

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 292 OF 2000

Jivandhar S/o Govindrao Katke

Age : Major, Occ. P.H.C. B.No. 944,

R/o : Police Station Kannad,

Taluka Kannad, Dist. Aurangabad.

.... APPELLANT

V E R S U S

The State of Maharashtra

.... RESPONDENT

.....

Mr. Satej S.Jadhav, Advocate for Appellant.

Mr. U.H.Bhogale, A.P.P. for Respondent - State.

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CORAM : V.M.DESHPANDE, J.

DATE OF JUDGMENT : 30th MARCH, 2015

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JUDGMENT :

1. Being aggrieved by the Judgment and Order of conviction passed by Special Judge [A.C.], Aurangabad dated

29/06/2000 in Special Case No. 6/1994, whereby the appellant is convicted for the offence punishable u/s 7 of the Prevention of Corruption Act, 1988 and directed to suffer Rigorous Imprisonment for one year and to pay fine of Rs. 200/- and in default Rigorous Imprisonment for three months. The Court below also convicted the appellant for the offence punishable u/s 13 (1) (d) read with Sec. 13 (2) of the Prevention of Corruption Act, 1988 and directed to suffer Rigorous Imprisonment for two years and to pay fine of Rs. 500/- and in default Rigorous Imprisonment for six months.

2. The appellant was tried before the learned Judge of the Court below along with Sakhahari Walmik Bhople. A Charge was framed against the appellant and said Sakhahari Walmik Bhople vide Exh. 9 in Special Case No. 6/1994 on 17/10/1998. Co-accused Sakhahari Walmik Bhople was acquitted by the learned Special Judge.

3. The prosecution case is as under.

Deepak Govindram Lalwani [P.W. 1] lodged a Complaint [Exh. 15] with Anti Corruption Bureau,

Aurangabad on 15/03/1994.

Complaint reveals that complainant Deepak Lalwani is the resident of Kannad. He resides jointly with his father and brothers. They run a hotel and eating house at Kannad since last 15 years. It is known as “ Milan Khanawal ”. The licence of the said eating house stands in the name of father of the complainant. Said hotel is run by complainant, his father and brother Suraj Lalwani.

According to the complaint, both vegetarian and non vegetarian food, tea and cold drinks are for sell in the said hotel. Complainant prepares tea in the hotel. Said hotel is situated in the landed premises of Rajkumar Bharuka in front of S.T. Stand, Kannad. Apart from the family members, Bhausahab and Kalu are the employees.

4. Complaint further proceeds that on 08/03/1994, when complainant was present in “ Milan Khanawal ”, that time in between 7.00 – 8.00 p.m., one person came to the hotel under the influence of liquor. He used abusive words in the name of sister of the complainant and demanded tea. Upon getting infuriated by the same, complainant slapped the said person, due to which he fell down and received bleeding

injury on his head due to a stone. Complainant was not knowing the said person. Thereafter, said unknown person left the scene. Complainant was standing outside the hotel. That time, police came in police jeep. They took his father and brother Suraj with them in the police jeep. Thereafter, complainant and his friend Syed Rahim went to meet another friend Syed Sab Syed Gulab, who is a correspondent [पत्र कार] at his house and narrated the incident to him. According to the complaint, complainant waited at his house, whereas said reporter [पत्र कार] went to police station, Kannad. On his return, he disclosed to the complainant that crime is registered about the incident and, therefore, he asked the complainant to visit police station. Accordingly, at about 11.00 p.m., complainant went to police station, Kannad. At the veranda of police station, he met with his brother Suraj, also both the accused met at that time. They disclosed to the complainant that against him, offence is registered for assault. He was taken to a room. That time, his friend Rahim and brother Suraj were also in the said room.

Complaint further alleges, at that time a threat was given by both the accused to the complainant that he will

be arrested and he was asked whether he wants to sleep in the lock up or wants to go to the house. That time, both the accused demanded Rs. 1,000/- [Rupees One Thousand]. Complainant was having Rs. 300/- with him. He asked the appellant to take the said amount, however, ultimately the amount of bribe was lower down to Rs. 500/-. According to the complaint, it was made in presence of complainant's friend Syed Rahim and brother Suraj. That time, complainant was having only Rs. 300/- with him, hence he sent his brother Suraj to one Lucky Tailor and obtained Rs. 200/- by way of hand loan and the said amount of Rs. 500/- was given to Katke [appellant].

5. Complaint alleges that when the complainant was leaving police station, that time both the accused asked him that he should forget the payment of Rs. 500/- and in the morning he shall attend police station with surety and 7/12 extract and that time what will be the amount of his Saheb will be informed.

On the next day, in the morning, complainant did not go to the police station. Complaint further states that on 09/03/2014 at 7.00 p.m., he went to police station

with his friend Syed Salim Syed Pashu as his surety. That time, police head constable Kendre took his signature and signature of Syed Salim on a form to complete the formality of bail and thereafter he was directed to go to the house. After completion of the process of bail, when he returned to the hotel in between 8.00– 8.30 p.m., that time complainant's brother Suraj disclosed to him that both the accused persons had been to the hotel, is the further allegation in the complaint.

6. Complaint further proceeds that thereafter on account of Mahashivratra, complainant had been to Verul festival along with his tea kiosk. There, he had been from 10/03/1994 to 13/03/1994. After the Verul festival, complainant came to the house in the morning of 14/03/1994, that time complainant's brother Suraj disclosed to him that both the accused used to visit hotel daily and used to enquire about the complainant. Therefore, on 14/03/1994 in the afternoon, complainant had been to the house of Bhople [acquitted accused]. He met there with him. That time Bhople asked the complainant that they shall be going to Katke [appellant] and the complainant shall hand

over money as per his demand. Therefore, both Bhople and the complainant went to the house of appellant. That time, appellant made demand of Rs. 500/-, instead he will re-arrest complainant and also directed to brought article by which assault was made on that unknown person. Complaint further states that the appellant asked the complainant that they shall be visiting the hotel in between 5.00 to 7.00 p.m. on 15/03/1994. That time, complainant should keep ready an amount of Rs. 500/-.

7. Complaint states that since the complainant was not ready to give the amount as demanded, therefore, he approached to the Anti Corruption Bureau, Aurangabad along with Rs. 500/- and requested for taking the action.

8. Mr. Prabhakar Latange [P.W.8] was discharging his duties as Dy. Superintendent of Police at Anti Corruption Bureau, Aurangabad at the relevant time. He took the complaint [Exh.15] of the complainant. Thereafter, Prabhakar Latange called panchas from the office of the Maharashtra State Financial Corporation, Aurangabad. They were Vajjnath Vishnu Kathar [P.W.2] and Gurumurti s/o

Kochanna Nagula [P.W.6]. They were introduced to the complainant. Prabhakar Latange gave demonstration of use of Anthracene powder and ultra-violet lamp to them. The entire exercise was reduced into writing by drawing pre-trap panchanama [Exh.23].

9. As per the prosecution, thereafter, the raiding party went to Kannad by police jeep. The jeep was parked near bridge and they walked up to the hotel of the complainant. Accused persons came to the hotel of the complainant. According to prosecution, complainant gave agreed signal, thereof, raiding party rushed to the spot and caught the hands of both the accused persons. The hands of Katke [appellant] were seen in the light of ultra-violet lamp and Anthracene powder was seen on the fingers of his hand. No Anthracene powder was noticed on the hands of the acquitted accused. After a detailed exercise, panchanama was drawn, which is at Exh. 24. On 16/03/1994, F.I.R. [Exh.49] was lodged with police station, Kannad. Seized property was handed over to police station. Prabhakar Latange [P.W.8], the Investigating Officer recorded the statements of the complainant as well as both the panchas.

On 17/03/1994, Prabhakar Latange [P.W.8] informed to the Superintendent of Police, Aurangabad [Rural] about the registration of offence against the accused persons. He got prepared the map of the spot through the Maintenance Surveyor. The said map is at Exh. 27. He gave his final report of investigation to the Superintendent of Police, Anti Corruption Bureau, Aurangabad and requested to move the competent authority for sanction. The sanction order was received. The same is at Exh. 47. After the completion of the entire investigation, on 20/08/1994, Charge Sheet was submitted in the Court of law.

10. In order to bring home the guilt of the accused persons, prosecution examined following witnesses :

- [i] Deepak Govindram Lalwani [P.W.1], the complainant.
- [ii] Vaijinath s/o Vishnu Kathar [P.W.2], panch witness, who remained with complainant during the period of trap.
- [iii] Narayan s/o Kisanrao Satdive [P.W.3], Circle Officer who has prepared the map of the spot of incident.

- [iv] Ganpat s/o Budharao Rathod [P.W.4], A.S.I., who has proved the registration of crime No. 48/1994 against the complainant Deepak Lalwani.
- [v] Vishnupant S/o Apparao Bendre [P.W.5]. This witness was also examined in respect of the registration of the crime against the complainant.
- [vi] Gurumurti s/o Kochanna Nagula [P.W.6]. This witness was panch No. 2 and he has proved post-trap panchanama [Exh.24].
- [vii] Shridevi Goyal [P.W.7] was the Dy. Superintendent of Police, was the sanctioning authority who has accorded sanction.
- [viii] Prabhakar s/o Gopinath Latange [P.W.8] was the Dy. Superintendent of Police and was the Investigating Officer.

11. After a full dressed trial, learned Judge of the Court below acquitted the original accused No. 2 Sakhahari Walmik Bhople. However, convicted the appellant and sentenced to suffer the imprisonment on account of the offences punishable u/s 7 and 13 (1) (d) read with Sec. 13 (2) of the Prevention of Corruption Act, 1988.

12. Heard Mr. Satej S.Jadhav, learned Counsel for the appellant and Mr. U.H.Bhogale, learned A.P.P. for respondent – State in extenso. Learned Counsel for the appellant and learned A.P.P. in detail took me through the entire record of Special Case No. 6/1994.

13. According to the learned counsel for the appellant, appellant was framed in a false case. According to him, prosecution has utterly failed to prove the demand and consequent acceptance. As per the submission of the learned counsel for the appellant, the tainted currency notes were thrust upon the appellant, as it could be seen from the evidence of the prosecution witnesses and also from the explanation given by the appellant u/s 313 of the Code of Criminal Procedure. He further submitted that the evidence of Vaijinath Kathar [P.W.2] also shows that the prosecution has not proved the demand and acceptance on the spot by the appellant. He also attacked the reliability of the evidence of Vaijinath Kathar [P.W.2] on the basis of the reported decision of this Court reported in the case of Sharad s/o Namdeorao Shirbhate Vs. State of Maharashtra , 2006 (2) Mh.L.J. (Cri.) 1210, which is also approved by the

Division Bench of this Court in **Criminal Appeal No. 408 of 2012 in the case of Suresh s/o Purushottam Ashtankar Vs. The State of Maharashtra & Anr. [Hon'ble Mr.B.R.GAVAI & Mr. V.M.DESHPANDE, JJ.]**.

Learned counsel for the appellant also relied upon the decision of the Apex Court in the case of **State of Maharashtra Vs. Dnyaneshwar Laxman Rao Wankhede reported in [2009] 15 SCC 200** and prayed for acquittal of the appellant by allowing the Appeal.

Per contra, learned A.P.P. would submit that the evidence of the prosecution, as available on record, through the evidence of complainant Deepak Govindram Lalwani [P.W.1] and Vaijinath Kathar [P.W2] would reveal that the prosecution has adduced cogent and consistent evidence to bring home the guilt to the appellant. According to him, their evidence inspire confidence and can not be doubted. He submitted that the reasoning of the Judge of the Court below is based on the available material and requires no interference and, therefore, submits that the Appeal be dismissed.

14. A complaint is never a substantive piece of

evidence. Complaint can be used for corroboration and contradiction. Prosecution is obliged to prove its contents by substantive evidence.

15. According to complaint, first demand of Rs. 1,000/- [Rupees One Thousand] was made by both the accused in the night of 08/03/1994 at the police station, Kannad itself. According to the complaint, the amount was reduced to Rs. 500/-. The said amount was paid by obtaining hand loan from one Lucky Tailor by the brother of the complainant. The amount of Rs. 500/- was given to the appellant in presence of complainant's brother Suraj and friend Syed Rahim and thereafter the complainant was directed to leave the police station.

This particular assertion in the complaint in respect of the demand in presence of Suraj and Syed Rahim does not find place in the evidence of Complainant Deepak Lalwani [P.W.1], when he deposed from the witness box in the Court. His entire evidence is completely silent about the same.

Further, though the said demand was made in presence of brother Suraj and friend Syed Rahim and the

amount was accepted by the appellant in their presence, prosecution, for the reasons best known to it, has not adduced their evidence.

In that view of the matter and since the complainant Deepak Lalwani [P.W.1] is completely silent when he was in the witness box in so far as the said demand and acceptance of Rs. 500/- is concerned, it can be safely recorded that the prosecution has utterly failed to prove the same.

16. According to the complaint, second demand was made at the house of the appellant by him. Complaint further states that, when the complainant had been to the house of appellant along with acquitted accused, that time, appellant has uttered following words,

“ आम्ही दररोज चक्कर मारत होतो. कोटे गेला होता, कुठपर्यंत असा पळणार. तुमची इज्जत ठेवली असे म्हणून ५०० रुपये द्या नसता परत अटक करतो ”.

Complaint and also the evidence of Complainant Deepak Lalwani [P.W.1] would show that from 10/03/1994 till 13/03/1994, he had been to Verul for Mahashivratra fair. On 14/03/1994, he came to Kannad and that time his

younger brother Suraj gave message to him.

Thus, according to the prosecution, in absence of complainant at Kannad, appellant and acquitted accused used to visit complainant's hotel and it is his brother Suraj, who has disclosed to the complainant to visit appellant. Therefore, the evidence of Suraj would have been the connecting evidence in that behalf. However, prosecution has not examined Suraj as its witness to prove the fact of visiting the hotel of complainant by the appellant in his absence from Kannad.

17. Further, in the complaint, there is no reference about the second demand to the effect that the said demand was made to the complainant through his brother. On the contrary, as reproduced in the earlier part, the demand was made directly to the complainant.

However, from the witness box, Complainant Deepak Lalwani [P.W.1] has deposed as under :

“ 4. १५/०३/१९९४ रोजी मी ए.सी.बी.च्या कार्यालयात गेलो होतो, कारण अ. कटके व भोपळे यांनी ५०० रुपये माझ्याकडे माझ्या भावामार्फत मागितले होते ”.

“ 4. On 15/03/1994, I came to the office of Anti Corruption Bureau, because accused Katke and Bhople had demanded the bribe of Rs. 500/- from me through my brother ”.

Thus, the assertion of the demand of Rs. 500/- made in the complaint is not proved by the substantive evidence by the complainant. Further, as per the evidence, the demand was made through the brother of complainant. Said aspect is clearly absent in the complaint [Exh.15]. Thus, there is serious contradiction and discrepancy in the prosecution case about the said demand as to whether it was made to the complainant or it was made through the brother of the complainant.

Further, if the demand was made through the brother and if the evidence of Complainant Deepak Lalwani [P.W.1] is to be believed, then it was incumbent upon the prosecution to prove the said aspect through the evidence of Suraj only. However, as observed, Suraj is not examined by the prosecution.

18. According to the evidence of complainant Deepak Lalwani [P.W. 1] and Vaijinath Kathar [P.W. 2],

appellant and acquitted accused Bhople came to the hotel of complainant and made demand of Rs. 500/- and accepted the same.

As per the evidence of complainant Deepak Lalwani [P.W.1] and as per the map, there are four cabins in the hotel. According to the prosecution, the spot of incidence is cabin No. 1. The evidence of P.W. 1 Deepak Lalwani would show that the said cabin was 10-12 ft. away from the counter. It would be useful to refer the evidence of complainant himself for fixing the place, whereat independent witness P.W. 2 Vaijinath Kathar was sitting.

“ The distance between that cabin and the place where the panch Vaijinath Kahar was sitting was about 10-12 ft. ”.

It is brought on record through the evidence of complainant Deepak Lalwani [P.W.1] that at the relevant time, there was rush in the hotel and the customers were sitting in cabin No. 2 to 4 and the tape-recorder in the hotel was going on. It is also brought on record that there were curtains on the door of the cabin and the customers who are sitting outside the cabin, can not see the customers who are

sitting in the cabin.

As per the evidence of the complainant, the incidence of acceptance of bribe amount took place in cabin No. 1 of the hotel. Even from the map [Exh.27], prosecution has stated cabin No. 1 as the spot of incidence.

According to the complainant Deepak Lalwani, accused persons called him in cabin No. 1 of his hotel. There, they demanded money and accepted the same.

However, P.W. 2 Vaijinath Kathar, panch witness has given altogether different version. His evidence would reveal that the complainant sat on the counter of his hotel and he sat on the bench in front of the counter and there after arriving to the hotel, the demand and acceptance was made by the accused persons.

Though P.W. 2 Vaijinath Kathar in the Examination-in-Chief has stated that the demand and acceptance was made at the counter, however in the cross examination he has stated as under,

“ The transaction of money had taken place in the cabin ”.

“ The complainant and accused were talking in the cabin for five minutes. I

was sitting on the north side of the cabin ”.

Thus, it is clear that at one place, the panch witness is saying something and at another he states differently.

In that view of the matter, presumably, the amount was demanded and accepted by the appellant in side the cabin, if the evidence of P.W. 1 Deepak Lalwani is to be believed.

Once the place of incidence is fixed, then it is crystal clear that the allegation of demand is not supported by the independent witness. Firstly, even according to the complainant, the independent witness was sitting about 10-12 ft. away from the cabin. Secondly, tape-recorder in the hotel was going on. Thirdly, in view of the admission of the complainant Deepak [P.W.1], it is hard to believe that the talk between complainant and appellant was heard by independent witness P.W. 2 Vaijinath Kathar. The relevant admission is reproduced hereunder :

“ The talk between me and the accused had taken place in cabin in

slow volume ”.

Further, even P.W. 2 Vaijinath Kathar, independent panch witness has admitted as under,

“ I had not clearly heard the conversation between the complainant and the accused at the time of trap ”.

In view of the aforesaid, I am of the considered view that the prosecution has utterly failed to prove the demand at the time of trap.

19. P.W. 2 Vaijinath Kathar is candid enough to state as under,

“ When I had visited the Court, xerox copies of three panchanamas were given to me for reading and the said copies are still in my possession ”.

In the back-drop of above, learned counsel for the appellant has pressed into service the decision of the single Bench of this Court in Sharad s/o Namdeorao Shirbhate [cited supra], which is approved by the Division

Bench of this Court in Suresh s/o Purushottam Ashtankar [cited supra].

After having gone through the law laid down in the aforesaid two cases, it is clear that the xerox copies of three panchanamas were given to P.W. 2 Vaijinath Kathar for reading, which were in his possession. Thus, it is also clear that he had read those three panchanamas stealthily and not in the presence of the Court.

Refreshing the memory has to be done before the Court and not stealthily. It is impermissible for a witness to stealthily refresh his memory before entering the Court and deposing about the entire evidence. From the aforesaid version of P.W. 2 Vaijinath Kathar, it is clear that the xerox copies of the panchanamas were supplied to him, which would mean that he has refreshed his memory stealthily. In that view of the matter, the objection to the reliability of the evidence of the said witness is valid.

20. Same is the case in respect of the complainant. He has also admitted that on the day of evidence, complaint was given to him for reading.

21. Another blow to the prosecution is given by the complainant himself and in-fact it has supported the explanation given by appellant in his statement recorded u/s 313 of the Code of Criminal Procedure. During the course of cross examination, complainant has stated as under,

“ It is true that on 15/03/1994, in the cabin of my hotel, I tried to put the currency notes in the hands of accused Katke and they were thrown by him on the table ”.

Precisely, it is the explanation of the appellant in respect of observation of Anthracene powder on his hand.

22. Demand of illegal gratification is a *sine qua non* for constitution of an offence under the provisions of the Act. It would be useful to refer the observations of Hon'ble Apex Court in the authoritative pronouncement of State of Maharashtra Vs. Dnyaneshwar Laxman Rao Wankhede reported in [2009] 15 SCC 200 :

“ In disputably, the demand of illegal gratification is a sine qua non for constitution of an offence under the

provisions of the Act. For arriving at the conclusion as to whether all the ingredients of an offence, viz. Demand, acceptance and recovery of the amount of illegal gratification have been satisfied or not, the court must take into consideration the facts and circumstances brought on the record in their entirety. For the said purpose, indisputably, the presumptive evidence, as is laid down in Section 20 of the Act, must also be taken into consideration but then in respect thereof, it is trite, the standard of burden of proof on the accused vis-a-vis the standard of burden of proof on the prosecution would differ. Before, however, the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. Even while invoking the provisions of Section 20 of the Act, the Court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt ”.

23. The cumulative effect of the aforesaid survey of the prosecution case thus clearly established that the prosecution has utterly failed to prove the first demand allegedly made in the police station. Further, it would be hazardous to accept the prosecution case about the second demand in view of the contradictory evidence as to whether it was made to the complainant or through his brother. Thirdly, from the quality of the evidence, as available in the prosecution case, it is crystal clear that the prosecution has failed to prove the demand at the time of trap beyond reasonable doubt. Since the factum of demand is not at all proved and in view of the probable explanation available in the case cited by the appellant, which in fact find support from the cross examination of the complainant, the conviction of the appellant can not be sustained. That leads me to pass the following order.

ORDER

- (i) Criminal Appeal No. 292 of 2000 is allowed.
- (ii) The Judgment and Order of conviction convicting the appellant for the offence punishable u/s 7 and 13 (1)

(d) read with Sec. 13 (2) of the Prevention of Corruption Act, 1988 passed by the learned Special Judge [A.C.], Aurangabad dated 29/06/2000 in Special Case No. 6/1994 is hereby quashed and set aside.

(iii) The appellant is acquitted of the offence punishable u/s 7 and 13 (1) (d) read with Sec. 13 (2) of the Prevention of Corruption Act, 1988.

(iv) The bail bonds of the appellant stands cancelled.

(v) Fine amount, if any, paid by the appellant, be refunded to him.

[V.M.DESHPANDE, J.]