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In the Bombay High Court

Case No : Criminal Appeal No. 461 of 2015

Anuradha Anant Shitkande and Others APPELLANT

Vs

The State of Maharashtra RESPONDENT

Date of Decision : 19-01-2016

Acts Referred:

Prevention of Corruption Act, 1988 — Section 12, Section 13, Section 13(2), Section 19, Section 3, Section 7

Citation : (2016) 1 AIRBomRCri 620 : (2016) ALLMRCri 2302 : (2016) 2 BomCR(Cri) 168 : (2016) 4 MhLJCrl 623 : (2016) 5 RCRCriminal 151

Hon'ble Judges : A.M. Thipsay, J.

Bench : Single Bench

Advocate : Subodh Desai i/b. Hrishikesh Chavan, Advocate, for the Appellant; V.B. Konde Deshmukh, A.P.P., for the Respondent

Final Decision : Allowed

Judgement

A.M. Thipsay, J.—1. This appeal is directed against the judgment and order dated 27th March 2015 delivered by the Special Judge (appointed under Section 3 of the Prevention of Corruption Act) Pune, convicting the appellants, who were accused Nos. 1 and 2 respectively, in Special Sessions Case No. 11 of 2013 of an offence punishable under Section 7 of the Prevention of Corruption Act, 1988 (hereinafter "the P.C. Act") and sentencing them to suffer Rigorous Imprisonment for 6 months and to pay a fine of Rs. 1,000/-, in default, to suffer Rigorous Imprisonment for 1 month. The appellants were also charged of an offence punishable under Section 12 of the P.C. Act, but the Special Judge acquitted them of the said offence. Being aggrieved by their conviction and the sentence imposed upon them, the appellants have approached this court by filing the present appeal.

2. I have heard Shri Subodh Desai, the learned counsel for the appellants. I have heard Shri V.B. KondeDeshmukh, the learned APP for the State. I have gone through the evidence adduced during the trial and the impugned judgment.

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3. This is a case, where, on the complaint that certain public servants had demanded illegal gratification, a trap was laid by the Anti Corruption Bureau. The trap failed, as the public servants, who had allegedly made a demand, did not accept the money and did not even provide an occasion to pay the same. Inspite of failure of the trap, the public servants concerned, i.e., the appellants, have been held guilty, on the basis of the initial demand allegedly made by them.

4. The prosecution story, with all necessary details, may be best taken from the testimony of the original complainant - one Dhanraj Kitturkar - and stated thus:

The appellants, at the material time, were working as Clerks in the Pune Municipal Corporation (PMC). Dhanraj Kitturkar (PW 1) (hereinafter referred to as ''the complainant'') owns a shop by name Om Mobile Gallery and does the business of selling mobile telephones. The shop was previously owned by one Deepak Agarwal. It was purchased by the complainant in the year 2008 by a registered Sale deed. The complainant wanted his name to be entered in the municipal records, and therefore, he went to the Regional Office of the PMC, situate at Ghole road, on 19th December 2011. On going there, he met the appellants, who were working in that office. The appellants handed over one form to the complainant and asked him to fill in the same and submit it to their office along with a copy of the Sale deed; whereafter, the name of the complainant would be entered in the relevant records. They also asked the complainant to deposit an amount of Rs. 895/- and Rs. 25/- by a challan. The complainant was not having a copy of the Sale deed with him on that day. He, however, deposited an amount of Rs. 25/-. He again went to the PMC Office on 29th December 2011. On that day also, the appellants met him in the office. He deposited an amount of Rs. 895/- by challan and submitted the duly filled in form with a copy of the Sale deed attached thereto. The complainant asked the appellants as to when his name would be entered in the relevant records. The appellants, then, asked the complainant to come on 31st December 2011. The appellants also provided the land line number of their office to the complainant for enabling him to contact them.

The complainant went to the office on 31st December 2011 and contacted the appellant No. 2 Patole. When he made enquiries with appellant No. 2, he asked the complainant as to whether he had had any talks with ''Shitkande Madam'' i.e. appellant No. 1, regarding money. The complainant told that there was no such talk, but the appellant No. 2 again asked the complainant about money, taking the name of the appellant No. 1 Smt. Shitkande. The appellant No. 2, then, told the complainant that, on that day, it being 31st December, most of the employees were on leave, and that, the complainant should come on 3rd January 2012.

On 2nd January 2012, the complainant received a telephone call from the appellant No. 1 and the appellant No. 1 told the complainant that she was on leave, and that, he should meet Patole (appellant No. 2) and pay to him Rs. 2,000/-, whereafter, he would do the complainant''s work. The complainant told the appellant No. 1 that he had already deposited the requisite amount, and that, for what purpose he was required to pay any amount again. The appellant No. 1, thereupon, told him that he would have to pay the money, and that, without paying money, the work would not be done.

On 3rd January 2012, the complainant again went to the PMC Office and went to the appellant No. 2. The appellant No. 2 asked the complainant as to whether he had received a telephone call from the appellant No. 1 and whether there was any talk about money between the complainant and the appellant No. 1. The complainant told the appellant No. 2 that he had received a telephone call from the appellant No. 1, and that, she had told him that Patole - i.e. appellant No. 2 - would do his work. The complainant falsely stated to the appellant No. 2 that there was no talk between him and Shitkande Madam about money. The appellant No. 2, on noticing that the complainant was avoiding subject of money, told him ''to come later, as the appellant No. 1 was on leave.''

On 9th January 2012, the complainant again went to the PMC Office. The appellant No. 2 told him that his work was done, and that, only the signature of ''Shitkande Madam'' i.e. the appellant No. 1 was remaining, and that, after her signature, the complainant would receive the (necessary) document. It is at this stage, that, the complainant felt that the appellants were harassing him for money, and he decided to approach the Anti Corruption Bureau (ACB).

However, before going to the office of the ACB, the complainant again went to the PMC Office on 10th January 2012. This time the appellant No. 1 was also present there. The complainant had a talk with her. The appellant No. 1 then told the complainant that Shaikh Madam was on leave due to the demise of her mother, and that the signature of Shaikh Madam was necessary, and that, it was required to be obtained by going to her house. The complainant came out of the office, when appellant No. 2 followed him and told him that the appellant No. 1 was the ''in-charge'' of the matter. There was one more person with appellant No. 2, whose name was also Patole, and who was also, reportedly, working in the same office. The appellant No. 2, then, told the complainant that if he wanted to get his work done, he would have to pay money to the appellant No. 1. The complainant showed willingness to pay the amount. Thereafter, the complainant, the appellant Nos. 1 and 2 and the other Patole, went to Hotel Daffodil for tea. A talk regarding the work of the complainant took place in the hotel. The appellant No. 1 told the complainant to pay Rs. 2000/- to Patole, whereafter, Patole would bring signature of Shaikh Madam. The complainant requested that the amount may be reduced, whereafter, there was a discussion and after some bargaining, the amount was fixed as Rs. 1500/-. The appellants then told the complainant to come at 5.00 p.m., and that, till then the work would be completed. The complainant, then, went to the ACB Office and complained. The complaint was recorded by Sangeeta Patil (PW 3), Inspector of Police. She called two panchas - Sanjay Badhe (PW 2) and Meenakshi Makar. The complainant was made to narrate his complaint orally to the panchas and his written complaint was also

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given to the panchas for reading.

It was then decided to verify the demand. A voice recorder was provided to the complainant. The complainant, then, called on the land line telephone of the PMC Office, which call was answered by one lady. The complainant asked that lady whether Shitkande Madam (appellant No. 1) was there. The lady, who had picked up the receiver, handed it over to Shitkande Madam. The complainant spoke to appellant No. 1 and asked about his work, when the appellant No. 1 told him that his work would be completed. The complainant, then, said that the amount of Rs. 1500/- was excessive and requested for reducing the amount, on which, the appellant No. 1 asked him to pay Rs. 1000/- to the appellant No. 2, and told the complainant to come to the office at 5.00 p.m. The transcript of the conversation, that was recorded in the cassette, was prepared.

The complainant, then, provided an amount of Rs. 1000/- for laying a trap. After following the usual procedure and by making use of anthracene powder, a trap was laid. Panch Sanjay Badhe (PW 2) was to remain with the complainant.

5. The police party and the panchas then went to the PMC Office at Ghole road by a government vehicle. After going there, the complainant contacted the appellant No. 1 on the land line phone and informed her that he had come. The appellant No. 1 instructed him to come to the hotel and after confirming that she was speaking about the same hotel in which they had sat in the morning, the complainant and Sanjay Badhe (PW 2) went to the Hotel Daffodil. The appellants and the said another Patole came to the hotel. The complainant ordered for tea.

6. However, the appellant No. 2 went out of the hotel. The appellant No. 1 also received a telephone call; and on receiving it, she and the said other Patole got up and started going out of the hotel. When the complainant asked them about his work, he was told that his work was completed. The complainant was taken to the office. When the complainant asked about money, they told him that they do not accept amount for the work. The complainant believed that the appellants had suspected about laying of a trap and had changed their plan to accept the bribe amount.

7. After about eight days, i.e. on 18th January 2012, Sangeeta Patil lodged the First Information Report (FIR). Further investigation was thereafter carried out. Sanction to prosecute the appellants, as contemplated under Section 19 of the P.C. Act, was obtained from Mahesh Pathak (PW 4), the then Municipal Commissioner, PMC.

8. Upon completion of investigation, a charge-sheet was filed against the appellants, pursuant to which, they were prosecuted and convicted of an offence punishable under Section 7 of the P.C. Act, but acquitted of the offence punishable under Section 12 thereof.

9. It can easily be seen that the facts of the case are not usual. It is because, a trap was laid down, pursuant to the alleged demand of bribe by the appellants,

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but that trap, admittedly, failed. The appellants did not accept the bribe amount. The work of the complainant was also completed. Infact, there was no charge of an offence punishable under Section 13(2) of the P.C. Act against any of the appellants, and the charge was solely in respect of an offence punishable under Section 7 of the P.C. Act and of aiding and abetting each other in commission of the said offence.

10. Thus, the appellants have been held guilty on the basis that the ''demand of illegal gratification made by them to the complainant was duly proved.'' This proof was arrived at, inspite of the fact that, when, pursuant to the demand, the money was offered to be paid to them, the appellants did not accept the same.

11. Indeed, theoretically, since even a demand for illegal gratification constitutes an offence punishable under Section 7 of the P.C. Act, there would be nothing improper or illegal for holding a public servant guilty of an offence punishable under Section 7 of the P.C. Act, even if such public servant has not actually accepted the amount of bribe when tendered. The question, however, that would arise in such cases would be, ''whether inspite of the fact that the subsequent conduct of a public servant concerned, does not support the theory of his having demanded a bribe, and though he did not actually accept any bribe, still, a belief that he had indeed demanded bribe, can be formed?''

12. Obviously, this would be a question of fact and would differ from case to case. Such a question would necessarily be required to be determined on the basis of the evidence, that would be available, in a given case.

13. In this case, undoubtedly, the complainant has stated about the demands made by the appellants. His evidence is in accordance with the facts of the case, stated in the earlier part of the judgment. Rather, the facts of the case are taken from the complainant''s evidence itself. Since the trap failed, the evidence of the previous demand needs to be carefully examined.

14. The complainant''s evidence shows that he went to the office of the PMC for the first time on 19th December 2011. There was no demand for illegal gratification at that time. On the contrary, the complainant''s evidence itself indicates that the appellants extended all the necessary assistance to him, handed over a form to him and also told him about the requirements that would be necessary to have the shop entered in his name in the municipal records. Admittedly, the complainant was not having a copy of the Sale deed - which was necessary for effecting the change - with him on that day, and therefore, the formalities could not be completed on that day. The next relevant date is 29th December 2011, on which, the complainant had gone to the office of the appellants again. During the intervening period, he had, had no contact with the appellants. On 29th December 2011, he deposited the required amount of Rs. 895/- by challan, filled in the form, attached a copy of the Sale deed and completed the formalities. He was, then, asked to come on 31st December 2011, i.e., just after two days. At that time also, there was no demand of any money.

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15. The demand of illegal gratification surfaces for the first time on 31st December 2011, and was, allegedly, made tacitly, by the appellant No. 2. The appellant No. 2 asked the complainant as to whether he had, had any talk with the appellant No. 1 regarding money. Thus, it seems that the appellant No. 1 was expected to make a demand, but actually it had not been made. Now, the complainant''s work was not done on 31st December 2011. What the complainant thinks is that it was deliberately not done as the complainant was not discussing the issue of payment of money. However, this, evidently, is an inference drawn by the complainant. The complainant in his evidence said that the appellant No. 2 told him that the work could not be done as it being 31st December 2011, most of the employees were on leave. Now the possibility of a number of employees being on leave on that day, cannot certainly be ruled out, and therefore, not much importance to the inference drawn by the complainant, to the effect that his work was deliberately being delayed, can be given.

16. The actual demand is supposed to have been made, for the first time, on 2nd January 2012, telephonically. About this demand, there is no evidence, except that of the complainant himself.

17. On the next day, when the complainant went to PMC Office and met the appellant No. 2, the appellant No. 2 is said to have asked him whether the appellant No. 1 had a talk with him on telephone, and how much money the appellant No. 1 had told, to be given to him (appellant No. 1). According to the complainant, the appellant No. 2 told him to come on another day, as the appellant No. 1 was on leave. According to the complainant, this was deliberately done, as the subject of paying money to the appellants was being avoided by the complainant. However, that the appellant No. 1 was indeed on leave, does not seem to be in dispute.

18. The complainant next went to the office of the appellants on 9th January 2012, and that time the appellant No. 2 told him that the matter was pending only for the signature of the appellant No. 1. Now, it is clear that, on that day also, the appellant No. 1 was not in the office. It is, at that point of time, that the complainant decided to go to the ACB Office.

19. However, before going to the ACB Office, the complainant again went to the office of the appellants, which was on 10th January 2012. At that time, the appellant No. 1 was present in the office and she told him that the signature of one Shaikh Madam would be necessary, and that, she being on leave, it would be necessary to obtain her signature by going to her house. At that time, the appellant No. 1 did not make any demand of money. When the complainant left the office, the appellant No. 2 is said to have followed him and told him that the appellant No. 1 was the in-charge of the matter, and that, if the work of the complainant was to be got done, he would have to pay money to appellant No. 1. It is, thereafter, that the complainant actually went to the office of ACB.

20. In the ACB Office, the verification of the demand was done. A telephone call

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was made to the PMC Office and the conversation that took place between the complainant and the appellant No. 1 was heard by keeping the phone on speaker mode. The conversation was also recorded by using a voice recorder. In this regard, Shri Subodh Desai, the learned counsel for the appellants, submitted that, there was no evidence as to which particular number was dialed by the complainant, and there was no guarantee that the conversation that supposedly took place between the complainant and the appellant No. 1, had indeed taken place between them only. According to him, it was necessary for the complainant to have disclosed as to what was the number of the PMC Office and there was necessity to have evidence to show that the very number was dialed by the complainant. It is contended that, therefore, this story, viz., of having verified the demand by making telephone call, should not be accepted. Though there is some substance in this contention, I am not inclined to give much importance to this aspect. What is, however, important, in my opinion, is the non-production of the recorded conversation during the trial. The conversation having been recorded with the object of tendering it in evidence and thereby corroborating the testimony of the complainant, was certainly required to be produced before the court during the trial. No explanation for non-production of such conversation has been given. This weakens the case of the prosecution. Even if, an inference that ''the record of conversation, if produced, would not have supported the testimony of the complainant'', - which may legitimately be drawn, in the circumstances of the case - is not drawn, the least that can be said is that the complainant''s testimony about the alleged demand is not corroborated by the record of the conversation.

21. The question that would arise is, whether the evidence of the panch Sanjay Badhe (PW 2) affords sufficient corroboration to the testimony of the complainant to prove the alleged verification of the alleged demand. Undoubtedly, panch Sanjay Badhe did speak about the telephonic conversation. He said that the speaker of the mobile telephone was kept on and the conversation that took place was heard. Interestingly, the account of the conversation given by the panch Badhe is different from the account thereon given by the complainant. According to Badhe, the complainant asked about his work, when the appellant No. 1 told him that the work would be completed by 5.00 p.m., and that, he should come at 5.00 p.m. No demand made by the appellant No. 1 during this conversation, though that the work would be completed, was categorically stated. According to Badhe, it was the complainant who introduced the subject of paying of amount and asked as to how much was to be paid. Undoubtedly, Badhe (PW 2) states that the appellant No. 1 then made a demand, but this by itself would not be sufficient to hold that the making of demand by the appellant No. 1 was satisfactorily proved. Infact, the non-production of the recorded conversation affects not only the evidence of the complainant but also of panch Badhe. Rather, such non-production affects the whole of the case of the prosecution, as regards the alleged demands, adversely. The satisfaction about the reliability of the evidence of the initial demand was required to be of a very

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high degree, in view of the fact, that the trap - which would corroborate the theory of demand - failed. This is apart from the other objections raised by Shri Subodh Desai with respect to the reliability of this evidence, viz., that the evidence does not disclose as to which telephone number was dialed and whether a call had indeed been made in the office of the appellants. In case of panch Badhe, it is more important, because he was not supposed to identify the voice of the appellant No. 1.

22. There is also some variation in the version of the complainant and that of Badhe (PW 2). According to Badhe (PW 2) after the trap was laid, it was decided that the complainant and the panch would go to the office of the appellants. He, however, states that he and the complainant went to Daffodil hotel and from there the complainant contacted the appellant No. 2 on telephone and asked whether ''Madam'' (appellant No. 1) was there and whether the work was completed. The appellant No. 2 then told the complainant to come to the office and make corrections, if any, in the letter (which the complainant was to receive). That, the complainant and Badhe then went to the office where both the appellants were present. According to Badhe, the appellant No. 2 showed the letter to the complainant and asked him to check the name etc. There was some general talk between the complainant and the appellants, and the appellant No. 2 suggested that they should have tea, and then, all of them came back to Daffodil hotel.

23. The version of the complainant, however, is to the effect that after he and Badhe had gone to Daffodil hotel, the appellants came there within five to ten minutes. He does not speak about having gone to the office of the appellants.

24. The learned counsel for the appellants contended that this variation cannot be treated as minor or inconsequential, in as much as, the evidence of Badhe indicates that the work of the complainant was already completed, and that, he had seen so, by visiting the office of the appellants. According to Badhe, it was after the work was done, that there was a suggestion to have tea. Thus, the contention is that the complainant is deliberately hiding the fact that he had gone to the office and met the appellants there, before coming back to Daffodil hotel.

25. The evidence of Sangeeta Patil (PW 3) shows that the complainant and Badhe (PW 2) first went inside the office of the appellants and then came out and went to Daffodil hotel along with the appellants and one more person (supposed to be the other Patole). Thus, the complainant''s version that after the trap had been laid, he and Badhe directly went to Daffodil hotel where the appellants and the other Patole came within about five to ten minutes is not correct. There is substance in the contention advanced by the learned counsel for the appellants and this might not be a simple mistake and the complainant might be trying to suppress it because during the visit to the office, he had already been told that the entire work had been completed.

26. The real aspect of the matter is different. It is of the difficulty in having the

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satisfaction about the truth of the allegation of demand when the trap fails. Had the conversation that was recorded between the complainant and the appellant No. 1 been produced, it would have been possible to come to a conclusion about such a demand, but since the conversation was not produced, the requisite satisfaction about the demand indeed having been made cannot be reached.

27. Apart from this, there are some other aspects which should be viewed in favour of the appellants.

28. The FIR in this case was lodged on 18th January 2012, i.e., after about eight days from the incident. Evidently, the investigation agency was uncertain as to whether a case should be registered or not. It is obviously as a result of the failure of the trap. It is possible that sometimes because of the instinct, a public servant, who has earlier demanded a bribe, would suspect that a trap has been laid and would actually not accept the bribe amount when offered to him; but in such a case, there must be convincing and reliable evidence of the previous demand. In this case, there is no such evidence. As a matter of fact, the Manual of Instructions issued by the Maharashtra State Anti-Corruption and Prohibition Intelligence Bureau, for the guidance of the Officers from the ACB, shows that if a trap does not materialize, the Investigating Officer is expected to file a Closure report. It is not to suggest that no prosecution can ever be launched if the trap fails, as the offences contemplated under Section 7 and Section 13 of the P.C. Act are quite distinct and the offence under Section 7 is complete when a demand is made. But the fact remains, that usually where the investigating agency fails to collect evidence by laying a trap, the evidence about the initial demand automatically gets weakened. The least that can be said in the present case is that the Investigating Officer herself was in a doubt as to whether any further action was required to be taken into the matter. The delay in lodging the FIR cannot be attributed to any other factor.

29. Apart from this, there is also a fatal defect in the sanction to prosecute as accorded by Mahesh Pathak (PW 4). The sanction is totally without application of mind. From the documents that were tendered in evidence, it is seen that the sanctioning authority had serious doubts as to whether the sanction to prosecute the appellants should be accorded. The document at Exhibit 29 shows that the sanctioning authority was made aware of the fact that the trap had failed, and that, no report regarding the identity of the voice recorded in the audio cassettes had been received. It is not necessary to refer to the entire correspondence that has been produced, as a bare reading of the sanction order shows that it has been given without application of mind. The relevant part of the sanction order reads as under:

30. Thus, the sanctioning authority has considered two aspects of the matter, viz., i) that the appellants had not accepted the amount, and that, ii) the report from the Forensic Science Laboratory (about the identity of the voice) has not been received, as the consideration on which a decision to accord sanction has been taken. This is indeed absurd. Both these factors were in favour of the

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appellants. The sanction is clearly granted without any application of mind and is invalid. The same has resulted in miscarriage of justice.

31. The order of conviction, as recorded by the learned Special Judge, and the sentences imposed upon him are not in accordance with law. This was a case where the appellants should have been acquitted.

32. The appeal is allowed.

The impugned judgment and order of conviction is set aside.

The appellants are acquitted.

Their bail bonds are discharged.

Fine, if paid, be refunded to them.

The appeal is disposed of accordingly.

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