

(1992) 07 GUJ CK 0003
In the Gujarat High Court

Nasirmiya Hasanmiya Mallik

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 22-07-1992

Acts Referred:

Penal Code, 1860 (IPC) — Section 161, 161

Prevention of Corruption Act, 1947 — Section 5(1)(d), 5(1)(d), 5(2)

Citation : (1993) 1 GLR 853

Hon'ble Judges : K.J. Vaidya, J;J.M. Panchal, J

Bench : Division Bench

Judgement

K.J. Vaidya, J.—"Whether in a running-trap of the Corruption case, wherein the complainant whose services came to be requisitioned as a decoy-witness and is found to be hostile to the prosecution, can the trial Court still under the circumstances on the basis of evidence of the Panch-Witness and that of P.I. of the raiding party record the order of conviction sentencing the accused u/s 161 of I.P.C. and Sections 5(1)(d) and 5(2) of the Prevention of Corruption Act, 1947 ?" This in short is the question which we have been called upon to answer in this Appeal, at the admission stage.

2. In order to appreciate the question raised above, few relevant facts may briefly be narrated. Accordingly, the prosecution case as it gets unfolded from the evidence of P.I., Anti-Corruption Bureau Mr. G. K. Desai (PW-3, Exh. 20) is to the effect that on 23-5-1988, he received the information that some of the local police constables, traffic police, forest officers and officers of. R.T.O. department were illegally collecting money in the name of ""Entry Fees" from the truck drivers plying their vehicles on the highway and passing by Bhagpura, Kuha, Kunjad and Narol Circle. Acting on this tip-off, P.I.-Mr. Desai decided to arrange the trap and in the process, on 24-5-1988 requisitioned the services of two Panch Witnesses, viz., (1) Nilesh Chandrashankar Joshi (PW-1, Exh. 13), and (2) Pravinbhai Gineshbhai Patel (not examined). Thereafter, he alongwith the aforesaid two panch witnesses and other police personnel at 3-00 a.m, started from Ahmedabad and went to Kathlal, where at about 5-00 a.m. on seeing the

Truck No. GRQ 6911 coming, stopped it and informed its driver-Anvarhusen Rasulmiya (PW-2, Exh. 19) about the running-trap in question and further inquired as to whether he was ready and willing to co-operate in the said trap, working as decoy-witness ? On getting the favourable reply in affirmative, he was further asked to give Rs. 100/- for the trap-business, which he readily gave by taking out nine currency notes of Rs. 10/- denomination and two currency notes of Rs. 5/- denomination from his pocket. Thereafter in process of recording the first-part of the Panchnama, the number of the said currency were noted down, and after the usual anthracene powder test was carried out, the same were placed in the right-hand side pocket of the bush-shirt of the truck-driver Anvarhusen. After this formality was over, truck driver Anverhusen was further instructed not to touch the said currency notes till the time occasion arose to give the bribe amount to the person so demanding it. Panch Nilesh Joshi was also instructed to sit in the driver's cabin by the side of driver Anvarhusen and to see and hear whatever transpired between the driver and the person demanding the money and thereafter to give signal to P.I. Mr. Desai. This part of the story was recorded in the first part of the Panchnama Exh 14. After this was over, the truck was given green signal to proceed ahead, followed at some distance by P.I. Mr. Desai in the jeep with other members of the raiding party. At about 6-50 a.m., when the said truck driven by driver-Anvarhusen reached Odhav Octroi Gate, they found one mobile police van, surrounded by four police constables, standing on the left side of the road. Out of these four police constables, three were in their uniform, while one was found to be in civilian dress. Out of the said four constables, two constables in uniform signalled that truck to halt by pounding their sticks on the road. Thereupon driver-Anvarhusen stopped his truck on the side. Immediately, one police constable came near the truck and asked to open the door where Panch Nilesh Joshi was sitting, which was opened by Nilesh himself. Thereafter, the said police constable demanded Rs. 10/- from the driver Anvarhusen, whereupon the driver took out the said currency note of Rs. 10/- from his right-hand side pocket of his bush-shirt and gave it to the said police constable, who accepted the same by extending his hand across panch Nilesh Joshi from the truck-driver. After grabbing the said note of Rs. 10/- in his hand, he asked the truck-driver to go. Immediately thereafter, on the truck driver making a pre-arranged signal, panch Nilesh and other A.C.B, personnel got out from the truck, and in the meantime P.I. Mr. Desai came swooping in the jeep introduced himself to the police constable who had demanded and accepted Rs. 10/- from the truck-driver Anvarhusen Rasulmiya. On P.I. Mr. Desai inquiring about the name and address of the said police constable who had accepted Rs. 10/-, he gave his name as Nazirmiya Hasanmiya Mallik. Thereafter, P.I. Mr. Desai directed the police constable Nathalal to carry out the ultra-violet lamp experiment, wherein except the hands of truck-driver Anvarhusen Rasul-miya and that of the present appellant, none of the others hands were found to be shining with the anthracene powder marks. At this time of raid, one another police constable (Ajitsinh) who was in c.vilian dress started running away. Despite the fact that he was chased by the raiding party, he could not be caught

hold or and arrested. This constable Ajitsinh was also tried as co-accused alongwith the appellant-accused but he was given the benefit of doubt and acquitted. Thereafter on carrying out the usual ultra-violet lamp test on the hands of the appellant, his finger tips as well as palms of both hands were found to have been smeared with anthracene powder. On taking further search of the appellant, the currency notes of Rs. 145/- were also found from his pocket. The number of the currency notes recovered from the hands of the appellant was thereafter compared with those which were noted down in the first part of the panchnama and were found to be tallying. All these were seized under the second part of the Panchnama Exh. 14. On the basis of these facts, after obtaining the necessary sanction, the appellant came to be charge-sheeted to stand trial for the aforesaid alleged offences before the learned Special Judge, Ahmedabad.

3. At the trial, the appellant-accused pleaded not guilty and claimed to be tried. His defence was that of the alleged currency note of Rs. 10/- being thrust in his hand and that of the false implication. In support of his defence version, he has neither led any evidence in the Court nor has he attributed any motive to any of the prosecution witnesses for falsely involving him in this graft case.

4. The trial Court despite the fact that though the complainant-Truck Driver Anvarhusen Rasulmiya, a decoy-witness did not supported the prosecution, yet accepting and relying upon the evidence of the panch Nilesh Joshi and that of P.I. Mr. Desai, convicted the appellant-accused for the alleged offences u/s 161 of I.P.C. and under Sections 5(1)(d), and 5(2) of the Corruption Act and sentenced him to undergo, in all, S. I for 3 years and fine of Rs. 2,000/- and in default to undergo further imprisonment of 3 months, for each of the offences, etc., as stated in detail in the impugned judgment and order, giving rise to the present appeal by the appellant-accused.

5. When this matter came up for admission on 6-7-1992, we had called for the Records and Proceedings of the case and that the same were made available to Mr. V.M. Barot, learned Advocate for the appellant as well as the learned Addl. P.P. Mr. D. K. Trivedi.

6. Mr. V.M. Barot, learned Advocate for the appellant while challenging the impugned order of conviction and sentence submitted that in this case, the most material witness, viz , Anvarhusen Rasulmiya - truck driver from whom the bribe-amount was demanded and accepted, has not supported the prosecution case. This according to Mr. Barot completely knocks down the bottom of the prosecution case. Mr. Barot further submitted that Anvarhusen is the star and the key prosecution witness. He in fact is a foundation stone upon which rests structure of the prosecution case and its ultimate success in securing the order of conviction and sentence ! In this view of the matter, according to Mr. Barot, when he is found to be shifting, shacking and then ultimately not supporting the prosecution case, it would be simply hazardous to rely upon the rest of the prosecution evidence which is merely corroborative in nature for the purpose of

convicting the sentencing the appellant-accused. It was next contended by Mr. Barot that even the evidence of panch-witness Nilesh Joshi was not free from doubt. Making good this submission, Mr. Barot further submitted that the evidence of panch witness suffers from several contradictions, which should make this Court think twice before readily placing implicit reliance upon him, while reaching conclusion of the guilt of the accused. Mr. Barot submitted that panch Nilesh Joshi in unmistakeable terms has stated before the Court that the finger-tips and the palms of both hands of the appellant, when examined under ultraviolet lamp after the raid, the same were found smeared with the anthracene powder. However, according to Mr. Barot, on perusal of the cross-examination, it is very clear that the appellant-accused had accepted the monies only with the left hand and when raided, he was found to be holding the said currency notes in the left hand. Mr. Barot further submitted that the trial Court has clearly erred in not appreciating that the appellant had accepted the monies by his left hand and the monies were seized from the left-hand only, panch Nilesh (P.W.-1, Ex. 13) has voluntarily stated that the appellant had accepted the monies with his left hand, made a bundle of it with his right hand and then brought it back to the left-hand. This aspect, according to Mr. Barot, is not found to be there in the Panchnama, after the raid was carried out. According to Mr. Barot, the trial Court ought to have appreciated that a voluntary statement made by panch Nilesh Joshi (P.W.-I, Exh. 13) was only for the purpose of establishing his claim that the appellant had touched the monies with both his hands. Mr. Barot further submitted that the trial Court ought to have further appreciated that in fact, according to the Panchnama of the raid, the appellant-accused is alleged to have accepted the said currency note by his right hand and kept the same in his right hand itself. Mr. Barot further submitted that since the anthracene powder marks were found on both the hands of the appellant, that by itself clearly probabalize the defence version that muddamal currency-note was forcibly thrust in his hands.

7. In our opinion the submissions highlighted above by Mr. Barot just fails to carry any conviction. Turning first to the evidence of the truck driver Anvarhusen Rasulmiya, no doubt it is true that he has failed to narrate the incident exactly in the identical manner in which it took place at the time of the raid and therefore, he came to be declared as hostile. But here also we will have to make some allowance for this witness in not narrating the prosecution story in the exact manner before the Court by committing some error here and there. It should not be forgotten that the said truck driver was asked to act as a decoy-witness, for him quite unexpectedly, not only that but his evidence before the Court also came to be recorded after four years !! Under these circumstances, in all probability, he has committed some obvious bona fide error while narrating the incident and appears to have drawn more on the past memory which appears to have not served him well at the time of giving evidence before the Court and thereby failing him to give the evidence in the exact desired manner. Under such circumstances, it will not be prudent to say that this witness was got up by the

P.I. Mr. Desai in order to falsely implicate the appellant. While appreciating the evidence of truck-driver, one cannot be oblivious of the fact that he has admitted that on a particular day he was driving the truck, that he was asked by P.I. - Mr. Desai whether he was ready and willing to act as a decoy-witness; that he had also shown his willingness to act as such; that for the said purpose the anthracene power test was carried out and he offered the currency notes, that he did accompanied the raiding party when the raid actually took place and that the panch Nilesh Joshi was also alongwith him, and further that after the raid, the money were found from the possession of the appellant. Bearing in mind these sequence of events, the constituting the main substratum of the prosecution case, it would be indeed unjudicial to discard the evidence of this witness merely because he committed some error in describing bow the money passed into the hands of appellant. According to us, this witness failed to reproduce the prosecution case in the exact manner because of the time factor of intervening four years. Otherwise, on going through his entire evidence, he appears to be quite natural and truthful witness and inspires sufficient confidence as a witness present at the relevant point of time of the raid, etc. When such a decoy-witness under the circumstances beyond his control, viz., time factor, merely because he committed some genuine bona fide mistake in giving out the story in the exact manner, it cannot be said as suggested by Mr. Barot that he is a liar or a shakey and shifting foundation stone to convict the appellant. Mr. Barot had one more comment to offer against the evidence of the complainant that though he was declared hostile, he was not confronted with the previous police statement. Undisputedly, it is true that he was not so confronted. But merely because the learned P. P. in-charge of the matter for whatever reasons was unaware and failed in discharge of his duty in the said regard that does not mean that in the facts and circumstances of the case it damages the otherwise dependable evidence of the panch Nilesh Joshi and the P. I. Mr. Desai. We wish that the learned P.P. in-charge of the matter in future remains little alert while discharging such duties. But at the same time, the failure of the said discharge of the duty in the present case, does not destroy the prosecution case.

8. We cannot be oblivious to the fact that panch Nilesh as well as the truck driver Anvarhusen were giving evidence before the Court after about 4 years. Under such circumstances, it is but natural that they subject to some obvious human limitations have committed some honest mistake in narrating the evidence before the Court. Under such circumstances, to attach over undue importance and emphasize some such slip of memory while giving the evidence before the Court would be just violating the common sense more particularly when the main structure of the prosecution remains in-tact and cannot be doubted ! ! Even if the witness was to recall some facts having taken place even some days before or say before few hours, depending upon his power of observation, the presence of mind capacity to remember and the mindfulness of his earlier account" of witnessing a thing at the issue in exact manner, etc., he was bound to" commit some bona fide mistake. On the contrary, some such slip in the evidence before

the Court shows that the witness is a natural witness and that whatever he has stated on oath is stated in the most unadulterated manner. Under such circumstances, to make much ado about such slips because of the alleged time factor and other factors enumerated above, while appreciating the evidence it cannot be said to be a just and proper judicial approach. In fact, while appreciating the evidence, one should not forget that it is the human agency which was giving evidence before the Court and that too after lapse of about 4 years and not the mechanical process of audio-video cassettes which only can reply and reproduce events in exact and ideal manner. Under such circumstances, it is too much to expect the narration of events before the Court to be as exact and particular as the one would expect by reproduction from the audio-video cassette. Further as regards the contention of Mr. Barot that after the money were accepted by the right hand, how the left-hand of the appellant came to be smeared with anthracene powder, we feel that the same may be a problem for Mr. Barot and according to Mr. Barot, a good point also for him, but to us, the same is certainly not of any significance as it appears to us that after accepting the amount of Rs. 10/- when the appellant came to know that he was trapped, the funky, nervous and jittery he must have become, in a reflex action under the shudder of fear, perplexed and confused mind that his two hands coming in contact together cannot be ruled out, as this is a normal thing which happens when a person happens to be victim of sudden, grave, fear and nervousness ! In this view of the matter, finding of the marks of anthracene powder on both hands can be easily explained and in that view of the matter, it does not pose any problem to us. Further, merely because the marks of anthracene powder were found on the finger tips and palms of both the hands of appellant, that also by no stretch of imagination indicate that the muddamal currency note was forcibly thrust in his hands. Nothing has been suggested in the cross-examination of any of the witnesses. Now examining this case on the basis of probability also, this is not a case where the truck-driver was previously harassed by the appellant and therefore, he was bearing some grudge to falsely implicate him at any cost. Neither, as stated above there was any reason for panch - Nilesh Joshi or P.I. Mr. Desai to give false evidence against the appellant before the Court. In fact, panch Nilesh, aged 20 years is totally an independent person and he has no axe to grind against the appellant either for siding with the prosecution or was there anything to suggest that he was under the thumb of police to give false evidence or he was having any personal enmity with the appellant to settle the score by falsely implicating him. Similarly, nothing has been alleged against P.I. Mr. Desai for being party to a false trap for framing up the appellant in such a serious charge of corruption. Apart all these things, it is simply difficult to conceive that all the aforesaid three prosecution witnesses would conspire to trap a public servant and that too none other than a Police Constable ! ! Under such circumstances, it is indeed not possible to discard the evidence of panch Nilesh Joshi on the point of demand and acceptance of the bribe amount of Rs. 10/- which has been duly corroborated by the attending circumstances, viz., finding of the marks of anthracene powder on the hands of

appellant, tallying of the recovered currency note with that of the number mentioned in the first part of the Panchnama, no immediate protest for the alleged false implication, running away of the other constable, namely, Ajitsinh, absence of the reasonable explanation as to why the prosecution witnesses were giving false evidence and how he came to be in possession of the alleged currency note of Rs. 10/-, coupled with the corroboration of all the circumstances by the evidence of P.I. Mr. Desai. Further while appreciating the evidence, we cannot afford to be oblivious to the fact that this is a case wherein the appellant is trapped in a running trap.

9. Over and above the evidence of Truck Driver and the Panch witness, we have also gone through the evidence of P.I. Mr. Desai. His evidence appears to be absolutely straightforward and natural, and nothing has been elicited in his cross-examination, which can militate against his overall credibility. The fact remains that the bribe amount was found from the hand of the appellant. Regarding the demand and acceptance of the money, there is a definite evidence of the panch Nilesh Joshi who was sitting by the side of driver, in the cabin, whom as stated above, we have no reason to disbelieve it. When under such circumstances the appellant failed to give reasonable explanation as to how his hands came to be smeared with the anthracene powder and the money recovered from, except the bald assertions that the money was thrust in his hand, we are inclined to accept the evidence of panch Nilesh Joshi and that of P.I. Mr. Desai to whom the trial Court had an opportunity of seeing before its own eyes and have impressed as truthful and reliable witnesses. We have no reason to differ from the trial Court on this count.

10. The learned Judge while accepting the prosecution case and recording the order of conviction and sentence of the appellant has rightly referred to and appreciated three decisions of the Supreme Court rendered in the cases of (1) Prakash Chand Vs. State (Delhi Administration), (2) Hazari Lal Vs. State (Delhi Administration), and (3) State of U.P. Vs. Dr. G.K. Ghosh, This we entirely agree with and endorse.

11. Apart from the aforesaid decisions referred to and relied upon by the learned Judge, we would like to refer to and rely upon one more decision of the Supreme Court rendered in the case of Dharm Das Wadhvani Vs. The State of Uttar Pradesh, wherein in para 13, it has been observed as under:

13. The question then is whether the cumulative effect of the guilt pointing circumstances in the present case is such that the Court can conclude not that the accused may be guilty but that he must be caution about this mental sense of "must" lest it should be confused with exclusion of every contrary possibility. We have in Shivaji Sahabrao Bobade and Another Vs. State of Maharashtra, explained that proof beyond reasonable doubt cannot be distorted into a doctrine of acquittal when any delicate or remote doubt flits past a feeble mind. These observations are warranted by frequent acquittals on flimsy possibilities which are not infrequently set aside by the High Courts weakening the credibility of the

judicature. The rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of legitimate inferences flowing from evidence, circumstantial or direct. At the same time, it may be affirmed, as pointed out by this Court in *Kali Ram Vs. State of Himachal Pradesh*, that if a reasonable doubt arises regarding the guilt of the accused, the benefit of that cannot be withheld from him.

Bearing in mind the above principles laid down by the Supreme Court, merely because the complainant could not stand the test of time and his memory in re-pecturising the exact event in chronological order, in so many words, it would be unjudicial to throw-away the entire prosecution case which is otherwise fully corroborated by the evidence of Panch witness - Nilesch Joshi and P.I. Mr. Desai.

12. At this stage, Mr. Barot submitted that the sentence of three years and fine of Rs. 1,000/- on each count, on face of it, being harsh and unjust and that, the same deserves to be reduced. Mr. Barot further submitted that as a result of this prosecution, the appellant was even otherwise to lose his job and therefore the overall punishment, in the present case, would be quite severe. Mr. Barot submitted that the amount accepted was merely Rs. 10/- only and looking to this small amount, the sentence ultimately imposed alongwith his dismissal from service is proportionately heavy and harsh. This contention of Mr. Barot has been suitably dealt with by the learned Judge in para 11 of the judgment and indeed it is not possible for us to say that the discretion exercised in the said regard is in any way not judicial one. We may also incidentally further add that it was only in order to meet with the exigency of increasing menace of the rampant corruption in the country that the Parliament was constrained to come out with somewhat radical Act by enacting the Prevention of Corruption Act, 1947, whereby the statutory presumption of the guilt against the accused came to be raised u/s 4 of the said Act, though at the relevant time. Section 161 of the Indian Penal Code pertaining to public servant taking gratification other than the legitimate remuneration in respect of the office was very much on the statute.

13. Despite this fact and further still though the Corruption Act is in operation since last about 45 years, sometimes, it is alleged that the same has not been able to achieve the desired result by making effective dent on the problem. For the alleged weakness out of many reasons assigned, one of the probable reason often put forward is that while awarding the sentence, the Courts are taking comparatively quite lenient view of the matter by laying over-emphasis on the facts and the circumstances attending to the accused pushing back into insignificance the overall social perspective of the eradication of corruption involved. Undoubtedly, while awarding the sentence, the discretion is vested in the Court as to how much it should be awarded, but at the sametime while exercising the said discretion, the overall social perspective of the urgency of eradicating the corruption must be equally present to the mind of the Court as has been done in the instant case. Unless this is done, the intended object and

the sharpness of the spear-head action of the radical Act would not meet the desired success. What we mean is that unless the Court comes out heavily upon the accused of corruption cases, it will not be in a position to set an example in the society to prevent such crimes in future. This aspect every Court has got to borne in mind and that it appears that the learned Judge in the instant case also bearing in mind the said aspect only has awarded the maximum punishment of three years, which we do not propose to interfere with. In fact, to take a lenient view in such matters would be not only encouraging such offences, but would be practically tantamount to putting premium over the same.

14. In the result, this appeal fails and is dismissed at the admission stage. At this stage, Mr. Barot seeks time to surrender and for that purpose, prays for 10 weeks time. The time, as prayed for, is granted.