

(2011) 03 GUJ CK 0096

In the Gujarat High Court

Case No : Criminal Appeal No's. 837 and 852 of 1997

Amarabhai Kacharabhai Raval

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 25-03-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 107, 161, 165, 165(A), 21
Prevention of Corruption Act, 1947 — Section 4, 5(1), 5(2)
Criminal Procedure Code, 1973 (CrPC) — Section 313, 374

Citation : (2011) 03 GUJ CK 0096

Hon'ble Judges : Z.K. Saiyed, J

Bench : Single Bench

Advocate : J.V. Japee, for the Appellant; H.L. Jani, Ld. Addl. Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Z.K. Saiyed, J.—By way of present appeals filed u/s 374 of the Code of Criminal Procedure, 1973, the Appellants-original accused had prayed to quash and set aside the judgment and order of conviction and sentence dated 19th August 1997 passed by the learned Special Judge, Sabarkantha, Himmatnagar, in Special Case No. 07 of 1989 whereby the learned Judge was pleased to convict the Appellants.

2. Appellant-Amarabhai Kacharabhai Raval-original accused No. 2 in Special Case No. 07 of 1989 has preferred the Criminal Appeal No. 837 of 1997, whereas the Appellant-Dudhabhai Methabhai Vankar-accused No. 1 in Special Case No. 07 of 1989 has preferred the Criminal Appeal No. 852 of 1997 challenging the judgment and order of conviction and sentence dated 19th August 1997 passed by the learned Special Judge, Sabarkantha at Himmatnagar. Since both the appeals arise out of the same judgment delivered by the learned Special Judge, Sabarkantha at Himmatnagar in Special Case No. 07 of 1989 and since the set of oral as well as documentary evidence is same, both the appeals are heard

together and are disposed of by this common judgment.

3. As per the case of the prosecution, the Appellants are serving in the Forest Department. The Appellant of Criminal Appeal No. 837 of 1997 is serving as Bit Guard, whereas the Appellant of Criminal Appeal No. 852 of 1997 is serving as Forester. It is further the case of the prosecution that the applicant-Manglaji Sukaji Kaneja, resident of village Odh, Taluka Bhiloda, is an agriculturist. As per the case of the prosecution, the complainant is having three wells; out of which one well was constructed in the year 1988 and for the purpose of construction, the complainant needed some stones. As per the knowledge of the complainant, other villagers have also brought stones from Rojiya Hills, which is under the Forest Department. As per the case of the prosecution, when on 02nd January 1988 when the complainant was on his way to meet the Appellants-original accused, both the Appellants were passing through on motorcycle. Therefore, the complainant requested them to stop there and thereafter requested the Appellants to allow him to excavate stones from Rojiya Hills. It is alleged that at that time, the Appellants demanded Rs. 600/- from the complainant and further told the complainant that only after payment of half of the amount, the complainant can excavate stones from the Hills. It is also alleged that at that time, the accused No. 1 asked the complainant as to how much amount he is having, to which the complainant replied that he is having Rs. 100/-. It is also alleged that both the Appellants-accused told the complainant to make payment of half of the amount immediately. As per the case of the prosecution, as at the relevant point of time the complainant was having only Rs. 100/-, the complainant paid the said amount to the accused No. 2-Beat-Guard and it was agreed to make payment of Rs. 200/- to the accused No. 2 on the next date. As per the case of the prosecution, the complainant went to Parla at the residence of the accused No. 2 along with one Punaji Shakraji. He was not there. Both the persons met the accused No. 2 at the Bus-Stand of village Parla. It is alleged that at that time the accused No. 2 asked as to whether they have brought money? The complainant replied in the affirmative and thereafter, they went to the place of one blacksmith situated near S.T. Bus Stand. It is alleged that at that time, amount of Rs. 200/- was given to the accused No. 2, which the accused No. 2 accepted and put the same in his pocket. Thereafter, as alleged, the accused No. 2 took the thumb impression of the left hand of the complainant on a blank paper and he further told that on the date of excavation of the stones from the hill, he had to contact them and thereafter stones were to be removed. Thereafter, the complainant employed some labourers to excavate the stones and as the complainant wanted to remove the stones, he again contacted the Appellants. It is the case of the prosecution that the meeting was held at Shamlaji three roads. It is also the case of the prosecution that when the complainant told the accused No. 1 with regard to removal / transportation of stones, the accused No. 1 told the complainant to make payment and thereafter the complainant can remove the stones. Thereupon the complainant told that first he would transport the stones and thereafter he would pay the amount, to

which the accused No. 1 did not agree.

4. It is the case of the prosecution that as the complainant understood that receipt of Rs. 300/- was not given and the Appellants were asking illegal gratification, the complainant decided to approach the ACB Officer and on the next day, the complainant approached the Officers of ACB. The Appellants asked the complainant to pay an amount of Rs. 300/- on Saturday, to which the complainant agreed to meet on the junction of three roads at Shamlaji. It is the case of the prosecution that complaint was lodged before the ACB. Thereafter, the services of two panchas were sought. The facts of the case were narrated to them and thereafter the demonstration was made on the currency notes with the help of anthracene powder. The basic ingredients of the anthracene powder were explained to the panchas as well as the complainant. After performing the demonstration, preliminary part of the panchnama was drawn. The currency notes were smeared with anthracene powder and the said currency notes were put into the pocket of the bush-shirt of the complainant. Thereafter, all the members of raiding party, the complainant and two panchas proceeded to Shamlaji at the junction of three roads. They stopped the vehicle near the petrol pump and the complainant and the panch No. 1 proceeded to the junction of three roads. They waited for the Appellant-accused at the hotel situated at the junction of three roads. It is alleged that thereafter the accused No. 1-Forester came. Thereafter, as alleged, the complainant very much pressed for paying some less amount than Rs. 300/-, to which the accused No. 1-Forester replied that in fact we recover Rs. 5000/- as penalty on catching the tractor, but you should pay the amount as agreed between us earlier and no less amount than that and if you want to meet RFO, you can meet him. Thereafter, the accused No. 1 went out for sometime on his motorcycle and on his return, he asked the complainant as to what he has decided. After some conversation, the complainant took out the smeared currency notes from the pocket of his bush-shirt and gave the same to the accused No. 1. The accused No. 1-Appellant has accepted the same and put it in the pocket of his bush-shirt and closed the flap of the pocket. It is the case of the prosecution that thereafter the complainant gave the signal as decided.

5. Thereafter, members of raiding party rushed to the spot and caught the accused No. 1. Thereafter all the persons went to the Government Guest House where experiment of UV lamp was carried out. Three currency notes were found from the bush-shirt's pocket of the accused No. 1. On seeing those notes in UV lamp, blue fluorescent marks were found. From the pocket of the accused No. 1-Appellant currency note of Rs. 2/-, one chit and one key were also found. Presence of anthracene powder was also found in the pocket and on the hands of the accused No. 1-Forester. Thereafter, after following necessary formalities, second part of panchnama was drawn.

6. Thereafter the accused No. 2 was also arrested by the Police in connection with the offence as it was alleged that on earlier occasions, i.e. on 02nd

January 1988 and on 03rd January 1988, an amount of Rs. 100/- and Rs. 200/- respectively were paid to the accused No. 2. Thereafter, the Investigating Officer recorded statements of various persons. From the residence of the accused No. 1 certain record was seized under the panchnama. The panchnama was also drawn pertaining to the well which was under construction in the field of the complainant as well as panchnama regarding excavation of stones from Rojiya Hills was also drawn.

7. Thereafter, FIR was lodged. Statements of the complainant were recorded. After obtaining the sanction from the appropriate authority, the charge-sheet was filed.

8. Thereafter, charge was framed at Exhibit 15 against the Appellants. The Appellants-accused have pleaded not guilty and claimed to be tried.

9. In order to bring the home the charges levelled against the Appellants-accused, the prosecution has examined witnesses in support of their case.

10. Thereafter, after examining the witnesses, further statement of the Appellants-accused u/s 313 of the Code of Criminal Procedure, 1973 were recorded in which the Appellants-accused have denied the case of the prosecution. The accused No. 1-Forester in his further statement submitted that he was authorized to settle the case and to recover the amount from the concerned persons as the concerned persons, in the present case the complainant, was caught for illegally excavating stones and removing the stones from Rojiya Hills. It is the say of the accused No. 1 that the amount given to him was towards the settlement of such excavation and the same was never meant for illegal gratification.

11. After considering the oral as well as documentary evidence and after hearing the parties, the learned trial Judge vide impugned judgment and order dated 19th August 1997 held the Appellants-accused guilty to the charges levelled against them u/s 161 read with Section 34 and Section 165A of the Indian Penal Code. The learned trial Judge has also convicted the Appellants for the offences punishable u/s 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947 (old Act) read with Section 34 of the Indian Penal Code. The learned trial Judge has convicted the Appellants for the offence punishable u/s 5(2) of the Prevention of Corruption Act, 1947 and ordered to undergo rigorous imprisonment for a period of one year and also imposed fine of Rs. 500/-, and in default of payment of fine, ordered to undergo rigorous imprisonment for a further period of two months. However, no separate sentence was awarded to the Appellants for other offence.

12. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence passed by the learned Special Judge, Sabarkantha at Himmatnagar, the Appellants have preferred the present appeal.

13. Heard Mr. K.B. Anandjiwala, leaned counsel for the Appellant of Criminal

Appeal No. 852 of 1997-original accused No. 1, Mr. J.V. Japee, learned Counsel for the Appellant of Criminal Appeal No. 837 of 1997-original accused No. 2 and Mr. H.L. Jani, learned Additional Public Prosecutor for the Respondent-State in both the appeals.

14. Mr. Japee, learned Counsel appearing for the original accused No. 2, has read the charge at Exhibit 15 and contended that the prosecution has failed to prove its case beyond reasonable doubt. He has also contended that the learned trial Judge has not considered the defence of the present Appellant-original accused No. 2 and has convicted the Appellant-original accused No. 2. He has also contended that the judgment and order of conviction and sentence is against the provisions of law and is required to be quashed and set aside. He has read the oral evidence of P.W. No. 1 at Exhibit 28 and contended that P.W. No. 1 is a selected panch and complaint was read over to this panch. He has also contended that this witness in the main witness of the prosecution case, but during the trap, nothing is produced in respect of case against the present Appellant. He has also contended that the present Appellant is wrongly identified by the complainant and the panch witness. He has also read the cross-examination of the witnesses and contended that nothing is found from the possession of the present Appellant and prosecution has failed to prove beyond reasonable doubt that the present Appellant has committed the alleged offence. He has also contended that because of rivalry, present Appellant-original accused No. 2 is booked by the complainant. Mr. Japee has read the oral evidence of P.W. No. 3 and contended that he is a close friend of the complainant and just to support the case of the complainant, the said deposition was given in favour of the complainant. This witness is not trustworthy, reliable and acceptable. He has also contended that there is sufficient contradiction in the oral evidence of this witness and the complainant. He has also contended that even if the oral evidence of this witness is taken as it is, it does not involve the present Appellant in the offence of accepting the illegal gratification. As per the say of this witness, the complainant has given the said amount of Rs. 200/- to the present Appellant-original accused No. 2 as the amount is called for by the accused No. 1-Forester and it is to be given to the accused No. 1-Forester. Thus, mere accepting the amount does not mean that the present Appellant-original accused No. 2 has accepted illegal gratification. He has also read the oral evidence of P.W. Nos. 4, 5 and 6 and contended that from the oral evidence of these witnesses, prosecution has failed to prove its case beyond reasonable doubt. Mr. Japee has read the oral evidence of P.W. Nos. 8 and 9 and contended that these witnesses are not reliable and trustworthy. He has also read the complaint at Exhibit 52 and contended that the prosecution has failed to prove the case against the Appellant-original accused No. 2. He has also contended that the prosecution has failed to prove demand and acceptance so far as present Appellant-original accused No. 2 is concerned. He has also contended that no independent witness was examined by the prosecution to prove the case of demand of Rs. 600/- on 02nd January 1988. The learned trial Judge has believed the case of the complainant as true.

He has also contended that in absence of any independent witness and in absence of any corroborative evidence, sole evidence of the complainant cannot be believed. Therefore, the alleged demand of Rs. 600/- cannot be said to be proved against the present Appellant-original accused No. 2. Mr. Japee has also contended that nothing is recovered from the possession of the present Appellant. He has also contended that neither the demand nor acceptance of any amount is proved so far as the present Appellant is concerned and therefore, it cannot be said that the present Appellant has committed the said offence. He has also contended that looking to the overall facts and circumstances of the case and evidence, oral as well as documentary, produced on record of the case, Mr. Japee has contended that the impugned judgment and order of conviction and sentence is required to be quashed and set aside so far as present Appellant-original accused No. 2 is concerned.

15. Heard Mr. K.B. Anandjiwala, learned Counsel appearing on behalf of the Appellant-original accused No. 1. He has read the charge at Exhibit 15 and also contended that charge is not framed as per the facts of the case. He has contended that the complainant is the sole witness and no independent witnesses have been examined to prove the case of the prosecution. He has also contended that as per the case of the prosecution, at the first instance the complainant had paid an amount of Rs. 100/- and thereafter paid Rs. 200/-. For this aspect, there is no independent corroboration from any source. Prosecution has failed to prove the case by examining any independent witnesses to prove the case of demand and acceptance by the present Appellant-original accused No. 1. Mr. Anandjiwala has read the oral evidence of P.W. No. 3 and contended that this witness is the close friend of the complainant and his testimony creates some doubt. He has contended that this witness is interested witness and therefore, his evidence cannot be considered against the present Appellant-original accused No. 1. He has also contended that as per the case of the prosecution, initially demand of Rs. 600/- was made by the present Appellant-original accused No. 1 and other co-accused whereas at the time of trap, Rs. 300/- was recovered from the present Appellant-original accused No. 1 and therefore, the amount recovered from the present Appellant-original accused No. 1 is not in consonance with the earlier demand of Rs. 600/- as alleged by the complainant. When the prosecution has failed to establish beyond reasonable doubt the payment of Rs. 100/- at the first instance and Rs. 200/- at the second instance, it cannot be said that the amount of Rs. 300/- recovered from the Appellant-original accused No. 1 at the time of trap, is not in consonance with the earlier demand of Rs. 600/-. He has also contended that the evidence of the witnesses, who are examined by the prosecution, are not trustworthy, reliable and acceptable. Mr. Anandjiwala has also contended that the learned trial Judge has not made any reference about the cross-examination of any of the witnesses. He has also contended that the reference to the cross-examination of the witnesses on material points to bring home the charges against the Appellant-accused is necessary. However, there is no reference about the same. The

learned trial Judge has committed grave error in not appreciating the cross-examination of the witnesses. Mr. Anandjiwala has also read the provision of Sections 161 and 165A of the Indian Penal Code and contended that the prosecution has failed to prove the main ingredients of the said sections. He has also read the provision of Section 34 of the Indian Penal Code and contended that prosecution has failed to establish the common intention of the present Appellant-accused No. 1 with co-accused. The prosecution has also failed to prove beyond reasonable doubt the ingredient of criminal misconduct. He has also contended that in corruption cases, demand and acceptance is vital part. If demand is not established by the prosecution, then the case of the prosecution fails. Mr. Anandjiwala has contended that in the present case, the prosecution has failed to prove beyond reasonable doubt the demand and acceptance by the present Appellant-original No. 1. Mr. Anandjiwala has also contended that the Appellant-original No. 1 has taken probable defence which is absolutely just and proper. The learned trial Judge has committed grave error in disbelieving the probable defence of the Appellant-original accused No. 1. The Appellant-original accused No. 1 has raised a specific defence in his statement recorded u/s 313 of the Code of Criminal Procedure, 1973. He, therefore, contended that looking to the facts of the case, circumstantial evidence and probable defence of the present Appellant-original accused No. 1, judgment and order of conviction and sentence is required to be quashed and set aside so far as present Appellant-original accused No. 1 is concerned.

16. As against this, Mr. H.L. Jani, learned Additional Public Prosecutor appearing for the Respondent-State has read the judgment and order of conviction and sentence passed by the learned trial Judge and contended that the judgment and order is absolutely just, proper and correct and no interference is required to be called for. He has read the charge and contended that from the oral evidence of the complainant as well as witnesses, prosecution has proved its case beyond reasonable doubt against the Appellants-accused. He has read the oral evidence of P.W. No. 1 at Exhibit 28 and contended that from the oral evidence of this witness, prosecution has proved its case. This witness was present during the trap and he has deposed that in his presence the Appellant-original accused No. 1 has demanded the amount and also accepted the same. Thus, the prosecution has proves its case of demand and acceptance from the oral evidence of this witness. He has also contended that while experiment of UV Lamp was carried out, presence of anthracene powder was found from the thumb, finger tips and in the pocket of the Appellant-original accused No. 1. He has also contended that demand of Rs. 600/- was also made by the Appellant-original accused No. 2 and at the first instance Rs. 100/- and thereafter Rs. 200/- was given to the Appellant-original accused No. 2. Thus, the Appellant-original accused No. 2 under the direction of the Appellant-original accused No. 1 demanded the money and thereafter accepted Rs. 300/- from the complainant. Thus, ingredient of Section 34 of common intention is proved beyond reasonable doubt. He has also contended that from the oral evidence of the panch witness as well as

complainant, ingredient of Sections 161 and 165 of the Indian Penal Code is proved beyond reasonable doubt. Mr. Jani has read the oral evidence of P.W. No. 3 and contended that this is an independent witness and he has supported the case of the prosecution. He has also read the oral evidence of P.W. Nos. 4 and 6 and contended that from the oral evidence of these witnesses also, the prosecution has proved its case. He has also read the complaint at Exhibit 52 and contended that demand is established beyond reasonable doubt through the oral evidence of panch witnesses as well as of the complainant. He has also contended that the learned trial Judge has considered each and every aspects of the matter and after appreciating oral as well as documentary evidence produced on record, passed absolutely just and proper order and therefore, the judgment and order passed by the learned trial Judge is required to be confirmed and thereby appeals required to be dismissed.

17. I have heard the learned Counsel for the parties and perused the papers produced before me. I have also perused the submissions advanced by the learned Counsel for the parties. First of all, from the oral evidence P.W. No. 2, it is required to be considered that as per the allegation of the prosecution, both the Appellants are abettor and there was common intention for demand of money and acceptance. I have also considered the provision of Section 34 of the Indian Penal Code and also perused the oral evidence of the P.W. No. 2. From the oral evidence of this witness, presence of both the Appellants is established beyond reasonable doubt and even from the oral version of this witness, demand and acceptance is proved. Demand and acceptance is proved by the panch witness. It is also required to be noted that during the search of the Appellant-original accused No. 1, the amount is recovered from the pocket of the Appellant-original accused No. 1 and presence of anthracene is also found from the thumb and finger tips of the Appellant-original accused No. 1. I have also perused the oral evidence of P.W. No. 3, who is an independent witness. No doubt he is a close friend of the complainant, but from the cross-examination of this witness by the defence, the defence has failed to establish his case. From the oral evidence of this witness, it is also established beyond reasonable doubt that the Appellant-original accused No. 2 has accepted Rs. 100/- at the first instance and Rs. 200/- at the second instance as illegal gratification. Thus, the prosecution has proved its case of demand and acceptance beyond reasonable doubt. I have also perused the panchnama at Exhibit 29 and from the perusal of the oral as well as documentary evidence, I am of the opinion that prosecution has proved its case beyond reasonable doubt before the learned trial Judge.

18. It is established law that under the Indian law, for an offence of abetment, it is not necessary that offence should have been committed. A man may be held guilty as an abettor whether offence is admitted or not. Section 107 of the Indian Penal Code defines abetment. Section 161 provides as under:

Section 161. Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself

or for any other person, gratification whatever, other than legal remuneration as a motive or reward for doing or forbearing to do any official act or for showing or forbearing for show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Central or any State Government or Parliament or the Legislature of any State or with any local authority corporation of Government company referred to in Section 21 or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 165A provides as under:

Section 165A. Whoever, abets any offence punishable u/s 161 or Section 165, whether or not that offence is committed in consequence of the abetment, shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both.

In Old Act of 1947, Section 4 regarding presumption, provides as under:

Section 4. Presumption where Public Servant accepts gratification other than legal remuneration:

(1) Where in any trial of an offence punishable u/s 161 or Section 165 of the Indian Penal Code (or of an offence referred to in Clause (a) or Clause (b) of Sub-section (1) of Section 5 of this Act punishable under Sub-section (2) thereof), it is proved that an accused person has accepted or obtained, or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said Section 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable u/s 165A of the Indian Penal Code (or under Clause (ii) of Sub-section (3) of Section 5 of this Act), it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed unless the contrary is proved that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 161 of the Indian Penal Code or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in Sub-sections (1) and (2), the court may decline to draw the presumption referred to in either of the said Sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no inference of corruption may fairly be drawn.

For consideration of Section 161 of the Indian Penal Code, main three ingredients are required to be established.

- (i) That the accused was a public servant;
- (ii) That he must be shown to have obtained from any person any gratification;
- (iii) The gratification should be other than legal remuneration as a motive or reward for doing or forbearing to do any official act for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to the person.

19. Even, the Supreme Court has also observed in case of Sita Ram Vs. The State of Rajasthan, that when demand of bribe by accused is not proved and story of payment of money by complainant is also not established beyond reasonable doubt, presumption u/s 4(1) cannot be drawn for convicting the accused. In the said case demand and acceptance is not proved, but in the present case, from the oral evidence of P.W. Nos. 1, 2 and 3, demand and acceptance is proved beyond reasonable doubt. Hence, the presumption u/s 4(1) is required to be drawn against the present Appellants-accused.

20. Looking to the papers, knowledge and intention of original accused No. 2-Appellant No. 2 is established. It is also established that he is demanding bribe money. Both the Appellants are public servants and when they received illegal gratification, story put-forward by the Appellants cannot be acceptable.

21. In view of above observations, I am not hesitating to say that from the oral evidence of the prosecution, I have found that both the Appellants-accused have demanded illegal gratification and accepted the same and when demand and acceptance is proved against the Appellants-accused beyond reasonable doubt, question of probable defence will not arise. I have also perused the statement of both the Appellants recorded u/s 313 of the Code of Criminal Procedure. In their statement recorded u/s 313, the Appellants-accused have not explained presence of anthracene powder and recovery of the trap amount. Therefore, presumption u/s 4(1) is also required to be raised against the accused and when defence has failed to prove his defence beyond reasonable doubt, I am of the opinion that judgment and order of conviction and sentence is required to be confirmed.

22. Hence, in view of the foregoing reasons, both the appeals are hereby dismissed. The judgment and order of conviction and sentence dated 19th August 1997 passed by the learned Special Judge, Sabarkantha, Himmatnagar, in Special Case No. 07 of 1989, is hereby confirmed. The Appellants-accused are on bail. These bail bond shall stand cancelled. The Appellants-accused are, therefore, directed to surrender themselves before the Jail Authority within a period of four weeks from today, failing which the trial Court concerned is directed to issue Non-bailable warrant against the present Appellants-accused to effect their arrest. Record and Proceedings, if any, be sent back to the trial Court concerned, forthwith.