

In Re: G.R. Macfarland

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Court : Andhra Pradesh

Decided On : Jan-22-1960

Reported in : AIR1961AP3; 1961CriLJ33

Judge : Jaganmohan Reddy, J.

Acts : Criminal Law (Amendment) Act, 1952 - Sections 6 and 7(3); [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 154, 162, 173 and 233 to 236; Indian Penal Code (IPC) - Sections 477A; [Prevention of Corruption Act, 1947](#) - Sections 5(1) and 5A

Appeal No. : Criminal Appeal No. 590 of 1958 and Criminal Revn. Case No. 48 of 1959

Appellant : In Re: G.R. Macfarland

Advocate for Def. : Sivarama Krishna and ;Suryachandra Rao, Advs. for Public Prosecutor

Advocate for Pet/Ap. : Adavi Ramarao, Adv.

Judgement :

Jaganmohan Reddy, J.

1. This is an appeal by the accused G. R. Macfarland, formerly permanent Way Inspector, Southern Railways Gudivada, against his conviction under Section

5(1)(c) of the Prevention of Corruption Act (hereinafter called the Act) and under Section 477-A I.P.C. and sentence of one month simple imprisonment for each of the offences, and sentences to run concurrently.

2. The accused, while he was working as Permanent Way Inspector at Gudivada, was charged with having misappropriated 18 asbestos sheets of 10'-3' x 3'-51/2' 9/32' entrusted to him along with 50 other such sheets between 16-6-1955 and October, 1956. It is stated that in order to facilitate this misappropriation he had prepared with intent to defraud a false voucher No. 293 dated 23-2-1959 purporting to show that the said 18 sheets were used for the renewal of Gudivada island platform covering, while, in fact, no such renewal was done.

It was further alleged that he falsified the corresponding entries in the day book of issue and in other railway records. For this offence, the General Manager, Southern Railway, was competent to remove the accused from office and he had accorded his prior sanction to prosecute the accused by his proceedings P.A. CC./1570 dated 24-9-1957. In so far as the entrustment of the 68 sheets was concerned, the evidence of the prosecution has fully established that fact, nor has the accused denied the entrustment. There is credible documentary evidence to that effect which cannot be assailed, nor any attempt has been made in that behalf.

The case of the accused is that he issued the 18 sheets to replace the shed of the island at Gudivada station. P. W. 9, Krishnaswamy, carpenter says that when the accused goes on line and any urgent work has got to be done, he hands over the material to workmen and takes the signature of the artisan in his note book. Ex. B-5 is the signature with regard to the 18 sheets. This was signed on '20-2-1956 by D. W. 1, B. Sriramulu, the Iron-smith. There is also entry Ex. P-4(a) in the handwriting of the accused which is dated 22-2-1956, according to which the 18 sheets were issued in replacement of the Gudivada island shed. The prosecution has tried to establish that none of the regular artisans or Ironsmiths or carpenters who are in the pay of the railway had renewed these sheets, nor is it the case of the accused that they were utilised for this purpose. The case of the accused is that a temporary Iron-smith was used; but the prosecution says that under the,

railway rules, requisition has to be made for employing any outsider and it is only after sanction that the services of such a person can be utilised. It further contends that one person cannot do the job of replacement and that since no sanction was given by the railway authorities for D. W. 1 to do this particular work or for that matter for any other labourer to assist him, the defence put up by the accused is false.

3. Apart from the merits of the case, learned advocate for the accused has raised several contentions. They are: (1) The offences under Section 5(1) of the Act and Section 477-A I.P.C. cannot be tried together; (2) An important witness D. W. 1 was first cited by the prosecution, but was given up as hostile, which course is improper and illegal; (3) D.W.3 having been given up and the court having refused to call him as a Court witness he had to be examined by the accused and when he had examined him the witness was confronted with his Section 162 statement, Ex.P-22, which could not be availed of by the prosecution; (4) Even if entrustment is proved, fraudulent and dishonest intention cannot be said to be proved by the mere non-accounting of the sheets, unless the prosecution aliunde proves that fraudulent intention; (5) The investigation by the Inspector was not in accordance with Section 5-A of the Act, inasmuch as the entire investigation was completed before the permission of the Magistrate was obtained and the re-recording of the witnesses' statement after permission was granted cannot cure the defect in the prosecution which has resulted in prejudice to the accused; (6) Further the Magistrate has not directed his mind to the sanction; but has automatically given it and that he was also not examined to show that he had applied his mind thereto before giving the sanction; (7) The violation of departmental rules do not constitute an offence under Section 409 I.P.C. and (8) the non-furnishing of copies of what the prosecution stated was a preliminary investigation has resulted in prejudice.

4. So far as the first point is concerned, namely, that offences under Section 5(1) of the Act and under Section 477-A, I.P.C. cannot be tried together, learned advocate for the accused cited a decision of Sanjeeva Row Nayudu, J. In K. Subbatah, In re: (1958)2 Andh WR 523, but on further reflection submitted that he cannot press that decision into service. In the above cited case, offences under Section 5(1)(c) of the Act and under Sections 429, 468 and 467 I.P.C. were sought

to be tried together and though it might be contended that charges under 5(1)(e) and Section 420 were inconsistent and could not be clubbed together under Section 235 Cr. P. C. as being part of the same transaction, a matter upon which I do not wish to express any opinion at this stage the ground upon which he held that a special Judge has no jurisdiction to try offences under the Act along with offences under the Code, is, with due deference, not warranted by the provisions of Section 7(3) of the Criminal Law Amendment Act. The learned Judge says at p. 525 thus: '.....The Special Judge is not one of the criminal courts recognised by the Code of Criminal Procedure. His powers are conferred by and confined to Section 6 of the Criminal Law Amendment Act (XLVI of 1952) and delimited to certain offences specified in Sections 6 and 7 of the said Act. As the offences under Sections 466, 467 and 420 committed by persons who are not public servants, are not the subject matter of the provisions of the Prevention of Corruption Act, the learned Subordinate Judge, would have no jurisdiction to take cognizance of these offences. It is also significant to note in this connection that even the offences under Sections 466, 467 and 420 I.P.C., committed by public servants do not amount to criminal misconduct within the meaning of Section 5(2) of the Prevention of Corruption Act, and as such cannot be taken cognizance of or tried by the Special Judge unless the offences could be brought under Section 5(1)(d) of the said Act'.

5. In other words, the learned Judge appears to be of the view that unless the offences under the Penal Code amount to criminal misconduct within the meaning of Section 5(2) or unless the offences are committed by persons who are public servants and would come within the provisions of the Act, Special Judge has no jurisdiction to try any offences created by the Penal Code. In my view, the attention of the Learned Judge was evidently not drawn to the specific terms of Section 7 of the Criminal Law Amendment Act XLVI of 1952. It may be stated that Section 6 which confers power upon the State Government to appoint Special Judges provides that such Judges may be appointed to try the following offences, viz., (a) an offence punishable under Section 161, Section 165 or Section 165-A of the I.P.C. (Act XLV of 1860) or Sub-Section (2) of Section 5 of the Prevention of Corruption Act (II of 1947); and (b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a). Section 7

which is relevant for the present discussion is in the following terms :

'7. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898) or in any other law the offences specified in Sub-section (1) of Section 6 shall be triable by special Judges only.

(2) Every offence specified in Sub-section (1) of Section 6 shall be tried by the special Judge for the area within which it was committed, or where there are more special judges than one for such area, by such one of them as may be specified in this behalf.

(3) When trying any case, a special judge may also try any offence other than an offence specified in Section 6 with which the accused may, under the Code of Criminal Procedure, 1898, be charged at the same trial'.

6. It is thus seen that the specific provisions of Sub-section (3) admit of no doubt in authorising special judges to try any offence other than the offences specified in Section 6 with which the accused may under the Cr. P. C. be charged. The only limitation is that prescribed by the provisions relating to joinder of charges under Sections 233 - 236 Cr. P. C. I am, therefore, of the view that the learned advocate was well advised in the circumstances not to have pressed that contention as the offences under Section 477-A I.P.C. could be tried along with the offences under Section 5(2)(1) of the Act at one trial.

7. On the second point, learned advocate for the accused was not able to show that any memo was filed to say that the witness was hostile. The fact of the matter is that on 19-3-1958 the Public Prosecutor specifically asked D.W.1 to be held over till the next day. On 20-3-1958, after P. Ws. 10 and 11 were examined the Special Public Prosecutor gave up this witness and On objection being taken, the learned judge said that the legal consequences of this will be considered at the proper time, The accused put in an application to say that this witness may be examined as a Court Witness.

To this the Special Public Prosecutor objected and arguments were heard and the learned Judge expressed the view that though the powers under Section 540 are

very wide and that he will make up his mind later on, it is not advisable to examine him then. He said that the defence can examine him later on. In the circumstances, the accused had to examine this witness. While the prosecution can give up any witness it likes, it must conduct itself in a fair manner and should not manoeuvre or adopt tactics with a view to forcing the accused to put witnesses it should have examined in the box.

If D.W. 1 had become hostile, the prosecution could have examined him and sought permission to cross-examine him. In this case, what the prosecution sought to do was to give up this witness and when the defence was forced to put him in the box as he was the witness who according to the accused was employed for the purposes of replacing the old sheets on the island shed with the 18 sheets which are said to have been misappropriated, confronted him with earlier statements made at the preliminary investigation and thus tried to discredit him.

At first, the learned public prosecutor said Ex. P-22 could not be used, but later he contended that since Ex.P-22 was recorded prior to the commencement of the investigation, it was not hit by Section 162. This contention of the Public Prosecutor will be examined with the contention of the accused that the preliminary investigation was not warranted by Section 5A of the Act inasmuch as this was done without the permission of the Magistrate. But before I do so, I will consider the fourth contention urged by the learned Advocate for the accused that even if entrustment is proved, the mere fact that the accused has not accounted for these 18 sheets does not make him liable under Section 5(1)(c) of the Act.

8. The three necessary ingredients in the above section are that the accused must be a public servant at the time of the commission of the offence, that he dishonestly or fraudulently misappropriates or otherwise converts to his own use any property entrusted to him or under his control or allows any other person so to do. There is no doubt that the accused was a public servant at the time of the alleged offence and that the property was entrusted to him; but the only question is whether he dishonestly or fraudulently misappropriated the property.

If the accused who alone could say what he did with the property entrusted to him, gives an explanation which is found to be false the setting up of that false defence

would impute to him a fraudulent and dishonest intention. This view is amply supported by the recent judgment of the Supreme Court in Krishna Kumar v. Union of India, : 1959 CriLJ1508 . In that case Kapur, J. observed at p. 1393 as follows:

'It is not necessary or possible in every case to prove in what precise manner the accused person has dealt with or appropriated the goods of his master. The question is one of intention and not a matter of direct proof but giving a false account of what he has done with the goods received by him may be treated as strong circumstance against the accused person. In the case of a servant charged with misappropriating the goods of his master the elements of criminal offence of misappropriation will be established if the prosecution proves that the servant received the goods, that he was under a duty to account to his master and had not done so. If the failure to account was due to an accidental loss then the facts being within the servant's knowledge, it is for him to explain the loss. It is not the law of this country that the prosecution has to eliminate all possible defences or circumstances which may exonerate him. If these facts are within the knowledge of the accused then he has to prove them. Of course the prosecution has to establish a prima facie case in the first instance. It is not enough to establish facts which give rise to a suspicion and then by reason of Section 106 of the Evidence Act to throw the onus on him to prove innocence'.

The question, therefore, is whether the defence set up by the accused is false. In determining this question the effect of the preliminary investigation made by the Investigating Officer, P.W. 13, B. Sikander, and the non-furnishing of copies of those statements to the accused will have to be considered. In this connection it may be stated that on 23-5-1956 P. W. 12 B. R. Ramamohan sent a report Ex. P. 18 to the Superintendent of Police, Special Police Establishment, Hyderabad, giving details of the several allegations of corruption which came to light during the course of his enquiry. He detailed every one of those specific allegations against the accused and the material supporting them. In para 10 he says thus:-'The P.W. 1 has shown in his records as having issued 18 asbestos sheets for renewing old ones of Gudivada platform shed on 23-2-56. Actually no renewals were made. This work has to be (done by) the carpenters. When the Asst. Engr. Mr. P. K.

Srinivasan inspected Gudivada on 29-3-56, he did not find any renewals and he conducted an enquiry into this. Carpenters have stated that they did not do any renewal work of asbestos. Voucher and daily expenditure books were taken away by the Asst. Engineer on 29-3-56. All the papers in this connection are now with D.E. 2 Bezwada'.

I am not here concerned with the other allegations which evidently formed the subject-matter of a departmental enquiry. On receipt of this report, P.W. 13, Sikander, says that he began enquiry in August, 1956 and examined witnesses from that time to December 1956. He says as follows:-

'Ex.P-18, is the earliest report given by the Railway Sectional Officer, VijayavadaThe statements taken by me during the course of the preliminary enquiry I conducted are available. There was a reference about the offence in question in the said statements. They are signed statements because I was permitted to take the signed statements as per the orders of my department. I started my preliminary enquiry in August 1956. I have recorded the statement of the witnesses during the preliminary enquiry from August 1956 to December 1956. I had been to Gudivada in connection with the enquiry conducted by me either at the end of August 1956 or in the beginning of September 56 for the first time. I did not see the platform roofing when I first proceeded to Gudivada Railway Station. I might have seen the same in the month of September 1956'.

Again, towards the end of the cross-examination he says that it is not true that he had not examined the accused in connection with the above matter. The defence counsel requested that the diary prepared by the Investigating Officer might be ordered to be filed in Court so that it may be referred to at the proper stage. The Special Public Prosecutor objected to it; but the Judge directed that it should be filed. It appears to have been filed, but it is not found in the records. However, according to the prosecution in the preliminary enquiry P.W.3 was examined on 29-8-1956; P.W.10 on 30-8-1956; P.Ws. 5 and 6 on 31-8-1956: P.W.7 on 16-9-56 P.W.8 and D.W.1 on 17-9-56, P.W.9 on 6-10-58 and P.W.4 on 11-10-56. The F.I.R., it may be stated is dated 5-12-1956, so that all the witnesses for the prosecution were examined by the Investigating Officer long prior to the

registration of the F.I.R. The report! Ex.P-18 is as good as an F.I.R. and the Investigating Officer, before seeking the permission of the Magistrate under Section 5-A of the Act, conducted the entire investigation and only registered the F.I.R. at the end thereof and applied for permission of the Magistrate on 6-12-1956 which was granted on 18-12-1956. Some of the same witnesses were again examined even after permission was sought and given.

The fact, that the Investigating Officer does not choose to register a crime when he receives a full and detailed report such as Ex.P-18, does not take the statements recorded during the enquiry, conducted after the receipt of information, out of the purview of the provisions of Section 162 Cr. P. C. In other words, the investigation will be deemed to have commenced whether or not the F.I.R. has been registered. A case as in *In re Anandayya*, AIR 1915 Mad 312, where the police officer on receipt of a vague information such as a telegram, goes to the scene of the incident to ascertain the authenticity of the information and after making a few preliminary enquiries, registers a case on being satisfied, is different to a case where the information given is specific.

In such a case, it cannot be said that investigation has not commenced, and if it has commenced, It being without sanction under Section 5A, the investigation would be illegal and without jurisdiction. The learned Public Prosecutor contends that if the statements recorded and the investigation before the permission of the Magistrate was granted are illegal, that cannot affect the re-recording of the statements of witnesses after permission was granted; as such the previous statements which were not recorded during the course of investigation are not hit by Section 162 Cr. P. C. and can be used by the prosecution for cross-examination. With this contention. I cannot agree. Though an investigation may be declared to be illegal for non-conformity with any specific provision of law, it cannot any-the-less be said that the statements were not recorded during the course of an investigation.

In cases where the investigating officer does not refill a case and issue an F.I.R. but carries on a preliminary enquiry which is in fact an investigation. Courts have held that statements recorded during this irregular proceedings are nonetheless hit

by Section 162 as they are statements recorded during the course of investigation. In *Sahedali Mirdha v. Emperor*, AIR 1937 Cal 309 a Bench of the Calcutta High Court held that when information is given orally under Section 154 Cr. P. C. and a police officer does not reduce it into writing, he is doing what he ought not to do and has acted in an irregular way; but it is going too far to say that while investigating the truth or otherwise of the information, he is not carrying on an investigation within the meaning of Chapter 14 of the Code.

He obviously is, and if he is, Section 162 applies to the statements made by persons examined by him. In that case, a certain village Chowkidar arrived at the thana and reported the occurrence to the Sub-Inspector of Police. That officer did not record the statement of the Chowkidar in writing, but started investigation and a great deal of it was done, when later on another person also arrived at the thana. His statement which was recorded in writing was regarded by the prosecution as the first information report and was allowed to go in full before the jury.

In these circumstances, the statement was held to be inadmissible in view of the provisions of Section 162 and that the case ought to be retried as the evidence which was improperly admitted might have turned the scales against the accused. A similar view is also taken in *Narayana Reddi v. State*, : AIR1952 Mad821 which refers to a judgment of Balakrishnan Ayyar, J. in *Gurusami Naidu v. Guruswami Naidu*, : AIR1951 Mad812 . In the instant case, I have not the slightest doubt that the investigation had commenced on the receipt of Ex.P-18 and all the statements of witnesses recorded by the investigating officer are hit by Section 162, Cr. P. C.

The accused should have been furnished with copies of these statements under Section 173 Cr. P. C. and not only because this was not done, but also because when the accused asked for copies he was denied, the court directing that he should obtain certified copies at his expense, the accused is fully justified in complaining that the non-furnishing of these copies has prejudiced his trial. The Public Prosecutor contends that it is for the accused to show how he was prejudiced; but that contention is devoid of merit because unless the copies are furnished to the accused, he cannot say how he is prejudiced.

This is one of the contraventions of the mandatory provisions which results in prejudice and according to the latest decision of a Bench of this Court consisting of Chandra Reddy, J (as he then was), and Qamar Husan, J., in Jayarami Reddy v. State, : AIR 1959 AP325 , they would have the effect of making the statements of the witnesses valueless. That case considered the judgments of the Privy Council in Pulukuri Kotayya v. Emperor, AIR 1947 PC 87, and of the Supreme Court in Willie Slaney v. State of Madhya Pradesh (S) : 1956 CriLJ291 , Baladin v. State of Uttar Pradesh (S) : 1956 CriLJ345 and Purushottam v. State of Kutch AIR 1934 SC 700. It is unnecessary for me to refer to these cases once again and it would suffice if I refer to the concluding observations of Chandra Reddy, J. at p. 84;

'This principle enunciated in the passage (of Sinha J. in ((S) : 1956 CriLJ345) does not in any way conflict with the rule embodied in Kotaiah's case AIR 1947 PC 67, namely that where statements are not made available an inference which is almost irresistible arises of prejudice to the accused. His Lordship has pointed out earlier in the judgment that such Statements are very valuable material for testing the veracity of the witnesses examined in Court. The circumstances in which the observations extracted above have been made should be remembered. It was found that the officers concerned did not carry on the investigation honestly with a view to help the accused and the Sub Inspector had not faithfully recorded the statements of the witnesses and purposely distorted their versions. There is no indication in the report that their Lordships meant to strike a different note from Pulakurthi Kotaiah's case the doctrine of which has been accepted by the Supreme Court also. In : AIR 1954 SC700 , it is laid down that the wholesale refusal to grant copies of statements made during investigation is a serious irregularity which would vitiate the entire trial as held by the Privy Council in AIR 1947 PC 67. Thus a deliberate destruction of statements of witnesses made during investigation, or wholesale refusal to furnish copies of such statements leads to the inference that prejudice was occasioned to the accused. Even otherwise slight evidence of a reasonable possibility of prejudice would swing the balance in favour of the accused (in the words of Bose, J. in Slaney's case)'.

9. Having regard to these clear observations of Bench relying on the authority of the Supreme Court, I am well fortified in holding that the wholesale refusal and

omission to grant copies of the previous statements to the accused has prejudiced the accused and vitiated the trial.

10. That apart, the prosecution could not use Ex. P-22 for cross-examining D. W. 1 as that was a statement, though made in what is termed the preliminary investigation, is a statement recorded within the meaning of Section 161, and as such, it cannot be used for any purpose other than that specified in section 162 namely, where a witness is called by the prosecution in such enquiry or trial whose statement has been reduced into writing any part of his statement, if duly proved, may be used by the accused and with the permission of the court by the prosecution to contradict such witness and when any part of such statement is so used, any part thereof may also be used in the examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

The special Judge discarded D.W. 1's evidence because of the illegal use of Ex.P-22 in cross-examination. If that was not so, there was nothing in D.W.1's evidence which makes it unacceptable. If it is acceptable, then certainly the defence of the accused, viz., that it was through D.W. 1 that he had renewed the old shed by replacing the 18 new sheets, would be plausible. One curious feature of this case is that though P.W.3 goes to the spot on 29-3-1956, six days after the alleged entry Ex.P-4(a) he does not call for the explanation of the accused, nor does he hold a panchnama or make any report of his observations relating to the plea of the accused that he had utilised the 18 sheets in renewal of the Gudivada island shed.

One would have thought that having regard to the specific entry in Ex. P-4(a) he would have adopted one or both of these courses. Even the investigating officer, P.W.18, when he goes to Gudivada, does not observe whether a portion of the island shed was renewed or was still in the same leaky condition. Be that as it may, for the reasons already stated, the omission and refusal to furnish copies of the statements recorded in the preliminary enquiry has prejudiced the accused and the trial on that account is vitiated.

11. The other points raised need not be considered. I accordingly allow the appeal and set aside the conviction and sentence against the accused, and dismiss the

revision.

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