

(2008) 04 BOM CK 0162
In the Bombay High Court
Case No : Criminal Appeal No. 74 of 2001

Vishnupant Narute

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 10-04-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 4
Prevention of Corruption Act, 1988 — Section 13(1), 13(2), 7

Citation : (2008) 04 BOM CK 0162

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : R.L. Kute, for R.N. Dhorde, for the Appellant; N.H. Borade, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

V.R. Kingaonkar, J.—Challenge in this appeal is to Judgement rendered by learned Special Judge, Osmanabad, in Special Case (AC) No. 2/1998, convicting appellant, named above, for offence punishable u/s 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 and sentencing him to suffer rigorous imprisonment for six (6) months and to pay fine of Rs. 1000/-, in default to suffer rigorous imprisonment for one (1) month on first count and to suffer rigorous imprisonment for one (1) year and to pay fine of Rs. 2000/-, in default to suffer rigorous imprisonment for three (3) months on the second count.

2. Undisputedly, the appellant was working as lineman in Telephone Exchange Sub-Division at Bhoom. He was entrusted work of installation of telephone lines of village Aasu and village Sonari, which fall under jurisdiction of Paranda Sub-office. Complainant PW5 Rashid Patel is inhabitant of village Aasu and deals in transport business. He submitted an application for new telephone connection at his residence. He deposited the required initial amount of Rs. 1000/- as first installment for telephone connection alongwith Rs. 10/- towards charges of form. The first demand note was issued to him on 14th July, 1997 and he had

deposited the said amount on 28th July, 1997. The name of complainant (PW Rashid Patel) thereafter was included in the waiting list of the customers. The second advice demand note of Rs. 400/- alongwith the necessary forms in triplicate were given to the appellant by the Sub Divisional Engineer with a direction to recover the said amount from the customer (PW Rashid Patel) and, thereafter, to install the telephone line. The last date of such payment of second installment as demanded was 8th September, 1997. There is no dispute about the fact that the appellant did not issue the said second advice of demand to the customer (PW Rashid Patel). There is also no dispute about the fact that on 5th September, 1997, the appellant had visited village Aasu in connection with some official work.

3. Briefly stated, the prosecution case is that the appellant demanded an amount of Rs. 500/- as illegal gratification for installation of the telephone connection at residence of complainant (PW Rashid Patel). Though complainant urged him to install the telephone connection, yet, he refused to do the work without payment of illegal gratification of Rs. 500/-. There was quarrel between them at village Aasu on account of non-payment of illegal gratification. He had gone to Mumbai for a short duration of about two (2) weeks thereafter. He again met the appellant at Paranda weekly bazar and requested for installation of the telephone connection. The appellant then told him that he would not accept anything less than Rs. 500/- to do the work. The complainant approached the Anti Corruption Bureau on 5th September, 1997 and lodged a report. A pre-trap panchanama was prepared after giving five (5) currency notes of Rs. 100/- denomination smeared with anthracene powder. Two independent panchas were called at the office of the Anti Corruption Bureau, in whose presence, demonstration was given as to how the tainted currency notes showed blistering of blue colour and what instructions were given to the complainant at the time of giving the said tainted currency notes to the complainant. The complainant and one of the panch witnesses went to the office of the Telephone Exchange at Paranda, but then the appellant was not present there. They asked PW Kutub Saheb who is also a lineman attached to the said Telephone Exchange and was present in the office, as to where was the appellant. Then, PW Kutub Saheb informed them that he had gone to village Aasu. By that time, PW Kutub Saheb received a telephone call of the appellant. The appellant asked PW Kutub Saheb as to whether anyone had come in the office to meet him. Then, PW Kutub Saheb told him that two (2) persons had been to the office to see him. The appellant instructed PW Kutub Saheb to handover the telephone to that person. He had telephonic conversation with the complainant. He assured the complainant to meet near the Court premises at Paranda. A trap was laid in front of a hotel called "Hotel Shivneri", situated opposite to the Court premises of Paranda. The complainant alongwith panch witness awaited in front of the said Hotel, whereas the other party members of the Anti Corruption Bureau and another panch awaited in a nearby hotel. As assured, the appellant reached near the Court premises at about 3 p.m. The complainant called him inside the hotel. They sat at a table. The demand for

Rs. 500/- was repeated by the appellant in front of the panch witness. The complainant -PW Rashid Patel gave five (5) tainted currency notes of Rs. 100/- denomination to the appellant. The bribe money was accepted by the appellant and the tainted currency notes were placed in shirts pocket. The complainant gave signal to the members of the raiding party. Immediately, Dy.S.P. Ambegaonkar, his staff members and another panch reached the spot. Both hands of the appellant were firmly held and were examined under ultra violet lamp. The fingers of his right hand indicated blue blisters and so also his shirt pocket was found to bear blisters of blue colour. The tainted currency notes were seized alongwith other articles found with him. A post-trap panchanama was drawn then and there. The relevant investigation papers and other material documents were forwarded to the competent authority, namely, District Engineer of Telecom, Osmanabad. He gave sanction to prosecute the appellant. The appellant was accordingly prosecuted.

4. A charge (Exh-15) was framed against the appellant. He entered plea of "not guilty". His defence, as unfolded during the trial, is that the amount of Rs. 400/- was demanded as per the second demand note (advice) and that, remaining amount of Rs. 100/- was demanded to meet out the expenditure of transportation, because, on 3-4 occasions, he was required to visit village Aasu for claiming the demanded amount of Rs. 400/-. The appellant denied that he had demanded an amount of Rs. 500/- towards illegal gratification for the work which he was supposed to do officially. He denied that the amount was received by him towards the illegal gratification.

5. At trial, the prosecution examined in all eight (8) witnesses in support of its case. The learned Special Judge, on appreciation of the evidence, held that the demand for illegal gratification and the payment thereof was duly proved. The learned Special Judge held that the appellant failed to give explanation for receipt of Rs. 500/-. In keeping with such findings, the appellant came to be convicted and sentenced as stated earlier.

6. Mr. Kute, learned advocate, for the appellant, strenuously argued that case of prosecution is unbelievable in view of discrepancies in the versions of PW4 Subhash (panch) and PW5 Rashid Patel (complainant). He argued that the complainant was adamant and inspite of legal demand under the second advice note, the amount was not being paid nor the second advice note was being accepted by him. He contended that conduct of the appellant reveals that the amount of Rs. 500/- was accepted towards the second installment under the advice note issued by PW2 Prakash and the small amount required to meet out travelling expenses. He argued that the appellant need not have again explained the same defence which was suggested to the witnesses during course of statement u/s 313 of the Criminal Procedure Code. Mr. Kute, would submit that the material on record is sufficient to create a reasonable doubt as regards the nature of amount received by the appellant in the relevant noon. He would submit, therefore, that the appellant deserves acquittal by giving benefit of

reasonable doubt. Learned A.P.P. Mr. Borade, on the other hand, supports the impugned judgement.

7. At the threshold, it is pertinent to note that the procedural requirements are stated by PW2 Prakash. He is Sub-Divisional Engineer attached to Telephone Exchange, Paranda. The appellant was handed over the second advice notice in triplicate, with a view to recover an amount of Rs. 400/- towards the balance amount as installation charges. The version of PW Prakash reveals, unequivocally, that the three copies (Exh-34/1 and Exh-34/2) were tendered to the appellant on 25th August, 1997 with a direction to install the telephone line only after receiving the amount shown in the advice note. The version of PW Prakash reveals that he directed the appellant to execute installation work of the telephone line at residence of the complainant after receiving the payment of installation charges under the second advice note. He states that he had not received the second installment under the said advice note. His version reveals that the second demand was of Rs. 400/-. His version reveals that the appellant could have kept custody of the said second advice demand note till 8th September, 1997 as per the official procedure. His version further shows that the original demand note (Exh-34) was not given by the appellant to the customer (PW Rashid Patel). Needless to say, the said amount was due from the complainant at the relevant time.

8. In the wake of above fact situation, it is worthwhile to scrutinize the version of PW5 Rashid Patel. He states that he had deposited Rs. 1000/- in Paranda post office as per the first demand note on 28th July, 1997. His version shows that he contacted PW2 Prakash lateron and told that such an amount was deposited as per the demand notice. His version is to the effect that PW2 Prakash informed him that necessary instructions would be given to the appellant who was dealing with the work of such installation. According to PW Rashid Patel, the appellant kept on promising him about the installation and avoided to do the work. It appears from version of PW Rashid Patel that he asked the appellant to do the work immediately after the first installment was paid. However, the second advice demand note was yet to be given to him. The version of PW Rashid Patel reveals that after some period, the appellant demanded Rs. 500/- from him for the purpose of installing the telephone line. He states that he had refused to pay the amount of illegal gratification and, therefore, there was quarrel between himself and the appellant. He threatened that he would get the demand of telephone connection cancelled instead of making payment of illegal gratification. He states that the appellant advised him to apply to the Telephone Exchange at Bhoom for cancellation and to seek refund of the deposited amount. He, thereafter, left for Mumbai and stayed out of station for about a fortnight.

9. The version of PW5 Rashid Patel shows that when he had gone to attend weekly bazar (market) at Paranda, on or about 31st August, 1997, he again met the appellant and asked whether the appellant was going to install the telephone connection by accepting some lessor amount. The appellant declined to accept

anything less than Rs. 500/-. The version of PW Rashid Patel reveals that he then agreed to pay Rs. 500/- to the appellant on 3rd September, 1997. He could not, however, keep the word because he had to attend some other work of repairing his truck vehicle and, therefore, the date was postponed to 5th September, 1997. Thus, he was to pay the amount to the appellant on 5th September, 1997. He thereafter approached the Anti Corruption Bureau at Osmanabad and gave a report (Exh-42).

10. The version of PW Rashid Patel reveals that at about 2 p.m., the raiding party members reached at Paranda. He and Head Constable Mane proceeded towards the Court building whereas the remaining party members followed them. All of them went to Hotel Shivneri, which is situated in front of the Court building and took a cup of tea. It is the version of PW Rashid Patel that he had assured the appellant that he would pay the amount at 3 p.m. At about 3 p.m., the appellant came in front of the Court building and was called at the hotel. The version of PW Rashid Patel is to the effect that again, he asked the appellant as to how much amount needs to be paid. The appellant informed that Rs. 500/- will have to be paid. The version of PW Rashid Patel is that he requested to reduce the amount, but again the appellant told him that he would not accept even Rs. 499/- but wanted Rs. 500/- only. It is further stated by PW Rashid Patel that such a conversation between himself and the appellant took place in presence of both the panch witnesses at the premises of Hotel Shivneri. Then he further asked the appellant as to when the connection would be installed if the amount was paid at that time. Thereupon, the appellant told him that after receiving the said amount, he would go home, take lunch and would return in short time for the installation of the telephone connection. The complainant -PW Rashid Patel thereafter gave the tainted currency notes of Rs. 500/- to the appellant which were accepted by the appellant by his right hand. The appellant counted the currency notes and placed them in his pocket. Then signal was given as per the instructions of Dy. S.P. Ambegaonkar. The raiding party immediately rushed there. The hands of the appellant were caught, examined under the ultra violet lamp and the appellant was taken inside the hotel. A post-trap panchanama was prepared after confirming the fact that fingers of the appellant and his pocket bore blisters of blue colour under the ultra violet light.

11. It is categorically admitted by PW Rashid Patel that he did not inquire whether his name was shown in the list of urgent category or it was in the waiting list. His version, however, reveals that he had contacted PW Prakash who informed him that the wireman (appellant) would be instructed to install the telephone connection. He admits that PW Prakash did not tell him as to when would be the installation work done. He denied that the instructions were given to him by PW Prakash to deposit Rs. 400/- in accordance with the second demand notice, in addition to the payment of first installment of Rs. 1000/-. He denied that the appellant had brought to him the second demand notice and asked him to pay the amount of Rs. 400/- besides expenditure of Rs. 100/- required for making five (5) trips to his village. According to PW Rashid Patel, the

appellant demanded an amount of Rs. 500/- for the first time somewhere between 8th/10th of August, 1997. The evidence of PW Prakash reveals that for the first time, on 25th August, 1997, the second demand advice in triplicate was given to the appellant and he was directed to install the telephone line at residence of PW Rashid Patel. Obviously, when the second demand notice was not drawn, there was no reason for the appellant to put forth such demand on 8th or 10th August, 1997. The version of PW Rashid Patel further is that on second occasion, somewhere between 25th to 30th August, 1997, the appellant made demand for Rs. 500/-. It is probable that the appellant made such demand after receiving the second demand notice and copies of notice in triplicate for the service. The complaint was not lodged immediately, but according to PW Rashid Patel when the demand of Rs. 500/- was made on 3rd occasion, he assured to pay the amount on 3rd September, 1997. Then also, he did not lodge the complaint and assured the appellant to pay the amount on 5th September, 1997. He denied suggestion that the appellant informed that the telephone connection would not be given unless the second installment of the amount was deposited at the post office. The cross-examination of PW Rashid Patel reveals that he did not immediately approach the Anti Corruption Bureau. He did not verify whether the formalities were completed and, in fact, immediately the telephone connection could be legally installed by the appellant. The F.I.R. (Exh) reveals that on 7th August, 1997, there was quarrel between the appellant and PW Rashid Patel because of the demand of Rs. 500/-. The F.I.R. shows that on 31st August, 1997, PW Rashid Patel attended the weekly bazar at Paranda where he met the appellant. Then, PW Rashid Patel asked the appellant as to when would the telephone connection installed. The appellant told him that immediately on payment of Rs. 500/-, it would be made available. The third demand was made allegedly on 4th September, 1997, when PW Rashid Patel met the appellant at Paranda. Thus, it is explicit that PW Rashid Patel did not comply with the second demand notice and did not verify whether he was required to pay any further amount and refused to comply with the demand put forth by the appellant. His attitude is indicative of a stubborn nature.

12. So far as version of PW4 Subhash is concerned, it may be noted that he is an employee of Social Welfare Department at Osmanabad. He is a panch witness. His version purports to show that he was called at the Anti Corruption Bureau office by Dy. S.P. Ambegaonkar. He and another panch, by name Khanderao, were informed about grievances of the complainant -PW Rashid Patel. They were shown demonstration of use of anthracene powder under ultra violet lamp and the five (5) currency notes of Rs. 100/- each produced by PW Rashid Patel were smeared with anthracene powder. He was instructed to use the tainted currency notes to fulfil the demand of illegal gratification. He was given necessary instructions to give signal after acceptance of the tainted money by the appellant. The version of PW Subhash further reveals that a pre-trap panchanama (Exh-36) was drawn and thereafter, they went to Paranda. His version reveals that he and PW Rashid Patel went to Telephone Exchange office

at Paranda. Thereupon, PW Rashid Patel asked whereabouts of the appellant. They were informed that the appellant had gone to village Aasu for office work. They were also informed that he would arrive shortly from village Aasu. Hence, all of them went to a hotel in front of the Court building. He states that he and PW Rashid Patel awaited at "Shivneri Hotel" whereas the other members of the raiding party went to a nearby hotel. After a shortwhile, the appellant was seen going by the road and was called by PW Rashid Patel. The panch witness states that PW Rashid Patel again asked the appellant as to what had happened about his telephone connection. Thereupon, the appellant told him to pay Rs. 500/- as demanded earlier. He further informed that after the payment, he would go to home for lunch and will lateron accompany PW Rashid Patel to village Aasu for installation of the telephone connection. Then, PW Rashid Patel took out the tainted currency notes and paid the same to the appellant. The other members of the raiding party immediately arrived after a signal was given by PW Rashid Patel. The tainted currency notes of Rs. 500/-, comprising of Rs. 100/ denomination each, were recovered from person of the appellant. His fingers were examined under the ultra violet lamp. His fingers and the pocket of shirt were found to bear blisters of blue colour. A post-trap panchanama (Exh-39) was then drawn.

13. There is significant variance in the versions of PW Subhash and PW Rashid Patel as regards the conversation between the appellant and the latter at the place in front of Shivneri Hotel. The panch witness does not say that there was any request by PW Rashid Patel to reduce the amount of Rs. 500/- and reply of the appellant was that he would not accept even Rs. 499/-, but wanted Rs. 500/- only. It is stated by PW Rashid Patel that such conversation took place in presence of both the panch witnesses, however, PW Subhash does not say so. According to PW Subhash, he and PW Rashid Patel sat in front of Shivneri hotel whereas the other members of the raiding party went to a nearby hotel wherefrom they could see the signal. However, PW Rashid Patel states that the remaining members of the raiding party, including Dy. S.P. Ambegaonkar and three (3) Head Constables were sitting on a bench beyond two benches away in the same hotel i.e. Hotel Shivneri. The panch does not subscribe conversation regarding request for reduction of the said amount and response of the appellant that he would not accept even Rs. 499/-, but Rs. 500/- only. The post-trap panchanama reveals that PW Subhash narrated to the police that PW5 Rashid Patel asked the appellant whether the telephone connection was installed and thereupon, the appellant told him to pay Rs. 500/- as told earlier. The post-trap panchanama does not show that PW Rashid Patel urged the appellant to reduce the amount and he declined to do so by saying that he would not accept even Rs. 499/-. Needless to say, PW Rashid Patel has no compunction in making improvements in his such version. His version suffers from embellishment.

14. The version of PW Subhash needs to be scrutinized with circumspection. The Apex Court in *Som Parkash Vs. State of Punjab*, ", held that the witness who forms part of the raiding party cannot be readily accepted as an independent

witness. It is further held that the testimony of such a panch witness ought to be scrutinized with circumspection. Obviously, the testimonies of panch witnesses who are employees of the same Department will have to be considered with care and caution. The legal position may also be considered in the light of observations in "Ramesh Ramdas Vaidya v. State of Maharashtra 2004 ALL MR (Cri.) 611". The learned Single Judge noticed, in the given case, that there was no corroboration to the complainants evidence regarding earlier demand. Therefore, it was held that the conviction could not be sustained and had to be set aside. In the present case too, the version of PW Rashid Patel as regards previous demand is uncorroborated, interested and unacceptable. That testimony of panch witness, in a trap case, has to be scrutinized closely in as-much-as he is on par with interested witness.

15. The appellant explained during course of trial that the amount of Rs. 500/- comprised of the legal demand of second installment to the tune of Rs. 400/- and the charges of Rs. 100/- which were required towards expenditure borne by him. The evidence on record shows that he demanded the amount from time to time, but PW Rashid Patel did not pay. It is worthwhile to note that there is no justification given by the prosecution as to how, without compliance of the second demand, in respect of installment of Rs. 400/-, which was admittedly not paid by the complainant, he could insist for the installation of telephone connection. The version of PW Prakash clearly shows that the appellant was under instructions to install the telephone connection only on accepting payment of Rs. 400/- towards the second installment which had remained unpaid. Nowhere PW Rashid Patel states that he was ready and willing to pay such second installment. It appears that he did not bother to inquire whether he was under obligation to deposit the second installment of Rs. 400/- prior to seeking the installation of telephone connection at his residence. He is not a naive person. He is a businessman. He committed undue delay in lodging of the complaint. The appellant did not budge inspite of threat given by PW Rashid Patel to get his demand for telephone connection cancelled. The appellant continued to ask for the second installment of Rs. 400/- and Rs. 100/- towards his travelling charges, etc.

16. The remaining evidence of the prosecution need not be discussed with all details. The version of PW7 Khanderao relates to the pre-trap panchanama and post-trap panchanama. He corroborates pre-trap panchanama (Exh-31). His version shows that he and other members of the raiding party were sitting by side of Shivneri Hotel whereas PW Subhash and PW Rashid Patel were sitting in front of Shivneri Hotel at the relevant time. His version further purports to show that after some time, the appellant was called by PW Rashid Patel and they sat together. His version is to the effect that having seen signal given by PW Rashid Patel, all the members of the raiding party rushed to the place. Both the hands of the appellant were examined under ultra violet lamp. The tainted currency notes were recovered and a post-trap panchanama (Exh-39) was drawn. The panchanamas and the prosecution case is further corroborated by PW8 Dy. S.P.

Ambegaonkar.

17. Crucial question is as to whether there was demand of illegal gratification. The appellant was demanding Rs. 500/- from PW Rashid Patel, is an undisputed fact. It is not the case of prosecution that PW Rashid Patel got deposited Rs. 400/- towards the amount under the second demand notice. His name was in the waiting list and, therefore, he was not eligible for the telephone connection without completing the formalities of depositing the balance amount of Rs. 400/-. He could have verified the legal requirement from the office of the Telephone Exchange. He states that he had contacted PW Prakash, who is concerned Telephone Engineer. However, he does not say that all the formalities were completed. It is improbable that he would not have been told by anybody, including PW Prakash and the appellant, that balance amount of Rs. 400/- was due from him as per the second demand notice. The learned Special Judge discarded defence version on the ground that the appellant did not specifically state such a fact in course of his statement u/s 313 of the Criminal Procedure Code and moreover, no separate evidence was adduced by him.

18. The appellant suggested his defence to the complainant during course of cross-examination in no uncertain manner. The statement of the accused is required to be recorded u/s 313 of the Criminal Procedure Code in order to give him an opportunity to explain the circumstances and the evidence appearing against him. His omission to categorically give explanatory statement regarding the nature of amount demanded from the complainant, by itself, cannot be a ground to dislodge the defence. The only thing to be considered is where a probable defence is brought on surface of record, either through the cross-examination or any other material and that such an explanation is plausible. In this context, in *Man Singh Vs. Delhi Administration*, , the Apex Court held that the accused is not required to prove his defence by the strict standard of proof beyond reasonable doubt, but it is sufficient if he offers an explanation or defence which is probable and once this is so done the presumption u/s 4 stands rebutted. So also, in *Palania Pillai and another Vs. State*, , it is held that when it was shown that the accused had received certain sum of money, which was not his legal remuneration, the presumption must be raised. However, mere receipt of money would be sufficient. The accused may explain his defence by showing preponderance of probability as is done by a party in civil proceedings. It was not necessary that he should establish his case by the test of proof beyond reasonable doubt.

19. It need not be reiterated that PW Rashid Patel (complainant) improvised his version as regards the conversation between himself and the appellant at the time of payment of the tainted currency notes. The versions of the panchas do not show that the amount was being demanded towards illegal gratification for doing the work of installation of the telephone connection and that all the other formalities were completed by PW Rashid Patel. There are two (2) views possible from the circumstances appearing on record. First, the amount was so demanded

towards illegal gratification to do the work as alleged by the prosecution. Second, complainant PW Rashid Patel did not comply with the second demand notice nor accepted the same and yet, insisted for the installation of the telephone connection at his residence. He was persistent in seeking the installation and probably assumed that an amount of Rs. 500/- demanded by the appellant was towards illegal gratification notwithstanding the fact that an amount of Rs. 400/ was unpaid by him towards the second demand notice which was in accordance with the official procedure. One cannot be oblivious of the fact that atleast on two (2) occasions, PW Rashid Patel quarrelled with the appellant. If that was so, he could have ventilated his grievances to the higher officials including PW Prakash. He did not inform PW Prakash that the appellant was asking for the illegal gratification. He delayed lodging of the F.I.R. The conduct of the complainant, therefore, smacks of framing appellant in the trap case. Where two (2) views are possible, the view which is favourable to the appellant may be taken in view of the circumstances of the present case. In *State through Inspector of Police, A.P. Vs. K. Narasimhachary*, the Apex Court held that when there are two views possible, then acquittal recorded by the High Court would not be faulted with. The finding of guilt can be recorded when only one conclusion is available which leads to inference about guilt of the accused.

20. To conclude, I am of the opinion that the defence of the appellant could not be thrown overboard only for the reason that he did not spell it out instantaneously or in specific words during his examination u/s 313 of the Criminal Procedure Code. His defence is suggested to the witnesses and appears to be plausible. Conversely, the attitude of PW Rashid Patel is that of a stubborn person. The learned Special Judge committed error in appreciating the evidence and, hence, reached wrong conclusion regarding guilt of the appellant. In this view of the matter, the appellant deserves benefit of reasonable doubt, which is explicit from the circumstances.

21. In the result, the appeal is allowed. The impugned judgement of conviction and sentence rendered by the Special Judge, Osmanabad, in Special Case (AC) No. 2/1998, is set aside. The appellant is hereby acquitted of the offences punishable u/s 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988. His bail bonds be deemed as cancelled. The fine amount paid, if any, be refunded to the appellant.