
(2010) 06 AP CK 0094

In the Andhra Pradesh High Court

Case No : Criminal Appeal No. 1097 of 2003

V. Suresh, Mandal Deputy Surveyor

APPELLANT

Vs

The State of A.P.

RESPONDENT

Date of Decision : 09-06-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 161(3), 162

Evidence Act, 1872 — Section 145, 157, 27, 32, 32(1)

Prevention of Corruption Act, 1988 — Section 13(1), 2, 20, 7

Citation : (2010) 06 AP CK 0094

Hon'ble Judges : B. Chandra Kumar, J

Bench : Single Bench

Advocate : C. Praveen Kumar, for the Appellant; V. Ravi Kiran Rao, SC and Spl. PP, for the Respondent

Final Decision : Allowed

Judgement

B. Chandra Kumar, J.—The appellant, in this criminal appeal, has been challenging the judgment dated 01.09.2003 in C.C. No. 7 of 2000, passed by the Additional Special Judge for SPE & ACB - cum V Additional Chief Judge, City Civil Court, Hyderabad (hereinafter referred to as "Special Judge"), whereby and whereunder, he was convicted and sentenced to undergo Rigorous Imprisonment for a period of one year and to pay fine of Rs. 1,000/- in default to suffer Simple Imprisonment for three months for the offence punishable u/s 7 of the Prevention of Corruption Act, 1988, ("the Act", for brevity) and further sentenced to undergo Rigorous Imprisonment for a period of one year and to pay a fine of Rs. 1,000/- in default to undergo Simple Imprisonment for three months for the offence punishable u/s 13(1)(d) of the Act. Both the substantive sentences were ordered to run concurrently. The appellant herein will be hereinafter referred to as the accused for the sake of convenience.

2. The facts that are necessary for disposal of the prosecution case, in brief, are as follows:

The accused was working as Mandal Deputy Surveyor in the office of the Mandal Revenue Officer (hereinafter referred to as "MRO"), Raptadu Mandal, Ananthapur District during the period 06.07.1997 to 04.02.1999 and as such he was a public servant within the meaning of Section 2(c) of the Act. P.W.1 - Yerri Swamy is resident of Kottapalli Village, Raptadu Mandal, Ananthapur District. He and his elder brother - Ramakrishna partitioned the joint family property about eleven years prior to 08.01.2002. But however, boundaries to their lands were not fixed. Therefore, P.W.1 submitted an application to MRO requesting him to survey the lands and fix the boundaries in Survey No. 88/1, 89/2B of G.Kothapalli village and Survey No. 396/A of Bukkacharla Village. He had remitted the requisite amount in the bank and enclosed the bank challans along with his application. As the MRO was not present in the office, P.W.3 - G. Narsimhulu, who was working as Superintendent of the MRO office during the relevant period, received the application of P.W.1 and told P.W.1 that he would send the Surveyor. On 13.01.1999 at about 04:00 P.M., P.W.1 again went to the MRO office and at that time, the accused was present in the office. According to P.W.1, when he asked the accused for survey of their lands, the accused demanded a bribe of Rs. 4,000/- for conducting survey. When P.W.1 expressed difficulty in paying the demanded bribe amount, the accused reduced the same to Rs. 3,000/- and directed P.W.1 to pay Rs. 1,000/- as advance on 18.01.1999. Then, on 17.01.1999, P.W.1 lodged a complaint with P.W.6 - A. Satyanarayana, Deputy Superintendent of Police, ACB, Ananthapur. After receiving Ex.P.1 - complaint from P.W.1 and after ascertaining the genuineness of the complaint, P.W.6 registered a case in Crime No. 1/ACB-ATP/99 and issued Ex.P.11 - FIR.

3. On 18.01.1999, P.W.1 came to the office of P.W.6 along with Rs. 1,000/-, the proposed bribe amount as directed by P.W.6. P.W.6 secured the presence of mediators i.e. P.W.2 and one N.Rameshwar Rao and after introducing P.W.1 to the mediators and vice-versa, pre-trap proceedings were held. The significance of the Phenolphthalein test was explained and demonstrated. The currency note numbers were noted by the mediators and Phenolphthalein Powder was applied to those notes. Then the tainted currency notes were kept in the upper shirt pocket of P.W.1. P.W.1 was directed not to touch the tainted currency notes and to pay the same to the accused only on his demand. What all transpired during the pre-trap proceedings was noted in Ex.P.5 - First Mediator's Report. Then, the entire trap party, along with P.W.1 and the mediators, proceeded to Raptadu in a jeep and reached the vicinity of the MRO office, Raptadu Mandal at about 11.15 A.M.

4. P.W.1 was directed to go and meet the accused. The other trap party members took vantage positions. Then, P.W.1 met the accused who was standing outside the MRO office. The accused asked P.W.1 whether he had brought the bribe amount and he received positive signal, from P.W.1. Then, as per the directions of the accused, P.W.1 proceeded along with him to a nearby Dhaba Hotel. On the way, the accused directed P.W.1 to pay the amount. Then, P.W.1 took out the tainted currency notes from his shirt pocket and gave them to the accused. The

accused took the amount with his right hand and kept it in his left side pant pocket.

5. Then, P.W.1 gave pre-arranged signal to the trap party and the trap party immediately rushed to the Dhaba Hotel where the accused was sitting. Then, P.W.6 introduced himself and mediators to the accused. He got prepared the Sodium Carbonate Solution in two separate glass tumblers and at the request of P.W.6, the accused rinsed his both hand fingers separately in those solutions, as a result of which, the right hand wash turned into light pink colour and the left hand wash turned into dark pink colour. On demand by P.W.6, the accused produced the bribe amount and P.W.2 compared the note numbers with the numbers noted in the pre-trap proceedings and found them tallying. Then, the currency notes - M.O.5 were seized. The inner lining of the left side pant pocket of the accused was also subjected to the Sodium Carbonate test which yielded positive result. What all stated by the accused and P.W.1 were incorporated in the post-trap proceedings. The application of P.W.1 was also produced by the accused. Then, the trap party proceeded to the office of the MRO and Ex.P.3 - the application of P.W.1 along with the two challans were seized.

6. P.W.7 - S. Jawahar Basha, Inspector of Police, Vigilance and Enforcement, Kurnool, took up further investigation in this case, examined some witnesses and after obtaining sanction order, laid the charge sheet against the accused.

7. Since the accused denied the charges leveled against him, the prosecution, in order to prove its case, examined P.Ws.1 to 7 and got marked Exs.P.1 to P.18. On behalf of the accused, D.Ws.1 and 2 were examined and Exs.D.1 to D.8 were marked.

8. The learned Special Judge, having believed the prosecution case, found the accused guilty and convicted and sentenced him as referred supra.

9. Sri C. Padmanabha Reddy, learned senior Counsel, representing Sri C. Praveen Kumar, learned Counsel for the appellant submits that P.W.1 had given a complete go-bye to his earlier version in the cross-examination and that he had specifically deposed that he had paid Rs. 100/- by way of challan without enquiring from the MRO office as to the exact fees payable for survey and demarcation of sub-divisions of his lands. He deposed that when he met the Superintendent of MRO office, he was directed to meet the accused to know the exact fees payable for marking sub-divisions. According to P.W.1, there were no sub-divisions in their lands and that there could be 12 to 13 sub-divisions in the survey numbers mentioned in the application. It is also his case that the accused informed him that he had to pay Rs. 100/- per sub-division. According to him, he met the ACB officials assuming that the accused was demanding a bribe of Rs. 1,000/- and lodged the complaint accordingly. According to P.W.1, even on 08.01.1997, he requested the accused to pay the amount in the bank as the working hours of the bank for the day were over and handed over the amount to the accused towards fees for sub-division. Thus, the main submission of the

learned senior Counsel is that P.W.1 categorically stated that the amount of Rs. 1,000/- paid to the accused was towards the fees for sub-divisions and not the alleged bribe amount. It is also submitted that the evidence of P.W.1 establishes that there was no demand of bribe by the accused and once the demand of bribe had not been proved by the prosecution, even if it is held that the tainted currency notes had been seized from the accused, no presumption can be drawn and that the Court below ought not to have convicted the accused. Learned senior Counsel had also taken this Court through the judgment of the learned Special Judge and submitted that the learned Special Judge had erred in relying on the oral statement of P.W.1 recorded by the ACB officials and also on the statements made by him in pre-trap and post-trap proceedings, which are inadmissible in evidence. Thus, his main submission is that the learned Special Judge sought corroboration to the evidence of P.W.1 on inadmissible evidence and, therefore, the findings of the learned Special Judge are liable to be set aside. It is also his submission that in view of the total inconsistent versions given by P.W.1, his evidence cannot be taken as basis for convicting the accused. It is his further submission that except the evidence of P.W.1, there is no other evidence on record to prove the demand and acceptance of bribe amount by the accused. It is also his submission that if at all P.W.1's version is supporting the version of the accused, the prosecution should have declared him hostile and cross-examined him and confronted him with all his earlier statements. Without confronting with his earlier statements, the learned Special Judge ought not to have relied on inadmissible earlier statements of P.W.1. It is also his submission that the evidence of P.Ws.3 and 4 would go to show that the version of the accused is probable.

10. Per contra, Sri V. Ravi Kiran Rao, learned Standing Counsel and Special Public Prosecutor for ACB, submits that P.W.1 was examined in chief on 08.01.2002 and that he was cross-examined on 30.01.2002 and a reading of the evidence of P.W.1 clearly shows that when he was examined in chief, he supported the prosecution case and that when he was subsequently cross-examined after twenty days, he had resiled from his earlier version and supported the version of the accused. It is his submission that the circumstances that P.W.1 lodged the complaint with ACB officials and when the mediators enquired with P.W.1 during pre-trap proceedings P.W.1 admitted the correctness of contents of Ex.P.1 and that the evidence of P.W.1 in chief and recovery of tainted currency notes from the possession of the accused clinchingly establish the prosecution case. It is also his submission that even according to P.Ws.3 and 4, the surveyor is not expected to take any amount from any party and that the amount for fixing boundaries for sub-divisions have to be paid through bank challans. It is also his contention that the application of P.W.1 is not for sub-divisions and, therefore, the question of paying fees for sub-divisions would not arise. It is also submitted that what is the total amount to be paid for sub-divisions was not ascertained by P.W.1 and without ascertaining the amount, P.W.1 was directed to pay an amount of Rs. 1,000/- which cannot be treated as fee for making sub-division of lands.

Thus, the main submission of the learned standing Counsel for ACB is that since there was no application for making sub-division of land, subsequent version of P.W.1 cannot be accepted. It is also his submission that considering the facts and circumstances, the version of P.W.1, which is supporting the case of the prosecution in the chief-examination was rightly relied upon by the learned Special Judge.

11. Now the points that arise for consideration in this appeal are (1) Whether the evidence of P.W.1 can be relied upon for convicting the accused; (2) whether the earlier statements made by P.W.1 can be taken as corroborative evidence and whether they are hit by Section 162 Cr.P.C.

12. As far as recovery of amount from the accused is concerned, the accused himself admitted that he received Rs. 1,000/- from P.W.1 towards fees to be paid for making sub-divisions of the said survey numbers. Therefore, it is not necessary to discuss in detail with regard to the post-trap proceedings. However, the evidence on record reveals that P.W.2 - the mediator who accompanied the trap party had categorically deposed that he witnessed the pre-trap proceedings and that at about 01:28 P.M., P.W.1 gave pre arranged signal and accordingly, they rushed to the Dhaba Hotel and when the Sodium Carbonate Solution test was conducted to the both the hand fingers of the accused, it gave positive result. His evidence also shows that the accused produced the bribe amount from his left side pant pocket. He had also deposed that when the inner lining of the left side pant pocket of the accused was subjected to Sodium Carbonate Solution test, it gave positive result. Thus, the evidence of P.W.2 and the evidence of P.W.6 - Investigating Officer would establish that the amount of Rs. 1,000/- was seized from the possession of the accused and that the Sodium Carbonate Solution test gave positive result.

13. In the case between V. Venkata Subbarao Vs. State, represented by Inspector of Police, A.P., the Apex Court observed that "in the absence of any proof of demand, the question of raising presumption would not arise. Section 20 of the Act provides for raising of presumption only if the demand is proved". It was also held that "If the version of the accused appears to be probable, the same is sufficient and the standard of proof as is required to be made by the prosecution is not necessary to prove the version of the accused".

14. In view of the same, now we have to see whether the prosecution had proved that there was any demand for illegal gratification and whether the accused accepted illegal gratification.

15. As seen from the evidence of P.W.1, it is clear that he had not supported the case of the prosecution when he was cross-examined. Of course, he had supported the case of the prosecution when he was examined in chief. Thus, he had given a complete go-bye to what he had stated in the chief-examination. In the chief-examination, P.W.1 categorically deposed that when he asked the accused to survey the land, the accused demanded a bribe of Rs. 4,000/- but on

his request the accused reduced it to Rs. 3,000/-. It is also his specific case that the accused also directed him to pay Rs. 1,000/- as advance on 18.01.1999 and that on 17.01.1999, he went to the ACB office, Ananthapur and lodged Ex.P.1 - complaint. Subsequently, when he was cross-examined, it is his specific case that he was not happy with the accused as the accused refused to measure the pathway as per the judgment of a civil Court and that he had not paid the requisite fee for making sub-divisions of the lands. It is the specific case of P.W.1 that the accused never demanded any amount of bribe and that the accused directed him to deposit the amount in the bank and get the challans for making sub-divisions and that he himself requested the accused to pay the amount in the bank. Thus, the specific case of P.W.1 is that there was no demand of amount by the accused and that the amount of Rs. 1,000/- given by him to the accused was not towards bribe but towards fees for making sub-divisions.

16. Now it has to be seen which version is acceptable and which is his earlier version. Suppose if the version of P.W.1 in chief appears to be his earliest version, the Court may accept the same. Therefore, we have to examine what is the earliest version of P.W.1 and whether the earlier version of the P.W.1 has been brought on record as per the settled legal principles.

17. Learned Special Judge, while discussing the evidence of P.W.1, observed that the evidence of P.W.1 in the chief examination had been supported by his earlier statements. Learned Special Judge referred as follows:

...It was first in Ex.P.1 - complaint which is in his own hand P.W.1 has referred to the alleged demand, wherein he mentioned, that he submitted his Ex.P.3 application with Ex.P.4 challans on 09.01.1999 to P.W.3 - Superintendent of MRO office as the MRO was not available on that day in the office, P.W.3 stated to him that he would send his application to the A.O. and he meet the A.O. later, accordingly on 13.1.1999, he met the A.O. and asked him to conduct a survey as per his application, demanded to pay him Rs. 4,000/- to conduct the survey, and when he expressed his inability, bargained and reduced it to Rs. 3,000/- and having no other go, he agreed, and then the A.O. asked him to pay an advance of Rs. 1,000/- after the Sankranti Holidays i.e., on 18.1.1999.

18. The learned Special Judge had also taken corroboration from the contents of the post-trap proceedings under Ex.P.6. It reads as follows:

...I perused Ex.P.6 and found, P.W.1 at that earliest point of time gave a statement exactly what he stated before the Court in his chief examination as recorded supra and there is no deviation whatsoever.

19. Further, the learned Special Judge referred as follows:

...what P.W.1 mentioned in his complaint Ex.P.1 and stated in his subsequent statements that it is not for the sub division of the land but for fixing only the boundaries of the land in two villages and to know the extent he sought the official services of the A.O.

20. The learned Special Judge also referred to the evidence of P.W.6 and stated as follows:

...P.W.6 - the DSP deposed, that P.W.1 came on 17.1.1999 to his office and stated about the demand for bribe made by the A.O. for conducting survey of his land and submitted a Telugu written report Ex.P.1.

21. The learned Special Judge further referred to as follows:

...Before recording what those deviated statements are spoken to by P.W.1 in his cross examination by defence counsel, it is necessary to record here first the admissions made by P.W.1 in the re-examination by the learned Public Prosecutor, after the cross-examination by the defence counsel, where P.W.1 categorically admitted to be true, that what all he stated during the cross-examination by the defence counsel was not stated by him either in his complaint Ex.P.1 or in his statement before the Magistrate or in his statement before the Inspector, ACB.

22. Thus, the learned Special Judge had given his reasons for his conclusions. No doubt, the reasoning appears to be justified, but however, whether the learned Special Judge could have sought corroboration from the contents of Ex.P.1 - complaint and Ex.P.6 - Mediators Report and whether the contents of those documents can be relied upon without marking contradictions and omissions as per law. The legal position has been well settled. The FIR, being not a substantive piece of evidence, if a party wants to contradict the witness, i.e., maker of the FIR, when he deviates from the version given in the FIR, the attention of the said witness (author of the FIR) should be brought to the contents of the FIR before he is discredited with respect to his earlier statements. Such previous statements must be confronted to him. Admittedly, in this case, P.W.1 was not declared hostile. He was not cross-examined by the learned Public Prosecutor. His attention was not drawn to the contents of Ex.P.1 - complaint. The only suggestion given to him and accepted by P.W.1 was that what all he stated during the cross-examination by the defence counsel was not stated by him either in his complaint - Ex.P.1 or in the statement made before the Magistrate under Ex.P.2 or in the statement made before the ACB Inspector. Thus, what all he stated in his cross-examination was sought to be shown as omission. It was also suggested to him that during the post-trap proceedings, he did not state what all he had stated during the cross-examination.

23. In the above circumstances, we have to examine how the contents of FIR can be used, how the statements made by the witness when he was examined by the police can be used and how the contents of the panchanamas i.e., the first mediator's report and the second mediator's report in a trap case can be used. As far as the FIR is concerned, in case between Nagi Reddy v. State of A.P. (1968) 1 Andh. W.R. 178, it was observed as follows.

First Information Report is a valuable piece of evidence inasmuch as it is the earliest version that can be compared with what is later told during the trial. All

variations i.e., contradictions and omissions can be considered in judging the truth or otherwise of such version.

24. It is also settled legal position that the FIR is not a substantive piece of evidence. However, it can be used for one of the limited purposes of corroborating or contradicting the maker thereof. Another purpose for which the FIR can be used is to show that the information is a piece of evidence *res gestae*. In certain cases it can be used as dying declaration u/s 32 of the Evidence Act as to the cause of informant's death or as part of the informant's conduct. Refer *Damodarprasad Chandrikaprasad and Others Vs. State of Maharashtra*. Therefore, what was stated by a witness immediately after the occurrence of an incident becomes a piece of evidence on the basis of the principle of *res gestae*. Thus, it is admissible u/s 157 or Section 8 of the Evidence Act as a evidence of conduct. Since the FIR is not a substantive piece of evidence and it can be used only for the purpose of corroboration or contradiction when the maker of FIR gives a different version before the Court, his attention must be brought to the contents of the FIR and he must be specifically asked whether he had stated as in FIR. Without following such procedure, the contents of FIR cannot be relied upon.

25. Section 161 of the Criminal Procedure Code, 1973, reads as under:

161. - Examination of witnesses by police: (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.

[Provided that statement made under this sub-section may also be recorded by audio-video electronic means.]

26. Section 162 of Criminal Procedure Code, 1973, reads as under:

162. Statements to police not to be signed: Use of statements in evidence: (1) No statement made by any person to a police officer in the course of an investigation under this chapter shall, if reduced to writing, be signed by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the court, by the prosecution, to contradict such witnesses in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) Nothing in this Section shall be deemed to apply to any statement falling within the provisions of Clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act.

27. Section 145 of the Indian Evidence Act, 1872, reads as under:

145. Cross-examination as to previous statements in writing: A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

28. In *Sheikh Hasib alias Tabarak Vs. The State of Bihar*, it was observed as follows:

FIR, being not substantive evidence, the attention of the author of the FIR is to be drawn to the contents of FIR before he is discredited with respect to the statements. In a case where the conviction was solely based on the statement of evidence recorded during the investigation, this Court has disapproved such appreciation of evidence.

29. Since marking of contradictions and omissions are very important in a criminal case and failure to mark the material contradictions and omissions decide the fate of the case, I would like to deal with the same and hope that it may be useful to the trial Courts, Public Prosecutors and Defence Counsels while dealing with criminal cases.

30. Contradiction means a statement in evidence given by a witness on a material fact which is contrary to the earlier statement said to have been given by the said witness when he was examined by police. For example, a witness says in his evidence that "A" stabbed "C", but in his statement before the police he stated that "B" stabbed "C". A contradiction should be with regard to a material fact. If a witness deposed that a particular object or person was at a distance of 50 feet before police but when examined before the Court if he deposed that the distance may be 50 to 60 feet, it is neither a contradiction nor an omission. It may be a contradiction when a witness gives a quite opposite or different version. For example, when he says that the accused ran away towards east before the Court but when he deposed "towards west" before police.

31. An omission is a statement of a witness while giving evidence on a material fact which he did not state before the police. For example, before the Court if he deposed that A, B and C stabbed the deceased but before the police he had only stated that A and B only stabbed the deceased. Therefore, as far as C is concerned, it is an omission.

32. It is settled law that statements of witnesses recorded by police under 161(3) Cr.P.C. cannot be used for corroborating the statements made in the Court. Those statements, i.e., 161(3) statements can be used to contradict the evidence in a Court. The attention of the witness must be brought to those parts of the statement which are sought to be used for contradicting his evidence. In a case between Pedda Narayana and Others Vs. State of Andhra Pradesh, it was observed as follows:

A statement recorded by the police during investigation is not at all admissible and the proper procedure is to confront the witness with the contradictions when they are examined and then ask the investigating officer regarding those contradictions.

33. For example, when a witness says before the Court that A and B rushed to the spot hearing the cries, but he did not whisper about the presence of A and B before the police, it is an omission of a material fact and, therefore, amounts to contradiction. Then the witness must be specifically asked that he did not state before police that A and B rushed to the spot. Then the Investigating Officer should be asked whether the witness had stated before him about the rushing of A and B to the scene of offence hearing the cries. Then the entire statement of the witness recorded by the police should be marked for the purpose of proving the omission.

34. Similarly, when a witness had stated that "A" stabbed "C" before police but before the Court if he deposed that "B" stabbed "C", then the witness should be asked whether he had stated before the police that "A" stabbed "C". If the witness admits, the contradiction is proved. But if the witness denies the statement, then it must be suggested to the witness that he had stated before the police that "A" stabbed "C" and the portion of 161 Cr.P.C. should be marked. Then the Investigating Officer should be specifically asked whether the witness had stated before him as in for example Ex.D.1. Some Courts mark the contradictions only after the Investigating Officer has been examined. The same appears to be the correct procedure. If the contradiction is marked before the examination of Investigating Officer but if the Investigating Officer is not examined, the said contradiction cannot be proved. However, for non-examination of Investigating Officer, adverse inference can be drawn against the prosecution, if it appears that only for the purpose of avoiding to prove the contradiction or omission the Investigating Officer's evidence has been withheld. Recording of joint statements of witness is not permissible u/s 161(3) Cr.P.C. Delay in recording 161 Cr.P.C. statements casts a cloud of suspicion on the credibility of prosecution case.

35. The object of Section 162 Cr.P.C. is to impose a bar against the use of statement made before the police except for the limited purpose set out in the proviso, i.e., for using the same as a dying declaration u/s 32(1) of the Indian Evidence Act, 1872, or for the purpose of proving any recovery u/s 27 of the Indian Evidence Act, 1872.

36. In the case between *Tori Singh Vs. The State of Uttar Pradesh*, the police officer while preparing a sketch map had put a plus (+) mark showing the spot where the deceased was said to have been hit on the basis of statements made to him by witness. The Apex Court held that sketch map prepared by the police showing the place of occurrence, i.e., mark showing the spot where the deceased is said to have been hit, is hit by Section 162 Cr.P.C. and hence inadmissible in evidence. However, sketch map is admissible so far as it indicates all that the police officer himself had seen at the scene of occurrence. However, the same can be used for contradicting the statements of the witness. With regard to the spot, proviso to Section 162 Cr.P.C. authorizes an accused to make use of a previous statement made by a witness to a police officer in the course of investigation only for the purpose of contradicting the evidence of witness in the manner provided u/s 145 of the Indian Evidence Act, 1872.

37. Thus, the above referred sections make it very clear that any part of the statement recorded by the police cannot be used for any purpose at any enquiry or trial in respect of any offence under investigation at the time when such statement was made. Such statement should not be signed by the person making it. Any part of the statement if duly proved may be used to contradict such witness in the manner provided u/s 145 of the Indian Evidence Act, 1872. The prosecution also can use the statements recorded u/s 161(3) Cr.P.C. for the purpose of contradiction with the permission of the Court treating the witness hostile. Since the statements recorded by police are not substantive piece of evidence, they cannot be used for corroboration. The accused cannot use them when the witness is called as defence witness. Thus, those statements cannot be used for corroboration when a witness has been examined either by the prosecution or defence or a Court witness See *Chinnammal v. State of Tamilnadu* 1997 (1) ALD (Cri.) 23 SC.

38. In *Md. Badaruddin Ahmed Vs. State of Assam*, it was held as follows:

...Unless a particular matter or point in previous statements sought to be contradicted is placed before the witness for explanation, the previous statement cannot be used in evidence. The Drawing of the attention of the witness to his previous statement sought to be contradicted and giving of all opportunities to him for explanation are compulsory.

39. What is necessary for substantial compliance of requirements of Section 145 of the Evidence Act is to treat the witness fairly and to give him reasonable opportunity to explain the contradictions after his attention has been drawn to them. If a prosecution witness has given evidence contradicting the statement

recorded u/s 161(3) Cr.P.C., the witness should be asked whether he has made such statement to the police by drawing his attention to the previously recorded statement. If the witness denies to have made such contradictory statement to the police or says he does not remember whether he made it, the defence has to prove the said contradiction through the investigating officer who claims to have recorded such statement. Only contradicting portion should be exhibited and not the entire statement. If the witness admits the contradictory statement, there is no need to put the same to the Investigating Officer. The ideal procedure would be to record and extract deposition of the relevant previous statement or to make a specific observation about the context regarding which the contradiction has been marked. For example, contradiction is regarding "knife", "east or west" or a particular person or state of things etc.

40. In this case, only suggestions have been given to the witnesses. Mere putting suggestions and not getting the contradictions on record in the evidence of witness does not amount to proper compliance of Section 145 of the Evidence Act. Admittedly, in this case, P.W.1 was not declared hostile and he was not cross-examined. If the confronted portion is not marked by the Court, it would be difficult to verify the contradictions since statement recorded by the police are hit by Section 162 Cr.P.C. Therefore, the Court must always be vigilant and keep it in mind that the statement made by any witness before the police is not an admissible evidence and such a statement could be used only for the purpose of contradicting the evidence of witness in view of the provisions of Section 162 Cr.P.C. read with Section 145 of the Evidence Act.

41. In case between Tasreem Singh, Appellant v. State, Respondent AIR 1978 J&K 53 (wherein reliance was placed on State of Rajasthan Vs. Kartar Singh, it was observed as follows:

Before the prosecution can take advantage of contradicting the witness u/s 145 of the Evidence Act, it is the bounden duty of the prosecution to get the statement of those witnesses made u/s 161 Cr.P.C. proved by the officer who had recorded those statements during the course of investigation.

42. The learned Special Judge had not only taken corroboration from the contents of the FIR lodged by P.W.1 but also from the contents of the pre-trap proceedings and post-trap proceedings and the evidence of the Investigating Officer who deposed about the statement made by the accused in post-trap proceedings. Now, it has to be seen whether the procedure adopted by the learned Special Judge is correct.

43. In case between D.V. Narasimham Vs. State, it was observed as follows:

...Statements of the accused to the police when demand of illegal gratification is being made is hit by Section 162 Cr.P.C.

It was further held as follows:

...The Court should not advert to the question whether the accused made any

explanation to the police officer after the success of the trap as to the money recovered from the possession of the accused as such explanation, even if made, is hit by Section 162 Cr.P.C.

44. Therefore, what all that had been stated by the accused in the post-trap proceedings, cannot be treated as substantive evidence. It appears that when the prosecution is permitted to cross-examine its own witness, the prosecution cannot rely on his evidence or at least, part of his evidence. Probably, keeping this in view, the learned Public Prosecutor in the Court below seems to have not requested the Court to declare P.W.1 hostile. It is also settled law that the evidence of a hostile witness may not be rejected outright and the Court may accept a part of evidence of such witness for valid reasons. However, when a witness appears to have made different statements at different stages, it is clear that he has no regard for truth. It appears that non cross-examination of P.W.1 by the prosecution is fatal to its case.

45. In a case between State Vs. Bhola Singh, the Rajasthan High Court observed as follows:

When a party declines to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believes that the testimony given could not be disputed at all. This is the rule of essential justice.

46. Be it noted that it is the solemn duty of the Court to convict the culprit who had committed the offence. It is also the solemn duty of the Court to see that no innocent person is unnecessarily punished. If an innocent person is punished, not only that person, but all his kith and kin and also all the persons who knows that the accused is an innocent person will loose their faith in Courts. It is settled law that the Courts have to convict the accused only on the basis of legal evidence. There should not be any moral conviction. The basic principle is that the evidence, which is admissible as per the provisions of the Indian Evidence Act, 1872, and the Code of Criminal Procedure, 1973, and other Enactments should establish the guilt of the accused. Any prudent man who thinks logically should come to a conclusion that the accused had committed the offence. The general principles, basing on which the Indian Evidence Act, 1872, and the Code of Criminal Procedure, 1973, are enacted have been based on rich human experience. Most of the provisions have stood the strict scrutiny of logic, sound reasoning and human experience. Therefore, the Courts have to follow the settled legal principles keeping away personal whims and fancies.

47. It is our experience that there are still certain police officers who investigate the criminal cases with utmost devotion, care and they do not leave any stone unturned, which helps to find out the truth and thus make perfect investigation and file the cases. They are also well acquainted with the basic principles of law and legal requirements and the importance of compliance of those provisions. It is our experience that because of non-compliance of mandatory provisions, several cases fail. Of course, there are some unscrupulous and corrupt police

officials who want to take advantage of the criminal cases and their investigation itself shows the lack of promptness and spontaneity. They collude with the accused for some extraneous considerations and also implicate innocent persons in criminal cases. Thus, the influential persons, with their economic and political power and with their contact with police officials, implicate their opponents in false criminal cases. There are instances wherein the police officers try to help the real culprits and delete their names either at the stage of FIR or if it is not possible, at a subsequent stage. It is the duty of the honest superior police officers to verify the investigation done by their subordinates from time to time and see that corrupt officials do not change the fate of the case.

48. In a society, if a day comes where innocent persons are tried and convicted and the real culprits are set free, the socio-democratic fabric of the society would fall down and there will not be any moral or ethical values in society and if the moral and ethical values in the society are lost, there cannot be any order in the society guiding the people of younger generations and it would be difficult to maintain peace and progress in the society. Corruption is the root cause for 90% of the evils faced by us. The connection between the corrupt officials, politicians and big business houses appears to be on increase and the common man is slowly coming under the impression that such persons can do anything as they wish. Therefore, much responsibility lies on all those who think about the society and its future. If an intellectual knowingly keeps quiet, it may amount to treason because the future of the country depends upon how the present intellectuals and leaders deal with the present day situation. Since false implication of the accused cannot be completely ruled out in the present day scenario, the burden and the duty of the Judge presiding over the criminal Court would be much more. Therefore, he has to strictly follow the principle of stare decisis and should follow settled legal principles.

49. There cannot be any presumption that the contents of FIR are true or that they have been originally given by the complainant. Similarly, there cannot be any presumption or assumption that 161(3) Cr.P.C. statements or investigations done by the police officers reveal truth. The judicial officers should not be under the impression that whatever stated by the police or the accused is true. If that is the case, then there is no need of establishing the Courts and conducting criminal trials and all the accused may be straightaway sent to jail through police stations. Therefore, the Judges must realize the role assigned to them and they must apply their logical mind, reasoning power and judicious approach and consider the facts and circumstances of each case on the basis of settled legal principles and decide the case. They must have an inner satisfaction that their judgment is correct. For any reason, if their judgment is not satisfactory, then they must do hard work, ascertain the facts meticulously from the evidence and search for the case laws by burning oil in the midnight, if necessary, and then only prepare the judgments. A judgment pronounced by a Judge may not affect his career, but, the same judgment will ruin some families and may cause lot of miseries and heart breaking to who feel that injustice has been done to them.

Even the party who had lost the case should have an inner feeling that the judgment is perfectly justified.

50. In this case, P.W.1 had categorically deposed that the accused asked him to deposit Rs. 1,000/- in the bank and to get challans for making sub-divisions of his lands and that he himself requested the accused to deposit the amount in the bank and to get the challans towards sub-division fees and P.W.1 categorically deposed that the accused did not demand any bribe from him and that assuming that the accused was demanding bribe, he lodged complaint with the ACB. This part of evidence, though contradicting to the version given by him in the chief-examination, cannot be brushed aside when no suggestion was put to the witness that he was won over by the accused and what he had stated as referred above is false and incorrect. What is elicited in the re-examination is that whatever he had stated in the cross-examination was not stated by him in his earlier statements i.e., in Ex.P.1 - complaint or in 164 Statement before the Magistrate. That only shows that what he had stated in the cross-examination may be omission. Of course, that also cannot be definitely said in the absence of contradicting the witness when he was in the witness-box with his previous statement and marking such statements for the purpose of contradictions or omissions amounting to contradictions. It is settled law that defective investigation need not necessarily result in the acquittal. The appreciation of evidence must be based on legal evidence. Though technicalities should not defeat the justice, but at the same time, non-compliance of mandatory provisions in appreciation of evidence and relying on inadmissible portions of evidence cannot be permitted. Therefore, the whole appreciation of evidence by the learned Special Judge appears to be incorrect.

51. A reading of the evidence of P.W.1 makes it clear that he had specifically given two versions. The version in the chief-examination is favourable to the prosecution and the version given by him in the cross-examination is favourable to the accused. Now the question is which version to be preferred. When P.W.1 had given two contradictory statements, it appears that it is not safe to convict the accused on the basis of evidence of such witness.

52. Now, it has to be seen that even if the demand to be taken as not proved as the version of P.W.1 not to be accepted, whether it can be said that the accused received illegal gratification. As discussed supra, when the demand had not been proved and when the case of P.W.1 is that the amount paid to the accused is towards fees for sub-divisions, receiving of Rs. 1,000/- from P.W.1 by the accused cannot be treated as illegal gratification. Of course, the settled legal position is that when it is proved that the accused had accepted illegal gratification, he is liable to be convicted u/s 7 of the Act, even if the demand is not proved. But, as discussed above, the version of P.W.1 is that the accused had not received illegal gratification. Since there is no positive evidence to show what was received by the accused is illegal gratification, it appears that it is not safe to convict the accused even for the offence punishable u/s 7 of the Act. In view of

the above discussion, I hold that the prosecution, in this case, had miserably failed to prove its case and the accused is entitled for acquittal.

53. In the result, the Criminal Appeal is allowed. The judgment dated 01.09.2003 in C.C. No. 7 of 2000, passed by the Additional Special Judge for SPE & ACB - cum V Additional Chief Judge, City Civil Court, Hyderabad, is set aside and consequently the conviction and sentence passed against the accused are also set aside. Fine amount paid by the accused, if any, shall be refunded to him.