but on the other hand, the accused has not agitated against the alleged threat and

coercion. Moreover, when the accused was confronted with the missing money from the currency chest, he had no other option, but to give

Exs.P.7 and P.17 letters admitting his misappropriation and therefore he has repaid the money as seen from the records. Therefore, as far as

Section 409 IPC and Section 13(1)(c) read with Section 13(2) of the Prevention of Corruption Act is concerned in view of the admission made by

A.1, the offences alleged against him under these sections are held to be proved.

8. Mr. S. Ashok Kumar, learned senior counsel appearing for A.1 would contend that A.1 is now aged 72 years and he is not able to move

without the assistance of his relatives and if he is sent to jail for two years, he will not survive and prayed for leniency by invoking Section 360

Cr.P.C., In support of his contention, learned Counsel pressed into service an unreported judgement of this Court made in Crl.A. No. 667 of

1995 by Malai Subramaniam, J., wherein it has been held as follows:

7. The appellant was convicted for a single act of taking bribe both under Sections 7 and 13(2) r/w 13(1)(d) of the Prevention of Corruption Act,

1988. Section 7 of the Act punishes any public servant who takes gratification other than illegal remuneration as a motive or reward for doing any

official act in exercise of his official functions. Here is a case where the appellant in exercise of his official function, viz., measuring the land as a

surveyor had demanded and also accepted bribe. Therefore, the facts of the case clearly fit in within Section 7 of the Prevention of Corruption

Act, 1988. Insofar as Section 13(1)(d) is concerned, it speaks about the misconduct committed by public servants. There cannot be any dispute

that accepting a bribe is a misconduct. But when once there is a direct penal provision covering the guilt of the accused, he cannot be punished

both u/s 7 as well as u/s 13(2) r/w 13(1)(d) of the Prevention of Corruption Act. Section 13(1)(d) is applicable in case where prosecution is

unable to trap the accused and prove the actual demand and receipt of illegal gratification. Only in a case, where evidence is let in to the effect that

by abusing his power, the public servant obtained either for himself or for somebody any valuable thing or pecuniary advantage then Section 13(1)

(d) is attracted. Where there is specific provision for punishing a public servant for illegal gratification, another provision punishing misconduct need

not be invoked to punish the offender under two provisions of law for a single act of receiving a bribe. Therefore, I am of the view that the facts of

the case clearly attract the provisions u/s 7 of the Prevention of Corruption Act, 1988 and therefore, he could not have been punished u/s 13(2)

r/w Section 13(1)(d) of the Prevention of Corruption Act.

8. In the result, the conviction and sentence of the appellant for the offence u/s 13(2) r/w 13(1)(d) of the Prevention of Corruption Act is set aside

and his conviction for the offence u/s 7 of the Prevention of Corruption Act is confirmed. In so far as the sentence is concerned, the learned Senior

Counsel would submit that even the whereabouts of the appellant are not known and because there is a counsel on record, he was requested to

argue the matter. Moreover, the offence took place in the year 1992 and the alleged illegal gratification relates to an amount of Rs. 225/-. Taking

into consideration all these aspects, I am not inclined to confirm the sentence of imprisonment as well the fine, but instead I intend to invoke Section

360 of Cr.P.C.

9. Taking into consideration the meagre amount said to have been received by way of bribe by the appellant and also considering the fact that the

offence took place in the year 1992 i.e. 10 years back, the sentence awarded for offence u/s 7 of the Prevention of Corruption Act 1988 is set

aside and the appellant is ordered to be released on probation u/s 360 Cr.P.C.

The fine amount is ordered to be refunded.

9. With great respect to my learned brother, I am in total disagreement with the findings mentioned above. u/s 360 Cr.P.C., an order can be

passed to release on probation of good conduct or after admonition if it appears to the court before which he is convicted, regard being had to the

age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender

should be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released

on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three

years as the court may direct and in the meantime to keep the peace and be of good behaviour. But, Sub-section (10) of Section 360 Cr.P.C.,

reads as follows:

(10) Nothing in this Section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958) or the Children Act, 1960 (60 of

1960) or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders.

10. But, Section 18 of the Probation of Offenders Act reads as follows:

18. SAVING OF OPERATION OF CERTAIN ENACTMENTS:- Nothing in this Act shall affect the provisions of Section 31 of the

Reformatory Schools Act 1897 (8 of 1897), or Sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947 (2 of 1947) of any law

in force in any State relating to juvenile offenders or Borstal Schools.

11. It is the settled legal position that benefit of Probation of Offenders Act cannot be extended to an accused convicted of an offence punishable

with imprisonment u/s 5(1)(c) read with Section 5(2) of the Prevention of Corruption Act as has been held by the Hon"ble Supreme Court in State

of Gujarat Vs. V.A. Chauhan, . In the said decision Their Lordships of the Hon"ble Supreme Court held as follows:

In this case the only point involved is as to whether the provisions of Offenders Act would apply to the present case where the respondent was

convicted under Sections 409, 467 and 471 IPC and Section 5(1)(c) read with Section 5(2) of the Prevention of Corruption Act. The High Court

gave he benefit of the Probation of Offenders Act to the accused and since last

six years the respondent is enjoying this benefit. The matter seems to be concluded by the decision of this Court reported in *Som Nath Puri Vs. The State of Rajasthan*, here it has been held that the benefit of Probation of Offenders Act cannot be given to an accused convicted of an offence punishable with imprisonment for life. We entirely agree with this decision and hold that the Probation of Offenders Act is not applicable, but in the instant case, as the respondent has already been given the benefit of Probation of Offenders Act, we do not think it is in the interest of justice to interfere with it at this stage after so many years. The appeal is accordingly dismissed.

12. So also, in case of offences under a Special Act enacted after the Probation of Offenders Act which prescribes a minimum sentence of

imprisonment the provisions of the Probation of Offenders Act cannot be invoked if the Special Act contains a provision similar to Section 43, of

Defence of India Act, 1962, as has been held by the Apex Court in *Superintendent, Central Excise, Bangalore Vs. Bahubali*, . Likewise, in *Dalbir*

Singh Vs. State of Haryana, the Apex Court held that the benefit of the said Act should not normally be afforded in respect of the offences u/s

304-A IPC when it involves rash or negligent driving. These are the instances for showing how the nature of the offences could dissuade the Court

to give the benefit. The Apex Court also indicated that the courts should be wary of extending the benefit of Probation of Offenders Act to

offences relating to Corruption, narcotic drugs etc.,

13. Thus, there is a specific bar for invocation of Probation of Offenders Act for the accused convicted under Sections 13(1)(c) read with Section

13(2) of the said Act. As far as this case is concerned, the accused is convicted u/s 13(1)(c) of the said Act and also u/s 409 IPC. Therefore,

neither the provisions of the Probation of Offenders Act, nor Section 360 Cr.P.C., can be invoked to show leniency on A.1.

14. In this respect it is useful to refer to the judgment in *State through S.P., New Delhi v. Ratan Lal Arora* 2004 SCC 1353, wherein their

Lordships have held as follows:

In view of the provisions of Section 8 of the General Clauses Act, 1897, the references to Section 562 CrPC., 1898 and Section 5(2) of the

Prevention of Corruption Act, 1947 in Sections 19 and 18 of the Probation Act

respectively have to be inevitably read as references to their corresponding provisions in Cr.PC., 1973 and the Prevention of Corruption Act, 1988. Consequently, for the conviction u/s 13(2) of the Act the principles enunciated under the Probation Act cannot be extended at all in view of the mandate contained in Section 18 of the said Act. So far as Section 360 of the Code is concerned, on and from the date of extension and enforcement of the provisions of the Probation Act to Delhi, powers u/s 562 Crp.C., 1998 and after its repeal and replacement powers u/s 360 Cr.PC., 1973, cannot be invoked or applied at all, as has been done in the present case.

The judgments referred to above squarely apply to this case also.

15. However, Mr. S. Ashok Kuamr, learned Senior Counsel would submit that the accused has paid the entire amount as admitted by the prosecution and thus there is no loss to the Bank. The Bank has not lodged any complaint. But on some information, the CBI itself has registered a case and prosecuted the accused which ended in conviction. At the time of conviction the accused was 64 years of age and now he is 72 years old and according to the learned senior counsel his movements are restricted and he is not able to move freely without the assistance of his close relatives and would submit that if he is sent to jail he will not survive. Therefore, the learned senior counsel would submit the following judgments of the Hon''ble Supreme Court.

16. In N. Sukumaran Nair v. Food Inspector, Mavelikara reported in 1997 SCC 608 it has been held as follows:

3. The offence took place in the year 1984. The appellant has been awarded six months simple imprisonment and has also been ordered to pay a fine of Rs. 1000/= Under Clause (d) of Section 433 of the Code of Criminal Procedure, ""the appropriate Government"" is empowered to commute the sentence of simple imprisonment for fine. We think that this would be an appropriate case for commutation of sentence where almost a decade has gone by. We, therefore, direct the appellant to deposit in the trial court a sum of Rs. 6000/= as fine n commutation of the sentence of six months simple imprisonment within a period of six weeks from today and intimate to the appropriate Government that such fine has been deposited. On deposit of such fine, the State Government may formalise the

matter by passing appropriate orders under Clause (d) of Section 433 of the Code of Criminal Procedure.

17. In *Badri Prasad v. State of M.P.* reported in 1996 SCC 79, their Lordships have taken the similar view, which is as follows:

2. There is some scope, however, towards the sentence because this Court granted in 1989 leave and the appellant is on bail. We would rather now scale down the sentence of six months RI to three months simple imprisonment, which sustaining the fine of Rs. 1000 as awarded by the courts below. Subject to this modification in the sentence, the appeal otherwise fails. This has been made to enable the appellant to approach the State Government under Sub-clause (d) of Section 433 for conversion of simple imprisonment to fine. Since the adulteration was only by adding a colouring agent in the chillies power and that was possibly done to please the customer's eye, we recommend that the State Government release the appellant on the charging of Rs. 2000/= as fine and that an appropriate order be passed by the State Government to that effect within a period of three months. The appellant shall deposit in the trial court under two heads the fine imposed by the Court i.e., Rs. 1000/= as also the alterable fine of Rs. 2000/= within a period of three weeks from today and apprise the State Government of his having discharging his obligation. On his doing so the appellant need not be arrested.

18. Considering the age of the accused, the fact that he has already repaid the amount and the misappropriation was only temporary in nature and also the fact that the said offence took place in the year 1990, I am inclined to modify the sentence. As far as conviction u/s 409 IPC and 13(1)(c) of the Prevention of Corruption Act, 1988 are concerned, the sentence of two years rigorous imprisonment imposed for each offence is modified as one year simple imprisonment under both the Sections and the first accused is directed to pay an additional fine of Rs. 25,000/= to be deposited before the Special Court for CBI Cases, Coimbatore. This is to enable the appellant/accused to approach the State Government under Sub-clause (d) of Section 433 Cr.P.C., for conversion of simple imprisonment to fine. Since there is no loss to the Bank and no complaint has been preferred by the Bank in this regard, I recommend that the State Government release the appellant on the charging of Rs. 3000/= as fine and that an

appropriate order be passed by the State Government to that effect within a period of three months. The appellant shall deposit in the trial court

under two heads the fine imposed by the Trial Court i.e., Rs. 1000/= and the additional fine of Rs. 25,000/= imposed by this Court as also the

alterable fine of Rs. 3000/= within a period of three weeks from today and apprise the State Government of his having discharged his obligation.

On his doing so, the appellant need not undergo the sentence of imprisonment. Otherwise, he shall undergo the modified sentence as stated earlier.

19. With these directions, the CrI.A. No : 719 of 2000 preferred by A.1 stands disposed of. CrI.A. No : 720 of 2000 preferred by A.2 is

allowed setting aside the conviction and sentence passed by the III Additional Sessions Judge (CBI Cases), Coimbatore. Bail bond if any

executed by the accused shall stand cancelled.