

(2015) 05 GUJ CK 0042
In the Gujarat High Court
Case No : Criminal Appeal No. 1767 of 2004

Jethalal Amrabhai Khimsuriya

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-05-2015

Acts Referred:

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

Citation : (2015) CriLJ 3411

Hon'ble Judges : Kaushal Jayendra Thaker, J

Bench : Single Bench

Advocate : J.M. Panchal and K.J. Panchal, for the Appellant; Maithili Mehta, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

Kaushal Jayendra Thaker, J—By way of this appeal, the appellant, accused has challenged judgment and order dated 15.10.2004 passed by learned Special Judge, 8th Fast Track Court, Rajkot, in Special Case No. 11 of 1992 whereby he is convicted for the offence punishable under Section 7 of the Prevention of Corruption Act, 1988 (for short, "the Act") and sentenced to undergo simple imprisonment for one year and ordered to pay fine of Rs. 1,500/- and in default of payment of fine, simple imprisonment of one month is imposed and for offence under Section 13(2) read with Section 13(1)(d) of the Act he is sentenced to undergo simple imprisonment for one year and ordered to pay fine of Rs. 1,500/- and in default of payment of fine, simple imprisonment of one month is imposed. It is the case of the prosecution that Joint Director of ACB, Rajkot, received an information that police officers and officers of RTO were illegally taking gratification from truck drivers transporting salt on the pretext of not taking legal actions. Therefore, they decided to arrange a trap. On 5.4.1995 panchas were called and preliminary panchnama was drawn. Thereafter, they went to Nimaknagar at Village-Kuda. For this decoy trap, Shri Chudasama gave an amount of Rs. 400/- to decoy witness which was smeared with anthracene

powder. Thereafter, they proceeded towards Navakam Octroi Post at Gondal. At that place, trucks were stopped and the amount towards illegal gratification was demanded by the accused and the accused was caught red handed. Accordingly, trap remained successful. After completion of investigation, charge-sheet under Sections 7, 12, 13(1)(d) and 13(2) of the Act was filed on 17.11.1992 before learned Special & Sessions Judge, Rajkot. When the accused was summoned by the Special Judge, he pleaded not guilty and claimed to be tried. Therefore, he was tried by the learned Special Judge and the prosecution has examined four witnesses in support of its case. The prosecution also relied on several documents in support of its case. At the conclusion of the trial, the appellant came to be convicted by the learned trial Judge. The appellant has challenged his conviction by filing present appeal.

2. Mr. J.M. Panchal, learned Senior Advocate for the appellant submitted that the learned trial Judge has convicted the appellant herein in spite of the fact that prime genesis of demand and acceptance were not proved. Mr. Panchal has also taken this Court through the evidence of the complainant and panch witnesses. He submitted that the trial Court has committed an error in holding that the accused demanded bribe from the complainant and thereby committed an offence under the Act. He submitted that so far as PW Nos. 3 and 4 are concerned, they are police officer and ACB sleuths, who were not present when the alleged bribe was handed over to the accused. So their evidence would only throw light on prior or subsequent events of raid and panchnama and, therefore, these two witnesses would not be knowing anything as to what conversation had taken place between the driver of truck-decoy witness and the accused, by which way the amount is transferred from one hand to another, how the amount was demanded, by whom and by which way there was acceptance etc. and even if they say anything on this aspect, it would be a derived knowledge or information. He also submitted that in this case, the driver, PW-1, has not supported the prosecution case and he is declared hostile. He also submitted that there are contradictions in the evidence of panch witness. He submitted in such case of decoy raid, decoy witness should be supported by other witnesses, however, in the present case, the decoy witness has turned hostile and evidence of panch is not supported by any independent witness, therefore, this appeal may be allowed by reversing the conviction recorded by the trial Court. He also submitted that investigation in the present case is faulty. He submitted that the prosecution has failed to prove demand on the part of the appellant herein. He also submitted that the sanction granted in the present case is not legal sanction. He also submitted that learned trial Judge has also failed to consider the judgments cited on behalf of the defence in its true perspective. He also submitted that the panchas have deposed in a mechanical manner and, therefore, by relying upon such witness the accused could not have been convicted by the learned trial Judge. He submitted that the prosecution has failed to prove demand and acceptance on the part of the accused, therefore, the learned trial Judge has committed an error in convicting the accused. He also

submitted that the learned trial Judge has wrongly drawn presumption under Section 20 against the accused, though there is no sufficient evidence on record. In view of above, Mr. Panchal prayed that this appeal may be allowed and the impugned order may be reversed.

3. Per contra, Ms. Maithili Mehta, learned APP supported the impugned judgment and submitted that presumption under Section 20 of the Act has been rightly drawn against the accused. She has submitted that evidence of the prosecution witnesses corroborates with each other and it is sufficient to prove that the accused had demanded illegal gratification. She submitted that the pancha has shown that there was recovery from accused. She also submitted that there was no clarification by the accused in his statement under Section 313 of Criminal Procedure Code that he had not demanded the amount and there was only a bare denial. She also submitted that the prosecution has proved its case beyond reasonable doubt, therefore, this appeal may be dismissed and the impugned judgment may be confirmed.

4. I have learned advocate for the appellant and learned APP for the respondent-State. I have also gone through the evidence on record. Before dealing with the case on hand, it is necessary to reproduce Sections 7 and 13(1)(d) of the Act, which reads as under:--

"7. Public servant taking gratification other than legal remuneration in respect of an official act.- Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.

(Explanations) - (a) "Expecting to be a public servant". If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this section.

(b) "Gratification". The word "gratification" is not restricted to pecuniary gratifications or to gratifications estimable in money.

(c) "Legal remuneration". The words "legal remuneration" are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government or the organization, which he serves, to accept.

(d) "A motive or reward for doing". A person who receives a gratification as a motive or reward for doing what he does not intend or is not in a position to do, or has not done, comes within this expression.

(e) Where a public servant induces a person erroneously to believe that his influence with the Government has obtained a title for that person and thus induces that person to give the public servant, money or any other gratification as a reward for this service, the public servant has committed an offence under this section.

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"Section 13 : Criminal misconduct by a public servant - (1) a public servant is said to commit the offence of criminal misconduct,-

(a).....

(b).....

(c).....

(d) if he,-

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any persons any valuable thing or pecuniary advantage without any public interest.

Or

(e)....."

5. Considering the aforesaid provision of I the Act, the prosecution has to prove its case beyond reasonable doubt. I have gone through the materials on record. From the evidence on record it is clear that panch has stated in his evidence that when the decoy witness, truck driver, approached the accused, the appellant herein demanded Rs. 500/-, whereas as per the panchnama, it was Mr. Shah, who first demanded illegal gratification and when the driver asked as to how much amount, the present appellant gave the figure. It is also clear that as per panch witness, anthracene powder marks were found on left hand of the appellant, while as per panchnama, such marks were found on the right hand of the appellant. Panch witness has stated that stains of anthracene powder were found in the suit case, while as per panchnama no stains were found either on outer side or inside the suit case. Not only that in the present case, decoy witness has also not supported the case of the prosecution and he has turned hostile. In the present case, the decoy witness did not support the prosecution case insofar as demand by the appellant is concerned. The prosecution has not

examined any other independent witness, present at the time when the money was allegedly handed over to the accused by the decoy witness, to prove that the same was pursuant to any demand made by the accused. When the decoy witness himself had disowned what he had stated and when there is no other evidence to prove that the accused had made any demand, the evidence of PW-1 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused-appellant herein. Therefore, going through the evidence on record, it cannot be said that there was demand of illegal gratification. Therefore, it goes to show that there is no demand on the part of the present appellant. The learned trial Judge in his lengthy judgment has brushed aside the submissions made on behalf of the present appellant. The prosecution case falls to the ground on the cardinal principles that demand, acceptance and recovery are not proved. Therefore, in the present case, the prosecution has failed to prove its case beyond reasonable doubt against the appellant.

6. In the case of M.R. Purushotham Vs. State of Karnataka, (2014) AIRSCW 5740 : (2014) 3 SCC 721 , Honourable Apex Court observed as under:--

"6. In such type of cases the prosecution has to prove that there was a demand and there was acceptance of illegal gratification by the accused. As already seen the complainant PW1 Ramesh did not support the prosecution case insofar as demand by the accused is concerned. No other evidence was adduced by the prosecution to prove the demand made by the accused with the complainant. In this context the recent decision of a three Judge bench of this Court in B. Jayaraj Vs. State of A.P., (2014) AIRSCW 2080 : (2014) CriLJ 2433 : (2014) 7 JT 381 : (2014) 4 SCALE 81 is relevant and it is held as follows :

"8. In the present case, the complainant did not support the prosecution case insofar as demand by the accused is concerned. The prosecution has not examined any other witness, present at the time when the money was allegedly handed over to the accused by the complainant, to prove that the same was pursuant to any demand made by the accused. When the complainant himself had disowned what he had stated in the initial complaint (Exbt. P-11) before LW-9, and there is no other evidence to prove that the accused had made any demand, the evidence of PW-1 and the contents of Exhibit P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused. We are, therefore, inclined to hold that the learned trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under S. 7. The above also will be conclusive insofar as the offence under Section 13(1)(d)(i)(ii) is concerned as 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 established."

The above decision is squarely applicable to the facts of the present case. When PW1 Ramesh himself had disowned what he has stated in his initial complaint in Exh. P1 before PW4 Inspector Santosh Kumar and there is no other evidence to prove that the accused had made any demand, the evidence of PW3 Kumaraswamy and the contents of Exh. P1 complaint cannot be relied upon to conclude that the said material furnishes proof of demand allegedly made by the accused. The High Court was not correct in holding the demand alleged to be made by the accused as proved. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 13(1)(d) of the Act and the conviction and sentence imposed on the appellant are liable to be set aside."

7. I am also supported in my view by the latest decision in the case of B. Jayaraj Vs. State of A.P., (2014) AIRSCW 2080 : (2014) CriLJ 2433 : (2014) 7 JT 381 : (2014) 4 SCALE 81 , wherein it is observed as under:

"8. In the present case, the complainant did not support the prosecution case insofar as demand by the accused is concerned. The prosecution has not examined any other witness, present at the time when the money was allegedly handed over to the accused by the complainant, to prove that the same was pursuant to any demand made by the accused. When the complainant himself had disowned what he had stated in the initial complaint (Exbt. P-11) before LW-9, and there is no other evidence to prove that the accused had made any demand, the evidence of PW-1 and the contents of Exhibit P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused. We are, therefore, inclined to hold that the learned trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under S. 7. The above also will be conclusive insofar as the offence under Section 13(1)(d)(i)(ii) is concerned as 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 established."

8. In the case of C. Sukumaran Vs. State of Kerala(2015) 2 AD 69 : (2015) CriLJ 1715 : (2015) 1 Crimes 130 : (2015) 2 JCC 1322 : (2015) 2 RCR(Criminal) 159 : (2015) 1 SCALE 751 : (2015) 2 SCJ 135 , the Hon"ble Apex Court observed as under:--

"14. In the present case, as has been rightly held by the High Court, there is no demand for the illegal gratification on the part of the appellant under Section 7 of

the Act. Therefore, in our view, the question of acceptance of illegal gratification from the complainant under the provision of Section 13(1)(d) of the Act also does not arise. The learned Special Judge has come to the erroneous conclusion that the appellant had received the money and therefore he had recorded the finding that there was demand and acceptance of the bribe money on the part of the appellant and convicted and sentenced the appellant. However, the High Court on reappraisal of evidence on record has held that the demand alleged to have been made by the appellant from the complainant PW2, was not proved and that part of the conviction and sentence was rightly set aside in the impugned judgment. However, the High Court has erroneously affirmed the conviction for the alleged offence under Section 13(1)(d) read with Section 13(2) of the Act, although as per law, demand by the appellant under Section 7 of the Act, should have been proved to sustain the charge under Section 13(1)(d) of the Act.

15. Further, the fact that out of Rs. 1,500/- that was allegedly demanded as bribe money from the complainant, an amount of only Rs. 250/- was paid by him, out of which the appellant allegedly managed to return Rs. 50/- to the complainant, since he had no money left, makes us pause and ponder over the facts and circumstances of the case and casts a serious shadow of doubt on the sequence of events as narrated by the prosecution.

16. Further, none of the prosecution witnesses have actually deposed in the case that the appellant was the person who had demanded and accepted the bribe from the complainant and since PW2 has materially turned hostile, therefore, neither the demand aspect nor the acceptance of the bribe money can be verified from any other witnesses of the prosecution. Further, PW1 in his deposition before the Special Judge has also not supported the case of the prosecution, as he had refused to acknowledge the ownership of the tea shop, on the premises of which the bribe money was allegedly accepted by the appellant from the complainant. Hence, it is safe to say that the prosecution has failed to prove beyond any reasonable doubt that the appellant had accepted the illegal gratification from the complainant under Section 13(1)(d) of the Act....."

9. Similar is the case on hand. When the prosecution has failed to prove the case properly and when the decoy witness has not supported the case of the prosecution, it cannot be said that the appellant has committed an offence under the Act. In the totality of the facts and circumstances and considering the judgment in the case of *Satvir Singh Vs. State of Delhi*, (2014) AIRSCW 4924 : (2014) 9 SCALE 528 will also enure for the benefit of the accused. Ms. Mehta learned APP has not been able to satisfy this Court that the accused had used any corrupt or illegal means so as to see him behind bar under Section 13(1)(d) of the Act as the main ingredients are absent. Therefore, I am unable to concur with the learned trial Judge. All these in unison will permit this Court to reverse the judgment of the trial Court as it is not only perverse but it is against the evidence on record and it is found that the accused is roped in only with a view

to punish him. Therefore, this appeal is required to be allowed. The appeal is allowed. The judgment and order dated 15.10.2004 passed by learned Special Judge, 8th Fast Track Court, Rajkot, in Special Case No. 11 of 1992 is quashed and set aside. The accused-appellant is acquitted of the charges levelled against him. As the accused-appellant is on bail, he need not surrender. Fine, if paid, be refunded to the appellant. The bail and bail bond stands cancelled. Surety, if any, shall stand discharged. Record and Proceedings be sent back to the trial Court concerned forthwith.