
(1991) 01 AHC CK 0006
In the Allahabad High Court
Case No : Criminal Appeal No. 1671 of 1983

Bhav Nath Upadhyay	Vs	APPELLANT
State of Uttar Pradesh		RESPONDENT

Date of Decision : 29-01-1991

Acts Referred:

Penal Code, 1860 (IPC) — Section 161, 21
Prevention of Corruption Act, 1947 — Section 4, 5(2)

Citation : (1991) 15 ACR 258

Hon'ble Judges : K. Narayan, J

Bench : Single Bench

Advocate : N.N. Singh, for the Appellant;

Judgement

K. Narayan, J.—By a judgment and order dated 18-7-1983, the Appellant Bhav Nath Upadhyay has been found guilty of the offences u/s 161 IPC and Section 5(2) of the Prevention of Corruption Act in a Special Trial No. 6 of 1981 by the III Additional Sessions Judge, Bijnor. He has been sentenced to 6 months" R.I. and a fine of Rs. 200/- and in default further R.I. of one month under each count.

2. Sri Bhav Nath Upadhya was working as a public servant, Education Superintendent in the Nagar Chhetra of Bijnor on 19-1-1978. There was a teacher under the Basic Shiksha Scheme, namely, Ram Prakash Sharma. According to the prosecution version on 19-1-1978 Sri Ram Prakash Sharma complained to the District Magistrate, Bijnor that Sri Bhav Nath Upadhya was demanding illegal gratification which he was not willing to pay and consequently after getting his statement recorded by Sri C.S. Bakshi, Extra Magistrate, a trap was laid with the help of Sri Som Dutt Tyagi, Vigilance Inspector. The application to the District Magistrate conveyed that Sri Upadhya had asked for payment of Rs. 100/- is a hotel at about 5 p.m. and accordingly the arrangement of trap was made in the form that the Vigilance Inspector Sri Som Dutt Tyagi along with few constables reached there and soiled the notes with phenolphatbalein powder and tallied the number thereof which had already been noted by the Magistrate Sri

Bakshi. The facts as proved were that at the proper time that is at about 5 p.m. Sri Upadhya reached the hotel and sat there and then asked Sri Ram Prakash Sharma who was already there, if the arrangement had been made, whereupon Sri Ram Prakash Sharma gave him two fifty rupees currency notes which he accepted in the left hand and said that now the job will be done. In the meanwhile, Vigilance Inspector and the witnesses came out from the rear portion of the hotel and arrested the accused Appellant.

3. The prosecution in the case had examined (PW 2) Som Prakash, the proprietor of the hotel, (PW 3) Ram Prakash Sharma, (PW 4) Nand Ram, a servant of the hotel and (PW 5) Som Dutt Tyagi as witnesses of the occurrence in the hotel. The other witnesses were (PW 1) Rameshwar Dayal Mehrotra to prove certain occasions in the department and office itself. Sri Mathur was also Education Superintendent Nagar Palika and has proved the letter dated 10-1-1987 which has been discussed below. (PW 3) Prithvi Raj Chauhan has accorded sanction for prosecution of the accused. He was an Adhyaksh of the Basic Siksha U.P., Lucknow. (PW 7) R.N. Singh and (PW 8) Ram Autar Singh had investigated the case at different stages. The trial court after discussing the same recorded the findings of guilt.

4. In order to properly appreciate the issue, that is the demand of illegal gratification, the relevant circumstance obtaining in the office of Basic Siksha Adhikari have to be borne in mind. The entire facts have not been made available to the court which may be for a simple reason that at least one of the persons in the office was under the prosecution and the others could not have been of helpful attitude for Ram Prakash Sharma. Even then whatever is made out, establishes a picture not happy for the department itself. The story of Ram Prakash Sharma as mentioned in his application dated 19-1-1978 Ext-Ka 5 was that he had been transferred from the school in police lines to another school at Shambha by a letter dated 11-4-1977 Ext. Ka-13. Of course he has mentioned in the letter that he was desirous of getting his transfer back to police lines and for that purpose a demand of Rs. 500/- was made but the prosecution seems to have taken a stand which could be more helpful to Sri Upadhya that in fact the order of promotion in favour of Ram Prakash Sharma indirectly shown by Ext. Ka-12 dated 30-6-1975 was forged one and he wanted that this situation be hushed up and for that matter he was persuading the accused to accept something. This situation is not well made out and is rather dislodged. (PW 1) Rameshwar Dayal Mehrotra was examined to prove his letter dated 10-1-1978 Ext. Ka-1 which had desired Sri Bhav Nath Upadhya to take back the letter of appointment of Ram Prakash Sharma. It is also shown that in obedience Sri Bhav Nath Upadhya had obtained the original letter and given the receipt in the form of a copy which is Ext. Ka-12. It has also been attempted to be shown by the prosecution witnesses themselves obviously to help the accused that this letter was a forgery. Possibly some other signatures of Ram Prakash Sharma had also been obtained on that account. However, there could not be any explanation of another factor. Even if, this letter of 30-6-1975 was forged, how the department

had acted upon it in issuing a transfer letter dated 11-4-1977 Ext. Ka-13 describing the informant Ram Prakash Sharma as a person in the relevant scale. It is rather inconceivable that a person is asking for a scale and he is admitted to be in that scale in the letter Ext. Ka-13 and yet the departmental officer is asking for information as to how and under whose authority those posts were created and promotions were made. It has been stated by Sri Rameshwar Dayal (PW 1) that he had been the member of the committee which used to direct promotion etc. and despite that he did not know how and if the promotion was made and apart from that instead of looking into his records he wanted to get hold of the letter of promotion. The original letter which is shown to have been filed in a criminal case has been disowned by Ram Prakash Sharma when he was in the witness box. This simply indicates that the contentions put forward by Ram Prakash Sharma in his other letters, of which Ext. Ka-9 is one, were not absolutely unfounded and possibly other departmental officers were also with Sri Bhav Nath Upadhyaya who unfortunately has been the sole victim.

5. The defence contention has been, as already said above, that there was actually no demand and since Ram Prakash Sharma desired to get his mischief hushed up, he falsely implicated the accused by arranging the trap and then put the money in his pocket despite the protest of Sri Bhav Nath Upadhyaya. This has been suggested to (PW 2) Som Prakash as well as (PW 4) Nana Ram the two persons of hotel. Both of them had given such a statement in the examination-in-chief itself but were declared hostile and it was also suggested to them that they desired some gratification from Ram Prakash Sharma in order to give proper statement. Be it whatever it may be, the evidence of such persons would not in any case support the contention of the accused as they could not be said to be reliable persons. Apart from the statements made by them, there is one factor that Sri Bhav Nath Upadhyaya had reached the hotel at the relevant time which had already been declared by Ram Prakash Sharma in his application to the Magistrate and he could not have known the visit of Bhav Nath Upadhyaya in the hotel unless it was so fixed. It was attempted to be argued during the course of arguments before this Court that Bhav Nath Upadhyaya had gone there for his food but it was never stated by any witness that he was taking his food regularly in that hotel. If it was not a regular affair, the visit to that hotel having been known to Ram Prakash Sharma, would be a clinching factor. In any case, why should Ram Prakash Sharma tell a lie against Bhav Nath Upadhyaya. A person may think of a false prosecution, a false oath, to achieve something or to avenge something that had happened. In the instant case, there was no question of revenge as even if Sri Bhav Nath Upadhyaya was proceeding against Ram Prakash Sharma in avoiding his transfer, there could be no occasion for a false prosecution and obviously no purpose could be achieved by bringing this prosecution. He has simply invited wrath of the entire department by ringing the same. We see no reason to disbelieve him or (PW 5) Som Dutt Tyagi. It is material to note here that Sri Som Dutt Tyagi was not a person interested in prosecution like any other police officer but was a deputed person to remain in evidence in the laying of a

trap.

6. However, there is one factor which comes to the rescue of accused Appellant. This again in the nature of another omission on the part of the prosecution as a material piece of evidence has been at least inadvertently left to be led. Though it was mentioned in the application dated 19-1-1978 that there was a demand of illegal gratification on the part of Sri Bhav Nath Upadhyaya with all purpose and acceptance those facts have not been stated by (PW 3) Ram Prakash Sharma. The fact of this omission is to be seen in the light of Section 161 IPC which reads as under:

Whoever, being or expecting to be a public servant, accepts or obtains, or agrees, 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 to 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.

If the ingredients not applicable to the present case are left out, the material portions will form the following Section:

Whoever, being a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself...gratification whatever, other than legal remuneration as a motive or reward for doing any official act...in the exercise of his official functions...shall be punished with imprisonment....

In view of the above, a public servant has to either accept or obtain or agree to accept or attempt to obtain from any person an illegal gratification. Acceptance and obtaining naturally are not without any premediations. There has to be either an attempt to obtain or an offer and then acceptance of the gratification. The mere offer directly would not constitute an offence as a person shall have to put the notes in his hand even in order to return. In case there has been an agreement for payment already, the mere putting of money or other material may amount to acceptance of it. Unless earlier agreement is made out, the subsequent transfer and touching of the money, may not be good evidence of complete offence. Merely being in holding of the property, may not amount to possession unless the amount can be said to be in possession with an animus of possession. This animus could be evidenced if the gratification was shown to have been accepted by the accused. The mere holding of it in the hands, may not amount to a complete evidence of animus of possession specially when there has been a dispute as to whether it was really held by the accused in hand or was kept in pocket by Ram Prakash Sharma, and then taken out by the accused

on the command of Sub Inspector. The nature of Section even in the extracted form, shows that an agreement to accept which will obviously be preceded by an agreement to obtain illegal gratification, would also constitute an offence, even if there is no payment thereafter. In the instant case, the offence was complete if the facts contended in the application to the District Magistrate were taken into account, the moment an agreement was arrived at between the informant Ram Prakash Sharma and the accused Bhav Nath Upadhya. Subsequent payment was only an evidence to substantiate the same by proof of relevant facts happening in furtherance of the agreement already arrived at. It may be an illegal agreement or it may be that Ram Prakash Sharma was not a willing party to it, but that does not negative the existence of an agreement and thus ingredients of the offence having been completed at that stage and the subsequent factor being only an evidence in support thereof, the failure of Ram Prakash Sharma to state about those facts, is to be taken into account as a material omission.

7. It is in the above said parameters of law that the omission on the part of Ram Prakash Sharma to state about all those earlier facts has to be seen. It is true that Section 4 of the Prevention of Corruption Act 1947 which was applicable on the date of occurrence, a proof that the accused person has accepted or obtained or has agreed to obtain or attempted for himself or for other person a gratification other than legal remuneration could give rise to a presumption that he has accepted or agreed to or attempted to obtain that gratification as a motive or reward for doing, but this provision may not be available to the prosecution for more than one reason. Firstly, a presumption would not be available even if it is mandatory when the person who could have said about that had entered into the witness box and had omitted to state about that. Presumptions are of several form and one of them is also that if a person knowing a fact and having entered the witness box could not state on oath, it can be thought that he is shy of taking the oath and stating them and that he does not himself feel them to be true. In the absence of this statement the prosecution has suffered a material irregularity of which benefit must go to the accused. In the circumstances, this appeal has to succeed.

8. The appeal is allowed. The conviction and the sentences recorded by the Special Judge, Bijnor are hereby set aside. The Appellant shall stand acquitted of the charges. The Appellant is on bail. He need not surrender. His bail and bonds are cancelled and sureties discharged. The fine if paid shall be refunded. The material exhibits shall be disposed of as directed by the trial court.