IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 293 OF 2014

Rajeshwar S/o Baburao Tigote,
Age : 45 years, Occu.: Government
Service, At present working as
Police Constable with Police Head
Quartrs at Aurangabad,
R/o : Police Colony, T.V. Centre,
Aurangabad, Taluka and District:
Aurangabad .. Appellant
(Orig. Accused)

Vs.

The State of Maharashtra,
Through the CIDCO Police Station,
(City), Aurangabad, Taluka and
District : Aurangabad .. Respondent
(Orig. Prosecution)

Mr. Rajendra S. Deshmukh, Advocate for the appellant
Mrs. B.B. Gunjal, A.P.P. for the respondent/State

CORAM : M.T. JOSHI, J.
DATE : 23/07/2015

ORAL JUDGMENT :

Heard both sides.

2. Aggrieved by the recording of conviction and the consequent sentence of rigorous imprisonment for 6 months and to pay fine of Rs.1,000/- in default to suffer rigorous imprisonment for 2 months for the offences punishable under section 7 of the Prevention of

Corruption Act, 1988, to suffer rigorous imprisonment for 1 year and to pay fine of Rs.500/- in default to suffer rigorous imprisonment for 1 month for the offences punishable under section 13(1)(d) r/w. 13(2) of the Prevention of Corruption Act, 1988, against the present appellant, by the learned Special Judge (P.C. Act), Aurangabad vide judgment and order dated 03/06/2014 in Special Case (A.C.B.) No. 18 of 2009, the present appeal is preferred.

3. The prosecution case in short, is as under:-

. That complainant – P.W. 1 - Yeshvir Yadav is having mother-in-law, namely, Dagadubai. She had invested certain money in one Chetan Gagangiri Nagari Co-op. Credit Society at Aurangabad in fixed deposit. For refund of the said amount, account payee cheque was given by the officials of the said society, however, the cheque was not honoured. In the circumstances, the mother-in-law had filed a case with the Consumer Disputes Redressal Forum and ultimately, an amount of Rs.3,25,000/- was awarded to her. The complainant used to look after the case, since the mother-in-law was ill. Despite the order, the amount was not paid by the

Society and, therefore, execution proceeding was started, in which execution warrants were twice issued but those were not executed. Therefore, on third occasion, the execution warrant was issued by the Forum on 28/4/2009. Earlier, two warrants as well as the third one was assigned by the Crime Branch of Aurangabad Police to the present appellant-accused. Returnable date of the third warrant was 8/5/2009.

. As the complainant came to know that the execution of the warrant is to be made by the appellant, the complainant contacted the appellant on his mobile phone. Thereupon, the appellant continuously started pestering the complainant by making demand over the mobile phone for Rs.500/-, for execution of the warrant. Ultimately, the appellant has called the complainant to meet him on 5/5/2009 at about 5:00 p.m. in the evening near M.G.M. College with the gratification of Rs.500/-. As earlier also, the appellant had made similar demand, the complainant went to Anti Corruption Bureau, Aurangabad and filed the complaint on 5/5/2009.

. P.W. 5 – Police Inspector - Nandkumar Patil has conducted the investigation in the same. As usual, he collected two panch witnesses from two Government Departments including P.W. 2 – Milind Kothawala. Thereupon, the complainant was sent with this panch witness to meet the appellant and discuss with him about his work and confirm the demand. The complainant was told that in case, the appellant demands the bribe amount, then he should tell him that the amount would be given to him on the next day and to get time and place fixed by him. This was, in a way verification exercise.

. Accordingly, the complainant and the panch witness went near the M.G.M. College on 5/5/2009 at about 5:00 – 5:15 pm., as asked by the appellant. When they were near Lucky Juice Center, the appellant called complainant over his mobile and after 30-45 minutes, he reached there. During talk, he again made the demand of the amount, to which the complainant answered on the line of the instructions given to him by the Investigating Officer. Anyhow, the appellant agreed for getting the bribe amount on the next day at 10:30 a.m. in front of M.G.M. College and asked the complainant to wait in one Gajanan Tea Stall. Accordingly, the panch and the appellant went back and returned to the

Investigating Officer. Accordingly, the trap was arranged on 06/05/2009.

. During the trap, the very same panch witness P.W. 2 – Milind Kothawala was made the shadow panch witness, who was to accompany the complainant at the time of making demand and acceptance of the money. Previous to that, usual exercise of demonstration of application of anthracene powder was given to all the concerned. The decoy money brought by the complainant was smeared with anthracene powder and was kept with the complainant. Accordingly, the raiding party went in the vicinity. The complainant and the shadow panch went by motorcycle and waited for the appellant in one Gajanan Tea Stall. Pre-determined signal, upon acceptance of the decoy money by the appellant was agreed.

. At about 12:00 in the noon, the appellant came there. After the primary welcome was over, the complainant asked him about the execution of the warrant. Upon that, the appellant told that first he would execute warrant. He also told that his friend was coming there. The appellant also asked, as to whether the amount was brought. After taking tea when all of them went upto the M.G.M. College Gate, friend of the accused came there. The appellant and his friend had certain discussion in private, about which the complainant was not aware. Thereupon, the appellant asked the complainant to wait in Lucky Juice Center. Thereupon, the appellant and his friend went inside the College. After about 15 minutes, the appellant and his friend returned from the College. The appellant told that the person on whom the warrant was to be served, i.e. one Mr. Tawade, could not be found in the College. He therefore promised that the warrant would be executed on the next day. During further talks, as the complainant told that on the next day, he would be busy, the appellant asked for the agreed amount. Thereupon, the complainant removed the decoy money from his shirt pocket by his right hand and hold the same before the appellant. Appellant accepted the amount with his right hand and kept it in his left side T-shirt pocket. Thereupon, the appellant made enquiry as to whether any other similar warrant is to be executed. Upon that, the complainant told that there is one another case of Priya Madam. In the meantime, predetermined signal was given. Raiding party arrived. The appellant was apprehended.

Thereafter, post-trap exercise was carried in which the relevant parts of the body as well as the relevant part of the clothes of the appellant and thereafter of the complainant were found positive to the application of anthracene powder.

. Thereafter, P.W. 5 – the Investigating Officer carried the further investigation. The statements of the relevant witnesses were recorded. Necessary panchanama was recorded. Call details record of the mobile of the appellant was collected. The sanction was obtained from P.W. 3 – Prakash Waghmare, the Deputy Commissioner of Police and ultimately the chargesheet came to be filed.

4. Before the learned Special Judge, in all six witnesses were examined. P.W. 1 – Yeshvir Yadav is the complainant. P.W. 2 – Milind Kothawala is the shadow panch witness. P.W. 3 is the Deputy Superintendent of Police, who has granted sanction to prosecute the appellant. P.W. 4 – Parmeshwar Paigavane is the Police Head Constable, to whom the complainant described as a friend and in-fact, statement of P.W. 6 – Kushalchand Baheti, the then Police Inspector of the Crime Branch

would show that the work of the execution of warrant was entrusted to said P.W. 4 – Police Head Constable Parmeshwar Paigavane as a Senior Officer and the appellant was to assist him in the same. P.W. 5, as detailed above, is the Investigating Officer while P.W.6 was the then Police Inspector, Crime Branch, as referred above.

5. The defence of the appellant was of false framing and thrusting of the decoy money in his pocket at the time of trap. The appellant did not object to the proving of the call details record by the Investigating Officer and the call details record were exhibited at Exhibit 63.

6. Before the learned Special Judge, while the complainant and the Investigating Officer deposed on the line of the prosecution, the shadow panch witness though supported the prosecution case in the examination-in-chief, however, in cross-examination, he came with a different story that in-fact P.W. 4 – Police Head Constable Paigavane has made demand of the money and only because of the pressure from the Investigating Officer in examination-in-chief, he deposed as per the

panchanama.

7. The learned Special Judge brushed aside the statement of the panch witness in the cross-examination and observed that the acceptance of money is proved as the decoy money was found on the person of the appellant and in that view of the matter, the appellant was convicted. Hence, the present appeal.

8. Mr. R.S. Deshmukh, learned counsel for the appellant took me through the entire record and submitted as under :-

. While in the F.I.R., it is alleged that the appellant was continuously pestering over phone by making demand of money, the complainant himself has deposed that there was no such continuous demand and had there been any demand earlier, he would not have waited for filing of the complaint till 05/05/2009. His deposition would show that he refused to avail a tape-recorder offered by the Investigating Officer for use during trap, though he is well educated and is B.E. (Civil). Further, the prosecution evidence itself would show that P.W. 4 – Police Head Constable – Parmeshwar

Paigavane was entrusted with the work of execution of warrant as a Senior Officer. It has come in the evidence of the complainant himself that, before the appellant went in the premises of the M.G.M. College with said P.W. 4 – Parmeshwar, both of them had a private conference between themselves to the exclusion of the complainant. Further, though the panch witness has specifically deposed that in-fact, the money was demanded by P.W.4 – Parmeshwar and he though that he should also have been made co-accused, the learned Special Judge did not give any credence to the same and no reasons are assigned for the same.

. In the circumstances, submitting that mere finding of decoy money on the person of the accused would not take us to draw the presumption available under section 20(1) of the Prevention of Corruption Act, 1988, relying on the ratio of **State of Punjub Vs. Madan Mohan Lal Verma 2013 AIR (SCW) 4757**, he wanted that the appeal be allowed and the appellant be acquitted.

9. On the other hand, learned A.P.P. submits that admittedly, during the trap, the decoy money was found on the person of the appellant. The panch witness

conveniently in the cross-examination has given go-bye to the prosecution case. The statement of the complainant as well as the Investigating Officer and P.W. 4 – Paigavane would corroborate the fact that the present appellant has made demand of the bribe and ultimately, accepted the same. In the circumstances, she submits that the appeal be dismissed.

10. On the basis of this material, following points arise for my consideration:-

> I) Whether the prosecution has proved that the present appellant being a Police Constable and as such, a public servant, continuously made demand of Rs.500/-, as illegal gratification other than the legal remuneration for executing the warrant upto 5/5/2009 ?
>
> II) Whether the prosecution has proved that on 6/5/2009, the present appellant made a demand of the illegal gratification and, thereafter, obtained the same from the complainant by abusing his position as a public servant ?

My findings to both the points are in the negative. The appeal is therefore allowed and the appellant is acquitted of the offences punishable under section 7, 13(1)(d) r/w. Section 13(2) of the Prevention of Corruption Act, 1988 for the reasons to follow.

R E A S O N S

11. The entire evidence on record would show that from 28/4/2009 till 5/5/2009, there were atleast 10 phone calls between the appellant and the complainant. Though, in the FIR, the complainant has stated that during that period, the appellant was continuously pestering him over the mobile for illegal gratification, in his statement before the Court, he however, resiled from the same by saying that no such demand was made till 5/5/2009 and had there been any demand earlier, he would have approached the Anti Corruption Bureau.

12. The evidence of P.W. 6 – P.I. - Baheti (now A.C.P.) would show that the work of execution of warrant was assigned to P.W. 4 – Parmeshwar Paigavane on the strength of relevant register, certified copy of which is proved at Exhibit 69 and 70. The present appellant was to assist him in the same as per the said duty register. As against this, the Investigating Officer

deposed that from the documents which he received from the crime branch, he did not realize that duty of execution of warrant was given to P.W.4 Parmeshwar Paigavane. The deposition of very same P.W. 4 would however show that said warrant was given to him for execution and, thereafter, he handed over the said warrant to the appellant for its execution.

13. It is the prosecution case that P.W. 4 Parmeshwar Paigavane was not only present at the time of trap but he even accompanied the appellant to make the attempt of execution of warrant in M.G.M. College. According to the complainant, in-fact, there was a private conference between the appellant and P.W. 4 – Paigavane, away from him at that time.

14. In all these circumstances, if the deposition of P.W. 2 – the shadow panch witness is taken into consideration, that in-fact, P.W. 4 – Paigavane has demanded the money, then, certainly benefit of doubt would go to the present appellant. The panch witness not only deposed that the money was demanded by P.W. 4 but even supported the defence that the money was thrust upon the appellant.

15. The learned Special Judge however did not consider the evidence and took the alternative route by observing that the acceptance of decoy money is proved and, therefore, by drawing the presumption available under section 20(1) of the Prevention of Corruption Act, 1988 has convicted the appellant.

16. It is now well established that mere presence of the decoy money on the person of the accused would not be enough to draw the said inference.

. In the case of "**State of Punjab V. Madan Mohan Lal Verma**" (*cited supra*), the ratio of "**Abrar V. State of U.P." AIR 2011 SC 354; Rukia Begum v. State of Karnataka, AIR 2011 SC 1585;** and **State of Madhya Pradesh v. Dal Singh and others AIR 2013 SC 2059** is adverted and ultimately, in paragraph no. 5 it is observed as under:-

> "5. The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the Act 1988. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten

guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the Act 1988, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the Act 1988. 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. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convicting the accused person. (Vide : Ram Prakash Arora v. The State of Punjab AIR 1973 SC 498; T. Subramanian v. The State of T.N., AIR 2006 SC 836; State of Kerala & Anr. v. C.P. Rao, (2011) 6 SCC 450; and Mukut Bihari & Anr. v. State of Rajasthan, (2012) 11 SCC 642)."

17. One disturbing feature of the case requires to be noted here. As per the prosecution case, P.W. 2-Milind Kothawala, the shadow panch witness was sent with the complainant on the previous day of the trap for the

purposes of verification. The verification was successful as the appellant made demand of illegal gratification at that time. After 24 hours, however, the same panch witness was used for the actual trap. It is the well established norm of the Anti Corruption Bureau that the information is required to be kept secret till the trap is organized. For 24 hours, the same panch witness continued to be the panch witness for verification as well as for trap.

18. In the light of these facts, since the prosecution failed to prove its case beyond reasonable doubt, the following order:-

19. Criminal Appeal is hereby allowed.

20. The judgment and order dated 03/06/2014 passed by the learned Special Judge (P.C. Act), Aurangabad in Special Case (A.C.B.) No. 18 of 2009, convicting the present appellant for the offences punishable under section 7, 13(1)(d) r/w. 13(2) of the Prevention of Corruption Act, 1988 and consequently sentencing him to suffer rigorous imprisonment for 6 months and to pay fine of Rs.1,000/- in default to suffer rigorous

imprisonment for 2 months for the offence punishable under section 7 of the Prevention of Corruption Act, 1988 and to suffer rigorous imprisonment for 1 year and to pay fine of Rs.500/- in default to suffer rigorous imprisonment for 1 month for the offences punishable under section 13(1)(d) r/w. 13(2) of the Prevention of Corruption Act, 1988, is hereby set aside.

21. Instead, the appellant is acquitted of the offences punishable under section 7, 13(1)(d) r/w. 13(2) of the Prevention of Corruption Act, 1988.

22. Bail bonds, if any, of the present appellant shall stand cancelled.

23. Fine amount deposited by the appellant be returned to him after sixty (60) days, from the date of this order.

24. Criminal Appeal stands disposed of accordingly.

[M.T. JOSHI]
JUDGE

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