
(1982) 07 DEL CK 0009

In the Delhi High Court

Case No : Criminal Appeal No. 334 of 1974

Hakumat Rai Nigam

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 27-07-1982

Acts Referred:

Citation : (1982) 22 DLT 370

Hon'ble Judges : A.B. Rohtagi, J

Bench : Single Bench

Advocate : F. Anthony, K.C. Dua and Harish Gulati, for the Appellant;

Judgement

Avadh Behari Rohatgi, J.

(1) This is an appeal from the order of the Special Judge dated November 6, 1974 in a corruption case.

(2) These are the facts. The appellant was a superintendent in the office of the Small Scale Industries Corporation (Corporation) at Okhla. He was charged on two counts : (1) for an offence under S. 161 I.P.G. (1) and (2) an offence u/s 5(2) read with Section 15(1)(d) of the Prevention of Corruption Act (the Act). The Special Judge found him guilty on both counts and sentenced him to 1" years on each count, both sentence, to run concurrently. He was also sentenced u/s 5(2) of the Act to a fine of Rs. 300.00 in default of which he was to undergo rigorous imprisonment for two months.

(3) The main case set up by the prosecution was as follows. The complainant Ranbir Sehgal complained to the office of anti-corruption on May 3, 1971 that the appellant had visited his cycle parts shop at Esplanade Road on April 29, 1971 and had demanded a bribe of Rs 930.00 for getting the complainant's case in the office of the Corporation expedited. Ranbir Sehgal had started a factory for manufacturing cycle and motor parts in the name of Sehgal Cycle Works. He was in need of a gear shaper machines for his factory. He applied to the Corporation to enable him to purchase it on hire purchase basis. It was in this connection

that the appellant was alleged to have demanded the bribe. It is common case that the application of the complainant was pending at that time before the Corporation.

(4) The complainant's statement was recorded by inspector Bhim Singh and it was decided to lay a trap. The complainant had agreed with the appellant to pay the bribe on 3-5-1971 at 6 p.m. A raid was organized. Ajmer Singh (Public Witness 3) and Satish Pal (Public Witness 8) were joined as panch witnesses. The complainant produced one currency note of Rs. 100.00 and 10 currency notes of Rs. 10/ each; in all Rs 200.00 which were intended to be given to the appellant on the evening of 3-5-1971. Currency notes were treated with phenol pathylien powder. These treated currency notes were to be passed on to the appellant in the presence of the panch witnesses as a bribe and at that time Satish Pal (Public Witness 8) was to give a signal to the raiding party.

(5) The raiding party headed by inspector Bhim Singh including the complainant, two panch witnesses, and some police officials, left the office of the anti-corruption and they reached the shop of the complainant at Esplanade Road at about 5-30 p.m. The complainant sat behind the counter. At about 6 p.m. the appellant arrived. The complainant gave him currency notes of Rs. 200.00. The panch witness gave the signal. Inspector Bhim Singh arrived. He challenged the appellant for having taken a bribe. The appellant denied this. He said that the money was his own money and not a bribe. The currency notes were recovered from the bur shirt pocket of the appellant. A solution of sodium carbonate was prepared. Both the hands of the accused were dipped in the solution. The colour turned to pink. A case was registered against the appellant. A chargesheet against the appellant was submitted in court. The Special Judge found that sanction for prosecution was not valid. The trial proved abortive.

(6) The case was retried. A fresh sanction order was made by the Chairman of the Corporation. A fresh chargesheet was filed in the court against the appellant on the above two counts. The appellant pleaded not guilty. The prosecution produced 9 witnesses in support of its case. None of them supported the prosecution case except the complainant Ranbir Sehgal. The appellant also produced defense witnesses. His defense was that he had given Rs. 350.00 to the complainant for purchasing a cycle through him and that he had gone to the complainant to get back his money and after some altercation the complainant returned Rs. 200.00 to him on 3-5-1971 when he was trapped by the police. The Special Judge rejected the defense story outright. He disbelieved the defense witnesses. So far as the prosecution case was concerned he found that panch witnesses did not support the prosecution case. Satish Pal supported the defense version. The other one Ajmer Singh turned hostile. Relying solely on the testimony of the complainant the special judge convicted the appellant.

(7) In appeal the prosecution has largely rested the case on the testimony of the complainant. The only question in this appeal is whether appellant's conviction can be sustained on the sole testimony of the complainant.

(8) The complainant Ranbir Sehgal appeared as Public Witness 5. In his examination-in-chief he deposed that the appellant came to him in April 1971 and enquired from him if he had applied for a machine on hire purchase. The complainant said ".

".....I replied in the affirmative. Accused told me that he would get my case expeditiously passed by the board if I agreed to pay him 1% commission on the value of the machine which I wanted to purchase on hire purchase basis. Accused had told me that the value of that machine was Rs. 93,000.00 and 1% on the amount would come to Rs. 930.00 . I told accused that I had a strong case and that case had been recommended by Nsic Ghaziabad and amount demanded was excessive. Accused then suggested me to pay him the above-said amount in 3 Installments. He demanded the 1st Installment of Rs. 200.00 on the day he would get my case recommended by the board ; second Installment was to be paid on receipt of demand notice by me and the third Installment on completion of the deal. I agreed to this proposal of the accused. 3-5-71 was the date fixed by the accused to come to my shop to receive first Installment of Rs. 200.00 as accused had stated that my case was likely to be taken up by the board by that day. Accused was to come at my shop at about 6 p.m. on 3-5-71."

(9) There are two main points in the evidence of the complainant, as would appear from the above deposition. One is that the bribe was to be 1% of the value of the machine. The second is that this bribe was to be given for getting the "case passed by the board." In cross-examination the defending counsel was able to demolish the core of the complainant's case. On the first point the complainant admitted in cross-examination that the price of the machine was Rs.1,04,000.00 . Apart from it Rs.14,000.00 were to be paid towards accessories. The total value was Rs. 1,18,600.00 . If the agreement was to pay bribe at 1% of the value of the machine then it could not have been Rs. 930.00 . It would be Rs. 1186.00 . This discrepancy has not been explained at all by the prosecution.

(10) On the second point it appears from the evidence of the complainant himself that there was nothing in the appellant's power which he could do for the complainant. The complainant knew which of the officials had to deal with his case and were actually dealing with it in the office. He used to go to the office. He used to discuss his case with those officials and they used to tell him about its position. He did not know the appellant earlier. He had never met him in the office. He had a friend in the office, one Dutta, the security officer. Dutta informed him on phone on 28-4-71 that his case had been sent to the board. It was for the board to accept the complainant's application for hire purchase, Dutta was "a close friend" of his. The complainant admits that he knew from his friend Dutta that the case had been sent to the board. Dw 1 Kaptan Singh, a clerk of the Acceptance Cell of the hire purchase division, deposed in his evidence that the complainant's case was passed by the Indigenous Machinery Acceptance Committee on 28-4-71. It is highly improbable that on 3-5-71 the complainant would agree to pay bribe to the appellant even though he knew that

his case had been sent to the board for acceptance on 28-4-71. His friend Mr. Dutta must have told him in all probability that his case had been passed by the committee. If Dutta did not know about the acceptance of the complainant's application it is improbable that the appellant would know about the case having been passed by the Acceptance Committee on 28-4-71. The reason is that the prosecution witness S. K. Sur (Public Witness 2) in his evidence said that the appellant used to deal only with the cases of Hyderabad Intensive Campaign and that it was he, the witness Sur, who dealt with the complainant's application. It is in the evidence of Kaptan Singh that the decision of the meeting was communicated to the concerned cell only on 3-5-71. Therefore, on the date of visit of the appellant, that is, 29-4-71 it is highly improbable that the complainant would agree to pay bribe to the appellant for getting his case "passed" by the board.

(11) The following circumstances appear in the testimony of the complainant:-

1. That the complainant had been visiting the Corporation office and meeting the concerned officials who dealt with his case.

2. That the complainant had a close friend Dutta, security officer, in the Corporation.

3. That without ascertaining how and in what manner the appellant could help him in the task, the complainant agreed to pay bribe to the appellant in the meeting of 29-4-1971.

4. That the value of the machinery was not Rs. 93,000.00, as was stated by the complainant to the anti-corruption department, but it was 1,18,600.00 as was elicited from him in the cross-examination and 1 per cent of this was not Rs. 930.00 as deposed.

5. That the complainant's case had already been passed by the board on 28-4-71 as deposed by Dw 1 Kaptan Singh.

(12) All these circumstances show that the prosecution case is highly improbable. When these infirmities in the prosecution case were pointed out to the special judge he brushed them aside by saying "there is no dearth of credulous people succumbing to such demands in the hope of early achievement of their purpose." I cannot accept this view of the case. The complainant was no fool. He was not a man to be taken in easily. His evidence shows that he knew that he had a "strong case" for acceptance by the board. This is what he said in his evidence :

" It old accused that I had a strong case."

Why should he then agree to pay bribe when his case was "strong" and he had a "close" friend in the security officer, Mr. Dutta, who had told him that the case had gone to the board. This knowledge was with him. The complainant will not pay in the normal course any bribe in getting the case "expeditiously passed by

the board" when he knew that his case has gone to the board. On April 28, 1971 the case was passed by the board. Dutta would naturally tell the complainant if he comes to know of it on 28th or 29th April. If he does not know it, it is not likely that the appellant would know it on 29-4-71 when he visited the complainant's shop. Kaptan Singh's evidence shows that the decision of the meeting was communicated to the concerned cell only on 3-5-71. The complainant is a shrewd businessman. He was no novice. He knew his case inside out. He knew the officers who were dealing with it. He was conversant with the procedure of the Corporation. He knew that the appellant had nothing to do with his case and that others were dealing with it. The prosecution witness S K. Sur (Public Witness 2) who was dealing with this case has not supported the prosecution case. He was declared hostile by the prosecution. His evidence shows that the appellant was not dealing with the complainant's case at all. The evidence of Kaptan Singh shows that the appellant could not have known about the decision of the board on the complainant's application when he visited the complainant at his shop on April 29, 1971.

(13) Section 161 Indian Penal Code with which the appellant stands charged is that the gratification must have been received by the accused as a "motive for reward" for committing an act or omission in connection with his official functions. It must be shown that there was understanding that the bribe was given in consideration of some official act or conduct. It is true that in law the incapacity of the government servant to show any favor or render any service does not necessarily take the case out of the mischief of these penal provisions. Nevertheless it is an important factor bearing on the question as to whether the accused had received the gratification as a motive or reward for doing or forbearing to do an official act or for showing any favor or disfavor in the exercise of his official functions. This question as to whether the government servant receiving the money had the requisite incriminatory motive is essentially one of fact. (Trilok Chand Jain Vs. State of Delhi,). Can it reasonably be said in the circumstances of the instant case that the money was handed over to the appellant or received by him as "a motive or reward" when it is established that he, the appellant, had nothing to do with the case of the complainant ? The complainant) a prudent businessman, could not be duped easily.

(14) It is necessary in this case to understand the true scope of Section 4(1) of the Act. This section is confined to the trial of an offence punishable u/s 161 and 165 Indian Penal Code or under clause (a) or (b) of Section 5(1) read with Sub-section (2) of that section. If at such a trial, the prosecution proves that the accused has accepted or obtained gratification other than legal remuneration) the court has to presume the existence of the further fact in support of the prosecution case, viz., that the gratification was accepted or obtained by the accused as a motive or reward such as mentioned in Section 161 IPG. This is a presumption of law. A classic instance of a presumption is given in Burton (1854) 169 Er 728. Maule J. observed :

" IF a man go into the London Docks sober and comes out of one of the cellars very drunk, that would be reasonable evidence that he had stolen some of the wine in the cellar."

This is a presumption of fact. Section 4 raises a presumption of law. (The State of Madras Vs. A. Vaidyanatha Iyer, . But it is a rebuttable presumption, one that can be displaced by the accused. Our legislative masters frequently employ this device to lighten the heavy burden of prosecution. Not only that. The idea is to force the accused to adduce evidence. Section 4(1) places the "tactical" burden of disproving the fact on the accused. The effect of the presumption is to cast an evidential burden on the party against whom it operates. Dr. Glanville Williams calls it "evidential presumption" (Criminal Law-The General Part (2nd ed.) page 877).

(15) The role of this presumption was explained by the Supreme Court in Tirlok Chand (supra). Tirlok Chand's case decides that :-

(A)the presumption u/s 4(1) is not absolute. It is rebuttable. The accused can prove the contrary.

(B)the quantum and the nature of proof required to displace this presumption may vary according to the circumstances of each case;

(C)such proof- (i) may partake the shape of defense evidence led by the accused, or (ii) may consist of circumstances appearing in the prosecution evidence itself as a result of cross-examination or otherwise.

(D)But the degree and the character of the burden of proof which Sec 4(1) casts on the accused person to rebut the presumption raised there under cannot be equated with the degree and character of proof which u/s 101 of the Evidence Act rests on the prosecution.

(E)While the mere plausibility of an Explanation given by the accused in his examination u/s 342) old Cr. P.G. (now Section 313, new Cr. P.C.) may not be enough, the burden on him to negate the presumption may stand discharged, if the effect of the material brought on the record, in its totality, renders the existence of the fact presumed improbable.

(F)In other words, the accused may rebut the presumption by showing a mere preponderance of probability in his favor; it is not necessary for him to establish his case beyond a reasonable doubt. Sarkaria J. in Tirlok Chand said :

" THE sole purpose of the presumption u/s 4(1) is to relieve the prosecution of the burden of proving a fact which is an essential ingredient under S. 5(1)(2) of the Act and S. 161 IPC. The presumption Therefore can be used in furtherance of the prosecution case and not in derogation of it. If the story set up by the prosecution inherently militates against or is inconsistent with the fact presumed, the presumption will be rendered sterile from its very inception, if out of judicial courtesy it cannot be rejected out of hand as still-born."

(pp. 669-70).

(16) Applying these principles to the facts of this case I have come to the conclusion that the appellant has displaced the presumption raised by the statute against him. The statement of the complainant which the special judge thought was the appellant's undoing can roundly be condemned as untrustworthy if it is read as a whole, cross-examination including. There was absolutely no quid pro quo. You give something for something, nothing for nothing. The appellant could do nothing for the complainant in return for the bribe. As a man of the world the appellant knew this well. It is true that Sec 161 Ipg does not require that the public servant must, in fact, be in a position to do the official act, favor or service, at the time of the demand or receipt of the gratification. (Chaturdas Bhagwandas Patel Vs. The State of Gujarat,). But if it can be shown that the prosecution case is inherently improbable or that the preponderance of probability is in accuser's favor the presumption is rendered "sterile". The court will hold that the payment was not made corruptly. The prosecution has certainly discharged the evidential burden with the aid of the presumption. But that is all. The persuasive burden has not been discharged. Upon a review of all the evidence it appears that there are circumstances appearing the evidence of the prosecution which render the existence of the fact presumed improbable.

(17) Sec 4 of the Act is only a statutory reversal of onus. It merely shifts the evidential burden. "It is the evidential burden, if anything, that is shifted, and the evidential burden is not in the strict law the burden of proof." "Strictly speaking, an evidential burden is not a burden of proof, for evidence is not proof." (Glanville Williams-Criminal Law p. 880). The burden of persuasion rests on the prosecution. If any doubt or hypothesis have been raised " on behalf of the defense, in so far as they relate to the evidence given, even though they are not themselves supported by evidence, the charge has not been brought home beyond reasonable doubt. If we keep in mind the distinction between "evidential burden" and "persuasive burden", to use the terminology of Dr. Glanville Williams, the scope of presumption raised by Section 4 will be clear. It is an "evidential presumption" and not a "persuasive presumption", to use Dr. William's terms. The terms "evidential and persuasive burdens" are those of Dr. Glanville Williams. They are adopted by Cross. (Gross on Evidence 5th ed. pp. 126).

(18) Since the decision of Rex. v. Carr Briant (1943) 1 K.B.607 it is established that the accused has merely to show a "preponderance of probability", to use an expression of Willes J. in Copper v. Slade 6 H.L. Gas. 772 to displace a rebuttable presumption such as is raised by Section 4. Where by statute some matter is presumed against an accused person "unless the contrary is proved", the burden of proof required is less than required at the hands of the prosecution in proving the case beyond a reasonable doubt, and this burden may be discharged by the accused by showing that on evidence led by the prosecution the "preponderance of probability" is in his favor. The authority of Carr-Briant has been followed in

India by the Supreme Court (V".1). Jhingan v. State of U P., Air 1966 S.C. 1764. The law on this subject is thus finally established and is, I think, perfectly clear.

(19) The onus of proof lying upon the accused person is to prove his case by a preponderance of probability. As soon as he succeeds in doing so, the burden is shifted to the prosecution which still has to discharge the original onus that never shifts i.e. that of establishing on the whole case the guilt of the accused beyond a reasonable doubt. It was observed by Viscount Sankey in *Wilmington v. Director of Public Prosecutors*, (1935) A.C. 462:

" NO matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

This principle is a fundamental part of the English common law and the same position prevails in the criminal law of India. This does not mean that if the statute places the burden of proof on the accused person he is not required to establish his plea; but the degree and character of proof which the accused is expected to furnish in support of his plea, cannot be equated with the degree and character of proof expected from the prosecution which is required to prove its case. (*V. D. Jhingan v. State of U.P. (supra)*). The accused does bear a legal burden in respect of the particular fact in issue but the burden of proof required is less than that required at the hands of the prosecution. "It might fairly be stated as not being higher than the burden which rested upon a plaintiff or defendant in civil proceedings", and in civil proceedings, "the preponderance of probability may constitute sufficient ground for a verdict." (*R. v. Sodeman* (1936) 2 All Er 1138. This preponderance of probability in his favor the accused may show from the prosecution evidence or the defense evidence or a combination of both. At the end of and on the whole of the case he can show to the adjudicating tribunal that the preponderance of probability is in his favor and he is entitled to an acquittal. This he can show from circumstances appearing in the prosecution evidence. This is the governing principle of our law as to onus of proof. It is essential that a tribunal of fact should understand this. This fundamental principle was not taken into account by the special judge.

(20) The judge cannot say: "I have heard evidence on this from both sides, and if in the end I am left in a fog and do not know what to think I must convict the defendant, because the law presumes him to be guilty in respect of this issue unless he shows himself to be innocent." This is not the law nor the effect of presumption. (See *Glanville Williams-Text Book of Criminal Law* (1978) p. 115). The judge has to decide on a balance of probability on the whole of the evidence. He has to ask himself "Has the prosecution discharged the persuasive burden" ? This question remains for the judge to answer, however meritless the defense, however meretricious the accuser's story. The burden of proof resting on the accused to negative corruption is not as heavy as that resting on the prosecution. He can by picking holes in and by finding fault with the prosecution case show that the payments were not corruptly made.

(21) By cross-examining the complainant the appellant has been able to show that the prosecution case suffers from various infirmities and is one that cannot be accepted with any confident assurance. A dispassionate survey of all the evidence shows that the prosecution story is the direct opposite of the presumption. The complainant's case tested in the fire of cross-examination shows that his uncorroborated testimony cannot be relied upon. More so, when the panch witnesses do not support the prosecution case. One of them supported the defense version, the other turned hostile. It is unsafe to act on the sole testimony of the complainant. There is no independent and trustworthy corroborative evidence (Darshan Lal Vs. The Delhi Administration,). The uncorroborated testimony of the complainant does not inspire confidence. Having regard to the evidence before me, the preponderance of probability is in favor of the appellant, for it is on the evidence, and the evidence alone, that the appellant is being tried. "The statutory presumption", to use the words of Sarkaria J; "being antithetical to the prosecution story cannot be availed of by the prosecution. ""Tirlok Chand page 671). The presumption is "still-born". It is "sterile" in the circumstances of this case. The appellant cannot be held guilty of the charge u/s 161 Indian Penal Code even with the aid of Section 4(1) of the Act.

(22) So much for the charge u/s 161 Ipg where the prosecution is given the aid of presumption u/s 4. On the charge of "abusing his position" u/s 5(l)(d) the accused stands on a better footing. The prosecution has to prove the case beyond reasonable doubt unaided by any presumption as Section 4 does not apply to Section 5(l)(d). Presumption u/s 4(1) is not applicable to prosecution of accused u/s 5(l)(d) read with Section 5(2) and burden of proving his innocence cannot be cast on the accused. (R.C. Mehta Vs. The State of Punjab, , Sita Ram Vs. The State of Rajasthan, and V.K. Sharma Vs. State (Delhi Administration),). The burden on the prosecution is not light. It is strict and onerous. Here also the prosecution has failed to prove the appellant's guilt with such degree of cogency as must carry a high degree of probability.

(23) For these reasons I accept the appeal and set aside the conviction and sentence of the appellant.