SUPREME COURT OF INDIA

State by Karnataka Lokayukta Police Station

Vs.

M.R.Hiremath

Crl.A.No.819 of 2019

(Dr.D.Y.Chandrachud and Hemant Gupta,JJ.,)

01.05.2019

JUDGMENT

Dr.D.Y.Chandrachud,J.,

SLP(Crl)No.9009 of 2017

1. Leave granted.

2. This appeal arises from a judgment of a learned Single Judge of the High Court of Karnataka dated 27 April 2017 by which a petition under Section 482 of the Code of Criminal Procedure 1973 was allowed. While doing so, the High Court set aside an order dated 5 December 2016 of the Special Judge, Bengaluru rejecting the application of the respondent for discharge under Section 239 of the CrPC.

3. The respondent was at the material time serving as Deputy Commissioner in the Land Acquisition Section of Bangalore Development BDA had acquired certain lands for the formation of a layout on the outskirts of Bengaluru. The complainant moved the court for denotification of the lands following which, a direction had been issued. Accordingly, the complainant made an application to BDA for denotification of the lands.

4. The case of the prosecution is that on 6 November 2012, the complainant attempted to meet the respondent (accused no.1) by whom the file was to be placed before the Denotification Committee. It is alleged that though the complainant was not allowed to meet the respondent, he met his driver through whom he got to know that such cases were being ‘mediated' by the second accused, an advocate purporting to act as the agent of the respondent. A complaint was lodged with the Lokayukta Police on 8 November 2012 apprehending that a bribe would be asked for by the second accused. The police handed over a spy camera together with the instructions to be followed. It is alleged that a meeting of the second accused was arranged with a representative of the complainant. On 12 and 13 November 2012, a meeting took place with the second accused who is stated to have informed the representatives of the complainant of the amount which will be charged for the settlement of the deal. The prosecution alleges that on 15 November 2012 the

complainant met the respondent at about 7.30 pm near the BDA office. The conversation between the complainant and the respondent was recorded on the spy camera in the course of which, it has been alleged, there was some discussion in regard to the amount to be exchanged for the completion of the work.

5. On 16 November 2012, a complaint was lodged before the Lokayukta and a first information report was registered. Subsequently, it is alleged that a trap was set up and the second accused was apprehended while receiving an amount of Rupees five lakhs on behalf of the respondent towards an initial payment of the alleged bribe. A charge sheet was filed after investigation.

6. Charges were framed for offences punishable under Sections 7, 8, 13(1)(d) read with section 13(2) of the Prevention of Corruption Act, 1988.

7. The respondent instituted three successive petitions under Section 482 of CrPC before the High Court of Karnataka for quashing of the criminal proceedings. The first two petitions were dismissed as withdrawn on 26 February 2013, leaving it open to the respondent to pursue his remedies for seeking a discharge from the proceedings. The High Court dismissed the third petition.

8. The first respondent then filed a discharge application under section 239 of the CrPC before the Special Judge, Bengaluru . The trial judge dismissed the application by an order dated 5 December, 2016. This order was questioned in revision before the High Court. The revision was rejected on the ground of maintainability. The respondent instituted a petition under Section 482 of the CrPC which has resulted in the impugned order of the learned Single Judge dated 27 April 2017.

9. The learned Single Judge has quashed the proceedings against the respondent on the ground that (i) in the absence of a certificate under Section 65B of the Evidence Act, secondary evidence of the electronic record based on the spy camera is inadmissible in evidence; (ii) the prosecution is precluded from supplying any certification "at this point of time" since that would be an afterthought; and (iii) the case of the prosecution that apart from the electronic evidence, other evidence is available, is on its face unconvincing. The learned judge then held that the second accused who was the subject of the trap proceedings was not shown to have named the respondent as being instrumental in the episode. On this finding the proceedings have been quashed.

10. Assailing the correctness of the judgment of the High Court, Mr. Joseph Aristotle S., learned counsel appearing for the appellant, submits that (i) the High Court was manifestly in error in holding that a certificate under Section 65B was warranted at this stage; (ii) a certificate under Section 65B would be required to be produced at the stage when electronic evidence is produced in the course of evidence at the trial and hence the stage at which the High Court sought to apply the provision was premature; (iii) the prosecution is relying, apart from electronic evidence pertaining to the spy camera, on other material which prima facie shows the involvement of the first and the second accused; (iv) without considering the nature of that evidence, the High Court prevented the prosecution from

placing reliance on such material on the basis of a bald averment that it did not appear to be convincing; (v) in handing over the spy camera to the complainant and the process which followed by recording what transpired at the meeting with the respondent on 15 November 2012, the investigating officer was only conducting a preliminary inquiry of the nature that is contemplated by the decision of this Court in *Lalita Kumari v Government of Uttar Pradesh*[1]*;* and (vi) the purpose of the preliminary inquiry was only to enable the prosecution to ascertain whether a cognizable offence was made out. In other words, the utilization of the spy camera during the course of the preliminary inquiry was in the nature of a pre-trap mahazar which fell within the exceptions which have been carved out in the decision in Lalita Kumari. The investigation, it has been urged, would commence only thereafter having due regard to the provisions contained in Section 154 of the CrPC.

11. On the other hand, while supporting the view which has been taken by the learned Single Judge of the High Court, Mr. Basava Prabhu Patil, learned Senior Counsel appearing for the respondent, submits that (i) in the present case the investigation had commenced before the registration of an FIR under Section 154 of the CrPC. The events which transpired before 16 November 2012 before the FIR was registered and the collection of material would be inadmissible in evidence; (ii) while the decision of the Constitution Bench in Lalita Kumari allows a preliminary inquiry particularly in a case involving corruption under the Prevention of Corruption Act, the Trial Court erred in inferring from the decision of this Court that the investigating officer is entitled to collect evidence even before the FIR is lodged; (iii) there is nothing to indicate, even the existence of an entry in the Station Diary; (iv) in consequence, the decision of the trial court was inconsistent with the principle enunciated in Lalita Kumari, which warranted interference by the High Court in exercise of its jurisdiction under Section 482 of the CrPC; (v) as a matter of fact the trial against the second accused has proceeded and despite a lapse of seven years the prosecution has failed to produce a copy of the certificate under Section 65B of the Evidence Act; and (vi) in the absence of a certificate under Section 65B, there is an absence of material hence a discharge is warranted under Section 231 of the CrPC.

12. These submissions fall for consideration.

13. The fundamental basis on which the High Court proceeded to quash the proceedings is its hypothesis that Section 65B, which requires the production of a certificate for leading secondary evidence of an electronic record mandate the production of such a certificate at this stage in the absence of which, the case of the prosecution is liable to fail. Section 65B reads as follows:

> "Section 65(B). Admissibility of Electronic Records- (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or any fact stated therein of which direct

evidence would be admissible.

(2) The conditions referred to in the Sub-section (1) in respect to the computer output shall be following, namely:

(a) the computer output containing the information was produced by computer during the period over which computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of computer.

(b) during the said period the information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities.

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation for that part of the period, was not such to affect the electronic record or the accuracy of its contents.

(d) The information contained in the electronic record reproduces or is derived from such information fed into computer in ordinary course of said activities.

(3) Where over any period, the function of storing and processing information for the purposes of any activities regularly carried on over that period as mentioned in Clause (a) of Sub-section (2) was regularly performed by the computers, whether-

(a) by a combination of computer operating over that period, or

(b) by different computers operating in succession over that period; or

(c) by different combinations of computers operating in succession over that period of time; or

(d) in any other manner involving successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purpose of this section as constituting a single computer and any reference in the section to a computer shall be construed accordingly. (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b)giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the

electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this section,— (a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a computer output shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment. Explanation.—For the purposes of this section any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process."

14. The provisions of Section 65B came up for interpretation before a three judge Bench of this Court in *Anvar P.V. v P.K. Basheer* . Interpreting the provision, this Court held:

"Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only in accordance with the procedure prescribed under Section 65-B. Section 65-B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. "

Section 65B(4) is attracted in any proceedings "where it is desired to give a statement in evidence by virtue of this section". Emphasising this facet of sub-section (4) the decision in Anvar holds that the requirement of producing a certificate arises when the electronic record is sought to be used as evidence. This is clarified in the following extract from the judgment :

"Most importantly, such a certificate must accompany the electronic record like computer printout, compact disc (CD), video compact disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to

be used as evidence.

Electronic records being more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice."

(emphasis supplied)

15. The same view has been reiterated by a two judge Bench of this Court in *Union of India and Others v CDR Ravindra V Desai* . The Court emphasised that non-production of a certificate under Section 65B on an earlier occasion is a curable defect. The Court relied upon the earlier decision in Sonu alias Amar v State of Haryana7, in which it was held :

"The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency."

(emphasis supplied)

16. Having regard to the above principle of law, the High Court erred in coming to the conclusion that the failure to produce a certificate under Section 65B(4) of the Evidence Act at the stage when the charge-sheet was filed was fatal to the prosecution. The need for production of such a certificate would arise when the electronic record is sought to be produced in evidence at the trial. It is at that stage that the necessity of the production of the certificate would arise.

17. Apart from the above feature of the case, on which it is abundantly clear that the High Court has erred, we must also notice the submission of the appellants that independent of the electronic record, the prosecution is relying on other material. The existence of such material has been adverted to in the charge-sheet. Details of the documents on which the prosecution sought to place reliance find specific mention in the charge-sheet particularly at items 15, 25 and 28 to 31. The High Court rejected this submission of the appellant on the specious assertion that "it is found that, on the face of it, it is not convincing".

18. That leads us to the next limb of a significant submission which has been made on behalf of the respondent by Mr Basava Prabu Patil, learned senior counsel, which merits close consideration. It was urged on behalf of the respondent that the exercise of the investigating officer handing over a spy camera to the complainant on 15 November 2012 would indicate that the investigation had commenced even before an FIR was lodged and registered on 16 November 2012. This, it has been submitted, is a breach of the parameters which have been prescribed by the judgment of the Constitution Bench of this Court in Lalita Kumari.

19. Before we advert to the decision of the Constitution Bench, it is necessary to note that in the earlier decision of this Court in P. Sirajuddin v State of Madras8, the importance of a

preliminary inquiry before the lodging of a first information report in a matter involving alleged corruption by a public servant was emphasized. This Court observed:

> "17... Before a public servant, whatever be his status, is publicly charged with acts, of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner. The enquiring officer must not act under any preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon securing the conviction of the said person by adopting measures which are of doubtful validity or sanction. The means adopted no less than the end to be achieved must be impeccable. In ordinary departmental proceedings against a Government servant charged with delinquency, the normal practice before the issue of a charge sheet is for some one in authority to take down statements of persons involved in the matter and to examine documents which have a bearing on the issue involved. It is only thereafter that a charged sheet is submitted and a full-scale enquiry is launched. When the enquiry is to be held for the purpose of finding out whether criminal proceedings are to be resorted to the scope thereof must be limited to the examination of persons who have knowledge of the affairs of the delinquent officer and documents bearing on the same to -find out whether there is prima facie evidence of guilt of the officer. Thereafter the ordinary law of the land must take its course and further inquiry be proceeded with in terms of the Code of Criminal Procedure by lodging a first information report."

20. P Sirajuddin (supra) emphasized the requirement of a preliminary inquiry, where a public servant is alleged to have committed an act of dishonesty involving a serious misdemeanour. The purpose of a preliminary inquiry is to ascertain whether a cognizable offence has been made out on the basis of which a first information report can be lodged. The basis of a first information report under Section 154 of the CrPC9 is information relating to the commission of a cognizable offence which is furnished to an officer-in-charge of the police station. It is with a view to ascertain whether a cognizable offence seems to have been implicated in a case involving an alleged act of corruption by a public servant that a preliminary inquiry came to be directed in the judgment of this Court in P Sirajuddin. The decision in P Sirajuddin was recognized and followed by the Constitution Bench in Lalita Kumari. The Constitution Bench held that while Section 154 of the CrPC postulates mandatory registration of a first information report on the receipt of information indicating the commission of a cognizable offence yet there could be situations where a preliminary inquiry may be required. 9 154 Information in cognizable cases.- (1) Every information relating to the commission of a cognizable offence, if given orally to an officer

in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf; Indicating the cases where a preliminary inquiry may be warranted, this Court held :

> "120.5. The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.
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> 120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:
> a) Matrimonial disputes/ family disputes
> b) Commercial offences
> c) Medical negligence cases
> d) Corruption cases
> e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay."
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> The purpose of conducting a preliminary inquiry has been elaborated in the following extract:
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> "Therefore, in view of various counter claims regarding registration or non-registration, what is necessary is only that the information given to the police must disclose the commission of a cognizable offence. In such a situation, registration of an FIR is mandatory. However, if no cognizable offence is made out in the information given, then the FIR need not be registered immediately and perhaps the police can conduct a sort of preliminary verification or inquiry for the limited purpose of ascertaining as to whether a cognizable offence has been committed. But, if the information given clearly mentions the commission of a cognizable offence, there is no other option but to register an FIR forthwith. Other considerations are not relevant at the stage of registration of FIR, such as, whether the information is falsely given, whether the information is genuine, whether the information is credible etc. These are the issues that have to be verified during the investigation of the FIR. At the stage of registration of FIR, what is to be seen is merely whether the information given ex facie discloses the commission of a cognizable offence. If, after investigation, the information given is found to be false, there is always an option to prosecute the complainant for filing a false FIR."

21. In the present case, on 15 November 2016, the complainant is alleged to have met the respondent. During the course of the meeting, a conversation was recorded on a spy camera. Prior thereto, the investigating officer had handed over the spy camera to the complainant. This stage does not represent the commencement of the investigation. At that

stage, the purpose was to ascertain, in the course of a preliminary inquiry, whether the information which was furnished by the complainant would form the basis of lodging a first information report. In other words, the purpose of the exercise which was carried out on 15 November 2012 was a preliminary enquiry to ascertain whether the information reveals a cognizable offence.

22. The High Court has in the present case erred on all the above counts. The High Court has erred in coming to the conclusion that in the absence of a certificate under Section 65B when the charge sheet was submitted, the prosecution was liable to fail and that the proceeding was required to be quashed at that stage. The High Court has evidently lost sight of the other material on which the prosecution sought to place reliance. Finally, no investigation as such commenced before the lodging of the first information report. The investigating officer had taken recourse to a preliminary inquiry. This was consistent with the decision in Lalita Kumari.

23. The High Court ought to have been cognizant of the fact that the trial court was dealing with an application for discharge under the provisions of Section 239 of the CrPC. The parameters which govern the exercise of this jurisdiction have found expression in several decisions of this Court. It is a settled principle of law that at the stage of considering an application for discharge the court must proceed on the assumption that the material which has been brought on the record by the prosecution is true and evaluate the material in order to determine whether the facts emerging from the material, taken on its face value, disclose the existence of the ingredients necessary to constitute the offence. In the State of Tamil Nadu v N Suresh Rajan10, adverting to the earlier decisions on the subject; this Court held :

> "29...At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage."

24. For the above reasons we are of the view that the appeal would have to be allowed. We accordingly allow the appeal and set aside the judgment and order of the High Court dated 24 April 2017 in Criminal Writ Petition No 3202 of 2017. We accordingly maintain the order passed by the learned trial judge on 5 December 2016 dismissing the discharge application filed by the respondent.