

(2019) 08 GUJ CK 0034
In the Gujarat High Court
Case No : R/Criminal Appeal No. 598 Of 2006

State Of Gujarat

APPELLANT

Vs

Harsadray Trikammbhai Bhuva

RESPONDENT

Date of Decision : 09-08-2019

Acts Referred:

Code Of Criminal Procedure 1973 — Section 313, 378(1)(3)
Prevention Of Corruption Act, 1988 — Section 7, 13, 13(1)(d), 13(1)(d)(i), 13(1)(d)(ii), 13(1)(G), 13(2), 20

Citation : (2019) 08 GUJ CK 0034

Hon'ble Judges : A.P. Thaker, J

Bench : Single Bench

Advocate : K.P. Raval, M.J. Buddhbhatti

Final Decision : Dismissed

Judgement

A.P. Thaker, J

1. This appeal under Section 378(1)(3) of the Code of Criminal Procedure, 1973 (for short, "the Code, 1973") arises out of judgment and order dated 23.02.2005 passed by learned Additional Sessions Judge and 2nd Fast Track Court Judge, Dhrangdhra at Surendranagar, in Special Case No. 20 of 2003 acquitting the accused-respondent from the charges of offence punishable under Section 7, 13(1)(G) and 13(2) of the Prevention of Corruption Act, 1988.

2. The short facts leading to the filing of the present appeal are summarized as under:-

2.1 That PI, Shri. N.N. Gohil of Surendranagar, ACB at Dhrangadhra received information that the accused, Harshadray Trikammbhai Bhuva, who was by profession a Doctor, though was receiving non-practice allowance, collects fees for his visit. Therefore, on 13.2.2005, he met one Bhathibhai Ragahbahi Devania resident of Naradi, Taluka-Dhrangadhra, and told him about the accused and also informed Bhathibhai to accompany him in a raid being carried out by him as a

punter witness. Shri. Bhathibhai showed his willingness, therefore, PSI Gohil called him and made him understand about the raid, which was to be carried out to arrest the accused. He also drew preliminary panchnama regarding numbers of the currency notes of Rs. 50/-, Rs. 10/-, Rs. 100/- and thereafter, he followed all the necessary procedure i.e. procedure of phenolphthalein powder etc. he put the said currency notice in the pocket of Shri. Bhathibhai and asked him to go to the house of the accused along with the panch witness no. 1. Shri. Bhathibhai entered in the house of the accused situated at friends society, where the accused Dr. Bhuva was present in the clinic. Upon reaching there, the accused called Bhathibhai and after examining him, the accused advised him to complete the course of medicine and when Bhathibhai and panch witness started to leave the clinic the accused asked for Rs. 30 as fees. Therefore, Bhathibhai took out the currency notes which were put in his pocket by PI, ACB Surendranagar and gave it to the accused. The accused after taking said currency notes, which were smeared with phenolphthalein powder put the same in the wallet and put the wallet on the table. Thus, the accused demanded bribe amounts from Bhathibhai, though it was his duty and he was getting allowance for the same. Thereafter, Bhathibhai gave signal to the raiding party and, thereupon the raiding party approach the accused and recovered bribe amount. After completing procedure regarding preparation of panchnama, seizure memo etc. PI Gohil filed complaint against the accused. He also recorded statement of relevant witness and after getting sanction from appropriate authority, he submitted charge sheet in the Court of Additional Sessions Judge in Special Case No. 20 of 2003. The accused denied his involvement in the offence and claimed to be tried. To prove its case, the prosecution has examined five witnesses and produced 16 documentary evidence. Upon submission of closing purshis, further statement of the accused under Section 313 of the Criminal Procedure Code was recorded. Thereafter, after hearing both the sides at length, learned trial Judge by the impugned judgment acquitted the accused from the offence with which he was charged.

3. Heard Mr. K.P. Raval, learned APP for the State and Mr. M.J. Budhbhatti, learned counsel for the opponent. Perused the evidence on record and the impugned judgment of the trial Court.

4. Mr. K.P. Raval, learned APP for the State, after taking the Court to the entire evidence, has vehemently submitted that in the present case, the decoi witness and panch witness have specifically narrated entire incidence regarding demand of bribe amount by the accused and acceptance thereof by him and also the factum of recovery of the amount from the purse of the accused. According to Mr. Raval, police witness has also supported the version of the prosecution. He has also contended that from the documentary evidence and oral evidence, it is clearly found that all the three ingredients of commission of offence under the Prevention of Corruption Act viz. demand, acceptance and recovery are proved by the prosecution beyond reasonable doubt by leading cogent evidence. It is his submission that there might be some minor omission or contradiction in the evidence of panch and decoy witness, but this minor omission or contradiction

ought not to have been taken into consideration by the learned trial Judge. According to him, when there was a cogent evidence on record regarding fulfillment of all the three ingredients, learned trial Court ought to have convicted the accused and awarded sufficient punishment to him. It is his submission that in this case, the prosecution has been able to prove the charge beyond reasonable doubt. He has prayed to allow present appeal and reverse the order of acquittal and convict the accused and impose necessary sentence upon him.

5. Per contra, Mr. M.J. Budhbhatti, learned counsel for the accused has vehemently submitted that the prosecution has miserably failed to prove all the three ingredients. According to him, the entire version of the prosecution is not believable as the entire proceeding has been completed within ten minutes, which shows that everything was planned and the amount, which has been found from the pocket of the accused cannot be the sole ground to convict the accused, when he has not demanded anything from the complainant. While referring to the evidence on record and the defence version he has submitted that the accused being a doctor has only examined the decoy witness as he was sick and has prescribed medicine only. He has also stated that as per the prosecution version, the currency notes smeared with phenolphthalein powder were found from one part of the pocket whereas some other amount was found from another part of the same pocket. It is his version that if the accused has accepted the amount, he could not have placed it in another part of pocket. According to him, this shows that somebody has planted the amount which the accused was not knowing. In the facts and circumstances, even the recovery is doubtful. While referring to the impugned judgment, learned counsel for the opponent has vehemently submitted that learned trial Court has properly appreciated the entire evidence on record and has committed no error of facts and/or law in acquitting the accused. Learned advocate for the respondent - accused has also submitted that the sanction, in this case, is given by the concerned authority without application of mind and it has been given mechanically. It reveals that it pertains to C.R. No. 1/2003, whereas, in the present case the offence is registered as C.R. No. 2/2003. Learned advocate for the respondent-accused has submitted that this fact is also a ground which has been considered by the Trial Court in acquitting the accused and the same deserves to be confirmed by this Court. According to him, the impugned judgment is sustainable in the eyes of law and same does not warrant any interference at the hands of this Court. He has prayed to dismiss present appeal and confirm the impugned judgment.

6. It is well settled by catena of decisions that an Appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded. However, Appellate Court must bear in mind that in case of acquittal there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent Court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced,

reaffirmed and strengthened by the trial Court.

7. Further, if two reasonable conclusions are possible on the basis of the evidence on record, the Appellate Court should not disturb the finding of acquittal recorded by the trial Court. Further, while exercising the powers in appeal against the order of acquittal, the Court of appeal would not ordinarily interfere with the order of acquittal unless the approach of the lower Court is vitiated by some manifest illegality and the conclusion arrived at would not be arrived at by any reasonable person and, therefore, the decision is to be characterized as perverse. Merely because two views are possible, the Court of appeal would not take the view which would upset the judgment delivered by the Court below. However, the Appellate Court has a power to review the evidence if it is of the view that the conclusion arrived at by the Court below is perverse and the Court has committed a manifest error of law and ignored the material evidence on record. A duty is cast upon the Appellate Court, in such circumstances, to re-appreciate the evidence to arrive to a just decision on the basis of material placed on record to find out whether any of the accused is connected with the commission of the crime with which he is charged.

8. It is well settled by the Apex Court in the case of *A. Subair v. State of Kerala*, reported in (2009) 6 SCC 587, while dwelling on the purport of the statutory prescription of Sections 7 and Section 13(1)(d) of the Act ruled that the prosecution has to prove the charge under beyond reasonable doubt like any other criminal offence and that the accused should be considered innocent till it is established otherwise by proper proof of demand and acceptance of illegal gratification, which are vital ingredient necessary to be established to record a conviction.

9. In the case of *State of Kerala v. C.P. Rao*, reported in (2011) 6 SCC 450 the Apex Court reiterating its earlier dictum, vis-a-vis the same offences held that mere recovery by itself, would not prove the charge against the accused and in absence of any evidence to prove payment of bribe or to show that the accused had voluntarily accepted the money knowing it to be bribe, conviction cannot be sustained.

10. In the recent enunciation by the Apex Court to discern the imperative pre-requisites of Sections 7 and 13 of the Act, it has been underlined in the case of *B. Jayaraj v. State of A.P.*, reported in (2014) 13 SCC 55 : AIR 2014 SC (Suppl.) 1837 in unequivocal terms that mere possession and recovery of the currency notes from an accused without proof of demand would not establish the offence under Section 7 as well as Section 13(1)(d)(i) and (ii) of the Act. It has been propounded that in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. The proof of demand, thus, has been held to be an indispensable essentiality and of permeating mandate for an offence under Sections 7 and 13 of the Act. Qua Section 20 of the Act, which permits a presumption as envisaged therein it has

been held that while it is extendable only in respect of the offence under Section 7 and not the offence under Section 13(1)(d)(i) and (ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under Section 20 of the Act would also not arise.

11. The entire case of the prosecution is based on the evidence of punter Bhathibhai Raghabhai and panch witness. The evidence of police witness is based on hearsay evidence. In this matter, this Court has to decide as to whether all the three ingredients viz., demand, acceptance and recovery of amount have been proved or not. For that purpose, this Court has to examine the evidence on record, which is that of punter Bhathibhai Raghabhai and the panch witness no. 1.

12. It appears from the evidence of the complainant-Narendrasinh Natvarsinh Gohil, P.W.1 at Exhibit 11, who was, at the relevant time, Police Inspector of ACB, Surendranagar, that he has carried out his official duty and he got information that the accused herein, though receiving non-practicing allowance, he is being demanding Rs. 30/- to Rs. 100/- for his private practice as doctor. It appears from the evidence of this witness that as per the information, he has led trap with the help of one decoy witness Bhathibhai Raghabhai Dedvaniya, resident of Narali, Taluka: Dhrangadhra. It appears from his evidence that after following due procedure, he along with raiding party, two panchas and decoy witness went to Dhrangadhra and decoy witness and panch No. 1 went to the resident of the doctor. It also appears from his evidence that whatever stated regarding raid, demand of amount and acceptance by the accused, is based on hearsay evidence. It appears from his evidence that at the relevant time, the jeep of the Rajkot ACB is used. Thus, his entire evidence regarding the main ingredients demand and acceptance is based on hearsay evidence. According to his version, the offence was registered as C.R. No. 2/2003, but he is unable to say as to the facts of C.R. No. 1/2003.

13. He has admitted in his cross-examination that at the time of raid, the accused has specifically stated before him that he has not demanded any amount. According to his version, the entire raid was completed within ten minutes.

14. It appears from the evidence of decoy witness Bhathibhai Rathabhai, P.W.2 at Exhibit 19 that he has supported the case of the prosecution regarding experiment of phenolphthalein powder on the currency notes and the facts that he as well as other panchas and raiding party went to the Dhrangadhra in jeep. He has also stated that he and panch No. 1 went to the house of the Dr. Bhuva and remaining persons were standing outside. According to him, Dr. Bhuva has checked his stomach and asked him whether he has any pain in the stomach and, therefore, he has told him that he has pain in his stomach. He has stated that the doctor told him that there is nothing to worry and he will prescribe

certain medicine which he handed over to the panch Talshibhai and at that time he asked Dr. Bhuva as to how much amount is to be paid for his fee, and on that count, doctor demanded Rs. 30/- and, therefore, he has given currency notes tainted with powder, which doctor has accepted and put it in his one side pocket of his purse. According to him, thereafter, he himself gave signal, due to which the raiding party came there and other necessary procedures were carried out. On perusal of his evidence which includes his cross-examination, it appears that he has narrated the above version before the police that the doctor asked his name and prescribe the medicine and handing over to the panch Talshibhai and his demand of amount of fees. It also appears from his evidence that though he has gone to Surendranagar for purchasing the clothes he did not purchased the same. According to him, only two minutes were passed in his examination and Dr. Bhuva has not asked anything except his pain in the stomach. According to him, he and panch did not go to signal but he alone went for raising signal after acceptance of the amount. He has denied the suggestion that he was pretending regarding his pain in the stomach and, therefore, on humanitarian ground, the doctor has examined him and given treatment to him and the doctor has not demanded any amount from him and he has put it in the purse of the doctor which was lying on the table and the doctor has refused to accept it and that thereafter, he ran away from the place for giving signal to the raiding party.

15. It appears from the evidence of panch No. 1 - Talshibhai Bhimabhai Malvaniya, P.W.3 at Exhibit 21 that he has supported the version of the prosecution regarding preparation of first part of the panchnama and of he is going with the complainant to the house of the Dr. Bhuva. Regarding demand, he has stated that Bhathabhai has told the accused Bhuva that there is pain in his stomach and the doctor has examined him and told him that it will be all right and he prescribed the medicine and Bhathabhai has tendered Rs. 30/- which was of denomination of Rs. 10/- each and the same was accepted by the doctor and put it in his pocket and, thereafter, both were gone away from the place and, thereafter, Bhathabhai gave signal. From this very version, it appears that there was no demand made by the doctor at that time. According to him, ten minutes time was spent in examining Bhathabhai. He has accepted the suggestion of the defence side that at the relevant time, Bhathabhai was shouting as he has pain in his stomach and, therefore, the doctor has examined him, immediately and at that time also, Bhathabhai was telling that the pain is unbearable. Of course, he has denied the suggestion that after examination, punter has placed the amount in the pocket of the doctor which was lying on the table. He has accepted the version that Narendrasinh Gohil has seized the purse from the table and his all signatures were taken at a time on panchnama etc.

16. It appears from the evidence of the Investigating Officer Rajendrasinh Ghanshyamsinh Vaghela, P.W.4 at Exhibit 22 that he has recorded the statements of various police staff including the panchas and has also called for his sanction from the higher officer of the doctor. During his cross-examination, the contradictions in the evidence of panch witness as well as Bhathabhai have

been brought on record. He has submitted that he has not investigated regarding past history of the punter.

17. It appears from the evidence of Khodidas Chimanlal Dave, P.W.5 at Exhibit 28 that he has led the charge-sheet after getting necessary sanction to file the charge-sheet from the higher authority.

18. Now, on perusal of the evidence on record, it appears that the decoy witness has made improvement in his evidence before the Court and regarding demand, whatever he has not stated before the Investigating Officer, same has been narrated by him before the Court. It appears from the evidence of panch witness No. 1 coupled with the evidence of the decoy witness that there is contradiction in their evidence regarding demand as well as acceptance. It also transpires from the record that the amount was found from the pocket which was lying on the table. Of course, the sign of phenolphthalein powder was found on the finger tips of the doctor. However, mere finding of such sign of powder cannot sole ground to convict the accused. The prosecution has to prove all the main ingredients regarding demand and acceptance by the accused. In this case, as stated above, there is contradiction in the evidence of decoy witness and panch witness regarding the demand and acceptance.

19. On perusal of the evidence of decoy witness and panch witness, it appears that this is a some force in the argument of the defence that the entire trap was a pre-planned as decoy witness though pretending to have pain in the stomach and was shouting as stated by panch witness, the decoy witness.

20. It appears from the evidence on record that the staff members and the jeep of the Rajkot ACB, were called for though the vehicle was available in the ACB Surendranagar. It appears from the evidence of the complainant Narendrasinh Natvarsinh Gohil that he has called for the staff members and the jeep from the Rajkot ACB office for arranging the trap. It suggests that there was pre-plan to arrange the trap against the doctor and on previous day, everything was carried out. It appears from the evidence of the punter witness that though meager amount was with him, he has stated before the Court that he had come for purchase of the clothes from village: Narali to Surendranagar and instead of purchasing, he went to area where no such shop is available. It appears from the evidence of the complainant as well as panch witness that there is something fishy in the entire procedure adopted by the original complainant.

21. It also appears from the record that there is a force in the submissions of the learned advocate for the respondent - accused that the sanctioning authority has, without application of mind, signed the papers which have been assigned by the Investigating Officer and it was in mechanical manner and the sanction given thereunder is not legal and valid. On perusal of the letter dated 27.08.2003 at Exhibit 30 at page No. 209 of the paper book, the sanction has been given relating to the FIR being C.R. No. 1/2003 registered with Surendranagar A.C.B. Police Station. Now, admittedly, in this case, the FIR got registered as C.R. No.

2/2003. It clearly suggests that without application of mind, the concerned authority has mechanically signed the sanctioned order and this is also one of the ground which goes against the prosecution.

22. On perusal of the entire evidence on record, it clearly transpires that the prosecution has miserably failed to prove the basic ingredients viz. demand, acceptance and recovery beyond reasonable doubt. There is doubt regarding the demand and acceptance of the amount on the part of the accused. The entire evidence of the prosecution does not inspire any confidence.

23. On perusal of the impugned judgment and order of the Trial Court, it transpires that the learned Trial Judge has examined the entire evidence and has minutely examined the same in its true perspective. It also appears that the Trial Court has not committed any error of facts and law in reaching to the conclusion of acquitting the accused. The impugned judgment and order cannot be termed as perverse one and it is sustainable in the eyes of law and the same does not warrant any interference by this Court.

24. For the foregoing reasons, the present appeal is devoid of merits and it deserves to be dismissed. Resultantly, it is dismissed. The impugned judgment and order dated 23.07.2005 passed by the learned Additional Sessions Judge, 2nd Fast Track Court, Dhrangadhra in Special Case No. 20 of 2003 is hereby confirmed. Bail bond stands cancelled. Record and proceedings be sent back to the concerned Trial Court forthwith.