

The Public Prosecutor Vs. Pocku Syed Ismail and anr.

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Court : Andhra Pradesh

Decided On : Sep-01-1972

Reported in : 1973CriLJ931

Judge : Kondaiah and ;Ramachandra Raju, JJ.

Appellant : The Public Prosecutor

Respondent : Pocku Syed Ismail and anr.

Judgement :

Kondaiah, J.

1. This Criminal Revision case by the Public Prosecutor to revise the order of the Sessions Court, West Godavary refusing to revise the order passed by the 1st Additional Judicial 1st Class Magistrate Eluru in M.P. 210 of 70 gives rise to an important question of law relating to the scope and application of Section 124 of the Indian Evidence Act, 1872.

2. The material facts which are not in dispute and which lie in a short Compass may briefly be stated. On the information furnished by a private citizen in a statement recorded by the Assistant Collector. Central Excise and Customs Vijayavada, a surprise raid of the premises of the respondents accused at Pulla was made by the Central Excise and Customs authorities at about 6 a.m. On June 9, 1970. During the search 576 gold slabs with foreign markings, each weighing 10

tolas packed in jackets and concealed in a steel trunk were detected. The contraband gold was seized. A complaint against the respondents for contravening the provisions of the Customs Act and Gold Control Act was preferred by the Assistant Collector before the 1st additional judicial 1st class Magistrate Eluru on October 16, 1970. After examining three of the prosecution witnesses charges under Section 135(b)(1) of the Customs Act have been framed against the respondents who pleaded not guilty. Thereupon M.P. No. 119-A of 1971 under Section 94 of the Criminal Procedure Code praying for summoning 12 documents appended to the petition, was filed by the accused on the ground that they are required to enable them to cross-examine the prosecution witnesses. Eleven out of the twelve summoned documents have been produced before the court. The remaining one i.e. the first of the document summoned is the information received by the complainant leading to the issue of search warrant and consequent seizure of contraband gold from the premises of the accused. The Collector, Central Excise and Customs, who had possession and custody of the document, claimed the privilege under Sections 124 and 125 of the Indian Evidence Act. In his communication sent along with the document put in a sealed cover as per the direction of the court, the privilege to withhold the production of the document in question was claimed on the ground that the information contained in it is strictly confidential and its disclosure would injure public interests apart from its being harmful and dangerous to the life of informant. Relying upon the decision of a Division Bench of this Court, in *State of Andhra Pradesh v. Appanna* (1962) 1 Andh WR 256, the learned magistrate held that no privilege could be claimed either under Section 124 or under Section 125 of the Indian Evidence Act in respect of the information furnished by a private citizen to the public officer except the source of the information. The contents of the information excluding the source have, therefore, been directed by the Magistrate to be disclosed and made available to the accused. The revision filed by the Assistant Collector against the decision of the Magistrate in the court of Sessions was without success. Hence this revision case.

3. Our learned brother, Madhava Reddy, J. who heard the case in the first instance doubting the correctness of the view expressed by the Division Bench in Appanna's case (1962) 1 Andh WR 256 that Section 124 applies only to

communications from one public officer to another in the discharge of their official duties and not to communications to such officers by outsiders, has referred the case for consideration by a Division Bench. That is how this revision case has come up before us.

4. The contentions of the Additional Public Prosecutor is three fold.

(1) that Section 124 of the Act applies not only to communications by one public officer to another but also to a communication by a private citizen to a public officer,

(2) that it is not in public interest to disclose the contents of the document In question and the Collector is justified in withholding the production of the document and

(3) that the production of the document is neither required nor necessary for the proper trial and effective disposal of the case before the Magistrate. This claim of the petitioner is resisted by Mr. Kodanda Reddi the learned Counsel for the accused, contending inter alia that the Division Bench's decision in the case of Appanna (1962) 1 Andh WR 256 which is binding on this Court governs the point in issue and the document is really necessary for cross-examining the prosecution witness.

5. The short question that arises for determination is whether on the facts and in the circumstances, the Collector, Central Excise should be compelled to disclose the contents of the statement made by a private citizen to the Assistant Collector in official confidence, in other words, whether the Collector is entitled to claim under Section 124 of the Act, the privilege to withhold the production of the document.

6. The answer to the question turns upon the provisions of Section 124 of the Act which reads thus:

No public officer shall be compelled to disclose communication made to him In official confidence when he considers that the public interests would suffer by the disclosure.

The prime object of Section 124 is to prevent disclosures to the detriment of public interest. Vide *Nagaraja Pillai v. Secy. of State* ILR 39 Mad 304 : AIR 1915 Mad 1113. The very basis and foundation of the claim of privilege conferred on public officers under Section 124 is that the disclosure of the contents or information made to public officers in official confidence cannot be made without injury or detriment to public interests. See *Henry Greer Robinson v. State of South Australia* AIR 1931 PC 254. It is apposite to notice what the learned Judge, Wason J., speaking for the Court, in *Bhalchandra v. Chanbasappa* AIR 1939 Bom 237 at p. 247 had said about the basis for the privilege under Section 124: it is essential to bear in mind the cardinal fact that privilege does not attach to a document merely because it is a State or official document. The foundation of the claim rests on the consequence of disclosure of a communication made in official confidence whose publication the officer to whom it is made considers contrary to the public interests.

We may usefully refer to what had been stated in this context by Viscount Simon L.C. in *Duncan v. Cammell Laird and Co.* 1942 AC 624 at p. 636.

The principle to be applied in every case is that a document otherwise relevant and liable to production must not be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document or (b) by the fact that the document belongs to a class which, on grounds of public interest, must as a class be withheld from production.

Section 123 prohibits any one from giving evidence based on unpublished official records relating to any affairs of State, without the permission of the officer or the head of the department concerned. Section 124 entitles a public officer to claim privilege of withholding production of any communication received by him in official confidence, if in his opinion the disclosure of the contents of the document or information is injurious or detrimental to public interests. Under Section 124 no revenue officer can be compelled to say the source of the information got by him as to commission of any offence against the public revenue. Similarly, no magistrate, or police officer shall be compelled to disclose the source of the information which he got as to the commission of any offence. Sections 123, 124

and 125 of the Act constitute a clear and significant departure from the ordinary rules of evidence whereunder all the material documents had to be proved or else the presumption under Section 114 will have to be drawn. The aforesaid provisions do not permit any adverse inference or presumption under Section 114 where the concerned party is the State and the disclosure of the information or source is detrimental to public interests. The basis and foundation of the deviation from the ordinary rules of evidence where the concerned party is the State is public interest which, is paramount. Where a conflict between public and private interests arises, the former must prevail. To put it differently, private interests must yield to or give way to public interests whenever a conflict arises between the two. Whenever the question of privilege under the aforesaid provisions of Act arises for determination the Court has to consider and determine class or character of the document or information sought to be withheld from being produced or disclosed by the concerned person. If on a consideration of the facts and circumstances, it arrives at a conclusion that the document or Information in a given case relates to the affairs of the State and falls within the four corners of Section 123, the claim for privilege to withhold production of such document must be upheld without even summoning the very document or information. But if on the other hand, in its opinion, it does not pertain to affairs of the State, the court, for the purpose of satisfying itself whether the disclosure of the contents of the document would injure public interests, may call for the document or statement. As ruled by the Supreme Court in *State of Punjab v. S.S. Singh* : [1961]2SCR371 ..In dealing with an objection against the production of a document raised under Section 124 the court would have first to determine whether the communication in question has been made in official confidence. If the answer to the said question is in the negative then the document has to be produced; if the said answer is in the affirmative then it is for the officer concerned to decide whether the document should be disclosed or not.' The condition precedent to the claim under Section 124 is that the disclosure of the contents of the communication to the public officer must, in his opinion, be proved to be injurious or detrimental to public interest. The court must, therefore, apply its mind and peruse each document before disallowing any claim of privilege under Section 124 as there may be portions of a document which cannot be disclosed without injury to public interest. Where a document is

partly privileged and partly not, the court is neither competent nor justified to direct its production as it is really not in public interest to permit the production of such document. It is only in cases where the court is satisfied that the disclosure of the contents of the documents or information or statement would not in any, way injure, or adversely affect public interests, the claim of privilege under Section 124 can be rejected, but not otherwise. However it must be noticed that it is not every communication made to a public officer that is protected under Section 124. It is only such communication which are made to a public officer in official confidence that are privileged, but not others. Where the communication is public in nature and there is nothing confidential about its contents. Section 124 does not come into play as the production or disclosure of the contents of such communication cannot be held to be detrimental to public interests. But any communication which was treated as confidential and made to a public officer under an honest and bona fide belief that he would keep the contents of or the information contained in such communication confidential without disclosing the same to others would certainly come within the purview of Section 124. True, 'public officer' is not defined under the Act. All officers who in discharge of their regular duties receive communications made to them in official confidence and are expected not to disclose confidential information to others must be held to be public officers within the meaning of Section 124. Whereas in England it is the court which has to decide the expedience of the privilege it is the government or the public officer in India who is the sole Judge to decide the question of public policy or public interest. The government or the public officer in order to claim the privilege under Section 124 need only establish that the communication was confidential and the disclosure of the contents of the same would injure public interest.

7. In the light of the forgoing discussions, we shall examine the plea advanced on behalf of the accused that the communication in the instant case being one made by a private citizen to the Assistant Collector, Central Excise and Customs. Section 124 of the Act is not attracted. The provisions of Section 124 do not permit such an interpretation. The section is silent with regard to the source from which the communication should be made to a public officer. It only speaks of communications made to a public officer in official confidence. It does not specifically indicate that the communication privileged under Section 124 are only

communications made by one public officer to another officer. It is, therefore immaterial who made the communications to the public officer in order to attract the privileges envisaged under Section 124. The ingredients of Section 124 must be held to have been satisfied if the communication is made to a public officer either by a private citizen or another public officer in official confidence and if the public officer considers that the disclosure of the contents of the same would injure public interest. The very intendment and purpose of Sections 123, 124 and 125 is to safeguard the interests of general public. Hence the provision of Section 124 must be construed liberally so as to take it within their ambit any communication made to public officer in official confidence, irrespective of the person who communicates. The context in which the term 'communication' is used in Section 124 would amply support such a liberal interpretation, in our considered opinion, the limited construction sought to be placed by the accused that Section 124 is applicable only to communications made by one public officer to another is not permissible. If what the accused's counsel contends for is acceded to it would be doing violence to the very language of Section 124, and such an interpretation would run counter to the very purpose and object of that section. That apart the language of that section would have been different from what it is, if the legislature had intended to protect only communication made by one public officer to another. The legislature, in that premises would have added the words 'by another public officer' after the word 'made' and before the term 'to'. We may refer in this context to Section 129 of the Act, whereunder any confidential communication by any person with his legal professional adviser was protected. The use of the words 'confidential communication between him and his legal professional adviser' may be noticed. The omission of such specific words in Section 124 must be taken note of in construing its provisions.

8. We are not impressed with the submission of the counsel for the accused that the expression 'official confidence' occurring in Section 124 would support the interpretation sought to be placed by him. According to him, the expression 'official confidence' indicates that it is only the communications made by one public officer to another in discharge of his official duties of confidence, which are privileged. This takes us to examine the content and significance of the expression 'in official confidence'. As pointed out earlier, it is not every communication made to a public

officer which is privileged under Section 124 but it is only communications made to public officers in official confidence which are saved. The heart of the matter is whether the disclosure of the communication would result in an injury to the public interest and it would not amount to betrayal of person who under a bona fide and honest impression that the source as well as the contents thereof would not be published made that communication to the public officer. In other words the information though of a confidential nature, is given by a citizen or an officer to a public officer to enable him to take appropriate action and protect public interests. The object of Section 124 is to enable the public officer in discharge of his duties to take immediate and appropriate action and protect the interests of the general public, if the public officer has to publish the source as well as the contents of the information, persons would not generally come forward out of free will and volition to furnish such confidential information to the public officer. We may usefully refer to what has been observed by a Division Bench of the Bombay High Court in AIR 1939 Bom 237 at p. 247 (cited supra) in this context:

in my opinion a communication in official confidence requiring protection under Section 124. Evidence Act, must be such as to necessarily involve the wilful confiding of secrets with a view to avoid publicity by reason of the official position of the person in whom trust is reposed, under an express or implied promise of secrecy. The test must be whether the disclosure would result in betrayal of the person confiding by the publication of the communication having regard to the nature thereof. The prerogative right therefore has to be distinguished from the evidence showing how it arises in a particular case.

In order to find out whether a particular communication is made in official confidence or not, one of the tests that can safely be applied is whether the document produced before, or the statement made to, a public officer was or was not under the process of law. If the document or information produced was under the process of law. It must be held that Section 124 does not come into play. Where a statement is made or document is produced in a confidential departmental enquiry initiated for gathering information by the department for guiding them in future action, the provisions of Section 124 will come into play. See *In re - Killi Suryanarayana Naidu* : AIR1954 Mad278 . Whether a

communication to a public officer was or was not made in official confidence and whether the disclosure of such a communication is or is not in public interest, are questions of fact depending upon the facts and circumstances of each case. For all the reasons stated we are on a careful reading of the provisions of Section 124, of the firm view that Section 124 takes in not only communications made by one public officer to another but also any communication made to a public officer in official confidence by a private citizen.

9. This view of ours gains support from the decisions of the Madras High Court in : AIR1954 Mad278 and In re - Subramaniam Chettiar 1967 Cri LJ 1232 at p. 1234 and that the Rajasthan High Court in Kotah Match Factory v. State of Rajasthan cited by the additional public prosecutor. In : AIR1954 Mad278 , Ramaswami J. upheld the claim of the Collector seeking privilege under Sections 123 and 124 of the Act for withholding the production of the statements made by private parties, i.e., defendants in the suit, to the Taluk Supply Officer Amudalavalasa in a confidential departmental enquiry made against Killi Suryanarayana Naidu to whom black-marketing activities had been attributed in a petition sent to the Taluk Supply Officer. The statements of witnesses recorded in an enquiry under Police Standing Order 125 were held by Sadasivam J. in 1967 Cri LJ 1232 (Mad) at p. 1234 to be not privileged under Section 124 as the accused are entitled to copies of such statements. Therein the learned Judge observed thus:

Section 124 of the Evidence Act merely refers to privileges in respect of communications made to a public officer in official confidence, and there is nothing in the section to restrict the scope of the section to communications by public officers. It is not possible to infer from the words 'Official confidence' that Section 124 is intended to protect only communications by one official to another. There may be cases in which a private person may make a communication to a public officer in official confidence and¹ it could not be said that the public officer cannot claim privilege in respect of the same.

10. We are in entire agreement with the aforesaid view by Sadasivam J. in , the minutes of a Minister pertaining to affairs of State were held to be privileged.

11. We shall now turn to the decisions relied on by Mr. Kodanda Reddy Counsel for the accused. The decision of the Madras High Court in Venkatachela Chettiar v. Sampathu Chettiar (1909) ILR 32 Mad 62 relates to statements made and documents produced by an assessee before Income-tax officers in due course of law. Therefore, they were held not to have been made in 'official confidence' within the meaning of that term in Section 124 of the Act. In Barjorji Farmji Bharucha In re AIR 1932 Bom 196 a Division Bench of the Bombay High Court held that the accused can take advantage of the proviso to Section 162. Cr.P.C. only if the enquiry is to establish his guilt or innocence of the offence which is the subject of investigation and not when the offence investigated is not the *factum probandum* at the trial but only evidence to establish it. Therefore it was held that the accused was not entitled to the copies of the statements made by witnesses in the enquiry made by the Deputy Superintendent of Police on the complaints made by some persons that they were disturbed in their religious worship by the conduct of the accused. In K.S. Venkatesam Naidu & Sons v. State of Madras : AIR 1959 Mad 335 inter-departmental correspondence between officers of departments of Government was held to be privileged under Section 124 of the Act. In B.R. Srinivasan v. Bramhatantra Parakalaswamy Mutt, Mysore AIR 1960 Mys 186 the learned Judge Hegde J. (as he then was) held that whether a communication was made in official confidence or not is a question of fact. The claim of public officer under Section 124 of the Act was rejected on the ground that the official concerned had not directly claimed any protection nor was the Court informed that the disclosure of the documents called for would affect public interest. The aforesaid decisions will not render any assistance to the accused in the present case and in any event they are distinguishable from the facts of the present case.

12. In Blake v. Pilfold Moody and Robinson's Reports Vol. 1 (1837) p. 198 a letter written by a private individual to a public officer complaining of misconduct of a person under him was held to be not privileged from disclosure as an official communication. This decision will not apply to us as we are governed by the provisions of Section 124 of the Act.

13. We shall now consider the decision of this Court in (1962) 1 Andh WR 256 at P. 259 on which strong reliance has been placed by the accused. Therein the

communication sought to be privileged under Section 124 was admittedly a report from one officer to another. The learned Judge Satyanarayana Raju J. (as he then was) who spoke for the court, observed thus: the privilege under Section 124 has been given not for the benefit of the person making to communication but for the protection of the public interest and the dominant intention of the section is to prevent disclosures to the detriment of the public interests. The words 'official confidence' indicate that the section applies to communications from one public officer to another public officer, in the discharge of their official duties and not to communications to such officers by outsiders. Communications in official confidence, though they import no special degree of secrecy or protection, include generally all matters communicated by one officer to another in the performance of his duties.

We are in entire agreement with the view of the learned Judges that the reports made by one public officer to another in the discharge of his official duties would come within the purview of Sections 123 and 124, and therefore the decision is justified on facts. But the observations of the learned Judges that Section 124 will not apply to communications to public officers by outsiders, must be held to be obiter. In any event, the observations of general nature made therein must be confined to that case and read in the light of the important fact that the communication which was sought to be privileged under Section 124 in that case was made by one public officer to another in discharge of his official duties. See *Devilal Modi v. Sales Tax Officer* : [1965]1SCR686 .

14. This brings us to examine whether the disclosure of the contents of the document in the instant case would adversely affect public interests. It is the public officer i.e., the Collector, Central Excise and Customs herein who is competent to decide whether the disclosure of the contents of the document in question would injure public interests or not. The court will not interfere with the discretion exercised by the Public Officer in this regard unless the exercise of the discretion by the officer on a perusal of the contents of the document, is found to be perverse, mala fide and unjust. In the case on hand the Collector Central Excise while sending the document in question to the court, has expressed that it is not in public interest to disclose or divulge its contents. Admittedly on the information

furnished by the informant, a private citizen, in the statement recorded by the Assistant Collector the search of the premises of the accused has been made. The sudden raid and the search resulted in unearthing of huge quantity of contraband gold. The information had been furnished by the informant to the public officer who would not divulge or disclose the source and contents of his statement but make use of the same for protecting and safeguarding the interests of the public revenue. Any publicity of the contents as well as the source of the statement by producing the same in a court of law would certainly amount to breach of confidence reposed by the informant in the public officer at the time of its making. It is indeed detrimental to the interests of the democratic welfare State like ours to disclose or divulge the names of spies, decoys or Informers as well as the contents of the document or information which are confidential in nature. Very many citizens would refrain from giving any information relating to offences against the State to the concerned public officers for fear or dislike of being mixed up in enquiries, if such information is required to be published or produced in a court of law. The fear of reprisals on the part of the criminals sought to be booked is also a valid ground to withhold the contents of such information. In the present case, on a consideration of the entire facts and circumstances, we are satisfied that the disclosure of the contents of the documents in question would really injure and affect public interest and therefore, the privilege claimed by the Collector. Central Excise and Customs under Section 124, Evidence Act must be upheld.

15. There is another valid ground to reject the claim of the accused to summon the information in question. The application is made under Section 94, Cr.P.C. Section 94 does not give an absolute right for the accused to ask for summoning any document. It is only when the court on a consideration of the facts and circumstances, considers that the production of the document or thing sought for is necessary or desirable for the purpose of the trial, inquiry or proceeding that it summons the same but not otherwise. In the instant case the accused has not based his defence on the contents of the document. The charge with which he is concerned is illegal and unlawful possession of the contraband gold seized by the Customs authorities. How the Customs authorities got the information about the possession of the contraband gold by the accused, is not material or relevant for the purpose of the enquiry before the lower court. The police or Customs

authorities may get information from different sources. What the accused is entitled to, is to have any information that is sought to be relied on by the prosecution to secure his conviction. The contents of the documents in the instant case are not at all relevant or material or necessary for a proper and effective disposal of the proceedings before the lower Court. The accused is apparently trying to fish out some information which he is not very much concerned in this enquiry. We are, therefore, of the view that the application of the accused should have been rejected on this ground also.

16. In the result, the order of the Court below is hereby set aside and the revision as allowed.

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