

(2014) 04 GUJ CK 0116
In the Gujarat High Court
Case No : Criminal Appeal No. 476 of 2002

State of Gujarat	Vs	APPELLANT
Dahyabhai Hirabhai Solanki		RESPONDENT

Date of Decision : 07-04-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 378
Prevention of Corruption Act, 1988 — Section 13(1)(d), 20, 7

Citation : (2015) 1 Crimes 799 : (2014) 2 GLR 1805 : (2014) 4 RCR(Criminal) 987

Hon'ble Judges : Rajesh H. Shukla, J

Bench : Single Bench

Advocate : H.K. Patel, A.P.P, Advocate for the Appellant; R.J. Goswami, Advocate for the Respondent

Judgement

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Rajesh H Shukla, J.—The present Appeal is directed against the impugned judgment and order dated 3-12-2001 in Special (A.C.B.) Case No. 6 of 1998 by the learned Special and Additional Sessions Judge, Panchmahals at Godhra recording the acquittal. The facts of the case briefly summarised are that the respondent No. 1/original accused No. 1 ("A-1") was serving as Talati-cum-Mantri in or about December, 1997 and the respondent No. 2/original accused No. 2 ("A-2") is the uncle residing in his neighbourhood. The complainant having land jointly with his uncle and cousins at village Badroad wanted to have brick manufacturing, for which, he require entry in the revenue record regarding the land. He had, therefore, approached A-1, and A-1 is said to have stated that, if he want the copies of the entry, he may have to pay Rs. 700/-. Thereafter again he met A-1, and when it was suggested that he may pay Rs. 100/- and the remaining amount of Rs. 600/- subsequently when the copies are prepared, the complainant had paid Rs. 100/-. The A-1 is said to have asked the complainant to collect the copies from his house next Saturday and may pay the remaining amount of Rs. 600/-. Thereupon, the complaint was lodged by the complainant

at A.C.B., Godhra and the trap was arranged. On the basis of the trap, the aforesaid Special (A.C.B.) Case No. 6 of 1998 has been registered and the learned Special Judge proceeded with the trial.

2. After the recording of the evidence of the prosecution witnesses were over, the learned Judge has recorded the further statement under Sec. 313 of the accused and passed the impugned judgment and order recording the acquittal.

3. It is this judgment and order, which has been assailed in the present appeal by the applicant-State on the ground inter alia that the Court below has failed to appreciate the material and evidence. Learned A.P.P. Mr. H.K. Patel referred to the charge and the observations made. He emphasised pointedly to some of the observations and submitted that the doubts are raised without there being any justification. Learned A.P.P. Mr. H.K. Patel referred to the testimony of P.W. 1 at Exh. 10 and the testimony of the complainant P.W. 2 at Exh. 16. He has also referred to the testimony of Panch No. 2. Learned A.P.P. Mr. H.K. Patel submitted that the discrepancies, which have been referred to for the purpose of raising doubt, are not material, as it does not go to the root of the matter. He submitted that the Court below has failed to appreciate that the complainant was compelled to pay the illegal gratification/bribe, for which he had initially paid Rs. 100/- and thereafter, as the complaint was lodged and the trap was arranged, the acceptance and recovery are required to be appreciated. Learned A.P.P. Mr. H.K. Patel submitted that the Court below has unnecessarily given the weightage to the fact that the complainant was not able to produce Rs. 300/- for the trap, which was given by the A.C.B. and in fact it is a genuineness of the complaint, which is not appreciated. Similarly, the Court has given unnecessary importance to the presence of the I.O. Shri Barad. However, he submitted that it is not the case of defence that the I.O. Shri Barad was initially present and his presence has caused any prejudice to the accused. He submitted that admittedly it is not the case of defence that it is a false implication. Learned A.P.P. Mr. H.K. Patel, therefore, submitted that the Court below has failed to appreciate the modus operandi of the accused that he accepted Rs. 100/- and thereafter asked the complainant to collect the papers from his house on payment of Rs. 600/-. He had not accepted himself the said amount, but he had asked to pay this amount to his uncle who was residing in the neighbourhood and the uncle (A-2) had accepted the said amount on behalf of A-1, and therefore, it does not falsify the case of the prosecution. Learned A.P.P. Mr. H.K. Patel submitted that there is no animosity, and assuming that, if there is any such animosity or the previous incident, the A-1 would not have allowed him to come to his place. Learned A.P.P. Mr. H.K. Patel, therefore, submitted that the initial payment and acceptance through A-2 and the recovery from the house of the A-2 clearly proves the charges for the offence under the Prevention of Corruption Act. Learned A.P.P. Mr. H.K. Patel, therefore, submitted that the impugned judgment and order may be quashed and set aside.

4. Per contra, learned Advocate Shri R.J. Goswami for the respondent accused

referred to the testimony of witnesses. He referred to the testimony of P.W. 1 and submitted that, as stated by this witnesses, no offer or persuasion was made to A-1 by the complainant. Therefore, there is no demand. Therefore, learned Advocate Shri Goswami referred to the testimony of witnesses and tried to submit that there is a discrepancy with regard to the offer or the acceptance of the alleged illegal gratification. He submitted that there is inconsistent version regarding the preparation of the panchnama of the second part and there is no panchnama about topography about the place of the offence or from the place where the money was recovered. He submitted that the clothes of the complainant are not seized. He pointedly referred to the testimony of P.W. 1 at Exh. 10 and submitted that, as stated by him, the second part of the panchnama, according to him, was completed there. It would mean that the raiding party and the accused had returned for the same place of offence and completed the panchnama there. He, therefore, submitted that the panchnama was not completed at the Khanpur Police Station. On the other hand he referred to the testimony of the complainant and submitted that he has a different version. Therefore, learned Advocate Shri Goswami submitted that the trial Court can only note the demeanour of the witnesses, which he had noted, that the witnesses are taking more time and avoiding certain questions. He, therefore, submitted that this demeanour of the witnesses is required to be kept in mind even by the appellate Court. Similarly, he has referred to the testimony and submitted that if the money was accepted by A-2, then there was no question of search of A-1 - Talati nor is the question of examining his fingers in the ultra violet lamp. He also submitted that the officer has stated in his testimony that from Khanpur Police Station, they had left for the A.C.B. office suggesting that they had not gone back to the scene of offence.

5. Learned Advocate Shri Goswami, therefore, submitted that in background of this contradiction, which are relevant and material, going to the root of the matter, the Court may also examine the background and the defence about the animosity. He referred to the statement under Sec. 313. Learned Advocate Shri Goswami, therefore, submitted that the chances of false implication could not be ruled out coupled with the fact that there are discrepancies in the testimony of the complainant and panch witness. He submitted that there is a discrepancy with regard to the demand. Learned Advocate Shri Goswami submitted that as it is evident that I.O. Shri Barad was present throughout, the fair investigation and fair trial is doubted. In support of his submission, he has referred to the testimony of the I.O. Shri Barad at Exh. 21 and submitted that the investigation should be fair and it should not be with an idea for booking the accused. He again emphasised that the clothes of the complainant is not recovered. Similarly, the two relevant witnesses have not been examined. One Chandravir Singh, who has seen the incident, is not examined, for which no explanation is given. Similarly, the sanctioning authority is not examined and the sanction for the prosecution is also not proved. Further, learned Advocate Shri Goswami submitted that the panchnama is not dictated by the panch witness, and

therefore, it may not have any probative value. In support of his submission learned Advocate Shri Goswami has referred to and relied upon the judgment reported in State of Gujarat Vs. Gunvantlal H. Shah, . He has also referred to and relied upon the judgment reported in State of Gujarat Vs. Antheny Francis Koder, . He submitted that as could be seen from the testimony of the complainant and other witnesses, A-1 had no privy to the offence, as admitted, there is no conversation regarding demand or acceptance by A-1. Learned Advocate Shri Goswami submitted that the accused is not required to prove his defence beyond reasonable doubt, but has to suggest the probability of the defence version. He emphasised that the probability of defence has also to be seen as to whether the defence is probable. In support of his submission learned Advocate Shri Goswami has referred to the judgment of the High Court of Gujarat reported in Amrishbhai Manubhai Brahmbhatt and Another Vs. State of Gujarat, . He also submitted that the possibility of the animosity could also have been examined and considered. Learned Advocate Shri Goswami has also referred to the judgment reported in Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Sattayya and Others, . Lastly, learned Advocate Shri Goswami referred to the judgment of the Hon''ble Apex Court reported in Subash Parbat Sonvane Vs. State of Gujarat, .

6. In rejoinder, learned A.P.P. Shri H.K. Patel, however, submitted that though it is claimed that the panchnama was not dictated, a close look at the evidence would suggest that the trap laying officer in his testimony has clearly stated that he had dictated the panchnama and it was reduced to writing by his writer. He submitted that the amount is recovered, for which the receipt is given with the acknowledgment of the accused. Similarly, he has stated that the presence of the I.O. during trap itself is not fatal. In support of his submission he has referred to and relied upon the judgment of the Hon''ble Apex Court reported in S. Jeevanantham Vs. The State through Inspector of Police, TN, , he has referred to the testimony and submitted that the discrepancy or the contradiction in the testimony of the panch witness and the complainant is not such, which will go to the root of the matter. He emphasised that it is not the case of the defence that it is a case of false implication. He submitted that it is not the case of the A-1 - Talati that the money was not accepted by A-2 at his incidence. He submitted that similarly A-2 has also not controverted about the acceptance of the money. Learned A.P.P., therefore, submitted that the case of the prosecution is established by the cogent material evidence, which has not been appreciated correctly. He submitted that if there was any animosity, the accused would not entertain the complainant, which is evident from his conduct. He further submitted that the marks which have been found on the currency notes as well as on the finger tips of the accused and the panch, clearly suggest the acceptance. He submitted that if the animosity is claimed, the accused would not permit the complainant to visit his house, and therefore, the say about animosity cannot be accepted.

7. Learned Advocate Shri Goswami, therefore, submitted that the case of the

prosecution has many flaws, which has been discussed in the impugned judgment, and therefore, the acquittal recorded by the Court below is just and proper and may not be disturbed. Learned Advocate Shri Goswami has also submitted that in acquittal appeals, the Court would be slow in disturbing the findings arrived at by the trial Court. He emphasised that, merely because the other view is possible, may not be sufficient to disturb the findings of acquittal. He submitted that the reasons recorded for the findings and the conclusion arrived at, cannot be said to be perverse or contrary to the material and evidence, which would justify any such inference. In support of his submission he has referred to and relied upon the judgment of the Hon"ble Apex Court reported in Chandrappa and Others Vs. State of Karnataka, . He has also referred to and relied upon the judgment of the Hon"ble Apex Court reported in G.V. Nanjundiah Vs. State (Delhi Administration), .

8. In view of the rival submissions, it is required to be considered whether the impugned judgment and order recording the acquittal calls for any interference in the present Appeal.

9. As it transpires from the discussion regarding the appreciation of material and evidence, the ingredients for the alleged offence are not established. As could be seen from the case of the prosecution that the demand was made by A-1 and the complainant is called at his residence. Thus, it is relevant to consider as to what has transpired at the time of raid. From the discussion and appreciation of evidence as well as on scrutiny of the evidence by this Court, it transpires that A-1 was sitting outside his house. The complainant has a conversation when they go on one side and again they returned. Though it is stated by the complainant that the A-1 had inquired as to whether he has brought the money and thereupon the complainant is said to have stated that he has brought Rs. 600/- and the A-1 is said to have suggested to pay A-2, his uncle who was residing just opposite and sitting outside his house. In the cross-examination of the complainant, which is referred to in the impugned judgment, the complainant is said to have been called by the accused to the house and the accused is said to have stated that he can tell about his work. The Panch No. 1 is at a distance, and therefore, the conversation between the complainant and A-1 could not have heard by Panch No. 1 at a distance of 20 ft. Admittedly, at the time of raid and the trap, when the trapping officers and the A.C.B. persons rushed to A-1, it is stated that the accused is not having the tainted currency notes. Admittedly, at the time of trap regarding the aspect of recovery, the Panch No. 1 is said to have stated to the trap laying officer that A-1 does not have any money. It is, therefore, evident that the money is not accepted and recovered from A-1. The A-2 is sitting outside and the tainted currency notes have been recovered from inside the cupboard of the A-2. This is required to be considered with reference to the specific defence of the accused referring to the animosity and the past background. Therefore, the accused would not have entertained the complainant as he would have been sceptic about any such dealing with the complainant. Again, there is discrepancy with regard to the demand. It is well settled, that

therefore, the defence raised by the accused is required to be considered and is required to be tested on the basis of probability. The accused has not to prove beyond a reasonable doubt, but the test would be different on the basis of probability. The reliance placed by learned Advocate Shri R.J. Goswami for the respondents accused in a judgment reported in *Amrishbhai Manubhai Brahmbhatt and Another Vs. State of Gujarat*, , also refers to this aspect. A useful reference can be made to the judgment reported in *Sait Tarajee Khimchand and Others Vs. Yelamarti Satyam alias Satteyya and Others*, . Further, a useful reference can also be made to the judgment of the Hon''ble Apex Court reported in *Banarsi Dass Vs. State of Haryana*, . The submission made by learned A.P.P. Mr. H.K. Patel on this aspect of animosity and the probable defence that there is no documentary evidence to prove or show that there was animosity, has no merit inasmuch as in the written explanation given by the accused, there is a reference to the chapter case. Again, it is well settled that the prosecution has to stand its own case and prove the necessary ingredients for the offence, i.e. demand, acceptance and recovery. In the facts of the case, as discussed above, there is discrepancy with regard to the demand. Further, on the aspect of acceptance, admittedly, the A-1 has not accepted the money and the recovery is from the house of A-2. This is required to be considered in background of specific defence raised regarding animosity and the false implication. The Hon''ble Apex Court in a judgment reported in *Subash Parbat Sonvane Vs. State of Gujarat*, has made the observations. Moreover, it is well accepted that in order to establish the charges for the offence under Sec. 7 as well as Sec. 13(1)(d) of the Act, necessary ingredients such as demand, acceptance and recovery are required to be established by the prosecution. Initially the burden has to be discharged by the prosecution after the basic foundation is laid, thereafter the presumption under Sec. 20 of the Act could be attracted. The burden would shift and the accused is required to discharge their burden by explanation or probable explanation on the basis of the preponderance of possibility. It is at this stage, it would require appreciation and scrutiny of the evidence. A useful reference can be made to the observations made by the Hon''ble Apex Court in a judgment reported in *State of Punjab Vs. Madan Mohan Lal Verma*, , observing that mere recovery may not be sufficient. It has been observed:

The law on the issue is well settled that demand of illegal gratification is *sine qua non* for constituting an offence under the Act 1988. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification..... However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan

witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness.

10. It is in this background while scrutinising the material and evidence, the findings and conclusion arrived at by the Court below cannot be termed as perverse. Therefore, the test is whether the view taken by the Court below is reasonable and whether can be reasonably formed on appreciation of material and evidence, is required to be considered. The Hon"ble Apex Court in catena of judicial pronouncements has laid down the broad guidelines with regard to the approach in acquittal appeals, including the judgment reported in Chandrappa and Others Vs. State of Karnataka, , and has also discussed the relevant factors, which are required to be considered before the findings and conclusion could be disturbed. Thus, when the view taken by the Court below is a plausible view or it could be reasonably formed or arrived at on the basis of material and evidence, it does not call for any interference even if the other view is possible. The Hon"ble Apex Court in a judgment reported in Murugesan and Others Vs. State through Inspector of Police, has made the observations: The reversal of the acquittal could have been made by High Court only if the conclusions recorded by the learned trial Court did not reflect a possible view. The use of the expression "possible view" is conscious and not without good reasons. The said expression is in contradistinction to expressions such as "erroneous view" or "wrong view". A "possible view" denotes an opinion which can exist or be formed irrespective of the correctness or otherwise of such an opinion. A view taken by Court lower in the hierarchical structure may be termed as erroneous or wrong by a superior Court upon a mere disagreement. But such a conclusion of the higher Court would not take the view rendered by the subordinate Court outside the arena of a possible view. The correctness or otherwise of any conclusion reached by a Court has to be tested on the basis of what the superior judicial authority perceives to be the correct conclusion. Possible view, on the other hand, denotes a conclusion which can reasonably be arrived at regardless of the fact whether it is agreed upon or not by the higher Court. The fundamental distinction between the two situations have to be kept in mind. So long as the view taken by the trial Court can be reasonably formed, regardless of whether the High Court agrees with the same or not, the view taken by the trial Court cannot be interdicted and that of the High Court supplanted over and above the view of the trial Court.

Therefore, in light of the aforesaid discussion regarding the appreciation and scrutiny of the evidence and the relevant factors and also the approach under Sec. 378 in an acquittal appeal, the present appeal deserves to be dismissed and accordingly stands dismissed.