

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**  
**CRIMINAL APPELLATE JURISDICTION**  
**CRIMINAL APPEAL NO.718 OF 2016**

Devidas Rohidas Devkate .. Appellant  
**Versus**  
The State of Maharashtra .. Respondent

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Mr.Shekhar Ingawale for the Appellant.  
Mr.S.R.Agarkar, A.P.P. for the State/Respondent.

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**CORAM: BHARATI DANGRE, J.**  
**DATED : 02<sup>nd</sup> NOVEMBER, 2023**

**JUDGMENT:-**

1. The Appellant, a Police Constable, was tried in Special ACB Case No.07 of 2009, as he faced charges under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (for short, **“the PC Act”**).

By the impugned Judgment and Order dated 17/10/2016, he was found guilty of committing an offence under Section 7 and was sentenced to suffer rigorous imprisonment (**R.I.**) for one year and was directed to pay fine of Rs.5,000/-, in default to suffer R.I. for one month. He was also convicted under Section 13(1)(d) read with Section 13(2) of the P.C.Act and sentenced to suffer R.I. for one year alongwith fine of Rs.5,000/-, in default R.I. for one month.

The impugned judgment directed both the sentences to run concurrently.

While his Appeal was admitted on 17/11/2016, on an application filed under Section 389 of the Criminal Procedure Code, seeking suspension of sentence and for his release on bail, by an order passed on the same date, the sentence imposed upon him was suspended and he was directed to be released on bail, with fresh bond.

The said protection continued till date, when the Appeal is taken up for final hearing.

2. I have heard the learned counsel Mr.Shekhar Ingawale for the Appellant and the learned APP Mr.S.R.Agarkar for the State.

In a brief way, the prosecution case can be culled out as under :-

One Sunil Shantaram Sawant (the Complainant), working as Security Guard, entered into an Agreement to purchase a room from Yash Construction, whose proprietor is one, Mr.Jagdish Bhandari. On 30/06/2008, the Complainant met one Rajesh Patil and Munna Pande on the road and they are alleged to be the persons of Jagdish Bhandari, who visited his house and threatened his wife, so that the Complainant shall not visit the site of the hutment.

This incident prompted the Complainant to report to Mumbra Police Station, where he met the present Appellant, working as Police Constable, who demanded a bribe of Rs.1,000/- to take action on his complaint. An N.C. was

registered and the copy of the N.C., which was given to the Complainant, was accompanied with chit on which the mobile number as well as the buckkle number was scribed by the Appellant and the bribe amount, on negotiation, was reduced to Rs.500/-.

3. The Complainant approached Anti Corruption Bureau (ACB), Thane and lodged his complaint on 05/07/2008. The written complaint was signed by him and the Investigating Officer decided to verify the complaint. On 05/07/2008, the Complainant was asked to contact the Accused on his mobile and, since, the battery of his mobile phone was low, a SIM card from his mobile was removed and fixed in the mobile set, which was registered in the Government's name and the speaker was switched on. The conversation was recorded in DVR and it is the case of the prosecution that the Accused inquired with the Complainant about how much money he possessed and he responded, by stating that he has Rs.400/-. The Accused, therefore, offered the Complainant that he should come with the money and, accordingly, the trap was laid by following the necessary procedure.

Instructions were given to the Complainant, who was followed by the raiding party and, accordingly, a trap was arranged on 05/07/2008 and a voice recorder was affixed on the person of the Complainant. The Complainant was followed by Panch No.1-Mr.Kale.

The Accused instructed the Complainant to put the money inside the Register and on a signal being given by the

Complainant, the raiding party rushed to his chamber and the bribe amount was recovered from the red Register, which was found to be smeared with anthracene powder and the description of the same tallied with the one mentioned in the panchnama.

4. The above case of the prosecution resulted into filing of charge-sheet. The Special Judge (P.O.C.Act), Thane, in Special Case No.7 of 2009, charged the Accused as under :-

“That on 30/06/2008 and on 05/07/2008 at Mumbra Police Station you were working as a Police Constable and you being public servant demanded for yourself an illegal gratification of Rs.1000/- and agreed to accept Rs.400/- other than legal remuneration as a motive and reward by accepting and registering complaint of complainant in exercise of your official function and thereby committed an offence Under Section 7 of Prevention of Corruption Act, 1988 and within my cognizance.

Secondly, on 5/7/2008 at about 03-35 p.m., at Mumbra police station you being public servant obtained for your pecuniary advantage of Rs.400/- by abusing your position as a public servant and thereby committed an offence u/s Section 13(1)(d) and u/s 13(2) of Prevention of Corruption Act 1988 and within my cognizance.”

Since the Accused pleaded not guilty, he was subjected to trial.

5. In order to establish it's case, the prosecution examined three witnesses, though the Complainant could not be examined, as he was not traceable.

The panch witness, Mr.Vinod Kale, who accompanied the Complainant at the time of trap, was examined as PW 1,

whereas Mr. Anil Dhere, the then Police Commissioner posted at Thane, who accorded sanction (Exh.20), was examined as PW 2. Mr.Murlidhar Visphute, Police Inspector, ACB, who carried out the investigation, was examined as PW 3.

On the evidence being led through these three witnesses, the Special Judge concluded that the prosecution has established that the bribe amount is accepted and, since, it was accepted as motive or reward, the charge under Sections 7, 13(1)(d) read with 13(2) of the P.C.Act was held to have been established.

6. Admittedly, the Complainant did not step into the witness box and the question is, what is its effect on prosecution case. The Constitution Bench of the Hon'ble Apex Court in the case of ***Neeraj Dutta Vs. State (Government of NCT of Delhi)***<sup>1</sup>, has settled the law, contemplating this contingency, where there is absence of evidence of the Complainant (direct or primary) of demand of illegal gratification and determined the question, whether it was permissible to draw an inferential deduction of culpability/guilt of a public servant under Sections 7 and 13(1) (d) read with Section 13(2) based on other evidence adduced by the prosecution. It is held by the Constitution Bench categorically that in the event, the Complainant turns hostile or has died or is unable to let in his evidence during trial, demand of illegal gratification can be proved by letting in the evidence of any other witness who can again let in evidence, either orally or documentary or the prosecution can prove the

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<sup>1</sup> (2023) 4 SCC 731

case by circumstantial evidence. The position of law which emerges from the judgment of the Constitution Bench is clear; the trial does not abate nor does it result in an order of acquittal of the accused public servant, if the complainant is not examined for any of the aforesaid reasons.

7. In the wake of the aforesaid proposition, I must now proceed to examine the evidence on record, to examine the correctness of the finding rendered by the Special Judge in the impugned judgment and as to whether the evidence placed before the Special Judge, proved the charge against the Accused and whether the offence under Sections 7 and 13(2) read with Section 13(1)(d) is made out.

8. PW 1, who acted as a panch in the Anti Corruption case, was working as Head Surveyor in Deputy Collector Office in Chembur and he reported to the ACB Office, Thane, as orders to that effect were passed on 05/07/2008 by his superior. On reporting, as directed, the Complainant explained his case to him as well as to the second panch. PW 1 read the complaint and after verifying the written complaint as well as the oral complaint, he affixed his signature to it. The complaint was attempted to be verified by directing the Complainant to make a phone call to the Accused, which was put on the speaker mode. A SIM card was put in the Government mobile and the Complainant spoke to the accused, with it's speaker on, so that the Investigating Officer as well as the panch witnesses could hear the conversation.

PW 1 deposed that he heard the conversation and the Accused demanded Rs.400/- as bribe and the Complainant agreed that he would bring the money and, thereafter, it was agreed that the Complainant would deliver the money as per demand, on 05/07/2008 at noon. As per PW 1, the entire conversation was recorded on digital voice recorder and after recording it, it was again heard.

The conversation that was recorded is a part of the verification panchnama (Exh.13) and the transcript is of the alleged conversation between the Accused and the Complainant and though there is a reference of Rs.400/- which was with the Complainant, the conversation does not refer to any demand, but it is indicative, that as regards the complaint, the Accused asked the Complainant to visit the police station and the Complainant inquired with the Accused, as to when he should come to the police station.

However, the conversation does not refer to any demand by the Accused. Apart from this, there is no verification of the voice in the conversation, which was recorded.

9. Now coming to the actual trap, when the evidence of PW 1 who acted as a panch and whose testimony assumes great significance, since the Complainant has not stepped into the witness box is carefully read, he has demolished the case of the prosecution.

In the examination-in-chief, he referred to the verification panchnama by stating that demand was made by the Accused as bribe amount. While narrating the proceedings of the trap panchnama, he deposed in the following words :-

“It was around 3 p.m. complainant-Sawant and myself went to police station. Complainant went inside and sat on the bench in the chamber of P.I. I was standing beside the bench. Complainant was talking with accused. They were talking about money. Complainant took out tainted bribe amount from his pocket and hold it before the accused who asked him to keep it in the register. Complainant came out and gave signal to raiding party by stretching his body. Raiding party members entered inside the chamber.”

However, in the cross-examination, PW 1 has specifically given the following admissions :-

“(1) It is true to say that there was no reference that how much bribe amount shall he bring.

(2) It was decided that I should not accompany the complainant and wait in the compound.

(3) There is 8 to 10 ft. Varhanda in front of the police station. There is one full length (up to the wall) counter which divides visitors and office staff. There is one gate on right corner to enter into the office area. Visitors speak from the counter to the staff members. One has to climb four steps to enter police station Varhanda.

(4) It is true to say that from the place where I was standing, from there I could not see what has happened in across the counter. I have not heard what talk was there between accused and complainant.”

The above admissions given by the panch witness in the cross-examination has made the prosecution case extremely doubtful, as he has categorically admitted that he could not see what had happened across the counter nor he was able to hear the talk between the Accused and the Complainant.

The aforesaid admission, in absence of the Complainant testifying before the Court about the bribe amount being paid in compliance of the demand and the amount being paid by way of illegal gratification, is not established. The prosecution

case thus fall to its ground, without the demand having been established by the prosecution.

10. In order to establish the offence under Section 7 as well as under Section 13(1)(d) (i) and (ii), it is imperative for the prosecution to prove the demand and acceptance of illegal gratification, either by direct evidence, which can be in form of oral or documentary evidence or by circumstantial evidence, in absence of oral and documentary evidence.

The necessary ingredient of Section 7 of the P.C. Act is acceptance or obtaining or agreeing to accept or attempt to accept from any person for himself or for any other person, any gratification other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, any favour or disfavour. Similarly, as far as Section 13(1)(d) is concerned, it is necessary for the prosecution to prove that the public servant, by corrupt or illegal means, has obtained for himself or for any other person any valuable thing or pecuniary advantage, or by abusing his position as public servant, or while holding his office as a public servant and has obtained the valuable thing or pecuniary advantage, without any public interest. Mere acceptance of any valuable thing or pecuniary advantage is not an offence under this provision.

11. The demand of bribe amount is thus a sine qua non to establish an offence under Sections 7 and 13(1)(d) of the P.C. Act. The statutory presumption under Section 20 of the Act is

available only for the offence punishable under Section 7, but not for Section 13(1)(d).

12. When the Complainant has failed to step into witness box, it is permissible to look into the evidence of demand and acceptance through the other witnesses, who depose before the Court in support of the prosecution case and, therefore, non-examination of the Complainant or on he having turned hostile will not affect the prosecution case adversely, if the other evidence which is led before the Court establish the demand and acceptance. But, in this case, the shadow panch who followed the Complainant on the trap being laid, has clearly given an admission that he was not able to see the event of occurrence, when the bribe amount was offered and accepted, nor did he hear the conversation between the Complainant and the Accused. This admission has adversely affected the prosecution case as PW 1 in his examination-in-chief has categorically stated that on reaching the police station, the Complainant went inside and sat on the bench in the chamber of the Police Inspector and he was standing beside the bench and the Complainant was talking to the Accused about money and, thereafter, the Complainant took out the bribe amount and held it before the Accused, who asked him to keep in the register. But, in the cross-examination, he has admitted that he was standing at the place from where he could not see as to what has happened across the counter nor he could hear the talk ensued between the Accused and the Complainant.

On giving the exact description of the place, where he was standing and where the Accused and the Complainant were sitting, it can be clearly inferred that he was standing at a distance and with his admission that he did not hear the talk between the Accused and the Complainant nor he was able to see as to what had happened across the counter, the prosecution case cannot be said to be established through this witness, as the Complainant has failed to step into the witness box.

13. The Sanctioning Authority (PW 2) in the cross examination has admitted that the Complainant had not filed any document showing purchase of flat by him and the tainted currency notes were not found on the person of the Accused.

As far as PW 3- the Investigating Officer is concerned, he has deposed that the Complainant had disclosed to him that he had purchased one room from Jagdish Bhandari and he had paid Rs.1,00,000/- to him. Even he has failed to produce any document, which would have established this dealing. When the complaint (Exh.11) lodged by the Complainant is read, it reveal that he had purchased a room from Yash Construction for a consideration of Rs.1,70,000/- and he has parted with sum of Rs.1,00,000/- and the work of the building was on going. The complaint lack details about any Agreement, being executed and the cause for which he approached the police is, he was threatened by one Rajesh Patil and Munna Pande and demand of Rs.70,000/- by them.

When the conversation recorded is looked into, the present Accused is referring to some amount being parted, but it was an attempt of the Complainant to evade the said query, when he gave a clear suggestion that he had parted some amount. The prosecution has failed to prove that demand of bribe amount was by way of illegal gratification as motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, any favour or disfavour. In absence of necessary ingredients of Sections 7 and 13(1)(d) having been established, the Special Judge has wrongly inferred that offence under Section 7 is proved. The demand for gratification and acceptance thereof are sine qua non for the offence punishable under Section 7, before it can be concluded that the offence under Sections 7 and 13(1)(d) (I) and (ii) is made out. Though it is permissible to establish proof of demand and acceptance of illegal gratification by circumstantial evidence, and as it has been highlighted by the Constitution Bench in the case of Neeraj Dutta (supra), since in the present case, the circumstance of demand and acceptance is not established, the charge under Sections 7 and 13(1)(d) must necessarily fail and the Appellant deserve an acquittal.

14. By setting aside the impugned judgment dated 17/10/2016 passed in Special Case No.7 of 2009, the Appellant is acquitted of the charge levelled against him, as the prosecution has failed to prove the necessary ingredients of Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, despite the existence of

presumption under Section 20 to come into play, as regards Section 7 of the Prevention of Corruption Act.

15. The Appeal is allowed in the aforesaid terms. On the Appellant being acquitted, the bail bond stands cancelled.

( SMT. BHARATI DANGRE, J.)