
(1979) 09 BOM CK 0022
In the Bombay High Court

Doma and Another

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 28-09-1979

Acts Referred:

Penal Code, 1860 (IPC) — Section 161, 21(8), 34

Citation : (1981) CriLJ 653

Hon'ble Judges : Waikar, J

Bench : Single Bench

Judgement

Waikar, J.—This judgment shall dispose of Criminal Appeals Nos. (i3 and 64 both of the year 1978. Criminal appeal No. 63 of 1978 has been preferred by the original accused No. 1, Doma, while Criminal Appeal No. 64 of 1978, has been preferred by original accused No. 2 Diwan, both of whom in a joint trial, were convicted by the Special Judge, Bhandara for the offences u/s 161 read with Sec 34 of the Indian Penal Code and Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act. A compendious sentence against each of them was passed sentencing each of them to rigorous imprisonment for one year and to pay a fine of Rs. 200/-; or in default to suffer rigorous imprisonment for two months.

2. Appellant Doma original accused No. 1 was working as a Patwari with his headquarters at mouza Irali while appellant Diwan original accused No. 2 was working as a Kolwal at mouza Umri at the material time. Maroti (P. W. 3) resident of Umri had agreed to purchase some land from one Kisan Brahmankar and because of the provisions of Prevention of Fragmentation and Consolidation of Holdings Act, he required a permission from the Collector for which he required certain documents from the Patwari.

3. It is alleged by the prosecution that Sitaram and his father Maroti had approached appellant Doma, who was the Patwari, several times for getting these documents from him. Appellant Doma every time used to demand a bribe of Rs. 50/- from them for supply of those documents. On 8th January 1977, it is

alleged that the Patwari made a demand of Rs. 50/- stating that the amount should be paid to appellant Diwan, who was the Kotwal, and collect the papers from him. It is then alleged that Sitaram contacted Diwan Kotwal on 9-1-1977 and enquired from him about the documents and learnt that the documents were received by him from the Patwari, but he was told that the documents would be handed over to him only after Rs. 50/- were paid, It is further alleged by the prosecution that on 10-1-1977 when Sitaram happened to come to Bhandara for his work he met appellant Doma where again Doma told him to pay Rs. 50 to Diwan Kotwal and collect the documents from him.

4. On 11.1.1977 Sitaram, on the advice of his relative, thought of approaching Anti Corruption Bureau and report the matter. On 12-1-1977 he came to Bhandara, contacted Police Sub-Inspector Thokal (P. W. 10) who recorded his complaint at Ex. 25. A wireless message was sent by Thokal the same day at 1.55 p.m. to Deputy Superintendent of Police and Police Inspector A.C. & P.I.B. Nagpur seeking the necessary services from them. As their services were not available and as the matter was urgent Thokal approached Shri Thaore (P. W. 6), Judicial Magistrate, First Class, Bhandara, along with complainant Sitaram and sought his permission to investigate into this crime. Judicial Magistrate, First Class, Shri Thaore, after being satisfied, granted the necessary permission to P.S.I. Thokal to investigate into the matter and to lay a trap. Thokal then requisitioned the services of two clerks from Education Department namely, Pralhad (P.W. 2) and one Anandrao and made necessary preparations for the trap after carrying out the demonstration with the use of Phenolphthalein powder.

5. After completing the necessary formalities for laying the trap, the raiding party left Bhandara by State Transport bus and reached village Umri at 8.00 p.m. As it was night time it was decided to lay the trap the next morning. The members of the raiding party slept overnight in the house of Sitaram.

6. It is then alleged that the next morning Sitaram and panch witness Pralhad (P. W. 2) contacted Diwan Kotwal at his house and asked him to come with the necessary papers which were with him. It is then alleged that Diwan Kotwal came with these papers to the house of Sitaram. Sitaram, his father Maruti and panch witness Pralhad were sitting in the verandah, while the other members of the raiding party were inside the house. The Kotwal, it is alleged, handed over those documents to Sitaram, who, in his turn, handed them over to panch Pralhad, who noticed that only one document, namely, map exh. 35 was signed by the Patwari while the rest of the documents at Exs. 36 to 38 were unsigned. Pralhad brought this fact to the notice of Sitaram and his father Maroti. Upon this they requested the Kotwal to bring the signatures of Patwari Doma on these documents. Kotwal Diwan stated that he would write a chit in the name of the Patwari to sign the rest of the documents as the amount was paid. Accordingly the Kotwal, it is alleged, scribed the chit at Ex. 31 with his own dot pen. After Sitaram received this chit Ex. 31, he took out the bundle of currency notes stained with phenolphthalein powder and handed over the same to Diwan

Kotwal, who accepted them and counted them with both the hands. Immediately thereafter the agreed signal was given and the raiding party appeared in the varandh. The Kotwal in a frightened state threw away those notes on the ground. The usual test with the solution of sodium carbonate was carried out and it was found that the fingers of both the hands of the Kotwal tested one after the other in the fresh solution yielded positive result, a circumstance, which according to the prosecution, confirmed that he had accepted the amount. The chit at Ex. 31 was also attached from Sitaram and after necessary investigation both these appellants came to be prosecuted under the aforesaid offences.

7. Appellant Doma Patwari denied that he agreed to supply the documents on receipt of a bribe of Rs. 50/- which he directed to be paid to appellant Diwan Kotwal. He admitted that he was approached by Maroti for securing those documents. He also admitted that he had prepared the document at Exhs. 35 to 38 to be given to Maroti. He had signed only one document namely, the map Ex. 35, but others were not signed as he wanted some information. Those documents were kept on his table and some one took them away. He denied that he handed over those documents to Diwan Kotwal with any instructions. He further stated that his relations with Diwan Kotwal were strained and he has been falsely involved in this case.

8. Appellant Diwan Kotwal also denied that those documents were handed over to him by the Patwari, or that he was instructed that he should hand over the same to Maroti or Sitaram on payment of Rs. 50/-. According to him, these documents at Exs. 35 to 38 were already with Sitaram and he never handed over any documents to him that morning at the time of the trap. He stated that he refused to accept any money from Sitaram though he was insisting that it should be accepted and be paid to Doma Patwari. As regards the chit at Ex. 31 he admitted that it is in his own hand and that it was written at the house of sitaram after the trap, but he denied that it was written by him voluntarily under the circumstances, as alleged by the prosecution. He stated that it was got written from him by the P. S. I,

9. The learned Special Judge relying upon the evidence of Sitaram (P. W. 1), Pralhad (P. W. 2) and Maroti (P. W. 3) found that the offences were duly brought home against both the accused and convicted them as aforesaid and hence these appeals.

10. Shri Deshpande, the learned Counsel for appellant Doma, submitted that except the evidence of Maroti and his son Sitaram, there is no other evidence to show that appellant Doma had made any demand for any amount for supply of documents. The evidence of both these interested witnesses is vague and no specific dates or places are mentioned by both of them whom the alleged demands were made by appellant Doma. Their evidence, therefore, is highly incredible and not corroborated by any independent evidence. It was further submitted that since relations of Doma with Diwan Kotwal were strained, the services of the latter could not be employed by him for receiving the bribe

amount. Appellant Doma was residing at village Irali, while Maroti, Sitaram and Diwan Kotwal were residing at Umri and it is submitted that their relations inter se were friendly and an anxiety is evinced during trial by Sitaram and Maroti to exonerate appellant Diwan Kotwal. He, therefore, submitted that the possibility of Maroti and Sitaram, who may have been aggrieved because the documents were not supplied to them early as demanded, trying falsely to implicate him through appellant Diwan Kotwal could not be ruled out. It is also submitted that there is no evidence that appellant Doma had handed over the documents at Ex. 35 to 38 any time to appellant Diwan Kotwal. The chit at Ex. 31, which is said to have been written by appellant Diwan by which appellant Doma is sought to be implicated, is a highly suspicious document and there is reason to believe that it was purposefully got executed from appellant Diwan Kotwal at the instance of the P. S.I. to involve this appellant Doma by hook or by crook.

11. Shri Hardas, the learned Counsel for appellant Diwan Kotwal, submitted that the evidence of complainant Sitaram (P. W. 1) who is principal witness, did not support the prosecution story that appellant Diwan accepted the amount to be paid to appellant Doma. The evidence, on the other hand, shows that he refused to accept any thing, though he was trying to offer and in that attempt the left hand of this appellant Diwan happened to touch the bundle of smeared currency notes, which ultimately fell on the ground. When the evidence of complainant Sitaram, who in fact is in no better position than an accomplice, wholly explodes the prosecution story so far as appellant Diwan is concerned, he submitted that it is not necessary to look for any corroboration to this evidence. The evidence also shows that the chit at Ex. 31 was got executed from appellant Diwan by the P. S. I. Thokal only to supply some missing link. Lastly he submitted that appellant Diwan was not a public servant and that the sanction given by Judicial Magistrate, First Class, Shri Thaore (P. W. 6) was illegal.

12. I must say at the outset that the conviction of both the appellants cannot be sustained. What is alleged is that both the appellants in pursuance of their common intention demanded gratification otherwise than a legal remuneration and thus abused their position as public servants, it is not the prosecution case that both the appellants in any joint meeting had made a demand either with Maroti or his son Sitaram. What is alleged is appellant Doma made a demand of Rs. 50/- for supply of the documents separately with Maroti and behind the back of the appellant Diwan Kotwal, directing them that the amount be paid to appellant Diwan who would supply them the documents. If the evidence of either Maroti or Sitaram inspires no faith so far as this alleged agreement with appellant Doma is concerned, the whole basis of the prosecution story must vanish. Appellant Diwan Kotwal was to act as an agent so to say for appellant Doma in this affair. In a way he was only the extended hand of appellant Doma and if the evidence shows that appellant Diwan was an innocent person and he in fact had no reason to accept anything either for himself or for Doma, it constitutes a serious lacuna, in the prosecution story as sought to be made out against both the accused.

13. Corning now to the oral evidence, Sitaram (P. W. 1) deposed that he himself had approached the Patwari for documents, but the patwari demanded Rs. 50/- as a bribe, which he agreed to pay. Further in his examination-in-chief itself he deposed that the next day when he came to Bhandara he happened to meet the Patwari at the bus stand and he had learnt from him that the documents were ready and were with the Kotwal and that only one document was signed and the rest were unsigned, which he would sign after the amount was paid to Kotwal. This part of the evidence of Sitaram appears to be an improvement. If really he was so informed by appellant Doma earlier at the bus " stand, there is no reason why he made no mention of this material fact, in his , report at Ex. 25. This story again itself appears highly improbable. If he had really agreed to supply the " documents on receipt of Rs. 50/- and if necessary instructions were also given to Diwan Kotwal to hand over the documents only after receiving Rs. 50/- there was no necessity for appellant Doma Patwari to sign only one document and not to sign the rest and to give incomplete documents to Diwan Kotwal. In the examination-in-chief he then stated that appellant Diwan produced these documents and when it was discovered that some documents were not signed by appellant Doma he asked him to bring his signatures on the same to which appellant Diwan Kotwal said that he (Sitaram) himself should get signatures of the Patwari for which he would give him a chit. He then said that when he took out the amount from the pocket and wanted to hand over the same to the Kotwal, he refused to accept the same. However, his left hand touched the currency notes as they fell on the ground. In his further examination-in-chief he stated that the Kotwal never accepted the amount from him and never counted the same with his both hands. Thereafter a permission was granted to put questions to Sitaram (P. W. 1) in the nature of cross-examination. Even so he adhered to the same statement that appellant Diwan Kotwal never accepted the amount from him. During cross-examination he admitted that in his report at Ex. 28 he had never stated that he had approached Doma Patwari for the documents and that the latter had made a demand of Rs. 50/-from him, or that he had agreed to pay the amount to the patwari through the Kotwal. He also omitted to mention this material fact in his statement u/s 162 of the Code of Criminal Procedure also. Lastly this is what he stated:

It was my intention to catch Patwari by reporting against him. Kotwal himself is not a guilty person.

14. In further cross-examination Sitaram (P. W. 1) also admitted that in his report at Ex. 25 and in the police statement u/s 162 of the Cr. P.C. he never stated that when he met the Patwari at the S. T. bus stand the previous day he was told that he had signed only one document and that the rest of the documents would be signed after receiving the amount. Again he re-affirmed that the Patwari never agreed to accept the amount from him at the time of the trap. This is what he stated:

At the time of incident, Diwan Kotwal told me that as Meshram Patwari was

demanding Rs. 50/-, I should directly pay the amount to him and get his signatures on the documents which were not signed by him.

This admission in fact negatives his earlier version that Diwan Kotwal had agreed to accept the amount as an agent for Doma Patwari. If both the appellants had a pre-concert and such a mode of payment of illegal gratification was acceptable to both the accused and they both had so conveyed to Sitaram, it is strange that Diwan Kotwal should adopt such an attitude when the amount was actually offered to him,

15. Maroti (P. W. 3), the father of Sitaram, no doubt deposed that when he approached appellant Doma, he had made a demand for Rs. 50/- for supply of documents. He further stated that he approached Doma again along with Diwan Kotwal when the latter requested the patwari to accept Rs. 30/- only, but the patwari paid no heed. He had omitted to make any mention about this material fact in his statement u/s 162 of the Cr. P.C. Since he omitted to state this very material fact which was calculated to establish a common design or meeting of minds of both the appellants, this must be branded as a deliberate improvement during the trial. According to him, at the time of the trap his son Sitaram handed over the amount to Kotwal and asked him to bring the signatures of the Patwari on the documents for which he scribed a chit and gave it to Sitaram. In his cross-examination he further stated that the Patwari and the Kotwal were not pulling on well as the Patwari troubles the Kotwal. This fact again rendered the prosecution story highly improbable that appellant Doma Patwari would have agreed to receive the bribe through Diwan Kotwal. Lastly this is what he stated regarding the execution of chit at Ex. 31.

When P. S. I. and police came in the Chhapri and Kotwal was caught, he scribed the chit. Kotwal stated to the Sub-Inspector that the amount did not belong to him but belonged to Patwari. Daroga asked Kotwal to write in that way and accordingly Kotwal scribed a chit.

Thus he belies the version of other prosecution witnesses that this chit was written voluntarily. His evidence in fact shows that the chit was actually got written by the P. S. I. after the trap. It would be pertinent to refer to the contents of this chit which are to this effect: "Kindly put signatures on the documents of Maroti Mangru Gadekar. Received remuneration for that." Now this document the chit Ex. 31, which is relied upon as a key stone of the prosecution story in pooh-poohed by the witness, who is no better than an accomplice as a dishonest creation of evidence with some sinister intention. He also further stated in his cross-examination that at the time of the trap this Kotwal was saying to his son that the amount should be paid directly to the Patwari and he should take his signatures on the papers. He also opined that according to him the Kotwal had not committed any offence.

16. Nathu (P. W. 4) examined by the prosecution in fact did not support the prosecution and was declared hostile. He came to depose that when he had

visited Doma Patwari to pay the land revenue he found the Kotwal present there. He heard the Patwari asking the Kotwal to carry the papers to Maroti or to his son with a direction that Maroti or Sitaram should be told to see him 1981 Cri. L.J./42 V with the papers and the bribe of Rs. 50/-. Thus he came to make out a totally different story and is of no avail for the prosecution.

17. Panch witness Pralhad (P. W. 2) no doubt deposed as per the prosecution version, but being a panch witness he was interested in "the" trap and he was a partisan witness. In the absence of any other evidence it is difficult to accept his version that the papers were handed over by accused No. 2 Diwan to Sitaram at the time of the trap, that the accused No. 2 had accepted the amount and that he executed the chit at Ex. 31 voluntarily.

18. P. S. I. Thokal (P.W. 10) in his cross-examination stated that it was only at the time of the seizure of the documents after the trap that he came to know that only one document Ex. 35 was signed, while the rest of the documents were unsigned. In this connection it is pertinent to note that panch witness Pralhad (P. W. 2) had stated that after he and Sitaram came from the house of Diwan Kotwal in the morning before the trap he happened to see the documents and found that one was signed by the Patwari while the rest were not and that he had told this fact to P.S.I. Thokal before the arrival of Diwan Kotwal. He further stated that when he brought this fact to the notice of P. S. I. Thokal, as a possible hurdle in their way, the P. S. I. said that let appellant Diwan Kotwal come with the papers and they would see what should be done about it. The P. S. I. denied that he was so informed by Pralhad and deposed that it was at the time of seizure only that he came to know this fact. It appears that this is a purposeful suppression of the fact in his anxiety to eschew and shun his connection in any manner with Ex. 31 which refers to signing of the documents by Doma Kotwal and which according to Maroli was got scribed at the instance of the P.S.I. from appellant Diwan Kotwal,

19. It may be pointed out that in the oral report Ex. 25 it was stated that on 8-1-1977 Maroti had visited appellant Doma along with one Kawadu of his village in whose presence Doma had repeated the demand for Rs. 50/-. Further Maroti in his evidence stated that he had told his vendor Brahmarkar that the Patwari was demanding Rs. 50/- for supply of the documents. Thus these were the two independent witnesses who could have been examined by the prosecution to corroborate the evidence of Sitaram and Maroti that appellant Doma had really agreed to receive a gratification other than legal remuneration as a motive for supply of documents.

20. Thus having scanned the evidence carefully, I find that Maroti and Sitaram, the father and son, who stand on no better footing than that of an accomplice, as observed in Panalal Damodar Rathi Vs. State of Maharashtra, instead of emerging out as truthful witnesses at the: close of their cross-examination appeared wholly un-reliable in their anxiety to see that expellant Diwan Kotwal is somehow exonerated. If they could falsely implicate, appellant Diwan Kotwal initially, and set the police machinery into action against him and subsequently

from the witness stand tried to certify that he was an honest person and committed no offence, what guarantee is there that the implication of appellant Doma Patwari at their instance is not equally false. Thus in addition to their initial position as accomplices, when they appeared in the witness-box, when they left it they put on the badge of dishonesty and unscrupulosity. Having thus gone through the whole evidence I find that the prosecution case instead of advancing towards light and inspiring any faith, receded into a shady setting highly redolent with grave and doubtful circumstances, the benefit of which must go to both these appellants and they must be acquitted.

21. Turning now to the question of grant of permission to investigate, Shri Hardas referred me to a case reported in State of Andhra Pradesh Vs. P.V. Narayana, In the said ruling it appears that the order of the Magistrate did not show that the Inspector of Police had contacted the Superintendent of Police or the two Deputy Superintendents of Police or that he was told by them that they were engaged in administrative matters. In the evidence it was again admitted that before giving the requisition the Inspector did not send any memo or letter to the office for ascertaining whether the D. S. P. or S. P. were engaged in any other case. Thus the requisition was made without any basis and the Magistrate was apparently satisfied that the assertions of the Inspector were correct, In view of these facts it was held that the procedure adopted was wholly unwarranted and the Magistrate had erred in giving the sanction. All the same it was observed that the proceedings against the respondent could not be quashed solely on the ground of illegal investigation.

22. In the instant case the evidence shows that a wireless message was sent by P.S.I. Thokal at 1. 00 p. m. to Dy. S.P. Nagpur vide Ex. 59. The same day a reply was received that the services of Dy. S. P. and P. I. were not available being busy vide Ex. 60. Then at 2.00 p. m. on 12-1-1977. Thokal applied to the Judicial Magistrate, First Class, for grant of permission, vide Ex. 49. It is true that before the permission was actually granted he had summoned two panchas from the Education Department. This act he did in anticipation of permission which followed the same day. This would not, in my opinion, constitute any serious irregularity. The trap was to be operated in the evening on 12-1-1977, but as the raiding party reached in the night, it was postponed to the following day. Under these circumstances it cannot be said that P.S.I. Thokal was not justified in approaching the Judicial Magistrate asking for permission to investigate into the crime, nor was the Judicial Magistrate, First Class, Shri Thaore committed any error in granting permission to P.S.I. Thokal to investigate into the crime.

23. Lastly, there is nothing on record to show that a serious prejudice had occasioned to any of the appellants by the investigation which has been conducted by the P.S.I. or that there has been any miscarriage of justice. The finding of the learned Special Judge, therefore, on the point that the investigation conducted by P.S.I. Thokal is valid is upheld.

24. The last question for consideration is whether appellant Diwan, who was the

Kotwal, was a public servant. In *Shriram v. State of M.P* 1957 MPLJ 173 it was observed that Kotwal in the former Madhya Pradesh was a public servant within the meaning of Clause (8) to Section 21 of the Indian Penal Code. Shri Hardas pointed out that under the M.P. Land Revenue (Village Kotwars) Rules, 1958 the Kotwars were empowered to arrest persons for non-bailable and cognisable offences and carry them to the police authorities or competent authorities, 1958 MLJ 57. In this connection he also referred to *Rarnbhau v. State of Maharashtra* 1979 MahLJ 603. The question for consideration in this ruling was whether a Kotwal was a police officer within the meaning of Section 25 of the Evidence Act and whether confession made to him was admissible. It was observed that the position and status of village Kotwal who has merely duties to perform and no power to exercise cannot be equated with that of a police officer. A village Kotwal is thus not a police officer and an extra judicial confession made to him is admissible in evidence and does not come within the mischief of Section 25 of the Evidence Act.

25. It is not necessary to be a public servant within the meaning of Section 21 of the I.P.C. that a person must be clothed with certain powers as contradistinguished from performing merely duties. Clause (8) and Clause 12(a) of Section 21 of the I.P.C. which are relevant and applicable here are in these terms:

Eighth - Every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience.

Twelfth - Every person.-

(a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government.

The Supreme Court in *G.A. Monterio Vs. The State of Ajmer*, laid down the tests to determine whether a person was an officer of the Government and the tests were (i) whether he is in the service or pay of the Government and (ii) whether he is entrusted with the performance of any public duty, and it was observed that if both these requirements are satisfied it matters not the least what is the nature of his office, whether the duties he is performing are of an exalted character or very humble indeed.

26. A Village Kotwal in this State has no doubt no powers but several duties to perform. The period of employment of a Kotwal is no doubt a purely temporary employment for one year. He is appointed by the Collector and is paid from the Government treasury. The duties he is called upon to perform, include inter alia accompanying Government remittances to sub-treasuries, calling villagers to the Chawadi for paying Government dues, carrying village dafter to and from taluka kacheri, keeping a watch on Government money and office records at the village and on property attached for the recovery of Government dues, carrying Government tapal to and from the taluka office and taking Government post of

officers on tour where no transport facilities are available, reporting birth and deaths to village officers, accompanying the police patil and the police at the time of night rounds, doing night patrol to find out all arrivals and departures, publishing Government orders in the village by beat of drums, bringing impounded cattle to the Kacheri for auction, assisting the vaccinator in collecting children for vaccination etc. (See *Rambhau v. State of Maharashtra*, 1979 MahLJ 603.

27. So far as the post of Kotwal is concerned the two tests laid down by the Supreme Court in *G.A. Monterio Vs. The State of Ajmer*, are thus satisfied. Clause 8 and Clause 12(a) of Section 21 of the Indian Penal Code, quoted above, thus in the first place refer to an officer of the Government, as distinguished from private person and secondly they pre-eminently refer to certain duties of the kind mentioned here. The duties of the Kotwal as enumerated above certainly relate to bringing the offenders to justice, to protect the public health safety and convenience. The post of Kotwal, therefore, would fall under Clauses 8 or 12(a) of Section 21 of the I.P.C. and it must be held that the Kotwal is a public servant within the meaning of Section 21 of the I.P.C.

28. In the result, therefore, the two appeals are allowed. The conviction and sentence passed against them by the learned Special Judge are hereby set aside and they are acquitted of the charges against them. Their bail bonds shall be cancelled and the amount of fine, if paid, shall be refunded to them.