

(2012) 08 GUJ CK 0038

In the Gujarat High Court

Case No : Criminal Appeal No. 543 of 1999 With Criminal Appeal No. 699 of 1999

Sardarsinh Laxmansinh Bariya

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 01-08-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 377, 7(1)
Prevention of Corruption Act, 1988 — Section 11, 12, 13, 13(2), 14

Citation : (2013) 1 Crimes 404 : (2012) 3 GLH 44

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

Bench : Single Bench

Advocate : K.B. Anandjiwala 1, for the Appellant;

Judgement

Mr. Z.K. Saiyed, J.—Both the above Appeals arise out of the one and the same Judgment and order dated 24.5.1999 passed by the learned Special Judge, Panchmahals at Godhra, in Special Case No. 3 of 1995 and, therefore, they are heard and disposed of together by this common Judgment. The appellant - original accused has preferred Criminal Appeal No. 543 of. 1999, against the judgment and order of conviction and sentence dated 24.5.1999 passed by the learned Special Judge, Panchmahals at Godhra, in Special Case No. 3 of 1995, whereby, the learned Special Judge has convicted the appellant - accused for the offence under Sec. 7, 13 read with Section 13(2) of the Prevention of Corruption Act and sentenced him to undergo R.I. of 1 (one) year and to pay a fine of Rs. 1000/-, in default, to undergo further R.I. for three months on first count and also sentenced to suffer R.I. for one year and to pay a fine of Rs. 1000/, in default, further RI for 3 months on the second count. The learned Judge has ordered that substantive sentences to run concurrently.

2. Criminal Appeal No. 699 of 1999 has been filed by the State of Gujarat, u/s 377 of the Code of Criminal Procedure, for enhancement sentence awarded to the respondent -original accused by the learned Special Judge, Panchmahals at Godhra in Special Case No. 3 of 1995, by Judgment and order dated 24.5.1998.

3. The brief facts of the prosecution case are as under :-

The appellant - accused was serving as Surveyor in the office of the District Inspector and Land Record (DILR). It is alleged that the complainant was having the land which he wanted to get it converted in to NA and wanted to get subplotting of the said land. The complainant approached the appellant for the said work. It is alleged that the complainant had paid the amount of Rs. 200/- as Fees towards survey of the land in the Treasury Office for the said work and he showed the receipt thereof to the appellant - accused. However, the appellant had asked the complainant as to what about him and demanded Rs. 3,000/- as illegal gratification from. the complainant for the said work. It is alleged that on 2.5.1994, at 3.00 p.m., the complainant met the accused at Devgadh Bariya, however, the accused told him to meet on Wednesday at Derol Bus Stand at about 9.30 A.M. The accused also informed the complainant that he (appellant) and his man would come with instruments for measurement of the land and also informed the complainant to keep ready Rs. 3,000/-. Thereupon, the complainant told the accused about his inability to pay such a big amount. It is alleged that the accused told the complainant to keep Rs. 1,000/- ready for him and Rs. 100/- for the purpose of giving to his man. The remaining amount of Rs. 2,000/- was to be paid after about a month as and when the plot work is ready and thereafter they separated. It is alleged that as the complainant was not ready and willing to give the said amount, as demanded by the appellant accused, he approached the A.C.B. Office and lodged his complaint. On receipt of the complaint, Police Inspector arranged for the Panchas from the S.T. Division Office. The complaint and the Panchas were called on the next day at 7.00 a.m. by the Inspector and thereupon the Panchas and the complainant went to the A.C.B. Office at 7.00 A.M. Thereafter, the complaint was read over to the panchas and the signature of the panchas were taken below the complaint. Necessary procedure was completed. Preliminary panchnama was prepared and the signature of panchas were taken below it. Thereafter, the complainant, panchas and the members of raiding party proceeded to the village Kandaj. The complainant sent one person to call the accused and his man. It is alleged that thereafter the accused came in a rickshaw along with his man with necessary instruments for measurement. The survey work was done and the boundaries were fixed. The map was drawn by the accused and the nails were also fitted for the purpose of fixing the boundaries. After completing the work, all came to the house of the complainant. The complainant, Panch No. 1 and the accused set in the room in the house of the complainant. The complainant gave water to wash the hands and the face and while returning from the Vada, it is alleged that the accused told the complainant to give the amount. Thereupon, the complainant took out the smeared currency notes from his left pocket of the shirt by his right hand and handed it over to the accused. The accused counted the same and put the same on the back side pocket of his pant. Thereafter, the accused, Panch No. 1 and the complainant went inside the house and set on their respective places and the peon set on the floor. Thereafter, the complainant gave prearranged

signal. The Police inspector, Panch No. 2 and the members of raiding party rushed to the spot and caught the accused. The muddamal currency notes were recovered. Thereafter, investigation was carried out and after following the necessary procedure, and on grant of sanction, the chargesheet against the accused came to be submitted before the Court.

4. Thereafter, the charge was framed against the appellant to which the appellant - accused pleaded not guilty and claimed to be tried.

5. In order to bring home the charge levelled against the appellant accused, the prosecution has examined witnesses and also produced documentary evidence on record of the trial Court.

6. After examining the witnesses, further statement of the appellant-accused under Sec. 313 of Cr.PC was recorded wherein the appellant-accused has denied the case of the prosecution. As per his defence, it is alleged that the accused had never demanded any amount nor he had accepted the same. It is alleged that on the date of the incident, after doing the plotting work which is not the function of DILR office and not the part of the duty of any officers of DILR office, including the appellant -accused, the said work was being done by him. It is alleged that after the work was completed they went to the house of the complainant and at that time he asked for the water for washing his face. When he (accused) bent down and was in leaning position for washing his face, the complainant inserted something in the back pocket of his pant and thereafter, just out of curiosity he took out the thing which was inserted/thrusted in his pocket and at that time the raid was carried out.

7. After considering the oral as well as documentary evidence and after hearing the parties, learned Special Judge, Panchmahals at Godhra, vide impugned judgment and order dated 24.5.1999, held the appellant - accused guilty of the charge levelled against him and convicted and awarded the sentence as stated herein above.

8. Being aggrieved by and dissatisfied with the impugned judgment and order of conviction and sentence passed by the learned Special Judge, Panchmahals at Godhra, the appellant C.R. accused has preferred Criminal Appeal No. 543 of 1999 and the State of Gujarat has preferred Criminal Appeal No. 699 of 1999 for enhancement of sentence awarded by the learned Special Judge.

9. Heard Mr. K.B. Anandjiwala, learned Advocate appearing on behalf of the appellant and Ms. Hansa Punani, learned APP for the respondent State.

10. Mr. Anandjiwala has read the charge and contended that the learned Special Judge has failed to appreciate that for recording conviction under the Prevention of Corruption Act, there are four stages which are required to be proved through the evidence of the complainant and there should be corroboration to all those stages (i) initial demand (ii) second demand to be made in presence of panch (iii) acceptance and (iv) recovery. He has contended that looking to the evidence,

it is alleged that Rs. 3000/- was demanded by the appellant accused for himself and Rs. 100/- for peon, but, the prosecution has not proved the said demand with other corroborative piece of evidence from the evidence of witnesses. Learned Advocate has contended that except the evidence of the complainant there is no other evidence to corroborate his version regarding initial demand. He has contended that, as per the allegation of the complainant that he met the accused in the office at Devgadh Bariya where the accused told him to deposit the amount of Rs. 200/- in Treasury for survey and on 26.4.1994 he (complainant) deposited the said amount. It is alleged that the accused had written a chit mentioning that the complainant should meet him on 28.4.1994 and though the complainant was in possession of the said chit, he did not produce it along with the complaint nor there is any mention in the complaint about the same and he came out with the say for the first time in his further statement and produced the same. It is also not established on the record as to who had written on the said chit. Except the bare word of the complainant, there is no other corroborative evidence and the opinion of the hand writing expert is also not taken. He has contended that the accused was not entrusted with the survey work of the said field and it is also not the function of the office of DILR to do the plotting work. Therefore, it cannot be said that for the purpose of doing some official work any illegal gratification is received by the accused as the same was not part of the duty of any of the officers. He has contended that the panchas have been selected. He has read the deposition of P.I. Pathan and contended that this witness has admitted that as and when there is necessity they used to call the persons from the S.T. Office as per serial number. From this evidence it becomes clear that a list of the employees of S.T. Department must have been prepared and it must be with the PI and as per serial number, two persons from the S.T. Department were called. Therefore, it becomes clear that the PI, ACB used to call the persons to act as panchas from the same office frequently. He has contended that there are catena of decisions deprecating the said practice of calling the persons/panchas from the same office. He has contended that the story of demand put forward by the prosecution is also not believable that as soon as the accused came in a rickshaw at the house of the complainant, they proceeded to the field for the purpose of doing plotting work, the work lasted for about 1-1/2 hours and it is the positive evidence that on the way to the field, in the field and after doing the plotting work in the field, at no stage the accused demanded the money from the complainant, and thereafter they came to home along with the complainant, they sat for some time in the room, the accused washed his face and till that time the accused had not demanded the amount and at last, while returning after washing the face, the accused demanded the money. He has contended that the complainant and his brother are in the habit of filing false cases against the Government servants. He has contended that when the accused was in a leaning position of washing the face, something was inserted and therefore, with the help of his right hand he took out the thing which he found the currency notes and at that time the trap was carried out and, therefore, he had no sufficient time to inquire about the

same and he was trapped. His statement was also recorded in this regard. However, that statement is not brought on the record. When it is a case of planting or thrusting of the currency notes, the presumption would not be raised against the accused. He has contended that it is not necessary that he has to prove his case beyond reasonable doubt. He has to probablize the case and the fact is that when in fact he was in the process of washing face, the amount was alleged to have been accepted or planted in the pocket, the defence story is absolutely probable and believable one. He has contended that the panchas are selected and the contents of panchanama also create some doubt. The panchnama is not dictated by the panchas. He has contended that when the evidence of panch creates some doubt then it cannot be said that the prosecution has proved its case beyond reasonable doubt. He has contended that the recovery of the trap amount is also not proved beyond reasonable doubt. He has read further evidence of complainant and contended that the appellant has rebutted the presumption in his defence version and looking to the prosecution evidence, the demand, acceptance and the recovery is not proved beyond reasonable doubt. He has contended that present complainant is interested witness and his evidence is not trustworthy. He has contended that looking to the conduct of the complainant and the fact that the complainant and his brother are habitual persons for lodging false complaints against the Government servants, the learned Judge should have considered their evidence in a great cautious manner. He has contended that most vital part of the prosecution case is demand and when demand is not proved beyond reasonable doubt, then only on the ground of recovery of trap amount from the possession of the present appellant, he cannot be convicted for the offence under Prevention of Corruption Act. He has contended that so far as allegation of the prosecution case is concerned, present appellant is a public servant and ordinarily a public servant would not accept the bribe in the presence of a stranger. He has contended that the conduct of the complainant and panch witness creates sufficient doubt and learned Judge has not considered defence version of the appellant. He has contended that when recovery creates some doubt then, u/s 20 of the Prevention of Corruption Act, presumption cannot be drawn. The judgment of the learned Judge is against the provisions of law and present appellant is wrongly convicted and therefore, the judgment and order of conviction is required to be quashed and set aside.

11. On the other hand, learned APP has supported the judgment and order of the Special Court and contended that the trial Court has fully appreciated the evidence produced on record by the prosecution and, therefore, no interference is called for by this Court. She has also contended that when the prosecution has proved its case beyond reasonable doubt then the learned Judge should not have taken the lenient view by imposing lesser punishment and, therefore, the Appeal, filed by the State Government for enhancement of sentence, may be allowed. She has contended that so far as law is concerned, there is no parameter that person cannot file complaints frequently against one person and then another

complaint for other person. She has contended that when the trap amount is recovered from the possession of the accused then u/s 20 of the P.C. Act, presumption is required to be drawn against the accused and anthracene powder is also found from the physical search of the accused. She has contended that even the appellant has failed to establish probable defence through the cross examination of witnesses. She has contended that the first part of the panchnama is dictated in presence of panchas and that is not challenged by the appellant. She has contended that the contents of 2nd part of the panchnama regarding the demand and acceptance is proved beyond reasonable doubt through the evidence of independent witnesses, viz. Complainant, Panch and the Trapping Officer and, therefore, the learned Judge has rightly held the appellant - accused guilty for the offences alleged against him.

12. She has also contended that looking to the facts of the case presumption u/s 20 of the P.C. Act is required to be drawn against the present appellant - accused. Section 20 of the P.C. Act reads as under :-

20. Presumption where public servant accepts gratification other than legal remuneration -

(1) Where, in any trial of an offence punishable u/s 7 or Section 11 or clause (a) or clause (b) of sub-Section (1) of Section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable u/s 12 or under clause (b) of Section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7, or as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-Section (1) and (2), the Court may decline to draw the; presumption referred to in either of the said sub-Sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn.

13. She has also placed reliance upon a decision of the Hon"ble Apex Court in the case of Narendra Champaklal Trivedi Vs. State of Gujarat, and contended that the Apex Court has also considered that, as per Section 20 of the Prevention of Corruption Act, presumption is required to be drawn in such type of cases.

14. She has read further statement of the appellant - accused recorded u/s 313 of the Code and contended that presence of the anthracene powder found from both the hands of the appellant is not explained by the appellant accused. It is the duty of the appellant to rebut the presumption u/s 20 of the Prevention of Corruption Act. In support of her contention she relied on the decision in the case of Balasubramanian Vs. State thr. Inspector of Police, . She has contended that sufficient opportunity was given to the appellant to explain the evidence against him after the prosecution witnesses are examined and no explanation is given about the trap amount recovered from the possession of the present appellant in further statement u/s 313 of the Code.

15. I have perused the oral as well as documentary evidence. I have also considered the oral arguments advanced by learned Advocates appearing for both the sides. Mr. Anandjiwala, learned Advocate for the appellant has vehemently submitted that the learned Judge has committed grave error in convicting the present appellant. He has tried to prove that sanctioning Authority has given sanction without application of mind. From the evidence of the sanctioning Authority, I do not find that the sanction is given without application of mind. The sanction given by the Authority is as per provisions of law and sufficient papers are produced before the Authority and after perusal of the said papers, sanction is given and therefore, it cannot be said that sanction is given without application of mind.

16. I have perused oral evidence of the complainant and the panch witness and from the evidence of these witnesses, it clearly appears that the demand is proved beyond reasonable doubt. I have perused further statement of the appellant recorded u/s 313 of the Code of Criminal Procedure. In the further statement the appellant has tried to prove the defence version, but, the appellant has failed to explain as to how the amount in question was found in his possession and as to how light blue fluorescent marks of anthracene powder were found on his hands. The appellant has failed to rebut the said presumption by leading probable defence. Thus, when demand and acceptance are proved and when the appellant has failed to rebut the presumption u/s 20 of the Prevention of Corruption Act, 1988, I am of the opinion that prosecution has proved its case beyond reasonable doubt. I have perused the oral evidence of Trapping Officer. The defence has not produced any evidence to suggest that the Trapping Officer is biased or that he has committed any illegality. The Trapping Officer is an independent witness and he is not having any ill intention to implicate the appellant falsely. He has supported the case of the prosecution. The defence has failed to prove the probable defence. I have not found anything to accept the defence version of the appellant. I am of the opinion that the learned Special Judge has passed the judgment and order after appreciating all the aspects of the matter.

17. The Apex Court in case of Narendra Champaklal Trivedi v. State of Gujarat (Supra), held that the demand and acceptance of the amount as illegal

gratification is the sine qua non for constituting an offence under the Act. It is also settled law that there is a statutory presumption u/s 20 of the Act which can be dislodged by the accused by bringing on record some evidence, either direct or circumstantial, that money was accepted by him other than the motive or reward as stipulated u/s 7 of the Act. The Apex Court further held that it is obligatory on the part of the Court to consider the explanation offered by the accused u/s 20 of the Act and the consideration of the explanation has to be on the anvil of preponderance of probability. It was further held that it is not to be proved beyond reasonable doubt and it is necessary to state here that the prosecution is bound to establish that there was an illegal demand of bribe and acceptance thereof. The same has to be founded on facts. The Apex Court referred the decision in the case of M. Narsinga Rao Vs. State of Andhra Pradesh, wherein a three Judge Bench observed that the only condition for drawing the legal presumption u/s 20 is that during trial it should be proved that the accused has accepted or agreed to accept any gratification. The Section does not say that the said condition should be satisfied through direct evidence. Its only requirement is that it must be proved that the accused has accepted or agreed to accept the gratification. Thereafter, the Apex Court reproduced a passage from the decision in the case of Madhukar Bhaskarrao Joshi Vs. State of Maharashtra, with approval. It reads as follows :-

The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted "as motive or reward" for doing or forbearing to do any official act. So the word "gratification" need not be stretched to mean reward because reward is the outcome of the presumption which the Court has to draw on the factual premise that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions adjacent to each other like "gratification or any valuable thing". If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word "gratification" must be treated in the context to mean any payment for giving satisfaction to the public servant who received it.

18. In *Raj Rajendra Singh Seth v. State of Jharkhand & Anr.* the principle laid down in *Madhukar Bhaskarrao Joshi* (supra) was reiterated.

19. In *State of Maharashtra v. Dnyaneshwar Laxman Rao Wankhede*, it has been held that to arrive at the conclusion that there had been a demand of illegal gratification, it is the duty of the Court to take into consideration the facts and circumstances brought on record in their entirety and for the said purpose, undisputedly, the presumptive evidence as laid down in Section 20 of the Act must also be taken into consideration.

20. In *C.M. Girish Babu v. C.B.I., Cochin*, High Court of Kerala, after referring to the decisions in *M. Narsinga Rao* (supra) and *Madhukar Bhaskarrao Joshi* (supra), this Court has held thus :-

19. It is well settled that the presumption to be drawn u/s 20 is not an inviolable one. The accused charged with the offence could rebut it either through the cross examination of the witnesses cited against him or by adducing reliable evidence. If the accused fails to disprove the presumption the same would stick and then it can be held by the Court that the prosecution has proved that the accused received the amount towards gratification.

21. In the case on hand, the money was admittedly recovered from the hands of the accused appellant and therefore a presumption u/s 20 of the Act becomes obligatory. It is a presumption of law and it casts an obligation on the Court to apply it in every case brought u/s 7 of the Act. The said presumption is a rebuttable one. In the present case, the explanation offered by the accused appellant has not been accepted and there is no evidence on the basis of which it can be said that the presumption has been rebutted.

22. The learned Advocate for the appellant has vehemently submitted that admittedly there has been no demand or acceptance. To bolster the said aspect, he has drawn the attention of this Court to the fact that the plotting work is not the official work of the Government servant serving in the office of DILR and, therefore, it cannot be said that for the purpose of doing some official work any illegal gratification is received by the accused as the same was not the part of the duty of any of the officers. However, looking to the oral as well as documentary evidence, produced on the record, it is clearly established that all the witnesses have supported the case of the prosecution. The currency notes were recovered from the possession of the appellant. In the cross-examination nothing has really been elicited to doubt his presence and veracity of the testimony of prosecution witnesses. The appellant in his statement u/s 313 of the Code of Criminal Procedure has made an adroit effort to explain his stand, but, I have no hesitation in holding that he has miserably failed to dislodge the presumption. Thus analyzed and understood, there remains no shadow of doubt that the accused-appellant had demanded the bribe and accepted the same. Therefore, the conviction recorded by the learned trial Judge does not warrant any interference.

23. The learned Counsel for the appellant has, in the course of arguing the appeal, submitted that the appellant has suffered enough as he has lost his job, the said aspect should be considered as mitigating factor for reduction of the sentence. Sympathy has also been sought on the foundation that the incident had taken place almost 18 years back. On a perusal of Section 7(1) of the Act, it is perceptible that when an offence is proved under the said Section, the public servant shall be punished with imprisonment which shall not be less than six months but which may extend to five years and shall also be liable to fine. Section 13(2) of the Act postulates that any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine. As is demonstratable from the impugned judgment, the learned trial

Court has imposed the minimum sentence.

24. Looking to the facts of the case, I am of the opinion that the prosecution has proved its case beyond reasonable doubt, that the appellant accused, being a public servant, demanded the bribe amount and also accepted the bribe amount from the complainant, The accused has not explained by leading cogent and convincing evidence and failed to discharge his burden of rebutting the statutory presumption of guilt drawn against him. From the facts and evidence on record it is clearly established beyond reasonable doubt that the amount by way of bribe was demanded by the accused and he accepted the same voluntarily as an illegal gratification.

25. In view of above, I am in complete agreement with the findings, ultimate conclusion and resultant order of conviction and sentence passed by the trial Court and I am of the view that no other conclusion except the one reached by the trial Court is possible in the instant case as the evidence on record stands. Therefore, there is no valid reason or justifiable ground to interfere with the impugned judgment and order of conviction and sentence.

26. Looking to the facts of the case, I am of the opinion that the learned Judge has not committed any error in awarding the sentence to the appellant and, therefore, the Criminal Appeal, filed by the state of Gujarat for enhancement of sentence awarded by the learned Special Judge also requires to be dismissed. In the result, both the above Appeals, viz. Criminal Appeal No. 543 of 1999, filed by the appellant - original accused challenging the Judgment and order of conviction passed by the learned Special Judge, Panchmahals at Godhra, in Special Case No. 3 of 1995 and Criminal Appeal No. 699 of 1999, filed by the State of Gujarat for enhancement of the sentence awarded by the learned Special Judge in above Special Case No. 3 of 1995, are hereby dismissed. The Judgment and order dated 24.5.1999 passed by the learned Special Judge, Panchmahals at Godhra, in Special Case No. 3 of 1995 is hereby confirmed. Bail bond stands cancelled. R & P to be sent back to the trial Court forthwith. The appellant - accused is directed to surrender before the Jail Authority within a period of four weeks from the date of this order, failing which the concerned Sessions Court shall issue nonbailable warrant to effect the arrest of the appellant - original accused.