

(2012) 02 GUJ CK 0071
In the Gujarat High Court
Case No : Criminal Appeal No. 582 of 2003

Bhaskar Ramchandra Patil	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 21-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Prevention of Corruption Act, 1988 — Section 13(2), 20, 4, 7

Citation : (2012) 02 GUJ CK 0071

Hon'ble Judges : Rajesh H Shukla, J

Bench : Single Bench

Advocate : Dilbur Contractor for Mr. P.R. Nanavaty 1, for the Appellant; H.L. Jani, APP for Respondent 1, for the Respondent

Judgement

1. The present Criminal Appeal is directed against the judgment and order passed in Special Case No. 12 of 1998 by the learned Special Judge, City Civil and Sessions Court, Ahmedabad dated 17.4.2003 recording conviction of the Appellant - Original Accused for the offence u/s 7 as well as 13(2) of the Prevention of Corruption Act (hereinafter referred to as "the Act") imposing RI for 1 1/2 years and fine of Rs. 2500/- for the offence u/s 7 of the Act and also imposing RI for 2 1/2 years with fine of Rs. 2500/- for the offence u/s 13(2) of the Act and in default RI for 2 months. The facts of the case briefly summarized are that PW-1 - Ramasankar Rajaram Gupta was working as loading rickshaw driver, and a decoy trap was arranged, where the accused is said to have demanded illicit gratification for allowing the rickshaw to be plied without license and also carrying the scooter in rickshaw. It is also the case of the prosecution that the accused stopped the vehicle and thereafter inquired as to whether the PW-1 is having the license or else he will have to pay the fine. Thereafter, when it was stated to him that he does not have the license, the accused is said to have demanded Rs. 25/- towards the illicit gratification for allowing him to go. PW-1 is said to have offered Rs. 20/- which the accused is said to have stated "lav" and thereby accepted. Raiding party in the meanwhile came there and the

panchnama was prepared for recovery of the currency notes tainted with anthracene power.

2. Thereupon a complaint was lodged with ACB, Ahmedabad, on the basis of which it has been registered as Special Case No. 12 of 1999 and the learned Special Judge, City Civil and Sessions Court, Ahmedabad after framing the charges proceeded with the trial.

3. After recording of the evidence of the prosecution witnesses was over, the learned Special Judge also recorded further statement of the accused u/s 313 of the Criminal Procedure Code.

4. After hearing the learned APP as well as learned Advocate for the defense, the learned Special Judge recorded the conviction of the accused as stated hereinabove for the offences as stated above. It is this judgment, which has been assailed on the ground inter alia set out in detail in the memo of Appeal contending that the learned Judge has failed to appreciate the material and evidence on record with regard to the demand. It has been specifically contended that the version of the prosecution has not been supported or corroborated by PW-1 who is an independent witness and he has turned hostile. It has been also contended that the learned Special Judge has failed to appreciate the fact that the amount was offered towards fine, which was accepted, and thereupon, no time was left for him to prepare the receipt, and therefore, the presumption could not have been made that it was by way of illicit gratification or the bribe. It is also contended that the court below has failed to appreciate the material and evidence on record, and the omissions in the evidence with regard to this material aspect, failed to establish the necessary ingredients for the offence, namely the demand, which is an essential ingredient for recording the conviction of the offence under the Act.

5. Herd learned Advocate Mr. P.R. Nanavaty for the Appellant - Original Accused. He referred to the testimony of PW-1 and submitted that as can be seen from his evidence, he has not at all supported the prosecution case. He pointedly referred to the testimony of PW-1 and submitted that he has on the contrary denied even the suggestion that there was any such incident or he has accompanied or there was any demand or acceptance. He submitted that the other witnesses are interested witnesses. Learned Advocate Mr. Nanavaty submitted that as is evident from the evidence, the panch witness was brought from the office of the Charity Commissioner, which is admittedly at a distance of about 10 kmts. though there was other offices. He therefore strenuously submitted that the panch witness was selected, who is experienced and trained in such matters as he has been panch witness earlier also. Learned Advocate Mr. Nanavaty therefore submitted that he was an interested witness and the trapping officer had himself selected him, as admittedly stated by the trapping officer in his testimony.

6. Learned Advocate Mr. Nanavaty submitted that if the evidence is scrutinized closely, what transpired between the accused and the PW-1, would be relevant

and the conversation could not have been heard by other witnesses like the I.O. He therefore submitted that the prosecution has not been able to establish beyond reasonable doubt the essential ingredients of demand inasmuch as PW-1, who is an independent witness, has not supported the prosecution version. Moreover, PW-2 has stated that after they were stopped, the accused had demanded license for verification, and when he has stated that he does not have, it was stated to him about the fine, and thereafter demand is said to have been made for Rs. 25/-, which ultimately settled at Rs. 20/-. Learned Advocate Mr. Nanavaty submitted that this version or the theory cannot be accepted as it could have taken some time, and it is also possible that the amount which was accepted was towards the fine, but the accused was not given any time to prepare any receipt. He submitted that before he could prepare any receipt, for which he was having the receipt book, the raiding party came there and arrested. He pointedly referred to the statement of the accused in support of his submission. Therefore, learned Advocate Mr. Nanavaty submitted that, as there is no evidence of an independent witness regarding demand, which is an essential ingredient, the Appeal may be allowed.

7. Alternatively, learned Advocate Mr. Nanavaty submitted that the benefit of doubt deserves. He also submitted that it would result in some kind of economic death penalty, and therefore, at least the sentence may be reduced.

8. In support of his submission, learned Advocate Mr. Nanavaty has referred to and relied upon the judgment of the Hon'ble Apex Court in case of C.M. Girish Babu Vs. CBI, Cochin, High Court of Kerala, and submitted that the demand is not established, and mere recovery of tainted currency notes would not be sufficient and it cannot be said to be a substantial evidence. The Hon'ble Apex Court in paragraph 22 has observed:

22. It is equally well settled that the burden of proof placed upon the accused person against whom the presumption is made u/s 20 of the Act is not akin to that of burden placed on the prosecution to prove the case beyond a reasonable doubt.

4. It is well established that where the burden of an issue lies upon the accused he is not required to discharge that burden by leading evidence of proof his case beyond a reasonable doubt. That is, of course, the test prescribed in deciding whether the prosecution has discharged its onus to prove the guilt of the accused; but the same test cannot be applied to an accused person who seeks to discharge the burden placed upon him u/s 4 under the Prevention of Corruption Act. It is sufficient if the accused person succeeds in proving a preponderance of probability in favor of his case. It is not necessary for the accused person to prove his case beyond a reasonable doubt or in default to incur verdict of guilt. The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. As soon as he succeeds in doing so, the burden shifts to prosecution which still has to discharge its original onus that never shifts, i.e.; that of establishing on the whole case the guilt of the accused beyond

a reasonable doubt.

(Emphasis supplied)

(See V.D. Jhingan v. State of U.P. at AIR 1764, para 4)

9. Learned Advocate Mr. Nanavaty therefore submitted at the cost of repetition that the amount which was received may not be towards the bribe or illicit gratification when it is not corroborated by an independent witness PW-1 coupled with the fact that he was having the receipt book with him. He therefore submitted that the present Criminal Appeal may be allowed.

10. Learned APP Mr. H.L. Jani submitted that the evidence on record clearly established the necessary ingredients for the offence, i.e. demand, acceptance and recovery from the accused. Learned APP Mr. Jani has referred to the papers and submitted that as could be seen from the testimony of PW-2 panch witness he has clearly stated as to what has it was present as to what has transpired. He pointedly referred to his testimony and submitted that the tainted currency notes have been admittedly recovered from the accused. There is also specific evidence as to what has transpired and he has stated that when they were passing, the accused had stopped the rickshaw and inquired as to whether the driver (Gupta) had a license. When it was stated that he does not have the license, the accused is said to have asked for fine and demanded Rs. 25/-. Thereafter, when it was suggested that instead of Rs. 25/-, the driver (Gupta) would offer Rs. 20/-, the accused is said to have "lav" and accepted the tainted currency notes and put it in his pocket when the signal was given. In the panchnama (Exh.19) it is corroborated and it has been specifically emphasized that initially though he had asked for fine, it was suggested that if the driver (Gupta) is not inclined to pay the fine, he has to pay Rs. 25/-. Thereupon, when the driver (Gupta) had suggested for Rs. 20/-, the accused is said to have stated "lav" and accepted the same. Therefore, learned APP Mr. Jani submitted that in light of this clear evidence with regard to the demand and acceptance, the submissions made by the defense may not be accepted and the present Appeal may not be entertained.

11. Learned APP Mr. Jani submitted that the submissions made by learned Advocate Mr. Nanavaty for the defense that the amount was offered towards fine, and before he could prepare the receipt he was cornered and arrested, and therefore, he could not give the receipt, cannot be accepted. Learned APP Mr. Jani submitted that the talk was about fine, then he had demanded Rs. 20/-. He submitted that if it was a fine, it would have been higher amount and the receipt would have been prepared first. Learned APP Mr. Jani submitted that these submissions have been made at this stage, which have not been advanced at all either at the time of recording the statement u/s 313 of Cr.P.C. or at the time of the arguments or submissions before the learned Special Judge. He referred to the statement u/s 313 of Cr.P.C. and submitted that infact there is no such reference, on the contrary it has been claimed that due to animosity, he has been falsely implicated, but he has not claimed that he has accepted the money

towards fine and was about the prepare receipt. Therefore, learned APP Mr. Jani submitted that such submissions which have not been there and which have never been raised during trial, cannot be accepted in the present Appeal at this stage.

12. In view of the rival submissions, it is required to be considered whether the present First Appeal can be entertained or not.

13. As could be considered, the main emphasis of submissions made by learned Advocate Mr. Nanavaty is that there is no acceptance, and infact, when he was preparing the receipt, he was arrested, is required to be considered. In order to appreciate this submission, the scrutiny of evidence is necessary inasmuch as testimony of PW-2 at Exh.17 read with the panchnama at Exh.19 which clearly reveal as to what had transpired. The panch witness - PW-2 in his testimony at Exh.17 has clearly stated that the accused stopped the vehicle (rickshaw) and had inquired about the license from the driver (Gupta), and when he stated that he does not have the license, initially it was a talk about fine, but then the accused is said to have stated that if the driver (Gupta) is not inclined to pay fine he may have to pay Rs. 25/- to him. Thereafter, the driver is said to have offered Rs. 20/- and the accused is said to have stated "lav" and accepted it and pocketed it. This clearly suggest about the demand as well as acceptance. As a matter of fact the reliance placed by learned Advocate Mr. Nanavaty for the Appellant referring to the judgment of the Hon''ble Apex Court in case of C.M. Girish Babu v. CBI, Cochin, High Court of Kerala (supra) that mere recovery of tainted currency notes from the accused by itself would not be sufficient, is required to be considered in background of the facts of the case. It is required to be mentioned that the Hon''ble Apex Court in catena of judicial pronouncements, including the judgment in case of State of A.P. Vs. P. Satyanarayana Murthy, has clearly made the observations that recovery of tainted currency notes from the person of the accused and / or acceptance would be sufficient to raise the presumption u/s 20 of the Act and the submission made by learned Advocate Mr. Nanavaty that there was no demand at all, cannot be readily accepted. Further, once this provision of Section 20 of the Act is attracted, the burden would shift on the accused to offer plausible explanation. As rightly submitted by learned APP Mr. H.L. Jani referring to further statement u/s 313 of Cr.P.C., there is not a whisper about defense or the submissions which are sought to be canvassed at this stage in the Appeal. In the further statement recorded u/s 313 of Cr.P.C., the accused is said to have stated about the animosity and he has never pleaded that he was in the process of preparing the receipt for fine, and before he could do so, he was arrested. Infact, if it was a fine, the amount would have been higher and not merely Rs. 20/-. Again if that is so, he would have stated in his further statement recorded u/s 313 of Cr.P.C. when an opportunity is provided, but when he has not even made any mention, it is difficult to accept such submission in the Appeal raised for the first time.

14. A useful reference can be made to the judgment of the Hon''ble Apex court in

case of State of Andhra Pradesh Vs. T. Venkateswara Rao, , wherein it has observed that, once the demand and acceptance is established and the tainted currency notes are recovered from the accused, the presumption would be attracted unless there is plausible explanation.

15. A useful reference can also be made to the judgment of the Hon''ble Apex court in case of State of A.P. Vs. P. Satyanarayana Murthy, , referring to the aspect of presumption u/s 20 of the Act, and it has emphasized the word "shall be presumed". In other words it is a statutory presumption which is required to be drawn once the tainted currency notes are recovered unless the plausible explanation is offered. In the facts and circumstances, as there is no such explanation is offered, the present Appeal cannot be entertained.

16. Moreover, the contentions which have been raised with regard to the quantum of sentence, are required to be appreciated.

17. In the background of the facts and circumstances, though the court is not inclined to interfere with the findings and the conclusions arrived at, only by way of indulgence and considering the facts and the passage of time, the aspect of sentence could be substituted and modified to the extent that instead of sentence of 2 1/2 years, which has been imposed for the offence u/s 13(2) of the Act could be substituted and modified as sentence of 1 1/2 years u/s 13(2) of the Act and which has to run concurrently with the sentence of 1 1/2 years imposed for the offence u/s 7 of the Act.

18. Therefore, the court is not inclined to interfere with the impugned judgment and order recording conviction for the alleged offences. However, the sentence as stated is modified. The Appellant accused who is on bail is granted 4 weeks time to surrender.