IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE JURISDICTION
CRIMINAL APPEAL NO. 521 OF 1994

Uttam Tatya Dhavale since deceased through his legal heirs: 1. Ramchandra Uttam Dhavale 2. Rajendra Uttam Dhavale 3. Sou. Sunita Chandrakant Kate R/o Chikmahud, Tal-Sangola, Dist. Solapur 4. Sou. Rukmini Adinath Gade R/o Udanwadi, Tal-Sangola, Dist. Solapur. 5. Rahul Uttam Dhavale Appellant nos. 1, 2 & 5 residents of 514, Juni Peth, Pandharpur, Dist. Solapur.	}	….Appellants

V/s.

The State of Maharashtra ....Respondent

Mr. Ganesh Bhujbal Court appointed Advocate for Appellant
Mrs. A. A. Mane APP for the State.

CORAM : SMT. SADHANA S. JADHAV, J.
DATED : NOVEMBER 30, 2015.

JUDGMENT:

Appellant herein stands convicted for offence punishable under sections 7, 13 (1) (d) r/w section 13 (2) of Prevention of Corruption Act, 1988 in Special Case No. 17 of 1992 by Special Judge, Solapur vide Judgment and Order dated 29/09/1994 and is sentenced to rigorous imprisonment for three years and fine of Rs. 3000/- i.d. to suffer further rigorous imprisonment for 9 months. He is also sentenced to suffer rigorous imprisonment for 4 years for offence punishable under section 13 (2) of Prevention of Corruption Act and fine of Rs. 4000/- i.d. to suffer rigorous imprisonment for one year. Being aggrieved by the said Judgment and Order, appellant had filed present criminal appeal. Appellant was enlarged on bail during the pendency of the appeal. Appellant has expired on 27/04/2003. The death certificate is taken on record. Legal representatives of the appellant have filed criminal application no. 1583 of 2011 seeking leave to prosecute present appeal. By an order dated 22/12/2011, application is allowed and hence the appeal is being prosecuted through legal heirs.

2) Such of the facts necessary for the decision of this appeal are as follows:

3) On 10/02/1992 one Namdeo Ingole a young lad of 15 years old approached Anti Corruption Bureau, Solapur and lodged a report alleging therein that he is prosecuting his education in Ashram School. He was residing with his aunt Tanubai. One Shevantabai was her neighbour. There was a quarrel between Tanubai and Shevantabai. Both the parties had lodged a report. Complainant had returned to school. He has received a message from his cousin that on 08/02/1992 he has been called to Mangalwedha police station. On 08/02/1992, he along with his aunt and nephews had been to the police station. Police Patil was present along with complainant. They met the officer in the police station. They were referred to A.S.I. Present appellant was officiating as A.S.I. at Mangalwedha Police Station at the relevant time. That A.S.I. Dhavale had taken them to Tahsil office. Complainant was assaulted. They had all requested A.S.I. Dhavale to release them. A.S.I. Dhavale had demanded Rs. 500/- to enlarge them. Complainant had only Rs. 100/-. He then borrowed the money and paid Rs. 400/- to A.S.I. Dhavale. At that time, they were informed by A.S.I. Dhavale that he had accepted Rs. 400/- for not retaining them in prison. For

discharging them from the case, they should pay Rs. 1500/-. Complainant has specifically stated that since he used to read newspapers he was aware of the procedure to be followed in a case where there is demand of illegal gratification, and therefore had approached the office of Anti Corruption Bureau and informed them about the conduct of the appellant. He had also informed anti corruption bureau that the accused has told them that he would not accept one farthing less than Rs. 1500/-. That complainant was also directed to give money at the earliest, preferably on the next day. Upon receiving the report, Dy.S.P. of anti corruption had called upon two public servants working in the office of T.I.L.R. to act as panch. One Devidas Rathod was asked to act as shadow panch. The trap was arranged on 10/02/1992. At the office of anti corruption bureau pre-trap panchanama was recorded and the raiding party proceeded to Mangalwedha. Accused was not present in the police station. Accused could not be traced and hence, first raid had failed.

4) On 11/02/1992, again a fresh pre-trap panchanama was recorded. They had again proceeded to the police station. Accused was

not found at the police station and hence, trap had failed on 11/02/1992.

5) On the third occasion on 13/02/1992, pre-trap panchanama was recorded and thereafter raiding party and the complainant had proceeded to Mangalwedha. They had initially been to the police station and had learnt that after completing the duty accused had gone to Tahsil Office, hence, complainant and others went to Tahsil Office. There they met accused/appellant. Appellant had offered tea to the complainant and shadow panch. They were taken to an open canteen nearby. After having tea, complainant had paid the bill. Thereafter, complainant had given a signal to the raiding party. Appellant was apprehended at the spot. Money was recovered from his pocket and thereafter report was lodged at the police station and crime no. 8 of 1992 was registered against accused/appellant for offence punishable under section 7, 13 (1) (d) and 13 (2) of Prevention of Corruption Act, 1988. Case was registered as Special Case No. 17 of 1992. Prosecution examined as many as eight witnesses to bring home the guilt of the accused.

6) P. W. 7 happens to be aggrieved complainant. He has deposed before the court in consonance with F.I.R. The sterling testimony of P. W. 7 could not be over turned in the cross-examination. P. W. 7 has deposed before the Court that on 13/02/1992 he along with the shadow panch had met accused/appellant near Tahsil Office, Mangalwedha. Accused/appellant had questioned the identity of shadow witness. Accused had taken complainant and shadow panch to the canteen nearby. Accused/appellant had assured complainant that he could save them from prosecution, at the same time he asked whether the amount of Rs. 1500/- was brought as per the agreement. Complainant had paid bill of Rs. 25/-. Thereafter, accused/appellant had asked the complainant to hand over the amount which he has brought. Accordingly complainant had paid amount in canteen. On the way to Tahsil Office, complainant had informed the police that amount is already paid to the accused/appellant. Complainant gave a signal as directed and thereafter appellant was apprehended. Complainant has admitted before the court that soon after the amount was accepted by accused/appellant, he had not given a signal. According to him, trap

amount was accepted voluntarily. Complainant P. W. 7 has denied the suggestion that appellant had uttered the words as "अगं आई गं!". There are stray omissions and contradictions which are elicited in the cross-examination. Hence, it can be safely said that the substantive evidence of original complainant is of a sterling nature.

7) P. W. 4 Devidas Rathod who was acting as a shadow witness at the time of panchanama was working in office of Land Records Department. On 10/02/1992, he was asked to report to office of Anti Corruption Bureau to act as a panch in a trap case. He had attended the office of 10/02/1992. After recording pre-trap panchanama, they all had proceeded to Mangalwedha. On that day, accused/appellant had been to Solapur and therefore trap was unsuccessful. On the next occasion also the trap was unsuccessful. On 13/02/1992 after recording of pre-trap panchanama, they had again visited Mangalwedha, more particularly Mangalwedha Tahsil Office. After exchange of honour for each other they had decided to go for tea. Complainant had paid bill of the canteen. Thereafter, complainant had

given a signal and trap was successful.

8) Section 20 of Prevention of Corruption Act, 1988 reads thus:

“20. **Presumption where public servant accepts gratification other than legal remuneration :-**

(1) Where, in any trial of an offence punishable under section 7 or section 11 or clause (a) or clause (b) of sub-section (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be Inadequate.

(2) Where in any trial of an offence punishable under section 12 or under clause (b) of section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been 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 that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7, or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-section (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no inference of corruption may fairly be drawn."

9) Whenever a Statute directs that the court 'shall' presume a fact, the court 'shall' regard a fact as proved unless and until it is disproved. Since it is a presumption of Law it would be obligatory on the part of the Court to raise this presumption.

10) In the case of **The State of Madras Vs. A. Vaidyanatha Iyer (A.I.R. 1958 S.C. 1961)** wherein Hon'ble Apex Court has observed :

"Where it is proved that a gratification has been accepted then the presumption shall at once arise under the section. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused. It may here be mentioned that the legislature has chosen to use the words 'shall presume' and not 'may presume', the former a presumption of law and latter a 'presumption of fact'.

11) Presumption is an inference which is drawn from the other facts which are proved; when there is documentary evidence which is substantiated by substantive evidence at the trial, it would become incumbent upon the court to presume that the offence alleged against the accused stands proved; unless the presumption is rebutted by the accused. The onus therefore shifts upon the accused. The degree of onus is not the same as it is upon the prosecution. The evidence to be led by the accused may not mean proof to rigid mathematical demonstration, but it is sufficient to raise a doubt in the mind of the court and just tilt the arrow in favour of the accused. This is not so in the present case. The defence of the accused is neither logical nor worth inspiring confidence, much less to raise a probable doubt which would appeal to a judicial conscience.

12) It is pertinent to note that in this case accused has not raised any positive evidence to enable the Court to rebut the presumption under section 20 of the Prevention of Corruption Act. That prosecution

through substantive evidence of P. W. 7 and P. W. 4 has established the demand and acceptance by the appellant as illegal gratification. Appellant has not given any preponderance of probabilities to dislodge the case of prosecution. Complainant who was a young lad of 15 years old has specifically deposed before the court that even as a student he was reading the newspapers and therefore, he knew the procedure of booking public servant who demands illegal gratification. The evidence of P.W.7 cannot be discarded only on the ground that he was a minor when he reported the matter to the office of Anti Corruption Bureau. On the day of recording of evidence, he had attained majority as the substantive evidence was recorded on 28/05/1994. He could not be shattered by the defence. Upon perusal of the records it is apparent that the appellant has also not offered any explanation either soon after the raid or in his statement under section 313 of Code of Criminal Procedure, 1973. Only the defence of the accused is that he has been falsely implicated by the complainant as he had caused arrest of relatives of the complainant and that complainant belonged to Dawri community. The explanation offered by appellant cannot be considered as an explanation which would throw light on preponderance of probabilities to dislodge the case of prosecution. The explanation offered does not inspire the confidence of the court.

13) This Court cannot be oblivious of the fact that cases of corruption are on the rise. Corrupt public servants are given latitude on the basis of loopholes in the prosecution case. The court cannot go beyond the evidence adduced by the prosecution unless the accused on the same set of evidence is able to present a different view of the matter. Only in such a situation where two views are possible the court may take a view in favour of the accused.

14) Section 3 of The Evidence Act, 1872 interprets the word 'Proved' as:

> "A fact is said to be proved when, after considering the matter before it, the court either believes it to exist, or considers its existence so probable, that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

15) In the present case;

(i) The first demand caused the complainant to approach the Anti Corruption Bureau

(ii) The effect is the arrangement of a trap.

(iii) A subsequent demand afforded an opportunity to the complainant to extend the tainted currency notes to the accused.

(iv) The transaction had taken place. The tainted currency notes were rather accepted and found in the possession of the accused for which he had not offered any plausible explanation.

(v) The elements requisite to prove the offence are substantially brought before the court.

(vi) This court is bound by the mandate of the legislature 'shall presume'. Hence the appeal deserves to be dismissed.

16) Learned Special Judge has recorded justifiable reasons for recording conviction. Hence, it can be safely said that prosecution has established the guilt of the accused beyond reasonable doubt.

17) None appeared for the appellant on several dates of hearing. Appeal was called out for final hearing on 03/11/2014. Matter was

fixed for final hearing on 20/11/2014 and was adjourned from time to time. On 29/06/2015, none appeared for the appellant. Matter was adjourned to the next date. None appeared for the appellant on 20/07/2015. On 10/08/2015 also, learned counsel for the appellant had sought an adjournment through Advocate Ms. Jayashri Gite. On 14/09/2015, none appeared. Taking into consideration that Advocate for the appellant was not interested in prosecuting the appeal, this court had requested learned Advocate Shri. Ganesh Bhujbal to espouse the cause of the appellant. Learned counsel appointed for the appellant has put in best of efforts to espouse the cause of the appellant. It is submitted by learned counsel for the appellant that prosecution has not been able to establish that complainant had paid Rs. 400/- to the accused on 08/02/1992 or that he had borrowed the amount to pay to the appellant. It is also submitted that demand for illegal gratification has not been proved. However, after perusing the evidence of complainant as well as shadow witness, it is clear that prosecution has rather established the demand and acceptance of illegal gratification by the accused/appellant. Hence, appeal deserves to be dismissed. The professional fees are quantified to the tune of Rs. 5000/- to be paid to Advocate appointed for appellant within 3 months from today.

<u>O R D E R</u>

(i) Appeal stands dismissed.

(ii) The Judgment and Order dated 29/09/1994 passed in Special Case No. 17 of 1992 by Special Judge, Solapur is hereby confirmed.

(iv) Office to communicate this order to the legal representatives of the appellant.

(v) Appeal stands disposed of.

(SMT. SADHANA S. JADHAV, J.)