**Vasanthakumar.K. Vs. Thomas.C.G.and Another**

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**SooperKanoon Citation** : sooperkanoon.com/1096535

**Court** : Kerala

**Decided On :** Oct-22-2013

**Judge** : Honourable Mr.Justice V.K.Mohanan

**Appellant** : Vasanthakumar.K.

**Respondent** : Thomas.C.G.and Another

**Judgement** :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE V.K.MOHANAN TUESDAY, THE22D DAY OF OCTOBER201330TH ASWINA, 1935 CRL.A.No. 159 of 2007 (D) Crl.L.P. 34/2007 of-----------------------DATED1601-2007 HIGH COURT OF KERALA AGAINST THE

ORDER
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JUDGMENT
IN CC982004 of J.M.F.C.,RANNI APPELLANT/COMPLAINANT::DATED0211-2006 -------------------------- VASANTHAKUMAR.K. VASANTHA BHAVAN, MUKKALUMON, KARIKULAM, RANNY. BY ADVS.SRI.B.RADHAKRISHNAN PILLAI SMT.S.AMBIKA DEVI SRI.P.U.SHAILAJAN SRI.R.JYOTHIKRISHNAN RESPONDENTS/ACCUSED & STATE:: ------------------------------- 1.VALIATHANNICAL THOMAS.C.G., S/O.C.T.GEORGE, HOUSE, ERAVIPEROOR, THIRUVALLA. 2.REPRESENTEDOFBYKERALA, THE STATE

THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM. R1 BY ADV. SRI.M.V.S.NAMBOOTHIRI R2 BY PUBLIC PROSECUTOR SRI.E.M.ABDUL KHADIR THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON2210-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: V.K.MOHANAN, J.

------------------------------- Crl.A.No.159 of 2007 -------------------------------- Dated this the 22nd day of October, 2013

JUDGMENT

The complainant in a prosecution for the offence punishable under Section 138 of the N.I. Act preferred the above appeal challenging the judgment dated 02/11/2006 in C.C.No.98 of 2004 of the court of the Judicial First Class Magistrate Court, Ranni since the learned Magistrate by the above judgment acquitted the accused under Section 255(1) of Cr.P.C.

2. The case of the complainant is that, the accused borrowed a sum of `2,50,000/- from him and issued Ext.P1 cheque dated 03/11/2003 from the account maintained by the accused but when the said cheque presented encashment dishonoured on the ground that the 'account closed'. According to the complainant, though a formal notice caused to send to the accused and he received the same, no reply was given nor the amount covered by dishonoured cheque has paid and therefore the accused has committed the offence Crl.A.No.159 of 2007 :-2-: punishable under Section 138 of the N.I. Act. The specific defence taken by the accused is total denial of execution of the cheque and the liability alleged.

3. With the above allegation the complainant/the appellant herein approached the court of Judicial First Class Magistrate Court, Ranni by filing a complaint alleging the offence under Section 138 of the N.I. Act. The learned Magistrate on taking cognizance for the said offence, instituted C.C.No.98 of 2004 and when the accused appeared the particulars of the offence read over and explained to the accused, who in turn denied the allegation and pleaded not guilty. Consequently, the trial was further proceeded during which PWs.1 to 5 were examined from the side of the complainant and produced Exts.P1 to P11 documents. From the side of

the defence DW.1 was examined and produced Ext.D1 document. The trial court finally, on the basis of the available evidence and materials, came to the conclusion that, it is not possible to come to a positive finding that the complainant has pleaded and proved that any transaction Crl.A.No.159 of 2007 :-3-: between the complainant and accused two months prior to 03/11/2003 and the accused had signed and issued the cheque, at the time of the alleged transaction, to the complainant. Consequently, found that there cannot be a presumption under Section 139 of the N.I. Act and the defence version is more probable. Thus, it is finally found that, the complainant has not succeeded to prove that the accused had issued cheque in question, to the complainant, for the discharge of `2,50,000/- as alleged by the complainant and accordingly held that the accused has not committed any offence under Section 138 of the N.I. Act and consequently he is acquitted under Section 255 (1) of Cr.P.C. It is the above finding and order of acquittal that are challenged in this appeal at the instance of the complainant.

4. Smt.Ambika Devi, the learned counsel for the appellant vehemently submitted that the complainant by producing cogent and satisfactory evidence established the transaction under which the accused issued Ext.P1 cheque to discharge the liability due to the complainant. But the learned Crl.A.No.159 of 2007 :-4-: Magistrate overlooked such evidence and went wrong in holding otherwise. In support of the above contention it is pointed out that, by examining PW.3 and in the light of the evidence of the complainant, the complainant has proved that Ext.P1 contained the signature of the accused and the evidence of PW.3 shows that the signature seen in Ext.P1 cheque is the same that contained in Ext.P6 account opening form. But the accused has not effectively disputed the same and no contra evidence is adduced to show that the signature containing Ext.P1 is not that of him and not put by him. It is also the submission of the learned counsel that the defence version that the complainant was working under the accused and he stealthily removed Ext.P1 cheque from the possession of the accused, etc. are not proved. In support of the above point the learned counsel placed reliance upon the decision reported in L.C.Goyal Vs. Mrs.Suresh Joshi [CDJ 1999 SC159. It is also the submission of the learned counsel that, though DW.1 was examined and Ext.D1 was marked, the accused failed to prove and establish that he was unable to Crl.A.No.159 of 2007 :-5-: sign on Ext.P1 cheque on the basis of the so-called

infirmity or inability due to the accident which occurred on 24/12/1999, especially when Ext.P1 cheque bear the date 03/11/2003. According to the learned counsel, one of the grounds projected by the learned Magistrate to disbelieve the case of the complainant is that, he failed to mention the exact date of the transaction, which according to the learned counsel is not fatal to the prosecution since the complainant is not expected to state all details with respect to the transaction in the complaint. To substantiate the above contention, the learned counsel placed reliance upon Joseph Jose Vs. Baby [2002(3) KLT46Case No.64].

5. It is also the contention of the learned counsel that, even if the cheque in question returned for the reason 'account closed' the accused cannot escape from the penal liability under Section 138 of the N.I. Act, particularly in view of the decision reported in NEPC Micon Ltd. Vs. Magma Leasing Ltd. [CDJ 1999 SC293. Thus, according to the learned counsel the findings of the court below and the order of Crl.A.No.159 of 2007 :-6-: acquittal recorded by the trial court are legally and factually unsustainable.

6. On the other hand Sri.M.V.S.Namboothiri, the learned counsel for the respondent/accused submitted that the accused has succeeded in making out a probable case based upon the evidence and materials available on record. According to the learned counsel, the complainant has miserably failed to establish the transaction under which Ext.P2 cheque was allegedly issued and therefore the trial court is perfectly justified in its findings and the order of acquittal. The reason given by the learned Magistrate in the impugned judgment appeared to be reasonable and possible and therefore there is no scope for any interference by this Court in appeal.

7. I have carefully considered the arguments advanced by the learned counsel for the appellant as well as the learned counsel for the respondents. I have perused the evidence and materials on record and I have gone through the judgment impugned and the decision cited. Crl.A.No.159 of 2007 :-7-:

8. In the light of the rival contentions, particularly, in view of the evidence and materials on record, the question to be considered is, whether the appellant has succeeded in making out any compelling circumstances or substantial reason to

interfere with the findings of the court below and whether the judgment of the trial court is vitiated or liable to be interfered with as the same is perverse or illegal.

9. According to the complainant, the cheque in question is duly executed and issued by the accused from the house of the complainant itself when the accused received the sum of `2,50,000/- from him. Suffice to say, either in Ext.P4 notice or in the complaint or even in the proof affidavit filed in lieu of chief-examination, the complainant has miserably failed to raise such a plea and to state the exact date of the transaction. As rightly pointed out by the learned counsel for the appellant, in a complaint for the prosecution for the offence under Section 138 of the N.I. Act, the details of the transaction may not be necessary. But such a preposition cannot be treated as straitjacket one and universally Crl.A.No.159 of 2007 :-8-: applicable. The factual inputs which are required and requisited in each complaint depends upon the facts and circumstances involved in each case and no straitjacket formula can be laid down. According to me, in a complaint purportedly filed alleging the offence under Section 138 of the N.I. Act, no split up details are required, but the essential facts showing the nature of the transaction are absolutely inevitable.

10. Now let us consider the case of the complainant in the present case. As I indicated earlier, either in the lawyer notice or in the complaint or in the chief-affidavit the complainant has not stated the exact date of the transaction. But it is relevant to note that, during the cross-examination of PW.1, he had stated that, the amount was borrowed two months prior to the date bearing in Ext.P1 cheque. According to me, such a version can be given by any person. Even if the said version is accepted as correct for the time being, still then there is failure on the part of the complainant in stating the facts which led to the so-called transaction. It is true that he had stated that the accused obtained the money from his Crl.A.No.159 of 2007 :-9-: house and simultaneously issued the cheque in question. There is no pleading or evidence about prior understanding for giving the amount as claimed by him. From the version given by the complainant during his cross-examination, it appears that, on one morning the accused approached the complainant and demanded the money for which the cash was readily available with the complainant and given to the accused and simultaneously obtained the

cheque in question. In the absence of any evidence or materials regarding the date of prior demand, the understanding thereon and cash raised, even though there is no specific pleading either in the complaint or in Ext.P4 notice or in the chief-affidavit, the version given by the complainant during the cross-examination that the money was obtained two months prior to the date mentioned in Ext.P1 cannot be believed. In this juncture, it is relevant to note that the complainant is a Tax Practitioner, and it is quite prudent to expect that such a person will remember or having valid and acceptable document about the date of transaction. Therefore, it cannot be ruled out that to get rid of Crl.A.No.159 of 2007 :-10-: the adverse situation, not said that, it was 2 months prior to the date mentioned in the cheque still then he failed to mention the exact date.

11. In this juncture, it is relevant to note that, the specific case set up by the accused during the cross- examination of PW.1 as well as during his 313 statement is to the effect that, the complainant was looking after the affairs of the accused, connected with the financial institution run by him under the name and style "Unique Bank" and thus the complainant has got ample opportunity to handle the affairs of the concern run by the accused and he had occasion to come into possession of the cheque pertained to the account of the accused. It is also the defence of the accused i.e., on 24/12/1999 he had met with an accident and his right hand was paralysed and he was not in a position to put his signature after the said accident and thus he totally denied the transaction claimed by the complainant and the execution and the issuance of the cheque and also gave an explanation as to how Ext.P1 cheque reached the hands of the complainant. Crl.A.No.159 of 2007 :-11-: According to me, the conspicuous absence of the specific pleading with respect to the date of the transaction is relevant and material, in the light of the above defence of the accused. Therefore, though the details of the transaction as stated in Joseph Jose Vs. Baby [2002(3)KLT46Case No.64] are not necessary according to me, the same depends upon the facts and circumstances involved in each case.

12. Connected with the above it is relevant to note that, according to the complainant, Ext.P1 cheque was executed and issued 2 months prior to 03/11/2003 probably on 03/09/2003, or in and around the above date. But in the

present case, Ext.P1 was dishonoured for the reason 'account closed'. The evidence of the complainant himself, particularly in view of Ext.P6 and connected papers, it can be seen that by a letter dated 19/6/2001 itself the accused requested his banker to close his account and to transfer the balance if any to his new account i.e., S/B account No.2107 opened in the South Indian Bank. The said letter itself shows that he had returned the passbook and unused cheque leaves pertained to account Crl.A.No.159 of 2007 :-12-: No.344 in the Federal Bank, Ranni Branch. So, the above contemporaneous document shows that at least 2 years in advance he had closed the account to which Ext.P1 cheque pertained. Though PW.3 was examined by the complainant, who produced the above letter of the accused, nothing elicitated from PW.3 to the effect that as to why Ext.P1 cheque was not produced at that time. So, it is improbable to believe that while closing the account which was maintained by the accused he retained Ext.P1 cheque leaf and it was subsequently executed and issued to the complainant. In this juncture, it is relevant to note that Ext.P1 bearing the date, i.e., on 03/11/2003, but as per Ext.P6, which is a contemporaneous document, he closed the account on 19/6/2001 and presented the unused cheque. If that be so, as on 19/6/2001, the cheque bearing serial number, as that of Ext.P1, is an unused one, which surrendered to the Banker of the accused. So the accused could succeed in treating a genuine doubt, in the absence of any cross as I indicated earlier, about the claim of the complainant that Ext.P1 was Crl.A.No.159 of 2007 :-13-: given prior to two months from 03/11/2003.

13. Suffice to say to prove the above transaction except the interested version of PW.1-the complainant, no independent witness or documentary evidence is adduced by him. As rightly pointed out by the learned counsel for the respondent, during the cross-examination of PW.1, it is elicitated that PW.1- complainant is a tax practitioner and he used to submit returns to the income tax department. But he is not prepared to produce any document to show that the transaction with respect to `2,50,000/- as on the alleged date.

14. The defence during their defence evidence examined DW.1 and produced Ext.D1 and as per the evidence of DW.1 the accused sustained right breachial plexus injury and he had also deposed in terms of content of Ext.D1 medical

certificate dated 14/2/2006 that his right hand was paralysed. It is true during cross-examination he had admitted that he gave the evidence on the basis of the matters two years prior to 14/2/2006. He had also stated:- " Crl.A.No.159 of 2007 :-14-: Q1 . orthopeadic surgeon ." But, during re-examination he had stated that:- "3, 4 injury- treat ." 15. In the present case according to the complainant Ext.P1 was executed and issued two months from 03/11/2003. But the evidence of the defence probabilised that it was practically and physically impossible for the accused to put his full signature in Ext.P1 particularly when Ext.P6-a contemporaneous document shows that while he addressed his banker to close the account he had affixed his thumb impression instead of putting his signature since at that time he was physically unable to endorse his full signature. So, the execution of Ext.P1 cheque and the issuance of the same all the above backdrops of the defence case rendered as unbelievable. Crl.A.No.159 of 2007 :-15-:

16. Another important circumstance which probabilise the case of the defence is that the complainant presented the cheque in question, two times for encashment. It is an admitted case of the complainant that, though he initially sent a notice, on dishonouring the cheque when it was presented first time for encashment, and thereafter he again presented the cheque on 22/12/2003 as evident by Ext.P2. Ext.P3 is the intimation issued by the Indian Bank to the complainant. There is also some discrepancies in the memo with respect to Ext.P3 intimation. The learned counsel for the appellant on the strength of the recent decision of the Hon'ble Apex Court in MSR Leathers Vs. S.Palaniappan & another [(2013)1 SCC177, submitted that the complainant on presenting the cheque repeatedly, he can send the notices more than a time. But in this juncture it is relevant to note that, the trial court acquitted the accused not on the basis of any defect in the statutory notice sent by the complainant. According to me, the presentment of Ext.P1 cheque on two occasions, probabilise the case of the accused that Ext.P1 cheque was unauthorisedly Crl.A.No.159 of 2007 :-16-: removed from the possession of the accused. During the 313 statement the accused has stated:- " Unique Bank . . . . 2003 November 27 notice . 30/11/03 . . . Bank- present ." But the complainant has no explanation as to why he did not lodge the complaint after sending the first statutory notice. No explanation for the same and presentment of the cheque on two occasions, according to me, justifying the version of the

accused, which also further probabilised the defence case. Crl.A.No.159 of 2007 :-17-:

17. It is equally important to note that, though the details of the acquaintance of the complainant with the accused has not stated, which according to me, in the present case necessary to substantiate the case of the complainant for releasing such a huge amount to the accused. What he stated that he has got acquaintance with the accused for 10 years as friends. But the details of such acquaintance are not mentioned. During the cross-examination of PW.1 he expressed his ignorance about the details of the injury sustained by the accused connected with the accident occurred during they year 1999 and the then position about the injury. If he is close friend to the accused, all those details would have been with his knowledge. But the accused has gave a convincing explanation about the acquaintance between himself and the complainant and the circumstances under which the cheque in question reached the hands of the complainant. According to him, the complainant was a tax practitioner and he was looking after the affairs of the financial institution conducted by the accused by the style and Crl.A.No.159 of 2007 :-18-: name 'Unique Bank'. But about the said facts the complainant kept mum.

18. In the light of the above discussions and the facts and materials referred to above, the circumstance mentioned above improbabilise the case of the complainant and probabilise the case of the accused. As in any other criminal case, in a prosecution for the offence punishable under Section 138 of the N.I. Act, the complainant has to discharge his burden in proving the allegation beyond reasonable doubt. In the light of the decision of the Hon'ble Apex Court in Krishna Janardhan Bhat Vs. Dattatraya Hegda [2008(1) KLT425(SC)] the accused to rebut the presumption need to make out a probable case. In the above decision, in paragraph 23, the Hon'ble Apex Court has held that, "......An accused for discharging the burden of proof placed upon him under a statute need not examine himself. He may discharge his burden on the basis of the materials already brought on records. An accused has a constitutional right to maintain silence. Standard of proof on the part of an accused and that of Crl.A.No.159 of 2007 :-19-: the prosecution in a criminal case is different." It is further held in

paragraph 25 "......Furthermore, whereas prosecution must prove the guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is 'preponderance of probabilities'. Inference of preponderance of probabilities can be drawn not only from the materials brought on records by the parties but also by reference to the circumstances upon which he relies." Further in paragraph 26 it is held by the Hon'ble Apex Court "A statutory presumption has an evidentiary value. The question as to whether the presumption whether stood rebutted or not, must, therefore, be determined keeping in view the other evidences on record. For the said purpose, stepping into the witness box by the appellant is not imperative. In a case of this nature, where the chances of false implication cannot be ruled out, the background fact and the conduct of the parties together with their legal requirements are required to be taken into consideration." Crl.A.No.159 of 2007 :-20-:

19. Going by the findings of the court below and materials on record especially in the light of the circumstances and the factual input which I referred above, and in the light of the above decision in Krishna Janardhan Bhat's case according to me, the accused has succeeded in making out a probable case and it rendered the complainant's case wholly unbelievable and improbable.

20. The Hon'ble Apex Court in a recent decision reported in Mokkiah & Anr. Vs. State, Rep. by the Inspector of Police, Tamil Nadu [2013 (1) Supreme 88], has held as follows:- "8. In a recent decision in Murugesan & Ors. vs. State Through Inspector of Police, 2012 (10) SCC383 one of us Ranjan Gogoi, J.

elaborately considered the broad principles of law governing the power of the High Court under Section 378 of the Code of Criminal Procedure while hearing the appeal against an order of acquittal passed by the trial Judge. After adverting to the principles of law laid down in Sheo Swarup vs. King Emperor, AIR 1934 PC227(2) and series of subsequent pronouncements in para 21 summarized various principles as found in para 42 of Chandrappa & Ors. Crl.A.No.159 of 2007 :-21-: vs. State of Karnataka, (2007) 4 SCC415as under: ............ "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge: (1) An appellate court has full power to review, re-appreciate and re-consider the evidence upon which the order of acquittal is founded. (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law. (3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion. (4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the Crl.A.No.159 of 2007 :-22-: presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. (5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court." (emphasis supplied). On examination of the facts and circumstances involved in the case and going by the impugned judgment of the trial court, according to me, the appellant has miserably failed to make out any compelling circumstances or substantial reason to interfere with the impugned judgment and it cannot be said that the reasons assigned by the learned Magistrate in support of his findings to acquit the accused are perverse or illegal so as to interfere with the order of acquittal recorded by it, while exercising the appellate jurisdiction by this Court. Crl.A.No.159 of 2007 :-23-: In the result, there is no merit in this appeal and accordingly, the same is dismissed. V.K.MOHANAN, JUDGE skj True copy P.A. to Judge