

GAHC010108012011



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./161/2011

MD. TOUHID ALI
S/O LATE SAMTANU ALI, VILL. MLLAPARA P.S MONGAODOI, DIST.
DARRANG, ASSAM.

VERSUS

STATE OF ASSAM

Advocate for the Petitioner : MRA K AHMED

Advocate for the Respondent :

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGEMENT AND ORDER (CAV)

Date : 27.02.2023

Heard Mr. M.H. Rajbarbhuiya, learned counsel for the accused-appellant. Also heard Mr. K.K. Parasar, learned Additional Public Prosecutor for the State/respondent.

2. This is an appeal filed under Section 374(2) Cr.P.C. 1973, against the judgment and order dated 29.08.2011 passed by the learned Special Judge, Assam in Special Case No. 1/2009, whereby the appellant has been convicted under Section 12 of the Prevention of

Corruption Act, 1988(herein after referred to as 'P.C. Act,) and sentenced him to undergo rigorous imprisonment for 6(six) months and also to pay a fine of Rs.3,000/- in default to suffer simple imprisonment for 2(two) months.

3. The brief facts of the case is that on 23.09.1998, the informant lodged an FIR before the Superintendent of Police, Darrang, Mangaldoi stating inter alia that on that day at about 8.15 a.m., while he was at Mangaldoi Circuit House in room No. 7 along with the then Executive Magistrate Sri N.D. Patowary. At that time the accused/appellant entered into the said room and identified himself as the father of one Md. Dulu and requested him to delete the name of his son from Mongaldoi P.S. Case No.239/1998 under Section 379 I.P.C. who was involved in the said theft case and he offered Rs.500/- in cash as gratification in presence of said Executive Magistrate Shri N.D. Patowary. Thereafter, the Magistrate Shri N.D. Patorwary interfered in that matter and seized the money from the hand of the appellant.

4. On receipt of the complaint, a case was registered vide Mongaldoi Police Station Case No. 281/1998 under Section 12 of P.C. Act r/w Section 120(B) I.P.C. and accordingly it was entrusted with one Shri Muslesh Uddin Ahmed, D.S.P.(H.Q.), Mongaldoi to investigate the case. The appellant was arrested and forwarded to judicial custody and after completion of investigation, charge-sheet was submitted against the present appellant under Section 12 of P.C. Act, 1988 and accordingly trial was initiated in the court of Special Judge, Assam at Guwahati.

5. During trial prosecution examined as many as 8(eight) witnesses who were cross-examined by the defence. On the other hand, the accused/appellant also adduced one witness in support of his case. After completion of trial, the statement of the accused/appellant was recorded under Section 313 Cr.P.C., wherein incriminating materials found in the evidence of the witnesses were put to him to which he denied the same. After hearing the argument advanced by the learned counsel for both sides, the judgment was delivered by convicting the accused/appellant as aforesaid. Hence, this appeal challenging the judgment and order of the Special Judge, Assam, dated 29.08.2011.

6. The learned counsel for the accused/appellant has argued that there are lots of contradictions in the evidence of the witnesses. P.W.4 who was the informant in the case, the then DSP of Assam Police and it is not believable that the accused/appellant directly entered into the alleged room No.7 of Mangaldoi Circuit House while the said DSP and one Shri N.D. Patowary, Executive Magistrate were sitting therein and offered bribe of Rs.500/- to an unknown person like DSP in presence of another unknown person like Executive Magistrate, Mangoldoi without any hesitation.

7. It is also submitted by the learned counsel for the appellant that the learned Speical Judge, Assam has failed to appreciate the evidence of seizure witnesses because none of the seizure witnesses had stated that they had seen the accused/appellant while giving money to the informant as such, the impugned judgment suffers miscarriage of justice and the same is not sustainable in law.

8. Mr. Rajbarbhuiya, learned counsel for the appellant has further submitted that the offence under Section 7 or Section 13 of P.C. Act itself has not been established and hence, there is no question of offence under Section 12 of P.C. Act being committed by the appellant. He contends that there has to be first an independent finding that the offence under Section 7 or other offences under P.C. Act, 1988 has been committed and as the learned trial court has not recorded such evidence, the judgment is unsustainable.

9. Inviting attention to Section 313 Cr.P.C. statement of the accused, the learned counsel for the appellant states that the appellant has taken the plea of denial and material on record does not show that he was party to any criminal design. The appellant has clearly stated in his statement recorded under Section 313 Cr.P.C. that in fact on the day of occurrence, he was called by the informant in the Mangalgoi Circuit House to settle one theft case instituted against his son so that he went along with one Harunal Rashid to Mangaldoi Circuit House to meet him. Then the then DSP Nanda Singh demanded Rs.20,000/- from him to settle the case but he refused and then the informant had instituted a false case against the appellant with a view to harass him. Mr. Nanda Singh never told the appellant that his son was arrested

in connection with a theft case. Hence, the judgment passed by the learned trial court is liable to be set aside.

10. On the other hand, Mr. Parasar, learned Additional Public Prosecutor for the State has relied upon the evidence of complainant and other eye witnesses (P.W.2 and P.W.3) to urge that they have specifically pointed out that the appellant has offered Rs.500/- to the informant in their presence. Mr. Parasar further adds that the presence of the appellant on the spot and his offering of money to the complainant shows that the appellant offered money to the complainant for getting rid of criminal complaint filed against his son. Learned Additional Public Prosecutor also submits that in this situation the consideration by the learned trial court is neither erroneous nor perverse and hence this Court should not interfere in the judgment of the trial court.

11. In reply, learned counsel for the appellant has submitted that the appellant is now about 80 years of age. He is totally bed ridden for last two years and he is not in a position to move. Alternatively, the learned counsel for the appellant has submitted that considering the health condition of the accused/appellant he is entitled for benefit under provision of Probation of Offenders Act.

12. I have considered the submissions made by the learned counsel for the parties and I have also gone through the record of Special Case No.01/2009. Before proceeding further, a look at Section 12 of P.C. Act is imperative which reads as follows-

“S.12. Punishment for abetment of offences.-Whoever abets any offence punishable under Section 7 or Section 11, whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to five years and shall also be liable to fine.”

13. On a bare look at the provision, it reveals that Section 12 of the P.C. Act provides that

whoever abets any offence punishable under Section 7 or 11, whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than six months, but which may extend to five years and shall also be liable to fine. The Prevention of Corruption Act does not specifically define abetment meant under Section 12. So we will have to apply the definition of abetment under the Indian Penal Code. To constitute abatement of an offence there must be some instigation to do an act of offence, or the alleged abettor must have intentionally aided or facilitated that commission of a crime, or the alleged abettor must have engaged in some conspiracy with one or more other person or persons for the commission of an offence. Thus the definition of abetment under Section 107 IPC shows that to constitute the abetment as defined under the law, there must be some nexus between the acts of the alleged abettor and the act of offence abetted.

14. In this case, the abetment of offence alleged by the prosecution is that the accused offered bribe amounting to Rs.500/- to the informant i.e. the then DSP, Mangaldoi. Let us have a look at the evidence of the witnesses recorded by the trial court.

15. P.W.1 is the then Circle Officer, Sipajar, Darrang, Mr. N.D. Patowary who deposed in his evidence that in the year 1997 he joined in the Assam Civil Service. On 23.09.1998 while he was working in the office of Deputy Commissioner, Darrang, in the capacity of Extra Asstt. Commissioner (EAC), he used to reside in room No.6 of Mangaldoi Circuit House and at that time room No. 7 which was adjacent to his room, was occupied by the then DSP, probationer Mr. Nanda Singh. On that day at about 8 to 8.30 a.m., while they were taking breakfast, a person entered into the room No. 7 and the person talked with Mr. N. Singh which he did not notice. Thereafter, he saw that the said person was removing some currency notes from his pocket of a shirt and the person also intended to handover the said currency notes to Mr. N. Singh. Then Mr. N. Singh asked the person as to what purpose money was intended to be handed over. Then the person told that his son was arrested yesterday by the police and Mr. N. Singh had to do something. Then Mr. N. Singh refused to accept the money and he(P.W.1) also interfered with the matter. Finally, Mr. N. Singh took the decision to initiate action against

the said person. Thereafter, Mr. N. Singh informed the matter to the then DSP, Headquarter and he arrived at the scene and seized the money in question vide Ext.1 and obtained his signature thereon.

16. In his cross-examination, P.W.1 replied that at that time of seizure of the money, he was present at the place of occurrence. Mr. Singh was residing in room no. 7 of the circuit House since 2/ 2 ½ months prior to the date of incident. There were no nameplate in front of the room No. 7 of the Circuit House. The accused entered into the room No. 7 alone and some other persons were also waiting outside the room. He could not indentify those persons.

17. P.W.2 Shri Keshab Ch. Deka, who was the Secretary of Village Defence Party of village Sapaichuka. From his deposition, it reveals that on 23.09.1998 he visited Mangaldoi Circuit House wherein the advisor of VDP was supposed to come. But on that day, he did not come to Mangaldoi. Then he heard some noise of people and thereafter police had shown him a sum of Rs.500/- which was reportedly given by the accused to the informant and seized the same and also obtained his signature in the seizure list vide Ext.1. In his cross-examination P.W.2 replied that he did not see the accused giving any money to the informant.

18. P.W.3 Harunal Rashid deposed in his evidence that on 23.09.1998, he along with the appellant visited the room of Mangaldoi Circuit House where the DSP, Mr. N. Singh was residing because the appellant's son was wanted in connection with a theft case. The witness was declared hostile by the prosecution.

19. In his cross-examination, P.W.3 replied that he had not seen that the accused giving any money to DSP, Mr. N. Singh. DSP, Mr. N. Singh demanded certain amount of money to release the son of the appellant against whom one theft case was registered. He(P.W.3) was also arrested by police and put in lockup. Subsequently, he was released from the lockup and asked to put his signature on a paper if he wanted to go to his house freely and accordingly, he put his signature on Ext.2 on the believe that he would be released from the liability.

20. P.W.4 is the informant Mr. Nanda Singh. He deposed in his evidence that he joined the Assam Police Service on 15.05.1997 as DSP, Probationer. On 23.09.1998, he was working as DSP of Mangaldoi and on that day, he lodged an FIR before the S.P. Mangaldoi against the accused/appellant vide Ext. 3. On 23.09.1998, while he was sitting at Mangaldoi Circuit House along with Mr. N.D. Patowary the then Executive Magistrate of Mangaldoi, one man came to his room and he told him that his son Md. Dulu was arrested in connection with a theft case by Mangaldoi Police and he himself identified as Md. Touhid Ali and he requested him to release his son Dulu from police station and he offered him Rs.500/- for that purpose as illegal gratification for such help. Then he refused the accused for doing such illegal act and subsequently he lodged the FIR.

21. In his cross-examination, P.W.4 replied that the FIR was not written by him but he put his signature on the FIR. He did not take the money from the accused. At that time, he did not count the money. Subsequently, he came to know from the O.C. of Mangaldoi P.S. that one boy name Md. Dulu was taken by the police for interrogation in theft case. At the time of giving statement before the I.O., he did not state before him that at the relevant time along with him Mr. N.D. Patowary was sitting in the Circuit House. The money was seized by Mr. N.D. Patowary. The seizure was made in his presence on the spot.

22. P.W.5 is another seizure witness who was working as Home Guard at the relevant time of incident. According to him, on 23.09.1998, he was working with Mr. N. Singh, DSP, as orderly peon. On that day, Mr. N.D. Patowary seized Rs.500/- from the possession of one Touhid Ali which was offered to Mr. N. Singh as illegal gratification.

23. In his cross-examination, P.W.5 replied that the denomination number of the currency notes are not known to him. At the time of giving the money to Mr. N. Singh by the accused, he was present and at that time he brought a glass of water for Mr. N. Singh at room No.7. This witness also admitted that at the time of giving statement before the police during investigation, he did not state that he saw the accused giving money to Mr. N. Singh, the then DSP at Circuit House. P.W.5 also admitted that he saw few people in front of the room

No. 7 at Circuit house and he went there. He did not state before the police during investigation that at the time of occurrence, he was along with Mr. N. Singh(P.W.4). As per instruction of DSP, Mr. N. Singh, he put his signature in the seizure list.

24. P.W.6 is the then DSP(Head Quarter) at Darrang and he has completed the investigation of the case and submitted charge-sheet against the accused/appellant under Section 12 of P.C. Act vide Ext. 6. In his cross-examination, P.W.6 replied that the original seizure list was prepared by Mr. N.D. Patowary, the then Executive Magistrate, Darrang and that seizure list was subsequently seized by Mr. M. Ahmed in connection with the instant case.

25. P.W.7 is the investigating officer. From his deposition it discloses that on 23.09.1998 he was working as DSP(Head Quarter), Mangaldoi. On that day, he seized one seizure list which was prepared by Sri N. Patowary, the then Executive Magistrate, Mangaldoi in connection with Mangaldoi P.S. Case NO. 281/98 under Section 12 of the P.C. Act, 1988 r/w Section 120(B) of I.P.C. The seizure was made in presence of witnesses namely 1. Mr. N.D. Patowary, the then Executive Magistrate, 2. Mr. Keshab Charan Deka. During the course of investigation, he recorded the statement of the witnesses and then arrested the accused and forwarded him to the court.

26. In his cross-examination, P.W.7 replied that he received the FIR on 23.09.1998 and visited the place of occurrence on the same day at about 9.30 a.m. The place of occurrence is adjacent to the police station. He did not seize the money and the same was seized earlier by Mr. N.D. Patowary. He had seized the seizure list from Mr. N.D. Patowary. He had not seen from whom the money was seized.

27. P.W.8 is the then O/C of Mangaldoi Police Station. He deposed in his evidence that on 23.09.1998 he was working as Officer-in-Charge of Mangaldoi Police Station. On that day, he received one FIR from Mr. N. Singh, the then DSP, Mangaldoi and thereafter the same was registered as Mangaldoi P.S. Case No. 281/98 under Section 12 of the P.C. Act 1988 r/w Section 120(B) of IPC. Subsequently, after registration of the case, the case was endorsed to

Mr. M. Ahmed, the then DSP, Mangaldoi to investigate the case.

28. In his cross-examination, P.W.8 replied that he could not remember whether the son of the accused/appellant was arrested in connection with any case on the day and whether he was kept in the lockup of police station.

29. The accused/appellant was examined in this case as DW1, he deposed in his evidence that his son Dulu was falsely implicated by the then DSP. On the previous day of the date of occurrence, the police officer Mr. N. Singh went to his residence and asked to meet him in Mangaldoi Circuit House on the following day and accordingly, on 23.09.1998 at about 8 a.m. he went to Mangaldoi Circuit House to meet the police officer. He allowed to sit in a chair and demanded Rs.20,000/- from him and he said that if it is paid he would not come to search his son. He refused to pay the amount as his son was innocent. On that matter, there was an altercation between him and the informant(P.W.4) and in the meantime, one unknown person entered into the room and when that person came to know about the discussion the police officer was annoyed and in order to get rid of, he falsely implicated the accused/appellant by alleging that he (D.W.1) offered him Rs.500/- as bribe. His son Dulu was never arrested in connection with Mangaldoi P.S. Case No.239/1998.

30. This witness also stated that in connection with the said case, he filed an application before the CJM, Mangalgori under RTI Act and accordingly, the authorized person Civil Judge & Asstt. Sessions Judge, Darrang, Mangaldoi issued the information vide Ext. A and Ext. B, wherein it was clearly stated that one Md. Tanmizur Rahman @ Bulbul Hussain, S/o Md. Habibur Rahman, village- Mollapara, Darrang, Mangaldoi and Md. Tofiqul Ali, S/o Md. Fuzimuddin, Village-Adhikar, Darrang, Mangaldoi were remanded to judicial custody under Section 379 I.P.C.

31. After going through the evidence of the aforesaid witnesses, it reveals that the allegation against the accused/appellant is that he offered bribe of Rs.500/- to the informant, the then DSP, Mr. N. Singh with a view to release his son Md. Dulu from a theft case in which

he was arrested. But a mere offer of bribe will not constitute the offence of abetment meant under Section 12 of P.C. Act. Of course, it is well settled that payment of bribe will definitely come under Section 12 of the P.C. Act, if such payment of illegal gratification was made as a motive or reward for some favours as meant under Section 7 of the P.C. Act.

32. Section 15 of the P.C. Act cannot have application to persons other than public servants. Attempt made punishable under Section 15 of the P.C. Act can be punished only when such attempt is committed by a public servant. What is made punishable under Section 15 is attempt to commit an offence referred to in Clause (c) or Clause (d) of Sub section 1 of Section 13. Persons other than public servants cannot commit such an offence. So Section 15 dealing with attempt to commit offence cannot have application to persons other than public servants.

33. The prosecution here is not under Section 15 of the P.C. Act, but under Section 12, on a definite allegation, that the accused abetted the commission of an offence punishable under the said Act. The allegation in the complaint and also the evidence given by the witnesses before the trial court is that the accused offered to give illegal gratification to P.W.4 for some illegal favours. The very important question is whether such an offer alone, or a mere offer to give illegal gratification will constitute the offence of abetment punishable under Section 12 of the P.C. Act.

34. In the case of *State of Punjab vs Madan Mohanlal Verma (Manu/SC/0776/2013)*, *B. Jayaraj vs State of Andhra Pradesh (2014 Cri.LJ 2433)* and *C. Sukumaran vs State of Kerala (2015 Cri.LJ 1715)*, the Hon'ble Apex Court has held that demand of illegal gratification by the accused is the *sine-quo-non* for constituting an offence punishable under Section 7 of the P.C. Act, and mere recovery of tainted money will not by itself prove acceptance of illegal gratification.

35. In the instant case, there is no allegation that the informant i.e. P.W.4 had demanded money from the accused/appellant when there is absolutely no material to show that P.W.4

had at any time made any demand for illegal gratification, even actual payment of illegal gratification by the accused will not be punishable under Section 12 of the P.C. Act. This is not in fact a case of actual payment of illegal gratification. The prosecution allegation is that the accused just made an offer to give illegal gratification. What is alleged in the complaint is not abetment as such but only an attempt to commit abetment, which is not punishable under the law. Even if, there was an offer from the side of the accused, the question is whether such an offer will by itself constitute abetment.

36. Of course, payment of illegal gratification on demand is punishable as abetment under Section 12 of the P.C. Act. But this is not a case involving payment of bribe. The prosecution allegation is that even without any demand, the accused voluntarily made an offer to give illegal gratification. When there is no such demand there is no question of a prosecution. When there is no acceptance of illegal gratification with the knowledge that it is illegal gratification there is no question of a prosecution under Section 7 of the P.C. Act. Mere offer to give illegal gratification without any demand from the public servant cannot be punished as abetment under Section 12 of the P.C. Act. If a person gives illegal gratification to a public servant, he will have two options. He can either accept it with the knowledge that it is illegal gratification, or he can reject it and make a complaint against the person who paid it. If it is accepted, the public servant, and also the person who made payment will be liable for punishment. The public servant will be liable under Section 7 of the P.C. Act, and the person who made payment of bribe will be liable under Section 12 of the Act. But in a case where the illegal gratification is rejected by a public servant, the public servant will have to make a complaint against the person who made payment, and in such a situation, the person who made payment will be liable under Section 12 of the Prevention of Corruption Act. Here there is no such factual situation. In this case, the accused/appellant voluntarily made an offer by conduct, and nothing was actually paid by him, or received by the police officer. Thus, there is only a mere offer voluntarily made by the accused, without any demand from the police officer.

37. Section 20 of the P.C. Act contains some presumptions. Sub-section 2 deals with

presumption in the case of a prosecution under Section 12 of the P.C. Act that where it is proved in any trial of an offence punishable under Section 12 that any illegal gratification was given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give such illegal gratification as a motive or reward as mentioned under Section 7 P.C. Act. Thus what is presumed under Sub-section 1 to Section 20 of the P.C. Act is not guilt of the accused facing prosecution under Section 12. What is presumed is only that illegal gratification was given by the accused or offered by the accused as a motive or reward as meant under Section 10. Presumption is only a rule of evidence, and the presumption under Section 20(2) of the P.C. Act can be applied only where it is proved that any illegal gratification was given or offered to be given. On the basis of the presumption under Section 20(2) of the P.C. Act it cannot be found that offer to give illegal gratification is punishable under Section 12 of the P.C. Act. Such offer will only raise a presumption regarding motive or reward. Section 24 r/w Section 20(2) of the P.C. Act will show that a mere offer to give illegal gratification is not punishable as abetment, under Section 12 of the Act. Here is a case of mere offer voluntarily made by the accused without any demand. Such an offer cannot be said to be abetment of an offence punishable under Section 7 of the P.C. Act.

38. Reverting to the present case, from the evidence of the witnesses, it appears that on the date of incident while the informant the then DSP, Mr. N. Singh was sitting with Mr. N.D. Patowary in room No. 7, the accused/appellant entered into his room and offered Rs.500/- to the informant and requested him to delete the name of his son Md. Dulu who was involved in Mangaldoi P.S. Case No. 239/1998. But none of the witnesses have stated before the trial court that the son of the accused/appellant was arrested in connection with Mangaldoi P.S. Case No. 239/1998. P.W.8(O/C, Mangaldoi P.S.) has stated that he could not remember whether the son of the accused was arrested in connection with a case on the date of the incident and whether he was kept in the lockup in Mangalgoi Police Station. The I/O of the case as P.W.7 also stated in his evidence that he had no knowledge when the son of the accused was arrested and how long he was in police custody for interrogation. He did not collect any further information regarding the said theft case which was registered against the

son of the accused.

39. Regarding seizure, P.W.7 has admitted that he had not seen from whom the money was seized. The seizure witness P.W.2 also stated that he did not see the accused/appellant giving money to the informant. According to P.W.3, he came to Mangaldoi Circuit House on the day of the incident along with the accused/appellant but he was arrested and he was also put in lockup and he was asked to put his signature in the seizure list with a view to release him from the liability. P.W.5 has stated that he was present at the time of giving money by the accused/appellant to D.S.P, Mr. N. Singh but interestingly, neither the informant nor P.W.1(Mr. N.D. Patowary) had stated before the trial court, that at the time of the incident, P.W.3 was present as he brought a glass of water for Mr. N. Singh at room No. 7 at the relevant time.

40. This is also to be noted that P.W.5 admitted in his evidence that he had not stated before the police during investigation that at the time of occurrence, he was along with Mr. N. Singh. P.W.5 also admitted that as per instruction of DSP, Mr. N. Singh, he put his signature in the seizure list.

41. Vide Ext.2 seizure was done by the then Executive Magistrate, Mr. N.D. Patowary when the accused/appellant offered money as gratification to the then DSP, Mr. N. Singh. The seizure was made in presence of Harunal Rashid (P.W.3) and Brojen Borua (P.W.5) but it is interesting to note that though the money was seized from the accused/appellant but signature of the person i.e. Touhid Ali(accused/appellant) is not available in Ext. 2. from whom the money was seized. It also appears that the denomination of currency notes is not mentioned in Ext.2.

42. As discussed above, this Court is of the view that if the allegation can be accepted on the facts that the accused/appellant had offered bribe to the police officer, or had just attempted to offer bribe to him, as alleged in the FIR, the allegations will not come under Section 12 of the P.C. Act, punishable as abetment. A mere offer of bribe which does not amount to payment of bribe, is not punishable as abetment under Section 12 of the P.C. Act.

Accordingly, the accused/appellant cannot be found guilty under Section 12 of the P.C. Act.

43. In the result, the appeal is allowed. The conviction and sentence recorded by the learned Special Judge, Assam against the accused/appellant in connection with Special Case No. 01/2009 under Section 12 of P.C. Act, 1988 is hereby set aside. The accused/appellant is acquitted on the charge levelled against him.

44. Seized money be confiscated to the State.

45. Send back the LCR.

JUDGE

Comparing Assistant