CRIMINAL APPEAL NO. 1235 OF 1984

Date of Decision: 2nd May 1995

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE S.D.DAVE

1. Whether Reporters of Local Papers may be allowed to see the Judgment?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made..

5. Whether it is to be circulated to the Civil Judge?

Mr. Vivek Barot, Advocate for the appellant
Mr. K.P. Raval, Assistant Public Prosecutor, for the respondent-State.

Coram : S.D. Dave, J.
2nd May 1995

ORAL JUDGMENT:

The appellant-original accused came to be convicted for the offences punishable under Sections 409, 477-A IPC and under Section 5(2) of the Prevention of

Corruption Act, 1947 and has been sentenced to the RI for one year and to a fine of Rs.1,200/- in default, to a further RI of six months for the offence punishable under Section 5(2) of the Prevention of Corruption Act, 1947. He has been awarded the RI for one year for the offence punishable under Section 409 IPC and to a further RI of six months for the offence punishable under Section 477-A IPC, vide judgment dated July 31, 1984, in Special Case No. 35 of 1983. The substantive sentences have been directed to run concurrently. The said judgment of conviction and sentence has been brought in challenge in the present Criminal Appeal, before me.

The appellant-accused, who, at all the material time, was working as a Clerk in the sub-post office, at Kadi, was put on trial on the acquastion that, while working as a Government servant during November 1981 to October 1982, he had defalcated an amount of Rs.16,500/-. The accused had pleaded not guilty to the charges levelled against him. Any how, the learned Special Judge, placing reliance upon the oral and documentary evidence, has found him to be guilty and he has been sentenced, as indicated above.

The facts leading to the prosecution of the appellant-accused are brief and for the most part, undisputed. The Superintendent of CBI (SPE) had received certain information from undisclosed sources regarding the fraudulent activity being carried on at Kadi sub-post office. The Investigating Officer, Shri H.D. Ghasura, attached to the CBI, in the capacity of the Inspector of Police, had lodged the FIR under Section 154 of the Code of Criminal Procedure, 1973, saying that, having received the information that, two persons, namely, Shri Ismailbhai Darveshbhai Malvi, the Sub-Post Master, Kadi Post office and Shri Arvindkumar Somabhai Parmar, the present appellant-accused, in collusion with each other and also with other unknown persons, have dishonestly and fradulently cheated the Postal Department and various account holders to the tune of Rs.50,000/- by not crediting to their accounts and they appear to have falsified the accounts also. It is said in this FIR that Shri Malvi, accused no.1 was supposed to tally the entries of postal accounts and was not supposed to issue the National Savings Certificates (NSCs) unless the credit entries against the same were posted. It is also made clear in the FIR that, despite this, a number of NSCs were issued and the amount thereof was misappropriated by Shri Malvi and he had also initialled the passbooks and credit slips of various accounts as if the amounts were actually credited to the Post Office.

The FIR lodged by Shri Ghasura proceeds ahead to furnish the necessary particulars in respect of the different amounts defalcated, the sum total being Rs.16,500/-. This FIR which speaks volumes against Shri Malvi as the accused no.1, had, later on, gone to the Special Judge concerned. Any how, though the FIR came to be lodged against the Sub-Post Master Shri Malvi and Clerk Shri Parmar, the appellant-accused, ultimately, after some investigation, Shri Ghasura had asked for the sanction under Section 6 of the Prevention of Corruption Act, 1947. PW12 Smt. Sobha Koshi Exh.163, later on, in the capacity of the Senior Superintendent, Mehsana, had granted the sanction to prosecute the present appellant-accused who was shown as the accused no.2 in the FIR. On the basis of this sanction, ultimately, the appellant-accused came to be prosecuted, the result of the prosecution being as indicated above.

Leaving aside the merits of the case, learned Counsel Mr. Vivek Barot appearing on behalf of the appellant-accused urges that the FIR filed by Shri Ghasura, Investigating Officer attributes a major role to Sub-Post Master, Shri Malvi in the FIR, but all of a sudden, by way of a strange development, the sanction is being sought qua the appellant-accused only and ignoring the vital fact that the allegations were mainly levelled against Shri Malvi, the sanctioning authority has granted the sanction to prosecute the appellant-accused only and, therefore, as the sanctioning authority who was granting the sanction qua the facts constituting the offence, has failed to appreciate the question of granting the sanction in a proper manner, the whole sanction process along with the outcome in the form of a sanction letter has been vitiated and that the cognizance taken by the Special Court of the offences allegedly committed by the appellant-accused is also vitiated and that, therefore, the conviction of the appellant-accused based upon such a vitiated sanction and vitiated trial could not be sustained. Learned Government Counsel Mr. K.P. Raval in answer to the above said contention urges that, after the filing of the FIR which showed the name of Shri Malvi as the principal accused, the investigating agency might have thought it fit and proper to prosecute the present appellant only and that, if on the prayer of the investigating agency, the sanctioning authority has given the sanction to prosecute the appellant-accused only, nothing turns upon the trial and the outcome of the trial.

The contention of the learned Government Counsel is that, probably nothing could have been said against

Shri Malvi and, therefore, in all fairness, the prosecution could have been launched against the appellant alone. But this contention coming from the learned Government Counsel does not appear to be genuine which would require countenance when a casual look at the evidence brought on record is accomplished. One of the prosecution witnesses, namely, Arjunsinh Bhati PW2-Exh.18 has said in his evidence that, when he had handed over the cash amount of Rs.3,600/- to the appellant-accused, Shri Malvi was already present there. Smt. Sobha Koshi, PW12-Exh.163 has stated that she had accorded the sanction to prosecute the appellant-accused only and she was acting upon a letter of request received by her. During the cross-examination, Smt. Koshi comes out with a candid admission that, if Shri Malvi, who was shown as the principal accused in the FIR had observed the relevant rules, the fraud could not have been committed. It is also her say that because Shri Malvi was found guilty of the non-observance of the rules, Departmental inquiry against him for showing the negligence in his duty as a Post Master had already initiated. To be exact, the say of Smt. Koshi can be reproduced thus:

> "We have also initiated departmental inquiry against Malvi for negligence in his duty as Post Master. I agree that fraud in respect of national savings certificate would not have been committed if Mr. Malvi had observed the rules."

Thus, Smt. Koshi says unequivocally that Shri Malvi was guilty of the non-observance of the relevant rules and if there were to be no non-observance on the part of Shri Malvi, the entire fraud could not have been committed. Shri Ghasura, Investigating Officer PW13-Exh.166 says that he had received the necessary information on 11th March 1983 and thereafter, he had filed the FIR against Shri Malvi and the appellant-accused. He has also said in the examination-in-chief itself, that during the course of the investigation, it was noticed that Shri Malvi was not guilty for the defalcation but it also, was borne out from the investigation papers, that the appellant-accused could commit the defalcation because of the negligence on the part of Shri Malvi. Shri Malvi, in his evidence as PW10-Exh.147 has stated that the National Savings Certificates used to remain in the custody of the Cashier Shri M.C. Dhabhi and that the appellant-accused was required to take the certificates from Shri Dhabhi and to deliver the same to the person investing in the certificates. He has also said that, according to the rules, a daily account statement was to be maintained in

the Post Office and that, if there was any discrepancy between hand book and the treasury book, then the necessary entry was required to be posted in the error book which would be in the custody of the cashier. He has also further stated that his initials would be necessary in the error book and, ultimately, if there was some increase in the cash not supported by the relevant entries, the necessary note shall have to be made in the unclaimed receipt register. In the cross-examination, he was confronted with a clear eventuality of the missing of the error book and the unclaimed receipt register (UCR). It was suggested to Shri Malvi that the error book to be maintained by the appellant-accused was in the custody of the Post Office. Though he denies having signed the error book to be maintained by the appellant-accused at one juncture, he has said that the error book was in the custody of the Post Office. Changing the version, he has tried to answer in negative also. Any how, it is an admitted position, not disputed before me by learned Government Counsel Mr. Raval that, both the error book and UCR which were to be in the custody of the Post Office and which were in fact in the Post Office were found to be missing and that the same could not be produced before the Court, at the relevant juncture.

Thus, from the evidence of the prosecution witnesses including Shri Ghasura, Smt. Sobha Koshi and Shri Malvi, it is abundantly clear that it cannot be said that there was absolutely no evidence against Shri Malvi who was shown in the FIR as the principal accused. This important aspect requires to be appreciated for the sole purpose of examining the question regarding the bona fides of the prosecution and the genuineness of the sanction obtained by the prosecution.

Section 6 of the Prevention of Corruption Act, 1947 (as it was applicable at the relevant time) says that, no Court shall take the cognizance of the offences punishable under Sections 161, 164 or 165 of IPC and under Sub-section (2) or sub-section (3) of Section 5 of the Act, if they are alleged to have been committed by public servant except with the previous sanction. The provisions contained under Section 6 of the Act of 1947 places an embargo against the very taking of the cognizance of the offence committed by a public servant.

The Madhya Pradesh High Court decision in STATE v. HIRANAND, AIR 1958 M.P. 2, makes it clear that a valid sanction is regarded as the condition precedent to a valid prosecution under Section 6 of the Prevention of Corruption Act, 1947. The burden of proving that the

requisite sanction has been obtained rests on the prosecution and such burden includes the proof that the sanctioning authority had given the sanction in reference to the facts on which the prosecution case was to be based. The said decision carves out a well known principle that the sanction should be in reference to the facts on which the prosecution was to be based. The Privy Council decision in GOKULCHAND DWARKADAS MORARKA v. THE KING, AIR (1935) PRIVY COUNCIL, 82, says while interpreting Clause 23 of the Cotton Cloth and Yarn (Control) Order (1943) that it must be proved that a sanction was given in respect of the facts constituting the offence charged. The Supreme Court pronouncement in BALADIN AND ORS. v. STATE OF UTTAR PRADESH, AIR 1956 SC 181, lays down that the statements made by the prosecution witnesses before the Investigating Police Officer being the earliest statements made by them, with reference to the facts of the occurrence are valuable material for testing the veracity of the witnesses examined in the Court. In R.P.KAPUR v. STATE OF PUNJAB, AIR 1960 SC 866, it has been made clear that the investigation into criminal offences must always be free from any objectionable features or infirmities which may lead to grievance of accused that investigation is carried on unfairly or with any ulterior motive. The Calcutta High Court decision in INDU BHUSAN CHATTERJEE v. THE STATE, AIR 1955 CALCUTTA, 430, while examining the questions of provisions contained under Section 6 of the Prevention of Corruption Act, 1947 says that it is essential that persons charged with the responsible duty of granting sanction, which is a duty of deciding whether or not the credit and reputation of another citizen should be put in peril by means of a criminal prosecution, should bring to the discharge of their duty a sense of responsibility and the industry required to examine the relevant materials.

Learned Counsel Mr. Vivek Barot places heavy reliance upon the say of the Apex Court in YAMUNA CHAUDHARY AND ORS. v. STATE OF BIHAR, AIR 1974 SC 1822, to urge that the duty of the Investigating Officer is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction but to bring out the real unvarnished truth.

The logic which can be derived from the above said decisions, put in a simpler form, is that the sanction is qua the facts of the offence or the facts which would constitute the offence. It would be the duty of the presenting officer to present before the sanctioning authority all the relevant material and to

ask for the sanction, which again, shall have to be, on the appreciation of the facts, which would constitute the alleged offence. Any thought process or action which would amount to an effort to bolster the case of the prosecution putting the real justice in jeopardy shall have to be eschewed. The sanctioning authority cannot be asked to accord a sanction against a particular accused only, the selection of which could be done by the Investigating Agency. All the relevant facts which would constitute the alleged offence should have been placed before the sanctioning authority and that the process of pick and choose under which the appellant-accused only was chosen as an accused and was made to face the trial, appears to be unjustifiable.

As indicated above, learned Government Counsel Mr. Raval wanted to urge that, possibly, there was nothing against Shri Malvi which could have led Shri Ghasura to concentrate upon the appellant-accused only and in the same way, the very same consideration would have prevailed when Smt. Sobha Koshi had accorded the sanction. This contention, obviously, cannot be accepted because as referred to above, the evidence tendered by Shri Ghasura, Smt. Sobha Koshi and Shri Malvi would go to show that something very material was being said against Shri Malvi also. The FIR which puts the criminal law in motion speaks of Shri Malvi as a principal offender who is said to be guilty of the defalcation. Even according to the sanctioning authority, Smt. Sobha Koshi, Shri Malvi was found guilty of non-observance of certain rules which were required to be followed in the day-to-day transactions of the sub-post office. It also cannot be denied that Shri Malvi had to face departmental inquiry for the non-observance of the rules. The sum and substance of the evidence is that, there was a strong accusing finger against Shri Malvi and that if he had discharged his duties in a proper fashion, in consonance with the relevant rules and regulations, the defalcations could not have occurred. This aspect is to be viewed along with the fact that, one of the witnesses, namely, Shri Bhati, PW2-Exh.18, has said very clearly that the exchange of the currency notes had taken place when Shri Malvi himself was present. This evidence is to be read along with a further fact that Shri Malvi was required to sign the error book to be maintained by the appellant-accused and that, ultimately, the error book and the UCR were found to be missing. This all would go to show the involvement of Shri Malvi to some extent, if not to the fullest, or more than which can be attributed to the appellant-accused.

In view of these prominant features of the prosecution evidence, it appears that Shri Malvi, who was shown as the principal accused in the FIR, could not have been allowed to go only as a prosecution witness after obtaining the sanction to prosecute the appellant-accused only. The whole process appears to be a process under which a pick and choose policy was adopted under which the principal accused was turned as a prosecution witness and the accused no.2 was made the only accused during the trial. This vitiates not only the sanction but the entire trial, the benefit of which shall, necessarily, go to the appellant-accused.

Therefore, in the aforementioned circumstances and the reasons, the present appeal requires to be allowed. The same is hereby accordingly allowed. The appellant-accused is hereby acquitted of all the offences for which he was found guilty by the Court below and came to be convicted. The appellant-accused is on bail and, therefore, his bail bonds shall stand cancelled. The fine, if paid, shall be refunded to the appellant-accused.

The Criminal Miscellaneous Application No. 1639 of 1984 in the form of suo-motu notice for the enhancement of the sentence shall have to be dismissed. The same is hereby accordingly dismissed.

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