

(2011) 11 GUJ CK 0002
In the Gujarat High Court
Case No : Criminal Appeal No. 218 of 1998

Dilubhai Mansinh Jethwa

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 18-11-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Prevention of Corruption Act, 1988 — Section 12, 13(1), 13(2), 20(2), 7

Citation : (2011) 11 GUJ CK 0002

Hon'ble Judges : Md Shah, J

Bench : Single Bench

Advocate : Thakkar Assoc Mr VH Kanaras, for the Appellant; L.R.Pujari, APP for Opponent(s) : 1, for the Respondent

Final Decision : Dismissed

Judgement

Mr.Justice Md Shah

1. This appeal is filed against the judgment and order dated 3.3.1998 passed by the learned Special Judge, Jamnagar in Special Case No.4 of 1996, whereby the learned Judge has convicted the present appellant-original accused no.1 under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act and ordered him to undergo sentence of simple imprisonment of six months and pay fine of Rs.500/-, in default to undergo simple imprisonment for further fifteen days for the offence punishable u/s 7 of the Prevention of Corruption Act and ordered him to undergo sentence of simple imprisonment of one year and pay fine of Rs.500/-, in default to undergo simple imprisonment for further fifteen days for the offence punishable u/s 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act. The accused nos.2 and 3 were acquitted of the charges levelled against them.

2. The brief facts leading to filing of this appeal are such that a complaint came to be filed by Shri G.N. Sarvaiya, Police Inspector, Anti Corruption Bureau, Rajkot (Field), Rajkot on 10.5.1996 to the effect that as per the information received by

him, lot of illegal gratification under the guise of entry fees was demanded by the police and officers of R.T.O. near Jam agar bi-pass and Khambaliya, Dwarka from the truck drivers bringing lignite coal and, therefore, he decided to lay trap and he went with his staff members and took Rajendrasinh Khodubha Vaghela and Kishorsingh Hakubha Zhala aspanchas from the office of Executive Engineer, Panchayat Sub-Division, Dhrol. Thereafter, all of them went near patiya of Sarmat village via Jam agar bi-pass road and stopped the truck no.GJ-12T-8575 and took the consent of its driver Mubarak Mamadbhai to remain as punter. Thereafter, the said punter, complainant, both the panchas and members of the A.C.B. party went in the truck towards Dwarka and on the main road towards Okha, three police personnel in civil dress were standing near motor cycle and one person out of them stopped the truck and demanded Rs.10/- as entry fees. The truck driver gave ten rupee note from the notes tainted with anthracene powder which was accepted by the said person whose name was Dilubha Mansinh Jethwa and on signal being received, the complainant and members of A.C.B. party got down from the truck and caught hold of Dilubha and on seeing this, the other two police personnel who were standing near Motor cycle fled away on the said motor cycle and their names were told by Dilubha as Kasam Ismail and Harun Musabhai, Police Constables, Dwarka Police Station. The said incident took place on 9.5.1996 at 18.05 hours. Thereafter, the complaint came to be filed against all the three accused under Sections 7,12,13(1)(d) and 13(2) of the Prevention of Corruption Act.

3. After registering the complaint, the investigation was handed over to P.I. Shri B.B. Jadeja and he recorded the statements of witnesses, the Dy. Director, A.C.B., Ahmedabad obtained the sanction through D.S.P. Jam agar and after completing the investigation, P.I. Shri Jadeja filed charge sheet in the Sessions Court, Jam agar.

4. Charge was framed against the accused at Exh.13 and the accused pleaded not guilty at Exhs.14,15 and 16 and therefore the evidence of prosecution was led wherein the prosecution examined five witnesses i.e. the punter Mubarak Mamad at Exh.20, panch Rajendrasinh Khodubha Vaghela at Exh.24, senior clerk Liladhar Bhimjibhai Sarvaiya at Exh.26, the complainant P.I. Shri Gajendrasinh Nanbha Sarvaiya at Exh.40 and the Investigating Officer P.I. Shri Bhikhubha Balubha Jadeja at Exh.44. The prosecution also led documentary evidence including the panchanama, sanction, complaint etc.

5. Thereafter, the further statement of accused was recorded u/s 313 of Criminal Procedure Code wherein the accused no.1 stated that on the date and place of the incident, all the three accused were standing near bus-stand at a tea stall for drinking tea and during that time, they saw a truck coming from Khambaliya wherein there were passengers sitting illegally and therefore he stopped the truck and the truck driver came to him and the accused no.1 wanted to talk with the truck driver regarding the passengers sitting in the truck, but, in the meantime, he was caught and made to sit in the jeep and thereafter he was

taken to Zilla Panchayat guest house and made to sit there for five-ten minutes and then asked to leave. He stated that he is innocent and false case is registered against him. The accused nos.2 and 3 stated in their further statement that they are falsely implicated in this case.

6. The learned Special Judge, after hearing the arguments advanced by both the parties and after considering the evidence on record, passed the impugned judgment and order, against which the present appeal is filed.

7. Heard learned advocate Mr.V.H.Kanara for the appellant and learned APP Mr.Pujari for the respondent and perused the record and impugned judgment.

8. Learned advocate Mr.Kanara vehemently argued that there are major discrepancies and contradictions in the evidence of panch witness and the complainant who carried the trap and the panchanama is not duly proved and therefore the trial Court has committed error in convicting the appellant relying on the panchanama only. He further submitted that though the complainant received the information of demand of illegal gratification by the police personnel at Rajkot, he did not call panchas from any government office at Rajkot but only with ulterior motive and with a view to falsely involve the accused persons, he selected the panchas from government office at Dhrol which is situated in Jam agar district. He further submitted that the complainant is from Rajput community and he selected the panchas who are from Rajput community with a view to falsely involve the accused. He further submits that the complainant turned hostile and did not support the case of prosecution but the trial Court has committed error in convicting the accused relying only on the evidence of the panch witness. He also submitted that there are major contradictions in the evidence of panch witness and evidence of complainant regarding the signals given by the panch witness after the currency note was accepted by the accused. He also submitted that as per the prosecution case, panch witness and raiding officer P.I.Sarvaiya were travelling in the cabin of the truck and the truck was stopped by the accused persons and in presence of both the witnesses, the demand of bribe was made from the driver of the truck and the amount was paid by the driver to the accused and as per this case, the accused were caught red handed and therefore there is no need to give any signal to the officer but it has come on record that after the signals were given, the accused was caught by P.I.Shri Sarvaiya which creates doubt about the genuineness of the trap. He submitted that there are major contradictions in the evidence of complainant and panch witness regarding the drawing of panchanama, author of various parts of panchanama and panchanama was never read over before the panchas and so when panchanama is not duly proved and under the provisions of law, the panchanama is corroborative evidence, on basis of panchanama, the accused could not be convicted. He submitted that the trial Court failed to appreciate that the use of phenolphthalein powder should be preferred to anthracene powder in the trap. He, therefore, submitted that the trial Court has erred in convicting the accused no.1-appellant herein and prayed to allow this appeal. He placed reliance

on the following authority:

1. Gopalbhai Oghadbhai Parekh V/s State of Gujarat, reported in XLIII(1) GLR 89.

9. Learned APP Mr.Pujari submits that after discussing the evidence in great detail and considering the case from all angles, the trial Court has rightly come to the conclusion that accused no.1 is guilty of the charges levelled against him and so this court may not interfere with the same. He further submitted that even if the complainant-p.w.1 is hostile, if the evidence of panch witness inspires confidence and found trustworthy and corroborates with the other evidence, the Court can impose the conviction. Therefore, he prayed to dismiss the appeal. He placed reliance on the following authorities.

1. State of U.P. Vs. Zakaullah,

2. M. Narsinga Rao Vs. State of Andhra Pradesh,

3. Ashok Tshering Bhutia Vs. State of Sikkim,

10. From the evidence on record, it has come that the complainant got the information regarding the demand of bribe by the police personnel at Rajkot and therefore he started from Rajkot with his team members and made inquiry from the drivers of other vehicles on the way regarding the correctness of information and after confirming the same, he went to the P.W.D.Office at Dhrol and met Dy.Engineer Joshi and requested him to provide the services of panchas and thereupon Shri Joshi called the two panchas and took their consent and there is nothing on record which shows that the panchas were known to the complainant previously and that the complainant knew that they were serving in the said office. Therefore, it is a mere coincidence that both the panchas and the complainant belong to the same community and therefore it could not be said that the complainant selected the said panchas to falsely implicate the accused. Further, in a trap case, the panch witness is not merely a panch witness but he is a witness to the incident and his evidence is very important. Nothing has come in evidence that P.W.2 panch witness Rajendrasinh Khodubha has any enmity with the accused and that with ulterior motive, he gave false evidence. On going through the evidence of this witness minutely, it is found that his evidence is very natural, trustworthy and inspiring confidence. From the evidence on oath before the Court, it has come out that demand of illegal gratification in the name of entry was made by the accused and he accepted the bribe amount from the driver-P.W.1 with his hands and he put the tainted currency notes in his pocket. Nothing has come out from the cross-examination of this witness which creates doubt about the evidence of this witness. As far as accepting the bribe amount is concerned, it is totally corroborated with the evidence of raiding officer Shri Sarvaiya and during the course of carrying out the experiment of ultra violet lamp, powder marks were found on the hands and pocket of the accused which also lead this Court to believe that the evidence of panch witness is trustworthy.

11. In the case of Panchanbhai Nanjibhai Kantaria Vs. State of Gujarat, , this

Court held in Head-Note (A) as under:

(A) Prevention of Corruption Act, 1988(49 of 1988) - Secs.7,13(1)(d) & 13(2) - Appreciation of evidence - Even if evidence of complainant is totally doubtful, evidence of panch witness who had accompanied complainant during `trap" held, sufficient to prove `demand and acceptance" of bribe by accused - Panch witness who is a public servant and who has no animosity against accused, his evidence cannot be ignored where in his cross-examination nothing adverse is brought out by defence - Conviction confirmed.

12. In this case also, when oral evidence of panch witness who is also eye witness to the incident is found trustworthy and inspires confidence, the accused can be held guilty and some discrepancies which are found in the evidence of the Investigating Officer and panch witness in reference to the writing of the panchanama, time and place of the panchanama can be ignored.

13. As per evidence of P.W.1 punter exh.20, he is declared hostile but if his evidence is minutely read, then as per his evidence, he was driver of the truck bearing no. GJ-12T-8575 and when the said truck reached the patiya of village Sarmat, his truck was stopped by one person who was in civil dress and there were other three persons along with this person. As per evidence of this witness, these four persons put one currency note of Rs.50/-, one currency note of Rs.20/- and one currency note of Rs.10/- in his pocket and he was instructed by those persons that if any police personnel stopped his truck ahead on the way and demanded money, then he should pay the said amount of Rs.80/- which was put by them in his pocket. As per the evidence of this witness, these four persons sat in the cabin of the truck and they started the truck and thereafter when the truck reached near the ST workshop of Dwarka, one person asked him to stop his truck and so he stepped down from the truck. Thereafter, this witness does not support the case of the prosecution. So, from the evidence of this witness, it is crystal clear that two panchas, complainant P.I.Shri Sarvaiya and other members of the raiding party were sitting in the truck and the truck was stopped by accused no.1. This part of evidence is also getting support from the evidence of panch witness and so it is proved beyond reasonable doubt by prosecution that trap was arranged and the ACB Inspector and panchas were in the truck when present appellant-accused no.1 demanded bribe amount and when he accepted the said amount.

14. In the case of Gunvantbhai Virabhai Parmar V/s State of Gujarat, reported in 2011(3) GLH 390, this Court has held that when the Court is satisfied from the facts and circumstances of the case that the Panch witness is a witness of truth, his evidence cannot be discarded.

15. It is proved that the currency notes were recovered from the custody of the accused and when it is so, then u/s 20(2) of the Prevention of Corruption Act, the burden is shifted on the accused to establish that how he got the money in his custody and that the said amount was not towards illegal gratification, which

the accused failed to do so in this case.

In the case of Gopalbhai (supra), this Court held in paragraph 10 as under:

With regard to the contention of using anthracene powder for the trap and no explanation by the prosecution having been coming forth as to why the phenolphthalein powder was not used, and therefore, the accused is entitled to be acquitted, the Court may only observe that there cannot be any hard and fast rule that the prosecution must use only phenolphthalein powder for the trap. In the case of Gopalla Chhipa (supra), relying on the decision of the Supreme Court in the case of Khilli Ram Vs. State of Rajasthan, wherein it is laid down that if a trap is laid for a public servant, it is desirable that the marked currency notes which are used for the purpose of trap are treated with phenolphthalein powder so that the handling of such marked currency notes by the public servant can be detected by chemical process and the Court does not have to depend on oral evidence which is sometimes of a dubious character for the purpose of deciding the fate of a public servant. In view of the fact that when the Apex Court has held that it is desirable to use phenolphthalein powder, it cannot be contended that it is a mandatory requirement. Therefore, the findings of this Court in the case of Gopalla Chhipa (supra) relying on the decision of Allahabad High Court in the case of Devendra Narain V/s State of U.P. (supra), that the use of phenolphthalein powder is a mandatory requirement, in the Court's opinion, is contrary to the observations of the Apex Court in the case of Khilli Ram (supra).XXX

16. In view of the above decision, non-use of phenolphthalein powder in the trap and use of anthracene powder would not vitiate the trial.

17. For all the these reasons, I do not find any reason to interfere with the conviction imposed by the trial Court.

18. In view of the above, this appeal deserves to be dismissed and is accordingly dismissed. The judgment and order dated 3.3.1998 passed by the learned Special Judge, Jam agar in Special Case No.4 of 1996 is hereby confirmed. As the accused no.1-appellant is on bail, his bail bonds stand cancelled. The accused no.1-appellant is hereby ordered to surrender to jail authorities within a period of six weeks from today.