

(2011) 02 GUJ CK 0025
In the Gujarat High Court
Case No : Criminal Appeal No. 307 of 2000

Gunvantbhai Virabhai Parmar

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 24-02-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374(2)
Evidence Act, 1872 — Section 8
Prevention of Corruption Act, 1988 — Section 11, 12, 13(1), 14, 20
Shops and Establishments Act — Section 20

Citation : (2011) 3 GLH 390

Hon'ble Judges : Z.K. Saiyed, J

Bench : Single Bench

Advocate : J.V. Bhairavia, for the Appellant; H.L. Jani, App for Opponent : 1, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Z.K. Saiyed, J.—The appellant - original accused has preferred this appeal under sec. 374(2) of the Code of Criminal Procedure, against the judgment and order of conviction and sentence dated 3rd March, 2000 passed by the learned Special Judge, Court No.7, City Civil Court, Ahmedabad, in Special Case No. 35 of 1996, whereby, the learned Special Judge has convicted the appellant - accused for the offence under sec. 7 of the Prevention of Corruption Act and sentenced him to undergo rigorous imprisonment of 6 (six) months and to pay a fine of Rs. 300/-, in default, to undergo further R.I. For 15 days. The appellant is also convicted for the offence u/s 13(1)(d) of the P.C. Act and is sentenced to undergo R.I. for a period of one year and to pay a fine of Rs. 300/ -, in default, to undergo further RI for 15 days, which is impugned in this appeal. The learned Judge has ordered substantive sentences to run concurrently.

2. The brief facts of the prosecution case is as under :-

That on 7.2.1996, complainant Firozkhan Hafizkhan Pathan, manufacturer of

wooden heels of chappals, gave a complaint before the ACB that before about four years he purchased house for Rs. 1,05,000/-. The municipal tax of the said house for the previous years to the tune of Rs.4000/-remained unpaid and, therefore, the licence under the Shops & Establishment Act by the Health Department of the Corporation has not been issued to him. It is alleged that prior to Diwali, the appellant - accused, who was Sanitary Inspector in the Corporation, and also the other persons of the said Department, have visited his shop and told that the complainant is not possessing the licence under the Shops & Establishment Act and, therefore, he should pay Rs.50/- per month and then he would not require to obtain any licence. It is alleged that on 7.2.1996 the appellant - accused came to his shop and asked the complainant that why he has not paid the amount of Rs.50/- and thereafter told him that he should approach his office between 4.00 and 6.00 p.m and pay the amount. As the complainant did not want to pay the said amount, he approached the Office of Anti-Corruption Bureau and lodged the complaint. After receipt of the complaint, the panchas were called and after following the due procedure, raid was carried out and the accused was found accepting the illegal gratification from the complainant in presence of Panch No.1. It is alleged that experiment of ultra-violet lamp was carried out on the hands and clothes of the accused and the anthracene powder marks were found. After following due procedure, panchnama was drawn and after raid was over, after getting due sanction for prosecution, Police Inspector Mr. Rathod of ACB submitted the charge-sheet against the accused.

3. Thereafter, the charge was framed against the appellant. The appellant - accused has pleaded not guilty and claimed to be tried.

4. In order to bring home the charge levelled against the appellant- accused, the prosecution has examined four witnesses and also produced documentary evidence on record before the trial Court. On behalf of accused, one witness D.W. 1 - Rajesh Kantilal Darji (Exh.27) has been examined.

5. Thereafter, after examining the witnesses, further statement of the appellant-accused under sec. 313 of Cr PC was recorded in which the appellant-accused has denied the case of the prosecution.

6. After considering the oral as well as documentary evidence and after hearing the parties, learned Special Judge, vide impugned judgment and order dated 03.03.2000, held the appellant - accused guilty of the charges levelled against him and awarded the sentence as referred herein above.

7. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence passed by the learned Special Judge, Ahmedabad, the present appellant has preferred this appeal.

8. Heard Mr. Jayesh Bhairavia, learned Advocate for the appellant and Mr H.L. Jani, learned APP for the respondent-State.

9. Mr. Bhairavia for the appellant has read the oral evidence of P.W.1 -

complainant Firozkhan (Exh.15), and contended that the complainant is a star witness of the prosecution case. However, he never uttered a single word in favour of the prosecution and he has turned hostile. In cross examination of the complainant also the prosecution could not establish the contents of the complaint. He has, therefore, contended that when the material star witness has not supported the case of the prosecution, then the learned Judge has committed grave error in holding the appellant - accused guilty of the offences charged against him. Mr. Bhairavia has contended that P.W.2 Mahendra Kantilal Trivedi (Exh.18) is not reliable and trustworthy witness and his evidence is not acceptable. He has contended that this witness is a public servant and he was under the influence of A.C.B. and, therefore, he has deposed as narrated in the panchnama. He has contended that from the evidence of this witness also, the demand and acceptance of illegal gratification by the appellant is not proved beyond reasonable doubt. He has contended that the complainant has clearly deposed, that when they entered the office of accused, the complainant alone entered without anybody accompanying him and in spite of the clear deposition that the accused appellant had neither demanded nor accepted the amount, the complainant had forcefully thrust upon in the pocket of the accused the sum of Rs.50/- and then rushed out to raise a signal. He has contended that there is major discrepancy between the evidence of panchas and the Investigating Officer, inasmuch as though there is specific case, even as per the deposition of the Investigating Officer, that another officer Mr. Darji was sitting inside the office of the appellant and that the incident alleged to have occurred in his presence, he has not been examined by the prosecution. However, said Mr. Darji has been examined on behalf of defence, as defence witness. Even the statement of said Mr. Darji was not recorded by the Investigating Officer though he was very much present during the occurrence of the alleged incident. He has contended that there are material contradictions and omissions in the matter which create serious doubt into the veracity and genuineness of the complainant. He has contended that it is a specific case of the appellant - accused that the amount was forcefully thrust in the pocket of accused and the accused has tried to give back the amount and, therefore, the marks of anthracene powder were found on the finger, tips and the corner of the pocket of the appellant - accused. He has contended that the prosecution has failed to prove that accused had accepted the money. He has contended that the oral evidence of P.W.4 Mr. K.M. Rathod (Exh.23) is totally silent and he has never bothered to inquire about the issue of demand and acceptance of illegal gratification by the appellant-accused. He has contended that the defence witness Mr. Darji, examined on behalf of defence as D.W. 1, is a public servant and he is not an interested witness. Even the presence of said Mr. Darji is admitted by the Investigating Officer. He has contended that from the evidence of complainant, the demand is not proved beyond reasonable doubt and the story of demand is also doubtful and, therefore, the Judgment and order of conviction is required to be quashed. Mr. Bhairavia has also placed reliance upon a decision of the Hon"ble Court in (sic) case of Banarsi Das v State of (sic)ana, reported in AIR 2010 SC and contended that in the case before the

Hon"ble Apex Court, it is observed that ".....Recovery of tainted note proved - Complainant however (sic)ning hostile - Testifying before (sic) that complaint was made as she (sic) ehended that accused would (sic)mand bribe - Further stating that notes were placed on table of accused where from they were recovered by police - Her driver also turning hostile and stating that neither demand nor acceptance of bribe was made in his presence - In absence of proof of demand and acceptance of bribe by accused - Accused entitled to acquittal." In the present case also, the complainant has not supported the case of the prosecution. He has contended that in the present case, the complainant has categorically deposed that he alone entered the office of the accused without anybody accompanying him and inspite of the clear deposition that the accused appellant had neither demanded nor accepted the money, the complainant had forcefully thrust upon in the pocket of the accused the sum of Rs.50/- and then rushed out to raise a signal. He, therefore, contended that looking to the facts and circumstances of the case, the prosecution has failed to establish the case against the appellant -accused and, therefore, the Judgment and order of the trial Court is required to be quashed and set aside and applicant - accused is required to be acquitted from the charges levelled against him.

10. On the other hand, learned APP Mr Jani has supported the Judgment and order of the Special Court and contended that the trial Court has fully appreciated the evidence produced on record by the prosecution and, therefore, no interference is called for by this Court. He has contended that merely because the complainant has not supported the case of prosecution, that does not mean that the prosecution has not proved its case beyond reasonable doubt. He has contended that the complainant was won-over by the appellant - accused and that the complainant is accomplice. Mr. Jani has also contended that the P.W. 2 - Mahendra Kantilal Trivedi (Exh.18) is a public servant, who is an independent witness. He has compared the oral evidence of this witness with the evidence of Investigating Officer and contended that the defence has not established that appellant was having any enmity with the Panch witness or with Trapping Officer and, therefore, he was wrongly booked by the Trapping Officer.

11. Mr. Jani has contended that no doubt the complainant has not supported the case of the prosecution, but, even in absence of his evidence the demand and acceptance is proved by the prosecution. He contended that search was carried out in presence of panch and in his presence, the amount was recovered. He has contended that on the bribe amount of Rs.50/- presence of anthracene powder is also established beyond reasonable doubt and, therefore, the presumption u/s 20 of the Act is required to be drawn. He has contended that even in the statement recorded u/s 313 Cr.P.C, the accused has never bothered to explain and has never tried to rebut the presumption. In the present case the question of res-gesta is applicable and the oral evidence of defence witness will not be helpful to the case of the accused. Therefore, the prosecution has proved its case beyond reasonable doubt and the learned Judge has rightly held the appellant - accused guilty of the offence alleged against him. Therefore, the Judgment and order of

the learned Judge is required to be confirmed.

12. Heard the learned Counsel for the parties. I have gone through the oral as well as documentary evidence produced on the record. I have read the oral evidence of prosecution witness and also perused the charge framed against the appellant and considered the submissions made by learned Counsel for the parties. I have also considered the decisions cited by both the parties. In the present case from the contents of the complaint as well as from the deposition of P.W. 2 - Panch witness, the prosecution has proved its case beyond reasonable doubt that the appellant - accused has made demand from the complainant and he has also accepted it.

13. I have also considered the conduct of the present appellant -accused. From the evidence of P.W. 2 -Panch witness, it is clearly established that the appellant - accused has accepted amount by way of ill(sic) gratification. It is true that the evid(sic) regarding the demand and acceptance required to be corroborated by some other independent evidence. In the present case, panch witness who is an independent witness, has fully supported the case of the prosecution. Even it is not a case of appellant that he has any enmity with the panch witness. No doubt, the complainant has not supported the case of the prosecution, but, looking to the facts of the case that the complainant was not having licence to run his business and the appellant, being the Sanitary Inspector, frequently visiting the business premise of the complainant, it creates doubt that without expecting anything from the appellant, the complainant would not have permitted the appellant to run his business without licence. The panch witness, who accompanied the complainant, has categorically deposed that when they reached to the office of the complainant, at that time the complainant asked the appellant that he has brought the amount as per his say and thereupon the appellant told him that whatever you have brought, give it to him. Upon saying so by the appellant, the complainant took out 50 rupees currency note from his right side pocket and put up the same before the appellant which has been accepted by him by his right hand and he put up the same in the left side pocket of his "T-shirt". Thereafter, the complainant came out of the office and gave agreed signal. This evidence of panch clearly proves that the appellant has demanded the illegal gratification and accepted the same from the complainant. It appears from the deposition of this witness that after the raid, the trap amount was collected and in the light of ultra-violet lamp the anthracene powder was found on the right hand fingers tips of the appellant - accused. This is sufficient to prove the guilt of the appellant - accused. The Hon''ble Apex Court has also held in catena of decisions that the evidence of independent witness cannot be discarded mainly branding it as that of a cached or tutored witness. The evidence of Government servant cannot be rejected mainly because he is called to associate the raiding party. When the Court is satisfied from the facts and circumstances of the case that the panch witness is a witness of truth, then his evidence cannot be discarded. I have also found that the appellant - accused has abused his position as "public servant" and the abuse of position was also dishonest and it is also

proved that the appellant has deliberately caused wrongful act by obtaining pecuniary benefit and his pecuniary benefit is also proved beyond reasonable doubt.

14. Mr. Jani has also contended that looking to the facts of the case, the presumption u/s 20 of the P.C. Act is required to be drawn against the present appellant - accused. Section 20 of the P.C. Act reads as under :-

20. Presumption where public servant accepts gratification other than legal remuneration -

(1) Where, in any trial of an offence punishable u/s 7 or Section 11 or clause (a) or clause (b) of sub-Section (1) of Section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable u/s 12 or under clause (b) of Section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7, or as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-Section (1) and (2), the Court may decline to draw the presumption referred to in either of the said sub-Sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn.

15. Looking to the evidence produced on record it appears that the illegal gratification was accepted by the appellant - accused. It also appears that the appellant - accused has not properly explained the presence of anthracene powder. From the perusal of evidence on record, I am of the opinion that the appellant - accused has failed to rebut the presumption drawn u/s 20 of the P.C. Act. Even from the cross-examination of witnesses also, I have found that the appellant has failed to prove his probable defence beyond reasonable doubt before the trial Court.

16. As per Section 8 of the Evidence Act, the conduct of the accused is required to be considered. From the record it is clearly established that at the place of occurrence, the accused was found and from his possession the trap amount was recovered in presence of panch witness and hence that conduct of the accused

can be considered that there was motive of the accused to commit the offence and just to get some illegal gratification. Therefore, the contention of the appellant - accused that the accused was wrongly involved in the commission of offence is not believable.

17. This Court has also gone through the latest decision of the Hon''ble Supreme Court in the case of Banarsi Dass Vs. State of Haryana, In the case before the Hon''ble Supreme Court, the complainant and another independent witness have not supported the case of the prosecution and, therefore, the Hon''ble Supreme Court has quashed and set aside the Judgment of the High Court and acquitted the accused of the charges levelled against him. In the present case, no doubt the complainant has turned hostile and has not supported the case of the prosecution, but, the panch witness has fully supported the case of the prosecution and his evidence is fully corroborated with the circumstantial evidence. In Banarsi Das (Supra) the Hon''ble Supreme Court in Para - 20 has also observed that...."It is a settled canon of criminal jurisprudence that the conviction of an accused cannot be founded on the basis of inference. The offence should be proved against the accused beyond reasonable doubt either by direct evidence or even by circumstantial evidence if each link of the chain of events is established pointing towards the guilt of the accused. The prosecution has to lead cogent evidence in that regard so far as it satisfies the essentials of a complete chain duly supported by appropriate evidence." In the present case before me, the panch witness has fully supported the case of prosecution and even by circumstantial evidence each link of the chain of events is established to prove the case of prosecution.

18. Looking to the facts of the case, I am of the opinion that the prosecution has proved that the appellant - accused, being a public servant, has demanded the amount and also accepted the bribe amount from the complainant, The accused has not explained by discharging his burden of rebutting the statutory presumption of guilt against him. From the facts and evidence on record, it is clearly established beyond reasonable doubt that the amount by way of bribe was demanded by the accused and he accepted that amount voluntarily as an illegal gratification.

19. In view of above, I am in complete agreement with the findings, ultimate conclusion and resultant order of conviction and sentence passed by the trial Court and I am of the view that no other conclusion except the one reached by the trial Court is possible in the instant case as the evidence on record stands. Therefore, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence.

20. In the result, this appeal is dismissed. The impugned judgment and order of conviction and sentence dated 03.003.2000 passed by the learned Special Judge, Ahmedabad, in Special Case No. 35 of 1996 is hereby confirmed. Bail bond stands cancelled. R & P to be sent back to the trial Court forthwith. The appellant - accused is directed to surrender before the Jail Authority within a period of four

weeks from the date of this order, failing which the concerned Sessions Court shall issue non-bailable warrant to effect the arrest of the appellant -original accused.