

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.248 OF 2002

Shashikant Sitaram Masdekar & Anr .. Appellants
Versus
The State of Maharashtra .. Respondent

WITH**CRIMINAL APPEAL NO.307 OF 2002**

Ganeshdatta Ramsagar Pande .. Appellant
Versus
The State of Maharashtra .. Respondent

Mr. Rajiv Patil, Sr. Counsel with Mr.Onkar Warange, Advocate for the appellant in Criminal Appeal No.248/02.

Mr.Vinay J. Bhanushali, Advocate appointed as amicus curiae in Criminal Appeal No.307/02.

Mr.Deepak Thakre, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

DATED : 27th OCTOBER 2015

ORAL JUDGMENT :

1 These two Appeals can be conveniently disposed of by this common judgment as the appellants in both the Appeals were convicted on a single trial held by the Special Judge (under the Prevention of Corruption Act, 1988) for Greater Bombay. The

appellants in Criminal Appeal No.248/02 are policemen. The appellant in Criminal Appeal No.307/02 is, however not a public servant. He is an ordinary citizen. The learned Sessions Judge has convicted and sentenced the appellants in Criminal Appeal No.248/02 of offences punishable under section 7 and of an offence punishable under section 13(2) read with Section 13(1) (d) of the Prevention of Corruption Act (hereinafter referred to as “the P.C.Act”). He sentenced both of them to suffer Rigorous Imprisonment for 1(one) year each, and to pay a fine of Rs.1,000/- each on both the counts. He directed that the substantive sentences would run concurrently. The appellant in Appeal No.307/02 was convicted of an offence punishable under Section 12 r/w section 7 of the P.C. Act. The learned Special Judge sentenced him to suffer RI for 6(six) months and to pay a fine of Rs.500/-.

Being aggrieved by their conviction and the sentences imposed upon them, the appellants have approached this Court by filing separate Appeals, as aforesaid.

2 During the pendency of the present Appeals, the appellant no.1 in Criminal Appeal No.248/02 – Shashikant

Masdekar – passed away. However, since the sentence imposed upon him by the learned Special Judge comprised of a sentence of fine also, the Appeal – even in so far as it related to him – did not abate.

3 The appellants in Criminal Appeal No.248/02 were the accused nos.1 and 2 respectively, and the appellant in Criminal Appeal No.307/02 was the accused no.3 in the trial Court. For the sake of convenience and clarity, they shall be referred to by their position in the trial Court.

4 The case against the accused persons arose on a report made by one Baijnath Chaudhary to the Anti Corruption Bureau (ACB) on 20th February 1992.

5 The prosecution case, as was put forth before the trial Court may, in brief, be stated thus :-

Baijnath Chaudhary is a photographer. He had been doing his business of photography at Gateway of India in partnership with one Ramdev Gupta. There were about 20 – 25

photographers who were also, at the material time, doing the business of photography at Gateway of India. It was not permissible to do the business of photography in the area of Gateway of India. Moreover, these photographers had no licence to run a business. The tourists would have their photographs taken at Gateway of India, and the photographers – including Baijnath Chaudhary – would despatch the photographs by post to the address given by such customers. So far as Baijnath Chaudhary (hereinafter referred to as 'the complainant') and his partner Ramdev were concerned, they used to divide the profit at the end of the day.

Since the business of photography, as was being conducted by the complainant and other photographers, was illegal, the police used to demand illegal gratification from these photographers for permitting them to do their business. In case of refusal to pay illegal gratification, such photographers would be taken to Colaba Police Station and would be charged for having committed an offence punishable under the relevant provisions of law. In a number of cases that had been filed against them, the photographers attended the Court and pleaded guilty to the

accusation levelled against them. The police used to permit the photographers – and even other hawkers – to carry on their business, provided illegal gratification would be paid to the police. The police from Colaba Police Station within the jurisdiction of which Gateway of India is situated, used to collect Rs.10/- per day by way of illegal gratification from the photographers.

On 20th February 1992, at about 10.00 a.m, the accused nos.1 and 2 approached the complainant and his partner Ramdev, and demanded '*hafta*' of Rs.10/- each, from both of them. The accused no.2 Bhosale told the complainant (PW 1) that the payment should be made on behalf of both, between 2.00 pm to 5.00 pm on the same day. The complainant and his partner decided to report the matter to the Anti Corruption Bureau (ACB) and the complainant actually reported the matter to the Anti Corruption Bureau at about 10.20 a.m. The report was registered by PI Gaikwad (PW 3) and was treated as the First Information Report. PI Gaikwad then called for two panchas, and accordingly, Chandrakant Joshi (PW 2) and Kumthekar, employees working in the office of the Dy. Director of Land Records, came to the Anti Corruption Bureau office. It was decided to lay a trap. *Anthracin*

powder was to be used in the trap. After following the usual pre-trap procedure, a pre-trap panchnama was drawn and appropriate instructions were given to the complainant. Among other things, the complainant was instructed not to touch the tainted currency notes and not to give the same until demanded by the policemen. After the tainted money would be given to the policemen, the complainant was to give a signal by folding the right sleeve of his shirt by his left hand.

After the arrangements for laying the trap were completed, the members of the raiding party, including the panchas, went up to *Lion Gate*, together. From there, the complainant – Baijnath Chaudhary (PW 1) and Chandrakant Joshi (PW 2) went together to the Gateway of India. The other members of the raiding party followed them by maintaining some distance.

The complainant and the panch Joshi kept waiting in the open space around the Gateway of India till at about 4.00 p.m when the accused no.3 Pandey approached the complainant, and made a demand for illegal gratification. The complainant refused

to make the payment and hence, the accused no.3 went away. He, however, again approached the complainant at about 4.30 p.m, but this time also, the complainant refused to make any payment. At about 4.50 p.m, the accused no.3 came along with accused no.1 – Head Constable Masdekar and accused no.2 – Constable Bhosale, Buckle No.8919. The accused no.1 asked the complainant – by pointing out a finger towards accused no.3 Pandey – as to why money was not given to him. The complainant said that he had not had any customer, and therefore, could not make the payment. The accused no.1 thereupon warned the complainant that if the payment would not be made, the complainant would not be allowed to be in that area. Thereafter, the accused no.2 Constable Bhosale also pointed out towards accused no.3 Pandey and told the complainant that if money would not be paid to Pandey, the complainant would be *challaned*, and would not be allowed to remain in the area from the next day. The complainant thereupon took out the tainted currency notes and gave the same to the accused no.3 Pandey. After accused no.3 had accepted the tainted amount, and had kept the same in his left breast pocket, the complainant gave the pre-determined signal to the raiding party, where-after the members of the raiding party

came there and apprehended not only the accused no.3, but even the other accused. All the accused persons were brought to a Customs chowky situate nearby. When examined under the *ultra violet* rays, bluish glow was found on all the finger tips and thumb of the right hand of the accused no.3 Pandey. In the personal search of accused no.3 Pandey, a visiting card on which several names were written and some markings were made against the written names, some loose coins, a blue ball pen refill and currency notes of different denominations, totally amounting to Rs.655/-, were found. No traces of *Anthracin* powder were found on the person or clothes of either the accused no.1 or accused no.2.

6 Further investigation into the matter was carried out. Sanction of the Commissioner of Police – Shrikant Bapat (PW 4) – who was the competent authority to accord the sanction as contemplated under section 19 of the P.C. Act was obtained. On completion of investigation, a charge-sheet was filed against all the three accused, who, as aforesaid, were tried and held to be guilty.

7 During the trial, the prosecution examined totally four witnesses, all of whom have been referred to earlier.

8 I have heard Mr.Rajiv Patil, learned Senior Advocate for the appellants in Criminal Appeal No.248/02. As none appeared for the accused no.3 at the time of the hearing of the Appeals, Mr.Vinod Bhanushali was appointed as *amicus curiae* to assist the Court in the matter. I have heard him also. I have heard Mr.Deepak Thakre, the learned APP for the State.

9 I have carefully gone through the entire evidence adduced during the trial and other records of the case. I have carefully gone through the impugned judgment.

10 Before proceeding to discuss the evidence adduced by the prosecution, some basic features of the matter must be kept in mind. These features are either undisputed and a part of the prosecution case itself, or in any case, sufficiently and satisfactorily established. The first and foremost is that the complainant is indulging into the business of photography in the area of Gateway of India, illegally and unauthorizedly. That, it is not permissible to

do photography as and by way of business in the area of Gateway of India, is accepted by the complainant himself. It is also admitted that the complainant does not hold any licence issued by the local authority to do a business. Apart from the police and the Officers of the local authority i.e. Municipal Corporation, even the Customs Department appears to be having an objection for permitting the business of photography to be done in the area of Gateway of India. The second feature is that inspite of these objections, the business of photography is being done not only by the complainant and his partner Ramdev, but also by several other photographers. This is possible because these photographers, including the complainant and his partner, pay bribes to the concerned public servants. The incident giving rise to the present case has taken place on 20th February 1992, but the complainant had been doing the business of photography at Gateway of India since atleast about 8 to 9 years prior to that. That, each of the photographer used to pay Rs.10/- per day to the police from Colaba Police Station. That, he having been left with no other alternative, everyday pays Rs.10/- to the policemen from Colaba Police Station, has been stated by the complainant in the First Information Report itself, apart from having accepted this position

in his evidence. The third aspect is that the complainant has not given any reason for suddenly complaining about the demand of illegal gratification on a particular date i.e. 20th February 1992 when such demands were usual, had been since about 8 years prior to 1992 and were being readily acceded to since a number of years.

11 It is in this background that the complainant's evidence about the alleged demand and the acceptance of the bribe amount, needs to be examined. It is well settled that unless the evidence of the initial demand is satisfactory, the whole evidence obtained by laying a trap would be open to doubt and would require a thorough and meticulous scrutiny before it is accepted. As the evidence with respect to the initial demand is only that of the complainant, the circumstances in which the alleged demand was made, and in which category – out of so many different categories of persons complaining of corruption by public servant/s, – the complainant falls, needs to be considered and kept in mind while appreciating his evidence. A reading of the evidence of the complainant, reveals a number of interesting aspects.

12 It appears that the disputes between the complainant and the other photographers, hawkers, operating in the area of Gateway of India and the public servants concerned, are not something new. Interestingly, in his evidence, the complainant has stated that he had been doing the business of photography in the area of Gateway of India since about 18 – 19 years, which means that even after the incident, which is the subject matter of the present case, the complainant had continued his business at the same place, and had been doing it even when he gave his evidence before the learned Special Judge which was some time in February 2001. In the cross-examination, the complainant admitted that the policemen were not allowing him and other photographers to do business of photography in the area of Gateway of India, and that on several occasions, the complainant and other photographers were prosecuted and sentenced to pay fine. According to him, he had appeared before the Court on 5 – 6 occasions every year. It also transpires that prior to the incident, he had been assaulted by policemen on 2 – 3 occasions as he had been found continuing the business inspite of a warning given by the policemen to him earlier to discontinue the same. It also transpires that Customs Officers were also not permitting the

photography business to be done at Gateway of India, and that, on a report made by one photographer, a Custom Officer had been trapped. The complainant also admitted that after the trap, the Customs Officers had not been taking interest in preventing photographers from doing their business. It also transpires that Ramdev Gupta (who has been referred to as 'Mishra' in the FIR) and the complainant had been doing the business of photography in partnership and that, Ramdev Gupta had previously made reports against a number of public servants to the ACB. On the complaint of Ramdev Gupta, one Officer from the Municipal Corporation was trapped and two constables from the Colaba Police Station were also trapped in the year 1985. The complainant was a witness in both these cases. It also transpires that Ramdev had gone with the complainant to the ACB office on 20th February 1992 when the complainant lodged a report (FIR). The complainant admitted in the cross-examination that the person referred to as 'Mishra' in the FIR, is actually 'Ramdev Gupta', and though the complainant said that this mistake occurred due to some 'confusion', it appears quite unlikely keeping in mind the long standing business association between the complainant and the said Ramdev. Instead, the possibility of the

name 'Mishra' having been given to conceal the identity of Ramdev who had lodged a number of complaints with the ACB against different public servants in the past, appears to be greater. It transpired in the cross-examination that the Custom Officer who had been trapped on a complaint of Ramdev – one Pingle – was ultimately acquitted. The complainant was a witness in that case. He was also a witness in the case against two constables from Police Station – Dinkar Vichare and Sakharam Chougule – who had been trapped in the year 1985 on a report lodged by Ramdev.

13 It is evident that the complainant is not a reliable person at all. It is true that he, perhaps, had no other alternative but to pay money to the public servants concerned, in order to be able to continue his business, *but the fact remains that he is a habitual bribe giver.* He is not a person to whom a demand of illegal gratification was made for the first time by any public servants on 20th February 1992. He had been carrying on his business by giving bribe to different public servants by negotiating with them, and occasionally, by trapping them. It is also evident that the demand of illegal gratification used to be made by different public servants, at different points of time, and even the policemen from Colaba Police Station who used to demand and

accept illegal gratification used to be different on different dates./occasions. *When such was the position, the complainant was expected to state a reason for suddenly on a given date feeling like not giving the bribe and feeling aggrieved by the demand made.* This is more so because the demand also does not seem to be more than the usual demand which was of Rs.10/- per day.

14 Under these circumstances, it would be hazardous to accept the evidence of the complainant, and consequently, place reliance on the evidence with respect to the initial demand, said to have been made by the accused nos.1 and 2 at about 10.00 a.m on 20th February 1992. In fact, the trial Judge has not believed the theory of such demand having been made. He has categorically framed such a point for determination, and has answered the same in the negative. The learned Special Judge noticed the conduct of the complainant and observed that he and the other photographer, hawkers were paying illegal gratification for conducting illegal business. He, however, also observed that the accused persons could not derive any benefit from this, and that there was no justification for demanding and accepting illegal gratification by them. Though the learned Special Judge was right in that regard, he ought to have considered as to what prompted the complainant

– who was a habitual and regular bribe giver – to make a grievance about the usual illegal demand of illegal gratification.

15 Anyway, the learned Judge has disbelieved the complainant entirely. He categorically held that it was not safe to rely on the testimony of the complainant. It is on this basis that he also held that there was no cogent evidence to establish the initial demand by the accused nos.1 and 2 from Ramdev and the complainant. He, however, held that the evidence of the panch Chandrakant Joshi (PW 2) and PI Madhav Gaikwad was sufficient to hold the accused persons guilty. The learned Judge was of the view that the demand made by accused nos.1 and 2 at about 4.50 p.m and the acceptance of the tainted amount by them was satisfactorily proved. The learned Special Judge was of the view that though the tainted amount was demanded and accepted by the accused no.3 Pandey, it was proved that the same had been demanded and accepted on behalf of the accused nos.1 and 2. According to him, the accused no.3 had aided and abetted the accused nos.1 and 2 in obtaining illegal gratification from the complainant for allowing him to conduct his illegal photography business.

16 The approach adopted by the learned Special Judge in appreciating the evidence of panch Joshi and Investigating Officer Gaikwad, does not seem to be proper. It must be clearly understood that the case of the prosecution was that the tainted amount was accepted by the accused no.3. It was nobody's case that it was either accepted by the accused no.1 and/or accused no.2, or that the accused no.3 had passed it on to the accused no.1 and/or accused no.2. Thus, *in order to hold the accused persons guilty, it was necessary to come to a conclusion that the money that was accepted by the accused no.3 was for and on behalf of the accused nos.1 and 2, and that it was pursuant to the demand of illegal gratification made by the accused nos.1 and 2.* In my opinion, there was no satisfactory evidence in that regard.

17 I have carefully considered the evidence of panch Joshi and IO Gaikwad. According to Joshi (PW 2), after he and the complainant went to Gateway of India which was at about 3.15 p.m, they remained there till 4.00 p.m, and it is only at about 4.00 p.m, a person i.e. accused no.3 approached the complainant and demanded money. The demand that was made, was, according to Joshi, something like 'हमारा पैसा दे दो'. The complainant

told him that he will not make the payment and then the accused no.3 Pandey went away. That, Pandey again returned at about 4.30 p.m and on this occasion also, similar conversation took place between the complainant and accused no.3 Pandey. That, Pandey then came back to the complainant at about 4.45 p.m to 5.00 p.m and this time, the accused nos.1 and 2 were with him. One of the two (i.e. either accused no.1 or accused no.2) asked the complainant as to why he had not given money to Pandey. The complainant then told him that he had not had a customer till then, and he had not earned any money. One of the accused nos.1 and 2 then told the complainant something to the effect that if money would not be paid, Chaudhary would not be allowed to remain in the area. According to Joshi, after all this was over, the other Havildar also said the same thing. He pointed out a finger towards Pandey and told the complainant to make payment of money to Pandey. That, it is thereafter that the complainant took out the money and gave the tainted notes to accused no.3 Pandey.

18 In my opinion, this evidence is hardly sufficient to show that the amount that was asked to be paid to the accused no.3 Pandey was as and by way of illegal gratification demanded

by the accused nos.1 and 2. *It cannot be overlooked that the learned Judge has totally discarded the evidence of the complainant and disbelieved him with respect to the initial demand itself.* When the evidence of the initial demand was not felt acceptable and was totally discarded, this conversation – as spoken about by panch Joshi – is not sufficient to come to a conclusion that the money that was allegedly asked to be paid by the accused nos.1 and 2 to the accused no.3 Pandey, was as and by way of illegal gratification for themselves. In coming to the conclusion that it was by way of illegal gratification, the learned Judge has relied upon the statement made by Joshi in the further part of his evidence viz :- 'that, accused no.3 Pandey had used the word '*hafta*' while making the demand of money'. Joshi mentioned the word '*hafta*' only after reading the panchnama. He had not mentioned it earlier. He was not questioned before that to try to remember the exact words used by the accused no.3 while demanding the money. When the panchnama was shown to him for establishing his signature thereon, Joshi stated that it was on reading the panchnama that he recollected that the accused no.3 had asked for demand of '*hafta*', and the word '*hafta*' had been used for demanding the money. It is hazardous to place reliance on this evidence of Joshi which has

been brought on record in this manner. While appreciating the evidence of the panch witness and the Investigating Officer, the entire case of the prosecution and the peculiar features of the case, need to be kept in mind. At the cost of repetition, it may be observed that it is well settled that when the evidence regarding the initial demand is found to be unsatisfactory, the entire evidence obtained by laying a trap would be weak, and would be difficult to be relied upon.

19 The learned Special Judge did not accept the defence of the accused no.3 as probable, and disbelieved it entirely. The accused no.3 had submitted that the amount that was accepted by him was towards the price of the cold-drink which the complainant had purchased from him previously. The learned Special Judge has subjected this defence to a very minute and careful scrutiny, discussed it in greater depth than the prosecution evidence, and discarded the same. In holding the prosecution case as proved, he was greatly influenced by his opinion that the defence was false. In my opinion, the learned Judge was not right in doing so. In the first place, falsity of the defence by itself would not establish the case of the prosecution. It would only be one

circumstance that would add strength to the prosecution case. When the prosecution case is basically weak, not supported by satisfactory evidence and suffering from obvious infirmities, it cannot be held as proved merely because the defence is believed to be false. Moreover, the reasons for discarding the theory of the accused no.2 as given by the learned Special Judge, do not appear to be entirely sound. The first reason given by the learned Judge for disbelieving this claim is that there was no evidence to show that the accused no.3 was having any bucket or bottles containing cold-drinks with him at the time of the trap. The learned Judge also observed that the accused no.3 had not specified which cold-drinks had been purchased on credit by the complainant, and how much amount was due. The learned Judge observed that the accused no.3 could not show that the price of one or more bottles of cold-drinks would come to the aggregate of Rs.20/-, and that, that is why the accused no.3 had been avoiding to specify which cold-drinks had been purchased by the complainant. The learned Judge did observe that suggestions were given to the complainant during his cross-examination that '*Thums-up*' and '*Gold Spot*' had been purchased by him from the accused no.3, but further observed that the prices thereof were not mentioned, and that the

cost of the cold-drinks came to Rs.20/-, was not shown. It is not possible to agree with this reasoning so as to hold categorically that the defence was false. In the first place, when the cold-drinks were said to have been supplied to the complainant previously, it did not matter that the accused no.3, at the time of demanding the amount, was not having any cold-drinks with him. The complainant had admitted in the cross-examination that the accused no.3 had been selling 'kulfi' and 'cold-drinks'. Secondly, the learned Judge ought to have realized that it was nobody's case and could not be imagined that the accused no.3 was charging the Maximum Retail Price (MRP) for the goods he was selling. Hawkers illegally selling goods at places where tourists visit, seldom charge the MRP and the prices of the goods which they sell can greatly vary. However, that is not the crucial aspect of the matter. The crucial aspect of the matter is the failure of the learned Special Judge to appreciate the role of defence evidence in the adjudication of guilt or otherwise of an accused. It is well settled that an accused need not prove his assertions. The burden of proving the entire case rests on the prosecution. The assertions of the accused and the statements made by him during his examination are expected to play a limited role of creating a

reasonable doubt about the truth of the prosecution case, when taken into consideration along with the evidence. Therefore, that the defence is false, even if satisfactorily established, would not *ipso facto* result in accepting the case of the prosecution.

20 So far as the evidence of Investigating Officer Gaikwad is concerned, he had not heard the conversation that took place between the complainant and the accused persons. As such, only on the basis of a sentence in the testimony of the panch Joshi (PW 2) that 'word "*hafta*" was used by the complainant while demanding the payment', it was unsafe to accept that there had been a demand of illegal gratification, *particularly when this version was not originally given by Joshi, and was given only after he read the panchnama.*

21 To sum up, the following factors :-

- (a) The complainant is a regular bribe giver, and had been giving bribe to different public servants for a long span of several years;
- (b) He had been giving bribe of Rs.10/- per day to different policemen from Colaba Police Station for a number of years;

- (c) That, no reason has been given by him, or can be found from the case of the prosecution, about his suddenly feeling aggrieved by the demand of the same amount of illegal gratification, on one fine day;
- (d) That, the complainant tried to hide that his business was being run in partnership with one Ramdev who had got atleast three public servants trapped on the allegation of having demanded bribes;
- (e) That, the complainant had been a witness in the previous trap cases registered against some public servants previously on the report of the said Ramdev;
- (f) That, the complainant had along with other photographers and Ramdev Gupta had been dealing and negotiating with different public servants for the purpose of enabling him and other photographers to carry on their business, and was thus, not a novice in the matter of seeking favours from, or dealing with public servants;

- (g) That the tainted amount was not accepted by either the accused no.1 or the accused no.2, but was accepted by accused no.3 who was not a public servant;
- (h) That, there was no evidence that the accused no.3 had been acting for and on behalf of the accused nos.1 and 2, and that, such inference had been drawn by the trial Court merely from the use of the word '*hafta*' as stated by Joshi (PW 2) – not initially but only after reading panchnama;

render it extremely unsafe to hold the charge against any of the accused as proved.

22 In fact, when the theory of the initial demand itself was discarded, it was hazardous to place reliance on the evidence obtained by laying a trap. The reasoning and the findings of the learned Special Judge are not very logical, inasmuch as *it would mean that the trap was laid without sufficient basis, but did accidentally succeed.* The learned Special Judge did not take into consideration the special features of the case such as the

complainant being a regular bribe giver, and inspite of that, feeling aggrieved suddenly on a given date for the demand of the usual amount for the usual favour. The learned Judge also overlooked that the complainant had continued to do his business which was believed to be unauthorized and illegal, and in any case, without a licence from the local authority, even after the incident. The learned Judge also overlooked that the complainant and others had often come in conflict or friction with the public servants over the issue of permitting them to carry on the business at the Gateway of India.

23 The appreciation of evidence, as done by the learned Special Judge, is not proper.

24 This was a case where there certainly was a doubt about the truth of the matter. The appellants should have been given benefit of such doubt and should have been acquitted.

25 In the result, the Appeals succeed.

OPERATIVE ORDER IN APPEAL NO.248 OF 2002

The Appeal is allowed.

The impugned judgment and order of conviction of the appellants, as also the sentences imposed upon them, are set aside.

The appellants are acquitted.

The bail bonds of the appellant no.2 are discharged.

Fine, if paid by the appellant no.1, be refunded to his legal heirs. Fine, if paid by the appellant no.2, be refunded to him.

OPERATIVE ORDER IN APPEAL NO.307 OF 2002

The Appeal is allowed.

The impugned judgment and order of conviction of the appellant, as also the sentence imposed upon him, is set aside.

The appellant is acquitted.

His bail bonds are discharged.

Fine, if paid be refunded to him.

(ABHAY M. THIPSAY, J)

CERTIFICATE

***Certified to be true and correct copy of the original
signed Judgment/Order.***