

BOMBAY HIGH COURT

Kadar Saleh Mohomed

Vs.

State (Bombay)

Crl. Revn. Appn. No. 297 of 1963

(Patel and Gokhale, JJ.)

21.08.1963

JUDGMENT

Patel, J.

1. This revision application is made on behalf of the seven accused, who have been committed to stand their trial before the Court of Session by the learned Presidency Magistrate, 16th Court, Esplanade, Bombay, for various charges, viz, forgery, using forged documents as genuine, cheating, and the conspiracy to commit these offences. When the case reached before the learned Addl. Sessions Judge, arguments were advanced before him that in respect of charge No. 1 in particular and in respect of other charges of forgery which may have occurred outside Indian territories the Addl. Sessions Judge would have no jurisdiction to try the case. The learned Addl. Sessions Judge rejected these contentions, and against that decision the present revision application is made to this court.

2. The accused are nationals of South Africa and they arrived on various dates in India. Accused No. 1 first came to India on the 31st of March 1961. He left within a short time thereafter and returned on 23rd of April 1961. Accused No. 5 came on 16th of June 1961. Accused Nos. 3 and 6 came on 23rd June 1961. Accused No. 2 came on 14th July 1961 and accused No. 4 came on the 11th of August 1961.

3. It appears that accused No. 1 when he landed in India made certain declarations before the customs Officer of the foreign currency which he brought into India and later on he utilized this declaration after making alterations for the purpose of getting foreign currency from Indian dealers by cashing forged drafts of the standard Bank of South Africa. As many as 84 charges were framed against these accused by the learned Presidency Magistrate, which have been recast by the learned Addl. Sessions Judge and reduced in number to 64. During his stay, accused No. 1 sold some drafts to one John Mascarenhas on the 21st of June 1961, of the total value of Rs.

36,000. Another set of drafts he sold to one Goverdhandas Ratansi Bajarria on the 22nd of July 1961, of the total value of Rs. 80,000/-. Within a very short time after these sales, it was discovered that these drafts were forged drafts and that these two persons were cheated by the accused. Inquiries were, therefore, set afoot and all the accused were arrested one after the other as a result of the complaint made by these two persons.

4. The first charge is one of conspiracy and it is directed against all the seven accused and is as follows :

"First : That between the 28th day of April 1960 and the 11th day of August 1961, at Bombay and/or at other places in and outside India, you Abdul Kadar Saleh Mohamed, accused No. 1, Abdul Gafar Khan, accused No. 2, Peerbhai Chagan, accused No. 3, Abdul Gafar Osman, accused No. 4, Osman Mahomed, accused No. 5, Habib Mohamed, accused No. 6, and Omar Mohamed, accused No. 7, along with (1) Shrimati Rabia alias Bakri alias Nargis, alias Sherbanoo alias Shrimati Kada wife of Abdul Kadar Saleh Mohamed, (2) Dawood Saleh Mohamed, (3) Allibhai Manjee and (4) Ramji Keshavji, all four of them now absconding, and along with other persons unknown, were parties to a criminal conspiracy to cheat persons by dishonestly inducing them to deliver money in Indian currency by using forged documents, viz. British Sterling drafts purporting to have been issued by the Standard Bank of South Africa, Pretoria and Johansberg Branches and thereafter to remit the money so obtained by cheating to South Africa after getting the same converted into foreign currency, knowing or having reason to believe at the time you used the said documents to be forged documents, and also by forging documents and possessing them intending to use them fraudulently for the purpose of carrying out the object of the said conspiracy, and by abetting the offences of forgery and of using as genuine forged documents for the purpose of cheating, and that in pursuance of the said criminal conspiracy the above-mentioned offences were in fact committed and that you all thus committed an offence punishable under Section 120-B read with Sections 467, 467-109, 471-467, 468, 468-109, 471-468, 417, 420, 474, 471-109 417-109 and 420-109."

It is urged by Mr. Pardivala that the offence of criminal conspiracy is complete under Section 120-A as soon as there is a completed agreement between the several accused, in the present case in south Africa, as the circumstances of the present case show and therefore none of the accused can be prosecuted in Indian Court. He has relied for this purpose on *Reg. v. Elmstone, Whitwell*¹, *Reg. v. Pirtai*² and *Gokaldas Amarsee v. Emperor*³, and *In re Dani*⁴ He argues that there is nothing in the evidence on record which could show that any of the accused formed the conspiracy in any part of India, and if the conspiracy was complete in South Africa, evidently, in view of these authorities, the accused cannot be prosecuted in this country. He has also relied upon the cases cited at foot-note 9, at Page 271 of Ratanlal's Law of Crimes, 20th edition, for the purpose of his arguments.

5. Before these sections were added to the Penal Code, conspiracy to commit offences was not

punishable. It became punishable as abetment if the offence was actually committed. This is evident from the language of Section 107 (second definition) which defines "abetment." By the amendment of the Penal Code by addition of Sections 120-A and 120-B, the Legislature brought the law in India in line with the English law and made conspiracy itself punishable as a distinct offence, apart from the object of conspiracy which, if carried, out, would itself amount to an offence.

¹⁷ Bom. H.C. (Cri) 89 (FB)

³ AIR 1933 Sind 333

²¹⁰ Bom HC 356

⁴ AIR 1936 Mad 317

6. Section 120-B which is the Penal section, says that whoever is a party to a criminal conspiracy to commit an offence punishable with death, shall be punishable in the same manner as if he had abetted such offence. The omitted words are not relevant for the present purposes. Now the question is, does Section 120-B limit its operation to those who are parties only to the agreement at the moment of its formation, or it is also applicable to those who continue to be parties during the entire period during which the conspiracy continues. It is no doubt true that the offence is complete as soon as an agreement is made between the conspirators, and they being parties to that conspiracy they would be punishable under Section 120-B. But by its very language Section 120B must apply to those who are members of the conspiracy during its continuance. The emphasis is on the words "are parties". It is not that the agreement as such is punishable, but being party to a conspiracy is punishable. The section is worded in the present tense and, therefore, cannot be exclusively read to mean whoever has been or had been party to a criminal conspiracy shall be punished, as if the offence was committed. In other words, it is intended to be treated as a continuous offence and whoever is a party to conspiracy during the period for which he is charged is liable under Section 120B. The same is the view in foreign jurisdictions.

7. In this connection, one may with advantage refer to American Jurisprudence, Vol. 11 Section 23, at page 559, where it is stated :

"The conspiracy is held to be continued and renewed as to all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design."

In *United States v. Kissel*⁵, Mr. Justice Holmes in answer to a contention that the prosecution was barred by the law of limitation said :

"But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distant conspiracies, rather than to call it a single one A conspiracy is constituted by an agreement, it is true, but it is the"

result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it.A conspiracy is a

partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act."

8. It is true that in AIR 1933 Sind 333 and AIR 1936 Madras 317 the convictions have been based on the footing that the agreement to commit offences by itself resulted in the offence of conspiracy under Section 120-B. On the other hand, there is not a single case where it has been asserted and accepted that merely because the objects with which the conspiracy was entered into were achieved and actual offences committed there could be no prosecution for the conspiracy itself or that since every conspiracy might amount to

⁵(1909) 218 US 601 : 54 Law Ed 1168

abetment of each of the offences committed, there can be no charge in respect of the conspiracy. Mr. Pardivala in support of his contention relied on the decision in *Leo-Roy Frey v. Supdt. Dist., Jail Amritsar*⁶ That case arose out of a warrant for the apprehension and detention of the petitioners in connection with offences including an offence under Section 120-B of the Indian Penal Code. While dealing with the arguments advanced before their Lordships that Article 20(2) of the Constitution protected them from being charged with these offences, their Lordships considered what a criminal conspiracy implied, and it is in that connection that it was said :

"The offence of conspiracy to commit a crime is a different offence from the crime that is the object of the conspiracy because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed, equally the crime attempted or completed does not require the element of conspiracy as one of its ingredients. The court was not invited to consider the meaning of the application of Section 120-B, and the question as to whether or not a conspiracy continues and the language of Section 120B applies to those who are parties to the conspiracy during every moment of its continuance was not canvassed before their Lordships. On the other hand, in *Swaminatham v. State of Madras*⁷, while rejecting the contention of misjoinder of charges on the ground that different people had joined the conspiracy at different times and also the charges were lumped together, the Court said :

"The charge, as framed, discloses one single conspiracy, although spread over several years. There was only one object of the conspiracy and that was to cheat members of the public. The fact that in the course of years, others joined the conspiracy of that several incidents of cheating took place in pursuance of the conspiracy did not change the conspiracy and did not split up a single conspiracy into several conspiracies."

It has been urged by Mr. Pardivala that though Sections 120A and 120B were added to the Indian Penal Code, in 1913, in no case, has a similar view been taken. That, however, does not mean that cannot be the meaning of Section 120B. It may be that in those cases it was not necessary to consider the application of Section 120B since the conspiracies were formed in India and the members thereof were amenable to the jurisdiction of Indian Courts. International offences of

this kind and such magnitude are of recent growth and hence the question. We do not see why we should give unnatural and perverted meaning to the section. In *Mobarack Ali Ahmed v. State of Bombay*⁸, Mr. Justice Jagannadhadas said in paragraph 31 :

"It is not necessary and indeed not permissible to construe the Indian Penal Code at the present day in accordance with the notions of criminal jurisdiction prevailing at the time when the Code was enacted. The notions relating to this matter have very considerably changed between then and now during nearly a century that has elapsed. It is legitimate to construe the Code with reference to the modern needs, wherever this is permissible, unless there is anything in the Code or in the particular section to indicate the contrary".

⁶ AIR 1958 SC 119

⁸ AIR 1957 SC 857

⁷ AIR 1957 SC 340

It is doubtful if the ratio of the decisions in 7 Bom HC (Cri) 89 (FB) : 10 Bom HC 356 and AIR 1933 Sind 333 can be regarded as sound law in view of the judgment of the Supreme Court in that case. After referring to the above cases and also the case of *Emperor v. Chhotalal Babar*⁹, Mr. Justice Jagannadhadas in the above case says in paragraph 30 :

"Undoubtedly some of them seem to support the view pressed before us on behalf of the appellant that criminal jurisdiction cannot extend to foreigners outside the State. These, however, are decisions rendered at a time when the competence of the Indian Legislature was considered somewhat limited under the influence of the decisions like those in *Macleod v. Attorney General for New South Wales*¹⁰, in spite of the decision in *Queen v. Burah*¹¹, "

It is significant to note in this connection that their Lordships confirmed the conviction of the appellant under Section 420 though charged under Section 420 and Section 34 for an offence which he committed by an agent, himself not being in this country at the time.

9. In the view that we take of Section 120B, it is clear that if the petitioners before us were parties to the conspiracy during its continuance when all of them were in Bombay, they clearly committed this offence within Indian territories, and that being so, it is impossible to hold that the Courts in India would have no jurisdiction to try the offence which is the subject matter of Charge No. 1.

10. Mr. Gumaste relied upon another alternative argument that even if the conspiracy had taken place outside India, even if at the time when the offences were committed any of them were outside India, since its effects were felt here and the actual offences in pursuance to the conspiracy were committed in the Indian territory, the Courts in India would have jurisdiction to try all of the accused even for conspiracy. He relied for this purpose on a passage in Halsbury's Laws of England, Vol. 10 paragraph 607, at page 329. There it is stated :

"Conspiracy may be tried in the place where the conspirators agreed to do the wrongful

act which is the object of the conspiracy. But as the place of agreement is often unknown, conspiracy is generally a matter of inference deduced from criminal acts of the accused persons which are done in pursuance of a common Criminal purpose, and are often not confined to one place a charge of conspiracy may consequently be laid in any country where one of these criminal acts is committed."

He relied on the decision in ILR 36 Bombay 524 particularly on the observations to the following effect :

"Where a foreigner starts the train of his crime in foreign territory, and perfects and completes his offence within British limits, he is triable by the British Court when found within its jurisdiction."

⁹ ILR 36 Bom 524 ¹¹(1878) 3 AC 889

¹⁰(1891) AC 455

He also relies for the purpose of his argument on the dicta of Mr. Justice Holmes which have been cited in AIR 1957 Supreme Court 857, at p. 868, paragraph (24). In the view which we have taken of Section 120B we do not think it is necessary for us to consider this aspect of the matter.

11. Mr. Pardivala then argued that the sanction of the State Government is necessary under Section 196A(2) of the Criminal Procedure Code. Inasmuch as conspiracy that is alleged includes some non-cognizable offences. The Legislature added Section 196A(2) requiring the sanction of the Government in such cases with a view that there should not be frivolous prosecutions on the ground of criminal conspiracy to commit non-cognizable offences which were petty in nature. The question is whether the present case falls within the ambit of Sub-Section (2) of Section 196. As far as relevant, Section 196A(2) reads :

"No court shall take cognizance of the offence of criminal conspiracy punishable under Section 120B of the Indian Penal Code.

(2) in a case where the object of the conspiracy is to commit any non-cognizable offence. unless the state Government or a Chief Presidency Magistrate empowered in this behalf by the State Government, has by order in writing consented to the initiation of the proceedings."

The primary question is whether it can be said that the object of the conspiracy is to commit any non-cognizable offence. No doubt the words are plain. But then as the words themselves suggest, the object of the conspiracy must be to commit any non-cognizable offence. In the present case the object was to commit cognizable offence, and the minor steps were merely steps in the committal of the main and cognizable offence of cheating the public, the Government and the banks, which clearly is outside the purview of the exception contained in the Sub-Section. It seems to us that such conspiracies as have their object only the commission of non-cognizable

offences, which are within the section. It may also be that there may be a conspiracy to commit non-cognizable offences and also distinct cognizable offence, in which case there may be scope for saying that as to non-cognizable offences, if prosecution is sought for conspiracy, there must be sanction. But where the only object of the conspiracy is, as stated above, commission of cognizable offences, then there can be no question of sanction for the steps that are being taken to the fulfilment of the conspiracy. Even apart from this, a Division Bench of this Court has taken the view in *Durgadas Tulsiram v. State*¹², that where commission of non-cognizable offences is merely a means to an end, sanction under Section 196A(2) would not be necessary. This case followed the earlier case in *Ramchandra Rango v. Emperor*¹³, We are bound by this decision and it would not be open to us to reconsider the matter.

12. It is then contended that in the first charge, the charge of conspiracy is vague in that it does not specify the exact place where the conspiracy was entered into for, the charge says "at Bombay and/or at other places in and outside India". It is also contended that the documents in respect of which forgeries and cheating were committed have not also been specified in that charge. As to the latter, it is sufficient to say that specific charges have been made against many of the accused individually in respect of the drafts and the other documents connected with cheating. It is clear, therefore, that there is no substance in the

¹²56 Bom LR 188 : (AIR 1955 Bom 82)

¹³41 Bom LR 98 : (AIR 1939 Bom 129)

contention. As to the first contention, we may refer with advantage to the decision in *State v. Shankar Sakharam Jadhav*¹⁴, and the authorities cited there. It is clear on authorities that direct evidence of conspiracy is almost an impossibility. It is in a rare case that there is direct evidence of the place where conspiracy is entered into. In almost every case, such conspiracies are to be inferred from the subsequent conduct of the parties having regard to all the circumstances of the case. Under these circumstances, from the very nature of things it is almost impossible to give the particulars, as the accused would now have the prosecution to give them. In this connection, Mr. Pardivala referred us to the Criminal Procedure Code and contended that under Section 236 the only alternatives that are permissible are as to the nature of the offence, but not any other matter. He relies particularly on Section 222 and says that the particulars must be supplied. Section 222, however, says that the charge must contain such particulars as to the time and place of the alleged offence as are reasonably sufficient to give the accused notice of the matter with which he is charged. It would be clear, therefore, that it is not in every case necessary to give the place of the offence. It depends upon the circumstances of the individual case. The same argument was advanced as to the charges with regard to certain forgeries. But then it was pointed out by the learned Addl. Government Pleader that many of the drafts were endorsed in Bombay, though they may have been forged in or out of Bombay. Even here, what we have said above in connection with conspiracy applies. Carried to its extreme, in every case of a forged document the prosecution would be required to supply the particulars of the place and time at which the document is forged, though it may be that it is forged in the house, in a running tram, in a running train or in a bath-room. This is putting too much strain on the section. It is, therefore, impossible to countenance the argument that in connection with the forgeries also the charges, as

framed, are vague.

13. Mr. Pardivala then contended that if he succeeded on the first point regarding jurisdiction and if the charge of conspiracy failed, there would be also misjoinder of charges both as to offences and as to accused. Since we are against him on the first point, this contention must fail, as is admitted by him.

14-17. Mr. Pardivala then argued that in any case so far as accused Nos. 5 and 6 are concerned, there is no evidence against them and, therefore, they should be discharged. In our view, this contention also is impossible of sustenance. (His Lordship perused the evidence and continued :). In our view, this evidence is more than sufficient for a committal, though this is not all the evidence. The committal, therefore, of these two accused is fully justified.

18. It was argued by Mr. Pardivala that it may be that accused Nos. 5 and 6 are innocent associates of the other accused against whom there may be some evidence. The only thing one can suggest is that the circumstances which we have pointed out cannot be regarded as mere coincidences. These circumstances positively suggest their association in a great measure with the other accused for the purpose of the conspiracy. At one time, a suggestion was sought to be made that against accused Nos. 4 and 7 also there was not sufficient evidence for their committal. Over and above the large amount of evidence that has been produced, it is sufficient to observe that a large number of drafts in the name of accused No. 3 were found with accused Nos. 4 and 7 and a large number of calls were booked from Hotel Waldorf, where they were staying, to the hotel where accused Nos. 3

¹⁴1459 Bom LR 244 : (AIR 1957 Bom 226)

and 6 were residing. Mr. Pardivala practically gave up that contention when certain material was pointed out.

19. No other points are argued.

20. In the result, the order of committal is confirmed. The application is dismissed and the rule is discharged. The learned Addl. Sessions Judge should proceed with the trial of the case as early as can possibly be done.

Revision dismissed.