

(2018) 10 BOM CK 0068
In the Bombay High Court
Case No : Criminal Appeal No. 286 Of 2005

Nivrutti Ganpati Sadekar

APPELLANT

Vs

State of Maharashtra,

RESPONDENT

Date of Decision : 09-10-2018

Acts Referred:

Prevention of Corruption Act, 1988 — Section 7, 13(1)(d), 13(1)(d)(i), 13(1)(d)(ii), 13(2), 20

Criminal Procedure Code, 1973 — Section 313

Citation : (2018) 10 BOM CK 0068

Hon'ble Judges : K. L. Wadane, J

Bench : Single Bench

Advocate : V. D.Sapkal, P.R. Bhumkar, Y. G. Gujrathi

Final Decision : Disposed Off

Judgement

1. The appellant has challenged the order of his conviction passed by the learned Special Judge, Osmanabad in Special Case No. 12 of 2001 dated

15th April, 2005, by which the appellant is convicted for the offence under section 7 of the Prevention of Corruption Act (P. C. Act) and sentenced to

suffer rigorous imprisonment for one year and to pay fine of Rs.1000/â. The appellant is further convicted for the offence punishable under section

13(1)(d) read with section 13(2) of the P. C. Act and sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs.2000/â.

Substantive sentences are to run concurrently.

2. Brief facts of the case may be stated as follows:

i. The appellant was serving as Junior Assistant in Class III cadre in the Education Department (Secondary), Zilla Parishad, Aurangabad since

November, 1993. Complainant Balaji Sable was working as Junior Clerk in Arts

College at Dhoki, District Osmanabad since July, 2000. He was assigned the duty to prepare Economically Backward Class Students Concession Bill (in short EBC Bills) and submit it to the Education Department for approval.

ii. On 16.11.2000, complainant Balaja Sable submitted various bills to the Education Department, Z.P. which were signed by the Principal of the college. The appellant was looking after the section pertaining to approval of EBC Bills. The complainant personally met to the appellant and made enquiry. According to the complainant, the bills were not being sanctioned and the appellant informed the complainant that there is no point in visiting the office repeatedly and he demanded Rs.3000/Â?.

iii. On 21.04.2001, the complainant felt that it is an illegal demand and as per instructions of Principal he visited the Anti Corruption Bureau on 23.04.2001 and lodged his complaint. After the complaint, PWÂ?4 Suryawanshi, by taking steps, arranged for the trap. Then the complainant, alongwith PWÂ?3 Panch Witness went to the office of the accused alongwith amount of Rs.1500/Â?.

iv. According to the prosecution, accused demanded bribe amount of Rs.1500/Â? and the same was accepted from the complainant on 23.04.2001 in presence of panch witness PWÂ3 Nandkumar Shinde. After acceptance of the amount of bribe, pre determined signal was conveyed to the panch and raiding party. After the signal, all of them entered into the office of the appellant and amount of Rs.1500/Â? was recovered from the possession of the appellant. Hands of the complainant as well as appellant were examined in ultraviolet lamp and on such examination, traces of anthracene powder were seen on the tip of fingers of the complainant as well as appellant.

v. Investigating Officer PWÂ4, Dy.S.P. Suryawanshi prepared Spot/Trap Panchanama in detail. Thereafter, the accused was arrested. After the trap statement of the accused was recorded vide Exh. 68 in which he admitted the acceptance of bribe. After carrying as usual investigation, the investigation officer sent papers of investigation to PWÂ?2 Mr. Wankhede for obtaining sanction to prosecute the appellant.

vi. On 15.07.200, PWÂ2 Mr. Bhaskar Wankhede, CEO, ZP, on scrutiny of the papers of investigation, and other material on record and after application of mind, accorded sanction to persecute the appellant. The

investigating officer submitted the charge sheet against the appellant in the court of Special Judge, Osmanabad.

vii. In order to establish the charges levelled against the appellant, the prosecution has examined in all four witness as under:

(1) PWÂ?1 Balaji Ramkrishna Sable Â? complainant.

(2) PWÂ?2 Bhaskar Yadavrao Wankhede, Chief Executive officer, Osmanabad (who accorded sanction to prosecute the appellant).

(3) PWÂ?3 Nandkishor Shinde, a Panch Witness (who was accompanied the complainant at the time of incident on 23.04.2001).

(4) PWÂ?4 K. S. Suryawanshi, Dy. S.P. and Investigating Officer.

Besides the oral evidence of the aforesaid witnesses, prosecution has produced and relied upon various documents, those were seized after the trap.

These documents are relating to proposal of EBC concession to eligible students, which are at Exh. 20 to 33, Spot/Trap Panchanama Exh.62 and

Statement of accused at Exh. 68. After recording evidence, statement of the accused was recorded under section 313 of the Criminal Procedure

Code. The Appellant has not adduced any evidence in defence.

3. After hearing both the sides, the learned Special Judge has convicted and sentenced the accused for the offence as above. Hence this Appeal.

4. I have heard arguments of Mr. V. D. Sapkal, learned counsel appearing for the appellant and Mr. Y. G. Gujrathi, learned APP for the State.

5. During the course of argument, Mr. Sapkal, learned counsel for the appellant submitted, on the basis of certain admissions given by the complainant,

that evidence adduced on behalf of the prseocution is not sufficient to prove the guilt of the accused since it has been admitted by the complainant that

he was under impression that the accused was demanding bribe. By referring further admission of the complainant, the learned counsel submits that

the appellant was in need of money and therefore he was asking the complainant to pay the amount and it was not the amount of bribe. On the basis

of evidence, one cannot reach to the conclusion that appellant accepted the amount as bribe and not other other than that. Mr. Sapkal, the learned

counsel further submits that evidence PWÂ3 Nandkishor Shinde is not supporting to the case of the prosecution and the evidence of PWÂ1

complainant. Therefore, there is no oral evidence in the form of corroboration. Mr. Sapkal further submits that in the cross examination, Witness

PWâ1 admitted that the appellant had not asked him to pay bribe in the context of official work. So according to Mr. Sapkal these admissions given

by the complainant are sufficient to infer that the amount recovered from the possession of the appellant was not the amount of bribe.

6. As against this, learned APP, by referring to the evidence of PWâ1 and PWâ3, submits that the complainant has submitted the proposal for

sanction of EBC Concession of the eligible students studying in his college and the accused was working as Junior Assistant in Z.P.

7. On the day of incident i.e. on 23.04.2011, the appellant had demanded bribe amount from the complainant in presence of Panch PWâ 3 Nandkishor

Shinde and appellant has accepted the same, he has counted the notes and kept in his pocket. After receipt of pre determined signal, raiding party and

panch witness came at the spot and recovered currency notes from the accused. The prosecution has successfully established that the accused has

demand and accepted the bribe amount for issuance of cheque of EBC Concession.

8. Considering the rival submissions, of both sides, now it is necessary to reassess the evidence of prosecution. Looking to the examinationâinâchief

of the complainant, it appears that more or less he deposed in the line with the contents of the complaint and learned Special Jdudge has considered the

evidence of the complainant in examinationâinâchief. However, on careful scrutiny of evidence of the complainant, particularly cross examination,

there are certain important admissions given by the complainant, which appear to be fatal to the case of the prosecution.

9. In the cross examination, following are the important material admissions given by the complainant PWâ?1.

It is true that due to my frequent visits I came in close contact with the accused. It is is true that prior to the incident accused had told me that he was

in need of the sume of Rs.2000/â to Rs.3000/â and had asked me as to whether I would pay him that amount. He had also told me that he would

refund that amount to me. It is true that without paying amount to the accused, I evaded myself from paying the amount to him on one or the other

reasons. Plain reading of the aforesaid admissions, it appears that before the incident, there was cordial relation between the accused and the

complainant and there was frequent contacts between them and due to which the accused had demanded Rs.2000â3000/â . At that time also, the

accused assured that he would refund the amount to the complainant. Looking to the background of this circumstance, it appears that there was no

reference, at the relevant time, that the accused had demanded bribe in connection with the work of the complainant. On the contrary, it reveals that

the accused was in need of money and therefore he demanded the amount. In view of the the aforesaid admissions, it cannot be inferred that at the

relevant time, the accused demanded bribe in connection with the work pending in the Z.P.Â Furthermore, at the relevant time, the appellant has said

that he would refund the amount. If at all the accused was intending to demand bribe, in such circumstance, it is not expected from the appellant that

he would say that he would refund the amount to the complainant.

Next admission given by the complainant in his cross examination reads as follows:

It is true that since the accused at every time was telling me about his need and demanding the amount from me, I formed an impression about him

that he was demanding the amount in the context of the work only and therefore made a grievance against him before the principal of the college. The

principal of the college told me that in case if the accused was demanding the amount from me, then I should pay it only through Anti Corruption

Bureau and not by any other mode.

Again, on plain reading of the aforesaid admission, it appears thatÂ theÂ accusedÂ wasÂ repeatedlyÂ demandingÂ theÂ amountÂ fromÂ the

complainant therefore, the complainant was under impression that such demand is in reference to the bribe for the work pending with the accused. If

this admission is read coupled with earlier admission, it reveals that demand of amount by the accused was due to his need and as the accused was

repeatedly demanding the amount, the complainant formed impression that he wasÂ demanding bribe. From the earlier admission, it appears that

initially the accused had demanded amount of Rs.2000/Â to Rs.3000/Â. In this context and the fact that an amount of Rs.1500/Â was recovered from

the possessionÂ of the accused following admissions of the complainant are relevant and important.

Accused asked me as to whether I can fulfill his need and I told him that I can pay him around Rs.1500/Â and not more than that. I paid Rs.1500/Â?

to the accused.

Again, if this third admission is read coupled with earlier two admissions, it appears that there was demand by the accused for an amount of

Rs.2000-3000/?. But as per this admission the complainant was in position to pay only Rs.1500/? and not more than that.

Forth admission given by the complainant reads as follows:

It is true that the accused had not asked me to pay the bribe amount to him in the context of the official work which was with him.

From this candid and clear admission given by the complainant it appears that the amount demanded and accepted by the appellant

accused was not the bribe amount but it was an amount demanded by the appellant as he was in need of money. Looking to the reasons recorded by

the trial court it appears that he has not referred those admissions and also not considered its effect therefore, it appears that the trial court has

conveniently bypassed or overlooked certain material admissions given by the complainant in the cross examination.

10. Mr. Sapkal, the learned counsel for the appellant submits that there was discrepancy in the evidence of the witnesses. PW4 Kalidas

Suryawanshi has deposed that after acceptance of the amount, accused washed his hands and then produced certain documents. I do not think that

such infirmity in the evidence is material, simply because it is the defence of the appellant that he has not accepted the bribe amount but the same

was an amount accepted, as the appellant was in need of it, with the assurance to repay the same to the complainant. So looking to the defence of the

accused, no importance is attached to the other things, since the accused has admitted the acceptance of the amount.

11. Controversy in the present matter falls within a sort compass, as to whether the amount accepted by the accused is bribe amount or the amount

other than bribe.

12. Learned APP invited my attention to the statement made by the appellant after the trap, vide Exh. 68. By referring the aforesaid statement, the

learned APP submits that after the trap, opportunity was given to the accused to explain as to why and in what circumstance, the accused appellant

had accepted the amount. However, during the course of cross examination, it was suggested on behalf of the defence/appellant that after the trap,

statement of the appellant was obtained under pressure. According to the

appellant, his statement at Exh.68 was obtained under pressure and in fact

the appellant has explained the nature of the amount which he had accepted from the complainant when first opportunity was given to him to explain.

In this behalf, it is necessary to refer admission given by panch witness PWÂ?3 Nandkishor Shinde, which reads as follows:

The accused told Dy.S.P. Suryawanshi that he had taken the handÂ loan from the complainant and the said amount is kept by him in the left side

pocket of his wearing pant.

From this admission, it appears that in presence of panch witness, when the enquiry was made and opportunity was given to the appellant to explain,

he immediately explained by saying that he had taken the amount as hand loan from the complainant. Therefore, say of the appellant that his statement

at Exh.68 was obtained under pressure appears to be probable. This Witness PWÂ3 has given some other admissions, however, those are not

material, since defence of the accused is that he has accepted the amount from the complainant as handloan.

13. Since it is the defence of the the appellant that he had accepted the amount but it was not bribe amount, it is presumed under section 20 of the P.

C. Act that he has accepted the bribe amount, unless contrary is proved. Burden on the prosecution to prove the guilty against the accused is beyond

reasonable doubt and burden on the accused is to prove his defence on the basis of preponderance of probabilities. Considering the defence of the

appellant, it is for the accused to prove that the amount accepted by him was not bribe amount and such burden is to be discharged by the accused on

the basis of preponderance of probability. From the evidence on record and circumstances, two views are possible, (1) that the accused had accepted

the bribe amount for the official work to be done and (2) that he has accepted the amount from the complainant as he was in need, by way of hand

loan.

14. From the admissions given by the witnesses, if two views are possible, in such circumstances, it is settled principles of law thatÂ the view

favourable to the accused has to be accepted. In this behalf, Mr. Sapkal, learned counsel for the appellant has relied on the decision of the ApexÂ

CourtÂ inÂ theÂ caseÂ of StateÂ ofÂ MaharashtraÂ Vs. Dnyaneshwar Laxman Rao Wankhede, reported in 2009 CRI L.J. 4425.

16. Indisputedly, the demand of illegal gratification is a sine qua non for constitution of an offence under the provisions of the act. For arriving at the conclusion as to whether all the ingredients of an offence, viz., demand, acceptance and recovery of the amount of illegal gratification has been satisfied or not, the court must take into consideration the facts and circumstances brought on the record in their entirety. for the said purpose, indisputably, the presumptive evidence, as laid down in Section 20 of the Act, must also be taken into consideration but then in respect thereof, it is trite, the standard of burden of proof on the accused vis-à-vis the standard of burden of proof on the prosecution would differ. Before, however, the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. Even while invoking the provisions of Section 20 of the act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt.

20. Even in a case where the burden is on the accused, it is well-known, the prosecution must prove the foundational facts. [See Noor Aga V. State of Punjab 2008 (9) SCALE 691 and Jayendra Vishnu Thakur Vs. State of Maharashtra and Anr. 2009 (7) SCALE 757] 2008 AIR SCW 5964, 2009 AIR SCW 3898]

21. It is also a well settled principle of law that where it is possible to have both the views, one in favour of the prosecution and the other in favour of the accused, the latter should prevail. (See Dilip and another Vs. State of M.P. (22007) 1 SCC 450 and Gagan Kanojia and another Vs. State of Punjab (2006) 13 SCC 516] 2004 AIR SCW 6246].

The aforesaid observation of the Apex Court is perfectly applicable to the present case as, in the present case also, there are two possibilities therefore, possibility or the view favourable to the accused has to be accepted. Therefore, from the evidence on record, it seems that the accused has discharged the burden upon him on the basis of preponderance of probability.

15. It is also well settled law that mere recovery of tainted currency notes from the possession of the accused is not sufficient to prove the offence under the provisions of the P. C. Act. Further, it to be established by prosecution that the amount accepted by the accused was bribe

amount and not other than bribe. Therefore, Mr. Sapkal has rightly placed reliance on the decision of the Apex Court in the case of B. Jayaraj Vs.

State of A. P., reported in AIR 2014 SC (Supp) 1837. Para 7 and 8 of the judgment reads as under:

7. Insofar as the offence under section 7 is concerned, it is a settled position in law that demand of illegal gratification is sine quo non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that

the accused voluntarily accepted the money knowing it to be a bribe. the above position has been succinctly laid down in several judgments of this

Court. By way of illustration, reference may be made to the decision in C. M. Sharma Vs. State of A.P. and C.M. Girish Babu Vs. C.B.I.

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 (Exh.PA?

11) before LWÂ9, and there is no other evidence to prove that the accused had made any demand, the evidence of PWÂ1 and the contents of Exhibit

PA11 cannot be relied upon to come to the conclusion that the above material furnishes proof of 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 is proved. the only other material available is the recovery of the rained 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 Section 7. the above also will be conclusion 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 aforesaid observations are applicable to the facts of the present case.

16. Mr. Sapkal, learned counsel for the appellant further argued that the

evidence of PW-2 sanctioning authority is not admissible since he has admitted during his cross examination as follows:

Before stepping into witness box, I had perused the file which was with A.P.P. and after perusing that file as also on my memory, I have narrated as to what file was actually studied by me.

In support of his contention- Mr. Sakpal, the learned counsel has relied upon the observation of Division bench of this Court in the case of Suresh

Purshottam Ashtankar Vs. State of Maharashtra and another, reported in 2014 DGLS (Bom.) 350 wherein, in para 32, relevant observation of the

judgment of learned Single Judge in the case of Sharad- Namdeorao Shirbhate Vs. State of Maharashtra, reported in 2006 (2) Mh. L.J. (Cri.) 1210,

is reproduced, which reads as follows:

There would indeed be nothing wrong in the witness refreshing his memory, but that ought to be done before the Court and not outside the Court. In

order to test the veracity of a witness, he would be required to recollect the incident out of his own memory and should he falter on some material

aspect, he could be allowed to refresh his memory with reference to the contemporaneous records of the incident created by the police. It would not

be permissible for such witness to stealthily refresh his memory before entering the court and deposing about the entire evidence giving minute details

as if he was reeling them out from his memory. Therefore, the objection to the reliability of evidence of PW-2 Prabhakar taken by learned Counsel

for the appellant is valid

The dictum of the learned Single Judge is approved by the Division Bench. On perusal of the same, it appears that the witness can be permitted to

refresh his memory in the Court with permission of the Court and if the witness deposed after perusal of the relevant papers available with the APP,

such evidence is not acceptable. Therefore, the evidence of the Sanctioning Authority PW-2 is also not acceptable.

17. I have gone through the reasons recorded by the trial court and found that the trial court has failed to assess the evidence correctly on record and

has wrongly convicted the accused person. On independent and in-depth scrutiny of entire evidence, I am of the opinion that the trial Court has failed

to consider the admissions given by the witnesses on record during the cross examinations and findings recorded are not consonance with the

evidence on record.

18. In the light ofÂ above discussion,Â the Criminal AppealÂ is allowed.

19. The impugned judgment and orderÂ dated 15.04.2005 passed by the Special Judge Osmanabad in Special Case No.12/2012 convicting the

appellant for the offence under section 7, and under section 13(1) (d) read with section 13(2) of the Prevention of Corruption Act, 1988 is quashed and set aside.

20. The appellant is acquitted from the offence under section 7, and under section 13(1) (d) read with section 13(2) of the Prevention of Corruption Act, 1988.

21. Fine amount, if deposited by the appellant, be refunded to the appellant.

22. Bail Bonds of the Appellant stands cancelled.

23. The criminal appeal is accordingly disposed of.