

(2014) 12 BOM CK 0183
In the Bombay High Court
Case No : Criminal Appeal No. 225 of 2005

Pralhad Kisan Kawale

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 11-12-2014

Acts Referred:

Evidence Act, 1872 — Section 114

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

Citation : (2015) ALLMR(Cri) 433 : (2015) 3 BomCR(Cri) 152 : (2015) 4 RCR(Criminal) 872

Hon'ble Judges : P.N. Deshmukh, J

Bench : Single Bench

Advocate : A.S. Mardikar, Sr. Adv, Advocates for the Appellant; S.M. Bhagde, Addl. P.P, Advocates for the Respondent

Judgement

P.N. Deshmukh, J.—This criminal appeal is filed against the judgment dated 11/3/2005 passed by the Special Judge, Pusa in Special Case No. 13/1998, whereby appellant is convicted for the offence punishable under Section 7 of Prevention of Corruption Act, 1988 and sentenced to suffer rigorous imprisonment for six months and to pay fine of Rs. 500/- and in default of payment of fine, to suffer further rigorous imprisonment for one month and for the offence under Section 13(1)(d) punishable under Section 13(2) of the said Act and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs. 1000/- and in default of payment of fine, to suffer further rigorous imprisonment for three months. In brief, it is the case of prosecution that appellant/accused at the time of incident was working as Medical Superintendent in R.P. Uttarwar Government Cottage Hospital, Umarkhed. Complainant Babangir Giri took his wife P.W. 5 Rukhminibai for medical treatment in the said Hospital on 22/2/1996 where accused examined her and called complainant at his residential quarter situated within the Hospital premises where it is alleged that accused demanded bribe of Rs. 150/- from complainant to provide better treatment to his wife or she would be discharged within two-three days from the

Hospital. Complainant paid Rs. 30/- as he was having that much amount with him and remaining amount of Rs. 120/- was further negotiated to Rs. 100/- and was agreed to be paid and accepted on the following day.

2. As complainant was not intending to make payment of the said amount of Rs. 100/-, on admitting his wife in the Hospital, he visited the office of Anti Corruption Bureau, Yavatmal and lodged his complaint (Exh. 85), which was recorded by P.W. 10 Sanjay Deshpande, Dy. Superintendent of Police, Yavatmal and he arranged for the trap. The Investigating Officer arranged for two panch witnesses from the office of M.S.R.T.C., Yavatmal including P.W. 1 Mohanlal. They were introduced to complainant, who narrated them his complaint and they verified the contents of complaint (Exh. 85) as orally stated by complainant. Demonstration of effect of phenolphthalein powder with sodium carbonate solution was given to complainant as well as to both panchas wherefrom they learnt that when said powder comes into contact with solution of sodium carbonate, it turns purple. Complainant then produced amount of Rs. 100/- consisting of one currency note of Rs. 50/- in denomination and five currency notes of Rs. 10/- each in denomination. Phenolphthalein powder was applied to said currency notes and they were kept in the shirt of complainant with instructions to him not to touch the same and to pay to accused only on demand. Instructions were given to P.W. 1 Mohanlal to remain with complainant and to observe conversation whatsoever may take place between accused and complainant. Complainant was also instructed to give signal by rubbing his head with his left hand on making payment of bribe. Pre-trap panchanama of above facts was drawn vide Exh. 41.

3. Trap accordingly came to be laid in the Government Hospital. Complainant and P.W. 1 Mohanlal entered the office of accused when accused called complainant to his residence and started proceeding towards his house. Complainant and P.W. 1 Mohanlal followed him in the verandah of his house where accused enquired from complainant if he had brought the amount, to which he replied in affirmative. Accused then demanded the amount, which was accordingly tendered by complainant by taking out of his shirt pocket. Accused accepted the amount and kept it in the right side pocket of his pant. Immediately thereafter complainant gave the proposed signal upon which members of the raiding team arrived on the spot and apprehended accused.

4. It is the case of prosecution that co-panch Jivan Miskin recovered the bribe amount from the pant pocket of accused upon which solution of sodium carbonate was sprinkled when violet colour dots were found on the currency notes. On examining right hand fingers of accused in the freshly prepared solution of sodium carbonate, the solution turned purple. Similarly, on examining right side pant pocket of accused by dipping into freshly prepared solution of sodium carbonate, the solution turned purple. Similarly, on examining right hand fingers of complainant in the said solution, solution turned purple as well as inner pocket of shirt when dipped into the solution of sodium carbonate, solution

turned purple. The post trap panchanama of all these facts was drawn as per Exh. 49.

5. On the basis of report lodged by P.W. 10 Deshpande, Dy. Superintendent of Police, offence came to be registered vide Crime No. 84/1996 at Police Station, Umarkhed against the accused for the offences punishable under Sections 7 and 13(1)(d) read with Section 13 of Prevention of Corruption Act, 1988. It was further investigated by P.W. 10 Deshpande, Dy. Superintendent of Police, during the course of which he made necessary correspondence with regard to grant of sanction to prosecute the accused. On receipt of sanction for prosecution, charge-sheet was filed in the Court of Special Judge, Yavatmal.

6. Charges were framed against accused for the aforesaid offences for which he pleaded not guilty and claimed to be tried. It is the further case of accused that he has accepted Rs. 100/- from complainant as said amount was due from complainant towards his fees for carrying out E.C.G. examination of his wife P.W. 5 Rukhminibai in his consulting room for which he was allowed to charge. It is also the case of accused that one P.M. Rathod, Pharmacist attached to the said Government Hospital had grudge against him and in fact he had extended threats to accused to falsely implicate him in a case and as such, having conspired with complainant, falsely implicated him in this case by lodging false report. Considering the evidence and documents on record, learned Special Judge convicted the accused as aforesaid. Hence, this criminal appeal.

7. Heard Shri Mardikar, learned Senior Counsel for appellant/accused and Shri Bhagde, learned Additional Public Prosecutor for respondent.

8. With the assistance of learned Counsel for the parties I have scrutinized the evidence and documents on record. It is noted that pending trial, complainant Babangir Giri expired. In that view of the matter, prosecution examined P.W. 1 Mohanlal, the first panch. He has stated that as per direction received from superior Officer on 22/2/1996 he along with co-panch Jivan Miskin attended office of Anti Corruption Bureau at 9 a.m. and as per instructions of P.W. 10 Deshpande, Dy. Superintendent of Police, again visited said office on the following day at 6 a.m. when he was introduced to complainant. He has further stated about panchas verifying contents of report (Exh. 85) from complainant and about demonstration given to panchas as well as complainant of phenolphthalein powder as well as sodium carbonate by which they learnt that when said powder comes into contact with sodium carbonate solution, it turns purple. He has further deposed about instructions given to complainant as well as to him and of signal to be given by complainant.

9. On the point of incident, P.W. 1 Mohanlal stated that he accompanied complainant and went to the office of accused. On meeting accused, he told complainant to come to his house and went towards his house, whom he along with complainant followed. In the verandah, accused enquired from complainant if he had brought money to which complainant replied that he had brought Rs.

100/- . Accused demanded the same upon which complainant tendered it by taking out the same from his shirt pocket, which was accepted by accused by his right hand and kept it in the right side pant pocket. On the proposed signal given by complainant, raiding team officials arrived on the spot and recovered bribe amount of Rs. 100/- from the pant pocket of accused.

10. It is to be noted that except for the evidence of P.W. 1 Mohanlal on the point of incident, no other evidence is on record to corroborate his version in view of admitted fact of death of complainant pending trial. In that view of the matter, I find it necessary to consider the case of prosecution by keeping in mind the probable defence put forth by accused as aforesaid. While considering this vital aspect involved in the appeal, it is necessary to refer to post trap panchanama (Exh. 49). From its contents, it is revealed that immediately after the trap, accused had given his explanation in writing, which was read over by the panchas and they had also signed on the same. It is found that said explanation of accused was not seized at the time of trap. From the original record and proceedings, it appears that said explanation is brought on record by defence by filing application (Exh. 51) before the trial Court. As per this application, it was contended that explanation of accused, which is referred in post trap panchanama (Exh. 49), is not on record though it is a part of the said panchanama. Another document, which was sought to be brought on record was house search panchanama of accused. It was also carried out immediately after the incident, but said document was not placed on record. As per order passed by the learned Special Judge, both these documents were accordingly brought on record by the defence.

11. In the background of above facts, when cross-examination of P.W. 1 Mohanlal is perused, he expressed his inability to say if accused had given any explanation in writing and if it was signed by him. On being confronted with portion "A" of post trap panchanama (Exh. 49), P.W. 1 Mohanlal has admitted its contents to be true, which as already referred above, are with reference to accused giving his explanation in writing immediately after the incident, upon which panchas had given their endorsement on reading contents thereof. P.W. 1 Mohanlal has further admitted that during the course of search panchanama, there was one board displayed having mentioned thereon rates of examination as Rs. 30/- and rates of E.C.G. examination as Rs. 70/-. It is also admitted that there was E.C.G. Machine available in the house of accused.

Thus, from the above evidence, it is material to note that in spite of accused giving his explanation immediately after the trap, for the reasons best known to prosecution, same was withheld and as such, was brought on record by defence by filing Exh. 51 - application, thereby calling upon prosecution to produce said documents on record.

12. Keeping above aspect in mind when evidence of P.W. 5 Rukhminibai is perused, she has stated that she had accompanied her husband to Government Hospital, Umarkhed on 22/2/1996 and had complained of chest pain, for which

accused had examined her and had obtained her E.C.G. To the specific question put to this witness whether her E.C.G. test was carried out on 22/2/1996, she had replied in affirmative and has stated that she had also informed this fact to Police.

13. In view of above evidence of P.W. 5 Rukhminibai, probable defence set up by accused of his obtaining Rs. 100/- towards his fees for taking E.C.G. of P.W. 5 Rukhminibai appears to be materially substantiated, which is further found substantiated from the fact of board as displayed by accused mentioning thereon charges as Rs. 30/- for examination and Rs. 70/- for performing E.C.G. test. Since it has also come in the evidence of P.W. 5 Rukhminibai that apart from E.C.G., she was advised certain pathological tests by accused, I find much substance when it is submitted on behalf of accused that amount of Rs. 100/- obtained by accused on the day of incident was towards his legal fees for which he is entitled for.

14. In the background of facts involved in the appeal as stated above, next question which is necessary to be considered is whether accused while working as Medical Superintendent in Government Hospital was allowed to charge fees from the patient examined by him. With reference to above, when evidence of P.W. 6 Linganna Ippewar, Sanctioning Authority is perused, he has stated that for the purpose of issue of grant of sanction, he received documents from the Investigating Agency, which consisted of explanation given by accused to the Investigating Officer and house search panchanama along with list of articles found in the house of accused and has specifically stated that according to panchanama, there was a board displayed in the house of accused stating thereon charges for examination as Rs. 30/- and for E.C.G. test as Rs. 70/-.

15. On this aspect, P.W. 8 Dr. Sudhir Khapali, who at the time of incident was posted as Deputy Director of Health Services, Akola having his jurisdiction over Government Hospitals at Buldhana, Akola, Yavatmal and Amravati, has stated that on the day of incident, accused was working as Medical Superintendent at R.P. Uttarwar Government Cottage Hospital, Umarkhed, District Yavatmal and for the post of Medical Superintendent, no non-practising allowance was paid and thus, said Officers are allowed to do private practice on following certain restrictions to the effect that their consultation room should not be within half kilometre from the Government Hospital premises. Said witness has specifically admitted that accused was allowed to do private practice, however, he was not allowed to take fees from the patients admitted in the Government Hospital. However, it is not the case of prosecution that P.W. 5 Rukhminibai, wife of complainant, was examined by accused in the Hospital, but according to the evidence of P.W. 5 Rukhminibai, her E.C.G. was taken by accused in his house. In that view of the matter, it can safely be held that accused has thus legally claimed Rs. 100/- from complainant towards medical examination and E.C.G. charges for his wife. This fact has not been disputed even by P.W. 8 Dr. Sudhir Khapli, who has stated that as per Government Resolution (Exh. 72), Doctors are

permitted to do private practice at their residence and are allowed to maintain private consultation room not within half kilometre from Government Hospital, if no consultation room is available in their residence.

16. In the background of above said evidence and particularly considering the fact that explanation of accused though tendered by him immediately after the trap was purposefully not filed with the charge-sheet, learned Counsel for appellant thus rightly relied upon the decision in Bismillakha Pathan Vs. State of Maharashtra . In that case, facts were somewhat similar as in that case post trap panchanama referred to explanation given by accused immediately after trap was carried out with reference to alleged acceptance of money, however, such explanation was not produced before the Court nor it formed part of record. It was held in that case that since such material piece of document was kept off the record by the prosecution for the reasons best known to it, this amounts to suppressing the best version given by accused, which is an important circumstance and certainly raises shadow of doubt about veracity of the case of prosecution.

17. In the appeal in hand, it has come in the evidence of P.W. 1 Mohanlal, panch witness as well as witness on the post trap panchanama (Exh. 49) that immediately after the trap, explanation given by accused was read over by him and it was signed by him along with co-panch, which fact is further substantiated by P.W. 10 Sanjay Deshpande, Investigating Officer and application (Exh. 51) vide which explanation of accused is brought on record, thus, it appears that since said document was suppressed by prosecution, defence by filing this application before the trial Court had sought production of said document along with house search panchanama of accused, which are accordingly placed on record. In that view of the matter, fact remains that such vital document since is supporting the case of appellant, is not brought on record only for the reason that had it been brought on record, it would have been fatal to the case of prosecution.

18. In view of above facts, I find it necessary to raise presumption as contemplated under Section 114 of Indian Evidence Act to the effect that had said document been produced on record, it would not have favoured prosecution and is, therefore, withheld. For this purpose, reference can be usefully made to illustration (g) of Section 114 of Indian Evidence Act.

19. With reference to further defence of accused of his false implication by complainant on the say of one P.M. Rathod, Pharmacist attached to the same Hospital where accused was working at the time of incident is considered, from the evidence of P.W. 1 Mohanlal it is revealed that though it is suggested to him that at the time of trap, P.M. Rathod was present, he replied that he did not remember about the same. However, from evidence of P.W. 5 Rukhminibai it has specifically come on record that she knows P.M. Rathod working in the same Hospital and he had come to her house in the previous night before she visited the Hospital and had talked with her husband complainant. She has further

stated that on 22/2/1996 when she was left in the Hospital by husband, she saw P.M. Rathod along with her husband in the Hospital wherefrom both of them went out. She has admitted that P.M. Rathod was on visiting terms with them.

20. In the background of above evidence as stated by P.W. 5 Rukhminibai, wife of complainant, and from the evidence of P.W. 6 Linganna Ippewar, sanctioning Authority, since it has come on record that accused prior to the incident had lodged complaint against P.M. Rathod on 19/2/1996, i.e. just three days prior to the incident involved in this case and as he has further admitted that Mr. Rathod had extended threats to accused to implicate him in a false case and in view of the fact that said fact is mentioned in the explanation given by accused about P.M. Rathod likely to falsely implicate him in a case, I find much substance in the case of accused of his false implication.

21. With reference to the said defence, on considering further evidence of P.W. 8 Dr. Sudhir Khapli, Deputy Director of Health Services, it is revealed that though he initially did not remember if accused had complained against P.M. Rathod attached to R.P. Uttarao Government Cottage Hospital, Umarkhed from 3/12/1995 onwards and thus, could not state, if on 15/1/1996, i.e. about one month prior to the incident, accused had given personal letter to him to look into the matter of P.M. Rathod, on being confronted with letter dated 25/1/1996 bearing his signature, admitted that vide this letter he had instructed P.W. 9 Dr. A.D. Deshpande, District Civil Surgeon to make preliminary enquiry and offer his remarks. The letter is on record (Exh. 74). Admittedly, P.M. Rathod being Pharmacist attached to R.P. Uttarao Government Cottage Hospital, Umarkhed was under the immediate control and administration of accused being Medical Superintendent of the said Hospital on the day of incident.

22. In the background of above, when evidence of P.W. 9 Dr. Anil Deshpande, Civil Surgeon is perused, it is noted that apart from deposing that Medical Superintendents are allowed to have their private practice, on being confronted with letter (Exh. 74), for want of record, though he was not in a position to state whether he had complied with the directions of P.W. 8 Dr. Sudhir Khapli, Deputy Director to hold preliminary enquiry, from above evidence, it can be said that certain directions were issued by P.W. 8 Dr. Sudhir Khapli to P.W. 9 Dr. Anil Deshpande, Civil Surgeon to hold enquiry on the basis of complaint lodged by accused against P.M. Rathod, Pharmacist.

23. Above evidence thus establishes that case of accused as set out about his false implication is more probable than the case of prosecution, which in the given circumstances is found to have miserably failed to prove the charge levelled against accused beyond reasonable doubt.

24. In that view of the matter, criminal appeal is liable to be allowed as even otherwise, there is no corroboration to the evidence of P.W. 1 Mohanlal from the complainant since dead and evidence of P.W. 1 Mohanlal is also not free from doubt as it does not establish the alleged demand of bribe by accused. On the

contrary, from the above stated evidence, there appears sufficient material to indicate that defence version is probable and in that view of the matter, it is safe to take a view that defence has ably established that the presumption under Section 20 of Prevention of Corruption Act, 1988 is rebutted, particularly in view of infirmities in the case of prosecution, which, on the contrary, are found to be consistent with the defence version. The appellant is, therefore, entitled for benefit of doubt. In the result, criminal appeal is allowed. The impugned judgment and order dated 11/3/2005 passed by the Special Judge, Pusa in Special Case No. 13/1998, thereby convicting and sentencing the appellant for the offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of Prevention of Corruption Act, 1988 is quashed and set aside. The appellant is acquitted of the said offences. His bail bonds stand cancelled. Amount of fine, if any paid, be refunded to the appellant.