

(2017) 01 GUJ CK 0147
In the Gujarat High Court
Case No : 739 of 2002

DINMAHMAD DOSTMAHMAD BALOCH

APPELLANT

Vs

STATE OF GUJARAT

RESPONDENT

Date of Decision : 12-01-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 374](#) - Power to examine the accused - Appeals from convictions

Citation : (2017) 01 GUJ CK 0147

Hon'ble Judges : R P Dholaria

Bench : Single Bench

Advocate : D A Chaudhari, Chintan Dave

Final Decision : Allowed

Judgement

1. The appellant has preferred the present appeal under section 374 of the Code of Criminal Procedure, 1973 against the judgment and order of conviction dated 30.8.2002 rendered by learned Special Judge, Jamnagar in Special Case No.9 of 1989.

2. The short facts giving rise to the present appeal are that there was quarrel between complainant - Dhaniben Tapubhai and other persons and hence both the parties were admitted in the hospital at Khambhalia and, therefore, the police has recorded their complaints. It is alleged that on the next day, the police personnel called the complainant in Khembhalia Police Station. It is alleged that on the third day, the complainant went to the police station where all the three persons were present, out of which, one Gul Mamad demanded Rs.2000/- for release on bail from the complainant but the said amount was scaled down to Rs.1000/- and hence the complainant paid Rs.300/- to Gul Mamad. It is alleged that on 6.3.1989, said Gul Mamad told the complainant to pay Rs.700/- at Vadinar Police Chowky. As the complainant was not willing to pay the amount of bribe, she approached the ACB office on 7.3.1989 and lodged the complaint.

3. In pursuance of the complaint, the Investigating Officer carried out the investigation and filed the chargesheet against the appellant accused. The charge was framed against the accused. The accused pleaded not guilty to the charge and claimed to be tried. 3.1 In order to bring home the guilt, the prosecution has examined witnesses and also produced documentary evidences. 3.2 At the end of the trial, after recording the statement of the accused under section 313 of the Code of Criminal Procedure 1973 and hearing the arguments on behalf of the prosecution and the defence, learned trial Court delivered the judgment and order, as stated above.

4. Being aggrieved by the same, the appellant has preferred the aforesaid Criminal Appeal before this Court.

5. By way of preferring the present appeal, the appellant 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.

6. Mr.D.A.Chaudhari, learned advocate for the appellant has argued that the complainant has turned hostile, however, she has supported the case of the prosecution in examination-in-chief. He submitted that in the cross examination, the complainant has turned diametrically opposite to her evidence in examination-in-chief and she did not even recognize the appellant accused. He submitted that the complainant also denied the factum of visiting Khambhalia at the time of trap and she has clearly and categorically admitted that she has not identified accused Nos.2 and 3. Therefore, according to the evidence of the complainant, nothing worth is coming out so far as the demand, acceptance and recovery are concerned. He submitted that PW 3 - Mohan Lakhman who was official panch has supported the demand and acceptance, but so far as recovery of tainted currency notes from the person of the appellant accused is concerned, it came to be effected by Police Inspector Mr.Mavani and not made through PW 3 - Mohan Lakhman. He further submitted that from the very inception of lodging and writing the complaint till the chargesheet is filed, Police Inspector Mr.Mavani has undertaken the entire procedure who has not been examined as he died before the trial and therefore, even the material contradictions, improvements and omissions could not be proved by the prosecution and for that reason also, the evidence on record is not sufficient to link the appellant accused with the crime in question. Lastly, he submitted that the impugned judgment and order of conviction is required to be set aside so far as the present appellant is concerned.

7. On the other-hand, Mr.Chintan Dave, learned APP has supported the judgment rendered by learned trial Court. He has taken this Court through the entire Record and Proceedings and evidence of material witnesses on record and argued that since the panch who was an eye witness has supported the case of the prosecution, learned trial Judge has rightly relied upon the evidence of the

panch. He submitted that vital ingredients as regards to demand, acceptance and recovery were proved in accordance with law and, therefore, learned trial Court has rightly appreciated the evidence on record. He further submitted that learned trial Court has recorded ample reasons based on the evidence on record for convicting the appellant and therefore, this Court should not disturb the finding recorded by learned trial Court, as such.

8. This Court has heard Mr.D.A.Chaudhari, learned advocate for the appellant accused and Mr.Chintan Dave, learned APP for the respondent State.

9. 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. As per the prosecution version, there was quarrel between the complainant and Ramnik Bhima on 2.3.1989 as regards to walking in the salt-pan, due to which, the appellant as well as two other police officials brought the complainant to the police station at Khambhalia, at that time, initially, the appellant demanded Rs.2000/- which was scaled down to Rs.1000/- and hence, Rs.300/- was recovered from the complainant and remaining amount of Rs.700/- was directed to be paid on 7.3.1989. As the complainant was not willing to pay the bribe, she approached the ACB office in the midnight at 1.00 am on 7.3.1989, the trap was arranged and during the trap, the appellant accused caught red handed with tainted currency notes and, thereby the appellant committed the offence, as alleged.

10. PW 1 - Dhaniben Tapubhai has been examined at Exh.28. The witness has deposed that when the incident took place, she was residing at village Vadinar and she was working in the saltpan. She deposed that there was quarrel with Champaben and others and the complaint was lodged and thereafter there was talk with Din Mamad for enlarging her on bail if she delivered Rs.2000/- which amount came to be scaled down to Rs.1000/-. As the witness was not supporting the case of the prosecution, she was declared hostile. In the cross examination undertaken by learned Public Prosecutor, she accepted recitals made in the FIR. However, she has admitted that she has not visited the police chowky of Vadinar and she did not know any police official of the said chowky. She also admitted that she was not knowing Gul Mamad or Din Mamad. She further admitted that on the day of trap, she did not meet either Din Mamad or Gul Mamad and none has demanded any amount as illegal gratification from her. She has admitted that she was not knowing original accused Nos.2 and 3.

11. PW 3 - Mohan Lakhman has been examined at Exh.31. The witness has deposed that he was requisitioned as official panch by the ACB office for holding the trap on 7.3.1989. The witness has deposed that he was called by the ACB office in the midnight at 3.00 am where the complainant was present and the contents of the complaint were appraised to him and thereafter trap was arranged. The witness has deposed that in his presence, Gul Mamad asked the complainant for her arrival and thereafter said Gul Mamad asked about the money and thereafter other members of the raiding party came there.

12. Other police officials who were members of the raiding party have been examined, but their oral testimonies are not relevant for the purpose of deciding this appeal and, therefore, the same have not been considered.

13. 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.

14. 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.

15. 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.

16. 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.

17. In the backdrop of the aforesaid factual as well as legal position and on

overall analysis of the evidence on record, it appears that learned trial Judge has raised the five points for determination while delivering the impugned judgment and order and so far as predemand and acceptance of Rs.300/- in pursuance of the predemand as illegal gratification, learned trial Judge has recorded negative finding as the prosecution has miserably failed to prove the same, but so far as the instant demand and acceptance are concerned, the case was believed against the present appellant being the accused No.1 and he came to be convicted as such and since accused Nos.2 and 3 were not identified by the complainant, they were acquitted.

18. On evaluation of the evidence of the complainant, it can be noticed that, initially, the complainant did not support the case of the prosecution and, therefore, the complainant was declared hostile and thereafter she accepted recitals in the FIR. However, during the course of her cross examination, she stood diametrically opposite to her stand in the examination-in-chief and she refused to recognize even all the three accused. Not only that, but the complainant also denied her visit at Khambhalia Police Station on the day of trap as well as she also denied the demand and acceptance of illegal gratification by the accused. In this view of the matter, the testimony of the complainant leads no further connecting the accused with the crime in question.

19. So far as the evidence of panch No.1 who was requisitioned as official panch by the ACB official during the nocturnal hours at about 3.00 O'clock, he did support the case of the prosecution to some extent, but once the complainant herself has not supported the case of the prosecution, the evidence of the panch No.1 is to be treated to be evidence in the nature of corroborative evidence than the primary evidence and therefore in absence of the evidence of the complainant, the evidence of the panch No.1 leads no further and solely on the basis of the evidence of the panch No.1 who recognized the accused at the time of trap, the accused cannot be convicted. At this stage, it is pertinent to mention that in the State of Gujarat, while carrying out such types of trap, the ACB office used to engage official panch so that chances of turning hostile by the panch can be eliminated. In this view of the matter, it would be very hazardous to record conviction solely on the basis of the evidence of such panch who had witnessed the incident.

20. On overall analysis of the evidence on record, when the case of the prosecution is not at all getting any support from the evidence of the complainant and so far as recovery of tainted currency notes from the person of the appellant accused is concerned, the evidence on record is doubtful in view of the fact that the prosecution could not examine crucial witness - Police Inspector Mr.Mavani who died before the trial, who recorded the complaint as well as statements of the witnesses. In this view of the matter, the prosecution has miserably failed to prove vital ingredients as regards to demand and acceptance and therefore, as stated above, in absence of specific and clinching evidence to prove all such acts by the accused, conviction recorded by learned trial Judge is

not sustainable.

21. For the reasons recorded above, the appeal succeeds. The judgment and order of conviction dated 30.8.2002 rendered by learned Special Judge, Jamnagar in Special Case No.9 of 1989 is quashed and set aside. The appellant is acquitted from the charges levelled against him. Bail bond, if any, stands cancelled. R & P be sent back to the trial Court, forthwith.