

(1990) 06 BOM CK 0009
In the Bombay High Court
Case No : Criminal Appeal No. 173 of 1986

State of Maharashtra

APPELLANT

Vs

Nainprakash Adalkhiya

RESPONDENT

Date of Decision : 28-06-1990

Acts Referred:

Penal Code, 1860 (IPC) — Section 161
Prevention of Corruption Act, 1947 — Section 5(1), 5(2)

Citation : (1991) 1 BomCR 230

Hon'ble Judges : B.U. Wahane, J;A.A. Desai, J

Bench : Division Bench

Advocate : S.J. Jiekar, A.G.P, for the Appellant; V.S. Sirpurkar, for the Respondent

Final Decision : Allowed

Judgement

A.A. Desai, J.—The State by this appeal has questioned the correctness and legality of finding of acquittal recorded by the learned Special Judge for the offence punishable u/s 161 of the Indian Penal Code and section 5(1)(d) read with section 5(2) of the Prevention of Corruption Act, 1947, mainly on the ground that entire approach and appreciation were grossly erroneous and hence the finding in question resulted in miscarriage of justice. On the other hand the respondent while supporting the finding has urged that the reasoning as adopted and findings recorded by the learned Special Judge, are just and after proper appreciating on the material as placed on record. By inviting attention to the ratio laid down by the Supreme Court in the case of Tota Singh and another v. State of Punjab AIR 1967 S.C. 1083, we are reminded that unless the findings impugned are manifestly illegal and the conclusion as drawn can only be described as perverse, interference in appeal is totally unwarranted. Bearing in mind the settled proposition, we propose to deal with the rival contentions.

2. The complainant-P.W. 2, Syed Gafur, was the proprietor of Star Welding Workshop, Buldhana. This concern used to undertake the job of welding of

various departments including of the Municipal Council, Buldhana. The accused, Nainprakash Adalkhiya, at that time was the Chief Officer of the Municipal Council and admittedly a public servant. In the month of October 1979, the complainant P.W. 2 Syed Gafur had to recover total amount of Rs. 11,000/- towards the payment of remuneration for the services rendered to the Municipal Council. According to him, part payment of Rs. 3,250/- was made by cheque by the Municipal Council on 12-10-1979, for which he was required to pay Rs. 500/- to the accused Chief Officer.

3. On 17-10-1979, the complainant approached to the Chief Officer-accused, for the release of balance payment. Accused to the complaint at that time made a demand of Rs. 800/- for doing the needful. The complainant assured the accused about making of payment next day evening. The complainant (P.W. 2) thereupon approached to P.W. 4 Shivkumar Godbole, who was at that time the member of the Municipal Council and narrated to him the incident of demand. P.W. 4 Godbole advised the complainant to report the matter to the Anti-Corruption Department. P.W. 2 complainant then went to Akola and reported the matter to P.W. 8 Inspector Choube. As instructed by P.W. 8 Choubey, the complainant reduced the complaint in writing (Exh. 21). Inspector Choube directed the complainant to come to his office on the next day i.e. on 18-10-1979 along with the currency notes of Rs. 800/-. The complainant accordingly on 18-10-1979 presented the 11 currency notes (Articles 1 to 10). P.W. 3 Mankar requisitioned as panch witness, who ascertained the substance of the complaint Exh. 21 from the complainant P.W. 2. Numbers of the Currency Notes were noted. The constable applied the phenolphthalein powder. Necessary instructions to the panch and complainant were given. After completing requisite formalities, pre-trap panchanama (Ex. 37) was drawn. The complainant P.W. 2 and P.W. 3 Mankar along with the raiding party thereafter proceeded to Buldhana.

4. On reaching Buldhana, the complainant and panch Mankar first went to the workshop of the complainant. The complainant took his daughter with him and thereafter proceeded to the house of the accused. In the drawing room of house of the accused, the complainant and the panch sat on the chairs whereas the accused was sitting on the cot. On making demands by the accused, the complainant handed over the currency notes (Article 1 to 11). The accused accepted the same by right hand. As instructed, thereafter, the complainant gave the agreed signal. The raiding party reached inside the drawing room. The Inspector Choube asked the panch P.W. 3 whether the accused has accepted the amount. On receiving the answer in affirmative, Inspector Choube asked the accused to produce the amount. The accused was reluctant. He denied of having accepted the bribe. Inspector Choube then warned him that in case of failure to produce the amount, they would take search. The accused even then was reluctant. Inspector Choube then took a search of the accused. However, currency notes were no found. Inspector Choube then enquired from the panch as to where the accused was sitting. The panch pointed out the cot. On removing the pillow which was lying on the cot, Inspector Choube found the currency

notes. After completing necessary formalities of preparation of the solution and testing the hands of the accused, the complainant, the pillow cover and the bed-sheet, as per the version of P.W. 3, post-trap panchanama i.e. Exhibit 40 was drawn. After taking necessary steps, charge sheet was filed.

5. The defence of the accused was of denial. According to him, he was implicated owing to political vengeance, since P.W. 4 Godbole was cherishing a grievance against him. His specific defence was that while complainant and the panch witness were sitting in drawing room of his house, he went inside. When he returned back, the complainant shook his hands as a gesture of Diwali greetings. Fingers of his right hand therefore came in contact with powder. In the meanwhile, according to the accused, perhaps the complainant might have kept those currency notes tainted with phenolothalein powder beneath the pillow lying on the cot. The learned Special Judge observed that the prosecution case suffers from variance and contradiction on the material aspects. He, therefore, disbelieving the prosecution story recorded the finding of acquittal.

6. According to the learned Special Judge, as per the version of the complainant, in the complaint Ex. 21 that he was required to pay amount of bribe of Rs. 500/- on the earlier occasion to the Chief Officer on 12.10.1979. However, he has disowned the same in his substantive testimony. He deposed that he was not required to pay any bribe amount at any time. This candid admission, according to the learned Special Judge, has created a doubt about the very inception of the prosecution case. The learned Special Judge made a pertinent omission from consideration and also in approach that P.W. 2 complainant while in the dock realised from case and subsequently turned hostile. His tendency to oblige the accused was writ large. Even otherwise, the incident of payment of bribe on 12-10-1979 has hardly any bearing on the question of demand on 1-10-1979 and acceptance of bribe in pursuance thereof on 18-10-1979.

7. Another aspect which has weigh with the learned Special Judge was the then prevailing situation in the Municipal Council and the official position of the accused. As per the version of P.W. 7 Jaiswal, who was the employee of the Municipal Council, there were no funds with the Municipal Council. Besides, this, the final authority in the matter of payments was the President of the Council. Referring to various documents as pointed out by P.W. 7 Jaiswal, the learned Judge has observed that the accused was not in a position to release the payment of balance amount. This aspect of the matter has been reiterated before us by the learned Counsel Mr. Sirpurkar. According to him, the complainant had already approached the President in this regard. There was further correspondence and note marked as Exhibit 34. Taking entire stock of the situation, it is vehemently urged that the accused was not in a position to oblige the complainant. As such there could not be a demand by the accused for an amount of bribe or illegal grantification. It is further urged that the complainant was well conversant with the situation and as such there could not be an offer to make the payment in pursuance of the demand. The submission as made, we

must say is totally misconceived. Undisputedly, the Chief Officer was the Executive head of the Municipal Administration. It is not disputed that in a process of releasing the payment for and on behalf of the Municipal Council, he had a definite say and positive role to play. The learned Special Judge has also observed that the Chief Officer as per the procedure, has to recommend the payment of bills. It is also not disputed that in the matter of ultimate payment he has to sign the cheque along with the President. As such, the Chief Officer has a very crucial and important official function to discharge in the matter of release of the payment. The accused, was, therefore, definitely in a position to oblige and was officially capable for doing the needful, as per the request of the complainant. He was, therefore, capable to make demand of bribe by way of reward for discharge of his function. The Special Judge committed material illegality in approach in this regard. It is equally erroneous to presume that the paucity of funds with the Council made the accused incapable to make the demand. The complainant had to earlier dealings with the Municipal Council and was well conversant with the affairs. Even otherwise as a normal practice in day-to-day affairs, the payment of bribe is not always accepted in lieu to oblige the persons officially.

8. The complainant (P.W. 2) lodged the report (Exhibit 21), accompanied the raiding party, reached to the house of accused with the panch and tainted currency notes. He then retracted and turned hostile. However, it is not disputed before us by the learned Counsel that the case of the prosecution does not fail even if the complainant declined to support. It is also not disputed that the panch who witnessed the incident of accepting the bribe, if his evidence is cogent, convincing and trustworthy, a finding of conviction can be recorded.

9. The complainant (P.W. 2) in the complaint (Ex. 21) has averred that "on 17-10-1979, I went to the house of Adalkhiya, the Chief Officer, where he asked him to give Rs. 800/-". The complainant, however, in his substantive testimony at page 77 stated that he went to the office of the accused/Chief Officer. The learned Special Judge, taking into account this contradiction, disbelieved the story of demand of bribe on 17-10-1979. The complainant with a definite design tried to resale from his own complaint. The learned Special Judge, however, submitted while appreciating the material that the attitude adopted by the complainant could not be decisive in this regard.

10. P.W. 4 Godbole to whom the complainant undisputedly not immediately after demand of by the accused, stated their time of meeting as 8.00 a.m. There is no omission or contradiction in this regard in the testimony of this witness. Meeting with accused before 8.00 A.M. could ordinarily be possible for the complainant at his residence. Statement in Ex. 21, therefore, appears more near the truth, which the complainant specifically asserted to be correct in his testimony. This is further fortified by the material on the record and which also exposes the fallacy of the complaint.

11. The complainant in para 21 of his deposition stated that he met P.W. 4

Godbole on 17-10-1979 at 4.00-4.30 p.m. This is apparently false. Reason being the complainant then physically could not reach from Buldhana to Akola on the same day during the office hours of the Department. P.W. 8- Inspector Choubey has specifically stated that the complainant reached to his office on 17-10-1979 at 4.30 p.m. The claim of the complainant of his meeting with P.W. 4 Godbole at 4.30 p.m was with an oblique motive. In normal course he could reach from Buldhana to the office of P.W. 8 at Akola at 4.30 P.M. - if the incident of demand has occurred in the morning hours. We have, therefore, definite reason to believe that the demand was made on 17-10-1979 at the residence of the accused and version in the complaint (Ex. 21) is correct.

12. The defence then tried to assail the lodging of complaint on the ground that it was politically motivated and was at the instigation of P.W. 4 Godbole. The ground made as such is lame and crippled.

13. The complainant though hostile, does not dispute the demand of bribe on 17-10-1979 by the accused, and his thereafter meeting with Godbole. He on his own, narrated the incident to him. Mr. Godbole (P.W. 4) then advised him to report the matter to the Anti-Corruption Department. Such advice in the eventuality could be tendered by any responsible person. Advice was well intended and no ill design can be attributed. P.W. 4 Godbole has not invited the complainant (P.W. 2) and instigated him to make a false complaint against the accused Chief Officer. It is no doubt true that Godbole (P.W. 4), who was the Vice-President of the Municipal Council at the relevant time, made a representation to the concerned Minister for transferring the Chief Officer from Buldhana. Even then it is absolutely without any bearing even to presume that Godbole (P.W. 4) planted the complainant to lodge a false report against the accused Chief Officer. Certainly (P.W. 4) Godbole has not concocted the story of demand for lodging the complaint.

14. The complainant in his testimony tried to oblige defence by saying that Godbole (P.W. 4) accompanied him to Akola and was present when he lodged the report. P.W. 4 Godbole specifically denied the suggestion of giving company or his presence at the time of lodging the complaint. No such suggestion was made to P.W. 8 Inspector Choubey with whom complaint Ex. 21 was lodged. Moreover, it is pertinent to note in the cross-examination by the defence, the complainant has answered that, "It is not true that I have lodged my complaint at the instance of Shivkumar Godbole (P.W. 4)". In view of this, the attack as tried to be made is false and baseless.

15. We now proceed to deal with the aspect of demand. The complainant though turned hostile is unequivocal as regards the demand of bribe made on 17-10-1979 by the accused. The complainant fortified his version by saying that he was shocked on receiving demand from the accused and, therefore, met P.W. 4 Godbole and disclosed the same. P.W. 4 renders complete corroboration on this aspect. P.W. 3 Panch Shri Mankar also ascertained the truth of complaint Ex. 21 to whom the complainant testified the demand by the accused. The aspect of

demand is reflected in Ex. 21 which the complainant has maintained with entire solemnity. We, by taking into account this unimpeachable material on record, viz., evidence of P.W. 2, P.W. 3 and P.W. 4, further read with complaint Ex. 21 hold that the accused on 17-10-1979 demanded Rs. 800/- from the complainant as an amount of bribe for doing the needful in the matter of release the payment of balance outstanding due.

16. Mr. Sirpurkar, the learned Counsel, invited our attention to the decision reported in Gulam Mahmood A. Malek Vs. State of Gujarat, . The Supreme Court taking into consideration the facts as involved has observed that, when the complaint is false and complainant is totally disbelieved, unless there are sufficient grounds, the High Court would not have reversed the finding of acquittal. We have carefully gone through the authority. In the case before the Supreme Court, the complaint was lodged after 10 days. The facts as presented by the prosecution before us are not identical. In the instant case, the complaint was immediately lodged on the same day when demand was made and the same did not suffer from any fallacy as discussed. Another aspect of the matter in the instant case is that the complainant while in dock declined to support the prosecution. As such the principal question before us is, whether the conviction can be recorded by relying on the testimony of panch Mankar (P.W. 3) on the aspect of acceptance of amount of bribe on 18-10-1979. The learned Counsel appearing for the defence has raised various objections and made a submission that the panch Mankar (P.W. 3) is liable to be disbelieved. We propose to examine this aspect.

17. Panch Mankar (P.W. 3) was the employee of the Regional Transport Office, Akola. There were rumours of rampant corruption in the Transport Office. Inspector Shri Choube was in the Department of Anti-Corruption. It is tried to be submitted that the staff in the Transport Office including P.W. 3 was apprehensive of him. Panch was under control and influence of Inspector Choube. It is contended that in view of the situation as prevailing obviously the panch acted as per the dictate of Inspector Choube and he tried to support the prosecution. The submission is without any substance and we reject the same.

18. The learned Counsel referred to the following aspect which according to him create doubt about the testimony of panch P.W. 3.

(A) Panch P.W. 3 acted contrary to the instruction of P.W. 8 Choubey by going along with the complainant to his workshop instead straight-way proceeding to the house of accused on reaching to Buldhana.

(B) While proceeding from the workshop towards the house of the Chief Officer, on the way, they met Inspector Shri Choube, However, the complainant (P.W. 2) denied this version.

(C) P.W. 2 while proceeding towards the house of the Chief Officer carried his small daughter. However, there is an omission in the evidence of panch as well as in second panchanama. These aspects are very minor and not sufficient to cast

doubt on the testimony of the panch P.W. 3. There is no dispute that the panch was in the company of the complainant when they proceeded towards the house of accused.

19. The learned Counsel then urged that there is serious doubt as regards preference of the panch P.W. 3 at the time of acceptance of bribe amount. It is pointed out that there is a variance in the version of P.W. 3 panch and P.W. 8 Choubey in respect of position of pillow on cot and about the act of verification of number of notes by the accused from pre-trap panchanama on being asked by P.W. 8 Choubey. These variations, according to us, are of no consequence. We may mention here, that there is no dispute about entry of the panch along with the complainant in the house of accused and sitting there along with him. P.W. 2 (P. 71) agreed to suggestion saying that, "It is true that I and panch Mankar then entered into his house. It is true that the accused then sat on the cot, while I sat on the iron chair which was placed near the western wall and panch Mankar sat on chair, which was placed near southern wall of the house." Complainant P.W. 2 further agreed with the suggestion (Pg-72) and said that, "It is true that I then went outside the room and gave signal as agreed, while panch Mankar was sitting in the drawing room." This is further fully supported by P.W. 8 Choubey who deposed of having seen entry of the panch in the house of accused and subsequently found him sitting on chair when he made entry on receiving signal from the complainant.

20 The learned Special Judge while recording the testimony in para 23 of the panch, translated the version saying that the accused had not made any query about my identity either with complainant or with me. The learned Counsel, therefore, submitted that this version is contradictory to the statement made in Examination-in-Chief. The presence of panch is, therefore, doubtful. We have carefully verified the Marathi version. The panch in his Examination-in-Chief has specifically stated that accused after entering into the drawing hall asked the complainant (P.W. 2) about the identity of the panch (P.W. 3). Thereupon the complainant (P.W. 2) has introduced the panch (P.W. 3) as an apprentice working in his workshop. However, in his cross-examination, what was put to him was that, when the call was given by the complainant to the accused by standing outside of the door of the house and when the accused opened the door whether at that time, the accused asked the identity to which the panch in para 23 has answered in negative. In view of this, there is no inconsistency or contradiction in the version of the panch (P.W. 3). His version was not correctly translated. On realisation the learned Counsel did not pursue the ground.

21. The main criticism against the testimony of the panch as levelled and as considered by the learned Special Judge is that he could not see where the accused kept the currency notes after accepting the bribe. The learned Special Judge has considered this aspect in para 31 of the impugned judgment. According to the learned Special Judge, the panch was sitting just in front of the accused. As such in all probability he had reason to see as to when and where

the money has been kept by the accused. The panch has tried to explain that for some time he was looking towards the outer gate of house. The learned Special Judge considered this explanation as unsatisfactory. Mr. Sirpurkar, the learned Counsel heavily relied on this aspect of the matter and made a submission before us that this aspect supports the version of the defence that at the relevant time or even at the time of accepting the bribe the panch (P.W. 3) was standing outside the house of the accused.

The panch (P.W. 3) who narrated the incident of offer and acceptance of bribe, ought to have normally witnessed the venture of accused in concealing the currency notes below the bed-sheet or beneath the pillow. It is pertinent to note here that the currency notes were ultimately found beneath the pillow which was lying on the cot where the accused was sitting. In a situation as such, the panch (P.W. 3) not noticing how and when the amount was kept cannot be said to be an aspect which cast any doubt about his presence in a drawing room where the bribe amount was offered and accepted. It is no doubt true as canvassed before us that P.W. 8 Choubey instructed P.W. 3 to hear the conversation between accused and the complainant and also watch over the dealings. The panch, it appears, after acceptance of bribe was not that vigilant. This is quite natural. He could miss from his attention the gesture of accused in concealing the currency notes just at place where he was sitting. Examination of the panch cannot be said to be unsatisfactory or unnatural. Inability of the panch to point out the place of concealment does not create any doubt much less serious, as canvassed, about his presence at the relevant time of acceptance, in view of the voluminous evidence positively indicating his presence.

22. We now propose to deal with the main incident as occurred in the drawing room of the accused Nainprakash. The version of the panch (P.W. 3) we are anxious to reproduce. In para 8 of his deposition, he has narrated the actual incident. According to him, he along with the complainant entered into the drawing room of the accused. The accused at that time sat on the cot and two iron chairs were in front of the said cot. He further stated that bed was also placed on the cot where the accused was sitting. He deposed.

"The complainant again requested the accused to issue the cheque of remaining bill early. Thereupon the accused told him that the work of many other persons was pending. The complainant then told him that he had come prepared as per his say. The accused then told him, all right, his work will be done. The accused then asked the complainant as to who I was ? The complainant told him that I was working as apprentice in his workshop. The accused then told him, all right, pay the amount. The complainant then took out the notes from the left pocket of his manila by his left hand and handed over the same to the accused. The accused took those notes by his right hand."

The complainant was cross-examined on various aspects at length. With the assistance of the learned Counsel, we have gone through the entire cross-examination with due caution. We have particularly noticed the version of

offering and acceptance of bribe as reproduced above, has not been shattered. He stood the searching cross-examination. He asserted in cross-examination that the conversation between the accused and complainant was in Hindi and he heard it. He also asserted in reply to the suggestion that in the beginning the complainant requested the accused to issue cheque regarding his bills early. On the contrary, according to us, narrating the minute details of the aspect further fortify the credibility of this witness. The defence in cross-examination could not bring any contradiction or omission amounting to contradiction or variance in the substance of the version regarding the acceptance of bribe. This witness according to us, is completely trust worthy. We may further add that in lengthy cross-examination of this witness in para 24, the defence gave a specific suggestion to which he has answered, "It is true that the accused demanded the money and extended his hand. It is true that thereafter the complainant took out the money from his pocket of his manila and gave the same to the accused." The piece of evidence as brought on record by the defence has strengthened the testimony as reproduced above.

Besides this, we find a corroboration to the version of the panch from the result of test of the figures and also of the bed-sheet and pillow. His version is further supported by the facts that the currency notes recovered from the place where accused was sitting and the number of which tallied with the first panchanama (Exhibit 27). The panch P.W. 3 is also corroborated by P.W. 8 Choubey, post trap panchanama., Exh. 40 and seizure Ex. 38. Considering this consistent, cogent and convincing evidence we reach to the conclusion that the prosecution has also proved the acceptance of the bribe by the accused.

23. The accused has set up a defence as discussed above that when he was inside his house the complainant (P.W. 2) inserted the currency notes tainted with phenolphthalein powder below the mattress and he came in contact with the phenolphthalein powder when the complainant shook his hands. It is no doubt true that the complainant tried to support the defence. However, in view of our earlier discussion on the aspect of demand and acceptance of bribe as we have held, the defence as set up must fail, since fake and frivolous.

24. We, therefore, hold the respondent/accused is guilty for having committed an offence punishable u/s 161 of the Indian Penal Code and section 5(1)(d) read with section 5(2) of the Prevention of Corruption Act, 1947 for having demanded on 17-10-1979 bribe amount of Rs. 800/- for discharging his official duties and accepting the same on 18-10-1979 at about 8 p.m.

25. We have heard Mr. Sirpurkar, the learned Counsel appearing for the defence, on the question of sentence. According to Mr. Sirpurkar, the accused who was then in the employment of the Municipal Council has now retired. He is an old man aged about 65 years. Therefore, leniency be shown. He has further stated that the accused suffered agony since 1979 as he was under suspension. In the submission of Mr. Sirpurkar, that the accused should be let off only by imposing a fine. We have also heard the learned Counsel for the State. According to Mr.

Jichkar, A.G.P., as per the penal provisions laid down under the Prevention of Corruption Act, 1947 the accused could not be let off only on imposing a fine. He, in the submission of Mr. Jichkar, A.G.P. is liable to be sentenced. Considering the various aspects as canvassed by the learned Counsel, we pass the following order.

26. Appeal No. 173 of 1986 is allowed. The finding of acquittal as recorded by the learned Special Judge vide Judgment and order dated 24-2-1986 is hereby set aside. The respondent accused Nainprakash S/o. Tularam Adalkhiya is hereby convicted for the offence punishable u/s 161 of the Indian Penal Code and section 5(1)(d) read with section 5(2) of the Prevention of Corruption Act, 1947 and is directed to suffer rigorous imprisonment of three months and to pay fine of Rs. 10,000/-. In case of default, he shall suffer further imprisonment of six months. The accused respondent shall surrender to his bail within a period of one month from the date of this judgment.