
(2011) 05 GUJ CK 0082
In the Gujarat High Court
Case No : Criminal Appeal No. 843 of 1999

Puranmal Motumal Pesavani	Vs	APPELLANT
State of Gujarat		RESPONDENT

Date of Decision : 04-05-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374
Evidence Act, 1872 — Section 8
Prevention of Corruption Act, 1988 — Section 13, 13(1), 13(2), 2, 20

Citation : (2011) 05 GUJ CK 0082

Hon'ble Judges : Z.K. Saiyed, J

Bench : Single Bench

Advocate : Nitin M. Amin, for the Appellant; Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Z.K. Saiyed, J.—By way of present appeal, filed u/s 374 of the Code of Criminal Procedure, 1973, the Appellant-original accused No. 1

has prayed to quash and set aside the judgment and order of conviction and sentence dated 23rd July, 1999 passed by the learned Special Judge,

Ahmedabad (Rural), in Special Case No. 13 of 1998 whereby the learned Special Judge was pleased to convict the Appellant for the offence

punishable u/s 7 of the Prevention of Corruption Act, 1988 and sentenced him to undergo rigorous imprisonment for a period of one year, and also

imposed fine of Rs. 5,000/-, and in default of payment of fine; sentenced him to undergo imprisonment for a further period of six months. The

Appellant was also convicted for the offence punishable u/s 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and was

sentenced to undergo rigorous imprisonment for a period of two years, and also

imposed fine of Rs. 3,000/-, and in default of payment of fine;
sentenced to undergo imprisonment for a further period of four months.

2. As per the case of the prosecution, the Appellant was serving as Section Officer in the office of the Water Resources Corporation, Sub

Division, Viramgam. On 07th January, 1998, the complainant met the present Appellant in connection with his application made for obtaining ""No

Objection Certificate"" for taking electric connection on the Water Bore on his land. It is alleged that the Appellant took him in the compound of the

office and asked for Rs. 5,000/- as illegal gratification and told the complainant that he will have to understand in dealing and after having bargained

an amount of Rs. 3,000/- was decided which the Appellant asked the complainant to pay by evening of 08th January, 1998 and take away the

required papers. It is further alleged that the Appellant took the complainant to accused No. 2 and asked the accused No. 2 to take Rs. 3,000/-

from the complainant and give him papers if the Appellant is not present on that day. That on 08th January, 1998, at about 17.00 hours in the

office of the Corporation, original accused No. 2 accepted Rs. 3,000/- from the complainant and it is the prosecution case that the same was

accepted on behalf of the present Appellant for issuing NOC to the complainant and therefore, both the accused misused their position as public

servant and committed the offence as alleged here-in-above.

3. As the complainant was not willing to make the payment, he approached the ACB Office and lodged his complaint. Thereafter, the services of

two panchas were sought. The facts of the case were narrated to them and thereafter, experiment was made on the currency notes with the help of

anthracene powder. The basic ingredients of the anthracene powder were explained and made understood to the panchas as well as to the

complainant. After performing the experiment, preliminary part of the panchnama was drawn. The currency notes, i.e. five notes of the

denomination of Rs. 500/- and five currency notes of the denomination of Rs. 100/- each, were smeared with anthracene powder. Thereafter, the

complainant, panchas and members of the raiding party proceeded for trap. Thereafter, the complainant and the panch No. 1 met the present

Appellant-original accused No. 1 and the Appellant asked them as to why they are so late? Thereafter, the present Appellant, complainant and the

panch No. 1 came near the office gate in the compound where complainant asked for his papers in connection with NOC from the present

Appellant and the Appellant told him that the papers are ready and whether they brought money or not, to which the complainant replied in

affirmative. Therefore, the present Appellant-original accused No. 1 told the complainant to go in the office and pay the money to original accused

No. 2. Therefore, the complainant went inside the office and gave money to the accused No. 2 as stated by the Appellant from his pocket, who

accepted the money and put it in the left side drawer of his table. In the meantime the accused No. 2 took out the tainted currency notes from the

left side drawer and put those currency notes in the right hand side drawer of the table. Thereafter, the Appellant came inside and the complainant

went outside and gave signal to the members of raiding party. Thereafter, on making necessary inquiry, he took out the currency notes of Rs.

3,000/- through panch No. 1 from the right hand side drawer of the table of the accused. Thereafter, experiment of UV Lamp was carried out.

The light blue fluorescent marks were found on the currency notes, on both the hands of the accused No. 2, on the border of the handles of both

the drawers of the table and also inside the drawer. The numbers of the currency notes recovered from the drawer of the table got tallied with the

numbers noted down in the first part of panchnama. Thereafter, the currency notes were seized under the panchnama. Thereafter, the second part

of panchnama was completed there.

4. Thereafter, the Investigating Officer lodged FIR, registered the offence and recorded statements of various persons. Thereafter, after obtaining

sanction, charge-sheet came to be filed against the Appellant-accused No. 1.

5. Thereafter, charge at Exhibit 9 was framed against accused persons for the offences punishable u/s 7 and 13(1)(d)(i) and (ii) read with Section

13(2) of the Prevention of Corruption Act and read over to the complainant. The Appellant pleaded not guilty and claimed to be tried.

6. In order to bring the home the charges levelled against the accused, prosecution has examined five witnesses and also produced documentary

evidence in support of its case.

7. Thereafter, after examining the witnesses, further statement of the Appellant-accused u/s 313 of the Code of Criminal Procedure, 1973 were

recorded in which accused persons have denied the case of the prosecution.

8. After considering the oral as well as documentary evidence and after hearing the parties, the learned Special Judge vide impugned judgment and

order dated 23rd July 1999 held the Appellant-original accused No. 1 guilty to the charges levelled against him and sentenced him as mentioned

aforsaid. Hence, the learned Special Judge acquitted the original accused No. 2.

9. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence passed by the learned Special Judge,

Ahmedabad (Rural), the Appellant-original accused No. 1 has preferred the present appeal.

10. Heard Mr. Nitn Amin, leaned Counsel for the Appellant and Mr. H.L. Jani, learned Additional Public Prosecutor for the Respondent-State.

11. Mr. Amin, learned Counsel appearing for the Appellant has contended that the judgment and order passed by the learned Special Judge is

illegal, invalid and improper. He has also contended that the learned trial Judge has not considered the case of the defence and evidence and

material produced on record. He has read the charge at Exhibit 9 and contended that originally charge-sheet was filed against two accused

persons and original accused No. 2 is acquitted by the learned Special Judge, but the learned Special Judge has committed grave error to convict

the present Appellant-original accused No. 1. He has read the evidence of P.W. No. 1 and contended that looking to the evidence of P.W. No. 1,

demand is not established. He has also contended that from the evidence of this witness, it is established beyond reasonable doubt that the amount

of trap was accepted by the original accused No. 2 and not by the present Appellant. He has also contended that the day on which the

complainant came to the office of the Appellant, it was a day of salary and on account of shortage of the staff, papers of the complainant were not

possible to send on that day. However, being a headstrong person, the complainant quarreled and asked the Appellant to forward his papers

forthwith and got excited and threatened the Appellant that he would see him. He has also contended that the complainant in this case is

accomplice and therefore, the evidence of the complainant is not at all reliable, trustworthy and acceptable. Mr. Amin has also read the oral

evidence of P.W. No. 2 and contended that prosecution has failed to prove the

demand beyond reasonable doubt from the oral evidence of this witness and so far as acceptance of amount is concerned, it was not accepted by the Appellant, but it was accepted by the original accused No. 2, who was acquitted by the learned Special Judge. Thus, looking to the facts of the case, prosecution has failed to prove beyond reasonable doubt the demand and the acceptance. He has also contended that there are material discrepancies in the evidence of the complainant and the panch with regard to talk between the accused and the complainant. He has also contended that even the prosecution has failed to establish the contents of Exhibit 21-panchnama. He has also read the oral evidence of P.W. No. 4-Trapping Officer and contended that there are contradiction in the oral evidence of Trapping Officer and P.W. Nos. 1 and 2. He has also contended that the Appellant is standing on the same footing with the original accused No. 2, who is acquitted. He, therefore, contended that present Appellant is, therefore, required to be acquitted from the charges levelled against him.

12. Mr. Amin has also contended that the prosecution has failed to establish the demand and acceptance beyond reasonable doubt. He has further contended that the complainant is a headstrong person and he is in the habit of filing such type of false complaints. He has also contended that the present Appellant is innocent and has been falsely involved in the present case. Just to take revenge, the complainant has filed false complaint against the Appellant. He, therefore, contended that the judgment and order of conviction and sentence passed by the learned Special Judge is required to be quashed and set aside and the Appellant is required to be acquitted from the charges levelled against him.

13. As against this, Mr. Jani, learned Additional Public Prosecutor, has contended that the judgment and order passed by the learned Special Judge is absolutely just and proper. He has contended that the prosecution has proved its case beyond reasonable doubt. He has contended that looking to the overall facts and circumstances of the case, circumstantial evidence and evidence produced on record, the learned Special Judge has passed absolutely just, proper and legal order, which is not required to be interfered with. He has read the oral evidence of P.W. No. 1-complainant and contended that the first demand made by the Appellant is

proved from the oral evidence of this witness. At the first instance, the Appellant-accused had demanded Rs. 5,000/- and thereafter, after some bargaining, he had agreed to accept Rs. 3,000/- on 08th January, 1998.

He has also contended that on 08th January, 1998 when the complainant along with panch No. 1 went to meet the Appellant, the Appellant was waiting for the complainant and even asked the complainant the reason for coming late and in presence of panch No. 1, the Appellant asked the specific question ""have you brought money?"". Thus, demand is established beyond reasonable doubt. Mr. Jani has contended that it is true that the trap amount was recovered from the original accused No. 2 and he was acquitted, but the said amount was not demanded by the accused No. 2.

Even it is not the case of the Appellant that the original accused No. 2 is an abettor and in abetment with the original accused No. 1-present Appellant, the amount is accepted by the original accused No. 2. He has read the oral evidence of P.W. No. 2 and contended that from the evidence of this independent witness, demand is proved. Mr. Jani has further contended that thus, from the oral evidence of P.W. Nos. 1 and 2, sufficient evidence is produced on record to prove the demand. He has read Section 13 of the Prevention of Corruption Act and contended that looking to the evidence produced on record, prosecution has proved that present Appellant has committed criminal misconduct and as a result, the trap amount was accepted by co-accused. He has read the oral evidence of P.W. No. 4-Trapping Officer and contended that from the oral evidence of this witness as well as from the oral evidence of P.W. Nos. 1 and 3, prosecution has proved its case beyond reasonable doubt. He has contended that when the demand is proved and misconduct is also proved, appeal is required to be dismissed.

14. I have heard the learned Counsel for the parties and perused the papers produced before me. I have also considered the submissions advanced by the learned Counsel for the parties. It appears from the papers that originally charge was framed against two accused persons and ultimately the original accused No. 2 was acquitted of the charges levelled against him, but the said order of acquittal was not challenged by the State Government. Today, the question as to legality and validity of the acquittal of original accused No. 2 does not arise before this Court, but the

question arises as to whether the learned Special Judge has committed any error in convicting the present Appellant or not. It is the say of Mr.

Amin, learned Counsel for the Appellant, that the present Appellant and the original accused No. 2 stands on the same footing and the original

accused No. 2 was abettor. To appreciate this issue, I have perused Section 7 of the Prevention of Corruption Act, 1988, which reads as under:

Section 7 - Public servant taking gratification other than remuneration in respect of an official act. - Whoever, being, or expecting to be a public

servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification

whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show,

in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any

person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority,

corporation or Government company referred to in Clause (c) of Section 2, or with any public servant, whether named or otherwise, shall be

punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.

15. Just to consider the issue of illegal gratification or bribe, I have perused the evidence of P.W. No. 1-complainant, who had stated that he has

applied for N.O.C. on 24th December, 1997 and he has deposited fees for the same also. He has also verified from the office of Department of

Water Resources, Viramgam whether his papers are received or not? and at that point of time, demand was made by the Appellant. It appears

from the papers that at the first instance, the Appellant had demanded Rs. 5,000/- and thereafter he had agreed to accept Rs. 3,000/-. It also

appears from the papers that the Appellant had instructed the original accused No. 2 to accept the amount of Rs. 3,000/- from the complainant in

case if he is not available and only after receiving Rs. 3,000/- from the complainant, his papers be handed over to the complainant. It appears from

the papers that the defence has failed to rebut the presumption as to said demand. Even on 08th January, 1998 when the complainant along with

panch No. 1 went to the office of the Appellant, the Appellant asked a specific question to the complainant as to why he was so late and also

asked whether he has brought the money or not. Thus, it clearly transpires that the Appellant was waiting for the complainant. Thereafter, the

complainant handed over Rs. 3,000/- to the original accused No. 2 as per instruction given by the present Appellant-original accused No. 1. Thus,

at the second instance also, demand is proved by the complainant as well as through oral evidence of panch No. 1. I have also perused oral

evidence of P.W. No. 2 at Exhibit 20 in connection with demand and acceptance. The said witness is a public servant and is an independent

witness. He has in his oral evidence admitted that in his presence the Appellant had demanded illegal gratification and told the Appellant to give the

amount to the original accused No. 2. The evidence regarding demand by the Appellant and acceptance by the original accused No. 2 is

corroborated by the evidence of P.W. No. 2. Looking to the oral evidence of P.W. Nos. 1 and 2 and also the documentary evidence produced

on record, I have not found anything requiring to consider the probable defence of the Appellant. So far as acceptance is concerned, it is proved

through oral evidence of P.W. Nos. 1, 2 and 4 and so far as recovery is concerned, it is proved that in connection with the demand made by the

present Appellant, the amount was accepted by the original accused No. 2. Thus, I am of the opinion that demand is proved in light of Section 7 of

the Prevention of Corruption Act, 1988. I have also perused further statement of the Appellant recorded u/s 313 of the Code of Criminal

Procedure. The Appellant has failed to rebut the evidence of the prosecution witnesses.

16. I have also perused Section 13(1)(d) and 13(2) of the Act. It is true that the trap amount is not recovered from the possession of the present

Appellant, but it was recovered from the possession of the original accused No. 2, who is acquitted by the learned Special Judge. Thus, so far as

question regarding acceptance of bribe amount is concerned, it was not accepted by the present Appellant. Thus, the prosecution has failed to

prove the acceptance beyond reasonable doubt. But looking to the provision of Section 13(2) of the Prevention of Corruption Act, the conduct of

the present Appellant is required to be considered. Even in light of Section 8 of the Evidence Act, it is proved beyond reasonable doubt that in

connection with the demand made by the present Appellant, original accused No. 2 has accepted the said amount. Thus, conduct of the Appellant

shows that he has committed criminal misconduct in light of the provision of Section 13(2) of the Act. Section 13 prescribed as under:

Section 13. - (1) A public servant is said to commit the offence of criminal misconduct,-

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification

other than legal remuneration as a motive or reward such as is mentioned in Section 7; or

(b) if he habitually accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person, any valuable thing without

consideration or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be likely to

be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of

himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so

concerned; or

(c) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a

public servant or allows any other person so to do; or

(d) if he,-

(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or

(e) if he or any person on his behalf, is in possession or has, at any time during the period of his office, been in possession for which the public

servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income.

17. The issue regarding Public servant abusing his position for obtaining pecuniary advantage is concerned, it can be considered from the oral

evidence of P.W. Nos. 1 and 2. It appears from the words uttered by the Appellant, viz. why you are so late? and have you brought money?, it

clearly transpires that the said words were uttered by the Appellant with dishonest mind and looking to his conduct, it clearly appears that he has misused his official capacity. The gist of the offence under this clause is that a public officer abusing his position as public servant obtains for himself or for any other person any pecuniary advantage, he can be said to committed offence of criminal misconduct. "Abuse" means misuse, i.e. using his position for something for which it is not intended. The element for dishonesty is implicit in the word of abuse. In other words, mere misuse without dishonest intention is not abuse. In the present case, when dishonesty is established beyond reasonable doubt and dishonest mind is already established, then it can be said that present Appellant has misused his position and demanded the bribe.

18. Expression "burden of proof" has two defined meanings, (i) legal burden - burden establishing the guilt and (ii) circumstantial burden. In criminal trial, burden of proving guilt against the accused lies upon the prosecution and that burden never shifts. Notwithstanding the general rule, burden of proof is exclusively upon the prosecution but in case of certain offences, the same is shifted on the accused. The burden upon the accused in such cases is however not too onerous as compared to the burden of proof which lies on the prosecution.

19. It is the duty of the defence to establish probable defence. Only on the ground that because of hot exchange of words delivered between the Appellant and the complainant, complainant threatened the Appellant and filed false complaint, it cannot be said that the defence is able to shift the burden. Only on this ground, defence cannot say that the defence has established probable defence beyond reasonable doubt. The Appellant has failed to establish the probable defence in his further statement recorded u/s 313 of the Code of Criminal Procedure. It is true that so far as acceptance is concerned, prosecution has failed to prove its case beyond reasonable doubt. The amount was accepted and recovered from the possession of the original accused No. 2 and not from the present Appellant. But looking to the provision of Section 13(2) of the Act, criminal misconduct is proved beyond reasonable doubt through oral as well as documentary evidence produced on record. Hence, I am of the opinion that the learned Special Judge has committed error in convicting the Appellant for the offence of Section 13(1)(d) of the Prevention of Corruption

Act. Therefore, that portion of the judgment and order of conviction is required to be set aside, but so far as conviction u/s 13(2) of the Prevention of Corruption Act is concerned, prosecution has proved its case beyond reasonable doubt regarding demand and criminal misconduct. It clearly transpires from the papers that at the first instance the Appellant had demanded Rs. 5,000/- as illegal gratification and then agreed to accept Rs. 3,000/- and he had instructed the original accused No. 2 to accept the said amount. Thus, the Appellant has misused his position as public servant and thus, he has committed criminal misconduct.

20. However, it also appears that the trap was carried out in the year 1998 and in the year 1999, judgment was delivered by the learned Special Judge. Today, in the year 2011, i.e. after 11 years, present appeal is listed before this Court for final hearing and disposal. When the prosecution has failed to prove beyond reasonable doubt the acceptance, I am of the opinion that conviction u/s 13(2) of the Act for two years is very harsh and under such circumstances, if some lenient view is taken, it would meet with ends of justice. Therefore, in my opinion, instead of two years, one year punishment u/s 13(2) is sufficient.

21. As per above observation, I found that demand of illegal gratification made by the Appellant-accused is proved beyond reasonable doubt through oral evidence of complainant and panch witness as well as through documentary evidence produced on record. The prosecution has failed to prove beyond reasonable doubt the acceptance by the present Appellant. As per provision of Section 20 of the Prevention of Corruption Act, presumption is required to be drawn against the present Appellant and when the Appellant has failed to rebut the said presumption, no defence can be considered, which is tried to be established by the learned Counsel for the Appellant.

22. Hence, in view of the foregoing reasons, present appeal is partly allowed. The judgment and order of conviction dated 21st May, 1997 passed by the learned Special Judge, Ahmedabad (Rural), in Special Case No. 13 of 1998 so far as offence punishable u/s 7 of the Prevention of Corruption Act, 1988, is hereby confirmed. However, the judgment and order of sentence dated 21st May, 1997 passed by the learned Special Judge, Ahmedabad (Rural), in Special Case No. 13 of 1998 so far as offence

punishable u/s 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 is concerned, conviction u/s 13(1)(d) of the Prevention of Corruption Act, 1988 is hereby quashed and set aside. The Appellant-original accused No. 1 is convicted u/s 13(2) of the Prevention of Corruption Act, 1988 only and is sentenced to undergo rigorous imprisonment for a period of one year instead of rigorous imprisonment for a period of two years as awarded by the learned Special Judge and also to pay a fine of Rs. 5,000/-, and in default, to undergo simple imprisonment for a further period of four months for the aforesaid offence. The Appellant is on bail. This bail bond shall stand cancelled. The Appellant-accused is, therefore, directed to surrender himself before the Jail Authority within a period of four weeks from today, failing which the trial Court concerned is directed to issue Non-bailable warrant against the Appellant-accused to effect his arrest. Record and Proceedings, if any, be sent back to the trial Court concerned, forthwith.