REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 192 OF 2010
(Arising out of S.L.P. (Crl.) No. 4708 of 2007)

P. Vijayan .... Appellant (s)

Versus

State of Kerala & Anr. .... Respondent(s)

J U D G M E N T

P. Sathasivam, J.

1) Leave granted.

2) This appeal is directed against the judgment and order of the High Court of Kerala at Ernakulam dated 04.07.2007 passed in Criminal Revision Petition No. 2455 of 2007, in and by which, the learned single Judge, after finding no ground to interfere with the order passed by the

Trial Judge dismissing discharge petition filed by the appellant herein, refused to interfere in his revision.

3) According to the appellant, he is a retired IPS officer aged about 85 years. He enjoyed a considerable reputation as an IPS officer and had retired as the Director General of Police, Kerala. In the course of his tenure as a senior police officer, he controlled the Naxalite militancy which was rampant in Kerala in the 1970s. In the 1970s, Naxalites under the banner of CPI(ML), a militant organization, had taken up the cause of the poor through armed appraisal and violence. The said organization committed various brutal murders and dacoities including attacking police stations and murdering innocent policemen. The State Government which was in power at the relevant time took serious note of the said atrocities committed by the cadres of CPI (ML) and took a decision to put an end to the said atrocities.

4) It is his further case that Naxalite Varghese was a prominent leader of the CPI (ML) in Kerala during 1970s. He was an accused in cases relating to murder of landlords as well as attack on policemen. Since, he was wanted in many grave criminal offences, he was hiding. A special team consisting members of the Kerala Police as well as CRPF was formed to nab Naxalite Varghese. On 18.02.1970, the police received a tip off that he was present in the hut of one Shivaraman Nair and based on the said information, the special team rushed to the spot and broke open the door of the said hut and arrested Naxalite Varghese. However, while he was being taken to the Mananthavadi police station in a police jeep, he tried to escape and attacked the policemen resulting in clash between the police party and Naxalite Varghese. During the said clash, in order to prevent Naxalite Varghese from escaping, the police had to fire and in the shoot out he was killed. The capture of Naxalite Varghese was highlighted as one of the achievements of the Kerala Police

at that time and the police personnel involved in the said operation were given out of turn promotions and increments in appreciation of being part of the team. The appellant had also received various medals while in service for his role in tackling the naxalite militancy in Kerala.

5) It was further pointed out that from 1970 till 1998, there was no allegation that the said encounter was a fake encounter. Only in the year 1998, reports appeared in various newspapers in Kerala that the killing of Varghese in the year 1970 was in a fake encounter and that senior police officers are involved in the said fake encounter. Pursuant to the said news reports, several writ petitions were filed by various individuals and organizations before the High Court of Kerala with a prayer that the investigation may be transferred to Central Bureau of Investigation (CBI). In the said writ petition, Constable Ramachandran Nair filed a counter affidavit dated 11.01.1999 in which he made a confession that he had

shot Naxalite Varghese on the instruction of the then Deputy Superintendent of Police (DSP), Lakshmana. He also stated that the appellant was present when the incident occurred. By order dated 27.01.1999, learned single Judge of the High Court of Kerala passed an order directing the CBI to register an FIR on the facts disclosed in the counter affidavit filed by Constable Ramachandran Nair. Accordingly, the CBI registered an FIR on 03.03.1999 in which Constable Ramachandran Nair was named as accused No. 1, Mr. Lakshmana was named as accused No. 2 and Mr. P. Vijayan, the appellant herein, was named as accused No. 3 for an offence under Section 302 IPC read with Section 34 IPC. After investigation, the CBI filed a charge-sheet before the Special Judge (CBI), Ernakulam on 11.12.2002 wherein all the above mentioned persons were named as A1 to A3 respectively for an offence under Sections 302 and 34 IPC.

6) By pointing out various reasons, his meritorious service and nothing whispered for a period of twenty

years, the appellant filed a petition on 17.05.2007 under Section 227 of the Code of Criminal Procedure (in short "CrPC") for discharge. The learned Trial Judge by order dated 08.06.2007, dismissed the said petition and passed an order for framing charge for offence under Sections 302 and 34 IPC. Aggrieved by the aforesaid order, the appellant filed a Criminal Revision Petition No. 2455 of 2007 before the High Court of Kerala. By an impugned order dated 04.07.2007, learned single Judge of the High Court dismissed the said Criminal Revision Petition. Questioning the said order, the appellant filed the above appeal by way of Special Leave Petition.

7) We have heard Mr. Raghenth Basant, learned counsel for the appellant and Mr. H.P. Raval, learned Additional Solicitor General for CBI-second respondent herein.

8) The questions that arose for consideration in this appeal are (i) whether the appellant established sufficient ground for discharge under Section 227 of the CrPC, and (ii) whether the Trial Judge as well as the High Court

committed any error in rejecting the claim of the appellant.

9) Before considering the merits of the claim of both the parties, it is useful to refer Section 227 of the Code of Criminal Procedure, 1973, which reads as under:-

> "**227. Discharge**.—If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

10) If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the Trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words "not sufficient ground for proceeding against the accused" clearly show that the Judge is not a mere Post Office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not

necessary for the Court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the Court, after the trial starts. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the Court which *ex facie* disclose that there are suspicious circumstances against the accused so as to frame a charge against him.

11) The scope of Section 227 of the Code was considered by this Court in the case of ***State of Bihar*** vs. ***Ramesh Singh*** (1977) 4 SCC 39, wherein this Court observed as follows:-

> "... ... Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding

> against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. …. "

This Court has thus held that whereas strong suspicion may not take the place of the proof at the trial stage, yet it may be sufficient for the satisfaction of the Trial Judge in order to frame a charge against the accused.

12) In a subsequent decision i.e. in ***Union of India*** vs. ***Prafulla Kumar Samal***, (1979) 3 SCC 4, this Court after adverting to the conditions enumerated in Section 227 of the Code and other decisions of this Court, enunciated the following principles:-

> "(*1*) That the Judge while considering the question of framing the charges under Section 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 under Section 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 so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

13) The scope and ambit of Section 227 was again considered in ***Niranjan Singh K.S. Punjabi*** vs. ***Jitendra Bhimraj Bijjaya***, (1990) 4 SCC 76, in para 6, this Court held that:

"Can he marshal the evidence found on the record of the case and in the documents placed before him as he would do on the conclusion of the evidence adduced by the prosecution after the charge is framed? It is obvious that since he is at the stage of deciding whether or not there exists sufficient grounds for framing the charge, his enquiry must necessarily be limited to deciding if the facts emerging from the record and documents constitute the offence with which the accused is charged. At that stage he may sift the evidence for that limited purpose but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that he is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose he must weigh the material on record as well as the documents relied on by the prosecution. In the *State of Bihar* v. *Ramesh Singh* this Court observed that at the initial stage of the framing of a charge if there is a strong suspicion-evidence which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to

> say that there is no sufficient ground for proceeding against the accused. If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged by cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. In *Union of India* v. *Prafulla Kumar Samal* this Court after considering the scope of Section 227 observed that the words 'no sufficient ground for proceeding against the accused' clearly show that the Judge is not merely a post office to frame charge at the behest of the prosecution but he has to exercise his judicial mind to the facts of the case in order to determine that a case for trial has been made out by the prosecution. In assessing this fact it is not necessary for the court to enter into the pros and cons of the matter or into weighing and balancing of evidence and probabilities but he may evaluate the material to find out if the facts emerging therefrom taken at their face value establish the ingredients constituting the said offence."

14) In a recent decision, in the case of ***Soma Chakravarty*** vs. ***State through CBI***, (2007) 5 SCC 403, this Court has held that the settled legal position is that if on the basis of material on record the Court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material

brought on record by the prosecution has to be accepted as true. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial. Charge may although be directed to be framed when there exists a strong suspicion but it is also trite that the Court must come to a *prima facie* finding that there exist some materials therefor. Suspicion alone, without anything more, cannot form the basis therefor or held to be sufficient for framing charge.

15) We shall now apply the principles enunciated above to the present case in order to find out whether or not the Courts below were justified in dismissing the discharge petition filed under Section 227 of the Code.

16) In the earlier part of our judgment, we have adverted to the assertion of the appellant that from 1970 till 1998, there was no allegation that the encounter was a fake

encounter. In the year 1998, reports appeared in various newspapers in Kerala that the killing of Varghese in the year 1970 was in a fake encounter and that senior police officers are involved in the said fake encounter. Pursuant to the said news reports, several writ petitions were filed by various individuals and organizations before the High Court of Kerala with a prayer that the investigation may be transferred to Central Bureau of Investigation (CBI). In the said writ petition, Constable Ramachandran Nair filed a counter affidavit dated 11.01.1999 in which he made a confession that he had shot Naxalite Varghese on the instruction of the then Deputy Superintendent of Police (DSP), Lakshmana. In the same counter affidavit, he also stated that the appellant was present when the incident occurred. Based on the assertion in the counter affidavit of Ramachandran Nair dated 11.01.1999 by order dated 27.01.1999 learned single Judge of the High Court of Kerala passed an order entrusting an investigation to the CBI. As said earlier, accordingly, CBI registered an FIR on

03.03.1999 implicating Constable Ramachandran Nair, Lakshmana and the appellant-Vijayan as accused Nos. 1, 2 and 3 respectively for an offence under Section 302 read with Section 34 IPC.

17) The materials relied on by the CBI against the appellant are as follows:-

a) Confessional note dictated by Constable Ramachandran Nair to Shri M.K. Jayadevan which was handed over to one Mr. Vasu.

b) The 161 statement of CW 6, Mr. Vasu, an erstwhile Naxalite in which he stated that in the year 1977, Constable Ramachandran Nair confessed to him that he had shot dead Naxalite Varghese.

c) The 161 statement of CW 21 Constable Mohd. Hanifa in which he has stated that he was present along with Constable Ramachandran Nair while he shot dead Naxalite Varghese.

d) The 161 statement of CW 31, Mr. K. Velayudhan in which he stated that Constable Ramachandran Nair

contacted him and stated that he had shot dead Naxalite Varghese.

e) The 161 statement of CW 32, Mr. M.K. Jayadevan who stated that Constable Ramachandran Nair had dictated his confessional statement to him and he delivered the same to Mr. Vasu.

f) The counter affidavit dated 11.01.1999 filed by Constable Ramachandran Nair before the High Court of Kerala in O.P. No. 21142/1998.

18) Learned counsel for the appellant at the foremost submitted that even if the alleged confession of Constable Ramachandran Nair is found to be correct, in view of the fact that the said Ramchandran Nair is no more and died long ago, in the light of Section 30 of the Indian Evidence Act, 1872 and in the absence of joint trial, the same cannot be used against the appellant. It is not in dispute that Constable Ramachandran Nair is not alive and there is no question of joint trial by the prosecution against the

other two accused along with the said Ramchandran Nair. Section 30 of the Evidence Act, 1872 reads as:

> **"30. Consideration of proved confession affecting person making it and other jointly under trial for same offence.** —When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.
> [Explanation.—"Offence", as used in this section, includes the abetment of, or attempt to commit the offence]"

It was pointed out that the confession of Constable Ramachandran Nair is inadmissible since this confession is made by an accused which cannot be used against a co-accused except for corroboration that too in a case where both accused are being tried jointly for the same offence. In the present case, the accused-Constable Ramachandran Nair is dead and, therefore, the trial against him has abated, hence there is no question of joint trial of Constable Ramachandran Nair and the appellant. He further pointed out that in view of the same the said extra judicial confession is inadmissible by virtue of

Section 30. He relied on a three-Judge Bench decision of this Court in ***Mohd. Khalid*** vs. ***State of West Bengal***, (2002) 7 SCC 334.

19) In ***Hardeep Singh Sohal & others*** vs. ***State of Punjab***, (2004) 11 SCC 612, this Court again held that confession cannot be admitted in evidence against the co-accused under Section 30 of the Indian Evidence Act, 1872, since, the accused who made the confession was not tried along with the other accused.

20) Insofar as the admissibility or acceptability of the extra judicial confession in the form of counter affidavit made by the first accused before the High Court in the earlier proceedings are all matters to be considered at the time of trial. Their probative value, admissibility, reliability etc are matters for evaluation after trial. As rightly pointed out by Mr. H.P. Raval, learned Additional Solicitor General, apart from the confession, the statement of Vasu-CW-6, Md. Hanifa-CW-21, Mr. K. Velayudhan-CW-31 and Mr. M.K. Jayadevan-CW-32 are very well

available and cannot be ignored lightly. We are satisfied that all the above materials require sufficient scrutiny at the hands of the Trial Judge.

21) As discussed earlier, Section 227 in the new Code confers special power on the Judge to discharge an accused at the threshold if upon consideration of the records and documents, he find that "there is not sufficient ground" for proceeding against the accused. In other words, his consideration of the record and document at that stage is for the limited purpose of ascertaining whether or not there is sufficient ground for proceeding against the accused. If the Judge comes to a conclusion that there is sufficient ground to proceed, he will frame a charge under Section 228, if not, he will discharge the accused. This provision was introduced in the Code to avoid wastage of public time which did not disclose a *prima facie* case and to save the accused from avoidable harassment and expenditure.

22) In the case on hand, though, the learned Trial Judge has not assigned detailed reasons for dismissing the discharge petition filed under Section 227, it is clear from his order that after consideration of the relevant materials charge had been framed for offence under Section 302 read with Section 34 IPC and because of the same, he dismissed the discharge petition. After evaluating the materials produced by the prosecution and after considering the probability of the case, the Judge being satisfied by the existence of sufficient grounds against the appellant and another accused framed a charge. Whether the materials at the hands of the prosecution are sufficient or not are matters for trial. At this stage, it cannot be claimed that there is no sufficient ground for proceeding against the appellant and discharge is the only remedy. Further, whether the trial will end in conviction or acquittal is also immaterial. All these relevant aspects have been carefully considered by the High Court and it rightly affirmed the order passed by the Trial Judge

dismissing the discharge petition filed by A3-appellant herein. We fully agree with the said conclusion.

23) It is made clear that we have not expressed anything on the merits of the claim made by both the parties and the conclusion of the High Court as well as this Court are confined only for disposal of the discharge petition filed by the appellant under Section 227 of the Code. It is for the prosecution to establish its charge and the Trial Judge is at liberty to analyze and to arrive at an appropriate conclusion, one way or the other, in accordance with law.

24) We direct the Trial Judge to dispose of the case of the CBI expeditiously, uninfluenced by any of the observations made above. Considering the age of the appellant, he is permitted to file appropriate petition for dispensing his personal appearance and it is for the Trial Court to pass an order taking into consideration of all relevant aspects. With the above direction, the criminal appeal is dismissed.

.....J.
(P. SATHASIVAM)

.....J.
(H.L. DATTU)

NEW DELHI;
JANUARY 27, 2010.