B.K. Kutty Vs. State

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Court : Orissa

Decided On : Jun-19-1984

Reported in : 58(1984)CLT53; 1984(II)OLR597

Judge : B.K. Behera, J.

Acts : Prevention of Corruption Act, 1947 - Sections 5(1), 5(2) and 6; Criminal Law Amendment Act, 1952 - Sections 6 and 7(3); Indian Penal Code (IPC), 1860 - Sections 147 and 467; Evidence Act, 1872 - Sections 45, 47 and 133

Appeal No. : Criminal Appeal No. 210 of 1979

Appellant : B.K. Kutty

Respondent : State

Advocate for Def. : Indrajit Ray, Addl. Govt. Adv.

Advocate for Pet/Ap. : R. Mohanty, K. Patnaik and A.C. Mohanty

Disposition : Appeal allowed

Judgement :

B.K. Behera, J.

1. The appellant stood charged for commission of offences punishable under Section 5(2) read with Section 5(1) (c) of the Prevention of Corruption Act, 1947

(for short, the Act) and Section 467 of the Indian Penal Code (for short, the Code) in the Court of the Special Judge, Sambalpur, as follows;

'First--That you B.K. Kutty being a public servant i. e., in the capacity of Steno to R. T. O. Sundargarh, in December, 1972, dishonestly or fraudulently misappropriated or converted to your own use a sum of Rs. 325/- by forging the R. C. Book of Car No. ORO 5323 and by putting a false R.C. No. 1034 dt. 20. 11. 72, which sum was entrusted to you in the said capacity, which was under your control by one Kundanlal of Old Station, Rourkela, towards the tax of his said car and thereby committed an offence punishable under Section 5(2) of the Prevention of Corruption Act read with Section 5 (1) (c) of the Prevention of Corruption Act, and within my cognizance.

Second--That you B.K. Kutty during the same time and place, being the Steno to R. T. O., Sundargarh, forged certain documents purporting to be a valuable security i. e., the R. C. Book of Car No. ORO 5328 by incorporating false entries therein and by putting a false and fabricated signature and seal of the R.T.O, Sundargarh, with intent to misappropriate a sum of Rs. 325/- and that you thereby committed an offence punishable under Section 467 of the Indian Penal Code and within my cognizance.'

2. To bring home the charges to the appellant, the prosecution had examined eight witnesses of whom P. W. 1 was the person who had allegedly entrusted the amount of Rs. 325/- with the appellant. P. W. 2, an employee of the office of the Regional Transport Officer at Rourkela, had proved Ext. 1, the sheet containing the seal of the Taxing Officer, Rourkela. P. W. 7 was the Regional Transport Officer at Sundargarh at the relevant time. P. W. 3 had examined the disputed signatures and seal with the specimen and admitted signatures and writings of the appellant and P. W. 7. The case of forgery had been based on his opinion. P. Ws. 4 to 6 and 8 had investigated into the case. P. W. 4 was the Inspector of Vigilance who had obtained the order of sanction and submitted the charge-sheet.

3. The appellant had pleaded not guilty to the charges and according to him, all the allegations made against him were false. He had not examined any witness in his defence.

4. On a consideration of the evidence, the learned Special Judge had held that both the charges had been established. For his conviction in respect of each of the charges, the appellant has been sentenced to undergo rigorous imprisonment for a period of one year and to pay a fine of Rs. 200/- and in default of payment thereof, to undergo rigorous imprisonment for a period of one month with a direction that the sentences of imprisonment would run concurrently.

5. Appearing on behalf of the appellant, Mr. K. Patnaik has raised three contentions :

(1) The prosecution of the appellant in respect of the offence punishable under Section 5(2) read with Section 5 (1) (c) of the Act was bad in Jaw owing to want of valid and legal sanction under Section 6 of the Act.

(2) As the prosecution of the appellant was illegal and invalid because of want of sanction for the offence punishable under the Act, the trial of the appellant in respect of the other charges of forgery punishable under Section 467 of the Code was without jurisdiction.

(3) The factual findings recorded by the trial Court against the appellant are unwarranted on the evidence on record and the order of conviction cannot be sustained in law.

6. Mr. Indrajit Ray, the learned Additional Government Advocate, has submitted that the factual findings recorded by the trial Court are well-founded on the evidence on record. According to him, sanction has been accorded by the appropriate authority. He has very fairly submitted that in case this Court finds that there had been no valid sanction for the prosecution of the appellant in respect of the offence punishable under the Act, the legal contention raised on his behalf that he could not be prosecuted and punished by the learned Special Judge under Section 467 of the Code would prevail.

7. Coming first to the legal question raised with regard to the validity of the sanction which, as would appear from the impugned judgment, had not been raised before the learned Special Judge, but can be raised for the first time in this

Court, as it strikes at the root of the case and relates to a condition precedent for a valid prosecution. I find, as has rightly been contended on behalf of the appellant, that sanction had not duly been accorded after proper application of mind by the sanctioning authority. The first part of the sanction order (Ext. 10) mentions the allegations made against the appellant constituting the offences punishable under Section 5 (2) read with Section 5(1) (c) of the Act and Section 467 of the Code. Thereafter, Ext. 10 reads :

'And whereas, I, Shri S. Rath, I. A. S., Chairman, Regional Transport Authority, Sundargarh, being the authority competent to remove the said Shri B. Krishnan Kutty from office, after fully and carefully examining the material before me in regard to the said allegations and the circumstances of the case, consider that the said Shri B. Krishnan Kutty should be prosecuted in a Court of Law for the said offences.

Now, therefore, I do hereby accord sanction under Section 6 (1) (c) of the Prevention of Corruption Act for the prosecution of the said Shri B. Krishnan Kutty for the said offence and any other offence punishable under other provisions of law in respect of the said offences by a Court of competent jurisdiction.'

It is not clear from Ext. 10 as to what materials had been placed before the sanctioning authority. The only witness with regard to the grant of sanction was P. W. 4, an Inspector af Vigilance. He had testified thus :

'On 15.7.1975 as Vigilance Inspector, Rourkela, I took charge of investigation of this case from K.S. Joshi. I perused the case record and prepared a consolidated report and sent that to the S. P. , Vigilance, Sambalpur. Subsequently, I sent the investigation report to S. P. I received the sanction order, Ext,. 10 of Collector-cum-Chairman, R. T. A., Sundaigarh, through the S.P. and I submitted charge-sheet.'

This witness had not stated in his evidence that he had placed the case diary and other materials before the sanctioning authority. The consolidated report and the investigation. report said to have been submitted by him to the Superintendent of Police had not been produced and proved at the trial. The Superintendent of

Police had not been examined for the prosecution. It has not specifically been mentioned in Ext. 10 that a consolidated report and an investigation report prepared by the Inspector of Vigilance (P. W. 4) had been placed before the sanctioning authority. According to P. W. 4., he had received the sanction order through the Superintendent of Police. It is not understood as to what materials had been sent to and placed before the sanctioning authority by the Superintendent of Police before the sanction was accorded.

8. The learned counsel for the appellant has invited my attention to the principles laid down by the Supreme Court in AIR 1979 Supreme Court 677, Mohd. Iqbal Ahmed v. State of Andhra Pradesh and the view taken by this Court in 55 (1983) C. L. T. 288, Md. Sabir Hussain v. State of Orissa. In 1971 S.C.D. 1126, Major Som Nath v. Union of India and Anr., the Supreme Court has held:

'...For a sanction to be valid it must be established that the sanction was given in respect of the facts constituting the offence with which the accused is proposed to he charged. Though it is desirable that the fact should be referred to in the sanction itself, none-the-less if they do not appear on the face of it the prosecution must establish aliunde by evidence that those facts were placed before the sanctioning authorities '

It has been laid down by the Supreme Court in AIR 1979 Supreme Court 677 (supra) that the grant of sanction is not an idle formality or an acr(sic)itonious exercise but a solemn and sacrosanct act which affords protection to Government servants against frivolous prosecution and must therefore be strictly complied with before any prosecution can be launched against the public servant concerned. In the instant case, no evidence has been adduced by the prosecution to prove as to what were the contents of the consolidated report and the investigation report to which reference has been made by P. W. 4. In AIR 1979 Supreme Court 677 (supra), no evidence had been led to prove as to what were the contents of the note mentioned in Ext. P-16 which was placed before the sanctioning authority. The Supreme Court held :

"...In the instant case no evidence has been led either primary or secondary to prove as to what were the contents of the note mentioned in Ext. P-16 which was

placed before the sanctioning authority. The evidence of P. W. 2 or P. W. 7 is wholly irrelevant because they were not in a position to say as to what were the contents of the note which formed the subject-matter of the sanction by the Standing Committee of the Corporation. The note referred to above was the only primary evidence for this purpose. Mr. Rao vehemently argued that although the Resolution, Ext. P-18 does not mention the facts, the Court should presume the facts on the basis of the evidence given by P. W. 2 and the order implementing sanction which mentions these facts. This argument is wholly untenable because what the Court has to see is whether or not the sanctioning authority at the time of giving sanction was aware of the facts constituting the offence and applied its mind for the same and any subsequent fact which may come into existence after the resolution granting sanction has been passed, is wholly irrelevant....'

9. Keeping in mind the aforesaid principles laid down by the Supreme Court which-were followed in 56 (1983) C. L. T. 288 (supra) and the highly unsatisfactory evidence led by the prosecution in this regard, I would uphold the contention raised on behalf of the appellant that his prosecution for commission of the offence punishable under Section 5 (2) read with Section 5(1) (c) of the Act was bad in law as no cognizance could be taken by the learned Special judge in respect of that offence for want of legal and valid sanction.

10. This takes me to the second legal contention raised on bahalf of the appellant that as the prosecution of the appellant under Section 5(2) read with Section 5 (1) (c) of the Act was bad in law owing to want of sanction, the learned Special Judge had no jurisdiction to try him in respect of the offence of forgery punishable under Section 467 of the Code. The contention raised in this regard on behalf of the appellant and the concession made by the learned Additional Government Advocate are legally well founded for the following reasons.

11. In support of this legal stand, reliance has been placed by the learned counsel for the appellant on the principles laid down by this Court in 52 (1981) C. L. T. 197, Republic of India v. Khagendranath Jha. In that case, the accused person had been convicted under Section 5(2) read with Section 5(1) (d) of the Act and under Sections 120B and 477A of the Code. The prosecution for the offence punishable

under the Act was held to be invalid owing to want of sanction. Relying on the principles laid down in AIR 1961 Patna 203, Ramautar Mahton v. The State and 1963(2) Cr. L. J. 556 (Gujarat), Sahebkhan Umarkhan v. State, this Court held :

'...In Ramautar Mahton v. State, it has been held by a Division Bench that the proceeding before a Special Judge in a case relating to an offence under Section 5(2) of the Prevention of Corruption Act;, 1947 is no trial at all when there is no valid sanction under Section 6 of that Act. In such a case the Special Judge has no jurisdiction under Section 7(3) of the Criminal Law Amendment Act, 1952 to try the of fence under Section 409 of the Indian Penal Code also. The trial for that offence being without jurisdiction, is nullity and void. Thus, the trial for the other offence is without jurisdiction when the Special Judge convicts the accused for such an offence by the same judgment which he was trying under Section 7(1) of the Act.

A Division Bench of the Gujarat High Court in Sahebkhan Umarkhan v. State, has also held that if the Special Judge has no jurisdiction to try an offence punishable under Section 5(2) of the Prevention of Corruption Act, he has no jurisdiction to try the other allied offence?, such as one under Section 409, Penal Code, for which power has bee, conferred upon him under Sub-Section (3) of Section 7 of the Criminal Law Amendment Act, 1952. The Gujarat High Court has followed the aforesaid Patna decision.

In view of the aforesaid position of law, I am to hold that the Special Judge had no jurisdiction to try the case and the entire prosecution was illegal. Therefore, the conviction of the accused under Section 477A and Section 120B of the Indian Penal Code should be deemed to be null and void and amounts to no conviction in the eye of law.'

12. Besides these decisions cited at the Bar, some other reported cases have come to my notice. The same view has been taken in 1970 M. L. J. (Cr.) 217, Ramachandra Babanna Chanti, In re : 1975 Raj. L.W. 214, Ganesh Narain v. State of Rajasthan, 1975 Cr. L. J. 973 (Rajasthan) Zahoor Ahmed v. State of Rajasthan, and AIR 2977 Kerala 113 : 1977 Cr.L.J. 1114, M.A. Kochudeyassy and Ors. v. The State of Kerala.

It has bean laid down by the Supreme Court in AIR 1961 Supreme Court 1241, State of Andhra Pradesh v. Kandinulla Subbaiah and Anr. that as provided in Sub-section (3) of Section 7 of the Amendment Act, when trying any case under the Act, a Special Judge may also try any offences; other than an offence specified in Section 6 of that Act with which the- accused under the Code of Criminal Procedure, be charged at the same trial.

13. The offences punishable under the Act have been enumerated in Section 5 thereof. Section 6 at the Act provides for previous sanction for prosecution for some offences under the Code and under the Act. The Criminal Law (Amendment) Act, 1952 (for short, the Amendment Act)' was enacted to provide for speedy trial of certain offences. Under Section 6 thereof, the State Government may, by notification in the official Gazette, appoint as many Special Judges as may be necessary for such area or areas as may be specified in the notification to try the offences enumerated therein,

14. Section 7 of the Amendment Act provides:

'7. Cases triable by Special Judge-- (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 by the State Government.

(3) When trying any case, 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.'

It is clear that Sub-section (3) of Section 7 of the Amendment Act is an enabling provision conferring jurisdiction on the Special Judge to try offences which arise in the course of the same transaction allied with the principal offences for the trial of which he is appointed to be a Special Judge. If the Special Judge has no

jurisdiction to try an offence punishable under Section 5 (2) of the Act, he cannot exercise jurisdiction to try the other allied offences for which power has been conferred on him by Sub-section (3) of Section 7 of the Amendment Act. The trial of a person before the Special Judge in a case relating to an offence under Section 5(2) of the Act is no trial at all in the eye of law when there is no valid sanction under Sec 6 of the Act. In such a case, the Special Judge has no jurisdiction under Section 7 (3) of the Amendment Act to try an offence punishable under Section 467 of the Code. The trial for that offence, being without jurisdiction, is null and void.

15. For the aforesaid reasons, I would, with respect adopt the view taken by this Court in 52 (1981) C. L. T. 197 (supra) and hold that as the learned Special Judge had no jurisdiction to take cognizance for the offence punishable under Section 5(2) read with Section 5(1) (c) of the Act for want of legal and valid sanction, he had no jurisdiction to take cognisance in respect of the allied offence punishable under Section 467 of the Code in view of the specific powers conferred on a Special Judge with the limitations specified in Section 7 (3) of the Amendment Act. The result would be that the order of conviction recorded against the appellant in respect of both the charges and the sentences passed against him there-under have got to be set aside as there had been no valid trial in the eye of law.

16. Assuming, however, that sanction had duly been accorded for the appellant's prosecution under the Act and that the learned Special Judge had, therefore, jurisdiction to take cognizance and try him for both the charges. I find, for the reasons to follow, that the factual findings recorded against the appellant holding him to be guilty of the charges are unfounded on the evidence on record and cannot be sustained in law.

17. The specific charge against the appellant was that he had dishonestly or fraudulently misappropriated or converted to his own use a sum of Rs. 325/- by forging the registration certificate book of Car No. 15. ORO 5328 by putting a false registration certificate No. 1034 dated November 10, 1972, which sum had been entrusted by Kundanlal P. W. 1 with him in his capacity as a public servant and was under his control. P. W. 1 had deposed thus :

'For a pretty long time I know the accused in dock. He was working in the Rourkela R. T. O. Office. I owned a Car ORO 5328. I had sent that car to Bihar and had not paid tax from September, 1971 to December, 1972, I wanted to dispose of that car and for that I contacted this accused. The accused told me that on payment of Rs. 325/- everything would be clear. In December, 1972 I paid him Rs. 325/- and R. C. Book. Two to three days thereafter he was transferred to Sundargarh. Since 1954 I have automobile work-shop at Rourkela. The accused used to visit my ga(sic)age. I paid the above amount and the R.C. Book in my garage in presence of some workers. I know Upadhyaya Babu who works as Motor Vehicles Agent. 15 days after payment of money to him, the accused returned the R. C. Book showing payment of tax with the seal and signature of the officer. I sent the R. G. Book to Bokaro. The R. C. Book was returned to me with a letter from Dhanbad that until no objection certificate was given by the R. T. O., Sundargarh, the transfer was not permissible. I made over that R. C, Book . and the letter from Bokaro S. O. to Upadhyaya to deposit Rs. 2/- and obtained no objection certificate. This is my R.C. Book (marked 'X' for identification). The accused has returned this book with the entry marked 'X-I'. 2 to 3 days thereafter it was known that the entry at X/1 was forged and that was seized by the police.'

He had not given the date of payment and had not specifically stated in his evidence that a part of the amount was to be deposited towards the tax for the car. His evidence, read as a whole, would give an indication that he had handed over Rs. 325/- to the appellant as bribe for doing his work. As a matter of fact, while examining the appellant under Section 313 of the Code of Criminal Procedure, question No. 5 was put thus:

'From the evidence of the P, Ws. it appears that you had received a sum of Rs. 325/- from Kundanlal as bribe promising that you will do everything possible to facilitate the sale of the car of Kundanlal ORO 5328. What have you got to say ?'

The appellant had denied this accusation. It may be kept in mind that the appellant had not been prosecuted under Section 161 of the Code for receiving illegal gratification not for misconduct specified in Section 5 (1) (d) of the Act for obtaining for himself pecuniary advantage by corrupt or illegal means or by otherwise

abusing his position as a public servant, but had been charged specifically for misconduct specified in Section 5(1) (c) of the Act for dishonestly misappropriating Rs. 325/- entrusted with him as a public servant. The expression 'entrustment' carries with it the implication that the person handing over any property continues to be its owner and he must have confidence in the person taking the property so as to create a fiduciary relationship between them. A trust implies confidence placed by one man in another. If there be a trick or deceipt, there can be no entrustment and an accused person may be prosecuted for cheating under Section 420 of the Code. Bribe money handed over to a public servant cannot, under the law, amount to entrustment of the money with a public servant in his capacity as such. The order of conviction for criminal misappropriation in respect of an amount of Rs. 325/- entrusted with the appellant is, therefore, legally misconceived.

18. Apart from this legal infirmity in the order of conviction, the uncorroborated evidence of P. W. 1, who on his own showing, would be characterised as an accomplice being a bribegiver, is unworthy of credit although an accomplice is also competent witness as provided under Section 133 of the Evidence Act. A conviction may not be illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. As a rule of prudence, however, the evidence of an accomplice should be corroborated in material particulars. Being tainted evidence, the evidence of an accomplice is to satisfy a double test. The evidence must be reliable and if this test is satisfied, it must be sufficiently corroborated. Reference may be made in this connection to the observations of the Supreme Court in AIR 1980 Supreme Court, 1382 State (Delhi Administration) v. V.C. Shukla and Anr.

19. In the instant case, the evidence of P. W. 1 with regard to payment of Rs. 325/- had not received any corroboration although in his examination-in-chief, he did state that he had paid Rs. 325/- in the presence of some workers in his garage which statement he gave a go-bye in his cross-examination, wherein he had stated that here was none other than himself and the appellant when he paid Rs. 325/- to the appellant. The latter statement, as would appear, had designedly been made so that no comment could be made on his evidence that it could be, but had not been corroborated. According to P. W. 1, prior to this payment of Rs. 325/- he

had, on many occasions, paid moneys to the appellant and had got his work done. There was no evidence in support of this evidence of P. W. 1 either. If the quarterly tax for his car was Rs. 30/- and tax had not been paid from September, 1971 to December, 1972, it is not understood as to how and why P. W. 1 would pay a sum of Rs. 325/- to the appellant who, as a Stenographer to the Regional Transport Officer, would have nothing to do with the deposit of tax or the issue of a registration certificate. In this state of evidence, the trial Court unjustifiably accepted the evidence of P. W. 1 and held that he had paid Rs. 325/- to the appellant.

20. I would hold, in disagreement with the trial Court, that the evidence would not warrant a conclusion that a sum of Rs. 325/- had been paid by P. W. 1 to the appellant.

21. I would next come to the charge of forgery. The case of the prosecution was that a few days after the payment of Rs. 325/- by P. W. 1 to the appellant, the latter returned the Registration Book with a false entry purported to have been signed by the Regional Transport Officer (P. W. 7) which had been forged and affixing a false seal. It was in the evidence of P. W. 8, one of the Investigating Officers, that he had taken the specimen signatures and writings of the appellant 'in the presence of a Magistrate (Mr. R.K. Hota) and Ext. 17 series were the specimen writings and signatures of the appellant. Mr. R.K. Hota had not been examined as a witness for the prosecution. It was, indeed, unfortunate that while examining the appellant, the trial Court did not take care to ask him as to whether these specimen writings and signatures had been taken from him. The evidence of P. W. 3, the Handwriting Expert, was that the signature (Y-1) purported to be that of the Regional Transport Officer had not been written by P. W. 7 as compared by him with his specimen writings. It was not in his evidence that this signature had been written by the appellant. P. W. 7 had not testified that this signature, which was not his, was in the hand of the appellant. As regards the disputed entry (Y-2), the evidence of P. W. 3 was that it was in the hand of the appellant as compared by him with the specimen writings of his. It was not in the evidence of P: W. 7, who was supposed to be acquainted with the writing of the appellant, that this writing was in the appellant's hand. The appellant had denied to have written 'Y-2'. The

evidence of the Expert (P. W. 3) in this regard had not received any corroboration. There was no specific evidence that the appellant had been instrumental in putting a false seal in the Registration Book.

22. It has been laid down by the Supreme Court in AIR 1980 Supreme Court 531, Murarilal v. State of Madhya Pradesh, that it may be hazardous to base a conviction solely on the opinion of a handwriting expert. But the hazard in accepting the opinion of any expert, handwriting expert or any other kind expert, is not because experts, in general, are unreliable witnesses--the quality of credibility or incredibility being one which an expert shares with all other witnesses--, but because all human judgment is fallible and an expert may go wrong because of some defect of observation, some error of premises or honest mistake of conclusion. The science of identification of handwriting is not so perfect, as observed by Their Lordships of the Supreme Court. In appropriate cases, corroboration may be sought although there is no rule of law nor rule of prudence which has crystallised into a rule of law that opinion evidence must never be acted, upon unless substantially corroborated. In the circumstances of the case, it would not be reasonable and proper, in my view, to base a conviction of the appellant for forgery in respect of the entry marked 'Y-2' without any corroboration.

23. For the reasons aforesaid, I am of the view that the case against the appellant in respect of both the charges had not been established on facts and the order of conviction recorded against him cannot be sustained in law.

24. In the result, I would allow the appeal and set aside the order of conviction and sentence passed against the appellant in respect of both the charges.