(2005) 10 KL CK 0021

High Court Of Kerala

Case No: Criminal R.P. No''s. 1135 and 1215 of 2005

Moosa		APPELLANT
	Vs	
Jomon Puthanpurackkal		RESPONDENT

Date of Decision: Oct. 26, 2005

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 202, 203, 204, 227, 244
- Evidence Act, 1872 - Section 137, 138, 33
- Penal Code, 1860 (IPC) - Section 163, 34
- Prevention of Corruption Act, 1988 - Section 10, 11, 13, 15, 3

Citation: (2005) 4 KLT 685

Hon'ble Judges: M. Sasidharan Nambiar, J

Bench: Single Bench

Advocate: M.K. Damodaran, M.P. Prabhanandan, Sojan Micheal, M. Asokan and Devaprasanth P.J, for the Appellant; P.K. Asokan and Noorjee Noushad, Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

M. Sasidharan Nambiar, J.
First respondent filed a complaint before Enquiry Commissioner and Special Judge, Kozhikode alleging that the five accused shown therein committed offences under Sections 7, 10, 11, 13 and 15 of the Prevention of Corruption of Act, 1988 (for short PC. Act). First accused was the then Minister for Education and second accused, the then Principal Secretary, Education Department, State of Kerala: 5th accused was an Ex-MLA and accused 3 and 4 are leaders of Indian Union Muslim League, one of the ruling political parties in Kerala. Petitioners in Crl.R.P. 1215705 were the original accused 3 and 4 who are now arrayed as accused 1 and 2. Revision petitioner in Crl.R.P.1135/05 is the 5th accused who is now arrayed as third accused. They are

challenging the order of Enquiry Commissioner for Special Judge, dated 14.2.05 whereunder charge for the offence u/s 9 of the Act read with Section 34 of IPC was framed against accused 1 to 3. The learned Special Judge had taken cognizance of the complaint on 10.3.04 and conducted enquiry as provided u/s 202 of the Code of Criminal Procedure. Statements of witnesses including first respondent complainant and Metropolitan, Yoohannan Mar Philixinos were recorded. Thereafter cognizance was taken against petitioners after arraying them as accused 1 to 3. Revision petitioners in Crl.R.P.1215/05 challenged that order before this Court in W.P.(C) 3959/05. A learned single Judge, as per order dated 22.2.05 dismissed the petition holding that there is no ground to quash the order. W.P.(C) 3959/05 was filed at a time when learned Special Judge was recording prosecution evidence as provided u/s 244 of the Code of Criminal Procedure. After completing the recording of prosecution evidence, learned Special Judge framed the charge against petitioners for the offences under the impugned order.

2. Petitioners in Crl.R.P.1215/05 are contending that court below failed to take note of the fact that there was no evidence showing a prima facie case as the material witness examined did not give evidence in chief examination and only stated that a statement was furnished earlier u/s 202 of the Code and it is not an evidence which could be looked into for the purpose of deciding whether there is evidence to frame charge and the order of the learned Special Judge relying on the inadmissible evidence is illegal and irregular. It was contended that as there is no chief examination to support the allegations in the complaint, it is a case without any evidence to proceed further against the accused and the order framing charge is illegal and is to be set aside. It was also contended that finding of the Special Judge that evidence of PW6 is more than sufficient to frame charge for the offence u/s 9 of the Act is perverse and it amount to miscarriage of justice and on the materials available, it can only be held that no case has been made out to frame the charge and so the order is unsustainable. Revision petitioner in Crl.R.P. 1135/05 has challenged the order reiterating the contentions of the other petitioners. He also contended that evidence tendered by PW6 in cross-examination contradicts his case at the time of inquiry u/s 202 and therefore the court below should not have framed charge and the impugned order is to be set aside and accused are to be discharged.

3. The allegation of first respondent in the complaint was that revision petitioners owing allegiance to Muslim League demanded gratification from PW6 Metropolitan, as a motive for inducing public servants to give ''No Objection Certificate'' for B.Ed. College to be started at Meenangadi under the Jacobite Educational and Charitable Trust, Malabar Diocese. The allegation was that accused demanded the gratification to the tune of Rs. 2 1/2 lakhs for constructing a building for the District Committee of Muslim League for the purpose of exercising their personal influence on the Minister for Education and other officials who were in authority, to grant No Objection Certificate applied for by PW6. Special Judge examined six witnesses and on that evidence framed the charge against the accused. First witness was a

member of Kerala Legislative Assembly who was an ex-Minister for Irrigation. When examined PW1 deposed that PW6 told him that revision petitioners demanded money for construction of District Committee Office of Muslim League for exercising their personal influence on the Education Minister for granting sanction to the B.Ed. College applied for. PW2 was another sitting MLA who also deposed that first respondent had met him and he handed over a copy of the letter sent by PW6 to the then Chief Minister wherein it was alleged that revision petitioners demanded gratification. Both PWs.1 and 2 have no personal knowledge about the demand for gratification. Their evidence is only hearsay. PW3 only deposed that he saw second revision petitioner in Crl.R.P.1215/05 coming downstairs, when he had gone to Bishop''s house at Meenangadi and he enquired with PW6 why third accused was seen in angry mood, PW6 allegedly disclosed that he had demanded Rs. 2.1/2 lakhs as bribe for granting B.Ed. College. PW4 is the Chief Minister of Kerala. PW4 only deposed that he had received copy of Ext.A1 letter from Bishop alleging that revision petitioner demanded bribe. First respondent was examined as PW5. He has admittedly no personal knowledge on the allegations. It is on the evidence of PW6 Metropolitan, learned Special Judge framed the charge holding that, there is no inherent infirmity or improbability in his version and the probative value of the evidence is to be determined at the stage of trial and evidence tendered by the first respondent is sufficient to hold that there is a prima facie case to go for trial.

4. The argument of senior counsel Advocate Sri. M.K. Damodaran appearing for revision petitioners in Crl.R.P. 1215/05 and Advocate Sri. Asokan appearing for revision petitioners in Crl.R.P.1135/05 was that evidence of PW6 could not have been relied on by Special Judge as there was no chief examination on the allegations in the complaint, at the time of his examination u/s 244 of the Code of Criminal Procedure and therefore no charge could have been framed.

5. Chapter XIX of the Code of Criminal Procedure deals with trial of warrant cases by Magistrates. u/s 244 in any warrant case instituted on a police report, the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear prosecution and take all such evidence as may be produced in support of the prosecution. Section 245 deals with discharge of accused. Under Sub-section (1) upon taking all the evidence referred to in Section 244, if the Magistrate considers that no case against the accused has been made out which, if unrebutted, would warrant his conviction, Magistrate shall discharge him. But in that case Magistrate is bound to record the reasons for discharge. Sub-section (2) provides that nothing in Sub-section (1) shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, if Magistrate considers the charge to be groundless. Here also, the Magistrate is bound to record the reasons. Section 246 mandates that after evidence has been taken as provided u/s 244 or at any previous stage of the case, the Magistrate is of the opinion that there is ground for presuming that the accused has committed an offence triable under the Chapter, which he is competent to try and which could be adequately punished by him, the

Magistrate shall frame charge against the accused. u/s 244 the Magistrate is bound to take all such evidence that may be produced by the prosecution. If on that evidence so taken, the Magistrate is satisfied that no case has been made out as against the accused, Magistrate shall discharge the accused u/s 245. If on considering the evidence so recorded, the Magistrate is of the opinion that there is ground for presuming that the accused has committed the offence which he is competent to try, Magistrate is bound to frame charge. The argument of learned Senior counsel is that the evidence contemplated u/s 245 is the evidence recorded u/s 244 and the sworn statement recorded earlier in the course of the enquiry u/s 202 of the Code is not the evidence contemplated u/s 246 and as no such evidence was adduced by PW6 the Special Judge could not have presumed that any of the accused committed the offence.

6. The P.C. Act was primarily enacted to render the criminal law more effective in dealing with cases of bribery and corruption of public servants. Chapter III of the Act deals with offences and penalties. u/s 9 of the Act whoever accepts or obtains or agrees to accept or attempts to obtain, from any person for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant whether named or otherwise to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person or to render or attempt to render any service or disservice to any person with the Central Government or State Government or Parliament or the Legislature of any State or with any local authority, Corporation or Government Company or with any public servant, whether named or otherwise shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and fine. This Section corresponds to Section 163 of IPC with slight modification. The scope of Section 9 is identical to the scope of Section 8 except that u/s 8 it shall be a motive or reward for inducing by corrupt or illegal means, any public servant to do or forbear to do any official act or to show favour or render any service specified in the section. The learned Special Judge framed charge against the petitioners for the offence u/s 9 read with Section 34 of IPC. As stated earlier, the only evidence which could be considered for presuming that the accused committed the offence could only be the evidence of PW6. The question is whether evidence of PW6 prima facie show that accused committed the offence.

7. Though u/s 3 of the P.C. Act a Sessions Judge/Additional Sessions Judge/ Assistant Sessions Judge can only be a Special Judge, and under Sub-section (1) of Section 5 the Special Judge is entitled to take cognizance of offences without the accused being committed for trial, he shall follow the procedure prescribed by the Code of Criminal Procedure for the trial of cases by Magistrate. When a private complaint is filed before the Special Judge, he is entitled to take cognizance of the complaint. As is the case with any other Magistrate, three courses can be adopted, (i) Straightaway process can be issued as provided u/s 204. (ii) He can postpone the issue of process

for holding an inquiry as provided u/s 202. (iii) He can direct an investigation to be made. Inquiry u/s 202 is of a limited nature. It is to find out whether there is a prima facie case in issuing process against the person accused of the offence in the complaint and to prevent issue of process in the complaint which is either false or vexatious or intended only to harass the person. At that stage, the evidence is not to be meticulously appreciated. The limited purpose is to find out "whether or not there is sufficient ground for proceeding against the accused." The standard to be adopted by the Magistrate at that stage is not the same as the one which is to be adopted at the stage of framing charges or at the final stage of deciding whether the accused is to be convicted or not. After process was issued to the accused as provided u/s 204 of the Code, the evidence of all the prosecution witnesses has to be taken by the Magistrate. It is only after considering the statements so recorded and the materials placed, the Magistrate can decide whether a case has been made out or the accused is to be discharged. If a prima facie case is made out, the Magistrate is bound to proceed further u/s 246 and frame the charge. The Apex Court in Ratilal Bhanji v. State of Maharashtra (AIR 1979 SC 94) page 101 held as follows:
"The trial in a warrant case starts with the framing of charge prior to it the proceedings are only an inquiry. After the framing of charge if the accused pleads not guilty, the Magistrate is required to proceed with the trial."

Analysing the earlier decisions on the question the principles to be adopted at the time of framing the charge has been summarised by the Apex Court in Union of India v. Prafulla Kumar Samal (1979 SCC (Cri) 609. It reads:

"Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges u/s 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction u/s 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and soon. This however does not mean that the judge should make aroving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

8. At the stage of framing the charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The consideration is not whether the accused has committed the offence. The court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If a prima facie case is made out for proceeding further, a charge shall be framed. If the evidence which the prosecutor proposes to adduce, to prove the guilt of the accused, even if it is not challenged or unrebutted, do not show that accused committed the offence it has to be held that there is no sufficient ground for proceeding with a trial. As declared by the Apex Court in Niranjan Singh Karam Singh Punjabi and Others Vs. Jitendra Bhimraj Bijja and others, at that stage though materials placed could be appreciated, it could only be for the limited purpose of deciding whether the facts emerging from such materials constitute the offence charged. The appreciation cannot be to decide the reliability of the materials. If facts emerging from the materials taken at their face value disclose the existence of all the ingredients constituting the alleged offence, the court has to frame the charge. To find out whether the materials at their face value disclose the existence of all the ingredients constituting the offence, the court is competent to sift the evidence. But only to that limited extent.

9. The evidence contemplated is the evidence that was let in after the process has been issued to the accused u/s 204 of the Code. The statement recorded at the stage of inquiry u/s 202 cannot be looked into as at that stage the accused has no right or opportunity of cross-examination. Any evidence that has been recorded at a stage when the accused has no opportunity or right to cross-examination is not an evidence contemplated u/s 245 of the Code. A learned single Judge Of this Court in Gopalakrishnan v. State of Kerala (2001 (2) KLT 767) has considered the question and held that an accused has no right of cross-examination at the stage of Section 244 of Cr.P.C. and the refusal of the Magistrate to permit the accused to cross-examine the witness examined at the stage of Section 244 of Cr.RC. is not illegal.

10. Another single Judge of this Court, in Vasudevan Vs. State of Kerala, has also considered a similar question and held that the statement recorded in the course of an inquiry at a stage prior to Section 203/204 of the Code of Criminal Procedure will not be an evidence. The Apex Court in 2004 (3) ACR 2600 (SC) has considered the question when an evidence given by a witness in a judicial proceeding could be used as an evidence. It was held:

"From a bare perusal of the aforesaid provision it would appear that evidence given by a witness in a judicial proceeding or before any person authorised to take it is admissible for the purpose of proving in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states in its evidence given in earlier judicial proceeding or earlier stage of the same judicial proceeding but under proviso there are three pre-requisites for making the said evidence admissible in subsequent proceeding or later stage of the same proceeding and they are (i) that the earlier proceeding was between the same parties (ii) that the adverse party in the first proceeding had the right and opportunity to cross-examine and (iii) that the questions'' in issue in both the proceedings were substantially the same and in the absence of any of the three pre-requisites aforestated."

The question therefore is whether an accused has a fight and also has an opportunity to cross examine a prosecution witness examined during the course of inquiry u/s 202 of the Code. Eventhough the accused could be present in an inquiry u/s 202 of the Code, he has no right to participate in the inquiry much less a right to cross-examine the witness. His presence could only be with a view to be informed of what is going on. Apex Court in Chandra Deo Singh Vs. Prokash Chandra Bose and Another, settled the position that an accused during the course of inquiry u/s 202 has no right at all to cross examine any witness examined on behalf of the prosecution. It was held:

"9. Taking the first ground. It seems to us clear from the entire scheme of Ch.XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this therefore, that it would be open to the Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued, nor can he examine any witnesses at the instance of such person.

10. Thus, we have no difficulty in holding that as during the course of inquiry u/s 202 of the Code an accused has no right much less opportunity to cross-examine a prosecution witness, statement of such a witness recorded during the course of the inquiry is not admissible in evidence u/s 33 of the Act and consequently the same cannot form the basis of conviction of an accused."

Analysing the earlier decisions, Apex Court in Sashi Jena''s held that during the course of inquiry accused has no right or opportunity to cross examine a prosecution witness, statement of such a witness recorded during the course of

inquiry is inadmissible in evidence u/s 33 of the Evidence Act. The principles squarely applies while considering the sufficiency of the materials adduced by the prosecution u/s 245 of the Code to decide whether a prima facie case has been made out to frame the charge. The Special Judge is not entitled to decide the question basing on the evidence tendered by the prosecution witness in the earlier inquiry u/s 202 of the Code.

11. The evidence of PW6 recorded by the learned Special Judge show that he did not give any of the details necessary to be relied on for framing a charge. He was asked in chief examination whether he was not examined before the court on 6.2.04. That examination was in the course of the inquiry u/s 202 of the Code. When he answered in the affirmative he was asked whether he had deposed true facts at the time of inquiry. He answered that question in the affirmative. Then he was shown copy of Ext.A1 letter sent by him to the Chief Minister and he deposed that that letter was sent when the name of St. Gregorious Teachers Training College, Meenangadi was not found in the list published in the newspaper, as the colleges for which ''No Objection Certificate'' was granted. He was asked whether the statements in Ext.A1 were not correct. He answered the question in the affirmative. He was then asked showing the photography of the function which was attended by the Chief Minister and the second accused. He was not asked anything about the alleged demand for bribe or the motive of inducing public servant using personal influence. As rightly argued by learned Counsel appearing for revision petitioners, on this evidence, it cannot be said that a prima facie case has been made out. True, PW6 was cross examined with reference to his earlier statement recorded u/s 202 of Cr.P.C. The argument of learned Senior counsel Sri. Damodaran is that unless there is chief examination there cannot be a cross examination and as PW6 did not depose the ingredients constituting the offence alleged, his evidence cannot be looked into. Learned Counsel also argued that as the evidence contemplated u/s 245, is the evidence adduced by the prosecution at the stage of u/s 244 and the accused has no right to cross-examine the witness at that time the evidence brought out in cross examination cannot be looked into. Advocate Mr. Asokan argued that eventhough accused have no right to cross examine a witness examined at the stage of Section 244 of the Code having availed the facility of cross examining the witnesses, the cross examination portion of the evidence cannot be eschewed, while considering the sufficiency of the evidence to decide whether there is a prima facie case. It is also argued that when the learned Special Judge adopted the shortcut method of not recording the entire statement and only recorded a statement that what was deposed in the course of inquiry u/s 202 of the Code was true and correct and having not objected to that course, the revision petitioners are debarred from challenging the course adopted by the learned Special Judge and the arguments of the learned Counsel for the petitioners are to be rejected.

12. Section 137 and 138 of the Indian Evidence Act deal with examination of witnesses. u/s 137 examination of a witness by the party who calls him, shall be

called his examination-in-chief. Examination of a witness by the adverse party shall be called his cross-examination. Examination of a witness subsequent to the cross examination by the party who called him, shall be called his re-examination. Section 138 provides that witnesses shall be first examined then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. It also provides that examination and cross examination must relate to relevant facts but the cross-examination need not be confined to the facts, of which the witness testified on his examination in chief. Eventhough at the stage of recording the prosecution evidence u/s 244 of the Code, accused has no right to cross examine the witnesses, Magistrate is competent to grant opportunity to the accused to cross-examine the witnesses. If such an opportunity was granted and it was availed of by the accused he is not entitled to turn round thereafter and contend that the evidence recorded in cross examination cannot be looked into for the purpose of considering the sufficiency of the materials and evidence for deciding whether the accused is to be discharged or a charge is to be framed. There is force in the submission of the learned Counsel appearing for first respondent that it was not the fault of PW6 or first respondent/ complainant that the entire chief examination was not recorded. It is clear that to avoid recording of the same statement of the witness recorded earlier u/s 202 of the Code, the Special Judge recorded that what was stated at the time of his examination u/s 202 of the Code earlier was, true and correct. But the procedure is not correct and cannot be upheld. As the statement recorded earlier u/s 202 of the Code was in the absence of the accused, evidence then recorded cannot be used for deciding whether there is a prima facie case to frame a charge against the accused. The evidence and material to be considered is the evidence and materials recorded or placed at the stage of Section 244 of the Code. The procedure adopted by the learned Special Judge is illegal and irregular and cannot be upheld.

13. Advocate Mr. Asokan relying on the decision of the Apex Court in Rosy and Another Vs. State of Kerala and Others, argued that as revision petitioners did not challenge the procedure adopted by the learned Magistrate at the time of recording the evidence of PW6 and did not challenge the procedure even at the time of hearing W.P.(C) 3959/05 by this Court and having availed the opportunity of cross-examining the witness, irregularity if any has not caused any prejudice and as provided u/s 465 of the Code the irregularity did not cause any failure of justice, no interference is warranted.

14. Their Lordships in Rosy''s case found that in that case Judicial Magistrate of the II Class committed the case without examining any witness and for six years the case remained in limbo in Sessions Court and thereafter the decks were cleared for the Sessions Court to commence the proceedings by the High Court and neither then nor when charges were framed by the Sessions Court nor even thereafter, any of the accused raised any objection that the order of committal was wrong due to non-examination of any witness in the committal court. In such circumstance, it was

held that Section 465(2) of the Code does not mean that for the reason of every irregularity the proceedings is to be held void. It was held:

"When the accused had chosen not to raise objection on the premise of omission to examine witnesses before process was issued by the Magistrate, it must be taken that they had no grievance that such omission had occasioned failure of justice. Even if they had taken such objection after committal of the case to the Sessions Court there was no need to turn the switchboard backwards as there is no scope for believing that such omission had occasioned failure of justice. This is because no evidence of any witness would be used in the trial court, unless such witness was examined in the trial court and the accused is afforded reasonable opportunity to cross examine him".

But that cannot be equated with a case where the procedure adopted was challenged before this Court immediately after the framing of charge. When it is clear that the learned Special Judge has violated the provisions of the Code and did not examine the witness produced by the prosecution as provided u/s 244 and that irregularity was pointed out without delay, this Court is bound to interfere in exercise of the revisional powers. But that does not mean that the accused are to be discharged for that reason. It is pointed out by learned Counsel Mr. Asokan that cross examination of PW6 show that the case of the prosecution that petitioners demanded money from the accused was not denied and instead the denial was only on the quantum and the purpose for which demand was made and the evidence of a witness recorded at the stage of Section 245 of the Code cannot be appreciated as at the final stage, after recording the evidence of the prosecution and the defence to decide whether the offence has been proved or not. There is force in the submission.

15. In the circumstance of the case as the learned Special Judge did not record the evidence of PW6 properly and the only evidence which could be relied on to find a prima facie case is that of PW6, it is necessary to direct the learned Special Judge to recall PW6 and examine him afresh. The evidence of PW6 has to be recorded with regard to the contents of Ext.A1 complaint sent by him to the Chief Minister and also on the matters he had disclosed earlier in the course of the inquiry u/s 202 of the Code of Cr.P.C. Consequently the framing of charge against petitioners is to be set aside. I do so.

Both revisions are allowed. The order of the learned Special Judge dated 14.2.05 framing charge for the offence u/s 9 of P.C. Act read with Section 34 of IPC is set aside. The Special Judge is directed to recall and examine PW6 and record the chief examination of the witness in its entirety as indicated above. As the accused had already been permitted to cross examine PW6, they are to be permitted to cross examine PW6 further. The learned Special Judge thereafter has to consider the evidence and materials, in the light of the settled position stated above and decide whether a prima facie case was established against the petitioners. If there is no

evidence, petitioners are to be discharged as provided u/s 245 of the Code. If there is evidence to presume that all or any of the petitioners committed the offence, charge has to be framed as provided u/s 246 of the Code. Send back the records to the learned Special Judge.