K.R. Purushothaman vs State Of Kerala on 25 October, 2005

Equivalent citations: AIR 2006 SUPREME COURT 35, 2006 (12) SCC 631, 2005 AIR SCW 5437, (2005) 4 KHCACJ 442 (SC), 2005 CRILR(SC&MP) 878, (2005) 9 JT 38 (SC), 2005 CRILR(SC MAH GUJ) 878, 2006 (1) CALCRILR 51, 2006 ALL MR(CRI) 575, 2005 (8) SLT 135, 2006 (1) SCC(CRI) 686, 2006 (1) SRJ 312, 2005 (4) CURCRIR 168.2, 2005 (4) KHCACJ 442, 2005 (8) SCALE 618, 2005 (12) SCC 631, (2005) 36 ALLINDCAS 68 (SC), (2007) SC CR R 717, (2005) 85 DRJ 430, (2006) 1 EASTCRIC 43, (2006) 2 SCJ 483, (2005) 3 ALLCRIR 3328, (2005) 8 SCALE 618, (2005) 4 CRIMES 191, (2005) 32 OCR 897, (2005) 4 KER LT 842, (2005) 4 RECCRIR 848, (2005) 4 CURCRIR 168(2), (2005) 7 SUPREME 323, (2006) 54 ALLCRIC 255, (2006) 2 CALLT 78, (2006) 1 CHANDCRIC 131, (2006) 1 ALLCRILR 258, 2006 (2) ANDHLT(CRI) 1 SC, 2006 (1) ALD(CRL) 402, (2006) 2 ANDHLT(CRI) 1

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Bench: H.K. Sema, P.P. Naolekar

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           CASE NO.:
Appeal (crl.)  495 of 2004

PETITIONER:
K.R. Purushothaman

RESPONDENT:
State of Kerala

DATE OF JUDGMENT: 25/10/2005

BENCH:
H.K. Sema & P.P. Naolekar

JUDGMENT:
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JUDGMENT P.P. NAOLEKAR, J.

This appeal has been filed against the common judgment of the Kerala High Court where the appeal of appellant (A-2) against his conviction was dismissed. A-2 was the Asstt. Commissioner of Tripunithura group of the Cochin Devaswom Board and convicted by the common judgment passed by the Enquiry Commissioner and Special Judge, Thrissur appointed under the Prevention of Corruption Act, 1988 (hereinafter referred to as Act) along with A-3 (T.S. Rajan) who was the Devaswom Officer, Chottanikkara Devaswom. The trial court acquitted two other accused persons,

A-1 (V. Unnikrishna Menon), who was Devaswom Commissioner, Cochin Devaswom Board and A-4 (V.G. Purushothaman Achari), the artisan/goldsmith/craftsman, who was appointed on 20.7.87 to make the Golaka. All these accused had been tried for offences punishable under Sections 13(1)(c) and (d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and Sections 409, 477-A and 120-B of the Indian Penal Code, 1860 (hereinafter I.P.C.) on the allegation that they had misappropriated the gold utilized for making a Golaka for Mekkavu Bhagavathy of Chottanikkara Temple.

The appellant was convicted for R.I. for two years and a fine of Rs. 10,000 and R.I. for two years and a fine of Rs. 5000 and in default R.I. for three months under Sections 13(1) (c) and (d) of the Act respectively, along with Section 13(2) and R.I. of one year under Sections 403 IPC and 477-A I.P.C., each. No separate sentence was awarded under Section 120B of the IPC.

The prosecution case, in brief, is that Chottanikkara Bhagvathy Temple at Chottanikkara is administered by Cochin Devaswom Board. Ornament "Golaka" was used in the temple on certain special ceremonial occasions and the other "Golaka" was used day-to-day. The Temple Board found that Golaka, which was being used throughout the year, was rendered unfit for adorning the deity and, therefore, a division was taken by the Board on 13.4.82 to make a new Golaka and for the said purpose, sanction was accorded to use 3 Kg. and 499 Gm. of gold from the gold stock available with the Devaswom. The Devaswom had received back a large quantity of gold, which had been invested in gold bonds, from the Government and it was in their custody. Out of that, aforesaid quantity of gold was to be used for the purposes of making the ornament. It was subsequently found that 3.499 Kg. was not sufficient and, therefore, the Devaswom Board by its order dated 4.9.86 granted permission to utilize 1.5 Kg. of gold more from the Nadavaravu (offerings in the form of ornaments and gold coins by devotees), by converting them into bars and sheets. In pursuance of the order, additional quantity of 1 Kg. of gold consisting of 150 pieces of gold jewellery and coins, was entrusted to A-3, who died during the pendency of the proceedings. The Board had asked for the quotations to prepare the ornament and the work was ultimately entrusted to the 4th accused by the Devaswom Board on 20.7.87. As per the quotation the wastage in making the ornament was 10 Gm. of the gold for 1 Kg. By order dated 20.2.87 (Ex.2b) the work of making the Golaka was directed to be supervised by the Assistant Commissioner of the Tripunithura group, K.S. Chakrapani Marar, J.S., D.Cs Office., T.S. Rajan Devaswom Officer, and other officials. The gold weighing 3.499 Kg., taken from the gold bond, was taken to Madras for converting into the gold sheets. The purity was tested at Elite Jwellery, Thrissur, to be 99.5%. This gold was converted into gold sheets and they were cut, and a portion having weight 2.469 Kg. was entrusted to A-3. The balance of gold sheet, i.e., 1.030 Kg. along with 1 kg. of gold from offerings (Nadavaravu) was converted into two gold bars. These two bars were later on converted into gold sheets. The gold sheets were used to make different portions of the body of Golaka. After cutting these sheets to the required size, the pieces left from the sheet, weighing 1.147 Kg., and the bits of gold weighing 13 Gm. were again melted to be converted into gold bars, weighing 1.149 Kg. This was done before the accused joined as Assistant Commissioner.

A-2 joined duty as Asstt. Commissioner of the Devaswom Board on 1/2-5-1988. On 10.9.88 the gold bar was taken by accused - appellant, along with A-3 and A-4 to A.K.A. Metals at Irinjalakuda for

converting the same into gold sheets. But when the attempt was made to convert the bars into sheets, cracks appeared on the side of the bar due to impurity of the gold. On 15.9.88, the accused-appellant had sent a report to the Board and sought permission to take the gold bar to Coimbatore and vide resolution dated 20.9.88, the Board authorized A-3 to take the gold bar to Coimbatore for converting it into gold sheets and accordingly the gold bar was taken to Coimbatore.

When the gold bar was melted for converting it into sheets, the quantity of pure gold was found to be only 919.500 Gm. of copper was added to it in order to conform the same to the prescribed Government standard, and the gold was converted into gold sheets, and these sheets were used for making the two hands of the Golaka, wires, pinheads, nails, and for soldering purposes. While making the Golaka the gold was several times melted and converted into bars and, thereafter, to sheets. The total weight of the gold utilized for making the Golaka was 4.499 Kg. which included the gold supplied from 150 pieces of ornaments and coins. After completion of the work, it was found that the weight of the ornament Golaka was 4.209 kg. Since 42 Gm. of copper was used for making the Golaka, the total wastage assessed as 332 Gm. A-1, the Commissioner made certain inquiries about the loss of gold during the process of making the ornament Golaka from some dealers at Thrissur, and was convinced that there was a possibility of wastage occurring (a) 50 Milligrams per 1 Kg. and since the gold had been several times melted and converted into bars and sheets, felt that wastage of 332 Gm. was quity reasonable and, accordingly sent a report to the Devaswom Board, which was approved and accepted by the Board.

Later on, the Local Fund Audit, audited the accounts of the Devaswom Board and submitted reports before the High Court of Kerala. The first report dealt with details of loss of gold sustained, to the illegalities in the work, and it was pointed out that wastage of 332 Gm. of gold was un- reasonable; whereas the second report had named the persons responsible for the loss.

Chargesheet was filed against A1 - the Commissioner, Devaswom Board; A-2 Astt. Commissioner, Devaswom Board; A-3 Officer of the Devaswom Board; and A-4 the maker of the Golaka. The trial court acquitted A-1 and A-4, but convicted A-2 along with A-3, who died during the proceedings.

The appeal was taken to the High Court by A-2. The High Court, while considering the case of A-2, recorded a finding that though there was nothing which indicated that the accused-appellant was a party to the attempts of melting the gold at Chottanikkara and Tripunithura, yet it is possible to conclude that he knew about it. It has been inferred by the High Court that gold when was carried to Irinjalakuda for the purpose of converting the gold bars into sheets where it was revealed that the gold was impure and it was not possible to convert the same into gold sheets, A-2 had not raised any objections against the same.

The High Court has found A-2 guilty only on the basis that he has conspired with A-3 dishonestly or fraudulently, to misappropriate the pure gold.

The conviction of the appellant is based on the conspiracy which is alleged to have been entered into between the appellant and accused No. 3. We shall advert to the law of conspiracy, with its definition, the essential features and required proof.

Section 120A of I.P.C. defines `criminal conspiracy.' According to this Section when two or more persons agree to do, or cause to be done (i) an illegal act, or (ii) an act which is not illegal by illegal means, such an agreement is designed a criminal conspiracy. In Major EG Barsay v. State of Bombay, AIR (1961) SC 1762, Subba Rao J., speaking for the Court has said:

> "The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. So too, it is not an ingredient of the offence that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts."

In State through Superintendent of Police, CBI/SIT v. Nalini and Ors., JT (1999) 4 SC 106 it is observed by SSM Quadri J. at paragraph 677:

> "In reaching the stage of meeting of minds, two or more persons share information about doing an illegal act or a legal act by illegal means. This is the first stage where each is said to have knowledge of a plan for committing an illegal act or a legal act by illegal means. Among those sharing the information some or all may form an intention to do an illegal act or a legal act by illegal means. Those who do form the requisite intention would be parties to the agreement and would be conspirators but those who drop out cannot be roped in as collaborators on the basis of mere knowledge unless they commit acts or omissions from which a guilty common intention can be inferred. It is not necessary that all the conspirators should participate from the inception to the end of the conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such offences even if some of them have not actively participated in the commission of those offences."

To constitute a conspiracy, meeting of mind of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every detail of conspiracy. Neither it is necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implications. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. The existence of conspiracy and its objects are usually deducted from the circumstances of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the Court to keep in mind the well-known rule governing circumstantial evidence viz., each and every incriminating circumstance must be clearly established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. The criminal conspiracy is an independent offence in Indian Penal

Code. The unlawful agreement is sine quo non for constituting offence under Indian Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express and partly implied. Mere knowledge, even discussion, of the Plan would not per se constitute conspiracy. The offence of conspiracy shall continue till the termination of agreement.

The suspicion can not take the place of a legal proof and prosecution would be required to prove each and every circumstance in the chain of circumstances so as to complete the chain. It is true that in most of the cases, it is not possible to prove the agreement between the conspirators by direct evidence but the same can be inferred from the circumstances giving rise to conclusive or irresistible inference of an agreement between two or more persons to commit an offence. It is held in Noor Mohd. v. State of Maharashtra, AIR (1971) SC 885, that:

> ". in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors constitute relevant material."

It is cumulative effect of the proved circumstances which should be taken into account in determining the guilt of the accused. Of-course, each one of the circumstance should be proved beyond reasonable doubt. The acts or conduct of the parties must be conscious and clear enough to infer their concurrence as to the common design and its execution. While speaking for the Bench it is held by P. Venkaratama Reddy J. in State (NCT of Delhi) v. Navjot Sandhu (a) Afsan Guru, JT (2005) 7 SC 1, (P. 63) as follows:

> "We do not think that the theory of agency can be extended thus far, that is to say, to find all the conspirators guilty of the actual offences committed in execution of the common design even if such offences were ultimately committed by some of them, without the participation of others. We are of the view that those who committed the offences pursuant to the conspiracy by indulging in various overt acts will be individually liable for those offences in addition to being liable for criminal conspiracy; but, the non-participant conspirator cannot be found guilty of the offence or offences committed by the other conspirators. There is hardly any scope for the application of the principle of agency in order to find the conspirators guilty of a substantive offence not committed by them. Criminal offences and punishments therefore are governed by statute. The offencer will be liable only if he comes within the plain terms of the penal statute. Criminal liability for an offence cannot be fastened by way of analogy or by extension of a common law principle."

We shall now proceed to examine the evidence placed on record and reasoning adopted by the High Court for finding the accused/appellant guilty of the offence of conspiracy on the basis of the principle laid down by this Court in various authorities.

The High Court completely missed the fact that on 15.9.88, immediately after it was noticed that the gold was impure and it could not be converted into sheets, A-2 had sent a report to the Board,

sought permission of the Board to take the gold to Coimbatore. It can very safely be presumed that when the gold was required to be taken to Coimbatore, the matter must have been reported to the Board that the gold was impure and the same was required to be taken to Coimbatore. High Court has also failed to notice that when the gold sheet was converted into gold bar, before the accused-appellant joined the Board, it weighed 1.149 Kg. and when this gold bar was melted, after the accused-appellant had joined duty, the gold was found only to be 919.500 Gm. Thus, before the accused-appellant joined as Asst. Commissioner, there was a shortage of 230 Gm. of the gold in the gold bar prepared, which was detected when it was converted into gold sheet. Shortage of pure gold was on account of impurity in the gold bar which was prepared when the accused-appellant had not even joined the services of the Board. The High Court has also recorded a finding in paragraph 21 onwards of the judgment that the bond gold weighing 2.469 Kg. and Nadavaravu (offerings) of 1 Kg. of gold was handed over to A-3, which was in the form of ornaments and coins. The purity of bond gold was ascertained and certified in Exh.P.1 but the purity of the Nadavaravu, was not ascertained at all and no satisfactory explanation, whatsoever, is offered by any witness or the prosecution as to how and why 1 Kg. of gold was handed over to A-3 and permitted to be used in making the Golaka without ascertaining its purity, as was done in the case of bond gold. The High Court further held that the entire gold was kept in the double locker system under the control of A-3 at Chottanikkara and A-3 was keeping both the keys of the double locker with him. There is convincing evidence to show that the entire gold was kept in the exclusive custody of A-3. A-3 used to release the gold necessary for making of Golaka every morning and used to keep them back by the end of the day and the craftsman A-4 was dealing with the gold everyday. The above finding of the High Court clearly establishes that it was A-3 who was entrusted with the entire gold and he was keeping the custody of the same. A-2 had nothing to do with it, except he being the Asstt. Commissioner of the Devaswom Board, Cochin. He was overall in-charge of the work carried on at Chottanikkara, along with the other duties which he was required to perform in the other shrines, which were coming under his jurisdiction. The High Court has also failed to notice after recording the finding, that 1 Kg. of gold of the Nadavaravu which was mixed up with pure bond gold, the purity was not assessed and it cannot be said with certainty that pure gold delivered was 4.499 Kg., to ascertain the loss of pure, gold, for which the accused persons were charged. It is a matter of common knowledge that ornaments contain and require mixing of other metals in gold, and when the gold ornaments weighing about 1 Kg. were given, it can safely be assumed that they contained, along with gold, impurities of other metals, and thus was not 1 Kg. of pure gold.

From the findings arrived at by the High Court that it was A-3 who was entrusted with the gold by the Devaswom Board, and who was looking after the affairs of making the ornament Golaka, simply because accused-appellant had accompanied him to Coimbatore, it cannot be inferred that there was an agreement entered into between them to misappropriate the gold. To constitute a conspiracy, agreement between two or more persons for doing an illegal act, or an act by illegal means, is a sine qua non. Although the agreement among the conspirators can be inferred by necessary implication, the inference can only be drawn on the parameters in the manner of proved facts, in the nature of circumstantial evidence. Whatever be the incriminating circumstance, it must be clearly established by reliable evidence and they must form the full chain whereby a conclusion about the guilt of the accused can be safely drawn. Even if we hold that at some point of time, the accused-appellant had some knowledge or suspicion about A-3 indulging in fraudulent misappropriation of gold, entrusted

to A-3, in the absence of some positive evidence indicating agreement to that effect, conspiracy could not be inferred. On the findings itself arrived at by the High Court, we cannot hold that the accused-appellant was the conspirator to misappropriate the gold, with A-3.

On scrutiny of the entire facts led by the prosecution, the charge of conspiracy cannot stand as there is no link to show that the conspirators agreed to misappropriate the gold while the gold ornament was being prepared.

The accused-appellant was convicted under Sections 13(1)(c) and (d) of the Prevention of Corruption Act, 1988. To constitute an offence under clause

(c) of Section 13(1) of the Act, it is necessary for the prosecution to prove that the accused has dishonestly or fraudulently misappropriated any property entrusted to him or under his control as a public servant or allows any other person to do so or converts that property for his own use. The entrustment of the property or the control of the property is a necessary ingredient of Section 13(1)(c). On the findings arrived at by the High Court, it is obvious that the property was neither entrusted nor was under the control of the accused-appellant and thus the accused-appellant could not have been convicted under the Section.

To attract the provisions of Section 13(1)(d) of the Prevention of Corruption Act, public servant should obtain for himself or for any other person any valuable thing or pecuniary advantage by corrupt or illegal means or by abusing his position as a public servant. Therefore, for convicting a person under the provisions of Section 13(1)(d) of the Prevention of Corruption Act 1988, there must be evidence on record that the accused has obtained for himself or for any other person, any valuable thing or pecuniary advantage by corrupt or illegal means or by abusing his position as a public servant obtained for himself, or for any person, or obtain for any person, any valuable thing, or pecuniary advantage without any public interest. What we find in the present case is that there is no evidence on record to prove these facts that the accused-appellant had obtained for himself or for any other person any valuable thing or pecuniary advantage. We may clarify that the charge of conspiracy being not proved under Section 120B I.P.C., the accused appellant could not be held responsible for the act done by A-3. The prosecution has failed to prove that he has obtained for himself or for any other person any valuable thing or pecuniary advantage. Similarly, we do not find any evidence on record to convict accused-appellant under Sections 403, 477-A I.P.C.

For the reasons aforesaid, the appeal is allowed. The judgment of the High Court is set aside.