**(2024) 04 OHC CK 0079**

**In the Orissa High Court**

**Case No :** I.A. No. 292 Of 2024

Ranjan Kishore Behera — APPELLANT

Vs

State Of Odisha (Vig) — RESPONDENT

**Date of Decision :** 12-04-2024

**Acts Referred:**

Code of Criminal Procedure, 1973 — Section 389, 389(1)
Prevention of Corruption Act, 1988 — Section 7, 20
Evidence Act, 1872 — Section 154

**Citation :** (2024) 04 OHC CK 0079

**Hon'ble Judges :** S.K. Sahoo, J

**Bench :** Single Bench

**Advocate :** Debi Prasad Dhal, B.S. Dasparida, Sanjay Kumar Das

**Final Decision :** Allowed

## Judgement

S.K. Sahoo, J

1. The appellant Ranjan Kishore Behera (hereinafter 'the petitioner') who was the District Labour Officer, Phulbani during the year 2019 has filed this interim application under section 389 of Cr.P.C. for stay of impugned judgment and order of conviction dated 24.11.2023 passed by the learned Special Judge (Vigilance), Phulbani in G.R. Case No.15 of 2019 (v)/T.R. No.12 of 2021 in convicting him under section 7 of the Prevention of Corruption Act, 1988 (as amended by Act No.16 of 2018 (hereafter 81988 Act9) and sentencing him to undergo rigorous imprisonment for three years and to pay a fine of Rs.5,000/- (rupees five thousand), in default of payment of fine, to undergo further rigorous imprisonment for three months.

2. The prosecution case, in short, is that on 07.11.2019 at about 2.45 p.m. while the petitioner was working as District Labour Officer, Phulbani, he demanded and accepted a sum of Rs.15,000/- (rupees fifteen thousand) from the complainant Babuja Pradhan (P.W.4) as illegal gratification other than legal remuneration, as a motive or reward for the scrutiny and processing the documents and to

recommend the files of four numbers of beneficiaries to get the death assistance of Rs.1,00,000/- (rupees one lakh) and other death benefits in favour of the family of the labourers as per the Govt. scheme and thereby, he committed an offence publishable under section 7 of the 1988 Act. It is the further prosecution case that P.W.4 being the President of Shramika Sangha was looking after the case of said beneficiaries and when he approached the petitioner to process the files, the petitioner demanded Rs.8,000/- (rupees eight thousand only) for each of the beneficiaries and ultimately, it was settled at Rs.15,000/- (rupees fifteen thousand).

It is the further prosecution case that being dissatisfied with the illegal demand raised by the petitioner, P.W.4 lodged a written report before the Superintendent of Police (Vigilance), Berhampur through the D.S.P. (Vigilance) on 06.11.2019. On the basis of such report of P.W.4, Berhampur Vigilance P.S. Case No.30 of 2019 was registered against the petitioner under section 7 of the 1988 Act and the Superintendent of Police (Vigilance), Berhampur directed P.W.11 to take up preliminary investigation and also directed P.W.12 to take up charge of investigation of the case subsequently. Accordingly, a preparation of trap was made and on 06.11.2019, requisition was issued for procuring the attendance of the independent witnesses to accompany the trap party. The Vigilance personnel, the complainant and independent witnesses assembled at Vigilance Unit Office, Phulbani at 11.30 a.m. and P.W.4 was introduced to the other trap party members by P.W.11 (T.L.O.). The complainant (P.W.4) narrated his grievance before them and produced Rs.15,000/- (rupees fifteen thousand) in the shape of seven nos. of 2000 GC notes and two nos. of 500 GC notes after which one Vigilance Constable Rama Chandra Sahoo was directed to demonstrate the chemical reaction of phenolphthalein powder with sodium carbonate solution. The GC notes produced by P.W.4 were smeared with phenolphthalein powder and wrapped in a four-fold paper and the same was handed over to P.W.4 with instruction to give the same to the petitioner only on demand. The official witness, namely, Nilakantha Sahu (P.W.5) was selected as overhearing witness to accompany P.W.4 to the spot, to overhear the conversation between P.W.4 and the petitioner, to see the transaction and to relay the signal to the trap party members. Another independent witness, namely, Srikanta Mishra (P.W.8) was directed to accompany the trap party members with an instruction to compare the number and denomination of the tainted currency notes with the number noted down in a plain paper. The copy of the preparation report (Ext.6) was also handed over to P.W.8. After preparation of the trap, the trap party members proceeded to the office of the petitioner i.e. District Labour Office, Phulbani in motor cycles and reached near Gopabandhu Chhak at about 1.40 p.m. and they parked their vehicles near Coronation play ground at Phulbani and P.W.4 as well as the overhearing witness (P.W.5) was directed by the T.L.O. (P.W.11) to proceed to the Office of the petitioner. At about 2.45 p.m. after getting pre-arranged signal from P.W.5, the trap party members proceeded to the spot and found P.W.5 was standing in front of the chamber of the petitioner. P.W.5 told them that the complainant (P.W.4) had already handed over the tainted money to the petitioner on his demand and the petitioner counted the same using both of his hands and kept it in his right side pant pocket. The further prosecution case is that the hand wash of the petitioner was taken with sodium carbonate solution, which turned into pink colour and the same was preserved in a glass bottle. When the petitioner was asked about the tainted money, he tried to swallow the same by bringing it from his pocket, which was obstructed by the T.L.O. (P.W.11) and in that process, the petitioner bit his thumb. It is the further prosecution case that the tainted money, which was recovered from the mouth of the petitioner was handed over to P.W.8 with a direction to count and compare the same with the numbers earlier noted down in the copy of the preparation report, which found tallied. The T.L.O. (P.W.11) seized the tainted notes and other relevant papers as per seizure list (Ext.14). After completing all the formalities, the T.L.O. (P.W.11) prepared the detection report vide Ext.9 and handed over the charge of investigation to P.W.12 along with documents, which were prepared and seized by him. Subsequently, on 27.08.2020 P.W.10 took over the charge of investigation from P.W.12 and on completion of investigation, submitted charge sheet against the petitioner for the offence as aforesaid.

3. The appeal was admitted on 11.12.2023, bail was granted so also an order was passed for stay of realisation of fine pending disposal of the appeal.

4. Mr. Debi Prasad Dhal, learned Senior Advocate appearing for the petitioner strenuously contended that the settled principle of law in the matter of appreciation of evidence in a case of this nature, is that in order to attract the ingredients of section 7 of the 1988 Act, the prosecution has the bounden duty to prove the twin requirements, i.e, demand and acceptance of bribe by the accused and proving one alone but not the other, is not sufficient to prove the charge. Learned counsel further submitted that since the demand of illegal gratification is the sine qua none to constitute the offence under section of 7 the 1988 Act, mere possession and recovery of currency notes from the petitioner without proof of demand would not bring home the charge under section of 7 the 1988 Act. He further argued that if the demand and acceptance is not proved by clear evidence, recovery of tainted money is not sufficient to convict the petitioner. Learned counsel further submitted that from the evidence of P.W.4, it appears that the said witness was declared hostile by the prosecution and also cross-examined. In paragraph-5 of his evidence, P.W.4 while replying to the question put to him by the prosecution, admitted that he had never talked to the petitioner before 06.11.2019 and he had brought the amount to be given to the petitioner out of his own calculation and he further admitted that he could not say as to who scribed the F.I.R. Learned counsel brought to the notice of the Court to paragraph-11 of the cross-examination of P.W.4 wherein he has categorically stated that he had never gone to the petitioner before 07.11.2019 with regard to the applications of four beneficiaries. He has also brought to the notice of this Court the deposition of P.W.4 wherein he admitted that the seat of the petitioner was not visible from outside and he had not seen the overhearing

 

witness (P.W.5) standing outside the chamber of the petitioner. Learned counsel further brought to the notice of this Court paragraph-12 of the cross-examination of P.W.4 wherein he admitted that he thrust the money in the right side pocket of the petitioner in white envelope and again in paragraph-16 of his cross-examination, he stated that he thrust the tainted money inside the right side back of the petitioner. Learned counsel has brought to the notice of this Court to paragraph-2 of the evidence of overhearing witness (P.W.5) wherein he stated that he was instructed to accompany Babuja Pradhan (P.W.4) to the spot to see the transaction and to relay the signal by rubbing his head with his hand. It is further submitted that the said witness in paragraph-12 of his cross-examination has stated that he remained near the door of the chamber and P.W.4 gave him signal and thereafter he relayed the same to the trap party members and he has also specifically stated that before getting signal from P.W.4, he had no knowledge regarding the transaction. Learned counsel has also brought to the notice of this Court to paragraph-10 of the cross-examination of P.W.5, wherein the said witness has stated that except the Magistrate, he had not given his statement before any other official. Learned counsel further contended that on an analysis being made to the evidence of both P.W.4 and P.W.5, it would be clear that P.W.5 had no occasion nor he was in a position to overhear the conversation between the petitioner and P.W.4 or to see any transaction between them and thus, from the evidence of P.W.4 and P.W.5, the demand and acceptance of illegal gratification which are the basic ingredients of offence under section 7 of the 1988 Act are not satisfied. Learned counsel further submitted that even though the so-called tainted money was recovered from the petitioner as per the evidence of witnesses, but law is well settled that mere recovery of tainted money divorced from the circumstances under which it was paid, is not sufficient to reach at the conclusion that the prosecution has proved its case beyond all reasonable doubt. Learned counsel further submitted that the initial burden of proving that the accused accepted or obtained the amount other than legal remuneration is upon prosecution and when the initial burden regarding demand and acceptance of illegal gratification is discharged by the prosecution, then the burden of proving the defence shifts upon the accused and a presumption under section 20 of the 1988 Act would arise. He placed reliance on the decision of the Hon9ble Supreme Court in the case of Neeraj Dutta -Vrs.- State (Govt. of N.C.T. of Delhi) reported in (2023) 4 Supreme Court Cases 731 wherein it was held that the proof of demand and acceptance of illegal gratification by a public servant is a sine qua non to establish the charge under section 7 of the 1988 Act which can be proved either by direct evidence and the same can be in the nature of oral evidence or documentary evidence and in absence of direct evidence, it can also be proved by circumstantial evidence. According to Mr. Dhal, the evidence of both P.W.4 and P.W.5 does not satisfy the demand and acceptance of illegal gratification by the petitioner and the finding of the learned trial Court on these two aspects is against weight of evidence on record which can be said to be a rare and exceptional case for grant of stay of conviction in view of the ratio laid down in the case of K.C. Sareen -Vrs.- C.B.I. reported in (2001) 6 Supreme

Court Cases 584, wherein it was held that if the impugned judgment is based on no evidence or against the weight of evidence, which must prima facie appear on the face of it without conducting a detailed analysis into the merit of the case, it can be said to be a rare and exceptional case for grant of stay against conviction under section 389 of Cr.P.C. Learned counsel further argued that by the time the main appeal is heard and disposed of by this Court on merit, the petitioner in all likelihood would have passed the cream of his life and if the stay of conviction is not granted, irreparable loss and irreversible damage would be caused to him.

Mr. Sanjay Kumar Das, learned Standing Counsel for the Vigilance Department appearing for the opposite party vehemently opposed the prayer for stay of conviction and also filed his objection to such petition. It is contended that the learned trial Court after going though the evidence on record has rightly found the petitioner guilty and nothing having been pointed out by the learned counsel for the petitioner to bring the case to an exceptional category, no favourable order should be passed in favour of the petitioner. It is further contended that delay in disposal of the appeal cannot be a sufficient ground to grant stay of conviction. The learned counsel further contended that laxity in corruption cases would encourage corruption and therefore, the interim application should be dismissed. He has filed the office order dated 16.03.2024 of the Govt. of Odisha, Department of Labour and E.S.I. relating to the dismissal of the petitioner from Govt. service.

5. The power to suspend an order of conviction, apart from the order of sentence, is not alien to section 389(1) of the Cr.P.C., but its exercise should be limited to very rare and exceptional cases. The Court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance.

In the case of State of Maharashtra through C.B.I. -Vrs.- Balakrishna Dattatrya Kumbhar reported in (2012) 12 Supreme Court Cases 384, it is held as follows:-

"12. Thus, in view of the aforesaid discussion, a clear picture emerges to the effect that, the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examined whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The Court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done."

In the case of Shyam Narain Pandey -Vrs.- State of U.P. reported in 2015 Criminal Law Journal 250, the Hon'ble Supreme Court has held as follows:-

"7. 'Convict' means declared to be guilty of criminal offence by the verdict of Court of law. That declaration is made after the Court finds him guilty of the charges which have been proved against him. Thus, in effect, if one prays for stay of conviction, he is asking for stay of operation of the effects of the declaration of being guilty.

8. It has been consistently held by this Court that unless there are exceptional circumstances, the appellate Court shall not stay the conviction, though the sentence may be suspended. There is no hard and fast rule or guidelines as to what are those exceptional circumstances. However, there are certain indications in the Code of Criminal Procedure, 1973 itself as to which are those situations and a few indications are available in the judgments of this Court as to what are those circumstances.

9. It may be noticed that even for the suspension of the sentence, the Court has to record the reasons in writing under Section 389(1) Code of Criminal Procedure. Couple of provisos were added under Section 389(1) Code of Criminal Procedure pursuant to the recommendations made by the Law Commission of India and observations of this Court in various judgments, as per Act 25 of 2005. It was regarding the release on bail of a convict where the sentence is of death or life imprisonment or of a period not less than ten years. If the appellate Court is inclined to consider release of a convict of such offences, the Public Prosecutor has to be given an opportunity for showing cause in writing against such release. This is also an indication as to the seriousness of such offences and circumspection which the Court should have while passing the order on stay of conviction. Similar is the case with offences involving moral turpitude. If the convict is involved in crimes which are so outrageous and yet beyond suspension of sentence, if the conviction also is stayed, it would have serious impact on the public perception on the integrity institution. Such orders definitely will shake the public confidence in judiciary. That is why, it has been cautioned time and again that the Court should be very wary in staying the conviction especially in the types of cases referred to above and it shall be done only in very rare and exceptional cases of irreparable injury coupled with irreversible consequences resulting in injustice."

In the case of Bedadyuti Samantaray -Vrs.- State reported in 2013(1) Orissa Law Reviews 1081, it is held that the power to stay conviction in terms of section 389 of Cr.P.C. should be exercised only in exceptional circumstances where failure to stay the conviction would lead to injustice and irreversible consequences.

6. In view of the ratio laid down in the aforesaid decisions and keeping in view the submissions raised by the learned counsel for the respective parties, it is to be seen whether it is a very exceptional case for grant of stay of order of conviction? What the evil that is likely to befall on the petitioner, if the order of conviction is not stayed? Whether failure to stay the order of conviction would lead to injustice and irreversible consequences?

Law is well settled that possible delay in disposal of the appeal and/or presence of arguable points in the appeal by itself may not be sufficient in staying the order of conviction of the trial Court without assigning any special reasons. An order granting stay of conviction is not the Rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate, but where the conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. As order of stay, of course, does not render the conviction non-existent, but only non-operative.

7. Keeping in view the settled position of law, without conducting a detailed analysis into the merits of the case, let me see whether impugned judgment is against weight of evidence which prima facie appears on the face of records as contended by Mr. Dhal, learned counsel for the petitioner.

The star witnesses on behalf of the prosecution are P.W.4, the decoy and P.W.5, the overhearing witness.

Evidence of P.W.4:

The evidence of P.W.4 in his chief-examination is totally silent that prior to the date of the trap, the petitioner made any demand of illegal gratification from him for scrutiny and processing the documents. So far as the date of trap is concerned, P.W.4 has stated that he along with P.W.5 went to labour office and the petitioner, who was the District Labour Officer, Phulbani was sitting on his seat and that he told the petitioner to take some money and to do the works of the applicants, who have applied for getting the labour assistance and death assistance, but the petitioner refused to accept any money from him and further told him that he would do the work. P.W.4 specifically stated that the petitioner had not demanded any bribe from him rather he (P.W.4) voluntarily thrust Rs.15,000/- (rupees fifteen thousand) in the pant pocket of the petitioner. The witness was declared hostile by the Special Public Prosecutor, who with the permission of the Court put leading questions and to cross-examine P.W.4 under section 154 of the Evidence Act wherein P.W.4 has stated that he had not gone to the petitioner before he went to the Vigilance Unit Office. In the cross-examination by the defence, P.W.4 stated that he did not give statement voluntarily before the learned Magistrate but as per instruction of the Vigilance Inspector K.K. Pradhan Madam, he gave his statement and while giving his statement, the Vigilance Inspector was also there. P.W.4 stated that he had never gone to the petitioner before 07.11.2019 with regard to the applications of four beneficiaries. He further stated that the seat of the petitioner was not visible from outside and that he had not seen P.W.5 standing outside the chamber of the petitioner. He further stated in the cross-examination by the defence that he thrust the money in the right side pant pocket of the petitioner by keeping the same in a white envelop. He further stated that the F.I.R. was not scribed as per his version and he put his signature on the F.I.R. on 07.11.2019. He further stated that the petitioner had not demanded bribe from him on the date of trap or prior to the date of trap and he had not seen the petitioner prior to the date of trap and that he thrust the tainted money inside the right side back pocket of the pant of the petitioner. He specifically stated that neither he had written the F.I.R. nor he had read the contents of the F.I.R. and that the contents of the F.I.R. were not read over and explained to him.

In the case of Neeraj Dutta (supra), the Hon9ble Supreme Court held that if there is an offer to pay by the bribe giver without there being any demand from the public servant and the later simply accepts the offer and receives the illegal gratification, it is a case of acceptance as per section 7 of 1988 Act and in such a case, there need not be a prior demand by the public servant. It is further held, inter alia, that in the event the complainant turns 8hostile9, demand of illegal gratification can be proved by letting in the evidence of any other witness, who can again let in evidence, either orally or by documentary evidence or the prosecution can prove the case by circumstantial evidence. It is further held that in the absence of the evidence of the complainant (direct/primary, oral/ documentary evidence), it is permissible to draw an inferential deduction of culpability/guilt of a public servant under section 7 of 1988 Act based on other evidence adduced by the prosecution.

From the evidence of P.W.4, the demand of illegal gratification by the petitioner and the subsequent acceptance are not proved. Thrusting of tainted money inside the pant pocket of the petitioner by P.W.4 when the petitioner refused to accept the offer of P.W.4, cannot come within 'acceptance of offer' or 'receipt of illegal gratification' and therefore, it cannot be a case of acceptance as per section 7 of 1988 Act.

Evidence of P.W.5:

P.W.5, the overhearing witness accompanied the decoy (P.W.4) to the District Labour Office, Phulbani on the date of trap as per instruction given and he stated in his chief examination that when P.W.4 entered inside the chamber of the petitioner, he (P.W.5) remained outside the door of the room. He further stated that P.W.4 talked with the petitioner and the petitioner asked P.W.4 whether he had brought the bribe money or not and thereafter, P.W.4 gave the bribe money to the petitioner and then P.W.4 came out from the chamber of the petitioner and informed P.W.5 that he had given the bribe money to the petitioner and accordingly, P.W.5 relayed pre-arranged signal whereafter the Vigilance staff came to the chamber of the petitioner. The demand of bribe money and acceptance of bribe money by the petitioner as stated by P.W.5 in the chief-examination has been given a complete go-bye in the cross-examination inasmuch as, he admitted to have stated before the learned Magistrate that when P.W.4 went inside the chamber of the petitioner, he remained near the door of the said chamber and when P.W.4 gave him signal, he relayed the signal to the other trap team members. He further stated that before P.W.4 gave him signal, he had no knowledge regarding the transaction. He further stated that he had no personal knowledge regarding demand of bribe money by the petitioner but he heard the same from P.W.4. Thus, the statement in the cross-examination makes it very clear that P.W.5 is neither a witness to demand nor acceptance of illegal gratification by the petitioner but on receipt of the signal from P.W.4, he just relayed the signal to the other trap team members and that he had no knowledge regarding the transaction.

The evidence of P.W.4 that he thrust the money in the pant pocket of the petitioner even though there was no demand from the petitioner runs contrary to the evidence of P.W.5 in the chief-examination that the petitioner asked P.W.4 whether he had brought the bribe money or not and then P.W.4 gave the bribe money to the petitioner. On the face of the evidence of P.W.4 and P.W.5, it can be said that the observation of the learned trial Court that the prosecution proved the demand of illegal gratification and subsequent acceptance by the petitioner is against weight of evidence.

8. What remains in the evidence of the witnesses examined by the prosecution is the statement made by the decoy (P.W.4) before them at the time of preparation of the trap regarding demand of bribe by the petitioner. P.W.4 has not stated to have participated in the preparation of the trap nor stated to have given any statement before the trap party members against the petitioner to have demanded bribe from him. Therefore, the evidence of the trap party members to that effect becomes hearsay evidence, which is not admissible. It is pertinent to note that P.W.4 has stated that when he told the petitioner to take some money and to do the works of the applicants, he refused to accept any money from him rather told that he would do the work.

So far as recovery of tainted money from the petitioner is concerned or change of both the hand wash of the petitioner when taken with Sodium Carbonate solution to pink and the finding as per the C.E. Report (Ext.P.32), in absence of demand of illegal gratification and subsequent acceptance or any evidence of offer to pay by the decoy (P.W.4) and acceptance of the offer and receipt of illegal gratification by the petitioner, in the factual scenario could not have been a ground on the part of the learned trial Court to hold the petitioner guilty under section 7 of the 1988 Act and therefore, I am of the prima facie view that the impugned judgment of conviction is against the weight of evidence. It is made clear that this view taken by me is only for adjudication of the interim application and at the final hearing of the criminal appeal, when a detailed analysis into the merits of the case would be made, the learned Judge may take a different view.

Therefore, in my humble view, the petitioner has made out an exceptional case for grant of stay of conviction and thus, if the impugned judgment of conviction is not stayed/suspended, since it is a criminal appeal of the year 2023, by the time the appeal is taken up for hearing and decided finally, much water will flow under the bridge and the evil that would likely to fall on the petitioner in the meantime would aggravate and it would be too late to set the clock back and it would cause irreparable loss and injury coupled with irreversible consequences resulting in serious miscarriage of justice to the petitioner.

9. Accordingly, the judgment and order of conviction passed against the

 

petitioner by the learned Special Judge (Vigilance), Phulbani in G.R. Case No.15 of 2019 (v)/T.R. No.12 of 2021 is stayed/suspended pending disposal of the criminal appeal.

The I.A. is accordingly allowed.

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