

(2019) 11 BOM CK 0085
In the Bombay High Court
Case No : Criminal Appeal No. 37 Of 2016

Prakash Babulal Pardeshi Samata Society	APPELLANT
Vs	
State Of Maharashtra	RESPONDENT

Date of Decision : 19-11-2019

Acts Referred:

Evidence Act, 1872 — Section 65B
Prevention Of Corruption Act, 1988 — Section 7, 12, 13(2), 13(1)(d)(i), 13(1)(d)(ii), 13(1)(d), 20
Indian Penal Code, 1860 — Section 161

Citation : (2019) 11 BOM CK 0085

Hon'ble Judges : Dama Seshadri Naidu, J

Bench : Single Bench

Advocate : G.S. Kukarni, Kripashankar Pandey, P.N. Dabholkar

Final Decision : Dismissed

Judgement

Facts:

1. Faced with the charges under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (PC Act), the appellant suffered conviction. The Sessions Court, Nashik, in Special Case No.11 of 2012, through its judgment dated 18th December 2015, sentenced the applicant, among other things, to rigorous imprisonment for one year and to pay a fine of Rs.10,000/-. That was under Section 7 of P.C. Act. Similarly, under Section 13(1)(d) r/w section 13(2) of P.C. Act, the appellant was handed down an identical sentence. Both the sentences were to run concurrently.

2. We may touch upon the facts briefly. The informant is an Architect. In 2010 he undertook the work of a private limited company, said to be a multi-national establishment. The Architect's duty was to prepare plans, submit them to the Executive Engineer, Maharashtra Industrial Development Corporation (MIDC), Nashik, for approval and, thereafter, to the Joint Director of Industrial Safety and Health, Nashik.

3. From the pleadings I gather when the plans were submitted for the appellant's approval, he did nothing for two months. During that period the informant met the appellant two or three times. Eventually, he received a call from one Chavan, whose name and identity are disputed, though. Chavan wanted the architect to go and meet the appellant on 11th August 2010. Ostensibly, Chavan is an employee in the appellant's department. As required, the architect met the appellant on that day; he was informed that the work was 'big' and that he should pay Rs.10,000/-. Of course, the architect, then, narrates the whole process of how he was compelled to meet the demand.

4. Bribe demanded, the architect first met the company's manager, but he refused to comply with that demand. He told the architect that he undertook to get the permission and it was his look out. Then, on 11th August 2010, the architect went to the office of the Anti-Corruption Bureau, Nashik, to complain. The next day, he again went to the ACB office and familiarized himself with the trap procedure. As described in the pre-trap panchnama, the architect received instructions and went to the appellant on the next date- 12th August 2010- accompanied by one of the two panch witnesses. Then after a successful trap, the ACB authorities again drew post-trap panchnama. That resulted in the appellant's arrest.

5. Eventually, the prosecution charged the appellant with the offences under the PC Act, examined the informant as PW1, one of the panch witnesses as PW2, the sanctioning authority as PW3, and the investigation officer as PW4, besides marking about 59 exhibits.

6. Convicted and sentenced, the appellant has filed this appeal.

Submissions:

Appellant:

7. Shri Girish Kulkarni, the learned counsel for the appellant, has advanced elaborate arguments. He has focused on five areas of what he terms prosecution's failure to bring home the appellant's guilt. According to him though the appellant was said to have demanded the illegal gratification on 11th August 2010, there was no charge about that alleged demand. The entire allegation and even the charge framed only concern the developments on 12th August 2010, when the trap was laid. Thus, an essential element of demand stands omitted from the trial. Therefore, the punishment under Section 7 of the PC Act, according to him, cannot be sustained.

8. After taking me through the complaint, the charge, the evidence of PW1 and PW2, besides the material portions of the judgment impugned, Shri Kulkarni has stressed that there are glaring and fatal contradictions in the complaint, the charge, and the evidence. Therefore, he contends that the benefit of doubt ought to have gone to the appellant.

9. To illustrate the prosecution's omissions, Shri Kulkarni has stressed that from

the stage of the initial complaint to that of trial before the court, there have been vast improvements. And some of the assertions by the witnesses are self-contradictory. About the date of demand, the date of complaint and the date of the trial, Shri Kulkarni has pointed out that, in answer to every question, PW1 narrated the sequence of events as if they had happened not on the day the chargesheet mentioned but the next day or some other day. Thus this contradiction remained unexplained, and it cast a shadow of doubt on the whole allegation.

10. About the presence of the panch witnesses along with the informant when the trap was laid, Shri Kulkarni has submitted that undoubtedly there were two panch witnesses: Ashish Shivaji Jadhav and Yogesh Sonawane. The informant, an architect by profession, must be knowing the difference between the two panch witnesses. But he contradicts the prosecution on this. Moreover, Shri Kulkarni has pointed out that the informant has deposed that the shadow witness informed the other witness about the developments inside the appellant's chamber. In other words, Sonawane told Jadhav about what has happened in the appellant's chamber; then, Jadhav's evidence as PW2 only amounted to hearsay.

11. Elaborating on the supposed contradictions in the evidence of the prosecution witnesses, Shri Kulkarni asserts that once the prosecution has failed to examine the shadow witness as admitted by the informant, the prosecution has failed to examine the best witness. That apart, any testimony from a third party who was not present never amounts to corroboration. According to him, neither Jadhav, as asserted by the informant; nor the investigating officer was an eye-witness to the alleged incident, that is the appellant's accepting the bribe.

12. Then, Shri Kulkarni has taken me through the judgment. According to him, the trial Court has either glossed over or explained away the most glaring omissions or contradictions. In other words, all through the trial Court has treated the case as if the primary burden lay on the accused to prove his innocence. Shri Kulkarni has also submitted that the prosecution has claimed to have recorded, at the pre-tap stage, the conversation between the informant and the appellant. But it did not produce that piece of evidence.

13. To support his contentions, Shri Kulkarni has relied on Gulabdagir Ramzan Inamdar v. State of Maharashtra 2018 SCC OnLine Bom 1322 rendered by this Court on 15th June 2018, and the Supreme Court's judgment in the case of Selvaraj v. State of Karnataka Criminal Appeal No.1172/2008, rendered on 18th August 2015.

Prosecution:

14. On the other hand, the learned Additional Public Prosecutor has submitted that the contradictions, if any, in the prosecution case are minor. They will not vitiate the findings rendered by the trial court, and the conviction should stand. She has first taken me to the charge and stressed that the charge does refer to the demand. That accepted, according to her, the ingredients of Section 7 stand

fulfilled. Then she has taken me to the Sanction Order. According to learned APP, the order of sanction has been specific about the charges the appellant faced.

15. First, the learned APP has drawn my attention to the complaint, as well as pre-trap and post-trap panchnamas, to stress what she terms the consistent prosecution version about both the demand and acceptance of the legal gratification by the appellant.

16. Then, the learned APP has dealt with the alleged discrepancy in the names of the shadow witnesses. She has submitted that the documents speak for themselves. If there is any conflict between the oral and documentary versions of evidence, she stresses, the latter should prevail. To distinguish the judgments Shri Kulkarni has relied on, the learned APP submits that in both cases facts are entirely different. According to her, in this case the trial Court has considered all aspects and arrived at the appellant's guilt beyond reasonable doubt. She also submits that the appellant could not explain how he came to possess the tainted money. Thus, the learned APP urges this Court to confirm the conviction.

17. Heard Shri Kulkarni for the appellant and Ms. Dabholkar, the learned APP for the State.

The Trial Court Findings:

18. To the question whether the prosecution has proper sanction to prosecute the accused, the trial Court has answered in the affirmative. Then the question is whether the prosecution has proved that the accused, being a public servant, has accepted gratification other than legal remuneration as a motive for doing official work. It was also answered in the affirmative. Next comes the question whether the prosecution has proved that the accused has conducted himself criminally by securing a pecuniary advantage through corrupt or illegal means, that is by abusing his position as a public servant. This question, too, the trial Court affirmatively answered.

The Contentions and the Answers:

19. In the context of those findings, we will examine the appellant's contentions and their sustainability.

20. Though the appellant was said to have demanded the illegal gratification on 11th August 2010, there was, according to the appellant, no charge about that alleged demand. But as the learned APP has demonstrated, there is a charge about the demand. Instead, the question is, has the demand been proved? In fact, the prosecution has maintained that it had taped the telephonic conversation between the informant and the accused a day before they laid the trap. But that evidence was not produced.

21. About the telephonic conversation, we may note that there are two facets to the appellant's demand for illegal gratification. He is said to have demanded the informant, first, orally. Then, through a member of his staff, too. And finally,

through telephone. As to the oral demand, it is hazy and self-serving. But that cannot be totally disregarded. As to the demand through the staff, it has not been established. Even the person through whom the demand had been made or information sent could not be identified. As to the telephonic conversation, much depends. It is, I reckon, the best evidence the prosecution had.

22. The best evidence as it had been, the taped conversation allegedly between the appellant and the informant has never seen the light of the day. The prosecution has not even attempted to introduce that piece of evidence. Between a self-serving statement and a verifiable record of fact, the latter carries greater weight. The prosecution's failure to introduce the best evidence may not always prove fatal, but it must have a reason or justification not to have done so. Here, the prosecution did assert that it had taped the conversation, it placed on record, it seems, that piece of evidence, but did not introduce it-mark it-by following the procedure under Section 65B of the Indian Evidence Act.

23. Under identical circumstances, this Court in Gulabdagir Ramzan Inamdar has held that the production and proof of the electronic evidence in the form of recorded conversation was very relevant to establish the guilt of the accused, for the ocular evidence was found to be highly unsatisfactory as well as totally untrustworthy. It has noted that for "the reasons best known to the prosecution, this evidence is not adduced by it creating further doubt in its case. The necessary inference which follows is that such evidence was not favourable and supporting the prosecution case."

24. In *State of Punjab vs. Madan Mohan Lal Verma* (2013) 14 SCC 153, the Supreme Court has held that a demand for illegal gratification is sine qua non for constituting an offence under the P.C.Act, 1988. In other words, the proof of demand of illegal gratification is the core of the offence under Sections 7 and 13(1)(d)(i)&(ii) of the Act. I, therefore, reckon that the appellant's demand, sans this taped conversation, is hazy and uncertain. By no means clinching. In other words, for the prosecution's failure to place on the record its best evidence, the benefit of doubt must go to the appellant. And it does.

25. The appellant allegedly demanded the bribe on 11th August, 2010; the next day, on 12th, the informant complained to the ACB officials, but that day he did not carry the money with him. So the trap must have been laid the following day, that is 13th August. Yet the prosecution insists that the trap was laid on 12th August-a chronological impossibility. At least, that is how the appellant has presented the sequence of events.

26. True, this chronological incongruity attempts to expose a chink or two in the prosecution's armour as if the whole trap was anachronistic. But the appellant could not deny that the trap was laid and it was carried out-its success or failure notwithstanding. At best, he could say that it happened on one day instead of another. So I reckon, this contention takes the appellant nowhere.

27. Now we will move to the identity crisis. That is, between the two punch

witnesses, who accompanied the informant. The prosecution has maintained that Jadhav was the shadow witness, but the informant has insisted in his testimony that it was Sonawane. In the face of this contradiction, what assumes importance is the witness that was examined. If we go by the informant's version, the prosecution ought to have examined Sonawane. Yet it has examined the other punch witness: Jadhav. That means, Jadhav had no personal knowledge about what happened in the applicant's chamber. He must have secured information from Sonawane. So Jadhav's testimony ought to be treated as hearsay.

28. Indeed, the prosecution has asserted that with the passage of time, the informant, as a witness, might have been confused. Having met the punch witnesses only once earlier, by the time he deposed before the court of law, the informant's memory may have weakened. Aggrieved, it is plausible. But we are dealing with a person's liberty. It is no place for sunrises and conjectures, though there could be reasonable room for human error and frail memories. Once the informant has persisted with the name of the punch witness as the shadow witness, at least in the re-examination, the prosecution must have elicited clarification from the informant about this identity crisis. It did not do so.

29. I may, finally, address the question of fading memory or confounding confusion. The informant is an architect, a professional, daily dealing with many people, including strangers. The punch witness was the one who accompanied him and who stayed with him for a while, besides interacting with him constantly. That admitted, it is difficult to believe that the informant could not correctly remember about who accompanied him. On this count, however, the benefit of doubt must go to the appellant.

30. The lack of clear proof about the demand and the mistaken identity of the punch witness stand strengthened by other factors. The appellant has not handled the tainted money himself. The tainted money, indeed, was found on his table. But legion are the decisions that the detection of money in the vicinity of the accused is no sure way of bringing his guilt home. In *State of Kerala vs. C.P.Rao* (2011) 6 SCC 450, the Supreme Court has reiterated its earlier dictum that mere recovery of the tainted money by itself would not prove the charge against the accused; there ought to be evidence that the accused has voluntarily accepted the money knowing it to be bribe.

31. In *Selvaraj*, a recent judgment, the Supreme Court quotes with approval its earlier dictum in *G.V. Nanjundiah v. State (Delhi Administration)* 1987 Supp SCC 266, that the allegation of the bribe taking should be considered along with other material circumstances. Demand is a matter of clinching evidence. "When the fact indicating that the complainant was aware of the amount, was not withheld by the accused, this court disbelieve the allegation of the complainant meeting the accused in the presence of strangers at the time of giving bribe was held unnatural."

32. About the presumption under Section 20 of the Act, I must note that it

springs to life only when the prosecution has proved that the accused has accepted or obtained gratification other than legal remuneration as a motive or reward, such as mentioned in Section 161 of IPC.

33. Under these circumstances, I hold that the conviction handed down to the appellant stands on shaky foundations. It fails strict legal scrutiny. That is, the prosecution could not establish the appellant's guilt beyond a reasonable doubt.

Result:

As a result, I quash and set aside the impugned judgment and order of conviction, and the resultant sentence, imposed on the appellant by the Sessions Court, Nashik, through its judgment and order dated 18th December 2015, in Special Case No.11 of 2012. Thus, the appellant is acquitted of the offences punishable under Sections 7, 13(1)(d) read with 13(2) as well as under Section 12 of the Prevention of Corruption Act, 1988.