

(2016) 03 BOM CK 0065

In the Bombay High Court

Case No : Criminal Appeal No. 128 of 2004

Vinod s/o Savalaram Kanadkhedkar, Age : 46 years, Occu.: **APPELLANT**
Government Service, At present working as Clerk with the
Office of Collector, Nanded, R/o : 84, "Tukai", Kousalya
Nagar, Dhanegaon, Nanded

Vs

The State of Maharashtra, through Police S **RESPONDENT**

Date of Decision : 31-03-2016

Acts Referred:

Prevention of Corruption Act, 1988 — Section 13(2), 19, 7

Citation : (2016) 2 AIRBomRCri 157 : (2016) ALLMRCri 3697 : (2016) 2
BomCR(Cri) 678 : (2016) MCR 1124 : (2016) 4 MhLJCrI 570 : (2016) 3
RCRCriminal 744

Hon'ble Judges : Indira K. Jain, J.

Bench : Single Bench

Advocate : Mrs. R.K. Ladda, APP, for the Respondent

Final Decision : Allowed

Judgement

Indira K. Jain, J.(Oral) - This appeal takes an exception to the judgment and order dated 20th February, 2004 passed by the learned Special Judge, Nanded in Special (ACB) Case No. 2 of 1994 convicting the Appellant for the offences punishable Sections 7 and 13(2) of the Prevention of Corruption Act, 1988 as under:

Conviction under Section

Sentence

7

Simple Imprisonment for six months and fine of Rs. 200/- in default Simple Imprisonment for fifteen days.

13

(2) Rigorous Imprisonment for one year and fine of Rs. 300/- in default Simple Imprisonment for one month.

2. Prosecution case in brief is as under :

On 12th September, 1993 Madhukar and Ramesh brothers-in-law of Complainant Shivram Tukaram Kharde were arrested by Shivajinagar Police Station, Nanded. They were taken to Tahsil office in the evening. Accused was serving as junior clerk in Tahsil office. He was to assist senior clerk PW-6 Padhye working in the office of Executive Magistrate. Complainant was informed that his brothers-in-law were arrested and so he rushed to Tahsil office. He was told by Accused to come on next day as remand warrants were already issued.

3. On 13th September, 1993 Complainant Shivram with his cousin Yadav had been to Tahsil office and submitted an application for bail for Madhukar and Ramesh. They were asked to wait till 04:00 p.m. as learned Magistrate was busy in a meeting. It is alleged that at 04:00 p.m. when Shivram met the Accused he demanded Rs. 300/- for releasing Madhukar and Ramesh on bail. Complainant expressed his inability to pay the amount. He however paid Rs. 100/- to Accused. Madhukar was released on bail on that day. So far as Ramesh was concerned it is further alleged that Accused insisted to pay remaining amount of Rs. 200/- and that time Complainant told him that he had no money and he would come with Rs. 100/- on next day.

4. On 14th September, 1993 Shivram approached A.C.B. office and lodged report alleging therein that Accused demanded money otherwise than for lawful purpose. On the basis of report trap was arranged. It was successful and currency notes one of Rs. 50/-, two of Rs. 20/- each and one of Rs. 10/- denominations were found in possession of Accused. Pre-trap Panchanama was prepared before the actual trap. After trap was successful post-trap Panchanama was drawn. Statements of witnesses were recorded. On completing investigation papers were submitted to the competent authority for issuing sanction. Competent authority issued sanction to prosecute the Accused. Thereafter charge-sheet was filed before the Special Court.

5. Charge came to be framed against the Accused vide Exhibit 13. He pleaded not guilty and claimed to be tried. Accused submitted his written defence and also through cross-examination of witnesses raised the defence that he accepted the amount for the purpose of paying Advocates fee for identifying surety, for fixing Court fee stamp to bail bonds and stamps for affidavit. Accused submitted that as per the instructions of his superior officer he was to assist the litigants approaching the office for official work and there was no motive to accept the amount as bribe as alleged by Complainant.

6. To substantiate alleged guilt of Accused prosecution examined in all 6 witnesses viz. PW-1 Pandurang Ganpatrao Wakadkar was a shadow Panch, PW-2 Shivram Complainant, PW-3 Yadav cousin of Complainant, PW-4 Investigating Officer Gopinath Patil, PW-5 G.M. Madan sanctioning authority and PW-6 Vinayak

Padhye senior clerk in Tahsil office. Considering the evidence of Complainant, his cousin and Investigating Officer Trial Court came to the conclusion that demand and acceptance was proved beyond reasonable doubt. Regarding sanction evidence of PW-5 competent authority was relied upon and sanction was held as legal and valid. On the basis of evidence of above witnesses Trial Court held that charge was proved beyond reasonable doubt and in consequence thereof convicted the Accused. Hence this appeal.

7. Mr. Deshmukh, learned counsel for Appellant during the course of arguments made the following submissions -

(a) Complainant Shivram had a reason to grind an axe against Accused since his brothers-in-law were not released on bail on the same day. Learned counsel would submit that evidence of Complainant was not corroborated by independent witnesses but by his cousin PW-3 Yadav. It is further submitted that shadow Panch PW-1 Pandurang turned hostile and he did not support prosecution on material particulars. Learned counsel submits that in this background reliance could not have been placed on the interested witnesses.

(b) Commenting upon conduct of Complainant learned counsel for Appellant submitted that Complainant had been to Tahsil office but did not inquire about the reason for arrest of Madhukar and Ramesh. Madhukar gave Rs. 100/- as stated in the complaint but Complainant even did not bother to inform Madhukar and Madhukar was not taken to office of A.C.B. No where in the complaint it is stated that amount was paid towards bribe. This was a material omission which was ignored by the Trial Court.

(c) According to learned counsel for Appellant defence raised by Accused is most probable, believable and acceptable in the circumstances in which amount of Rs. 100/- was accepted by Accused. Accused came with a bold defence that amount was required for the purpose of completing formalities so that brothers-in-law of Complainant would be released on bail. Learned counsel submits that Accused was duty bound to obey the instructions of his superiors that no one attending the office for official work should make any grievance and the staff working should assist the persons visiting the office for their work.

(d) Learned counsel submitted that on 13th September, 1993 Madhukar was released on bail after completing the formalities, but Ramesh could not be released as formalities were not completed on 13th September, 1993. Learned counsel submitted that absolutely there is no iota of evidence regarding demand and unless prosecution proves demand, Accused cannot be convicted for the offence alleged.

8. Per contra learned APP submitted that Complainant has stated in complaint and also in evidence that Accused demanded the amount towards bribe. She further submitted that trap was successful and based on evidence Trial Court has rightly convicted the Accused.

9. On the basis of the material and submissions advanced on behalf of parties, following points arise for determination of this Court.

(i) Whether prosecution has proved that on 13th September, 1993 Appellant being a public servant had demanded an amount of Rs. 300/- as a remuneration other than legal remuneration as a motive for releasing brothers-in-law of Complainant on bail ?

(ii) Whether prosecution has further proved that Appellant being public servant committed criminal misconduct by securing amount of Rs. 100/- by corrupt and illegal means from Complainant by abusing his position as public servant ?

(iii) Whether sanction to prosecute the Appellant granted by PW-5 sanctioning authority Mr. Madan is legal and valid ?

10. Findings to above points (i) to (iii) are in the negative for the reasons to follow -

REASONS

Most of the material facts are admitted in this case. Accused does not dispute that at the relevant time he was attached to Tahsil office as a junior clerk and he was a public servant. He did not dispute that Complainant with his cousin Yadav had been to Tahsil office on 12th September, 1993 and 13th September, 1993. He admits that he accepted Rs. 100/- from Complainant on 13th September, 1993.

11. In view of above admissions controversy would remain in narrow compass and this Court has to consider the evidence of Complainant, his cousin and Investigating Officer to find out whether amount accepted by Accused was towards illegal gratification as alleged by Complainant or towards completing legal formalities as submitted by Accused.

12. It is stated by Complainant Shivram in his evidence that on 12th September, 1993 after he came to know about arrest of Madhukar and Ramesh his brothers-in-law he had been to Tahsil office. He further stated that on 13th September, 1993 along with Yadav he again attended the office and requested Accused to release his brothers-in-law. It is further stated by Complainant that Accused demanded amount of Rs. 300/-. He was unable to pay the same. He paid Rs. 100/-. Thereafter Accused prepared bail bonds for Madhukar and his release order. He stated that for release of Ramesh, Accused asked him to come with Rs. 200/- on next day.

13. It further appears from the evidence of Complainant that on 14th September, 1993 Complainant went to A.C.B. office and lodged complaint against Accused. Complaint is proved at Exhibit 29. This Court finds that evidence in respect of pre-trap and post-trap Panchanamas would not be of much importance as Accused has admitted that he accepted an amount of Rs. 100/-. So far as demand is concerned from the evidence of Complainant and report lodged by

him it is apparent that Complainant did not state before A.C.B. officer that amount was demanded towards bribe by Accused. He admitted in cross-examination that neither in the complaint nor in the statement it is stated by him that Rs. 100/- were demanded by Accused as bribe. This omission is a material omission which shows that Complainant made material improvement on demand of Rs. 100/- as a bribe.

14. The defence could bring on record material contradiction "A" which would indicate that he did not come before the Court with true facts and tried to play hide and seek.

15. Another witness PW-3 Yadav is cousin of Complainant. He is an interested witness. PW-1 Pandurang shadow Panch was declared hostile by prosecution and he did not support the prosecution on demand and acceptance of alleged bribe. It appears from record that PW-1 Pandurang was an independent witness. Complainant and PW-3 his cousin had a grudge against Accused as brothers-in-law of Complainant were not released on the same day on bail. But PW-1 Pandurang had no reason to side the Accused or to disown his role as Panch. If the evidence of PW-1 Pandurang is taken into consideration, it is clear that he substantiates the defence of Accused that amount was given for completing necessary legal formalities as brothers-in-law of Complainant were to be released on bail. Evidence of PW-1 Pandurang further makes the evidence of Complainant and his cousin seriously doubtful.

16. Reverting to demand of alleged illegal gratification it would not be out of place to mention here that law is well settled and demand of illegal gratification is sine quo non for constituting offence under the Act of 1988. Mere recovery of tainted money is not sufficient to convict the Accused when substantive evidence in the case is not reliable unless there is evidence to prove payment of bribe or to show that money was voluntarily accepted as a bribe. Even mere receipt of amount by Accused is not sufficient to fasten the guilt in the absence of evidence with regard to demand and acceptance of amount as illegal gratification.

17. In the case on hand it can be seen from complaint Exhibit 29, evidence of Complainant, PW-3 Yadav and Investigating Officer that Accused never made a demand as illegal gratification. Even according to them demand was for getting Madhukar and Ramesh released on bail. Investigating Officer admits in an unequivocal terms that in all the documents he found that amount was asked for the work of bail. Investigating Officer also admits that after payment of amount Accused asked the Complainant to wait outside the office. It shows the conduct of Accused. If at all he demanded and accepted the amount towards bribe in natural course he would have asked the Complainant to go away giving assurance that work would be done. He did not do so. He asked Complainant to wait outside the office that shows that defence raised by Accused that amount was asked for completing the formalities of bail and as per the instructions of superior officers he was assisting the Complainant, appears to be more probable, plausible, believable and acceptable.

18. Coming to sanction as required under Section 19 of the Act of 1988, it appears from evidence of PW-5 sanctioning authority Mr. Madan that documents which were submitted for according sanction were the report of police and format of sanction order with other documents. So far as other documents are concerned, neither sanction order Exhibit 36 nor sanctioning authority had given description of those documents.

19. Before considering the evidence of sanctioning authority it is necessary to see the object of Section 19 of the Act. Under section 19, grant of sanction is a weapon to discourage vexatious prosecution and it is a safeguard for the innocent, though not a shield for the guilty. The essentials of a valid prosecution can be stated as under -

(i) The prosecution must send the entire relevant record to the sanctioning authority including the FIR, disclosure statements, statements of witnesses, recovery memos, draft charge-sheet and all other relevant material. The record so sent should also contain the material/document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction;

(ii) The authority itself has to do complete and conscious scrutiny of the whole record so produced by the prosecution independently applying its mind and taking into consideration all the relevant facts before grant of sanction;

(iii) The power to grant sanction is to be exercised strictly keeping in mind the public interest and the protection available to the accused against whom the sanction is sought ;

(iv) The order of sanction should make it evident that the authority had been aware of all relevant facts/materials and had applied its mind to all the relevant material.

(v) In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law.

20. In the above legal background evidence of PW-5 sanctioning authority is to be scrutinized. It is stated by PW-5 Mr. Madan that in 1993-94 he was Collector of District Nanded. It is not in dispute that he was appointing and disciplinary authority of Accused i.e. junior clerk. He states that in 1993, Accused was posted as clerk in Tahsil Office, Nanded. He received documents from Superintendent of Police (A.C.B.) as regards trap case against Accused. The documents were containing a report of police, format of sanction order and other documents. He studied those documents and came to the conclusion that there was sufficient material against Accused and passed sanction order to initiate prosecution against Accused.

21. In the cross-examination sanctioning authority admitted that in none of the

documents it was mentioned that Accused demanded amount for his own use. Sanction order Exhibit 36 would indicate that grievance of Complainant were reproduced in the sanction order and then the sanctioning authority stated that upon reading case papers of investigation in Crime No. 212 of 1993 of Police Station Vazirabad, Nanded, he was satisfied that Accused was to be prosecuted for the offences under the Act of 1988. Neither the sanctioning authority nor the sanction order refers to the description of documents other than the complaint and format of sanction order referred by sanctioning authority.

22. Needless to state that sanction order was not a mere formality. It was for the sanctioning authority to apply its mind before according sanction. Absence of description of documents referred by sanctioning authority and only considering the grievances made by Complainant would show lack of application of mind by competent authority while according sanction. If at all the documents other than complaint were taken into consideration those documents should have been referred in the sanction order. This was not done and therefore even the sanction accorded under Section 19 of the Act of 1988 by PW-5 Mr. Madan vide Exhibit 36 cannot be said to be legal and valid.

23. Apart from sanction, prosecution does not succeed for want of trustworthy and reliable evidence on demand and acceptance. In this premise impugned judgment and order of conviction and sentence deserves to be interfered with. Hence the following order -

ORDER

I. Criminal Appeal No. 128 of 2004 is allowed.

II. The judgment and order dated 20th February, 2004, passed by the learned Special Judge, Nanded, in Special (ACB) Case No. 2 of 1994, convicting and sentencing Appellant Vinod s/o Savalaram Kanadkhedkar for the offences punishable under Sections 7 and 13(2) of the Prevention of Corruption Act, 1988, is hereby set aside.

III. Instead Appellant Vinod s/o Savalaram Kanadkhedkar is acquitted of the offences punishable under Sections 7 and 13(2) of the Prevention of Corruption Act, 1988.

IV. Bail bonds of Appellant Vinod s/o Savalaram Kanadkhedkar shall stand cancelled forthwith

V. Fine amount if deposited, shall be refunded to the Appellant.