

## A. Shankar vs State Rep. [2010 - Unauthorized Access to Protected System

**A. Shankar vs State Rep. By on 13 December, 2010**

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**DATED: 13.12.2010**

**CrI.O.P No.6628 of 2010**

**A. Shankar**

**S/o. K.Achimuthu ... Petitioner**

**Vs.**

**State rep. by**

**Deputy Superintendent of Police,**

**Cyber Crime Cell**

**Crime Branch CID**

**Guindy**

**Chennai. ... Respondent**

Prayer: Petition filed under Section 482 Cr.P.C, praying to quash the charge sheet in the case in SC No.192 of 2009 pending on the file of the Learned Additional and Sessions Judge (Fast Track Court -V) Chennai.

For Petitioner :Mr.M.Radhakrishnan

For Respondents :Mr.R.Muniyapparaj (GA)

### **O R D E R**

Invoking the inherent jurisdiction of this Court under Section 482 Cr.P.C., the petitioner has approached this Court to quash the charge sheet in the case in SC No.192 of 2009 pending on the file of the Learned Additional District and Sessions Judge (Fast Track Court -V) Chennai.

2. The circumstances which led the petitioner to come forward with this petition are in brief as under.

3. That on 17.07.2008, the respondent police had registered a case in CBCID Cyber Crime Cell Crime No.02 of 2008 under Section 5 of the Official Secrets Act, Section 43 and 66 of the Information Technology Act, Sections 378, 379, 463, 465, 470, 471 and 5050 of IPC on the basis of the complaint lodged by Tmt S.Malathi, IAS, Principal Secretary to Government Home (SC) Department, Secretariat, Chennai-9.

4. It is alleged by the prosecution that on 01.04.2008 and 02.04.2008 at the room of Legal Advisor's of Directorate of Vigilance and Anti-Corruption (DVAC), Chennai the petitioner being a Special Assistant of Confidential Section in Directorate of Vigilance and Anti-Corruption office, functioning at NCB-23 building with intent to cause damage to the office of the Directorate of Vigilance and Anti-Corruption, which has not considered his appointment to the Secretariat as Assistant Section Officer (ASO), without the permission of the owner of the computer i.e., the witness Thiru N.Vijayarajan, Legal Advisor of DVAC and authorised user of the computer, having taken advantage of the absence of Legal Advisor, unauthorisedly accessed into the computer system of Legal Advisor through his pen drive named "SUJATHA" accessed the folder "Director's back up 2" kept in the Legal Advisor's computer without the permission of the owner of the information i.e., witness Thiru S.K.Upadhyay, and also downloaded the audio file including "CS 20.09.2007" and caused publication of the same in the "Deccan Chronicle" an English daily news paper on 14.04.2008 and also for the telecast on the same day on "Makkal TV" and "Jaya TV" at 08.00pm and 10.00pm., respectively. The

petitioner by accessing the computer system and information without the permission of the owners/authorised users copied, caused publication and thereby diminished the value of information, utility and affected it injuriously by means of securing access and downloaded the information, which was recorded and saved for the purpose of exclusive possession and use by the witness Thiru S.K.Upadhyay.

5. It is also alleged that the petitioner had secured access unauthorisedly to the protected system of the Legal Advisor (notified under G.O.Ms.No.5 & 6 of Information Technology Department dated 29.06.2005). On the above said dates through his pen drive names "SUJATHA" and downloaded the information, which was created for the purpose of exclusive possession and use by the witness Thiru S.K.Upadhyay in contravention of Section 70 of Information Technology Act 2000 and hence after filing of the charge sheet on 26.12.2008, now the petitioner for the alleged commission of offences of hacking with protected computer system and breach of confidentiality has been facing three charges under Sections 66, 72 and Section 70 of Information Technology Act 2000.

6. It appears from the materials available on record that on 14.04.2008 in "Deccan Chronicle" an English daily news paper had published a news item in the front page under the caption of "L.K.TRIPATHY'S PHONE TAPPED". The newspaper had published the transcript of the telephonic conversation between witness Thiru L.K. Tripathy, former Chief Secretary to Tamil Nadu Government and witness Thiru S.K.Upadhyay, former Director, Vigilance and Anti Corruption, Chennai.

7. It also appears that on the same date a news item in this connection was also broadcasted in "Makkal TV" and "Jaya TV" at 08.00pm and 10.00pm., respectively. Based on the above leakage of the telephonic conversation between the Chief Secretary to Government and former Director of Vigilance and Anti-Corruption, the Tamil Nadu Government have appointed a Commission of enquiry on 15.04.2008, chaired by the Single member, namely Hon'ble Justice Thiru.P.Shanmugam, retired High Court Judge, for the purpose of making an enquiry into the alleged transcript relating to the publication of such news in Deccan Chronicle and broadcasting of the same in "Makkal TV" and "Jaya TV" on 14.04.2008.

8. That on 14.07.2008, the commission submitted it's report to the Government, in which the commission had found that the petitioner being Special Assistant, Directorate of Vigilance and Anti-Corruption as the person responsible for the access and the leak of the telephonic conversation between Chief Secretary to Government and former Director of Vigilance and Anti-Corruption and that it recommended to register a criminal case against the petitioner. Only on the basis of the recommendation of the commission, Tmt. S.Malathi, Principal Secretary to Government Home (SC) Department, Secretariat was constrained to file a criminal complaint against the petitioner before the respondent police.

9. In this connection, the learned counsel for the petitioner has advanced his arguments on three grounds;

1. The petitioner herein has been considered to be the only person response for leakage of information and for the telecast and publication of the information. He has also adverted to, that one Dr.Subramanian Swamy, on 12.05.2008 had addressed the press conference and released to the press an audio CD containing a conversation between Tmt.Poongothai Aladi Aruna, the then Social Welfare Minister and Thiru.S.K.Upadhyay who had been recording all incoming telephone calls in his official telephone No.24612561. He has canvassed that the conversation which was released by Dr.Subramanian Swamy was one of those conversations including the one recorded by Thiru S.K.Upadhyay since 2005.

2. The learned counsel for the petitioner has also made stress that it was incumbent on the investigating officer to examine Dr.Subramanian Swamy, President of Janata Party and Ms.V.S.Chandralekha, State President of Janata Party, who were addressing the press on 12.05.2008, to know as to whether they were in possession of all the conversation recorded by Mr.S.K.Upadhyay and whether he could be a person who was instrumental in releasing the conversation which is the subject matter of the charge sheet to the press and the television. But unfortunately, the investigating officer had not chosen to examine Dr.Subramanian Swamy and Tmt.V.S.Chandralekha to ascertain the source of the telephonic conversation between Tmt.Poogothai and Mr.S.K.Upadhyay, which was released by Dr.Subramanian Swamy.

3. The learned counsel for the petitioner has also maintained that as per the statement of one Mr.S.Prabakaran under Section 161(3) Cr.P.C. which was reduced into writing by the investigating officer, that the DVD containing all the conversations including the

conversation in question recorded by Mr.S.K.Upadhyay was kept in the personal cup board of one Mr.S.Pattan, Personal Assistant to Mr.S.K.Upadhyay and the same had been kept there from 05.12.2007. He has also submitted that the statement of witness Mr.S.Prabakaran, transpired that the said DVD containing all the conversation recorded by Mr.S.K.Upadhyay was in the safe custody of his Personal Assistant, Mr.S.Pattan. He has also maintained that "Makkal TV" and "Jaya TV" had broadcasted the conversation in question on 14.04.2008. However the investigating officer had miserably failed to seize the computer used by Mr.Pattan at his residence and send the same to an expert to find out as to whether he could be the person who had leaked the conversation in question to the press and television. Hence, the failure on behalf of the investigating officer had rendered the investigation defective especially in the light of the fact that the computer used by the petitioner at his residence was seized by the investigating officer and sent for analysis.

4. The learned counsel has also submitted that the laptop of Mr.S.K.Upadhyay which contained the conversation in question and other conversations, was connected with several other computers through local area network (LAN) through a server and a person who operates the server can also have access to the laptop of Mr.S.Upadhyay. However the investigating officer has not seized the server from the building No.23 of the Directorate of Vigilance and Anti-Corruption office, to find out the fact as to whether any person sitting in the office of the confidential branch of the said office could have accessed the laptop of Mr.S.K.Upadhyay.

10. On coming to the complaint which is said to have been lodged by Tmt.S.Malathi Principal Secretary to Home (SC) Department, Government of Tamil Nadu, he would submit that the Principal Secretary Home (SC) Department, is not at all the competent person to lodge the complaint and if at all any complaint is to lodged that should have been lodged by Mr.S.K.Upadhyay as he is only the owner of the personal information which is said to have been accessed illegally by the petitioner. In this connection he has also added that when the information in question is personal to Mr.S.K.Upadhyay and not at all connected with the affairs of the State, Mr.S.K.Upadhyay alone ought to have lodged the complaint for the alleged offences. But no such complaint was lodged by him to that effect that his personal information was downloaded from the laptop without his consent to any other device. He has also added that in the absence of any complaint from the said Mr.S.K.Upadhyay the entire investigation directed against the petitioner was malafide and therefore, the charge sheet resulting from the defective investigation deserved to be quashed.

11. In order the substantiate his arguments the learned counsel has also placed reliance upon the decision in M.S.M.Haneefa and others vs. The Forest Ranger, Shencotta Range reported in 1991 CrL.J. 712. In this case a plea was raised by the learned counsel for the petitioner therein that;

"the complaint has not been filed by the committee constituted under Section 11 of the Act and the complaint has been filed by the Forest Ranger, and as such, it is not a valid complaint, with reference to the charges falling under the Tamil Nadu Hill Area (Preservation of Trees) Act 1955. Section 11 of the Tamil Nadu Hill Area (Preservation of Trees) Act 1955 contemplates that no Court shall take cognisance of any offence punishable under Section 7 except on a complaint in writing of the Committee.

The term committee under Section 2(A) of the said Act means any committee constituted under Section2(A) and having jurisdiction. On considering all the submissions, the Learned Single Judge of this Court, has observed that the complaint has not been filed by such committee, but it was filed by the Forest Ranger and as such the charges levelled against the petitioner under the Tamil Nadu Hill Area (Preservation of Trees) Act 1955 are liable to be quashed and accordingly, the charges levelled against the petitioner was quashed."

12. It also appears from the records that a sanction to prosecute against the petitioner A.Shankar was accorded by the Directorate of Vigilance and Anti-Corruption, Chennai on 24.12.2008 vide Ref.No.Camp/45/Dir./V&AC/2008. In this connection the learned counsel appearing for the petitioner has submitted that a sanction was accorded to prosecute the petitioner only in respect of the penal provisions under Section 66 and Section 70 of Information Technology Act 2000 and since no sanction was accorded in respect of the penal provision under Section 72, the sanction of prosecution dated 24.12.2008 has been fully vitiated and that the petitioner could not be proceeded with on the basis of a defective sanction of prosecution which was accorded even without application of mind. While advancing his arguments, he has also made reference to Section 197 of Cr.P.C.

Section 197 of Cr.P.C. reads as follows;

"Section 197 Prosecution of Judges and public servants (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognisance of such offence except with the previous sanction.

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government."

13. As contemplated under Sub Section (b) to Sub Clause (1) of Section 197 Cr.P.C. it is clear that no Court shall take cognisance of an offence except with the previous sanction of the State Government if it appears that the offence which is said to have been committed by a person during the course of his employment while discharging his official duty in connection with the affairs of the State, the State Government is the competent authority to accord sanction for the prosecution.

14. In this regard, the learned counsel for the petitioner has also submitted that out of three charges viz., under Sections 66, 70 and 72 of Information Technology Act 2000, the Government has accorded sanction, only for the offences under Sections 66 and 70 of the Act and in respect of Section 72, no sanction is accorded and hence sanction of prosecution itself is defective one and there may not be any difficulty to hold that the whole investigation or whole proceedings which are contemplated against the petitioner have absolutely been vitiated.

15. On the other hand the learned public prosecutor appearing for the first respondent has also submitted that the sanction to prosecute the petitioner has not been specifically accorded in respect of Section 72 of the Information Technology and that the penal provision under Section 72 of the Act has also been covered by the sanction to prosecute the petitioner accorded by the Directorate of Vigilance and Anti-Corruption on 24.12.2008. The learned public prosecutor has also submitted that the question of sanction could not be brought under Section 482 Cr.P.C. even if a particular penal provision is left out for the sanction of prosecution.

16. While advancing his arguments the learned public prosecutor has drawn the attention of this Court to page 25 and 26 of the typed set which has been furnished by the petitioner along with this petition. Section 72 of Information Technology Act 2000, deals with the penalty for breach of confidentiality and privacy. At page 18 of the charge sheet laid against the petitioner, it has been specifically stated that the Government through its G.O.Ms.No.5 and 6 of Information Technology Department dated 29.06.2005 notified the Government computers as protected system and existing users are authorised users.

17. The learned public prosecutor has also referred to paragraph 15 and 16, sanction of prosecution accorded by the Directorate of Vigilance and Anti-Corruption on 24.12.2008. In this connection he would submit that the sanction of prosecution accorded in respect of Section 66 and 70 of Information Technology Act 2000 is also inclusive of Section 72 and hence the non mentioning of Section 72 in sanction of prosecution will not in any way vitiate the entire proceedings.

18. During the course of his arguments he has also placed reliance upon the decision in Bholu Ram vs. State of Punjab and Another reported in (2008) 9 SCC 140. In this case at paragraph 61 it is observed that;

"The Revisional Court was aware of the legal position. It was however, held by the Court that at the most there was negligence on the part of respondent 2 but there was no criminal intent and he cannot be held criminally liable. We have already held that mens rea can only be decided at the time of trial and not at the stage of issuing summons. Moreover, a point as to need or necessity of sanction can be taken during the conduct of trial or at any stage of the proceedings. Hence, proceedings could not have been quashed on the ground of want of sanction in the present case. The order of the Revisional Court deserves to be set aside even on that ground"

19. The learned public prosecutor in order to fortify his arguments has also placed reliance upon the decision in Romesh Lal Jain vs.

Naginder Singh Rana and Others reported in (2006) 1 SCC 294. At para 33 of this decision it has been held that;

"The upshot of the aforementioned discussions is that whereas an order of sanction in terms of Section 197 Cr.P.C. is required to be obtained when the offence complained of against the public servant is attributable to the discharge of his public duty or has a direct nexus therewith, but the same would not be necessary when the offence complained of has nothing to do with the same. A plea relating to want of sanction although desirably should be considered at an early stage of the proceedings, but the same would not mean that the accused cannot take the said plea or the court cannot consider the same at a later stage. Each case has to be considered on its own facts. Furthermore, there may be cases where the question as to whether the sanction was required to be obtained or not would not be possible to be determined unless some evidence is taken, and in such an event, the said question may have to be considered even after the witnesses are examined."

20. Besides this the learned public prosecutor while advancing his arguments has also laid emphasis on the decision in State of M.P. vs. Dr. Krishna Chandra Saksena reported in (1996) 11 SCC 439. In this case at paragraph 8, it is observed that;

"in the instant case the sanction order show that the sanctioning authority was satisfied after complete and conscious scrutiny of the records produced in respect of the allegations against the accused. Now the question whether all the relevant evidence which would have tilted the balance in favour of the accused if it was considered by the sanctioning authority before granting sanction and which was actually left out of consideration could be examined only at the stage of trial when the sanctioning authority comes forward as a prosecution witness to support the sanction order if challenged during the trial. As that stage was not reached the prosecution could not have been quashed at the very inception on the supposition that all relevant documents were not considered by the sanctioning authority while granting the impugned sanction.

21. On coming to the instant case on hand it is obvious that there is no mention in the sanction of prosecution in respect of Section 72 of Information Technology Act 2000. It is also pertinent to note here that during the course of his arguments, the learned counsel for the petitioner has posed three questions i.e.;

1. Why Dr.Subramanian Swamy and Tmt.V.S.Chandralekha were not examined by the investigating officer so as to ascertain the source of telephonic conversation between Tmt Poongothai and Tr.S.K.Upadhyay which was released by the later to the press ?
2. Why the investigating officer has not seized the computer used by Tr.S.Pattan, who is the Personal Assistant to Mr.S.K.Upadhyay at his residence and sent the same for analysis to find out whether he could be the person who had leaked the conversation in question to the press and Television ?
3. Why the investigating agency has not seized the server in building No.23 of the DVAC with a view to find out as to whether any person sitting in the office of the confidential branch of DVAC could have accessed the laptop of Thiru S.K.Upadhyay ?

22. This Court has carefully considered the submissions made on behalf of both sides. The submissions made on behalf of the petitioner hinges around both questions of fact and question of law. In so far as the questions raised by the learned counsel for the petitioner this Court is of the considered view that it could very well be agitated before the trial court during the course of trial. In so far as the question of law relating to non granting of sanction of prosecution in respect of Section 72 of Information Technology Act is concerned, the charge sheet levelled against the petitioner cannot be quashed on this ground alone.

23. With regard to the question of facts are concerned, the High Court will not enter into an enquiry of disputed facts or thereafter, hold in favour of the accused. The inherent power cannot be invoked to quash the charge only on the ground of question of facts. This principle is laid down in Maheshwari Oil Mill v. State of Bihar reported in 1978 CrLJ 659.

24. Further the High Court has also no jurisdiction to interfere with the prosecution at the preliminary stage by prejudging the question without affording reasonable opportunity to the prosecution to substantiate the allegations. This principle has been laid down by the Hon'ble Supreme Court of India in State of Bihar v. Raj Narain Singh reported in AIR 1991 SC 1308.

25. Besides this in *State of Maharashtra v. Ishwar Piraji Kalpatri* reported in 1996 CrLJ 1127 the Hon'ble Supreme Court of India has also observed that;

"The Court should not except in extraordinary circumstances exercise its jurisdiction under Section 482 Cr.P.C. so as to quash the prosecution proceedings after they have been launched. The power of quashing a criminal proceedings should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR/complaint, the extraordinary or inherent power does not confer an arbitrary jurisdiction on the Court to act according to its whim or caprice."

26. With regard to the arguments relating to the lodging of complaint by an incompetent person i.e.; by the Principal Secretary Home Department Government of Tamil Nadu as advocated to by the learned counsel for the petitioner, this Court is of the considered view that this piece of arguments can also be not countenanced for the simple reason as it is left open to the petitioner to put forth before the trial Court during the course of trial.

27. Keeping in view of the observations made above, the decision in *M.S.M.Haneefa and others vs. The Forest Ranger, Shencotta Range* reported in 1991 CrL.J. 712 which is relied upon by the learned counsel for the petitioner is not made applicable in this case.

28. Having regard to the submissions made on either side, and on cursory perusal of the materials available on record, this Court is of firm view that, the question of sanction of prosecution can be taken during the conduct of trial or any such of the proceedings and therefore, the proceedings i.e.; the charge sheet at this stage cannot be quashed on the ground of want of sanction in respect of the Section 72 of Information Technology Act 2000.

With this observation, the petition is dismissed. Consequently connected miscellaneous petitions are also closed.