

(1995) 11 MAD CK 0015

Madras High Court

Case No: Criminal R.C. No. 144/92 and Criminal R.P. No. 141/92

Inspector of Police, S.P.E., C.B.I.,
Madras

APPELLANT

Vs

Philomena

RESPONDENT

Date of Decision: Nov. 17, 1995

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 223
- Penal Code, 1860 (IPC) - Section 120B, 27, 411, 414

Citation: (1997) 2 LW(Cri) 461

Hon'ble Judges: N. Arumugham, J

Bench: Single Bench

Advocate: P. Rajamanickam, Central Government Public Prosecutor, for the Appellant;

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

N. Arumugham, J.

The Inspector of Police, S.P.E., C.B.I., Madras, by filing this Criminal Revision Petition, has assailed the order passed

by the learned V Additional Special Judge, Madras, in CrI. M.P. No. 5964 of 1991 in C.C. No. 18 of 1990 filed under S. 223 of the Code of

Criminal Procedure praying for splitting up of the above case into two and have the trial separately for its want of legality and propriety.

2. The respondent herein is the wife of one Michael Selvaraj who was employed as Assistant in Food Corporation of India and the respondent is

employed as staff nurse in Dental College at Madras City and both were living together as husband and wife and earning jointly by their respective

employment. After the investigation, the revision petitioner being the investigating authority, laid the final report against both before the learned

Special judge for offence under S.120.B of the Indian Penal Code read with S.5(2) and 5(1)(e) of the Prevention of Corruption Act. 1947 and

specific offence under S.5(2) read with S.5(1)(e) of the Prevention of Corruption Act. To specify the alleged offences under S.120.B of the I.P.C.

along with the other offences passing from the respective parties projected by the investigating agency. Thiru Michael Selvaraj and the respondent

herein being the husband and wife, indulged in a joint concert for acquiring the disproportionate income and assets at the every behest and effort

taken by the former and through one of his relatives by name Balraj maneuvered to get a promissory note executed in favour of one Sivakami

Ammal, who is none other than the aunt of one of the close friends of the said Balraj with a view to conceal the acquisition of the disproportionate

assets. With the main theme formulated above, in furtherance of the offences under Ss.5(2) and 5(1)(e) of the Prevention of Corruption Act, the

prosecution dwelt their main thesis for their stake before the Court below. However, a petition under S. 223 of the Code of Criminal Procedure

was filed by the respondent praying for splitting up of the case stating that the trial against both in a joint trial will cause every prejudice for her, as

there are no materials or evidence to show that they are joint concerts. This petition was resisted by the revision petitioner. However, on hearing

both sides, in the context of the contentions raised on behalf of the respective parties, the learned Special Judge has passed the impugned order

splitting up of the case in C.C.No.18 of 1990 into two and have a separate trial against the respondent herein and her husband, and thus, allowed

the petition. Aggrieved at this, the investigating agency has come forward with this revision challenging the propriety and legality of the impugned

order.

3. After admitting this revision, though notice of the revision was sent to the address of the respondent, she had not entered appearance either in

person or through the Bar and thus there is no contest in this matter. However, Mr. P. Rajamanickam, learned counsel for and on behalf of the

revision petitioner wanted the revision to be disposed of on merits and accordingly, opposed the impugned order. His main grievance upon the

impugned order is that the learned Special Judge while adverting the case law held by a learned single Judge in this Court in *Thiyagarajan v. State*

(1990 L.W. CrL. 228) has totally mis-construed and mis-applied the various findings and views held on this score while dealing with the scope of

S. 223, Cr. P.C. Learned counsel would further contend that the case law cited and relied on by the learned Special Judge is to be distinguished

clearly for the reason that in the said case the inclusion of the husband and wife alone are there without any specified overt act among themselves

formulating the offence, but, however, in the instant case, materials collected for the commission of the offence under S.120.B of the IPC. against

the respondent and her husband are enormous and overwhelming and that was the reason why the offence under S.120.B of the I.P.C., was

projected and that the learned Special Judge has failed to note the abovesaid aspect while following the view held by the learned Single Judge in

the above cited case law. On the basis of the above only contention, learned counsel persuaded me to intervene and set aside the impugned order.

4. In the light of the point canvassed by the learned counsel in the instant case, I feel it necessary to advert S. 223 of the Code of Criminal

Procedure for the relevant and proper adjudication of the case in the proper perspective ""S. 223. What persons may be charged jointly:-

The following persons may be charged and tried together, namely:-

a. Persons accused of the same offence committed in the course of the same transaction;

b. Persons accused of an offence and persons accused of abetment of or attempt to commit, such offence;

c. persons accused of more than one offence of the same kind, within the meaning of S.219 committed by them jointly within the period of twelve months;

d. persons accused of different offences committed in the course of the same transaction.

e. persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation., and persons accused of receiving or

retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence

committed by the first-named person, or of abetment of or attempting to commit any such last-named offence;

f. persons accused of offences under SS. 411 and 414 of the Indian Penal Code or either of these sections in respect of stolen property the

possession of which has been transferred by one offence;

g. persons accused or any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin and persons accused of any other

offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained

in the former part of this Chapter shall, so far as may be, apply to all such charges;

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in

this section, the Magistrate may, if such persons by an application in writing, so desire, and if he is satisfied that such persons would not be

prejudicially affected thereby, and it is expedient so to do, try all such persons together.

5. If the above section of law is canalised by a mere casual reading and applied to the facts of the instant case for the reasoning mentioned above,

it cannot be disputed that sub clause (a) and (d) of S. 223 Cr. P.C. squarely comes into operation and applicable to the facts of the instant case.

That being so, the only question that remains for consideration is whether the facts of the instant case can be brought within the ambit of the

Proviso added thereto. Even assuming that one of the accused, namely, the respondent herein has filed a petition under S. 223, Cr. P.C, requesting

the Court to split up the case for separate trial, a perusal of the impugned order passed by the learned Special Judge would reveal that there is no

satisfaction of the proper ground by the learned Special Judge to order the split up of the case. The very fact of the joint concerted overt act in

acquiring the assets dis-proportionate to their income and the effort of concealment taken by Michael Selvaraj, the husband of the respondent

herein, under the pretext of a promissory note executed by the husband of the respondent herein in the name of one Sivakami Animal, would be

the prima facie case to be identified by the learned Special Judge for the offence under S.120-B of the I.P.C. Therefore, the above said fact is an illustration and a mere illustration is adequate enough to identify the prima facie material to frame the charge under S.120.B of the I.P.C. It is to be added with the admitted fact that both husband and wife are employed in different places, but however, living in the same house and they are living jointly by taking joint effort in acquiring the wealth. In the context of no specific reasoning given with regard to the prejudice or otherwise as provided by the Proviso, the very observation given by the learned Special Judge in the impugned order is clearly an error and, therefore, I am constrained to hold on factual aspects of the instant case that the approach adopted by the learned Special Judge is not correct and an erroneous one.

6. Another folly identified in the impugned order is that the learned Special Judge has not properly construed the legal principles laid down by a Single Judge in the above cited law. While dealing with the scope of S.5(l)(e) and 5(2) of Prevention of Corruption Act, the learned Single Judge in the above cited case law has observed as follows:-""It must be borne in mind that no allegations are made against the second accused except for the fact that she was present during the search and had opened the steel almirah with the keys in her possession. It cannot also be lost sight of, that when she was questioned she had stated that her husband alone has to account for the cash found in the steel almirah.

S. 5(l)(c) does not contemplate joint possession but takes in its fold property or pecuniary" resources held by any other person on behalf of the public servant It is the definite prosecution case that the petitioner had stolen medicines from the Government Hospital and obtained disproportionate wealth. In this context, a reference to S. 27 I.P.C. about the property in possession of a wife being deemed to be in that person's possession would not be out of place, though it can be argued that the section does not say, that such possession is not that of the wife also.

The word ""transaction" means a group of acts so connected together as to invoke unity, continuity and connection. The tests to decide whether

different acts are part of the same transaction are, proximity of time, unity of place, unity of purpose or design and continuity of action The main

test would be unity of purpose. If various acts are done in pursuance of a particular end they may be treated as parts of the same transaction. As to

what is the same transaction must depend on the facts and circumstances of each particular case.

S. 5(l)(e) of the Act does not warrant a prima facie case even contemplating in the joint possession of the property or pecuniary or monopoly

resources. Of course it is true that mere relationship between the public servants and their living jointly will not be sufficient on facts, to permit a

joint trial. There must be every material placed by the prosecution to reveal and demonstrate the link in either of them for amassing wealth. It is

therefore under the circumstances, the prosecuting agency will have to establish the person in possession of the assets found and the difficulty faced

by it if any, cannot erase the right of the petitioner to a separate trial, especially when prejudice and embarrassment is writ large. As I have

observed already, the facts of the instant case cannot be deemed to come any way nearer to the proviso added to the main section. It is not the

finding of the learned Special Judge that the respondent will be put to any prejudice if the joint trial is conducted. What the learned Special Judge

has observed is that there was no material to prove the joint concert or effort to frame the charge under S.120-B of the I.P.C. To counteract the

said observation as not correct and to hold as correct, I have extracted the factual aspects of the case particularly with regard to the offence under

S.120-B, of the I.P.C. on the basis of every material placed before it. That being so, I may say without any hesitation that the basic ingredients and

material facts which required the joint trial in this case for the respondent along with her husband by name Michael Selvaraj is very much available

and overwhelming and in passing the impugned order, I am fully constrained to say that the learned Special Judge has misapplied the legal ratio

enunciated by the learned Single Judge of this Court in the case cited above and accordingly, I am able to identify the impugned order to suffer for

its illegality and impropriety.

7. One another differentiation which was felt to be taken note of is the difficulty put upon the shoulder of the prosecution by passing the impugned order. If the impugned order is to be sustained, then the charge under S.120.B of the I.P.C, is to be rejected for which there is no detailed or elaborate findings given by the learned Special Judge. In the absence of any findings as to the actual prejudice to have a separate trial as enshrined in the Proviso under S. 223 Cr. P.C. prejudice will be caused only to the prosecuting agency and not to the accused and this basic factum has been clearly overlooked by the learned Special Judge, which clearly goes to the root of the case. For all the aforesaid reasoning having looked into the legal ambit and the factual aspect of the case, I am fully constrained to hold that there is every force and merit in the contentions raised by Mr.

P. Rajamanickam, learned counsel for the revision petitioner.

8. In the result, for all the foregoing reasoning, I have to allow the revision by setting aside the impugned order passed by the learned Special Judge in Cr. M.P. No. 5964 of 1991 in C.C. No. 18 of 1990 dated 23.1.92 forthwith and direct the learned Special Judge to frame the appropriate charges against both the accused and try them jointly, to proceed with the case and dispose of the same in accordance with the law without any delay.