**(2019) 03 OHC CK 0044**

**In the Orissa High Court**

**Case No :** Criminal Appeal No. 219 Of 2009

Kishore Kumar Mishra APPELLANT

Vs

State Of Orissa, Department Of Vigilance RESPONDENT

**Date of Decision :** 19-03-2019

**Acts Referred:**

Prevention Of Corruption Act, 1988 — Section 7, 13(1)(d), 13(2), 20
Evidence Act, 1872 — Section 154

**Citation :** (2019) 03 OHC CK 0044

**Hon'ble Judges :** C.R. Dash, J

**Bench :** Single Bench

**Advocate :** Tusar Kumar Mishra, Sanjay Kumar Das

**Final Decision :** Allowed

# Judgement

C.R. Dash, J

1. Judgment of conviction and sentence dated 14.05.2009 passed by the learned Special Judge (Vigilance), Bhubaneswar in T.R. No.62 of 2000

convicting the Appellant under Section 7 of the Prevention of Corruption Act, 1988 (â??P.C. Actâ? for short) and sentencing him to suffer R.I. for

six months and to pay a fine of Rs.1,000/- (one thousand) with default stipulation, has obliged the convict Appellant to file this Appeal.

2. The date of occurrence was 16.09.1998. One Pankaj Kumar Chhualsingh (P.W.7) presented a written complaint before the S.P. (Vigilance),

Bhubaneswar alleging demand of illegal gratification of Rs.500/-(five hundred) by the Appellant. The Appellant at that time was working as a Junior

Clerk in the Office of the A.D.M., Bhubaneswar and he was dealing with processing of files to be sent to the Inspector General of Registration for

registration of different organizations. Pankaj Kumar Chhualsingh (P.W.7) claiming himself as a member of â??Patita Uddhar Samitiâ? â?" a

voluntary organization, had approached the Appellant in his office for processing of the file for registration of the organization. It is alleged that the

Appellant had demanded Rs.500/- (rupees five hundred) from said Pankaj Kumar Chhualsingh (P.W.7) to do his work. Going further into the fact it is

found that, on 18.05.1998 the B.D.O., Bhubaneswar had submitted a report recommending for registration of the aforesaid Society. The file containing

such recommendation of the B.D.O., Bhubaneswar was in the office of the Additional District Magistrate, Khurda at Bhubaneswar and the Appellant

was dealing with that file. On the basis of the complaint, a trap was laid on the same day. Tainted G.C. Notes of Rs.500/- (five hundred) was detected

from the second drawer of the table of the Appellant in presence of witnesses, Detection Report was prepared and the Appellant was ultimately

charge-sheeted.

3. The prosecution has examined nine witnesses to bring the charge to home against the Appellant. P.W.1 is the Collector & District Magistrate,

Khurda and he had given the order of sanction. P.W.2 is the Assistant Director of State Forensic Science Laboratory, Bhubaneswar, P.W.3 is the

accompanying / overhearing witness â?" a Junior Clerk in the Office of the Executive Engineer, Prachi Division, Bhubaneswar, P.W.4 is a Trap

Witness who is stated to have brought out the tainted G.C. Note from the second drawer of the table of the Appellant and has tallied the numbers with

the numbers there in the Preparation Report, P.W.5 is also a Trap Witness, P.W.7 is the Complainant, P.W.6 is a witness to the Seizure, P.W.8 is the

Investigating Officer and P.W.9 is the Officer who led the trap party and detected the tainted G.C. Notes in the second drawer of the table of the

Appellant and had taken the hand-wash of the Appellant which was collected in a clean bottle and was sent to the S.F.S.L., Bhubaneswar for

chemical examination.

Besides oral evidence, a number of documents including the Preparation Report, Detection Report, Chemical Examination Report and Signatures of

different witnesses have been proved by the prosecution.

4. The specific defence plea is that, the Complainant is not related to the â??Patita Uddhar Samitiâ?. He was frequently offering bribe to the

Appellant, but the Appellant did not receive the same. It is the further plea that, when the Appellant was busy in locating some files from his table, two

persons came and challenged him and he denied to have received any money, but the Complainant said that the money is in the drawer of the

Appellant, and then the Vigilance Officers asked him to bring out the money and he brought out the money. However, no evidence has been tendered

by the defence.

5. Learned trial court, on detail discussion of the materials on record, found that the prosecution has failed to establish the factum of demand of bribe

by the Appellant and accordingly he acquitted the Appellant from the charge under Section 13(2) read with Section 13 (1)(d) of the P.C. Act.

6. So far as Section 7 of the P.C. Act is concerned, learned Court below had relied on the evidence of P.Ws.3, 4, 7 and 9 in addition to the Chemical

Examination Report and the conduct of the accused.

7. Learned counsel for the Appellant submits that, there being no evidence regarding demand and acceptance of bribe, offence under Section 7 of the

P.C. Act cannot be made out. Further it is submitted by learned counsel for the Appellant that, mere recovery of tainted G.C. Notes by itself is not

enough in absence of any evidence to prove demand of bribe or to show that the accused voluntarily accepted the money, knowing very well it to be

bribe. The second contention of learned counsel for the Appellant is that, the burden on the accused to rebut the presumption under Section 20 of the

P.C. Act is not the same as the burden placed on the prosecution to prove the case beyond reasonable doubt. The accused, by cross-examining the

witnesses and by adducing plausible evidence, may discharge his part of the burden.

8. Learned Standing Counsel for the Vigilance Department on the other hand supports the impugned judgment.

9. Coming to the evidence on record, P.W.7, who is the Complainant, has not supported the prosecution case at all. Learned trial Court on

misconception has accepted the facts brought out on record in evidence by cross-examination of the said witness (P.W.7) under Section 154 of the

Evidence Act, as to what he had told before the I.O. during investigation.

10. P.W.3, the overhearing / accompanying witness has testified that, when the Complainant entered into the room of the accused, the accused

showed a file to him. Thereafter the Complainant tendered the amount to the accused. The Complainant had kept the tainted G.C. Note in the drawer

of the accused. On this aspect, this witness has also been cross-examined under Section 154 of the Evidence Act and the learned Court below has

taken into consideration what the witnesses have stated before the I.O.

11. P.W.4 is stated to have brought out the tainted G.C. Notes from the second drawer of the table of the Appellant, verified its number and on

comparison it was found to be tallied with the numbers there in the Preparation Report.

12. P.W.9, the Detecting Officer has supported the prosecution case and has testified that, on washing of the hand of the Appellant, it turned pink

colour and phenolphthalein trace from the hand-wash collected from the Appellant is supported by the Chemical Examination Report.

13. From the evidence on record it is found that, both the decoy and the overhearing / accompanying witness have not supported the prosecution case.

The decoy may be a private complainant, but the accompanying / overhearing witness is a government officer. He has specifically stated that the

Complainant had kept the money in the drawer of the table of the Appellant.

14. Learned Court below, relying on the evidence of P.W.4 alone, has convicted the Appellant under Section 7 of the P.C. Act.

15. Honâ??ble Supreme Court, in the case of V. Venkata Subbarao VRS. State represented by Inspector of Police, A.P., 2007 CRL. L. J. 754, in

paragraph 24, has held thus :-

â??24. Submission of the learned counsel for the State that presumption has rightly been raised against the appellant, cannot be accepted as, inter alia, the demand

itself had not been proved. In the absence of a proof of demand, the question of raising the presumption would not arise. Section 20 of the Prevention of Corruption

Act, 1988 provides for raising of a presumption only if a demand is proved. â?¦â?¦â??.

In the aforesaid case, Honâ??ble the Supreme Court was dealing with a case under Sections 7 and 13 of the P.C. Act. In the aforesaid case it is

also held in paragraph â?" 26 of the judgment that, the onus on the accused isÂ notÂ asÂ heavyÂ asÂ thatÂ onÂ theÂ prosecution. ItÂ mayÂ

beÂ comparedÂ withÂ a Defendant in a Civil Proceeding.

16. Honâ??bleÂ SupremeÂ Court,Â inÂ theÂ caseÂ ofÂ C.M.Â GIRISHÂ BABU VRS. CBI,Â KOCHIN,Â HIGHÂ COURTÂ OFÂ

KERALA,Â (2009)Â 3Â SCCÂ 779,Â were dealing with a question relatable to Section 7 of the P.C. Act, as to whether mere recovery of

tainted currency note from the accused when substantive evidence is not reliable, is a ground enough for conviction under Section 7 of the P.C. Act.

In paragraph-18 of the judgment, Honâ??ble Supreme Court in the aforesaid case, relying on 1979 (4) SCC 725, has held that, mere recovery of

tainted money divorced from the circumstance under which it has been paid, is not sufficient to convict the accused. When the substantive evidence in

the case is not reliable, the mere recovery by itself cannot prove the charge of the prosecution against the accused in absence of any evidence to

prove payment of bribe or to show that the accused voluntarily accepted money knowing it to be bribe.

17. Similarly, regarding the nature of proof the accused is liable to adduce, Honâ??ble the Supreme Court has held that the burden of proof placed

upon the accused person against whom the presumption is raised under Section 20 of the Act is not akin to that of the burden placed on the

prosecution to prove the case beyond reasonable doubt. Such burden can be discharged through cross-examination of the witnesses cited against the

accused or by adducing reliable evidence.

18. This Court, in cases relatable to Section 7 of the P.C. Act, in the cases of Bhagirathi Pera VRS. State of Orissa, (2014) 58 OCR â?" 566,

Manoranjan Mohanty VRS. State of Orissa, (2014) 58 OCR â?" 703 and Kailash Ch. Sahoo VRS. State of Orissa, (1988) 1 OCR â?" 329, have held

that, mere recovery of tainted money divorced from the circumstance under which it was paid, is not sufficient for conviction of the accused, as

substantial evidence is not reliable.

19. In the present case, from the evidence of P.W.4, it might have been proved that tainted money was recovered from the second drawer of the

table of the Appellant. But there is no evidence to prove the demand or payment or the circumstance under which the money was paid. There is also

no evidence to prove that the Appellant accepted the tainted G.C. Notes knowing it to be bribe. There is further no evidence to prove whether the

complainant was an Office Bearer of â??Patita Uddhar Samitiâ? and he had pending work with the Appellant. The Complainant has turned hostile

completely and the accompanying / overhearing witness has supported the defence to the effect that the Complainant put the tainted money in the

second drawer of the table of the Appellant. There is also no evidence on record as to whether the file of the Complainant was still pending with the

Appellant or the role of the Appellant in withholding the file of the Complainant.

20. Taking into consideration the evidence on record in their totality and the law discussed supra, I am of the view that the prosecution has failed to

prove the charge under Section 7 of the P.C. Act against the Appellant. The Appellant is therefore entitled to be acquitted of the charge. Accordingly,

the judgment of conviction and order of sentence are set aside.

21. The Criminal Appeal is allowed. The Appellant be discharged of the Bail Bond forthwith.

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