
(1972) 12 BOM CK 0008
In the Bombay High Court

Purushottam Raghunath Pande and Another	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision : 12-12-1972

Acts Referred:

Penal Code, 1860 (IPC) — Section 161, 165A
Prevention of Corruption Act, 1988 — Section 5(1)(d), 5(2)

Citation : (1973) CriLJ 1005 : (1973) MhLj 108

Hon'ble Judges : Masodkar, J

Bench : Single Bench

Judgement

Masodkar, J.—These two appeals are by the two accused who stood charged u/s 161 IPC read with section 5 (2) and 5 (1) (d) of the Prevention of Corruption Act and Section 165-A IPC and Section 5 (2) read with Section 5 (1) (d) of the Prevention of Corruption Act, read with Section 109 IPC respectively. They having been found guilty of these offences were accordingly convicted and sentenced by the Special Judge, who tried them in Special Case No. 5 of 1959.

2. The prosecution case against these accused had been that on April 14, 1969. at Umarkhed, the accused No. 1 who was a Naib Tahsildar received an illegal gratification in the sum of Rs 175/- from P. W. 1 Dadarao who was at the relevant time the President of Vividih Karyakari Society, Deosari. As far as accused No. 2 is concerned, the prosecution case was, that he being a petition-writer at the place where accused No. 1 was working as Naib-Tahsildar, had aided and abetted the act of this illegal gratification.

3. The learned Special Judge, who recorded the evidence of both the prosecution and defence witnesses, came to the conclusion that the accused are guilty of the offences with which they were charged.

4. The defence, upon which much would depend in such matters, taken by accused No. 1 who is the principal accused, was that the amount received by him from P. W. 1 Dadarao was not accepted as a gratification but had reference to a voluntary promise made by P. W. 1 Dadarao to him to help by giving a loan of Rs.

500/- for the purposes of the marriage of his daughter. If he succeeds in showing that this is so under the circumstances, then he has received the amount lawfully and his conviction would not be warranted.

5. For establishing his plea, the accused cross-examined the witnesses brought by the prosecution being P. W. 1 Dadarao. P. W. 7 Baburao and P. W. 14 Bhimrao Govindrao who are all concerned with the Vividh Karyalaya Society and has attempted to point out that they are not the men who can safely be relied upon. Further, certain suggestions are put as to his definite case to P. W. 1 Dadarao and the panch witness P. W. 2 Rangrao as to what happened on the date when actual amount passed as alleged by the prosecution from P. W- 1 Dadarao to accused No. 1, Certain questions being first disclosure made by the accused to the investigating officer P. W. 16 Deole, were disallowed by the learned Judge being within the purview of Section 162 of the Code of Criminal Procedure. Taken the overall view of cross-examination of the prosecution witnesses, the accused No. 1 has put up the case trying to bring forth before the Court his possible defence with respect to the lawful nature of the transaction.

6. Apart from this, he has examined witnesses, being D. W. 1. Sk. Roshan. a clerk in his office. D. W. 3 Dr. Narayan Govind Shastri. D. W. 4 Ainath Dhondur Nilapwar and D. W. 5 Kesharao Chiddarwar. to establish that the marriage of his daughter took place on May 8, 1969 and Exfo. 68 is the invitation of that marriage. D. W. 5 Kesharao is the father-in-law of his daughter. It is his case that these three witnesses particularly. D- W. 3 X Mr. Shastri and D. W. 4 Nilapwar, who are independent witnesses, were present at the time of betrothal ceremony where P. W. 1 Dadarao had come as a guest. At "that time the latter made voluntary offer of payment of Rs. 500/- as a loan for meeting the marriage expenditure or else the marriage was being postponed. Thus the actual payment of the amount in this case being Rs. 175/- is referable, according to the accused, to this promise which was not only innocent but perfectly lawful and. therefore, it was the case of accused No. 1 that the payment made by Dadarao was pursuant to the promise which in law cannot be treated as illegal gratification. In that view, the accused claimed that he has rebutted the presumption that arises u/s 4 (1) of the Prevention of Corruption Act, 1947 and the passing of the money being lawful is not tainted and no offence has been committed by him. The case of accused No. 2 similarly was of denial and that he was not concerned in any manner with the alleged transaction.

7. In this Court the learned Counsel appearing for b"ot/h the accused have vehemently urged that the approach of the learned Judge has vitiated the trial itself. I was taken through all the evidence and appeal was made that I should reappreciate the evidence being a Court of fact and substitute the finding that accused No. 1 has properly discharged the burden as required by the law.

8. The critical portion on which naturally the attack centred is with reference to the provisions of Section 4 (1) of the Prevention of Corruption Act. 1947 and the matter stood contemplated by the words, "unless the contrary is proved" which is

the core of that sub-section. The learned Judge after noticing that section referred to the decision of *Dhanvantrai Balwantrai Desai Vs. State of Maharashtra*, and put the issue before him in the following words:

In view of this settled legal position it is necessary to consider whether the explanation offered by Shri Bompilwar is a true one.

In other words, the degree of proof that was sought by the learned Special Judge was that the explanation must be true. The test applied to the evidence of defence witnesses and the defence case naturally followed was that of truth that can satisfy the conscience of the Court, meaning thereby a fact has to be established beyond reasonable doubt. That is clear from the discussion made of the various witnesses and their statements in Court. The learned Judge has discarded the evidence of the defence, stating that it was weak, improbable and also referring to certain other possibilities as to the evidence of one Ainath Nilapwar, the learned Judge referred to his own impression and demeanour. It is also observed in para 44 by the learned Judge that in the ordinary course he would have certainly attached great weight to the testimony of Dr. Shastri, but he goes on to point out certain lacunae in that evidence and tries to brush aside that evidence for reasons given in para 44. Thus the test that was applied while appreciating the defence case was of an absolute degree, in that accused is put to proof of his case beyond reasonable doubt and from that angle the evidence was appreciated.

9. The passage of the principle with respect to burden of proof and which sheds light on the various facts involved in such matter is now well ascertainable. There cannot be a complete solution to the problems of proof in the Court of law. Section 3 of Evidence Act leaves the matter to the belief of the Court. The evidence on record may lead to that belief so that the Court may find that a fact so exists or its existence becomes so probable that a prudent man under the given circumstances of a case would act upon the supposition that such fact exists. The latter term of the definition of the word "proof" depends entirely on the preponderance of the probabilities. It may not reach the test of absolute truth and still may be within the realm of the term "proof". No one approach therefore will encompass all the quandaries of such of search in a single theoretical dictum. These are all matters having its own practical dimensions and it is not possible to predicate which fact will play upon the mind of the Court while reaching the belief that is contemplated by Section 3 while deciding the facts proved.

10. After *Dhanvantrai Balwantrai Desai Vs. State of Maharashtra*, the provision of Section 4 (1) of the Prevention of Corruption Act has been consistently considered in *V.D. Jhangan Vs. State of Uttar Pradesh*, and *Sailendranath v. State of Bihar* AIR 1968 SC 1292 : 1968 Cri LJ 1484 and the words "unless the contrary is proved, occurring in Section 4 (1) have been understood to mean that the burden resting on the accused will be satisfied if accused person establishes his case by a preponderance of probabilities and it has been laid

down that it was not necessary for him to establish his case by that test of proof beyond reasonable doubt. This principle has been restated in a report of the Note by the Supreme Court in *State of Assam v. Krishna Rao* 1972 SC 376 in Criminal Appeals Nos. 92 and 93 decided on 15-9-1972. (reported in *The State of Assam Vs. Krishna Rao*, There it was pointed out that the required proof could not be of such a degree as is expected for sustaining the criminal conviction. It need only establish a high degree of probability.

11. Thus the proof that was called for was not that the accused was to prove his case beyond reasonable doubt or to establish the truth as is understood by the learned Special Judge. What the court was required upon the law as is found is, whether, from the circumstances which will take in the nature of the prosecution evidence, similarly the positions of the parties and the oath taken by witnesses. The accused has shown that there were preponderant probabilities in his favour when he says that the payment from P. W. 1 emanated upon a lawful promise made by the said witness at the time of the betrothal ceremony and was not therefore an illegal gratification. The Court is bound to take into account while weighing the probabilities in such cases all relevant circumstances including the witnesses, their status and their independence, and judge their say on its own merits.

12. It was. therefore, eminently possible for the learned Counsel appearing for the accused to say that the approach in putting the burden on the accused has vitiated the judgment and, therefore, sitting in appeal I should reconsider the evidence and hold that the preponderance of probabilities has been reached by the circumstances. and set aside the conviction.

13. It is always possible for this Court to pre-empt its judgment in the matters of weighing the facts. But when the very approach upon which the evidence has to be tested has not been in accordance with law, this course may not be followed. It is perfectly possible that taking the proper approach in the matter of proof, the Court, that is the trial Court, can be convinced that the accused has furnished that material which entitled that Court to hold that the presumption raised by law u/s 4 (1) of the Act has been properly rebutted. The parties in such matters have a remedy against such appraisal of evidence by the Trial Court. That remedy in such matters is affected if taking the new approach which was not present to the mind of the trial Judge, the findings are disturbed at the stage of appeal. Interests of justice, therefore, require that the judgment recorded by the learned trial Court is set aside and the matter is directed to be reheard by it from the stage of arguments. That course alone appears to me to be proper in the present case.

14. There is one more matter on which the parties be at liberty before the learned Special Judge, It has come on record that one Mr. Dorle who was the Block Development Officer was called by the accused at the time when the amount was recovered. He was cited by the prosecution as their witness but was given up. Now this story upon which reliance is being placed by the accused is

eminently of raising the preponderance of probabilities. It is the say of the accused from the suggestions made to the witnesses that to that Mr. Dorle be told immediately how he had been subjected to the trap by fraudulent misrepresentations made by P, W. 1 Dadarao (sic). As the prosecution has given up Mr. Dorle he being not necessary for unfolding the prosecution case there cannot be any insistence as against the prosecution to examine him as their witness. But that need not shut the door of justice as far as finding out the truth in a given matter. It would be open, therefore, for the accused to apply to the Special Judge, if so advised to examine Mr. Dorle as a court-witness by giving proper reasons for calling him in the Court. The Court shall give hearing to the parties on this matter and decide whether interests of justice require that the evidence of Mr. Dorle should be taken as a Court-witness.

15. Accordingly, I hold that the present conviction recorded by the learned Special Judge, applying the test of truth to the defence and the evidence given by the accused, cannot be sustained. The judgment of conviction and sentence is, therefore, set aside. The matter is remitted back to the Special Judge, Yeotmal, to be heard afresh from the stage of arguments and reappraise the evidence in the light of the observations made above. The party i.e., the accused shall be at liberty to apply to the learned Judge for examining one Mr. Dorle if so advised as a Court witness, which application shall be dealt with according to law by the learned Special Judge. Except the evidence of Mr. Dorle if at all such an application is made and allowed, no further evidence shall be taken by the learned Judge. If in the circumstances there is any necessity of further examining the accused u/s 342. Cr, P. C. upon taking the evidence of Mr. Dorle, the same should also be considered. The learned Special Judge, therefore, is directed to rehear the matter keeping in view the above observations and give fresh findings as to the involvement or otherwise of both the accused-appellants.

16. The accused to appear before the learned Special Judge, Yeotmal, on 12th January 1973. The learned Judge will expedite the proceedings. The accused to continue on bail of fresh bonds that will be executed in Special Judge's Court.