REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 719 OF 2012

[Arising out of Special Leave Petition (Cri.) No.3989 of 2011]

DEEPAK KHINCHI … APPELLANT

Versus

STATE OF RAJASTHAN … RESPONDENT

JUDGMENT

(SMT.) RANJANA PRAKASH DESAI, J.

1. Leave granted.

2. This appeal, by grant of special leave, is directed against judgment and order dated 24/01/2011 passed by the High Court of Rajasthan at Jodhpur. By the impugned judgment, learned Single Judge dismissed Criminal Revision Petition No.853 of 2010 filed by the appellant challenging

order of Addl. Sessions Judge (Fast Track), Chittorgarh allowing application submitted by the prosecution under Section 311 of the Code of Criminal Procedure, 1973 (for short, **"the Code"**) and directing that trial should proceed against the appellant for offences under Sections 3, 4, 5 and 6 of the Explosive Substances Act, 1908.

3. Before, we turn to the facts of the case, it is necessary to have a look at Section 7 of the Explosive Substances Act, 1908 (for short, **"the said Act"**), as the controversy revolves round the 'consent to prosecute' contemplated therein. It reads thus:

> *"Section 7: No court shall proceed to the trial of any person for an offence against this Act except with the consent of the Central Government."*

It must be stated here that by Act 54 of 2001, Section 7 was amended and the words 'Central Government' were substituted by the words 'District Magistrate'.

4. The appellant claims to be a trader registered under the provisions of the Rajasthan Sales Tax Act, 1994. According to him, he deals in Kerosene, lubricants, paints, varnish, thinner, petroleum products and has a license for the storage of solvents, petrochemicals and raw materials used for the purpose of blasting for mining, roads and other end uses. The prosecution alleges that on 2/5/2006 at about 6.40 p.m. a fire broke out in the shop/store of the appellant situated at Gandhinagar Vistar Yojana, Chittorgarh, Rajasthan due to which many children, women and men were burnt alive. The SHO, Reserve Center, Chittorgarh, upon receiving telephonic information from an unknown caller, visited the spot and registered the First Information Report against three persons under Sections 285, 286, 323, 324, 304 of the Indian Penal Code (for short, **"the IPC"**) as well as under Sections 3, 4, 5 and 6 of the said Act. The appellant was arrayed as accused 1. Upon completion of the investigation, charge sheet was filed before the learned CJM,

Chittorgarh under Sections 285, 286, 323, 324 and 304 of the IPC as well as under Sections 3, 4, 5 and 6 of the said Act. In respect of the offences under the provisions of the said Act, no consent of the competent authority was taken.

5. After committal of the case before the Sessions Court, the case was registered as Sessions Case No.53 of 2006. After the arguments on charge were heard on 7/8/2007, the Sessions Court directed the prosecution, in the interest of justice, to file a reply, *inter alia,* stating why mandatory permission under Section 7 of the said Act was not taken and indicating the correct legal position in that behalf. The case was posted for hearing on 22/8/2007. Though opportunity was given, Addl. Public Prosecutor did not file any reply nor did he submit any written arguments. He prayed that another opportunity be given to him to file reply. In the interest of justice, learned Sessions Judge adjourned the case. On 10/9/2007, an application was moved by the Addl. Public Prosecutor stating that he had

written a letter to the SHO through the Superintendent of Police but no reply has been received so far. The case was, therefore, posted for hearing on 12/9/2007. Even on 12/9/2007, the sanction was not produced. Arguments of parties were heard and on 13/9/2007, learned Sessions Judge discharged the appellant of the offences under the said Act. While discharging the appellant of the said offences, learned Sessions Judge noted that though the hearing was repeatedly postponed, Addl. Public Prosecutor failed to produce the sanction and state the correct legal position. The question whether if a sanction is produced in future, the appellant could be tried for offences under the said Act was kept open by him. He sought for an explanation from the District Magistrate, Chittorgarh why sanction was not obtained though 14 persons had died and a number of persons had received severe burn injuries in the disastrous fire accident. Learned Sessions Judge also called for an explanation as to why the Chief Secretary, State of Rajasthan should not be informed about the unhappy state

of affairs due to which he was constrained to discharge the appellant of the offences under the said Act. Learned Sessions Judge, however, noted that it was his *prima facie* view that the appellant had not taken adequate care while conducting his business of storing and marketing of inflammable substances. He further noted that *prima facie*, it was evident that carelessness of the appellant led to the fire in his shop killing 14 persons and injuring many. He, therefore, directed that charge for the offences under Sections 285, 286 and 304 of the IPC be framed against the appellant on the next date of hearing of the case. It is pertinent to note that the appellant challenged order dated 13/9/2007 before learned Single Judge of the Rajasthan High Court. The said petition was dismissed.

6. On 3/4/2008, the SHO, Reserve Centre, Kotwali moved an application through the Addl. Public Prosecutor along with sanction letter issued on 1/4/2008 by the District Magistrate, Chittorgarh. On 15/5/2010, learned Sessions

Judge rejected the application on the ground that sanction to prosecute the appellant under Sections 3, 4, 5 and 6 has been granted by the District Magistrate, however, it is not under Section 7 of the said Act. A copy of the sanction order is annexed to the appeal memo at Ex-P/6. It would be advantageous to produce the relevant portion of the said sanction order.

> *"From the investigation of the case it has been revealed that the accused while acting negligently and in violation of the rules of the license kept in his shop in residential area highly inflammable substance solvent with the knowledge that it could at any time cause heavy loss to life and property but then also he committed this act due to which the explosion took place and the incident happened and damage has been caused to life and property.*
>
> *Therefore, against the accused Deepak Khichi S/o Madan Lal Khichi R/o Gandhi Nagar Chittorgarh prima facie the case under section 3, 4, 5, 6 of the Explosive Substance Act, 1908 is found to have been proved due to which under section 7 of the Explosive Substance Act, 1908 the sanction for prosecution upon the filing of the challan before a competent court is granted."*

It is surprising that in a serious case like this, the prosecution should not challenge order dated 15/5/2010 passed by learned Sessions Judge.

7. The prosecution again submitted an application purported to be under Section 311 of the Code along with sanction dated 1/6/2010 issued by the District Magistrate, Chittorgarh. As stated hereinabove, the said application was allowed by learned Sessions Judge on 16/11/2010. By the impugned order passed by the Rajasthan High Court the order passed by learned Sessions Judge was upheld. Hence, the present appeal.

8. We have heard learned counsel for the parties, at some length. Counsel for the appellant submitted that the courts below erred in allowing the application filed by the prosecution after a delay of about three years. He submitted that it was not open to the prosecution to make repeated attempts to get sanction from the competent authority. Counsel submitted that by passing order under

Section 311 of the Code, the trial court has subjected the appellant to the ordeal of a trial for the offences under the said Act after a period of three years. This has resulted in miscarriage of justice. Counsel submitted that since the prosecution had deliberately delayed obtaining sanction, it cannot be now allowed to fill in the lacuna. Such a course will result in abuse of process of court. In support of his submissions, counsel relied on the judgments of this court in ***Rajendra Prasad v. Narcotic Cell***[1] and ***State of Himachal Pradesh v. Nishant Sareen***[2].

9. The explosion which took place in the appellant's shop resulted in death of 14 persons. Several persons were severely injured. Seriousness of the occurrence can hardly be disputed. Learned Sessions Judge has framed charges against the appellant for offences under the IPC because in his *prima facie* opinion, there is enough material against the appellant to bring home the said charges. It is unfortunate

[1] (1999) 6 SCC 110
[2] (2010) 14 SCC 527

that so far as offences under the said Act are concerned, there should be so much inaction bordering on callousness on the part of the prosecution. Learned Sessions Judge has in his order expressed despair about the prosecution's conduct. He had called for an explanation but the explanation does not appear to have come. We express our extreme displeasure about this approach of the prosecution. We wonder whether as desired by learned Sessions Judge, the inaction of the prosecution was conveyed to the Chief Secretary. Ultimately, learned Sessions Judge had to discharge the appellant of the said charges because there was no sanction.

10. As stated hereinabove, on 1/4/2008 sanction was issued by the District Magistrate, Chittorgarh, but the application made by the prosecution for framing charge against the appellant under the said Act was rejected by learned Sessions Judge. We are *prima facie* satisfied that the letter of the District Magistrate, Chittorgarh issued on

1/4/2008 gave good and valid consent as envisaged under Section 7 of the Act for trial of the appellant for offences under the said Act and the learned Sessions Judge was in error in rejecting the consent letter by his order dated 15/5/2010. The proper course for the prosecution was to challenge that order and have it set aside by the High Court. Instead of taking that course, a fresh sanction was issued by the District Magistrate, Chittorgarh on 1/6/2008. The prosecution then filed an application under Section 311 of the Code. It was prayed that sanction issued under Section 7 of the said Act by the District Magistrate be taken on record and the appellant be tried for offences under Sections 3, 4, 5 and 6 of the said Act. Learned Sessions Judge while granting the said application, relied on the judgment of Rajasthan High Court, Jaipur Bench in ***Ramjani & Ors. v. State of Rajasthan***[3] wherein it was held that where sanction under Section 7 of the said Act is not obtained, the prosecution will have to be quashed but it would be open to the prosecution to start the prosecution afresh after

[3] 1993 Cr.L.R. (Raj.) 179

obtaining sanction from the competent authority. The High Court upheld this order.

11. Before dealing with the submissions of learned counsel, we shall refer to the judgments on which reliance is placed by learned counsel for the appellant. In ***Rajendra Prasad***, this court explained when a court can exercise its power of recalling or re-summoning witnesses. While repelling the contention raised by counsel for the appellant therein that power under Section 311 of the Code was being exercised to fill in the lacuna, this court observed that a lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. This court clarified that no party in a trial can be foreclosed from correcting errors and if proper evidence was not adduced or a relevant material was not brought on record due to any

inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. This court observed that after all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better. In our opinion, the appellant cannot draw any support from this judgment because it arose out of a totally different facts scenario. If at all the observations of this court quoted by us would help the prosecution rather than the appellant. No question of sanction was involved in that case. The prosecution and defence had closed their evidence and thereafter at the instance of the prosecution, two of the witnesses who had already been examined, were summoned for the purposes of proving certain documents for prosecution. In the circumstances, the question arose whether by making application under Section 311 of the Code, the prosecution was trying to fill in the lacuna. In our opinion, ***Rajendra Prasad*** has no application to the present case. We do not

want to express any opinion as to whether in this case, the application was made rightly under Section 311 of the Code by the prosecution. We find that, in substance, the application filed by the prosecution was for tendering the consent/sanction of the District Magistrate, on record and requesting the court to start trial against the appellant for the offences punishable under the said Act. Learned Sessions Judge granted the said application.

12. In ***Nishant Sareen***, the respondent therein was caught red-handed accepting bribe from the complainant. Sanction was sought by the Vigilance Department under Section 19 of the Prevention of Corruption Act, 1988 to prosecute the respondent. The Principal Secretary (Health) found no justification in granting sanction to prosecute the respondent. Sanction was refused. Thereafter, Vigilance Department took up the matter again with the Principal Secretary (Health) for grant of sanction. The matter was reconsidered. Though no fresh material was available for

further consideration, the competent authority granted sanction to prosecute the respondent. It is in these circumstances that this court observed that sanction to prosecute a public servant on review could be granted only when fresh materials have been collected by the investigating agency subsequent to earlier order. Reconsideration can be done by the sanctioning authority in the light of the fresh material, prayer for sanction having been once refused. This case also can have no application to the facts of the present case. Here, initially prosecution did show lackadaisical approach in obtaining sanction. But, at no point of time, sanction was refused. On 1/4/2008, the District Magistrate granted sanction but learned Sessions Judge rejected the application. Looking to the seriousness of the matter, that order ought to have been challenged by the prosecution but it was not challenged. Thereafter, the District Magistrate again granted sanction. Learned Sessions Judge took that sanction on record and directed the trial to proceed against the appellant for offences under

Sections 3, 4, 5 and 6 of the said Act. The High Court affirmed the view taken by learned Sessions Judge. To these facts, judgment in ***Nishant Sareen***, where sanction was refused earlier by the Principal Secretary (Health) and was granted on the same material later on, can have no application.

13. In this connection, we may usefully refer to the judgment of this court in ***State of Goa v. Babu Thomas***[4]***.*** In that case, the respondent therein was employed as Joint Manager in Goa Shipyard Limited, a Government of India Undertaking under the Ministry of Defence. He was arrested by the CID, Anti-Corruption Bureau of Goa Police on the charge that he demanded and accepted illegal gratification from an attorney of M/s. Tirumalla Services in order to show favour for settlement of wages, bills/arrears certification of pending bills and to show favour in the day-to-day affairs concerning the said contractor. The first sanction to prosecute the respondent was issued by an incompetent

[4] (2005) 8 SCC 130

authority. The second sanction issued retrospectively after the cognizance was taken was also by an incompetent authority. This court held that when Special Judge took cognizance, there was no sanction under the law authorizing him to take cognizance. This was a fundamental error which invalidated the cognizance as being without jurisdiction. However, having regard to the gravity of the allegations leveled against the respondent, this court permitted the competent authority to issue a fresh sanction order and proceed afresh against the respondent from the stage of taking cognizance of the offence. It is pertinent to note that the offence therein was committed on 14/9/1994. Looking to the seriousness of the offence, this court permitted the competent authority to issue fresh sanction order after about 10 years. We have no hesitation in drawing support from this judgment. The offence in this case is equally grave. At no stage, sanction was refused by the competent authority. It is not the case of the appellant that sanction is granted by the authority, which is not competent. It is true

that the proceedings are sought to be initiated under the said Act against the appellant after three years. But, in the facts of this case, where 14 innocent persons lost their lives and several persons were severely injured due to the blast which took place in the appellant's shop, three years period cannot be termed as delay. It is also the duty of the court to see that perpetrators of crime are tried and convicted if offences are proved against them. We are not inclined to accept the specious argument advanced by learned counsel for the appellant that the lapse of three years has caused prejudice to the accused. The case will be conducted in accordance with the law and the appellant will have enough opportunity to prove his innocence. Besides, equally dear to us are the victim's rights.

14. It is true that learned Sessions Judge has, by his order dated 13/9/2007 discharged the appellant of the charges under Sections 3, 4, 5 and 6 of the said Act because there was no sanction. But, the prosecution has now obtained sanction. The Sessions Judge has accepted the sanction and

has directed that the trial should be started against the appellant for offences under Sections 3, 4, 5 and 6 of the said Act, as well. The order of the Sessions Judge is affirmed by the impugned order passed by the High Court. In view of the legal position as discussed above, and in the facts of the case, as narrated above, we see no reason to interfere in the matter and we direct the trial court to frame additional charges against the appellant under Sections 3, 4, 5 and 6 of the said Act and to proceed with the trial. Needless to say that the stay of further proceedings granted by this court on 5/7/2011 shall stand vacated.

15. Appeal is disposed of in the aforestated terms.

.....J.
(AFTAB ALAM)

.....J.
(RANJANA PRAKASH DESAI)

NEW DELHI,
APRIL 30, 2012.