

(2018) 05 BOM CK 0011

In the Bombay High Court

Case No : CRIMINAL APPEAL NO. 775 OF 2003

SHASHIDHAR SHIVRAM SHINDE.....

APPELLANT

Vs

THE STATE OF MAH. THR. A.C.B. AKOLA S.

RESPONDENT

Date of Decision : 09-05-2018

Acts Referred:

Prevention of Corruption Act, 1988 — Section 7, 13(i)(d), 13(2), 20
Code of Criminal Procedure, 1973 — Section 164
Indian Evidence Act, 1872 — Section 114

Citation : (2018) 05 BOM CK 0011

Hon'ble Judges : M. G. GIRATKAR

Bench : Single Bench

Advocate : Anil S. Mardikar, Rishabh Khemuka, S.B.Bissa,

Final Decision : Allowed

Judgement

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M. G. GIRATKAR, J.

1.Appellant assailed the judgment of Special Judge and Additional Sessions Judge, Akola in Special Case No. 2 of 1996 by which he is convicted for the offences punishable under Section 7 of Prevention of Corruption Act and sentenced to undergo rigorous imprisonment for six months and to pay fine of Rs. 500/Â in default to undergo simple imprisonment for one month. By the said judgment, the appellant is also convicted for the offence punishable

under Section 13(i)(d) read with Section 13(2) of the Prevention of Corruption Act and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs. 1,000/Â? in default to undergo simple imprisonment for three months.

2.The case of the prosecution against the appellant in short is as under.

(i)Complainant Nilkanth Kute purchased one plot jointly with one Shri Chincholkar. He sold the said plot of his share to Sadashiv Nimkande in the year 1993. Nimkande also wanted to sell that plot. Mutation entry was not recorded in the name of Nimkande, therefore, he was insisting the complainant to contact concerned Talathi and get the mutation entry in his name. Complainant along with Nimkande met the appellant/Talathi for 5Â6 times. He requested the appellant/accused to mutate the name of Nimkande. Accused demanded bribe of Rs. 400/Â?.

(ii)Complainant was not willing to pay bribe to the accused, therefore, he approached the office of Anti Corruption Bureau on 29Â6Â1995 and lodged the complaint. As usual, Police Inspector Shri Idole called panchas. He introduced the complainant. Necessary instructions were given. PreÂtrap panchanama (panchanama no. 1) was prepared. As per the instructions, trap was to be effected on 30Â?6Â?1995.

(iii)On 30Â?6Â?1995, as per the instructions given by Police Inspector Shri Idole, complainant and panchas remained present. Complainant and panch no. 1 went to the house of accused. Accused was sitting in the room. The complainant asked the accused about the mutation. Thereafter accused demanded Rs. 400/Â?. Complainant took out currency notes from his right side pant pocket. Accused directed complainant to keep the money on table. Accused also demanded Rs. 200/Â? from Nimkande. He also kept Rs. 200/Â? on the table. Thereafter complainant and panch no. 1 went outside. Complainant gave signal as agreed. Trap party reached there, caught hold the hands of accused. Thereafter postÂtrap panchanama (panchanama no. 2) was prepared. Police Inspector Shri Idole recorded statements of panchas and lodged the report.

(iv)Crime was registered against the accused for the offences punishable under Sections 7 and 13(i)(d) read with Section 13(2) of Prevention of Corruption Act, 1988. After obtaining sanction from the appointing authority, chargeÂ?sheet came to be filed.

(v) Charge was framed at Exhibit 26. Same was read over and explained to the appellant/accused. He pleaded not guilty and claimed to be tried.

Defence appears to be of total denial and false implication. Prosecution has examined 5 witnesses. At the conclusion of the trial, Special Judge convicted the appellant/accused as stated above.

3. Heard learned Senior Counsel Shri Anil Mardikar for the appellant. He has submitted that accused given explanation at the time of trap itself. The explanation was recorded by the Investigating Officer Shri Idole in presence of panchas. Panchanama no. 2 itself shows that explanation of accused was recorded, but the said explanation was not filed along with the charge sheet. Therefore, adverse inference ought to have been drawn by the trial Court.

In support of his submissions, he pointed out following Mukhtiar Singh (d) thr. his L.R. Vs. State of Punjab [2017 ALL SCR (Cri) 1270], (2) Bismillakha s/o Salarkha Pathan Vs. State of Maharashtra [2004 ALL MR (Cri) 1341] and (3) Subhash s/o Narayanraoji Rahtod Vs. State of Maharashtra [2017 ALL MR (Cri) 4144].

4. Shri Mardikar, learned Senior Counsel has submitted that work of mutation was already over. Vide notice dated 20.5.1995, complainant was informed by the accused that mutation entry in the name of Shri Nimkande was taken, hence, there was no any question of demand of bribe for the work of mutation. Mutation was already done by the accused/Talathi.

5. Shri Mardikar, learned Senior Counsel has pointed out the charge framed by the Special Judge. As per the case of the prosecution and also the charge, Exhibit 26, Nimkande was present at the time of trap. He had also given Rs. 200/- to the accused as a bribe amount.

6. Statement of Nimkande was recorded under Section 164 of the Code of Criminal Procedure by the Magistrate. In his statement under Section 164 of the Code of Criminal Procedure, Nimkande has stated that accused has not demanded any amount of bribe, he is falsely implicated. Prosecution has not examined Shri Nimkande knowing well that accused not demanded any amount and this fact would be clear from the statement of Shri Nimkande.

Therefore, prosecution has deliberately not examined Shri Nimkande, hence, adverse inference under Section 114 of the Indian Evidence Act should have been drawn. At last, learned Senior Counsel has submitted that the amount which was seized not accepted by the accused. Currency notes were kept on

the table and those notes were seized by the trap party. Learned Senior Counsel has submitted that accused is falsely implicated. Prosecution fail to

prove the charge of demand and acceptance of bribe by the accused. Therefore, presumption cannot be attracted as laid down under Section 20 of the

Prevention of Corruption Act. At last, learned senior counsel prayed to allow the appeal and acquit the appellant/accused.

7. Heard Shri Bissa, learned Additional Public Prosecutor for the respondent. He has strongly supported the judgment of the trial Court.

8. There is no dispute that the complainant and one Chincholkar purchased plot jointly. That plot was recorded in the joint name of Chincholkar and

complainant. In the year 1993, complainant sold his half plot to Shri Nimkande. Nimkande wanted to sell the said plot, therefore, he was insisting the

complainant to record his name in the revenue record. Complainant and Nimkande visited accused/ Talathi.

9. It is also admitted fact that entry of mutation was recorded on 15/5/1995 itself and it was certified on 20/5/1995. As per the procedure, after the

receipt of application, Talathi used to take pencil entry (kachha entry), thereafter notice used to be served to the concerned persons. If anybody raised

objections, those objections used to be heard by the Revenue Inspector. If objection is not raised, then Revenue Inspector used to certify the mutation

entry. From the perusal of record and evidence of prosecution witnesses, it is clear that mutation entry was already taken and it was certified by

Revenue Inspector on 20/5/1995.

10. Cross-examination of the complainant shows that he was called by Talathi on several times and therefore, he was annoyed. Complainant himself has

admitted the procedure for mutation. He has stated in his cross-examination as under : " Before initiating the proceeding for Fer-far notices are

required to issue. No objection was taken by me in writing for Fer-far. It is true that the Revenue Inspector is to certify the Ferfar. I never meet

Revenue Inspector. It is true that an application is required to make for getting certified copies and requisite charges are to be paid towards the copying

fees. I did not make an application as the accused did not demand. The information regarding Fer-far can be received in Tahasil Office. I did not go to

Tahasil Office for enquiry about the Fer-far, as I was in contact with the accused. "

11. Complainant, P.W. 1 has admitted in his evidence that for all the times, Nimkande was with him. As per the case of prosecution, Nimkande also given Rs. 200/ as a bribe. Charge, Exhibit 26 also shows that complainant gave Rs. 400/ and Shri Nimkande also gave Rs. 200/ as a bribe to the accused. Statement of Nimkande was recorded by the Judicial Magistrate First Class on 22/12/1995. In his statement, he has stated that complainant told him that he along with him would go to the house of accused on 30/6/1995 and do his work. He has specifically stated that accused not demanded amount of bribe. He was not avoiding to record his name in the revenue record. He was present at the time of trap. Complainant kept the amount on table and went out of the house. Accused not taken out that amount and those amount was seized from the table.

12. As per the panchanama no. 2, explanation of accused was taken by Police Inspector Shri Idole. But that explanation not filed with the charge sheet.

In the case of Bismillakha s/o Salarkha Pathan Vs. State of Maharashtra (cited supra), this Court has observed as under : However, there is one more

important circumstance and i.e. the statement to be found in the post trap panchnama to the effect that immediately after the trap was sprung, both the

accused were asked by P.I. Dhok and they gave their version regarding acceptance of money. It is the express prosecution case which can be found in

the panchnama that the version given by accused was reduced to writing and signed by the panchas as well as P.I. Dhok. The contents of what was

mentioned in these two writings was not found in the panchnama as those were separate documents. However, for reasons best known to the

prosecution, these documents have not been brought before the Court in the trial. The panchas examined as well as P.W. 7 Dhok but do not utter a

single word about this first version given by the two accused in writing immediately after the trap was sprung. This circumstances of suppressing the first

version as given by two accused, according to him, is a very important circumstance which raises a shadow of doubt about the veracity of the prosecution

case. The duty of the prosecution is to bring the entire truth as found before the Court. It appears to me that these two vital documents have been kept

back from the trial. In my view, in such circumstances, these writings were evidence which could be produced and which were in the hands of the

Investigating Agency and which could have been produced as evidence in the

Court but was not produced. By virtue of Section 114 of the Indian Evidence Act, the Court would be entitled to presume that had these documents been produced, they would not have favoured the prosecution which had withheld these documents. Useful reference can be made to illustration (g) of Section 114 of the Indian Evidence Act, in this regard.

13. From the evidence on record, it is clear that Nimkande was present along with the complainant. As per the charge, Nimkande also gave Rs. 200/- as

a bribe. Therefore, prosecution ought to have examined Shri Nimkande but prosecution failed to examine him. Prosecution was aware that Nimkande

would not support the case of prosecution. Nimkande has specifically stated in his statement under Section 164 of the Code of Criminal Procedure that

accused not demanded any bribe amount. Therefore, trial Court ought to have drawn adverse inference under Section 114 of the Indian Evidence Act.

14. The prosecution has to prove the guilt of accused beyond reasonable doubt. Non-production of explanation given by accused and non-examination

of Shri Nimkande by the prosecution creates doubt about the charge framed against the accused. The allegation appears to be vague.

15. In the case of Mukhtiar Singh (d) thr. his L.R. Vs. State of Punjab (cited supra), Hon'ble Apex Court has observed as under : Accused, SHO alleged

to have accepted bribe amount from complainant to favour him in investigation. Evidence regarding demand and acceptance of bribe wholly inadequate.

Not only date or time of first demand of bribe amount is vague but even person in whose presence said amount is allegedly paid, not produced in

investigation. Prosecution version of demand and acceptance of illegal gratification in police station seems to be unusual. Contradictions of witnesses

with regard to location of transaction relating to second demand also make the case doubtful. Prosecution failed to prove charge levelled against accused

beyond all reasonable doubt. Conviction of accused therefore, set aside.

16. The evidence of panch witnesses show that they were not called on 29-6-1995 but evidence of Investigating Officer Police Inspector Shri Idole

shows that panchas were called on 29-6-1995 and in his presence demonstration of use of phenolphthalein powder were given to them is not reliable.

Cross-examination of panch witnesses show that they were called on 30-6-1995 for another trap and after effecting that trap, they were requested to

remain present for the trap against the accused. All this evidence creates doubt and benefit of doubt should be given to the accused.

17. In the case of Subhash s/o Narayanraoji Rahtod Vs. State of Maharashtra (cited supra), this Court has observed that prosecution case that accused,

Patwari demanded and accepted bribe from complainant to effect mutation. Evidence on aspect of demand for illegal gratification as on the date of trap,

is not sufficient. Evidence of complainant and panch witness not reliable both on demand and acceptance of illegal gratification. Possibility of false

implication not ruled out. Presumption of innocence is neither diluted nor dislodged by proof of acceptance or recovery of currency notes, unless demand

is established. Accused entitled to benefit of doubt.

18. The prosecution has failed to prove that accused demanded and accepted bribe from the complainant. Hence I am inclined to allow the appeal and

proceed to pass the following order.

ORDER

(i) The appeal is allowed.

(ii) Impugned judgment is hereby quashed and set aside. Appellant is acquitted of the offence punishable under Sections 7 and 13(i)(d) read with Section

13(2) of Prevention of Corruption Act, 1988.

(iii) Fine amount, if paid, be refunded to the appellant.

(iv) R & P be sent back to the trial Court.