

(2017) 01 GUJ CK 0198
In the Gujarat High Court
Case No : 887 of 2005

ASLAMBHAI RASULBHAI QURESHI

APPELLANT

Vs

STATE OF GUJARAT

RESPONDENT

Date of Decision : 30-01-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#) - Power to examine the accused
[Prevention of Corruption Act, 1988](#), [Section 20](#), [Section 13](#), [Section 13\(1\)](#), [Section 7](#), [Section 13\(2\)](#), [Section 13\(1\)\(d\)\(i\)](#), [Section 13\(1\)\(d\)\(II\)](#), [Section 13\(1\)\(d\)\(2\)](#), [Section 13\(1\)\(d\)\(3\)](#), [Section 13\(1\)\(d\)\(1\)](#) - Presumption where public servant accepts gratification other than legal remuneration - Criminal misconduct by a public servant - Criminal misconduct by a public servant - Public servant taking gratification other than legal remuneration in respect of an official act - Criminal misconduct by a public servant - Criminal misconduct by a public servant - Criminal misconduct by a public servant - Criminal misconduct by a public servant - Criminal misconduct by a public servant

Citation : (2017) 01 GUJ CK 0198

Hon'ble Judges : R.P.Dholaria

Bench : Single Bench

Advocate : RENU R.SINGH, KP RAVAL, PR ABHICHANDANI

Judgement

1. Both these appeals arise out of the same incident and involve common questions of law and facts and hence, they are being decided by this common judgment.

2. Criminal Appeal No.887 of 2005 is preferred by the appellant - Aslambhai Rasulbhai Qureshi, original accused No.1 and Criminal Appeal No.316 of 2006 is preferred by the appellant - State of Gujarat against the judgment and order dated 29.4.2005 passed by learned Special Judge and Additional Sessions Judge, 3rd Fast Track Court, Rajkot at Morbi in Special ACB Case No.5 of 1997 whereby original accused No.1 was convicted for the offence under section 7 of the

Prevention of Corruption Act 1988 ("the Act" for short) and sentenced to undergo three years rigorous imprisonment and to pay fine of Rs.5000/-, in default, to undergo further three

months simple imprisonment and for the offence under section 13(1)(d) (1), (2), (3) read with sections 13(2) of the said Act, the original accused No.1 was sentenced to undergo three years rigorous imprisonment and to pay fine of Rs.5000/-, in default, to undergo further three months simple imprisonment and both the sentences were ordered to run concurrently, whereas original accused Nos.2 and 3 were ordered to be acquitted from the charges levelled against them.

3. The short facts giving rise to the present case are that the accused persons were serving in jail at Morbi and there was a food contractor who was providing tiffin facilities to the prisoners at the jail. It is alleged that on 16.1.1992 the accused demanded a sum of Rs.1000/- from the said contractor. As the complainant was not willing to pay the bribe amount, he approached the ACB office and lodged the complaint.

4. In pursuance of the complaint, the Investigating Officer carried out the investigation and filed the chargesheet against the accused persons. The charge was framed against the accused. The accused pleaded not guilty to the charge and claimed to be tried. 4.1 In order to bring home the guilt, the prosecution has examined witnesses and also produced documentary evidences.

4.2 At the end of the trial, after recording the statements of the accused under section 313 of the Criminal Procedure Code, 1973 and hearing the arguments on behalf of the prosecution and the defence, learned trial Court delivered the judgment and order, as stated above.

5. Being aggrieved by the same, the appellants have preferred the aforesaid Criminal Appeals before this Court.

6. By way of preferring the present appeal, the appellant - convicted accused has mainly contended that learned trial Court has failed to appreciate the evidence on record and wrongly recorded the order of conviction. It is further contended that learned trial Judge has not appreciated the evidence on record in its proper perspective and in fact, there was no appreciation of evidence so far and hence, the impugned judgment and order of conviction is required to be reversed, as such. Whereas the State has also preferred the appeal contending that the learned trial Judge has not properly appreciated the evidence on record though the prosecution has successfully established the guilt against the accused.

7. Mr.Yogesh Ravani, learned advocate appearing for Ms.Renu Singh, learned advocate for

the appellant - original accused No.1 has taken this Court through the entire judgment and record and argued that during the trial, the complainant has expired and therefore, he could not be examined by the prosecution and hence, the prosecution has failed to establish pre-demand dated 9.3.1992 and

15.3.1992 as well as instant demand dated 16.3.1992. He submitted that even panch No.1 who was accompanied with the complainant at the time of trap has also not supported the case of the prosecution and even if his deposition may be taken into consideration on its face value, then also, it appears from his deposition that when he visited the office of accused No.1 in jail, at that time, the complainant placed tainted currency notes over the table which was lying in the chamber of the accused No.1 and that he had not uttered any word that the accused No.1 has ever demanded any amount towards illegal gratification and therefore, it is the contention of Mr.Ravani that the prosecution has miserably failed to establish vital ingredients i.e. demand, acceptance and recovery. He submitted that from the stage of recording the complaint, the Investigating Officer - PW 3 has assumed all the roles as regards to recording of the complaint, laying the trap, investigation of the offence and filing of the chargesheet and therefore, the investigation is vitiated. He, therefore, submitted that accused No.1 is required to be acquitted, as

such. In support of his submissions, Mr.Ravani has placed reliance on the decision of this Court in the case of Gopal Lal Ghisulal Chhipa and others Vs The State of Gujarat, reported in 1998 (1) GLH 943.

8. Mr.P.R.Abhichandani, learned advocate for the original accused Nos.2 and 3 has argued that from the trap itself, it is not indicating that the presence of accused Nos.2 and 3 was found at the time of trap and even their role is not at all disclosed. He submitted that none of the independent witnesses have identified the accused Nos.2 and 3 and there is no evidence worth the name available on record to link the accused with the crime in question. He, therefore, submitted that learned trial Judge has rightly recorded the finding and acquitted the accused Nos.2 and 3 which calls for no interference by this Court.

9. On the other-hand, Mr.K.P.Raval, learned APP has supported the judgment rendered by learned trial Court so far as it relates to conviction of original accused No.1. He submitted that this is a fit case wherein learned trial Court has considered voluminous evidence in its proper perspective and rightly convicted the accused No.1. He further submitted that finding recorded by learned trial Court is based upon the concrete and clinching evidence and, therefore,

punishment inflicted upon the accused No.1 does not call for any interference and learned trial Court ought to have recorded the conviction against accused Nos.2 and 3 also. He submitted that learned trial Court has recorded ample reasons based on the evidence on record for convicting the accused No.1 and ingredients as regards to demand, acceptance and recovery are proved in accordance with law. He submitted that since recovery of tainted currency notes was effected from the cup board of the accused No.1 which was in his exclusive possession and even the test of anthracene powder was found positive over his hand and finger and, therefore, it indicates demand and acceptance and therefore, this Court may not interfere with the order of conviction against accused No.1. He submitted that since the complainant could not be examined as

he expired prior to recording his evidence, but the complaint has already been proved in accordance with law which clearly indicates that the amount of illegal gratification was to be disbursed amongst all the three accused and that demand came to be raised by accused Nos.2 and 3 and therefore they are required to be convicted and as such, learned trial Court has wrongly acquitted them.

10. This Court has heard Mr.Yogesh Ravani, learned advocate appearing for Ms.Renu Singh, learned advocate for accused No.1,

Mr.Abhichandani, learned advocate for accused Nos.2 and 3 and Mr.K.P.Raval, learned APP for the State.

11. This Court has minutely gone through the impugned judgment rendered by learned trial Court as well as the evidence on record in the nature of paper book.

12. As per the prosecution version, the complainant was having contract of supplying food to the inmates of sub-jail situated at Morbi where the accused No.1 was serving as Jailer and accused Nos.2 and 3 were serving as Sipoi in the said jail. It is the case of the prosecution that during the course of operation of the said contract of supply of food, the accused demanded Rs.1000/- for the months of February and March 1992 as illegal gratification on 9.3.1992. As the complainant was not willing to pay the amount of illegal gratification, he approached the ACB office and lodged the complaint on 16.3.1992. The trap was laid and the accused were caught red handed along with tainted currency notes and thereby the accused have committed the offence, as alleged against them.

13. PW 1 - Dalchhabhai Haribhai Gurjar has been examined at Exh.16. The witness has deposed that he was requisitioned as Panch No.1 as in the year 1992, he was serving in the office of the

Lands Record, Rajkot. The witness has deposed that along with him, another panch was also requisitioned by the ACB office and he was made to understand as to how the raid is to be conducted and in order to conceal his identity as Government official, he was asked to wear dhoti and to accompany the complainant as well as to hear the conversation and to view the incident which may take place between the complainant and the accused on the appointed day. The witness has deposed that when he accompanied the complainant and went to the sub-jail, Morbi, at that accused No.1 was sitting on his chair and they took their seat in front of accused No.1 and thereafter the complainant placed the money over the table of accused No.1. The witness has deposed that thereafter, the complainant shook his hand with the accused No.1 and introduced the witness as son of the maternal uncle, at that time, his dhoti loosen and hence, he was not able to sit properly and that he could not hear the conversation between the complainant and accused No.1. The witness has deposed that thereafter the complainant raised alarm and hence other members of the raiding party arrived there and they recovered the aforesaid amount from the cup board and that numbers of currency notes were compared which were found to be tallied with the previous panchnama. The witness has deposed that test of

anthracene powder was also found to be positive. Later on, the witness was declared

hostile. In the cross examination, the witness has admitted that he did not hear any conversation between the complainant and accused No.1 and did not narrate anything as regards to conversation in the panchnama and even he did not identify any of the accused in the trial court.

14. PW 2 - Narendrabhai Labhshankar Pandya has been examined at Exh.18. The witness has deposed that he was working as Maintenance Surveyor and he was requisitioned as Panch No.2. The witness has deposed that after the signal, he came to the place of trap and rest of the proceedings for trap was carried out. The witness did not identify any of the accused before learned trial Court.

15. PW 3 - Natwarlal Narsibhai Nagar has been examined at Exh.21. The witness has deposed that he was serving as Police Inspector, ACB, Rajkot on 16.3.1992 and he recorded the complaint; thereafter, he arranged for trap and accordingly, carried out the entire trap. The witness has deposed that after the investigation, he filed the chargesheet. It is also interesting to note that during the course of investigation, especially Exh.24 was also seized which was jail report book maintained by the jail authority wherein entries dated 31.1.1992, 19.2.1992 and 11.3.1992 clearly disclose that during the course of inspection by the Superintendent of Jail as

well as accused No.1, it was found that quality of food supplied by the complainant was found to be inferior and not eatable and even the order of deducting the charges for the said inferior quality food was also made.

16. In the present case, even accused No.1 has been examined as DW No.1 at Exh.41 wherein he has deposed that at the time of marriage of his younger brother, the complainant was introduced and catering contract was given for supply of food for Rs.15000/- and the said amount was paid in advance, however, the bill was raised at Rs.12,700/- and, therefore, the complainant was required to return Rs.2300/- and out of that amount, Rs.1000/- was placed over the table by the complainant.

17. In view of the aforesaid nature of evidence, the important question arises for determination of this Court, as to whether the prosecution has established the three ingredients i.e. demand, acceptance and recovery of illegal gratification of Rs.1000/- or not ?

18. At this stage, it would be fruitful to make reference to the decision of the Honourable Apex Court in A.Subair Vs State of Kerala, (2009) 6 SCC 587 : (2009 AIR SCW 3994), while dwelling on the purport of the statutory prescription of Sections 7 and 13(1)(d) of the Act ruled that the

prosecution has to prove the charge thereunder beyond reasonable doubt like any other criminal offence and that the accused should be considered to be innocent till it is established otherwise by proper proof of demand and

acceptance of illegal gratification, which are vital ingredients necessary to be proved to record a conviction.

19. In *State of Kerala and another Vs C.P.Rao* (2011) 6 SCC 450 : (AIR 2012 SC (Supp) 393), the Honourable Apex Court reiterating its earlier dictum, vis-a-vis the same offences, held that mere recovery by itself, would not prove the charge against the accused and in absence of any evidence to prove payment of bribe or to show that the accused had voluntarily accepted the money knowing it to be bribe, conviction cannot be sustained.

20. In a recent enunciation by the Honourable Apex Court to discern the imperative pre-requisites of Sections 7 and 13 of the Act, it has been underlined in *B.Jayraj* (AIR 2014 SC (Supp) 1837) (supra) in unequivocal terms, that mere possession and recovery of currency notes from an accused without proof of demand would not establish an offence under Sections 7 as well as 13(1)(d)(i) and (ii) of the Act. It has been propounded that in the absence of any proof of demand for illegal gratification, the use of

corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. The proof of demand, thus, has been held to be an indispensable essentiality and of permeating mandate for an offence under Sections 7 and 13 of the Act. Qua Section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under Section 7 and not to those under Section 13(1)(d)(i) and (ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under Section 20 of the Act would also not arise.

21. In the present case, this Court is required to scrutinize the evidence to ascertain whether there is proper, reliable and cogent evidence beyond reasonable doubt to confirm the judgment and sentence awarded by learned trial Court. If there is no such evidence on record, in that event, the conviction cannot be sustained as the onus lies on the prosecution to prove its case beyond reasonable doubt.

22. In the backdrop of the aforesaid factual

position, this Court has minutely gone through the impugned judgment and order as well as the depositions of the witnesses in light of the rival submissions made by learned advocates for both the sides. In corruption cases, as laid down in the series of judgments by the Honourable Apex Court as well as by this Court, three vital ingredients are required to be established by the prosecution beyond reasonable doubt in order to prove the offence as alleged. Recently, the Honourable Apex Court has made it clear that the proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)

(i) and (ii) of the Act and in absence thereof, unmistakably the charge therefor, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. Precisely, failure of the prosecution to prove demand for illegal gratification would be fatal and mere recovery of amount from the person of the accused of the offence under sections 7 or 13 of the Act would not entail his conviction thereunder. In view of the aforesaid principle laid down by the Honourable Apex Court, so far as present case is concerned, the prosecution could not examine the complainant as he expired pending the trial and, therefore, as alleged by the prosecution that the accused raised pre-demand on

9.3.1992 and 15.3.1992 could not be proved for want of evidence of the complainant. So far as instant demand at the time of trap is concerned, as the complainant could not be examined, the case of the prosecution rests upon the sole evidence of panch No.1 who accompanied the complainant at the time of trap and on evaluation of his evidence, nowhere he has uttered any word that any of the accused has ever demanded any sort of illegal gratification. On the contrary, the evidence of Panch No.1 discloses that upon entering the chamber of accused No.1, he took his seat in front of accused No.1 and thereafter the complainant on his own thrust the money on the table which was lying there. In this view of the matter, element of predemand, demand or instant demand for illegal gratification is missing. Not only that, but neither panch No.1 nor panch No.2 who were party to participate in the trap had not identified any of the accused before learned trial Court and therefore even identification of the accused is not proved.

23. One another disturbing feature comes out from the Record and Proceedings of the case is regarding the fact that the Police Inspector has assumed all roles right from the stage of recording the complaint, arranging trap as well as members of raiding party, carrying out investigation till filing of the chargesheet. This course of action goes against the basic

tenets of criminal jurisprudence and fair investigation. The credibility of the case of the prosecution becomes suspicious on this count only. In the facts of the present case, the status of the investigating officer could not be placed on any pedestal higher than of a complainant and the complainant himself cannot be the sole agency of investigation. There should be no occasion to suspect fair and impartial investigation. The said view is fortified by the decision of the Honourable Apex Court in the case of "Bhagwan Singh vs State of Rajasthan" reported in AIR 1976 SC 985, followed by this Court in the case of Kanubhai Kantibhai Patel vs State of Gujarat, reported in 1998 (1) GLH 924 as well as in the case of Gopal Lal Ghisulal Chhipa (supra). Therefore, in this case, the prosecution case suffers from the aforesaid basic infirmity which itself is sufficient to vitiate the whole investigation and accordingly the whole proceedings based on such investigation deserves to be quashed and set aside

on this count only.

24. In view of the above discussion, the following final order is passed. Criminal Appeal No.887 of 2005 filed by accused No.1 is allowed. The impugned judgment and order dated 29.4.2005 passed by learned Special Judge and Additional Sessions Judge, 3rd Fast Track Court, Rajkot at Morbi in Special ACB

Case No.5 of 1997 is quashed and set aside. The appellant - accused No.1 is acquitted of the charges levelled against him. Fine, if any, paid by him be refunded to him. Criminal Appeal No.316 of 2006 filed by the State of Gujarat is hereby dismissed. Record & Proceedings, if any, be sent back to the trial Court concerned forthwith.

25. In view of the above order, Criminal Misc. Application No.33321 of 2016 does not survive and the same stands disposed of accordingly.