

(1998) 09 GUJ CK 0068
In the Gujarat High Court
Case No : Criminal Appeal No. 1221 of 1986

State of Gujarat	Vs	APPELLANT
Tejbhai Karimbhai Vora		RESPONDENT

Date of Decision : 03-09-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 162
Evidence Act, 1872 — Section 114
Penal Code, 1860 (IPC) — Section 161, 165, 165A
Prevention of Corruption Act, 1947 — Section 4, 4(1), 5, 5(1), 5(2)

Citation : (1999) CriLJ 2655 : (1999) 1 GLR 831

Hon'ble Judges : S.M. Soni, J;C.K. Buch, J

Bench : Division Bench

Advocate : K.P. Raval, P.P, for the Appellant; Manoj N. Popat, for the Respondent

Final Decision : Allowed

Judgement

1. The State of Gujarat has filed this appeal against the judgment and order dated 5th July, 1986 passed by the Special Judge, Junagadh in Spl. Case No. 1 of 1984 acquitting the respondent-accused of all the charges u/s 161 of the Indian Penal Code and Sections 5(1)(d) and 5(2) of the Prevention of Corruption Act, 1947 (hereinafter referred to as the "1947 Act").

2. The respondent-accused was Electricity Duty Inspector at Junagadh at the relevant time. The original complainant one Devjibhai Jatkiya owned one cotton processing factory in the name of M/s. Patel Cotton Processing Company in partnership. He had in his factory high tension electric supply from electricity Board. On consumption of electric energy tax is levied by the Board at different rates. As Government had changed rate in taxes, to have the benefit thereof he had applied on 26th November, 1983 to Collector, Electricity Duty, Ahmedabad who in his turn had sent that application to Junagadh Electricity Duty Inspector for verification thereof. According to him, his application for verification had come to accused who was Electrical Inspector at the relevant time. Accused had called

him in person and was informed that he will come to his factory for local inspection. As accused did not turn up to visit his factory, he again went to accused some eight days before filing of the complaint where he was told by accused that he shall have to understand the usual practice. On inquiry by him as to what is the usual practice, he was told that he shall have to pay Rs. 1,000/-. On his say that it is a very big amount and that it should be reduced accused told him to pay Rs. 500/-, otherwise his application may not be processed further. On inquiry as to when and where he should see him again, he was told that he is at his residence in the afternoon of 5th March, 1984 and he may come between 6.00 to 7.00 p.m. He was asked to bring Rs. 500/- and also supply the number of his meters. He was again told that his application will be processed thereafter. Based on these facts the complaint was recorded. Necessary formality of calling Panchas, explaining them the complaint, smearing the currency notes with anthracene powder, demonstrating how the anthracene powder can be seen through ultraviolet lamp, where to place the said currency notes, when to give it, who of the Panchas should accompany the complainant and who should remain with the police were all understood and necessary demonstration of anthracene powder was performed and after drawing preliminary Panchnama, they left for the house of the accused. Initially, it appears that it was arranged that the complainant will move in his car and police personnels with others will move in police vehicle. However, as police vehicle was not available all had gone in the vehicle of the complainant. When they reached near Balochawad Police Chowky, they stopped. The driver of the complainant was sent to inquire at the house of accused to inquire but he returned as accused was not available at home. Again the driver was sent by about 8.0" clock at the house of accused with instruction to call the accused as the complainant is in the car as he is not well. The driver returned in company of accused at the car. Accused sat in the car. On receiving the agreed signal, Investigating Officer (I. O. for short) Shri Desai raided the car and caught the accused and the currency notes were found from his pocket. Thereafter other formalities as to demonstration of ultra violet lamp, seizure of cloth and vehicles smeared with anthracene powder was completed. On completion of investigation, accused was charge-sheeted before the Special Judge, Junagadh.

3. On the chargesheet being submitted, charge u/s 161 of the Indian Penal Code and Section 5(1)(d) punishable u/s 5(2) of the "1947 Act" was framed to which accused pleaded not guilty and claimed to be tried. To prove the charge levelled against the accused, prosecution examined complainant-Devjibhai PW 1, one of the Pancha Vrandawan Tribhovan, PW 2, ultra violet lamp operator Mansukhlal Ramji, PW 3 and Investigating Officer-Janardhan Desai, PW 4. The prosecution evidence being over, further plea of the accused was recorded. Accused also filed a written explanation. From the plea of defence, more particularly, the written statement, his defence is to .the following effect: "That he had gone to the car of the complainant where he was informed by the complainant that he had applied for relief in Electricity Duty. He has brought the meter numbers of his factory at

Manavadar. He requested to help him as far as he can. On saying so, he (complainant) gave me copy of the application along with a paper bearing numbers of the electric meters which he took as folded they were, and without either seeing it or reading it he put it in the pocket of his bush-shirt. Immediately thereafter he was raided and he was taken to Balochawad Police Chowky and then to Mandvi Police Chowky where his bush-shirt was seized." According to the accused, complainant Devjibhai has cheated him and by falsely representing that the papers are copy of application and a note of numbers of electric meters, has passed off the currency note covered under those papers which he knew later on. According to him, if he would have known that the said folded paper contained the currency notes, he would not have accepted the same. The learned Spl. Judge after appreciating the evidence and the defence has come to the conclusion that the prime requirements of demand to be proved by the prosecution is not proved, and therefore, the whole case of the prosecution fails. He has given number of reasons for not accepting the evidence of the complainant and other witnesses and recorded the order of acquittal. This order of acquittal is under challenge in this appeal by the State.

4. Learned A.P.P. Shri K.P. Raval has challenged the order of acquittal on the grounds, namely, that the learned Judge has erred in rejecting the evidence of the prosecution simply appreciating the evidence of first demand without bearing in mind and effect thereof and find of currency notes which is required to be explained by accused in view of Section 4 of the "1947 Act". As many as fifteen reasons are assigned by the learned Spl. Judge, however, they are not warranted by evidence on record if read in its proper perspective. The contradictions relied on by the learned Spl. Judge are so insignificant to damage the case of the prosecution. Learned Advocate Shri Raval, therefore contended that the conclusion arrived at by the learned Judge is most unreasonable and based on no plausible reasons. Shri Raval contended that learned Judge has erred in law in concluding that the demand is not proved without taking into consideration the subsequent facts on record. Shri. Raval further contended that demand is implicit in the entire affair and demand is not an intrinsic part of the offence of taking bribe u/s 5(1)(d), punishable u/s 5(2) of the "1947 Act". Shri Raval therefore contended that the acquittal recorded by the learned Spl. Judge is bad. Shri Raval also contended that the acquittal recorded by the learned Judge is based on wrong assumptions, conjectures and surmises which has ultimately resulted into miscarriage of justice.

5. Shri. Budhbhatti appearing for the respondent-accused has supported the judgment of the learned Judge. He has contended that the reasons assigned by the learned Judge to record acquittal, namely:

1. The complainant is an accomplice and he had grudge against the accused as he had to pay penalty of Rs. 4500/- in the year 1972. He is a political leader and an influential person. He is contradicted by his previous statement recorded u/s 162 of Criminal Procedure Code without declaring him hostile. He has stated that

the money was not demanded.

2. Panch Shri Vrandavan is a selected Panch.

3. There is no explanation from prosecution as to why Panchas were taken from P.W.D. Department;

4. Panch did not accompany complainant even though he was instructed specifically.

5. Panch has admitted that he could not hear nor see what transaction took place inside the car.

6. There is no corroboration to demand of bribe made by the accused.

7. The complainant was nurturing vengeance against accused for he was fined Rs. 4,500/-.

8. Complainant admitted that he knew Panchas since long. Therefore, possibility cannot be ruled out that both Panchas were selected intentionally.

9. There is no consistency in the story about place of incidence. The witnesses are divergent about what happened at 6.00 p.m. and where the raiding party had gone. Complainant says that they had gone to A.C.B. office while according to others, they stayed there upto 8.00 p.m.

10. The driver is not examined though cited as a witness. He was very independent witness.

11. Shri Baxi (PP) has fairly conceded that; there is no evidence of demand and acceptance from complainant.

12. The evidence of complainant is tainted" and doubtful.

13. There is no question of any presumption u/s 4 of the Act.

14. There is missing link between demand and acceptance and conversation is not proved.

15. Panch is not creditworthy.

are cogent and convincing and that the limitations of this Appellate Court to interfere with the order of acquittal should be borne in mind and this Court should not interfere with the order of acquittal. Shri. Budhbhatti also contended that the judgment also cannot be said to be a perverse one. Simply because the other view is probable and possible this Court cannot interfere with the conclusion arrived at by the learned Judge, more particularly, in view of the principles laid down by the Supreme Court in the case of Solanki Chimanbhai Ukabhai Vs. State of Gujarat, stated hereun-der.

(1) the view of the trial Judge as to the credibility of the witnesses (2) the presumption of innocence in favour of the accused, a presumption certainly not

weakened by the fact that he has been acquitted at the trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of the appellate Court in disturbing a finding of fact arrived at by a Judge, who had the advantage of seeing the witnesses, which finding would not certainly be disturbed if two reasonable conclusions can be reached on the basis of the evidence on record.

6. Shri. Budhbhatti relying also on the judgment in the case of Ramesh Babulal Doshi Vs. State of Gujarat, , contended that unless this Court comes to the conclusion that the finding of the trial Court are palpably wrong, manifestly erroneous or de-monstrably unsustainable, this Court cannot interfere with the order of acquittal recorded by the learned Special Judge. Shri Budhbhatti also contended before us that the necessary facts to establish an offence u/s 5(1)(d) r.w. Section 5(2) are not established by the prosecution. According to him, to constitute an offence of corruption there should be first an agreement between the accused and the complainant. In response to that agreement there must then be a demand by the accused. In response to that demand there must be an offer by the complainant and on that offer there must be an acceptance by the accused of the amount agreed as bribe money. Shri Budhbhatti contended that if facts of all the above four stages are conclusively established or the above four circumstances are consecutively established, then and then, the offence will be constituted and in absence of any one of them, the chain to constitute an offence may not be established as fact of each stage is an integral part to constitute an offence. So, in the instant case, the first requirement i.e. first demand is not established by the prosecution and the question to go to other stages does not arise. Shri Budhbhatti contended that the learned Judge is therefore right in acquitting the accused. Immediately on failure by the prosecution to establish the first demand of the money, the question to consider other facts, namely, the find of smeared currency notes does not arise and is not required to be considered and is rightly been not considered by the learned Judge. Shri. Budhbhatti further contended that evidence of complainant in absence of any independent corroboration is not required to be accepted and rightly not accepted by the learned Judge. Shri Budhbhatti contended that complainant in cases of bribe giving are in the nature of accomplice and the rule of prudence requires that in absence of any independent corroboration to evidence of such witness, it will be dangerous to accept such evidence. Shri Budhbhatti further contended that even in the case on hand neither second demand nor acceptance is established by the prosecution. No one has either heard or seen demanding money from the complainant nor they have been accused accepting money from the complainant and in absence of any independent evidence or circumstance corroborating the complainant it will be hazardous to accept the evidence of the complainant and the learned Judge has rightly not accepted the same. Shri. Budhbhatti further contended that there is a little overt act on the part of the prosecution witnesses other than the complainant and overt act in such criminal cases should be taken seriously and adversely to the case of the prosecution. Shri Budhbhatti contended that admittedly and/or undisputedly it was dark at the

relevant time. The rear wind glass of the car was tainted with colour and it was not possible for any one to see inside the car from the back, more particularly, when there was no light in the car. Despite this fact situation when the witnesses say that they have seen the giving of paper bearing meter numbers and passing on currency notes reflects on their over-enthusiasm to support the case of the prosecution. The learned Judge has therefore rightly rejected that evidence. Shri. Budhbhatti therefore contended that the question of presumption u/s 4 will only arise after the prosecution has proved that the accused person has accepted or obtained the gratification. In the present case, prosecution has not only failed to prove that the accused has accepted any amount of gratification but has failed in the first stage of making any demand by the accused from the complainant. In absence of any proof as to acceptance of money by the accused, presumption u/s 4 is not attracted, and therefore, the learned Judge has rightly not discussed further into the matter about the presumption u/s 4, though in evidence, it transpires that the currency notes were found from the pocket of the accused. Shri. Budhbhatti further contended that the Panchas are selected ones, and therefore, they should not be relied upon. In view of this fact Shri. Budhbhatti contended that the appeal deserves to be dismissed and the acquittal should be confirmed.

7. We will first deal with the jurisdiction of this Court and extent to which such jurisdiction in acquittal appeal can be exercised and while exercising the same what facts and factors are required to be borne in mind. In *Ramesh Babulal Doshi Vs. State of Gujarat*, , the Supreme Court has held as to when High Court can interfere with the order of acquittal. In paragraph 7 of the judgment the Court has held as under:

7....This Court has repeatedly laid down that the mere fact that a view other than the one taken by the trial Court can be legitimately arrived at by the appellate Court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial Court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. While sitting in judgment over an acquittal the appellate Court is first required to seek an answer to the question whether the finding of the trial Court is palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities it can then and then only reappraise the evidence to arrive at its own conclusions.

8. This Court in *Solanki Chimanbhai Ukabhai Vs. State of Gujarat*, has then laid down the principles to review the evidence in case it requires to interfere with the order of acquittal. The said principles are stated hereinabove in the argument of Shri. Budhbhatti. Keeping in mind this principle, we are first required to decide

whether the approach of the trial Court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable and the finding of the trial Court are palpably wrong, manifestly erroneous and demonstrably unsustainable. In our opinion, the conclusions arrived at by the trial Court and findings are demonstrably unsustainable which we shall demonstrate by referring to the relevant evidence. Clause (d) of Sub-section (1) of Section 5 of the 1947 Act reads as under and is punishable under Sub-section (2) of Section 5 of that Act:

5(1)(d) if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do.

9. To hold a person guilty of Clause (d) of Sub-section (1) of Section 5, it is required to prove that (1) he is first a public servant and (2) by corrupt or illegal means or otherwise abusing his position as public servant obtains for himself or any other person any valuable thing or pecuniary advantage. Therefore the requirement of Clause (d) of Sub-section (1) of Section 5 is that to constitute criminal misconduct punishable under Sub-section (2) of Section 5, prosecution must prove that the person against whom criminal misconduct is alleged is a public servant; he has obtained for himself or for any other person any valuable thing or pecuniary advantage. The word "demand" is not contemplated in Clause (d) of Sub-section (1) of Section 5 of the Act, but it is implicit to constitute misconduct if alleged. Without demand there will not be a question of obtaining any valuable thing or pecuniary advantage. The question of demand will arise if one wants to abuse the position as the public servant, may be by corrupt or illegal means or otherwise. Therefore the situation so arises in a transaction by a public with Government servant in the course of their business concerned with the office of the public servant. A situation is created that some arrangement or agreement is required to be arrived at between the public and the Government servant to get work of the public done which ordinarily ought to have been done in the ordinary course. Government servant who has to deal with public, with a view to extract money adopt the following modes. (1) They unnecessarily raise objections or find faults in the applications and make them tired of visiting offices. (2) They then persuade that if something is understood viz. payment of money is implied, the objections raised may disappear and faults found may disappear. (3) If the public don't agree then they delay the disposal of their application to such an extent resulting into financial and sometimes social damage, loss and harassment to such and extent that everyone on earth including his friends and relatives will label that applicant is a most impracticable man. (4) Public servants do quote such damages caused by them before the public who does not fall in their trap and become gullible. Therefore, at this stage, it will be relevant to see whether the person who offers or from whom valuable thing or pecuniary advantage is obtained is an accomplice or not? To decide whether he is an accomplice and whether his being an accomplice has any effect on his evidence as accomplice, it will be relevant to know as to what type

of accomplice he is, if he is to be labelled as accomplice. This Court in the case of *Bansibhai Ashabhai Patel v. The State of Gujarat* 1984 GLH 29 has observed:

There are different types of bribe givers. Firstly, the person offers bribe to prompt a public servant to do him an undeserved favour. Secondly, the person who pays to a public servant to see that normal official act is done early and promptly and in favour of the bribe given. Thirdly, the type of person who is driven to pay a bribe on demand to do a normal work just to avoid coercion or harassment in getting the work which could normally be done in the official business. And the fourth is a type of person who pays a bribe to a public servant on demand by the public servant after his work is over and when the public servant demands it as a regard for what he has done. So, in fact, it can be said that bribe givers of the first type might certainly be the accomplices and to some extent the bribe givers of the second type also can be said to be the persons who prompt the bribes; while the persons in the categories of third and fourth types would be the persons who are unwilling to give bribe but would be required to pay bribe under certain circumstances as they are driven to that.

10. The Supreme Court in the case of *M.O. Shahishudhin v. State of Kerala* 1996 (1) GLH 371 : AIR 1995 SCW 2717 has also categorised the bribe givers at paragraph 12 of the judgment as under:

12. Now confining ourselves to the case of bribery it is generally accepted that the person offering a bribe to a public officer is in the nature of an accomplice in the offence of accepting illegal gratification but the nature of corroboration required in such a case should not be subjected to the same rigorous test which are generally applied to a case of an approval. Though bribe givers are generally treated to be in the nature of accomplices but among them there are various types and gradation. In cases under the Prevention of Corruption Act the complainant is the person who gives the bribe in a technical and legal sense because in every trap case wherever the complaint is filed there must be a person who has to give money to the accused which in fact is the bribe money which is demand and without such a giving the trap cannot succeed. When there is such a demand by the public servant from person who is unwilling and if to do public good approaches the authorities and lodges complaint then in order that the trap succeeds he has to give the money. There could be another type of bribe giver who is always willing to give money in order to get his work done and having got the work done he may send a complaint. Here he is a *particeps criminis* in respect of the crime committed and thus is an accomplice. Thus there are grades and grades of accomplices and therefore a distinction could as well as drawn between cases where a person offers a bribe to achieve his own purpose and where one is forced to offer bribe under a threat of loss or harm that is to say under coercion. A person who falls in this category and who becomes a party for laying a trap stands on a different footing because he is only a victim of threat or coercion to which he was subjected to. Where such witnesses fall under the category of "accomplices" by reason of their being bribe givers, in the first

instance, the Court has to consider the degree of complicity and then look for corroboration if necessary as a rule of prudence. The extent and nature of corroboration that may be needed in a case may vary having regard to the facts and circumstances.

11. Keeping in mind these four types of bribe givers we have to consider to which category the present complainant would belong to. To decide that fact, it will be relevant to refer to some evidence. The complainant in his complaint on 5th March 1984 has stated that in the name of M/s. Patel Cotton Processing Company, he is running a factory of ginning, pressing i.e. cotton processing and there he has taken an Electricity Board of high tension. On electrical energy used, a tax is levied by the Government. According to the complainant, Government has recently changed tariff of taxes and as by said change in the tariff, the complainant was likely to be benefited, he applied to the Collector, Electricity Duty for such relief on 26th November, 1983. As per his information, said application is received by Shri Vora, Electrical Inspector, Junagadh District for the verification as to the correctness thereof. What the complainant wanted was the benefit of relief granted by the Government in view of change in tariff for tax on electric energy. If the said application is processed early and decided, then, the complainant may if his application is found true start getting the benefit at the earliest. If it is delayed, then he will get benefit late and during the time he gets the benefit or gets his application decided he is required to pay tax at the old tariff rates. In verifying the application, there does not appear that any illegality or impropriety can be carried out. However, procedure requires that when an application is filed the same is required to be verified by the concerned officer and on his report application may be granted or refused. It is nowhere the case of the accused in cross-examination of the complainant that demand made by the complainant was an illegal one or he wanted a special favour by getting tariff changed to get a financial benefit. The complainant has come with the case that he was called by the Inspector and was informed that he will come for verification of the application at his factory and since a month when the Inspector Shri. Vora did not visit the factory, complainant again approached him at his residence where the Inspector Shri Vora told him that if he wants to get his application verified he shall have to understand the practice prevailing and on inquiring about the practice a demand of Rs. 1000/- was made which was ultimately settled for Rs. 500/- on negotiation. Thus, in view of these facts and particularly when either the correctness or the legality of the application and demand by the complainant vide his application of 26th November, 1983 is not disputed by the defence, the complainant, would fall in the third category of Bansibhai's case (1984 Guj 29) (supra) and that third category is the type of person who is driven to pay a bribe on demand to do a normal work just to avoid coercion or harassment in getting the work which could normally be done in the official routine business. Admittedly, application is filed for relief that may be available due to change in tariff in view of the Government circular of 26th November, 1983. The complainant has come to know that the Ahmedabad Office

has sent his application to Junagadh for verification of the same and the complainant was called by Shri. Vora a month before to inform that he will be coming for inspection at his factory. As Shri Vora did not visit, complainant again approached him a week prior to 5th March 1984. This must be in the last week of February. Now, an application was filed by the complainant for benefit in tax tariff in November, 1983. He had information that the said application was pending with Shri Vora for verification since before a month of 5th March 1994. As nothing was being done and on approaching Shri Vora, there came an understanding between the two and one can say speed money, was demanded. There is no suggestion in the cross-examination of the complainant to the effect that his demand was not a legal one and he wanted a special favour from Shri Vora and he wanted to get undue advantage though he was not legally entitled to. In view of the judgment in M. O. Shamsudhin's case AIR 1995 SCW 2717 (supra) and Bansibhai's case 1984 GLH 29 (supra), the complainant cannot be said to be an accomplice.

12. Keeping this in mind we will now revert back to the comments on constitution of offence under Clause (d) to Sub-section (1) of Section 5. Before that it is necessary to decide whether demand is an integral part to constitute misconduct as defined in Clause (d) to Sub-section (1) of Section 5. In our opinion, on a bare reading of the provisions of Clause (d) to Sub-section (1) of Section 5 of "the 1947 Act" the legislature has not incorporated or made it necessary as an ingredient that there shall be first a demand of money and then obtaining of the same. Demand is not a necessary ingredient or does not constitute an integral part of misconduct under Clause (d) of Sub-section (1) of Section 5 of "the 1947 Act". Thus, ordinarily unless there is a demand, there will be no question of obtaining or taking any gratification. Demand precedes subsequent act of offer and acceptance is an integral part of offence. Demand actual or by conduct, either first or subsequent which precedes the acceptance are the integral part of offence. We are supported in our view by the judgment of the Bombay High Court in the case of Manik Shrirang Gaikwad v. State of Maharashtra 1989 Cri LJ 2268. There, the relevant observation at paragraph (16) reads as under :

Now, the position is this that more often than not the acceptance itself would be a proof of the "demand". In many a case, it would be a circumstantial piece of evidence. The evidence required to be led by the prosecution for proving the demand, if the acceptance is proved, would be of a very slight character. Quite often than not, the acceptance spells "demand" because no public officer can dream of accepting any moneys from a stranger without there being some preexisting cause for the same and such cause would amount to "demand".

13. But that apart, by reading into the section, the necessity of demand, a good deal of injury is caused to the section. The intent of this section is to do away with the proof of certain things which are obvious, but the evidence of which would be very much long finding.

14. The plain reading of Section 4 is that not only the proof of the fact that the purpose of the acceptance is dispensed with, but even the proof of the making of the demand is dispensed with. The very acceptance bears upon itself the stamp of illegal gratification. No one accepts illegal gratification as a motive or reward without there being a nexus between the acceptance and the purpose. The "demand" is implicit in this entire affair".

15. In the present case, after drawing the preliminary Panchnama Exh. 18, the raiding party inclusive of driver of the car of the complainant Devjibhai Ravji PW 1, Panch Vrundavan Tribhovan PW 2, another Panch-Mansukhlal Rantji, PW 3 and Investigating Officer-Janardhan Ganeshbhai Desai, PW 4 left towards the house of the accused. As per the complaint Exh. 22, accused has said that complainant may come between 6.00 to 7.00 in the evening. However, he was informed that the complainant will be at his house in the afternoon. After the complaint Exh. 22 was recorded, Panchas were called by about quarter to four and the preliminary Panchnama was completed by about quarter to five and they proceeded towards the house of the accused. It appears from the evidence that it was decided to go to the house of the accused or to call him out of his house. Panch No. 1 who was instructed to remain in company of the complaint was told that if the complainant is required to go to the house of the accused, he shall accompany the complaint. When Panch No. 1 was told that if the complainant is required to go to the house of the accused, he may accompany, suggests that the situation may also arise that they may go to the house of the accused or accused may be called out. Initially when they were to proceed towards the house of the accused, it appears from the record that they had in their mind that the complainant and Panch No. 1 i.e. PW 2 would go in car of the complainant and Panch No. 1 i.e. PW 2 would go in car of the complainant and the rest of the raiding party personal will be following them in a Government jeep car. However, it was ultimately found that the Government jeep car was not available and then all decided to go in car of the complainant. They were all accordingly instructed to get out of the car and watch what happens in the car whether the accused comes to the car or if the complainant is required to go to the house of the accused. Panch No. 1 was instructed accordingly to be in company of the complainant and see and hear what dialogue and movement takes place. After leaving the office of the A.C.B. when they reached near Balochawad Police Chowky except the complainant all deboarded the car. The driver of the complainant was sent to the house of the accused and then he returned with the information that the accused is not available at his residence. On this information, they all remained there up to 8 O'clock. There is a conflicting evidence and that too only of the complainant that as the accused was not available at his residence all of them went to the office of the A.C.B. However, all others have said that they have not gone to the office of the A.C.B., but they have remained there around the car and the complainant sat in the car for all the time. This contradiction on the part of the complainant alone, in our opinion, should not be given any weight for the simple reason that nothing is alleged or suggested by the defence as to how it affects the fact of

raid. It is not suggested in the cross-examination of the complainant that when he left for the office of the A.C.B., after the accused was not available at his residence there was any change in their plan, particularly, about putting of money in the pocket, change of Panch or any addition or alteration in their plan to raid which was agreed when they left the A.C.B. office. No change is suggested to any of the witnesses also. Therefore, in our opinion, this contradiction is insignificant. We may say, at this stage, that subsequently when the driver was sent to the residence of accused, he was sent with a message that Devjibhai is not well; he is sitting in his car and he (accused) is called there. So far as the alleged ill health of PW 1 is concerned, defence has not disputed the same. Therefore, when initially it was agreed by the raiding party to go to the residence of accused and when at the second time accused was called at the car, there appears to a genuine cause to call the accused at the car. If accused would not have agreed to come to the car, it may be that the complainant might have gone to the residence of the accused, but the fact that the complainant was not well at the relevant time has remained undisputed. Therefore, one of the arguments advanced by the learned Advocate for the defence that initially it was agreed to go to the residence of the accused and subsequently the accused was called at the car and this change was neither agreed nor arranged by the raiding party, reflects on the credibility of the evidence of the raiding party is of no substance in our opinion. In our opinion, when the fact of ill-health of complainant is not disputed, this change at the relevant time taken instantaneously pales into insignificance and it does not affect on the credibility of any of the witnesses on this count alone.

16. One of the arguments advanced and, it appears that the learned trial Judge is impressed upon by it, is that the driver of the car is not examined and therefore an adverse inference should be drawn. The driver of the car of the complainant, except driving the car was not to participate in any of the function or stage of the raid. Neither he was informed for what purpose they are going to the residence of the accused nor was he informed as to why the accused is called from his residence to the car. Even if the driver is examined, in our opinion, he could not depose except the fact that he was asked by his master from Balochwal Police Chowky to go to the residence of the accused, the first time to inquire whether the accused is at home or not and the second time to inquire and call the accused at the car if he is at his residence saying that complainant is not feeling well. Even in the cross examination neither the complainant nor the Investigating Officer; nor Panch No. 1 is suggested that the driver was knowing certain things which if brought on record would adversely affect the prosecution case. Therefore, in our opinion, when the learned Judge has said that the driver is not examined though cited as witness and he would be an independent witness does not carry any further the case of the defence. In our opinion, non examination of the driver does not adversely affect the case of the prosecution.

17. For the first time when the driver went to the residence of the accused, the accused was not available. Then at about 8 O'clock when the driver was sent he

(accused) came to the car in company of the accused. On coming to car, the accused sat in the car on the left side of the complainant who was sitting in the rear seat of the car. In the said car only complainant and accused, were there. Even the driver was not in the car. When the prosecution witnesses have said that they saw passing of money by the complainant to the accused, we are in agreement with the contention of the learned Advocate for the defence that this cannot be accepted as it could not be seen. Admittedly the alleged witnesses were on the rear side of the car. Assuming that one can see in the car from the rear side of the car then also if something is exchanged between two persons sitting on the rear side of the car, could not be seen as at the most the head of the person could be seen from the outside and nothing else, more particularly, when admittedly the car is an ambassador car which has high back. We do not propose to discuss as to whether the glasses of the windows were tainted? If so, whether one can see inside the car? The fact remains that when that accused came near the car on the call of the complainant, he sat in the car with the complainant. Therefore, we can assume that there was light but it was not possible that one can read while sitting in the car. After the accused entered and sat in the car something went in between the two which is neither heard nor seen by anyone except the complainant. The accused straightway on coming to the car on call by the complainant sat in the car. When in defence he has stated that the complainant was a man of high status compared to his, then his sitting in the car and occupying the seat with the complainant suggests that that status has not intervened in their relations and status never interferes with such transactions.

18. On receipt of the signal, as agreed PW 4 rushed to the car and caught hold of the hands of the accused and asked Panch No. PW 2 to take out articles from the left hand side pocket of the bush-shirt. It is not disputed by the defence that currency notes five in number of the denomination of 100, one currency note of denomination of Rs. 10 and a paper which contained the meter numbers of the complainant were found. Initially they went to Balochawad Police Station as they wanted to inspect currency notes, pocket of the bush-shirt, hands of the accused etc. with the aid of ultraviolet lamp but as the electric plug was not operating they went to Mandvi Chowk Police Station and there experiment of ultra violet lamp was performed. We may say, at this stage, that there is no dispute of the fact that right hand fingers of the accused, left side upper pocket of the bush-shirt and five currency notes of the denomination of 100 were found smeared with anthracene powder. However, each of them were found smeared only on one side. Left hand front side pant pocket of the complainant was also found smeared with anthracene powder. The question is whether the alleged currency notes are obtained by the accused knowing it to be currency notes or has been passed over by the complainant covered under the paper which contained meter numbers under the pretext of passing over the paper as copy of application. The accused in his further statement has tried to explain possession of currency notes by stating that when he went to the car, complainant told him that he has applied

for relief in electric duty and he has brought in writing the electric meter number of the factory at Manavadar and he may help him to the extent he can. He then asked him to provide copy of his application and note on a piece of paper showing the meter number. He was then given the folded papers which he took without opening or reading it and placed in his bush-shirt pocket and immediately thereafter Shri. Desai came and caught hold of him and without inquiring and asking anything took him to Balochawad Police Station. The complainant Devjibhai in his evidence has deposed....The accused Shri Vora came and sat on my left hand side seat in the car. Then accused asked for the details of meter and told to give it to him. At this point of time, the paper which contained these details which was in the right hand side pocket of his pant and the currency notes were taken out and handed over to Shri Vora. The accused Shri Vora put the said paper containing details and currency notes in the pocket of his bush-shirt and then he gave a signal. Admittedly, complainant has not stated that accused asked for money at that time but the fact remains that the accused asked for the details about the meter and according to the complainant details stated in that paper and currency notes were separately handed over. In whole of the prosecution case, there is a confusion as to when the complainant went to the A.C.B. Office to file complaint? On his complaint being registered, Panchas were called. After the Panchas came and the demonstration on ultraviolet lamp was over, it appears that the person of the complainant was searched and there is no reference to paper which contained number of meters. There is no understanding with the raiding party as to in which pocket that paper was to be placed and if it was so required to be retained or kept and when and at what time the same was required to be handed over to the complainant. However, the fact remains that a paper which contained number of the meters is found and admittedly and or undisputedly the accused has accepted the say of the prosecution that he received the paper which contained meter numbers.

19. The short question which remains to be considered is whether the currency notes which are passed by the complainant to the accused were wrapped in the paper which contained meter numbers so that they are passed simply by way of paper and without knowledge of the accused that it contains currency notes. It will be relevant to state that accused in his further statement has stated that the complainant told him that he is giving him the copy of the application for relief in tariff and a paper containing meter numbers. While on search of person of the accused, no such copy of the application is found from the person of the accused. Say of the accused is that he was informed by the complainant that he is giving copy of the application with a paper which contained number of the meters may be with a view to show that what he received was not simpliciter an ordinary piece of paper only but it also contained some other papers. This may be with a view to convey that there may be an explanation as to how the currency notes were wrapped in a piece of paper which contained meter numbers. If that be so, the thickness of the paper would be immediately noticed by perception while accepting it and that will immediately put the accused on guard that something

else is being given wrapped in the paper which is alleged to contain only the meter number. Thus, according to the accused he has not accepted currency notes and if the currency notes are passed on to him by the complainant it is by fraud and acceptance by him is without knowledge, much less, conscious knowledge of it being currency notes.

20. Before we appreciate the other part of the evidence of the prosecution, it is necessary to appreciate this defence of the accused that currency notes are passed on or given to him by alleged misrepresentation or a fraud. It is clear from the evidence of the prosecution that after seizure of currency notes and a paper which contained meter numbers and a ten rupee currency note, they were seen under ultraviolet lamp to know whether it contains anthracene powder or not. Five notes of 100 denomination found from the accused were the same, as given by the complainant as the numbers tallied with ones referred in the first part the the Panchnama. The said currency notes were also found stained with anthracene powder on both sides. Ten rupee currency note was found stained with anthracene powder on one side only, so also, the paper which contained meter numbers was also found stained with anthracene powder on one side. If currency notes were given by placing it in the fold of the paper which contained meter number, then that paper would not be stained and is not found stained with anthracene powder from the outside. By holding that paper there was no possibility of the fingers of the accused to be stained with anthracene powder. There was no possibility also of a ten rupee currency note found from that very pocket to be stained with anthracene powder on one side. Paper which contained meter numbers if contained currency notes stained with anthracene powder, would be stained with anthracene powder on the sides where the currency notes have touched with paper, however only one side of that paper is found to have been stained with anthracene powder. If paper which contained meter numbers was given and accepted first and put in the pocket and then in that very pocket which contained currency note, of Rs. 10 denomination currency notes five in number of the denomination of 100 were placed, then and then that paper which contained number of meters and the currency note of rupees ten, would get smeared with anthracene powder on one side and all the fingers of the accused would be found smeared with anthracene powder. As fingers of the accused are found smeared with anthracene powder, the theory advanced by the accused in his further statement stands falsified and the fact remains that he has received the currency notes as alleged by the prosecution. No doubt, demand before acceptance of the note is not stated in evidence of complainant.

21. Keeping in mind this factual aspect, it will be relevant to refer to the case of Sonelal Tiwari Vs. State of Madhya Pradesh, where the relevant observations at paragraphs 8, 9, 10 and 11 read as under:

8. In view of the above broad features in evidence the disputed area has narrowed down to a very limited radius as to whether the appellant did receive the amount, with his own hands. Two circumstances are strongly suggestive of

the truth of the prosecution version. First is that the tainted currency notes were found kept beneath the bag "of the appellant. Second is that the appellant's fingers contained phenolphthalein powder.

9. On the first aspect it is difficult to conceive that somebody else would have placed the appellant's bag on the marked currency notes remaining on the office table kept in front of the appellant. If somebody else had done it without the appellant's consent we have no doubt that the appellant would have resisted even the attempt to plant it. In this context we bear in mind that the appellant had no case, at any time, that he made any such resistance or that somebody else had snatched his bag for placing it on the currency notes.

10. On the second aspect, learned counsel for the appellant invited our attention to the evidence of PW 4 Jagdish Prasad Shukla that the appellant was asked by the Dy. SP to take up the currency notes from the table to be delivered over to the police. On the strength of that piece of evidence learned counsel contended that presence of phenolphthalein powder on the fingers of the appellant is of no crucial impact on the culpability of the appellant. But that part of the evidence of PW 4 Jagdish Prasad Shukla is not in consonance with the testimony of PW 10 Dy. SP. In the cross-examination PW 10 Dy. SP was asked whether he wanted the appellant to take up currency notes from the table. The answer to this question was in negative. We have good reasons to prefer the version of PW 10 Dy. SP to the evidence of PW 4 on the aforesaid aspect.

22. Here in this case also passing over of currency notes by misrepresentation, wrapped in a paper bearing meter numbers would taint all the fingers of the accused with anthracene powder. Therefore, the find of anthracene powder on all the fingers and even on the pocket of the bush-shirt suggests that the theory advanced in defence is not acceptable. In the case of Niranjana Patnaik Vs. Sashibhusan Kar and Another, the Supreme Court in paragraph (9) has observed as under:

9. The trial Judge while assessing the merits of the prosecution case took note of the fact that since the first respondent did not deny the receipt of money or the seizure of the currency notes from him the burden of proof shifted to him u/s 4(1) of the Act. The Special Judge was of the view that the explanation of the first respondent was belated and, therefore, was not believable or acceptable and hence he convicted and sentenced him.

23. In the present case, find of currency notes is tried to be explained away by the accused saying that the same has been passed over to him by misrepresentation or a fraud played on him but as discussed hereinabove there does not appear to be any misrepresentation or a fraud played by the complainant. The question is whether alleged fraud or misrepresentation could be played by the complainant or not? According to the accused he was not on good terms or would not be treated friendly by the complainant in view of the following fact. Somewhere in the year 1972 complainant had applied for relief in

electric duty and at that time also the present accused was an Electrical Inspector in Junagadh. On his inquiry into the application of the complainant, the accused made report based on which complainant was required to pay penalty of Rs. 4500/- and according to the accused since then the complainant is against the accused. To appreciate this aspect, what is stated further and not disputed by the complainant is required to be stated. According to the accused, the complainant is a big politician, he is an industrialist and a big PWD contractor. At the time of incident, he was a member of Junagadh District Panchayat and was the Chairman of the Health Committee of the said District Panchayat. The accused very well knew that 10 or 12 years before on his report complainant was required to pay penalty of Rs. 4500. Thereafter, the complainant attained status. We appreciate the say of the accused that a man of status is required to be respected but not in the manner in which he has respected him in the present case. When the complainant called the accused from his residence through his driver, if he had gone to the car of the complainant be it out of respect, we do not think it to be wrong, but the evidence shows that immediately on reaching near the car, he sat in the car without any offer by the complainant or hesitation on his part. Normally if a man of high status calls a person of the stature of accused, as accused himself suggests that he is of low stature than that of the complainant, he will first inquire standing outside the car as to how is the health. If he was simply called for handing over the number of the electric meters, then, in our opinion, it was not necessary to do so at that time and place. Secondly the copy of the application for relief in duty which is marked "B" on record and the copy of which was sent by the Ahmedabad office to Junagadh office and which is seized by the Investigating Officer from his office did contain a number of high tension connection and that number is "11". There may be a different or separate meter number but it must be in connection with high tension connection No. 11 only. This apart, even as per the say of the accused he was required to go and visit the factory for the verification of the application for relief in tariff, then at that time he could have obtained the meter numbers because without visiting the factory we think that he could not have made a report into the matter. The accused has not stated any where, any time or suggested in the cross examination of the complainant that for considering the application for relief in duty it was not necessary to visit the factory of the complainant. The fact remains that he did receive a paper which contained meter numbers in the evening outside the office. The accused claims to be a man of integrity by showing to the Court that on his report the complainant had to pay penalty of Rs. 4500/-. This happened some 10 to 12 years before. When the complainant called him from his residence and when he came to the car he could have equally told the complainant that he may come to his office with necessary information as to meters and needful will be done there, may be in his presence. Here, when he comes near the car he straightway sits in the car without any formality and accepts the meter numbers, stated in a paper. This conduct suggests something adverse to the accused.

24. One of the grounds that the testimony of the complainant should be rejected because the complainant can be said inimical to him, as he had to pay penalty of Rs. 4500/- some ten to twelve years before incident. The accused wants the evidence of the complainant to be rejected because of the incident which took place 10 to 12 years back. If complainant had in his mind the incident of 10 to 12 years, possibly he would not have approached him much less at his residence as normally one would be afraid of such person as there are all chances of accused complaining again and complainant being, again punished if his application for relief in duty is either false or contains incorrect statement. However, from the conduct of the accused, it appears that both of them have forgotten the same or have compromised. According to the complainant, the accused was to visit his factory but as he had not visited, the complainant approached him to tell him to visit his factory, when he was asked to understand something. If this story advanced by the complainant had no ring of truth then normally reply of the accused would be that he is not able to visit the factory early but he may visit the factory after some time and there is no need for the complainant to see him. The complainant agreed to the suggestion of the accused and it was the suggestion of the accused, is affirmed by the conduct of the accused as in the evening of the incident just on call by the driver, the accused came to the car of the complainant. If he was informed that the complainant is sick, he would come and inquire about the health of the complainant and for the official work he will tell him to come to office. Thus, in our opinion, the previous incident of some 10 to 12 years appears to have been either compromised or forgotten.

25. The Supreme Court in the case of State of U.P. Vs. Zakaullah, in paragraph (6) has observed as under:

6. The complainant's evidence was jettisoned on the mere ground that since he had a grouse against the delinquent public servant he might falsely have implicated the later. Such a premise is fraught with the consequence that no bribe-giver can get away from such a stigma in any graft case. No doubt PW. 5 would have been aggrieved by the conduct of the respondent. The very fact that he lodged a complaint with the Anti-Corruption Bureau is reflective of his grievance. Such a handicap in his evidence may require the Court to scrutinise it with greater care, but it does not call for outright rejection of his evidence at the threshold. A pedantic approach rejecting the evidence of a complainant simply on the premise that he was aggrieved against the bribe-taker, would only help corrupt officials getting insulated from legal consequences.

26. Here, in the instant case, if the evidence of the complaint is read, it has created on the contrary an impression that after filing of the complaint he has tried to help the accused to a certain extent by giving vague replies like "I do not know, I do not remember", instead of sticking to the evidence and the facts. Therefore, in our opinion, these aspects of complainant having grouse against the accused is imaginary and cannot be a ground to reject the evidence of the

complainant.

27. The learned Judge after holding that the prosecution has failed to prove demand has then concluded the judgment without considering and discussing into any manner the find of currency notes from the possession of the accused. So far as the fact of demand as required to be proved, we have discussed hereinbefore that demand by itself is not an integral part of the offence of misconduct as defined in Clause (d) of Sub-section (1) of Section 5 of "1947 Act". When an amount is found from the person of the accused, question is how that amount has travelled from possession of the complainant to the accused. No one normally in this materialistic world gives any amount to anyone without any purpose and more particularly without asking. The defence of the accused is that currency notes are passed over to him by misrepresentation is not accepted as discussed hereinabove. Would anyone give any amount to anyone without any purpose? Would anyone accept any amount without any purpose? Would anyone retain any amount even given by mistake or by force or by misrepresentation, particularly when he comes to know about the same with him? In view of these facts when an amount is found, demand is implicit in the entire affair. Learned Judge in his judgment and order of acquittal has more emphasized that there is no demand, that there is no corroboration to demand, that learned P.P. has fairly conceded that there is no evidence of demand and as demand is not proved, question of offer would not arise and acceptance will not materialise. So far as the complainant is concerned, he has not stated in his substantive evidence that accused demanded money. Thus, when there is no such evidence, there is no question of corroboration to that part of the evidence. But the question is simply because Public Prosecutor states that there is no evidence of demand, whether the element of demand would become an integral part of an offence and no proof thereof would adversely affect the prosecution. As discussed earlier, demand is not an integral part of evidence of misconduct. The learned Judge has not accepted the evidence of Panch PW 2 saying that Panch is a selected one; that there is no explanation by the prosecution as to why Panchas were taken from PWD; that Panch did not accompany complainant though was specifically instructed to do so, that complainant knew the Panchas well in advance and in the last it is said that the Panch is not creditworthy. After drawing preliminary Panchnama and giving necessary instruction to Panchas and raiding party personnels and when the raiding party proceeds to raid, then at the time of raid if one of the members of the raiding party does not act as per the instruction of the Investigating Officer, who has no control at that place over that person nor could he prompt him that he was required to act in a particular manner and was doing otherwise. He had no scope to correct him. Therefore, that Panch when did not accompany complainant, in our opinion, cannot be a ground to reject the evidence of the Panch, more particularly, in the facts of the present case. It is not that the complainant had gone to the accused and the Panch was required to accompany him. In the case on hand, complainant has sat in car and the Panch has deboarded from the car and at that stage Investigating

Officer cannot tell him that he should go back and sit in the car. Therefore, this should not be and cannot be a ground to reject the evidence of Panch. It cannot also be a ground to reject the evidence of Panch as they are taken from P.W.D. It is not the suggestion of the defence that Panch is selected or called from P.W.D. at the instance of the complainant. It is the Inspector who had sent a note to the superior officer of the Panchas to send two persons without disclosing the purpose and when two persons have come and if they are asked to work as Panchas, it cannot be said that explanation was required to be given by the prosecution as to why Panchas were taken from P.W.D. Simply, that the Panchas were known to the complainant which is only a coincidence cannot be a ground to reject their evidence as they were not called at the instance of the complainant. Therefore, in our opinion, this is not a ground to reject the evidence of Panchas. Therefore, the fact remains that no sooner did the Police Officer receive the signal the accused was caught hold of and from his pocket Panch No. 1 had taken out articles Nos. 1, 2 and 4 which are currency notes and a paper which contains electric meter numbers. One of the grounds to reject the evidence of prosecution as held by the learned Judge is that there is no consistent story about place of incidence. According to the learned Judge, the witnesses are at variance about what happened at 6.00 p.m. and where the raiding party had waited. We have discussed this part of the evidence earlier and varying evidence is only of the complainant while all the other three witnesses have said that they have not gone to the office of the A.C-B. The further fact remains that complainant was not feeling well and they remained there upto 8.00 p.m.

28. The question is in absence of any positive evidence about demand, how a link between demand and acceptance can be established and is established by the prosecution. As discussed earlier, we would say that there is a nexus between acceptance and purpose of acceptance and also the demand which is implicit in the entire affair. Thus, in our opinion, the reasons assigned by the learned Judge to reject the case of the prosecution appears to be wholly unreasonable and erroneous.

29. In the evidence of Lamp Operator PW. 3 an attempt is made by the defence to create some confusion as to find of stains of anthracene powder on the bush-shirt, the pant and right side pocket of the pant or the left side pocket of the pant of the complainant. However, it has been clarified by the Lamp Operator, PW. 3 that he has by mistake referred to the bush-shirt instead of the pant. The question then remains whether he has demonstrated for stains of anthracene powder on the right side upper pocket or left side upper pocket. Panch PW. 2 and Investigating Officer, PW. 4 as well as the complainant are specific that no stains of anthracene powder were found from the right side upper pocket or left side upper pocket of the pant. This apart, the Supreme Court in *State of U.P. Vs. Zakaullah*, at paragraph 14 has observed as under:

14. The two remaining reasons, i.e., nobody overheard the demand made by the

respondent for bribe and that the amount was not in the right pocket but only in the left pocket are flippant grounds which should never have merited consideration. It is disquieting that the learned single judge has chosen to advance such untenable reasoning to find fault with the evidence of PW 5 which was supported by witnesses like PW. 4-DSP.

30. So also, in the instant case, from the evidence of PW. 1, 3 and 4 position is very clear that the currency notes were put in the left hand upper pocket of the complainant and stains of anthracene powder were also found from there.

31. This brings us to the question as to presumption u/s 4 of "the 1947 Act". We have discussed hereinabove and held that the currency notes were accepted by the accused and are found from the upper bush-shirt pocket of the accused. It is contended by Shri. Budhbhatti that unless the prosecution discharges the burden to prove demand and acceptance, question of presumption would not arise, but as discussed earlier, we have held that demand is implicit and acceptance is proved by find of currency notes from the pocket. Hence, presumption would arise u/s 4 of "the 1947 Act". Not only that, the explanation advanced by the accused in his further statement as to how he is found in possession of the currency notes is not acceptable as discussed hereinabove.

32. The Supreme Court in the case of Satpal Kapoor Vs. State of Punjab, has held at paragraphs 1 and 2 of the judgment as under :.

1. On a successful trap being laid the appellant was tried and found guilty for having accepted a bribe of Rs. 100/- from the complainant. The prosecution story is of the usual kind. The demand of bribe was made by the appellant under the threat that he would, as an authorised Food Inspector, purchase samples of milk from the complainant and put him to harassment. Otherwise in his capacity as Health Inspector he had complained to the authorities concerned about the insanitation created by the complainant in keeping cattle in his railway quarters. In these circumstances the CBI and the Department of Vigilance were moved into the matter and the trap was organized. The tainted currency of two notes of Rupees 50 denomination were found in the pocket of the appellant on the successful completion of the trap. The version of the appellant was that the complainant had walked into his office and on his own put the two notes on the top of an almirah placed in the covered verandah in front of his office and that the CBI officials on arrival had forcibly put those currency notes in his pocket. His case was that the CBI Inspector was inimical towards him and that was the reason for false implication.

2. The defence of the appellant presupposes that there was a raid. He has given the counter-version as stated above, but it does not probabilise in the facts and circumstances. Had the CBI people been interested in foisting a case against the appellant and that too namely, it was no cause for the raid party to have created a drama of putting the notes into his pocket and in that way to have soiled his hands with phenolphthalein powder. Without any such ritual the case could have

been foisted. The appellant led no contemporaneous evidence from which it could be proved or inferred that the appellant was a victim of an organized false trap. Both the Courts below having found him guilty of the offence, it is difficult for us to upset the conviction. Still to be on the safer side we have read with the aid of the appellant's counsel most of the prosecution evidence. The conviction u/s 5(2) of the Prevention of Corruption Act thus appears to us to be well based requiring no interference.

33. The Supreme Court in the case of Virendranath Vs. State of Maharashtra, as held at paragraph 4 of the judgment as under :

4. The Court of the Special Judge and the High Court believed the prosecution case and in particular the evidence of PW. 1, PW. 3 and PW. 12 to the successful completion of the trap. Two points however have been urged by the learned counsel appearing for the respective appellants and these are (1) since the tainted money was found with A-2, complicity of A-1 is ruled out and (2) complicity of A-2 is otherwise not established unless the prosecution could lead further evidence to show some meeting of minds between the two accused for acceptance of money, as mere acceptance on the suggestion of A-1 did not establish any guilty intent. Insofar as the first question is concerned, the fact that the tainted money in the hands of the complainant was meant to be passed on to the members of the trap party. PW. 3 is an independent witness in that regard. He is a witness to the effect that it is at the asking of A-1 that A-2 took the tainted money and that beforehand talk had ensued between A-1 and the complainant, the bribe money with the complainant was meant to A-1 at the restaurant of A-2 the convenient place chosen by him. When the complainant paid the money to A-2 on the directions of A-1 then it was as good as if A-1 had taken the money and passed on to A-2. Acceptance is thus established from the conduct of A-1. On this understanding of the situation, it is difficult for us to accept the contention of learned counsel for A-1 that he was not guilty of the crime. We reject the contention outright and confirm the conviction of A-1, dismissing his appeal. However, we are inclined to reduce his sentence to the minimum imposable, i.e. one year rigorous imprisonment under all counts, while sustaining that of fine with the default clause.

34. There the Supreme Court has held that the acceptance is established from the conduct of the accused.

Shri. Budhbhatti, learned Advocate for the defence has contended before us that there is no corroboration to the evidence of the complainant who being a bribe giver is required to be treated as an accomplice. We have discussed earlier with reference to M.O. Shamshudhin's case (AIR 1995 SCW 2717) (supra) about the types of bribe givers and who can be said to be accomplice from amongst those bribe givers. If a bribe giver is required to be treated as an accomplice then no doubt ordinary rule of appreciation of evidence would come into play and it would be a rule of prudence that evidence of accomplice should be corroborated by some piece of independent evidence to give tinge of truth to that evidence of the

complainant/accomplice Shri. Budhbhatti has relied on M.O. Shamshudhin's case (AIR 1995 SCW 2717) (supra) wherein relevant observations at paragraph (17) reads as under:

17. Now coming to the nature of corroborating evidence that is required, it is well settled that the corroborating evidence can be even by way of circumstantial evidence. No general rule can be laid down with respect to quantum of evidence corroborating the testimony of a trap witness which again would depend upon its own facts and circumstances like the nature of the crime, the character of trap witnesses, etc. and other general requirements necessary to sustain the conviction in that case. The Court should weigh the evidence and then see whether corroboration is necessary. Therefore as a rule of law it cannot be laid down that the evidence of every complainant in a bribery case should be corroborated in all material particulars and otherwise it cannot be acted upon. Whether corroboration is necessary and if so to what extent and what should be its nature depends upon the facts and circumstances of each case. In a case of bribe, the person who pays the bribe and those who act as intermediaries are the only persons who can ordinarily be expected to give evidence about the bribe and it is not possible to get absolutely independent evidence about the payment of bribe. However, it is cautioned that the evidence of a bribe-giver has to be scrutinised very carefully and it is for the Court to consider and appreciate the evidence in a proper manner and decide the question whether a conviction can be based upon or not in those given circumstances.

35. We have discussed earlier that the evidence of the complainant in the present case would not fall in the category of the persons who can be said to be accomplice. Despite that we will refer hereinafter how the evidence of the complainant is corroborated by other independent evidence either oral or documentary. In his examination-in-chief he has deposed : "Again in the evening at about 7-00 or 7-30 we all went to the house of Shri Vora by car. This time all others deboarded the car except myself. Again my driver was sent to the house of Shri Vora to inquire as to whether he is there or not. Thereafter, after some time accused Shri Vora personally came in my car. At that time I was sitting in the rear side. The accused sat on my left side. Thereafter accused asked the particulars about meter and told to give the same. This time that paper containing details which was in my right side pant pocket and also the currency notes were given to the accused Shri Vora. The accused Shri Vora put the said currency notes and the letter containing details of meter in the pocket of his bush-shirt. Then he gave a signal." In cross-examination the complainant has stated that "this time the accused told the complainant that his application is received in the office and he will come to inquire at his factory...." This part of the evidence of the complainant is corroborated by Panch PW-2 by the following part of his evidence....Thereafter the complainant Devji spat from the car as agreed and PSI Desai immediately rushed to the car and he caught hold of both the hands of Shri Vora....Shri Desai then instructed me to take out the currency notes from the pocket of the accused and accordingly I took out the said

notes....This experiment was verified by Constable Mansukhbhai and by viewing the said notes in ultra violet lamp blue colour glittering was found. Thereafter by comparing the numbers of the currency notes with the one stated earlier they were found to be the same. Blue colour glittering was also found on the pocket of the complainant and accused also....Then his hand and that of the complainant were shown under ultraviolet lamp and blue colour glittering was found. A Panchnama to that effect was drawn, facts stated in the same were read over, then it was accepted." Similar facts are stated in Panchnama Exh. 18 and this part is also supported by Mansukhbhai as well as Janardhan PWs. 3 and 4. This handing over of money and find of same from the pocket of the accused is also corroborated by the fact of find of the same on seizure as stated by the Panch."

36. Before we refer to the judgment cited by the learned Advocate for the defence, we think it proper at the cost of repetition to refer to some part of the evidence of the complainant wherein the complainant has deposed: "In Mandvi Police Chowky Shri Desai personally operated the lamp brought by his assistants and viewed the currency notes and said letter in the light of the lamp. Violet colour tinges were seen. While so viewing on hands of Shri Desai also violet colour tinges were seen....Thereafter Shri Desai showed the light of the lamp on my pant pocket and hands and stains of violet colour were found." In cross-examination find of stains on the currency notes and paper containing meter numbers are not disputed. For appreciating the evidence of the complainant, it should be borne in mind that the incident took place on 5th March, 1984 and the evidence in the Court is recorded on 17th February, 1986. So, there may be either omissions or contradictions but the question is to appreciate such omissions by way of contradictions and contradictions is to see that as to what extent said contradictions are material and destroys the case of the prosecution. In our opinion, defence has not been able to establish any such contradiction which may destroy the case of the prosecution from the evidence of the complainant. Learned Advocate for the defence Shri. Budhbhatti has relied on the two judgments of this Court (1) in the case of Kanubhai Kantilal Patel 1998 (1) GLH 924 and (2) Gopal Lal Ghisulal Chhipa v. The State of Gujarat (1998) 1 GH 943. The relevant observations relied on by the learned Advocate in Kanubhai's case 1998 (1) GLR 924 (supra) are at paragraphs 6 and 9 (relevant: portion) read as under:

6. From the evidence of Govindbhai Kodarbhai and Deveshbhai Ramanlal nothing can definitely be spelt out that a demand about the amount was made for doing the work about mutation. The evidence is conflicting and to an extent dubious. At the most what can be deduced from the evidence of both the witnesses is that after they went into the office of the appellant, without any talk keeping tight lips they just shrewdly offered the amount. Whether offence on such facts can be said to have been constituted if accordingly the currency notes are passed on to the accused. In the case of State of Madhya Pradesh Vs. Shri Vishnu Prasad Babele, , the law made clear appeals to me most. It has been held that if the demand of bribe is not clearly established and there are discrepancies in the

testimony of witnesses, the accused cannot be held guilty. A question about the establishment of the demand arose before the Supreme Court in the case of *Bal Krishan Sayal Vs. State of Punjab*, . In that case there was no clear evidence about what talk preceded the passing of the currency note. It was therefore, held that the demand was not clearly established and, therefore benefit of doubt must be given to the accused. The Himachal Pradesh High Court in the case of *State of Himachal Pradesh Vs. Tej Ram*, has made the law clear which is quite consistent with the law made clear by the Apex Court. It is held therein that in bribery case demand of illegal gratification by the accused must clearly be established; demand being the essential element of the offence if not established, the result would be catastrophic and any one may come forward to levy an allegation of corruption or bribery against the Government servant by just pushing money into his pocket or throwing the same on his table, and without even telling him the cause of it. The word "obtains" therefore has been intentionally used by the Legislature and it has a definite meaning, and therefore, before any one can be proceeded against under the provisions of the Prevention of Corruption Act, it is necessary to prove that it was the result of the demand that money was passed on.

9. Even if the case of acceptance is believed mere acceptance of the amount will not constitute the offence. It must be shown that illegal gratification was demanded by accused as a motive or reward for doing or forbearing to do any official acts or for showing or forbearing to show favour or disfavour in the exercise of his official function or for rendering any services or disservice to any one. Here in this case as discussed above the case of demand is not clearly established. The talk took place formerly is also not clearly established and there is nothing on record going to show that for doing a particular work, namely mutation, the amounts were demanded and accepted. On the contrary the evidence reveals that there is simple acceptance without any demand. In view of the above discussion, the offence simply on acceptance cannot be said to have been constituted." While in *Gopa Lal's case* (1998 (1) GLH 943) (supra), the relevant observations are at paragraph 9 which read as under:

9. Before I proceed to examine the evidence, the requirement to prove the charge may be stated. It is held by the Supreme Court in the case of *Hari Dev Sharma Vs. State (Delhi Administration)*, that vital part of the prosecution if cannot be believed or not proved, conviction cannot be based. As laid down in this case, the demand and acceptance are required to be proved without any doubt, and if one of them is not proved, being the vital part, the offence cannot be sustained. Likewise view has been taken in the cases of *Anantray Lalji Pandya Vs. The State of Gujarat*, , *State of U.P. v. Ram Asrey* 1990 G LR 188; and *Palanisamy Raju v. State of Tamil Nadu* 1986 CLR 99. In view of the law made clear in the abovestated decisions, what is required to be determined is whether the prosecution has successfully established the case about demand and acceptance.

37. It is true that to prove misconduct as defined in Clause (d) to Sub-section 1 of Section 5 of "the 1947 Act" prosecution is required to prove deal struck between the two and then demand by the accused, offer by the complainant and acceptance by the accused. In cases of Kanubhai (1998 (1) GLH 924) and Gopalal (1998 (1) GLH 943) (supra), the Court has held that demand and acceptance being vital ingredients and mere acceptance of the amount if proved will not constitute offence of misconduct as defined in Clause (d) to Sub-section (1) of Section 5 of "the 1947 Act". The answer to this is by the Supreme Court in the case of State of U.P. Vs. Zakaullah, at paragraph 14 of the judgment which is referred earlier in this judgment.

38. As we have discussed earlier and as we have said, we are supported in our view by the judgment of the Bombay High Court in the case of Manik Shirrang's case (1989 Cri LJ 2268) (supra) relevant paragraph 16 whereof is narrated hereinabove.

39. Thus, in our opinion, in view of the Supreme Court judgment demand by itself cannot be said to be an integral part to constitute a misconduct under Clause (d) to Sub-section (1) of Section 5 of "the 1947 Act".

40. As we have accepted the evidence of the prosecution, that acceptance or that the accused has obtained bribe money is proved, then Section 4 of "the 1947 Act" is attracted. In Satpal Kapoor Vs. State of Punjab, , it has been observed that: "Without any such ritual the case could have been foisted. The appellant led no contemporaneous evidence from which it could be proved or inferred that the appellant was a victim of an organized false trap.

41. In the instant case, the explanation advanced by the accused is not acceptable. In our view presumption u/s 4 is attracted. Section 4 of "the 1947 Act" reads as under:

4. Presumption where Public Servant accepts gratification other than legal remuneration :-- (1) Where in any trial of an offence punishable u/s 161 or Section 165 of the Indian Penal Code (or of an offence referred to in Clause (a) or Clause (b) of Sub-section (1) of Section 5 of this Act punishable under Sub-section (2) thereof, 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 the said Section 161, 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 165-A of the Indian Penal Code (or under Clause (ii) of Sub-section (3) of Section 5 of this Act), 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 161 of the Indian Penal Code or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in Sub-sections (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 inference of corruption may fairly be drawn.

42. In the facts of the present case, question to draw presumption as arising u/s 4 of "the 1947 Act" do arise as this being a case u/s 161, IPC also.

43. It is contended by learned Advocate Shri. Budhbhatti that an adverse inference be drawn as there are corrections as to date in the complaint Exh. 22. It is true that there are corrections as to date in complaint Exh. 22. Those corrections are admitted by the Investigating Officer. It is nowhere suggested as to what adverse inference by such corrections are required to be drawn. It is even not suggested that complaint is got up or prepared in advance on the earlier day or complaint was prepared and date was filled up and then corrected. It is only left to guess work as to what adverse inference be drawn. In our opinion, if one reads Section 114 of the Indian Evidence Act, there are presumptions and in absence of the same certain adverse inference can be drawn but this part of the evidence does not fall in any view of Section 114 either to draw a presumption or an adverse inference. Presumption u/s 4 is applicable to offence u/s 161 and not that misconduct defined in Clause (d) of Sub-section (1) of Section 5 of "the 1947 Act" punishable u/s 5(2) thereof. In view of the judgment in the case of Raghbir Singh Vs. State of Haryana, when marked currency notes are found from the possession of the accused, then presumption of guilt is required to be drawn unless refuted by him in advance. The relevant observation in paragraph 11 reads as under:

11. The last submission turns on the presumption u/s 4 of the Act. The contention of counsel for the appellant that the presumption available u/s 4 of the act cannot be raised in the present case since the charge is u/s 5(1)(d) read with Section 5(2), is apparently attractive. But we may notice that even if the statutory presumption is unavailable, courts may presume what may in the ordinary course be the most probable inference. That an Assistant Station Master like the accused has in his hand a marked currency note made, over to him by a passenger whose bedding has been detained by him for which no credible explanation is forthcoming, and he is caught red-handed with the note, is a case of *res ipsa loquitur*. The very thing speaks for itself in the circumstances. We need not, therefore, scrutinize, the substance of the argument based on the inapplicability of Section 4.

44. Learned Advocate for the defence Shri. Budhbhatti has also raised a

contention that prosecution has changed story with respect to place of acceptance and change in time of giving bribe. As we have discussed earlier, once the raiding party proceeds to raid, the raiding officer has no control over certain aspects which may happen there as it appears from the complaint Exh. 22 that time according to complainant fixed by the accused to accept the amount was between 6 to 7. There was no reason for the raiding party to go prior to 6 O'clock but if we read properly that complaint Exh. 22, it is also stated that accused would be available at his residence in the afternoon of 5th March, 1984. Therefore, if the raiding party reaches earlier than 6 O'clock, in our opinion, does not adversely affect the case of the prosecution. So far as the change of place is concerned, initially when they reached first near Balochwad Police Chowky and inquired at the residence of the accused he was not present. It may be that if he would have been present complainant would have gone at his house in company of Panch as arranged by the raiding officer but as the accused was not at his residence then they waited there up to 8 O'clock and it appears that in between that time something has gone wrong with the health of the complainant and if we look at the evidence of the prosecution it was only a suggestion to a driver to go to the house of the accused and tell him that he is called. Assuming that accused would not have come to the car then this complainant would have gone to the house of the accused. Therefore, this change in situation as to the place of acceptance and the time of paying bribe is only a change made by the situation and circumstances that prevailed then. In view of this, we do not find any favour with this contention of learned Advocate Shri. Budhbhatti.

45. The learned Judge in his judgment after holding that the prosecution has failed to prove demand on the ground stated and referred hereinabove in our view has not considered the subsequent aspect which we have discussed hereinabove. Therefore, in our opinion, the judgment of the learned Judge is manifestly erroneous and the reasons assigned are not only unsustainable but he has failed to consider certain further aspects in the matter particularly as to Section 4 of "the 1947 Act.

46. In view of the above discussion, the charge levelled against the accused u/s 161 Penal Code as well as u/s 5(1)(d) r. w. Section 5(2) of "the 1947 Act" stands proved beyond reason-abledoubt. The charge u/s 161 stands proved in view of presumption being attracted u/s 4 of "the 1947 Act".

47. In the course of arguments neither parties have raised contentions disputing the fact that respondent is a public servant and sanction is valid.

48. In the result, the accused-respondent is found guilty of an offence punishable u/s 5(2) r.w. Section 5(1)(d) of "the 1947 Act" and Section 161 of the Indian Penal Code.

49. For imposing sentence it is necessary to hear the accused on the question of quantum of sentence. We, therefore direct the learned Advocate for the respondent to keep the accused-respondent present before this Court on

16-9-1998 at 11 O'clock.

(RESUMED DATE : 16-9-1998)

50. Heard the learned Advocates on the question of sentence. We have also heard the respondent Tajbhai Karimbhai Vora who is present before the Court on the question of sentence. What is stated before us is that it was a fraud on him and the money is clandestinely passed over to him when he went to the complainant out of courtesy to see him when his driver informed him that he is not well and is sitting in the car. He stated that he has retired since last six years and he is at present about 65 to 66 years old. Since before retirement he has been suffering from diabetes and blood pressure and he is still suffering. He is on drugs for the same and is required to take insulin daily. (When we called him before us to address us on the question of sentence, he could get up from the chair only with the assistance of someone and could come only crippling even for moving four to five steps near the Bar.) He could stand only with the assistance of the Bar. He had met with accident twice and on both the occasions his both the eyes were injured one after the other whereby he lost his right eye completely while the vision of the left eye is lost by 50%. (We could ourselves perceive that he had lost his vision.) He was practically become infirm and he is a patient of diabetes and blood pressure. Incident is of 5th March, 1984 and the accused was acquitted by the Special Judge and today practically more than 14 years have passed since the date of incident. He therefore prayed for most liberal view.

51. Learned A.P.P. Mr. Raval contended that the case being of corruption and looking to the present tendency of the Government employees, the Court should take serious view of the matter and should not impose less than a minimum prescribed under the law. However, he has contended that special circumstances suggested by the accused would normally occur in all the cases if the accused has reached the age of 65. He contended that if the Court is inclined to take a liberal view considering the facts stated by the accused as special circumstances, then also, sentence should not be less than two months and fine should be about Rs. 15,000/- or so. Mr. Budhbhatti appearing for the accused in addition to what the accused has stated before the Court in person drew our attention to the judgment of this Court in Criminal Appeal No. 453/98 decided on 1st April, 1998 by his, Lordship Mr. Justice M.S. Parikh where Justice Parikh taking into consideration the special circumstances has passed the sentence till rising of the Court. Mr. Budhbhatti contended that the special circumstances in this case are far graver than the one shown in the judgment of Justice Parikh. He contended that the Supreme Court also in the case of B.G. Goswami Vs. Delhi Administration, and Sarup Chand Vs. State of Punjab, (also relied on by Justice Parikh) have taken the view which is suggestive that if there are special circumstances, Court may take liberal view. Certain circumstances which were there in the B.G. Goswami Vs. Delhi Administration, and (in) Sarup Chand Vs. State of Punjab, are also available in the present case as well, Mr. Budhbhatti

therefore contended that Court should take most liberal view in this case.

52. In the case on hand, we are recording conviction after practically more than 14 years. The accused has retired since about five to six years. The accused is suffering from diabetis and blood pressure and he is on drug since number of years. We have personally seen the accused who is not even able to walk four to five steps independently. While stating before the Court the circumstances as to why he should not be imposed any sentence and a liberal view be taken was so shaky and hazy that in our opinion he deserves the sympathy of the Court. It appears that the nature has also not spared him. In addition to the above disability conferred by the nature on him he has lost vision of one eye and about 50% vision of the other eye and that too by way of two accidents where in each accident each of his eye was injured. Keeping these circumstances in mind and the observations of the Supreme Court as well as the judgment of Justice Parikh, no doubt it is a judgment of the single Judge, but we are of the view that if we do not treat these to be special reason what other reasons can be said to be special one. Purpose of sentence is to deter a person but who is to be deterred? When the accused is already deterred by nature. The purpose of conviction will be served even if he is convicted till the rising of the Court. By passing an order of sentence he is to lose all his terminal benefits and we should not forget this circumstance is also taken note of by the Supreme Court.

53. In the result, we pass the following order:

The appeal of the State is allowed.

The respondent-accused is ordered to undergo sentence till rising of the Court u/s 5(1)(d) r.w. Section 5(2) of the Prevention of Corruption Act, 1947 and shall pay fine of Rs. 2500/-, in default, fifteen days S.I. The respondent accused is also ordered to undergo sentence till rising of the Court u/s 161 of the Indian Penal Code and shall pay fine of Rs. 2500/-, in default, fifteen days S.I. Both the sentences are ordered to run concurrently. Fine to be paid within six weeks in the Court of Special Judge, Junagadh. Respondent accused having remained present in Court today has already undergone sentence till rising of the Court.