(2017) 08 BOM CK 0207

In the Bombay High Court

Case No : 50 of 2002

Baliram s/o Mansingh Chawhan	APPELLANT
Vs	
State of Maharashtra through the Anti Corruption Bureau, Akola	RESPONDENT

Date of Decision : 18-08-2017

Acts Referred:
Indian Penal Code, 1860, Section 165A - .
Prevention of Corruption Act, 1988, Section 20, Section 7, Section 13(2), <a href=6460-

Citation : (2017) 08 BOM CK 0207

Hon'ble Judges : Rohit B. Deo

Bench : SINGLE BENCH

Advocate : A.S. Mardikar, T.U. Tathod, H.D. Dhumale

Final Decision : Allowed

Judgement

1. The appellant seeks to assail judgment dated 19.01.2002 in Special Case 3/1998 delivered by Special Judge, Washim, by and under the appellant is convicted for offences punishable under sections 7, 13(1)(d) read with section 13(2) of the Prevention of Corruption Act, 1988 and is sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.1000/.

2. Heard Shri A.S. Mardikar, the learned Senior Counsel for the appellant and Shri H.D. Dhumale, the learned Additional Public Prosecutor for the respondent/ State. Prosecution Case

3. The complainant Sk. Jafar and one Narayan Somatkar had a verbal alteration on 30.01.1998 and on 31.01.1998 both lodged complaints against each other with Police Station Shirpur. Appellant (herein referred to as "the accused"). Baliram, then attached to the Police Station Shirpur as Police Head Constable was enquiring into the said complaint. On 05.02.1998, accused Baliram demanded

illegal gratification of Rs.4000/from the complainant in the presence of Mukinda accused 2. The bribe amount was scaled down to Rs.1000/and accused Baliram agreed to accept the said amount through accused Mukinda on 07.02.1998.

4. On 07.02.1998 the accused accepted Rs.450/through accused Mukinda as part payment and agreed to accept the remaining amount of Rs.550/through Mukinda (Mukinda the Police Patil of village Ghata was arrayed as accused 2 in the trial, was convicted along with the accused Baliram, had preferred Criminal Appeal 88/2002 which has however, abated since Mukinda the original accused 2 is dead).

5. On 03.03.1998 Mukinda demanded Rs.550/from the complainant on behalf of accused Baliram and agreed to accept the same at Shirpur on 04.03.1998.

6. The complainant was unwilling to pay bribe of Rs.550/and approached the Anti Corruption Bureau (A.C.B.), Akola and lodged oral report (Exh.26) against both Baliram and Mukinda. The A.C.B. made elaborate preparation to trap the accused, panchas were summoned, the complainant and the panchas were given the demonstration of the phenolphthalein powder and sodium carbonate solution test and were explained the standard operating protocol. The trap party including the panchas and the complainant proceeded to Shirpur by government vehicle and reached at 12:30 p.m. or thereabout. The government vehicle was stopped near Darga at Shirpur. The complainant and the shadow panch Digamber proceeded towards Police Station Shirpur and were followed by the raiding party at some a distance.

7. The version of the prosecution is that the accused were successfully trapped at 05:00 p.m. on 04.03.1988. The tainted currency notes were recovered from accused Baliram. The sodium carbonate test was positive. Further investigations were done. The statutory sanction was obtained from the authority competent to remove the accused Baliram and chargesheet against both Baliram and Mukinda was presented before the Special Judge. The Special Judge framed charge at Exh.11, the accused pleaded not guilty and claimed to be tried. The defence of the accused, in support of which defence witnesses have been examined, is that on the date of the incident Mukinda had repaid to the accused a hand loan and that the accused Baliram did accept the currency notes from his coaccused Mukinda, but then not as illegal gratification, but as refund of the loan which he had extended to Mukinda a few days prior to the incident. These are are broad contours of the prosecution case. Submission

8. The learned Senior Counsel would urge that the prosecution has miserably failed to prove, much less beyond reasonable doubt that the accused Baliram demanded illegal gratification, which demand is sine quo non for constituting offences punishable under the provisions of the Prevention of Corruption Act, 1988 (''Act'' for short). The learned Senior Counsel would urge, that the acceptance of the currency notes by the accused from Mukinda (accused 2) is not in dispute. However, the currency notes were not accepted as illegal

gratification and the acceptance were as refund of the loan extended by Baliram to Mukinda prior to the incident. The learned Senior Counsel would urge arguendo, that even otherwise acceptance of the tainted currency notes pales into insignificance if the prosecution is not in a position to prove demand of illegal gratification beyond reasonable doubt. The learned Senior Counsel would further urge that although accused Baliram was under no burden in the eyes of law to examine witnesses in defence, defence witnesses were examined to probablize the defence that the acceptance of the currency notes were towards refund of the hand loan. The learned Senior Counsel would urge, relying on the dictum of the Hon''ble Supreme Court in Dudh Nath Pandey vs. State of U.P. AIR 1981 SC 911, that defence witnesses are entitled to equal treatment with the prosecution witnesses. The learned Senior Counsel invites my attention to the observation of the Hon''ble Supreme Court that the Court ought to overcome their traditional, instinctive disbelief in defence witnesses. He would urge that the reasoning of the learned Special Judge for not accepting the testimony of defence witnesses is no reasoning in the eyes of law. He would urge, that the only burden on the accused was to probablize the defence on the touchstone of preponderance of probabilities.

9. The learned Senior Counsel would rely on the judgments of the Hon''ble Supreme Court in Mukhtiar Singh (Since Deceased) through his L.R. vs. State of Punjab, 2017(7) Scale 702 and P. Satyanarayana Murthy vs. State of Andhra Pradesh (1992) 4 SCC 39 and B. Jayaraj vs. State of A.P. 2014 All SCR 1619 to contend that irrefutable proof of decisive demand is a condition precedent for bringing home charge under the provisions of the Act and that neither possession nor recovery of currency notes without proof of demand can constitute offence under the Act.

10. The learned Senior Counsel also invites my attention to the judgment of the Hon''ble Supreme Court in Pannalal Damodar Rathi vs. State of Maharashtra, 1988 SCC (Criminal) 121 and further contends that the evidence of the complainant and the panchas must be closely scrutinized since they are partisan witnesses in the sense that they are vitally interested in the success of the trap. The learned counsel would urge that the complainant is an accomplice in view of the introduction of section 165A in the Indian Penal Code and his testimony cannot be on a better footing than that of an accomplice. He would further urge that an accused under the Act cannot be treated differently from an accused under any other penal law. An accused under the Act is presumed to be innocent till the demand and acceptance of illegal gratification is proved beyond reasonable doubt. Reliance is placed on A. Subair vs. State of Kerla (2009) SCC Vol.6 587.

11. The learned A.P.P. would submit that the prosecution has conclusively established demand for illegal gratification. The acceptance of the tainted currency notes is not in dispute and would corroborate the evidence on demand. The learned A.P.P. would submit that the learned Special Judge was justified in

discarding the testimonies of the defence witnesses. The learned A.P.P. would urge that the judgment impugned does not suffer from any error, factual or legal. Consideration

12. P.W.1 states in the examinationinchief that accused 2 Mukinda conveyed to him that accused Baliram had demanded Rs.4000/for not initiating any action pursuant to the complaint lodged by Narayan. P.W.1 states that this demand conveyed through Mukinda was four days after P.W.1 attended Police Station Shirpur on 05.02.1988 and the accused Baliram recorded his statement. P.W.1 states that he agreed to pay Rs.1000/to accused and that it was decided between P.W.1 and accused Mukinda that the amount shall be paid to accused Baliram on Saturday. He further states that he went to Police Station Shirpur on Saturday, Police Patil Mukinda met P.W.1 in the premises of Police Station at 04:00 p.m. and enquired whether the amount of Rs.1000/was brought. P.W.1 further states that he told Mukinda that he was having only Rs.450/. P.W.1 states that he paid Rs.450/to Mukinda. P.W.1 states that after a month accused Mukinda again demanded the remaining amount of Rs.550/and P.W.1 told Mukinda that he would paid Rs.450/on 04.03.1988 in Police Station Shirpur. P.W.1 states that he was not willing to pay Rs.550/and lodged complaint with A.C.B. The P.W.1 deposes that on 05.02.1998 accused Baliram personally did not demand any amount from P.W.1. The P.W.1 was declared hostile and crossexamined by the A.P.P. on behalf of the prosecution. P.W.1 was subjected to extensive and searching crossexamination. However, P.W.1 did not support the prosecution on the role of accused Baliram and steadfastly continued to assert that Baliram did not make any demand of illegal gratification.

13. The shadow panch Digamber Bendre is examined as P.W.2. He asserts that accused Mukinda met the complainant and the shadow panch on the date of the trap, accused Mukinda asked the complainant whether he had brought the money and then on receiving an affirmative answer, accused Mukinda asked the complainant to accompany him to the house of accused Baliram for payment of the bribe amount. P.W.2 states that he and the complainant went to the house of accused Baliram at 01:00 p.m. The accused Baliram asked the complainant if he has brought the amount, the complainant told Baliram that he had indeed, brought the amount and requested Baliram not to arrest him after receiving the amount. P.W.2 further states that the accused Baliram told the complainant that he will not be arrested after receiving the amount. The P.W.2 states that Baliram asked the complainant and P.W.2 to wait at the hotel of one Pathan and that he will come there after having meal. P.W.2 states that it was only at 04:30 p.m. that along with the complainant went to the hotel. Accused Baliram and Mukinda were having tea. The complainant sat on the bench near Mukinda and P.W.2 shadow panch stood near them. P.W.2 further deposes, that complainant also had tea, the accused Baliram asked the complainant whether he has brought the amount, the complainant told Baliram that yes he has brought the amount and requested Baliram not to arrest him after taking the amount and accused Baliram assured the complainant that on receiving the amount he shall not arrest the

complainant. P.W.1 further states that accused Baliram asked the complainant to pay the amount to accused Mukinda. The complainant handed over the tainted currency notes to Mukinda, who accepted the said amount and thereafter handed over the tainted currency notes to accused Baliram. The amount was accepted by Baliram and kept in his right side pocket of his shirt. The predetermined signal was given and the raiding party rushed to the spot and apprehended Baliram and Mukinda.

14. The defence witnesses: D.W.1 is Vilas Tajne who was then attached to Police Station Shirpur as Writer to Baliram. D.W.1Vilas Tajne deposed that Mukinda was habituated to taking hand loan from the staff of Police Station Shirpur and had taken hand loan from accused Baliram many times. D.W.1 states that on 04.03.1988 he accompanied accused Baliram to village Karanji and Malegaon for execution of nonbailable warrant and the relevant station diary entry is at serial 16 dated 04.03.1988. He deposes that he and Baliram left Police Station Shirpur at 09:00 a.m. and returned at 04:30 p.m. D.W.2 is Mansoor Ali Khan who is the owner of the hotel within the premises of which the accused were allegedly trapped. D.W.2 states that the complainant had requested him for hand loan in February, 1998 for medical treatment of the brother of the complainant one Sk. Ahmed. Mukinda was present in the hotel at that time. P.W.2 deposes that he expressed inability to extend the loan amount and told the complainant to request Mukinda for hand loan. Mukinda conveyed to the complainant that although he did not have any money, he will arrange the loan from the Police staff. D.W.2 has deposed that 2 to 3 weeks after the said conversation, both Mukinda and the complainant came to the hotel, Mukinda asked the complainant for refund of hand loan and the complainant refunded the amount of hand loan. D.W.2 further deposes that thereafter Baliram and Police ConstableTajne came on motorcycle, Baliram came inside the hotel and asked Mukinda for refund of the hand loan and the money was handed over by Mukinda to Baliram. The defence evidence has been brush aside by the learned Sessions Judge, and I am afraid for reasons not entirely satisfactory. In paragraph 34 of the judgment, the learned Sessions Judge observes that since D.W.1Vilas Tajne and D.W.2Mansoor Ali Khan are cited at prosecution witnesses, it can safely be inferred that they are won over by accused Baliram. This is the only reason given by the learned Special Judge to hold that the defence evidence does not inspire confidence. The approach of the learned Special Judge is the very approach which the Hon''ble Apex Court has cautioned Courts not to adopt, i.e. not to view defence evidence with instinctive disbelief.

15. The complainant has not supported the prosecution. The two defence witnesses have more than probablized the defence on the touchstone of preponderance of probabilities. The version of the shadow panch is absolutely uncorroborated and is not trust worthy on material aspects. It is difficult to believe that accused Baliram would ask the complainant and the shadow panch to bring the bribe amount to the hotel of Pathan and then, the shadow panch and the complainant would go to the said hotel only at 04:30 p.m. Firstly, according

to the shadow panch at 01:00 p.m. or thereabout both he and the complainant went to the residence of accused Baliram and told him that the complainant had brought the money. If this is the version, it is difficult to believe that Baliram did not accept the illegal gratification then there and told P.W.1 and P.W.2 that he would come to the hotel after having meals and the bribe amount should be paid there and then, the version of the shadow panch that the complainant and the shadow panch went to the hotel only at 04:30 p.m. is hardly confidence inspiring. I am not persuaded to hold, on the basis of the uncorroborated and untrustworthy evidence of the shadow panch, that the prosecution has proved the demand much less proved beyond reasonable doubt. The learned Sessions Judge has held that the accused have not rebutted the presumption under section 20 of the Act. The learned Sessions Judge fell in serious error in so holding. In the absence of proof of demand of illegal gratification, there is no scope for the statutory presumption under section 20 to come into play. The view taken by the learned Sessions Judge militates against the settled legal position. The prosecution evidence on both demand and acceptance of illegal gratification, is not confidence inspiring and in my opinion, to base the conviction on such evidence would be most unsafe and hazardous.

16. In the light of the discussion and findings recorded supra, the appeal is allowed. The judgment impugned delivered by the Special Judge, Washim on 19.01.2002 in Sessions Case 3/1998 is set aside. The appellant is acquitted of the offences punishable under sections 7, 13(1)(d) r/w 13(2) of the Prevention of Corruption Act, 1988. His bail bond shall stand discharged. Fine paid, if any, by the appellant shall be refunded to him. The appeal is disposed of accordingly.