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Court : Delhi

Decided On : Mar-24-2005

Reported in : 119(2005)DLT433; 2005(81)DRJ364

Judge : Manju Goel, J.

Acts : Indian Penal Code (IPC) - Sections 419, 420 and 471; Code of Criminal Procedure (CrPC) - Sections 161, 397 and 482; Evidence Act, 1872 - Sections 7, 10, 25 and 30

Appeal No. : CRLMC 2511/2004

Appellant : Ms. Arunwan Thamvaro

Respondent : State

Advocate for Def. : Sunil Sharma, Adv.

Advocate for Pet/Ap. : Mirnal Kanti Mandal and; Prem Kumar, Advs

Disposition : Petition allowed

Judgement :

Manju Goel, J.

1. This petition u/s 482 Cr.P.C. seeks to challenge the order framing charge against the petitioner u/s 120B of the Indian Penal Code read with Section 419

and 420 of the Indian Penal Code as well as for commission of offences u/s 471/120B of the Indian Penal Code. The facts of the case are as under:-

On 29.5.2004 the passport of the petitioner Miss Arunwan Thamvaro Along with the passports of the two other passengers were scrutinised at the Indira Gandhi International Airport by Mr. Ganga ACIO-II who found UK visas on the three passports. The visa on the passport of the petitioner was found to be genuine. The other two visas on the two other passports of both Thai nationals were found to be fake. The two Thai nationals, co-accused in this case later revealed their real names as Pak Priya and Runguappa respectively. The petitioner was presumed to be the facilitator in the offence. All the three were handed over to police. All the three accused were arrested and the disclosure statements of the co-accused viz Pak Priya and Runguappa were recorded and they were eventually charge-sheeted. The two co-accused pleaded guilty and they were convicted u/s 419/420 IPC read with Section 120B IPC as well as Section 471/120B of IPC.

2. The petitioner prayed for discharge. The application was dismissed vide an order dated 24.8.2004 Eventually on 24.9.2004 the trial court framed charge u/s 419/420/471 IPC read with Section 120B against the petitioner.

3. The main ground for seeking discharge by the petitioner was that except the disclosure statement of the accused 1 and2, the two other passengers, there is no evidence against the petitioner Miss Arunwan Thamvaro who was accused No.3 in this case and that even the disclosure statement of those two accused were hit by Section 25 of the Evidence Act. The allegation against the petitioner is that she facilitated the journey of the accused No.1 and 2 on fake visas and in that manner had conspired in the offence of cheating and impersonation. The petitioner did not make any disclosure statement before the police. She was traveling on a genuine passport and genuine visa. The prosecution has thereforee to show some nexus either between the petitioner and the other accused in this case or between the petitioner and the act of acquisition of fake passports or fake visas which were used by the other two accused for their journey up to Indian soil. Learned State counsel has taken this Court through the evidence relied upon by the prosecution on which charge is framed. Mr. Ganga, ACIO-II/G of Indira Gandhi International

Airport reported the occurrence to the SHO, Indira Gandhi Airport, New Delhi by a written document. He reported that Shri Ram Singh I/C wing ACIO-I handed over to him three passports of three passengers including the petitioner who were intending to go to London by Flight No. VS-301 and on scrutiny of document it was found that the UK visa affixed on the passport of Ms. Hathai Pinthong had been tempered with and that the passport of the other passenger Ms. Wimonwan Dormer had not been rightfully issued to the passport holder while the passport and visa of the petitioner were genuine. The officials of the British High Commission was contacted by M. Ganga who confirmed that Ms. Pinthong and Ms. Wimonwan Dormer were not rightful visa holders.

4. Mr. Ganga further stated in his report that the petitioner Miss Arunwan Thamvaro was a 'facilitator (people smuggler)'. He reported further that the other two passengers revealed that the petitioner was facilitating their travel to UK. Mr. Ganga then concluded saying that three passengers were trying to cheat the immigration by attempting to travel on counterfeit documents and that thereforee the case under the relevant provisions be registered. The three passengers Along with the three passports, their embarkation cards, their boarding passes as well as the fax message received from the UK High Commission were submitted to the SHO. The three passengers were also handed over to the SHO. The disclosure statement was recorded by investigating officer Mr. Lokesh Sharma on 30.5.2004 Runguappa Jailaa disclosed that she visited a boutique shop run by Pak Priya's friend at Robinson Shopping Centre, Bangkok, Thailand several times and there she met one Tak who offered to organise their journey to UK and USA for which they were required to arrange 80,000 Baht (Thai Currency). She further disclosed that on a subsequent meeting with Tak, they gave him their photographs and 40,000 Baht each and after a few days Tak handed over a passport to her in the name of Ms. Wimonwan Dormer on which the UK visa was already affixed. She further disclosed that thereafter Tak introduced them with a lady named Ms. Arunwan Thamvaro and told them she would carry both of them to London. Another sum of 40,000 Baht was patio Tak by each of them and thereafter the two arrived in India from Bangkok on 25.5.2004 and stayed in Hotel Lohiya at Mahipalpur along with Ms. Arunwan Thamvaro from 26.5.2004 to 29.5.2004 and then they came to the airport to go to London when they were caught.

5. The disclosure statement of Pak Priya is exactly on the same lines. She was given the passport in the name of Ms. Hathai Pinthong with the UK visa affixed on it and she was introduced to the lady called Ms. Arunwan Thamvaro and was told by Tak that she would carry them to London on which they again gave 40,000 baht each to Tak and thereafter they both came to India with Ms. Arunwan Thamvaro and stayed in India in Hotel Lohiya and were caught on 29.5.2004 at the Airport while they were arrived to leave for London.

6. There is no disclosure statement of the petitioner. Tak is not a co-accused. There is no statement of Tak on record. The fax communication from the British High Commission gives no evidence against the petitioner although it describes the petitioner as the facilitator (people smuggler). This description is merely in the nature of allegation and cannot be read as evidence. The question is whether there was any legally admissible evidence against the petitioner.

7. The answer is clearly 'No'. The two disclosure statements of the two accused and statement given to police officer during the arrest are hit by Section 25 of the Indian Evidence Act. None of the two statements has led to any discovery of fact and so no part of any of the two statements can be read as evidence. The report of Mr. Ganga is what Mr. Ganga gathered on scrutiny of their passports and on questioning Ms. Pinthong and Ms. Dormer. The report does not say he examined Ms. Arunwan Thamvaro. The relevant part of the report is as under:-

' The third lady one Ms. Arunwan Thamvaro was a facilitator (people smuggler). On questioning both Ms. Pinthong and Ms. Wimonwan Dormer revealed that Ms. Arunwan Thamvaro was facilitating their travel to UK. Hence the passengers namely Ms. Hathai Pinthong and Ms. Wimonwan Dormer tried to cheat the immigration by attempting to travel on counterfeit documents and Ms. Arunwan Thamvaro was acting as their facilitator.'

8.The report does not say that Mr. Ganga either questioned the petitioner or that he had any evidence apart from the testimonies of the two other accused in arriving at his conclusion that the petitioner was a facilitator or a people smuggler.

9. The prosecution does not disclose any evidence of conspiracy against the petitioner although both the co-accused say that they were introduced to the petitioner by Tak. None of them say that the petitioner knew at all that the passport and visa of the no-accused were fake. There is no evidence that the petitioner shared in the income of Tak. Nor is there any evidence that the deal between the two co-accused and Tak was settled in the presence of the petitioner or that any payment to Tak was made inner presence. Most importantly, nothing is disclosed as to how the petitioner was facilitating the journey of the two co-accused. Both the co-accused say that they themselves wanted to go to USA and London and that Tak met them in the boutique of Pak Pria. The petitioner was introduced in the story after the deal was settled between the co-accused and Tak and after the two co-accused actually received the passports with the visas. The two co-accused could very well undertake their journey to India and USA or UK even without the company of the petitioner.

10. Further the prosecution story nowhere discloses the benefit derived by the petitioner by such alleged facilitation. There is no evidence that the petitioner had any interest in taking the two co-accused to USA or London or that she was in the business of recruiting people from Thailand. There is not even any evidence that the petitioner had even seen the passport and the visa of the two co-accused or that she knew that they were traveling on passports and visas issued on some assumed names or to persons other than the two co-accused. The only thing against the petitioner is that she was traveling with the two co-accused. Can it be said that there was evidence to prove her involvement in the conspiracy on which she could be charged?

11. Reference is made to Section 10 of the Indian Evidence Act 1872 which makes things said or done by a conspirator with reference to common design a relevant fact as against the other conspirators. Reference is also made to Section 30 of the Indian Evidence Act which permits the Court to take into consideration confession of one co-accused against others being tried jointly for the same offence. Shri Sunil Sharma appearing for the prosecution says that there were two sets of confessions, first made before the immigration officer and thereafter made before the police and that these confessions by the two co-accused can be read

against the petitioner. For the same reasons he says that Section 10 makes the confessional statement relevant against the petitioner and that when the statements of the co-accused are read in the light of Section 30 and Section 10 an offence against the petitioner can be said to have been made out. In order to sustain this argument, the learned State Counsel has to first shown confessional statements of the co-accused on record. The prosecution claims to have two sets of confessional statements, one made before the immigration officer and the other before the police. Unfortunately for the prosecution, the immigration officer aid not record any confession. Even his report on which the FIR is based does not say that any of the three passengers confessed their guilt. The report of Mr. Ganga merely states what he gathered on questioning the co-accused. The report does not say that the co-accused or the petitioner admitted their guilt thereforee the prosecution cannot show any confession made before the immigration officer. So far as the confession before the police is concerned, the same is nothing other than the two disclosure statements recorded by the police after arrest. The two statements are hit by Section 25 of the Indian Evidence Act. There was no discovery following the two disclosure statements and thereforee no part of statement could be proved even under section 7 of the Indian Evidence Act.

12. Even if it is accepted for the sake of arguments that there are two sets of confessional statements available on record it cannot be said that any of the two sets of statements in any way implicates the petitioner in any offence. As mentioned earlier the report of Mr. Ganga does not disclose how he gathered that the petitioner was a facilitator or people smuggler. No statement of Mr. Ganga has been recorded u/s 161 of Cr.P.C. thereforee all that he can do is to prove his report. His report merely says that on questioning the two co-accused it was revealed that the petitioner was facilitating their travel. The report does not say that it was gathered on questioning that the petitioner was in any way involved in obtaining fake passports and visas.

Nor does the report say in what manner the facilitation was being done by the petitioner. thereforee, even if what was gathered by Mr. Ganga is taken as a confession and the same is taken as correct it falls short of an evidence against the petitioner in the alleged offence of conspiracy. Similarly, the disclosure statements do not speak of any role played by the petitioner in the conspiracy relating to forging of the passport or the visa. The two disclosure statements also do not disclose how the petitioner was carrying the co-accused.

13. In L.K. Advani and Ors. v. Central Bureau of Investigation : 66(1997)DLT618 it was held that for proving conspiracy, the prosecution has to prove meeting of minds for commission of offence. It is true that each conspirator need not take an acting part in commission of each and every one of the conspiratorial act as was held in State of Himachal Pradesh v. Krishan Lal Pardhan and Ors. : 1987 CriLJ709 . However, even in the case of State of Himachal Pradesh (Supra), the Supreme Court aid hold that a meeting of mind was essential to constitute an offence of conspiracy. The same opinion has been expressed by the Supreme Court in Lennart Schussler and Anr. v. The Director of Enforcement and Anr. : 1970 CriLJ707 ; in V.C. Shukla v. State (Delhi Administration) : (1980)2SCC665 ; Ajay Aggarwal v. Union of India and Ors. : 1993 CriLJ2516 ; State of Kerala v. P. Sugathan and Anr. (2000) SCC 203.

14. How to prove the meeting of mind and entering into a conspiracy? For this one may refer to the judgment of the Supreme Court in the case of Kehar Singh and Ors. v. State (Delhi Administration) : 1989 CriLJ1 in which the Supreme Court said the conspiracy can be proved by circumstantial evidence as well as by direct evidence and that though the conspiracy is hatched in secrecy, the prosecution must prove some physical manifestation of agreement although it may not be necessary to prove actual meeting of two persons or the words by which the two persons communicated. The Supreme Court further said that the evidence regarding transmission of thoughts and sharing of unlawful design may be sufficient. If this principle is applied, it is clear that there is no circumstantial evidence or direct evidence showing meeting of minds between the petitioner and Tak or between the petitioner and the two co-accused for commission of their offence of cheating and impersonation. The meeting of mind, if any, is shown to have been for the purpose of traveling together and nothing more.

15. Even if everything relied upon by the prosecution is proved in this case it will not be sufficient to bring home the charge. In this situation, it cannot be said that

an offence of conspiracy has been made out in this case.

16. At the end, it will be appropriate to mention here that the petitioner has approached the Court u/s 482 Cr.P.C. instead of proceeding to file a revision. Undoubtedly, the petitioner could seek a revision of the impugned order of the learned ACMM. However since revision also lies to this Court, the petition cannot be thrown out only on the ground that it is shown to have been filed u/s 482 Cr.P.C. Whether entertained u/s 482 Cr.P.C. or u/s 397 Cr.P.C., the petitioner is entitled to the relief prayed or.

17. In view of the above, I hold that the petitioner is entitled to be discharged. The petition is allowed. The impugned order of learned ACMM is quashed. Petitioner is discharged.