

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.278 OF 2001

SHASHIKANT PIRAJI SONAWANE

.. APPELLANT

Versus

THE STATE OF MAHARASHTRA

.. RESPONDENT

Mr.S.V. Kotwal with Mr.Ashish Sawant, Advocate for the appellant.

Mr.Deepak Thakre, APP for the Respondent State.

CORAM : ABHAY M. THIPSAY, J.

JUDGMENT RESERVED : 11th AUGUST, 2015

JUDGMENT PRONOUNCED: 25th AUGUST, 2015

ORAL JUDGMENT :-

1 The appellant and one Smruti Achrekar were prosecuted on the allegation that they had committed offences punishable under section 7 and section 13(1)(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988. The learned Special Judge for Greater Bombay, by his judgment and order dated 27th February 2001, found the appellant (accused no.1 in the said case) guilty of the aforesaid offences, and sentenced him to suffer RI for 1(one) year and to pay a fine of Rs.1,000/- on each of the said two counts. The learned Special Judge, however, held the said Smt.Achrekar (accused no.2) not guilty and acquitted her. The appellant is aggrieved by the judgment and order convicting

and sentencing him, and has therefore approached this Court by filing the present Appeal.

2 I have heard Mr.S.V. Kotwal, the learned counsel for the appellant. I have heard Mr.Deepak Thakre, learned APP for the State. With their assistance, I have gone through the entire record of the case. I have carefully considered the evidence adduced during the trial and the impugned judgment.

3 The case of the prosecution, as put forth before the trial Court was as follows :-

Momin Iliyaz Ahmed Hasanmiya (PW 1) had made an application to the Maharashtra Housing and Development Authority (MHADA) for allotment of one of the plots situate at Versova in response to an advertisement published by MHADA inviting applications for the allotment of plots, by eligible persons, under a scheme of the Government. The allotment was to be made by drawing of lots. Momin (hereinafter referred to as 'the complainant') was declared as one of the successful candidates. He was called upon to produce necessary documents, including a certificate showing that his name had been entered in the electoral roll of the year 1985. The complainant went to the office of the Tahsildar at Mulund on 12th June 1991 for obtaining the necessary certificate. There, he met the appellant and the said Smt.Achrekar – accused no.2. The complainant made a request to them for issuing the necessary certificate urgently. The appellant and the accused no.2 – Smt.Achrekar expressed their inability to issue the certificate urgently. Since the appellant said that he was busy, and

plainly refused to issue the required certificate urgently, the complainant requested the accused no.2 to help him in the matter. The accused no.2 then told the complainant that he would have to pay Rs.200/- to her and would have to pay, additionally, another Rs.200/- to the appellant if the work was to be done immediately. She also informed the complainant that out of the said amount, Rs.100/- would be paid to the *Saheb* who would sign the certificate. Since the accused no.2 refused to reduce the amount, the complainant agreed to pay the amount. He was then told to come on 14th June 1991 between 10.30 a.m to 11.00 a.m with Rs.400/- and Rs.6/- towards the official fee for issuing the certificate. The complainant did not want to pay the bribe and therefore, went to the Anti Corruption Bureau (ACB) on 13th June 1991, and lodged a complaint which was recorded by PI Vilas Tupe (PW No.5). A case was registered against the appellant and the said accused no.2. A trap was arranged on the next day i.e. 14th June 1991. Two panchas – Shri Anil Tambe (PW 2) and Deepak Choudhary were called at the ACB office in the morning. The complainant had also been asked to come to the ACB office in the morning. After the arrival of the complainant and the panchas, necessary arrangements were made for laying the trap by using *Anthracin* powder. Usual instructions i.e. that the money should be paid only on demand, were given to the complainant. The amount of Rs.400/- that was produced by the complainant was divided into two parts of Rs.200/- each, and both the bundles were kept in the left breast pocket of the shirt of the complainant. As per the arrangement, Anil Tambe (PW 2) was to be with the complainant. He was to observe the happenings and listen to the conversation. After the arrangements were done, the raiding party

went to Mulund by the police van. The van was stopped at some distance from the Tahsildar office. The complainant and panch got down and went to the Tahsildar office. The complainant met the appellant and told him that he had come for taking the certificate. Things did not happen entirely as expected, but after some conversation had taken place between the complainant and the appellant, ultimately the appellant demanded and accepted the tainted amount of Rs.400/-. The complainant, thereafter, gave the pre-determined signal, where-after the appellant was apprehended. The tainted amount was recovered from him. When examined under the ultra-violet rays, traces of *Anthracin* powder found on the fingers of the right hand, the thumb and index finger of the left hand, at the mouth and the inner side of left breast pocket of the shirt of the appellant, and at both the legs of the appellant's pant, near knees. The appellant as well as the accused no.2 were detained. The search of the accused no.2 was also taken, but no *Anthracin* powder was found on her hands or garments. After the post-trap panchnama was drawn, the complainant was taken to the Tahsildar who had, by that time, come to the office. Tahsildar issued the requisite certificate in favour of the complainant. Search of the house of the appellant and of the accused no.2 was taken.

4 Further investigation into the matter was carried out by PI Tupe (PW 5). After obtaining sanction from the then Collector for Bombay City – Jatinder Sahani (PW 3), a charge-sheet was filed against the appellant, and the said accused no.2 Smt.Achrekar. The trial, as aforesaid, resulted in the conviction of the appellant and the acquittal of the said accused no.2.

5 Totally five witnesses were examined by the prosecution during the trial. Four of them have already been referred to above. The remaining is one Srirang Kamble (PW 4) who was, at the material time, working as a cashier in the office of Tahsildar, Kurla situated at Mulund. His evidence is not material.

6 Mr.Kotwal contended that the charge against the appellant had not been satisfactorily proved. According to him, there were a number of infirmities in the prosecution case. He submitted that as per the prosecution case, the accused no.2 was actively involved in the alleged demand, but she has been acquitted. He contended that the complainant's version before the Court is not consistent with the version that is found in the First Information Report. He also submitted that the First Information Report appears to be a manipulated document. Mr.Thakre, the learned APP, on the other hand, submitted that though there are infirmities in the evidence of the complainant, the trial Court has held the appellant guilty primarily on the basis of the evidence of the panch Anil Tambe (PW 2) and the Investigating Officer. According to him, the accused no.2 was acquitted because she had not accepted the tainted amount, and that since the appellant had accepted the tainted amount, he has been rightly convicted.

7 I have carefully gone through the evidence of the complainant.

8 Indeed, there are material variations in the complainant's version, as reflected in his evidence, when compared with the version found in the FIR. That, complainant needed a certificate showing that his name was registered in the electoral roll and that, therefore, he had gone to the Tahsildar's office for obtaining the certificate, is not in dispute and cannot be doubted. What happened when he went there on 12th June 1991 is important. When the complainant went to the said office, he met the appellant and the accused no.2, who both saw the complainant's voters card, and told him that he would have to make an application for getting the certificate. The complainant was told that the certificate would not be given immediately, and the process would require about two months. The appellant as well as the accused no.2 both were speaking to him and giving the necessary information. Since the complainant wanted the certificate urgently as per the requirement of MHADA, he requested the appellant and the accused no.2 for issuing the certificate as early as possible. However, they both refused to issue the certificate at an early date. The complainant then came out of the office room and made inquiries with some persons who were there. According to the complainant, one of them might be an agent of the appellant and the accused no.2. The said person, after he had had discussion with the complainant, gone inside the office and had discussion with the appellant and the accused no.2. After coming out, the said person had told the complainant to come on 14th and that he would have to pay an amount of Rs.400/-. The complainant thereafter went back to the office room for confirmation and that, at that time, the accused no.2 told

him that the person who had met the complainant was their agent and that the complainant should come on 14th with Rs.400/-. The complainant pleaded with her that the amount was excessive, and that he was not in a position to pay so much, but the accused no.2 insisted that, that much amount would have to be paid. In spite of the complainant's repeated requests, the appellant and the accused no.2 did not agree to reduce the amount, and therefore, the complainant finally told them that he would come on 14th. The complainant then approached the ACB office. He narrated the facts to the Officers. According to the complainant, his complaint was recorded on the same day, but his signature was not obtained at that time. According to him, his signature was obtained on the complaint (FIR) on the day of the trap. It was pointed out to the complainant that the FIR bears his signature and the date mentioned therein is 13th June 1991, but the complainant maintained that 'the procedure of taking his signature was completed after the trap'.

9 Mr.Kotwal contended that in the prosecution case as put forth, and as per the contents of the FIR, there is no mention of any agent approaching the complainant and making the demand. According to him, this is a material variation which casts a doubt on what the facts actually are. He also submitted that, that signature of the complainant was not obtained on the FIR on 13th June 1991 and that, it was obtained only after the trap had been laid and completed, shows that the FIR was subsequently got prepared so as to bring it in conformity with what was to be projected as having happened during the trap.

10 As to what happened on 14th June 1991 when the complainant went to the Tahsildar office after a trap had been laid, needs to be carefully considered. According to the complainant, he alongwith Panch Tambe (PW 2) went to the appellant and the accused no.2, met them, told them that he had come to the office earlier and that they had called him on that day. The appellant and the accused no.2 asked him to wait outside. The complainant came out and was searching for the agent. The agent was however, not found and the complainant therefore, went back to the appellant and the accused no.2. He requested them to issue the certificate. The appellant then took his voters card and went to the record section for searching the record. The accused no.2 remained at her seat. The accused no.2, at that time, asked the complainant whether he had brought money, whereupon the complainant assured him that he had brought the money. The appellant then came out from the record section and told him that he should bring one revenue stamp. The complainant and the panch Tambe then went to the stamp vendor, purchased a revenue stamp and went back to the office. The appellant, to whom the stamp was shown, said that that was not the stamp that was required. He asked the complainant to purchase a Court Fee stamp of Re.1/- and himself came to the stamp vendor along with the complainant. The stamp was purchased and the complainant, the panch and the appellant, all returned back. While going to the stamp vendor, the appellant had asked the complainant as to whether 'he (complainant) had made preparations as per the instructions given to him earlier'. The complainant answered in affirmative. After returning to the office, the appellant offered a chair to the complainant and asked him to sit down. He himself

again went back to the record section, brought the record and showed the same to the complainant. The appellant told the complainant that since his name was in the voters list, he was entitled to get a certificate. During this time, the panch Anil Tambe (PW 2) was also with the complainant. Though the appellant and the accused no.2 were asking about the complainant about 'compliance with their directions' they were not actually making a clear demand. The appellant had occupied his chair and the complainant was standing near his table. The complainant's file was kept on the table, but nobody was saying anything, and the appellant and the accused no.2 were not making any demand. The certificate was also not being given to the complainant. The complainant, therefore, took out money from his pocket and kept it near the file. The appellant picked up the currency notes and kept them in his pocket. He then wrote an application for the complainant and started preparing the certificate. It is thereafter that the complainant gave the signal, and then the raiding party arrived there.

11 Indeed, the complainant has given a go-bye to his initial version. The complainant was declared hostile by the Special Public Prosecutor in-charge of the trial, and questions in the nature of cross-examination were put to him by the Spl.PP with the permission of the Court. Pursuant to such questioning, the complainant *did* admit that on 12th June 1991, the accused no.2 had told him that he would have to pay Rs.200/- to the accused no.2 and Rs.200/- to the appellant if the work of issuing certificate was to be expedited. The complainant also said that the appellant had told him to come on 14th June 1991 with Rs.400/-.

The complainant said that the FIR was written on a rough paper on 13th and his signature was not obtained thereon. According to him, the 'final draft' (of the FIR) was prepared on 14th after the raid, and his signature was taken at that time.

12 Indeed, the complainant's version, as reflected from his evidence is different from the prosecution case, and the complainant's evidence creates a doubt about several aspects of the prosecution case. However, it is not necessary to discuss the infirmities in the evidence of the complainant any further, because the learned Special Judge has come to the conclusion that his evidence is not reliable. The learned Special Judge has observed that the complainant has changed his version on material points and introduced a story of his being approached by an agent through whom the deal was settled. The learned Special Judge also observed that even with respect to the happenings after the trap was laid, there was a variation in the case of the complainant, and that the complainant had introduced some facts such as the appellant had visited the record room on two occasions, and that the stamp vendor was also approached on two occasions, etc. That, neither the appellant nor the accused no.2 was making any demand and that the complainant kept the tainted amount on the table near the file, was also a material variation in the prosecution case, and this was so observed by the learned Special Judge. The learned Judge came to a categorical finding that the complainant's evidence was not reliable. As a corollary to this, the learned Judge recorded a categorical finding '*that the prosecution had failed to establish the initial demand of illegal gratification by the accused persons on 12th June 1991*'.

13 In view of the evidence of the complainant, this conclusion arrived at by the learned Special Judge appears to be proper, and in accordance with law.

14 At this stage, it would be appropriate to refer to the points for determination as framed by the learned Special Judge. The point no.(ii) framed by him was as follows :

- ii “Whether the prosecution proves that accused demanded Rs.200/- for each of them by way of illegal gratification from complainant on 12/6/1991 at their office at Mulund for the purpose of issuing required certificate urgently ?

15 Consistently with his view about the reliability of the evidence of the complainant, the learned Judge has answered the same in negative.

16 The point nos.3, 4 and 5 of the points for determination as framed by the learned Judge together with the findings thereupon may be conveniently reproduced here.

Sr. No	POINTS	FINDINGS
iii	Whether the prosecution proves that both the accused demanded and accepted illegal gratification of Rs.200/- each, for the purpose of issuing requisite certificate required by complainant by way of illegal gratification for showing favour to him by urgently issuing certificate ?	Demand and acceptance of illegal gratification by accused no.1 is proved.

iv	Whether the prosecution proves that on 14/6/91 at their Mulund office accused no.1 obtained pecuniary benefit of Rs.200/- from complainant by misusing his office by corrupt or illegal means?	YES
v	Whether the prosecution proves that on 14/6/91 accused no.2 obtained pecuniary advantage of Rs.200/- from complainant by corrupt or illegal means by abusing her office ?	NO

17 It is evident from the findings recorded by the learned Judge that he has relied solely on the happenings of 14th June 1991; and these findings are based only on the evidence of Anil Tambe (PW 2). This raises some fundamental issues related to criminal jurisprudence which may be discussed later. Before that, the evidence of Anil Tambe be examined.

18 Now, according to Anil Tambe (PW 2), on going to the office of the Tahsildar, the complainant met Sonawane and told him that he had come to collect the certificate as he had been asked to do. The appellant then told the complainant that the *Saheb* was busy on election duty, and that the certificate could be signed in the afternoon. The appellant also told the complainant that the application of the complainant (for such certificate) would be prepared, and then asked him to bring a stamp. That the panch and the complainant then went to the stamp vendor, brought a 20 paise revenue stamp, came back, but when the stamp was shown to the appellant, he said that the same was not the proper stamp

and that a Court fee stamp would be required. The appellant then said that he had a Court fee stamp with him, got up and asked the complainant to accompany him. Accordingly, the complainant and Tambe followed the appellant who went inside a room. After going there, the appellant asked the complainant whether he had brought money as told. The complainant then replied in affirmative and told Sonawane that he had brought in all Rs.400/- for the appellant and the accused no.2 Smt.Achrekar. The appellant then said that the money brought for both should be given to the appellant only, and accordingly, the complainant gave both the bundles of notes, each of Rs.200/-, to the appellant. The appellant then accepted the money, and told the complainant that if the accused no.2 would make a query, the complainant should tell her that only Rs.200/- totally were paid by him. After coming out of the room, the appellant prepared an application in the name of the complainant after taking some details and the required information from him. The appellant then told the complainant that the official fee for the certificate was Rs.2/-, and that he would pass the receipt of the said amount. The complainant paid Rs.2/- to the appellant. The appellant then prepared a receipt and gave it to the complainant. The complainant took the receipt and was getting up. That, at that time, the accused no.2 (referred to as 'Madam' by Tambe) asked the complainant about money when the complainant told her that money for both had been given to the appellant. After getting up from the seat, the complainant gave a pre-determined signal, where-after the police party came there and caught hands of Sonawane. A lady constable caught hands of the accused no.2. PI Tupe (PW 5), the other panch and the other members of the raiding party had also come there. PI

Tupe informed the appellant and the other accused that they were trapped.

19 Tambe then stated about bluish glow being found on the right hand of the appellant when examined under the ultra-violet lamp. Bluish glow was also found on the fingers and the thumb of the right hand of the appellant, and also on the thumb and index finger of the left hand. Bluish glow was also seen on some portion of the left breast pocket of the shirt of the appellant, and also a portion of the pants of the appellant. Tambe also speaks of search of the appellant being taken and the tainted currency notes being found in the wallet of the appellant. Bluish glow was also found on the paper on which the application of the complainant was prepared by the appellant as also the receipt of Rs.2/-.

20 The learned Special Judge has solely relied on the version of the panch Tambe to hold the appellant guilty. In other words, he has held the appellant guilty of having demanded an illegal gratification on 14th June 1991 itself i.e. just before it was given to him by the complainant. Thus, the theory developed by the learned Special Judge was that the demand had been made by the appellant on 14th June 1991 itself, and that it was pursuant to this demand that the illegal gratification was actually obtained by him.

21 Before proceeding further, some contentions raised by Mr.Kotwal may be dealt with. According to him, *Anthracin* powder was not seen on the application of the complainant which, as

aforesaid, was written by the appellant when the said application was examined in the Court in the course of recording of evidence. By this, he wanted to create a doubt about the version of Tambe that *Anthracin* powder was found on the application after the raid. I am unable to accept this contention. The trap had been laid on 14th June 1991. The evidence was recorded in the year 2000. The passage of time between the trap and the date on which the application was shown to the witness in Court was large, and the absence of traces of *Anthracin* powder on the application when the evidence was recorded, cannot negative the theory of such traces having been found immediately after the trap. Not much importance, therefore, can be given to the said contention.

22 Mr.Kotwal also contended that the appellant's defence, that when he went to the record room, his money purse had been kept on the table, and that the complainant taking advantage of the absence of the appellant, inserted the tainted money in the wallet, was probable. I am unable to accept this. This does not seem to be probable or plausible for a number of reasons, but it is not necessary to discuss this any further, or in details. Mr.Kotwal also contended that the evidence of Tambe cannot be believed with respect to the demand of illegal gratification by the appellant and the acceptance of the tainted money as, as per the evidence, the panch was asked to stay away by the appellant. Tambe had claimed that though he was asked to go out, he actually did not go out of the room and just moved towards the side by about 3 – 4 feet. According to Mr.Kotwal, this is not believable as when the appellant had asked the panch to go away, he would not tolerate his being there, and would not make a demand in his presence.

Though there is some substance in this contention, it is difficult to hold that this version is, by itself doubtful, and would discredit the panch witness to such an extent so as to form an instant disbelief in his testimony.

23 Mr.Kotwal also contended that pre-determined signal was not given to the raiding party immediately after bribe was handed over. He submitted that this was an admitted position. He contended that this was suspicious, and the possibility of the money having been thrust upon the appellant after the trap had failed, could not be ruled out.

24 Mr.Kotwal also contended that even according to Tambe, initially the appellant or the accused no.2 had not made any demand of money on 14th June 1991 also. I am not inclined to give much importance to this aspect.

25 In my opinion, this Appeal raises a fundamental question of quite some importance. It must be clearly understood that the prosecution case was that 'the initial demand of bribe was made on 12th June 1991'. This initial demand has been held to be 'not proved' – rightly in my opinion – but the appellant has been held guilty on the basis that he had made a demand for illegal gratification on 14th June 1991 itself, and had obtained and accepted illegal gratification pursuant to the said demand. Thus, the case put forth by the Investigating Agency stands substituted – so to say – by the version held as true by the trial Court. To remove any doubt about the fact that the appellant has been held guilty *only* on the basis of what has happened on 14th June 1991, a

reference be made to the opening part of paragraph no.24 of the judgment delivered by the learned Special Judge. The learned Special Judge was of the view that though the original case of the prosecution was not proved, the happenings (which the learned Special Judge referred to as 'developments') on 14th June 1991 were sufficient to prove the demand of illegal gratification and acceptance thereof by the appellant. *Thus, the demand of which the appellant is held guilty is not the one which was conveyed to the appellant on 12th June 1991 and pursuant to which a trap was laid.*

26 Interestingly, the learned Special Judge was fully aware that the appellant was, in effect, asked to meet a different case than was put forth initially by the prosecution. This is clear from the fact that after the final arguments in the case had been advanced, the learned Special Judge on 26th February 2001 amended the charge. The roznama of 26th February 2001 records “it is found that the charge is not properly framed. Therefore, the charge is amended”. By this amendment, the learned Special Judge removed the heads of the charge which related to the initial demand made by the appellant and the accused no.2 on 12th June 1991. *He retained only those heads of charge which had a reference to obtaining the illegal gratification on 14th June 1991 by the appellant and the accused no.2 – Smt.Achrekar.* Undoubtedly, the learned Special Judge gave an opportunity to the appellant and the other accused to recall any of the prosecution witnesses in view of the amendment/alteration of the charge, but that opportunity was not availed either by the appellant, or by the other accused.

27 There would be nothing wrong to hold the appellant guilty on the basis of the demand of illegal gratification made on 14th June 1991, – *on the evidence regarding it being believed* – though the evidence regarding the initial demand made on 12th June 1991 is not believed, or accepted. However, in this case, the demand made on 14th June 1991 is supposed to be a new or a different demand, and not a sequel to the initial demand made on 12th June 1991. The theory developed by the learned Special Judge is of a totally different demand, which originated on 14th June 1991 itself, and was not the demand pursuant to which the trap was laid. In other words, the trap became a 'chance trap'. This is particularly significant because the theory of the prosecution was that the initial demand had been made by *both the accused* i.e. the appellant and the accused no.2, but by this substituted case, only the demand allegedly made by the appellant on 14th June 1991 called for consideration. Accepting such a theory i.e. that *'whether or not the demand made on 12th June 1991 was proved, the demand made on 14th June 1991 and the acceptance of the illegal gratification pursuant to that demand was duly proved'*, creates a number of difficulties in arriving at the truth.

28 The initial demand made on 12th June 1991, as per the prosecution case, *was for and on behalf of both the accused* i.e. the appellant and the accused no.2 – Smt.Achrekar, but since that demand is disbelieved, the accused no.2 has been acquitted. *Curiously, the demand on 14th June 1991 which is held to be proved only on the basis of the evidence of Tambe, and only with respect to the appellant, also appears to be a demand made for and on behalf*

of both the accused from the evidence of Tambe itself. Tambe's evidence shows that when the complainant met the appellant on 14th June 1991, the appellant did not make any demand at all, and on the contrary, told him that the certificate could be signed only in afternoon, the *Saheb* being busy on election duty. The appellant also took initiative in getting the application of the complainant prepared which was actually the duty of the complainant. According to Tambe, the demand of money was made by the appellant in the room where the record was kept, and the complainant had told him that he had brought in all, Rs.400/- for the appellant as well as Smt.Achrekar i.e. the accused no.2. According to Tambe, the money was given to the appellant with the understanding that it had been brought for both the accused. Further, the appellant also is said to have told the complainant to give a wrong figure of the amount paid to him in case the accused no.2 would make a query in that regard. The complainant was advised to tell her that only Rs.200/- had been paid. If Tambe is to be believed, the money that was being demanded was not for the appellant himself, but also for the accused no.2 Smt.Achrekar, though the appellant might have entertained an intention to deceive the accused no.2 and give her less amount than her expected share of 50%. According to Tambe, even after the money was paid to the appellant, and the appellant, complainant and Tambe all came out of the record room, the accused no.2 asked the complainant about the money and the complainant told her that money for both of them had been given to the appellant.

29 Since the accused no.2 has been acquitted, it is obvious that this version of Tambe has not been fully accepted by the learned Special Judge. It has not been held that the illegal gratification was obtained by the appellant for himself, and also for an on behalf of the accused no.2. It is, therefore, evident that the learned Special Judge has actually acted only on the evidence of acceptance of the tainted amount by the appellant. He has not accepted any other evidence, and it is on the basis of the alleged acceptance of the tainted amount by the appellant which he held as proved, that he came to the conclusion that there had been a demand of illegal gratification. Though the evidence failed to establish the initial demand on 12th June 1991, the learned Special Judge accepted the theory of there having been a demand on 14th June 1991 itself. However, obviously this conclusion was not arrived by placing implicit reliance on the evidence of Tambe about the demand, but by relying on the evidence that tainted amount was actually found with the appellant. Had the learned Special Judge believed the evidence of Tambe with respect to the demand on 14th June 1991, it would have been evident to him that the demand had been made also by accused no.2 – Smt.Achrekar, and he would have held her also guilty. The learned Judge observed (paragraph no.27 of the judgment) that the utterance of co-accused could not be used against the accused no.2 – Smt.Achrekar, overlooking that as per Tambe's version, even the accused no.2 had herself asked whether money had been paid and had been told by the complainant that her part of money had also been paid to the appellant.

30 In my opinion, when the prosecution case had been varied to such an extent that the learned Judge felt it necessary to amend and alter the charge after the conclusion of the trial and even after the final arguments were heard, it was not safe to hold the appellant guilty.

31 Though the defence of the appellant i.e. that the money was secretly kept in his wallet is not acceptable, the fact remains that there arises a serious doubt about the truth of the prosecution case. It cannot be forgotten that the original case of the prosecution stood substituted – so to say – by what the learned Special Judge held as proved, and since this variation in the prosecution case was the factor that resulted in the acquittal of the accused no.2, the propriety and legality of the conviction of the appellant as recorded by the learned Special Judge becomes highly doubtful. The learned Special Judge has basically acted only on the evidence of the panch Tambe (PW 2) in coming to the conclusion that the appellant did demand and obtain illegal gratification for him. However, he has, evidently, not accepted the evidence of Tambe in entirety, inasmuch he has not accepted the same with respect to the involvement of the accused no.2. Thus, what the learned Judge has done is that he has accepted only that part of the evidence of panch Tambe, which was corroborated by the evidence of acceptance of an amount of Rs.400/- by the appellant. The learned Judge, in that regard, relied on the observations made by the Supreme Court of India, in some reported judgments in which, inspite of the complainant not supporting the case of the prosecution, the case was held as proved on the basis of the evidence of the panch witness and the

Investigating Officer. He also referred to the authoritative pronouncements of the Supreme Court of India, wherein in view of the provisions of section 20 of the P.C. Act, it was held that once the fact that gratification was accepted by a public servant, was proved, the Court should draw the legal presumption that the same was accepted as a reward for doing a public duty.

32 Though in trap cases under the P.C. Act, it would be legitimate and possible to hold an accused guilty, in a given case, inspite of the fact that the complainant himself does not support the prosecution case, on the evidence of the panch witness and the Investigating Officer with respect to the acceptance of the illegal gratification, in such a case, the Court must be absolutely satisfied that the prosecution case, as put forth, is true. It would certainly be open for the Court to arrive at a conclusion of the accused being guilty inspite of the hostility of the complainant towards the prosecution, and such hostility may not always be decisive. However, in such a case, the evidence of the panch witness must be found to be absolutely reliable. In judging the same, the usual parameters in appreciating the evidence, would need to be applied, and the whole of the prosecution evidence would need consideration in the light of broad probabilities of the case. The reported decisions would be of little or no assistance in deciding whether, in a given case, a conviction should be based solely on the testimony of the panch witness and the Investigating Officer about the demand for, and the acceptance of the illegal gratification, as that would be a question of appreciation of evidence for which there can be no yardstick. It all depends on the facts and circumstances of each case. All that can be safely

said is, that except that the complainant did not support the prosecution case, there should be no other weakness in the prosecution case if a conviction is to be based only on the evidence of the panch witness and the Investigating Officer which is not only not supported by the complainant, but rather contradicted by him.

33 In this case, there were a number of weaknesses in the prosecution case. In the first place, that the FIR was shown as having been registered on 13th June 1991, but was actually prepared on 14th June 1991, itself casts a doubt on the sincerity of the investigation. This assertion of the complainant finds support from the evidence of Tambe (PW 2) who says that the complaint was not at all shown to him on 13th June 1991. Had a complaint already been registered, it would have been shown by Tupe to Tambe as per the normal practice followed in trap cases. The fact that the complaint of the complainant was not shown to Tambe, lends corroboration to the version of the complainant – atleast to the extent of rendering it likely – that only a rough draft of the complaint was prepared on 13th and the 'final draft' was prepared after the raid.

34 There is also a suspicious circumstance, which has remained unexplained. The signal was not given to the raiding party immediately after the tainted amount was handed over to the appellant. This is so even according to panch Tambe (PW 2). A lot of time was allowed to pass after the tainted amount had been allegedly accepted by the appellant. The appellant had started working for the complainant by writing an application etc.

This delay in giving pre-determined signal to the raiding party needs to be considered, in the light of a contention raised by Mr.Kotwal. According to him, the initial demand was conveyed through an agent and since the agent was not found on 14th June 1991, an attempt was made to directly deal with the appellant and the other accused. According to Mr.Kotwal, when the appellant did not demand any money, and when the trap was to fail, the money was thrust upon the appellant. He submitted that this provides an explanation of the fact that no signal was given to the raiding party even after the money had allegedly been given to the appellant, which otherwise cannot be satisfactorily explained.

35 In this case, I do not find it safe to uphold the conviction of the appellant. Though the complainant has been declared as hostile, it is difficult to say that he was won over, or was deposing deliberately in favour of the appellant. If his evidence is seen as a whole, it is difficult to come to such a conclusion. The learned Special Judge has simply discarded his evidence so that the evidence of the panch does not come in conflict with the version of the complainant which course would be justified only if one comes to a positive finding that the complainant was clearly won over and was deposing falsely to favour the accused persons. Such inference is difficult to be drawn in the present case. On going through the judgment delivered by the learned Special Judge, it appears to me that he discarded the version of the complainant – more particularly of the happenings on 12/6/1991 – only to get rid of the difficulty that would otherwise arise in accepting the version of the happenings on 14/6/1991, as given by Tambe. By totally separating the evidence

of the happenings on 12/6/1991 from that of the happenings on 14/6/1991, the learned Judge not only substituted the prosecution case, but focused on only a part of the evidence that was adduced during the trial. Propriety of such separation seems to be doubtful inasmuch as the trap had been laid on the basis of what had supposedly happened on 12/6/1991, and more importantly, the quantum of the amount that was decided to be given to the appellant and the accused no.2 was also fixed on 12/6/1991. Even if the evidence of Tambe is considered, it is clear that the amount of Rs.400/- was not mentioned by the appellant. It was more than what was decided and had been given on the basis that it was for both – the appellant and the accused no.2.

36 In my opinion, considering that the original case of the prosecution stood substituted by what the learned Special Judge held as 'proved'; and that this variation in the prosecution in effect resulted in creation of a separate case against the appellant – distinct from that against the accused no.2, (who has been acquitted) the propriety and legality of the conviction of the appellant is rendered highly doubtful. It was dangerous to hold the appellant guilty only on the basis of the testimony of the panch witness, which testimony with respect to the accused no.2 was not accepted.

37 In my opinion, the appellant was entitled to the benefit of reasonable doubt which arises about what had actually happened, upon considering the case as a whole and the evidence on record.

38 Appeal is allowed.

39 The impugned judgment and order is set aside.

40 The Appellant is acquitted.

41 His bail bonds are discharged.

42 Fine, if paid, be refunded to him.

(ABHAY M.THIPSAY, J)