

Karnataka High Court
State Of Karnataka vs B S Shivaprakash on 18 May, 2023
Bench: Rajendra Badamikar

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 18TH DAY OF MAY, 2023

BEFORE

THE HON'BLE MR. JUSTICE RAJENDRA BADAMIKAR

CRIMINAL REVISION PETITION NO.376 OF 2017

BETWEEN:

STATE OF KARNATAKA
BY LOKAYUKTHA POLICE
REPRESENTED BY PSI LOKAYUKTHA POLICE
BENGALURU-560 001
BENGALURU CITY DIVISION

...PETITIONER

(BY SRI. PRASAD B.S, ADVOCATE)

AND:

1. B.S. SHIVAPRAKASH
S/O B.K. SIDDALINGAIAH
AGED ABOUT 51 YEARS
FIRST DIVISION ASSISTANT
KANNADA BHAVAN, J.C. ROAD
BENGALURU
R/AT NO.F298, SHIVA NILAYA
B.S. 1ST STAGE, 8TH CROSS
4TH MAIN ROAD, BHARATH NAGAR
VISHWANEEDAM POST
BENGALURU-560 091
PERMANENT RESIDENT OF BYADARAHALLI
MAGADI TALUK, BELAGUMBA POST
KASABA HOBLI
RAMANAGARA DISTRICT-571 511

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2. M.P. BALIGAR
KAS (RETD), FORMER COMMISSIONER
KANNADA AND CLUTURE DEPARTMENT
BENGALURU
R/AT NO.37, 6TH CROSS, 35TH MAIN ROAD
BTM 2ND STAGE, BENGALURU-560 068

3. K.T. CHIKKANNA
RETD. JOINT DIRECTOR
KANNADA AND CULTURE DEPARTMENT
KANNADA BHAVAN, J.C. ROAD
BENGALURU
R/AT NO.892, 1ST 'E' MAIN ROAD
2ND STAGE(8TH CROSS ROAD)
GIRINAGAR, BENGALURU-560 085

4. S.I. BHAVIKATTE
MANAGER
SUVARNA KARNATAKA
KANNADA AND CLUTURE DEPARTMENT
KANNADA BHAVAN, J.C. ROAD
BENGALURU
PRESENTLY DEPUTY DIRECTOR
RANGAYANA, MYSORE
R/AT 'A' BLOCK, NO.11
VISHWA KANNADA SAMMELANA APARTMENT
VINOBHA ROAD, MYSORE-570 001

... RESPONDENTS

(BY SRI. RAVI .B NAIK, SENIOR COUNSEL A/W
SRI. MAHABALESH .K. PATIL, ADVOCATE FOR
SRI. VIJETHA .R. NAIK, ADV. FOR R1, R2 & R4
SRI. KARTHIK YADAV. V, ADVOCATE FOR
SRI. S.K. VENKATA REDDY, ADVOCATE FOR R3)

THIS CRIMINAL REVISION PETITION IS FILED
UNDER SECTION 397 R/W 401 CR.P.C. PRAYING TO SET
ASIDE THE ORDER DATED 16.11.2016 PASSED BY THE
XXIII ADDITIONAL CITY CIVIL AND SESSIONS JUDGE,

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SPECIAL JUDGE, BENGALURU URBAN DISTRICT
(C.C.H.24), BENGALURU CITY IN SPL.C.C.NO.128/2014.

THIS PETITION HAVING BEEN HEARD AND
RESERVED FOR ORDERS ON 13.04.2023 COMING ON
FOR 'PRONOUNCEMENT OF ORDER' THIS DAY, THE
COURT MADE THE FOLLOWING:

ORDER

This revision is filed by the State through Lokayuktha challenging the order dated 16.11.2016 passed by the 23rd Additional Civil Judge and Sessions Judge and Special Judge, Bengaluru Urban District (CCH-24) and Special Judge for Lokayuktha ('trial Court/Special Judge' for short), in Spl.C.C. No.128/2014, whereby the learned Special Judge has discharged the accused the accused/respondents herein for the charges under Section 13(1)(c), 13(1)(d) read with 13(2) of Prevention of Corruption Act, 1988 (P.C Act, for short).

2. For the sake of convenience, the parties herein are referred with the original ranks occupied by them before the trial Court.

3. Accused Nos. 1, 3 & 4 have filed application under Section 227 and 239 of Cr.P.C seeking discharge. The allegations of the prosecution are that, the complainant-Lokayuktha Police have registered a suo- moto case against Accused Nos. 1 to 4 and submitted the charge sheet alleging that the accused being the responsible officers in Kannada and Cultural Department, misused their official powers and misplaced/misappropriated 06 Medals out of 25 Gold Medals of 22 carrot by causing loss to the tune of Rs.3,12,000/- to the public ex-chequer. The Investigating Officer seized 19 Gold Medals from the custody of Accused Nos. 1 and 4. Accused Nos. 2 & 3, were working there as Commissioner and Joint Director during relevant period. The Audit Report of Accountant General Office discloses that there were 24 Gold Medals available and subsequently only 19 Gold Medals were found and 06 Gold Medals were found missing, which is alleged to be dereliction of duty on the part of the public servants. In this regard, the accused were chargesheeted.

4. The accused in pursuance of summons appeared before the trial Court and were enlarged on bail. However, Accused Nos.1, 3 and 4 moved application under Sections 227 and 239 of Cr.P.C. for their discharge on the ground that, they have collected a document under Right to Information Act from the Assistant Audit Officer of Accountant General's Office by letter dated 21.08.2014 i.e., five months after submission of the charge sheet and sent it to the Director of Kannada and Cultural Department, Bengaluru, for deleting Para No.III/IIB:2010-11 and Para No.IV/2B:2011-12 and in view of dropping of the charges by the Audit Officer of Accountant General's office, the allegations of misappropriation or misplacement does not arise at all and the documents disclose that, it is only a miscalculation.

5. The said application was seriously contested by the learned Special Public Prosecutor. The learned Special Judge after hearing the parties, by the impugned Order dated 16.11.2016 discharged all the accused for the offences punishable under Sections 13(1)(c), 13(1)(d) read with Section 13(2) of P.C. Act. Hence, this revision by the Lokayuktha.

6. Heard the learned Special Pubic Prosecutor appearing for the petitioner/Lokayuktha and the learned Senior Counsel for Respondent Nos. 1, 2 and 4 and the counsel appearing for Respondent No.3. Perused the records.

7. Learned counsel for the petitioner/Lokayutha would contend that the learned Special Judge has committed serious error in discharging the accused. He would contend that, while considering the application for discharge of all the accused, the Court has to assess only the available records submitted along with the charge sheet and not to consider any other documents produced by the accused. He would also contend that the learned Special Judge has erred in considering the documents produced by the respondents at the time of hearing the discharge application. He would also contend that the charge sheet ingredients including the Audit Report would prima facie disclose regarding commission of the offences as alleged. He would further contend that, the ground that complainant himself being the Investigating Officer, vitiated the proceedings could not have been considered at the stage of framing charge and it was required to be considered only at the time of the

trial to show as to how the accused were prejudiced by this conduct, since in the instant case, the entire case depends on documents. The Investigating Officer has only collected documents which are undisputed. It is contended that the Auditor's letter is placed as additional documents, but it is not a part of charge sheet. He would contend that only prosecution materials are required to be looked into and 17 Gold Medals were admittedly seized from Accused No.1 and 02 Gold Medals were seized from Accused No.4. In clarification, the Audit Letter is relied on by the defence. But, that letter is required to be tested and at whose instance this clarification was issued and in what context it is issued, is also required to be considered only during the course of trial and the prosecution ought to have given an opportunity in this regard. But, that was not done. He would also contend that, the Audit Report discloses that, during physical audit, 24 Medals were noticed, but later only 19 Medals were traced. He would also contend that the trial Court has relied on the letter issued at the instance of accused, which is available in Page No.19 in Volume- III. But, that was required to be tested during the course of trial and that whether the letter issued by the concerned officer was considered and what are the reasons given by the Auditor is also to be tested during trial. Further, it is asserted that the said letter is based on own calculation of the concerned Department and its officials and that will not prevail, but Audit Report will prevail. Hence, he would contend that the entire approach of the learned Special Judge is erroneous and it has resulted in miscarriage of justice. Hence, he would seek for setting aside the impugned order.

8. Per contra, learned Senior Counsel appearing for Respondent Nos. 1, 2 and 4 would contend that, as per the case of prosecution, 25 Gold Medals were entrusted to Accused and 19 were seized and it is alleged that 06 Medals were missing. He would contend that, there is no dispute regarding seizure of 19 Medals and from 2010 Audit is conducted from time to time. He invites the attention of the Court regarding the statement of Commissioner and the letter issued available in Volume No.III at Page No.917 and 986, wherein it is clarified that only 19 Medals were available. Contrary to the same, in Volume-II at page No.134, the Audit Report discloses availability of 20+4 Medals. He would specifically contend that, the letter issued by the Assistant Auditor would disclose that these observations were deleted. Admittedly, out of 20 Medals, 03 were distributed and 17 were available and 02 Medals were added to it and 19 Gold Medals were seized. He would contend that in normal circumstances, the prosecution evidence is only relevant for considering the discharge application. But, if an un-impeachable evidence is produced by the defence, that can be looked into and in support of his contention, he placed reliance on 07 decisions noted below:-

- i) State Vs. Rajangam
[(2010) 15 SCC 369]
- ii) Nitya Dharmananda @ K. Lenin & Another Vs.
Sri. Gopal Sheelum Reddy & Another
[Criminal Appeal No.2114/2017-

Arising out of SLP (CRL.) No.8279/2016]

iii) Yogesh V. State Maharashtra [2008] 10 SCC 394

iv) CBI, Hyderabad Vs. K. Narayan Rao [(2012) 9 SCC 512]

v) Union of India Vs. Prafulla Kumar Samal & Another [1979) 3 SCC 4]

vi) State of M.P. Vs. Mohanlal Soni [(2002) 6 SCC 338]

vii) Dilwar Balu Kurane Vs. State of Maharashtra [(2002) 2 SCC 135

9. Learned counsel appearing for Respondent No.3 adopts the arguments advanced by the Senior counsel appearing for Respondents No. 1, 2 & 4.

10. Having heard the arguments and perusing the records, now the following point would arise for my consideration:

Whether the learned Special Judge has committed error in discharging the accused for the charges levelled against him?

11. At the out-set, it is to be noted here that the discharge applications were filed by Accused Nos.1, 3 & 4 alone. However, the learned Special Judge has passed discharge order against all the accused. Further, the charge sheet is based on the Audit Report and the Audit Report discloses that, totally 24 Gold Medals were held in stock and they were not utilized by the Department, which is available in Page No.171 of Volume No.II for the year 2011-12. This Audit Report further discloses that the Department was having 20 Gold Medals in stock till March 2011 and since from 1990, which was observed in the Audit Report of 2011-

12. Further, it is observed that 54 Gold Medals were purchased during the year 2011 and out of them, 50 Gold Medals were distributed and 04 Medals remained in stock. As such, 24 Gold Medals were held in stock for the year 2011-12. There is no dispute that 03 Gold Medals were distributed to Mr. Harish Kumar, Mr. Balaram and Mr.Nandakumar. But, they were distributed in the year 2011 and that was taken note of in Page 171, wherein there is clear observation that, out of 54 Gold Medals purchased, 50 Medals were distributed and 04 Medals were available in stock. Further at Page No.588 of Volume-II, there is a clear reference that the Commissioner of Kannada and Cultural Department in his letter has stated that, for the year 1996, 2004, 2005 and 2008, one Gold Medal each was pending and for one more year which is not mentioned there, two Gold Medals each were held in stock and in 2010 and 2011, 06 Gold Medals each were held in stock and total Gold Medals were 20. This is based on the letter issued by the Commissioner of Kannada and Cultural Department. On the basis of these aspects, in the Audit Report at Page-171, there is clear observation that 20 earlier Gold Medals and 04 Gold Medals of 2011 remained in stock ie., total 24 Gold Medals were held in stock.

12. Now, the defence counsel has relied on the statement of Commissioner available at Page Nos. 485 and 486. But, that has been considered while considering the charge sheet and in the statement it is asserted that 04 gold Metals were incorporated by mistake and it was a calculation error and clarification letter was written. But, it is not forthcoming as to why the Commissioner has given statement under 161 Cr.P.C, which is contrary to the letter issued by the Commissioner earlier wherein there is an admission that 24 Gold Medals were in stock.

13. The defence counsel has placed reliance on the letter issued by the Commissioner of Kannada and Cultural Department dated 25.10.2013, where 20 Gold Medals were shown in stock and 03 Medals were said to have been distributed. But, there is no explanation in this letter regarding 24 Gold Medals and what is base for this clarification is not forth coming. Further, the defence counsel has relied on the paragraphs pertaining to 24 Gold Medals in stock in earlier letter. But, the question would arise, at whose instance the said letter came to be issued and whether this letter was considered elaborately and after recalculation, whether the Audit was done or not. All these questions to are required to be answered by the Auditor and merely on the basis of letter obtained under RTI regarding dropping certain paragraphs, it cannot be straightaway presumed that innocence of accused is proved or established. Whether before dropping of certain paragraphs, relevant factors were considered or not and whether fresh audit report is submitted or not is required to be considered. All these questions are required to be answered by the Auditor for issuing subsequent letter said to have been issued by the Assistant Auditor of Accountant General's office. But, without verifying the same, only on the basis of that letter, straightaway discharging the accused appears to be erroneous. The said document is taken as gospel truth by the defence counsel. But, it is based on the letter issued by the Commissioner and earlier also the Commissioner has written a letter disclosing the stock. What is transpired in between are required to be explained by the defence. All these aspects are matter of trial.

14. Further, while considering the discharge application, only prosecution materials need to be looked into. There is no dispute of the fact that 17 Gold Medals were recovered from the custody of Accused No.1 and 02 Gold Medals were recovered from the custody of Accused No.4. Why these two accused were keeping these Medals in stock differently is not at all explained. All these Medals should have been kept in chest or should have been deposited in the treasury and lots of irregularities are forthcoming on the face of the record. Even while handing over the charge, all the Medals were not handed over and all these aspects are required to be tested during the Course of trial. Hence, without going to trial straightaway discharging the accused on the basis of subsequent alleged clarification is not just and proper.

15. It is argued that the complainant himself is the Investigating Officer and hence, it is submitted that entire investigation is vitiated. In this contest, reliance is placed on the decision reported in (2010) 15 SCC 369 [State Vs. Rajangam]. But, that was pertaining to NDPS Act and for recording seizure under NDPS Act, certain guidelines have been laid down and personal seizure is required to be carried in presence of Gazetted Officer. Hence acquittal in the said case was after trial and it was nothing to do with discharge application. Further, in the instant case, the entire case is based on documentary evidence and Audit Report. Hence, all the questions are required to be answered by the Auditor and the Investigating Officer has no role except placing seized records before the Court. There is no serious dispute regarding records also. Looking to these facts and circumstances, the principles enunciated in the above cited judgment will not come to the aid of the respondents/accused in any way and no evidence is placed to show that the accused were prejudiced in any way. However, they can show this aspect during the course of the trial and hence, at this juncture, the said principles cannot be made applicable.

16. The learned Senior Counsel appearing for respondents has placed reliance on a decision of the Apex Court in Criminal Appeal No.2114/2017 (Arising out of SLP (Crl.) No.8279/2016) in Nitya Dharmananda @ K.Lenin and Another Vs. Sri. Gopal Sheelum Reddy and Another rendered on 07.12.2017, and invited the attention of the Court to Para No.9 of the said judgment. In Para No.9, the Apex Court has clearly held that, ordinarily the Court has to proceed on the basis of material produced with the charge sheet for dealing with the issue of charge and if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the Court is not debarred from summoning or relying upon the same even if such document is not a part of the charge sheet'. There is no dispute about this proposition of law. But, the observation of the Apex Court is that, the material sought to be produced for considering discharge application needs to be of sterling quality. But, in the instant case, inconsistent stands are taken by the Commissioner and earlier the Commissioner himself has disclosed the stock of 24 Gold Medals and subsequently it was reduced to 19. Subsequently, the Assistant Auditor of Accountant General's Office is said to have given some letter. But, authenticity of letter is required to be tested during trial. Hence, with due regards to their Lordships, the principles enunciated in the above cited judgment cannot be made applicable to the case in hand and the documents relied at this juncture by defence cannot be said to be of sterling quality and it requires to be tested during trial by summoning the author of document.

17. The learned Senior Counsel appearing for respondents/accused has further placed reliance on the decision reported in (2008) 10 SCC 394 [Yogesh @ Sachin Jagadish Joshi Vs. State of Maharashtra]. In the said decision, it is observed that, if two views are equally possible and if the Judge is satisfied that evidence produced gives rise to suspicion only, as distinguished from grave suspicion, he would be fully within his right to discharge the accused. But, in the instant case, the Audit Report states missing of 06 Medals. Now the accused are relying on a clarification letter issued by the Auditor. But, that is required to be tested as to whether it was issued at the instance of the accused or otherwise and hence, at this juncture, other view cannot be drawn and as such, the said principles cannot be made applicable to the facts and circumstances of the case in hand.

18. The learned Senior Counsel has further placed reliance on the decision in CBI, Hyderabad Vs. K. Narayana Rao [(2012) 9 SCC 512], wherein it is observed that, the Judicial Magistrate enquiring into the case is not to act as mere Post Office and has to arrive at conclusion whether the case before him is fit for commitment of accused before the Sessions Court. He has further placed reliance on the decision in Union of India Vs. Prafulla Kumar Samal and Another [(1979) SCC 4]. Again in the said decision, it is held that, the Special Judge should not act as a trial Judge, but should weigh evidence and form opinion only on the limited question of whether a prima facie case made- out. Except in the cases of grave suspicion which the accused is unable to explain, he is empowered to discharge the accused'. The facts being different the said principles are not applicable to the facts and circumstances of the case in hand.

19. The learned Senior Counsel has further placed reliance on the decision in State of M.P.Vs. Mohanlal Soni [(2000) 6 SCC 338]. But, in the said case, Income-tax Returns which were collected during the course of investigation itself are rejected and they were part of the charge sheet. But, the facts and circumstances of the present case are entirely different and in the instant case, the document now said to have been produced is entirely different and it is yet to be tested. As such, the

principles cannot be made applicable to the facts and circumstances of the case in hand.

20. Lastly, the learned Senior Counsel has placed reliance on the decision in Dilawar Balu Kurane Vs. State of Maharashtra [(2000) 2 SCC 135]. But, in the said case also, the observations were regarding role of the Judge and he cannot be a mouth piece of prosecution, as held in the case of Narayana Rao's case (supra) and the Judge has to sift and weigh the evidence for limited purpose. First of all, the said principles cannot be made applicable to the facts and circumstances of the case in hand, as now the document sought to be produced would not tally with the charge sheet and secondly it was not tested and opportunity is required to be given to the prosecution to lead evidence and cross examine the person, who has given this document and then only the Court is required to assess the total evidence based on audit report. Hence, the above said principles will not assist accused/respondent in any way.

21. Looking to the facts and circumstances, the approach of the learned Special Judge in discharging the accused only on the basis of the subsequent letter issued by the Assistant Auditor of Accountant General's Office regarding deletion of certain paragraphs cannot be a ground for discharge and it is required to be weighed and tested only during the course of trial. The learned Special Judge without considering any of these aspects, in a mechanical way, discharged the accused by accepting additional documents. The letter produced by way of defence is not a part of charge sheet and the said clarification letter is required to be tested during trial and the accused are at liberty to prove this defence during the course of trial to show their innocence. Considering these facts and circumstances, the entire approach of the learned Special Judge is erroneous and without proper application of mind, he has discharged the accused only on the basis of document/certification letter produced by the accused. The prosecution is required to be given an opportunity to substantiate their case, as the charge is required to be framed and accused are at liberty prove their defence during the course of trial. Under such circumstances, the impugned order of discharge passed by the learned Special Judge is erroneous and does not sustain for judicial scrutiny and it warrants interference by this Court.

22. Considering the above facts and circumstances, the revision petition needs to be allowed and accordingly the point under consideration is answered in the affirmative and accordingly, I proceed to pass the following:

ORDER

i) The revision petition is allowed.

ii) The impugned order dated 16.11.2016 passed by the 23rd Additional Civil Judge and Sessions Judge and Special Judge, Bengaluru Urban District (CCH-

24) and Special Judge for Lokayuktha, for the offences under Section 13(1)(c), 13(1)(d) read with 13(2) of P.C. Act, in Spl.C.C. No.128/2014, is set aside and matter is restored to original file.

iii) The learned Special Judge is directed to frame charge against the accused and proceed with the trial.

iv) The respondents/accused are at liberty to substantiate their defence during the course of trial.

Sd/-

JUDGE KGR* CT:NR