

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

Criminal Appeal No. 9 of 2010

**Kishor son of Prabhakarrao
Lokhande,**

aged about 49 years,
occupation - service,
resident of Jawahar Nagar,
Pulgaon,
Tq. Deoli, Distt. Wardha.

..... **Appellant.**

Versus

State of Maharashtra,
through Deputy S.P.,
Anti Corruption Bureau,
Wardha.

..... **Respondent.**

Mr. A.S. Manohar, Adv., for the appellant.

Mr. V. A. Thkare, Addl. Public Prosecutor for the respondent-State.

CORAM : A.B. CHAUDHARI, J.

Reserved on : 17th July, 2015.

Pronounced on : 04th August, 2015.

J U D G M E N T:

01. Being aggrieved by the Judgment and Order dated 31st December, 2009, passed by learned Special Judge, Wardha, in Special [ACB] Case No. 2 of 2000, by which the appellant-accused was convicted of the offences punishable under Sections 7 and 13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, and was sentenced to undergo Rigorous Imprisonment for five years and to pay a fine of Rs. 4,000/-, in default, Simple Imprisonment for six months for the offence punishable under Section 7 of the Prevention of Corruption Act, and Rigorous Imprisonment for seven years and to pay a fine of Rs. 6,000/-, in default, Simple Imprisonment for nine months for the offence punishable under Section 13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, the appellant-accused filed the present appeal before this Court.

02. Case of the prosecution is that the complainant Pramod Gajbhiye wanted to have an electric meter in his house at Pulgaon from the Maharashtra State Electricity Board. Necessary measurement of his house was accordingly made and the appellant, who was working as a Sub-Engineer, told him that the complainant Pramod Gajbhiye will have to pay Rs.1250-00 as per the assessment made; but Pramod wanted him to reduce the amount, for which the appellant demanded a bribe amount of Rs. 300/- and would reduce the Demand

Note from Rs. 1250/- to Rs. 750/-. He then reduced the bribe amount from Rs.300/- to Rs.200/-, and lastly brought it down to Rs. 100/-.

03. On 6th August, 1999, the complainant again went to the appellant when he asked whether he has brought Rs.100/-, and was told to bring it on 12th August, 1999. On 12th August, 1999, complainant lodged a complaint with the Anti-corruption Bureau [ACB] against the accused. ACB personnel called Panchas, applied phenolphthalein powder to currency notes and arranged a trap. However, on that day, accused did not turn up in the office. Then the trap was arranged on the next day, namely 13th August, 1999. The appellant demanded bribe and complainant paid the same to him. This was noticed by one Panch who was at the door of office of the appellant-accused. Upon a signal being given, the ACB team caught the appellant red handed with the bribe amount and the bribe amount was taken out from the shirt pocket of the accused. The usual procedure of application of sodium carbonate was undertaken and the solution turned into violate colour no sooner the solution came into contact with phenolphthalein powder. The investigating Officer accordingly confirmed passing of the bribe amount to the accused from the complainant Pramod. Investigating Officer then prepared various Panchanamas, seizures etc. Crime was registered with Police

Station, Pulgaon. Charge-sheet was filed. Trial was held. The learned Trial Judge heard the evidence and finally after hearing the parties, convicted the appellant as above.

ARGUMENTS :

04. In support of the appeal, learned Adv. Mr. A.S. Manohar for the appellant made the following submissions:-

- [a]** That, the appellant was working as a Sub-Engineer of Maharashtra State Electricity Board and the only authority to approve the assessment or reduce or modify the same was only with the Assistant Engineer, his superior. The very story of the prosecution that the bribe amount of Rs. 100/- was sought by the appellant in order to reduce the amount of Demand Note from Rs. 1250/- to Rs. 750/- is, therefore, baseless, since the entire power and the authority lay with the Asstt. Engineer, who was his superior. Admittedly, the appellant had no authority to do any such thing. In this context, Mr. Manohar submitted that there is evidence on record to show that even before or after the trap was laid, the concerned file of the complainant was lying with the Asstt. Engineer - Mr. Amzare and, in

fact, the Investigating Officer admitted that he collected the file from the custody of Mr. Amzare. Mr. Manohar submitted that there was no proposal for reduction of amount of Demand Note from Rs. 1250/- to Rs. 750/- anywhere in the file, even if the appellant had no authority to reduce it. He, therefore, submitted that the very basis of the prosecution story is doubtful and since the appellant did not reduce the amount of Demand Note, as desired by the complainant Pramod, the trap was arranged by him.

[b] The complainant Pramod was examined at length by the prosecution, and was also cross-examined at length by the defence. He was not declared hostile by the prosecution at any stage and, therefore, the prosecution wanted to rely on his evidence. On the contrary, he was re-examined by the Public Prosecutor by making an application [Exh.35] to the Court. The re-examination was done for contradicting the complainant Pramod Gajbhiye [PW 2] with his Examination-in-Chief. But then he was not declared hostile even after re-examination. In other words, the prosecution still wanted to rely on the evidence of PW 2 Pramod Gajbhiye.

[c] Learned counsel for the appellant then argued that reading of the judgment of the Trial Judge

shows that the Trial Judge has acknowledged the fact that PW 2 Pramod did not support the prosecution and, on the contrary, specifically denied that there was any demand from the accused to him on both the dates, namely 6th August, 1999 and 13th August, 1999. He then submitted that the prosecution did not declare PW 2 Pramod hostile and, therefore, prosecution relied on the evidence in the cross-examination, though in favour of the appellant-accused. Then there was no reason for the Trial Court to take into consideration his testimony only in the Examination-in-Chief and not in the cross-examination merely because it was not convenient while writing the judgment of conviction. In his submission, such an approach is totally unknown and is perverse and consequently the demand was not at all proved by the prosecution.

- [d]** In so far as the Panch witness is concerned, the prosecution relied on the evidence of Panch witnesses and the Trial Judge relied on the evidence of the said witnesses for the purpose of establishing demand on the date of trap, namely 13th August, 1999. But then learned Trial Judge completely ignored their cross-examination. PW 3 Laxman who only had gone to the chamber with PW 2 complainant – Pramod did not hear any

demand. Trial Judge did not act in fairness while doing so and ought not to have acted on such evidence which did not inspire confidence. He then submitted that the Panch witness PW 3 - Laxman was unable to prove any demand. The proof of acceptance of bribe has been relied upon by learned Trial Judge from the evidence of Investigating Officer, namely after the trap was laid upon giving a signal. But then, according to learned counsel for the appellant, the same must lose its relevance, since the demand itself was not proved as held by the Apex Court from time to time in various decisions and mere acceptance does not prove the offences.

To substantiate his arguments, learned Adv., for the appellant relied on the following decisions:-

- [a] **B. Jayaraj Vs. State of Andhra Pradesh** [(2014) 13 SCC 55],
- [b] **State of Punjab Vs. Madan Mohan Lal Verma** [(2013) 14 SCC 153],
- [c] **M. R. Purushotham Vs. State of Karnataka** [(2015) 3 SCC 247],
- [d] **Arjun Bajirao Kale Vs. State of Maharashtra** [2009

ALL MR (Cri) 85], and

[e] **Panalal Damodar Rathi Vs. State of Maharashtra**
[AIR 1979 SC 1191].

05. Per contra, Mr. Vinod Thakre, learned APP, supported the impugned Judgment and order and submitted that the Trial Judge has recorded detailed reasons for recording order of conviction. According to Mr. Thakre, learned APP, the complainant – PW 2 honestly deposed about the demand and acceptance of bribe by the appellant-accused in his Examination-in-Chief and taking advantage of a gap of few days for his cross-examination, the appellant-accused must have prevailed over him to change his version in the cross-examination to favour the appellant-accused. But then, according to him, the Trial Judge committed no error in relying on his evidence about the demand and acceptance of bribe which was firmly stated by him in his Examination-in-Chief. According to him, even the evidence of a hostile witness can be believed by the Court. But, in the instant case, the witness was not declared hostile and nevertheless his evidence can well be believed. The evidence of PW 2 complainant was corroborated by the Panch witness who heard the demand of bribe by standing outside the chamber of the appellant and, therefore, finding of conviction cannot

be faltered. He, therefore, prayed for dismissal of the appeal.

CONSIDERATION :

06. I have heard the learned counsel for the rival parties at length. I have gone through the entire evidence with the assistance of the learned counsel for the rival parties.

07. The issue regarding demand will have to be first assessed with reference to the evidence of PW 2 - the complainant and the Panch witnesses - Laxman Kurwade [PW 3] and PW 4 Vinod. Reading of the entire evidence of PW 2 - Pramod, complainant in Examination-in-Chief shows that he supported the prosecution on the demand and acceptance of the bribe. However, in the cross-examination, he stated thus:-

“23. It is true that from the door of the cabin I saw the accused sitting inside and hence I went inside. It is true that Panch No.1 Kharwade did not come inside that cabin and the door. I had not told him to come inside the cabin. It is true that he was instructed to accompany me. Subsequently I had not asked him as to why he did not come inside with me. In my presence A.C.B., had not asked him as to why he did not went inside. It is true that two persons were sitting in the cabin of the accused. We had talks in the cabin in low voice. From inside the building, the members of the trap party were not visible.”

“27. It is true that the accused had not demanded money from me on 6.8.1999. It is true that when the accused was transferred to head office, my work was not with him. It is not true that on 13.8.99 I had not gone to the accused and that I had not given money to him. It is true that the accused had not demanded money from me on 13.8.99. It is true that on that day in the office of M.S.E.B., no proceedings were held in my presence. Hands of panch no.2 Kunwatkar were not tested.”

He also stated the following in paras 25 and 26 of his evidence:-

“25. It is true that on that day office of Shri Amzare was also searched. It is true that in order to ascertain for how many days my file was in his office, the documents were also seized. It is true that my file was at his office from 7 or 8 days prior to this incident. It is true that the concerned documents were also taken in custody by the staff of A.C.B.”

“26. It is true that the accused had stopped the practice of giving works to the outsider, and he was getting the work done from the regular labourers employed by the M.S.E.B. It is true that rate of wages paid by M.S.E.B., was more than the wages paid by outsiders. I know Mason named Chandankhede. House of the accused was located at Jawahar Colony of Pulgaon. It is true that I was working with mason Chandankhede occasionally. It is true that Chandankhede mason had done the work of construction of house of the accused at Jawahar Nagar. It is true that on one occasion there was dispute between I, Chandankhede and the accused in respect of work of construction.”

It is clear from paragraphs 23 and 27 quoted above that in terms he stated that the accused did not demand any money from him on 6th August, 1999, so also on 13th August, 1999. Thus, he clearly denied

the demand of the bribe. It is also clear from para 26 quoted above that at the construction site of the house of appellant in Jawahar Colony, Pulgaon, he was working with Mason Chandankhede and had a dispute with the accused in respect of work of construction. He further admitted in para 25 that the office of Mr. Amzare was also searched and the concerned file was seized from that office which was lying in that office for 7-8 days. It is also noteworthy at this stage that Investigating Officer – PW 6 – Mohammad Shabbir stated thus in his cross-examination:-

“6.
.....I asked the complainant to sit outside the office. When I asked the accused about the work of complainant regarding electric connection the accused told me that the papers were sent to Assistant Engineer. Hence I with two panchas went to see Assistant Engineer Amzare. I introduced him myself and the panchas. Mr. Amzare after seeing cases on his table sorted out case of complainant and gave the same to me. The case of complainant kept tagged with other cases. The same was separated. There were about 7 documents in the case of complainant. I went through it. I checked the outward register work out register with respect to case of complainant on the concerned entries myself and panchas put our signatures. The proceedings of complainant and the two registers were seized by me.”

08. The discussion about the aspect of demand now takes me to examine the evidence of Panch witness – PW 3 Laxman Kurwade. What he stated in paragraph 18 of his evidence reads thus:-

“18. It is true that though Gajbhiye entered in the cabin I had not entered in that cabin. The cabin was having space so as to occupy 3 or 4 standing persons. The area of that cabin was about 10 ft., x 10 ft. There was one table and chair meant for officer. There was rack for keeping file. There was one chair against that table. There was big window to that cabin. It is true that the said window was open and outside that window, it was premises of that office. It is true that from that side also there was traffic of the employees of M.S.E.B. It is not true that the two persons who were sitting in the cabin remained there till the proceedings were terminated. It is not true that for about ½ hour to 45 minutes Gajbhiye was inside that cabin. At 11.40 a.m., we went to the office of M.S.E.B. Immediately after reaching there, we went to the cabin of Lokhande. It is true that I waited outside the cabin about 5 minutes. It is true that then Gajbhiye entered inside. After coming out of the cabin, in 5 minutes we transmitted pre arranged signal. The signal was given at 12.35 p.m. It is true that for whatever time Gajbhiye was inside the cabin, he was speaking with Lokhande. He had not given money immediately after going inside. I made no attempt to enter inside. It is not true that the door of that cabin was collapseable.”

It is, thus, clear from his evidence that he did not enter the cabin of the appellant at all and on the contrary waited outside the cabin for about five minutes and thereafter complainant Pramod Gajbhiye came out of the cabin and then signal was given by them. He also stated that Gajbhiye was inside the cabin and had not given money immediately after going inside and he made no attempt to enter the chamber. His evidence read with the evidence in para 23 of PW 2 Pramod shows that two persons were already sitting in the cabin of the

accused and PW 2 Pramod had talked in the cabin in a low voice. It is, therefore, difficult to believe that PW 3 Panch witness Laxman heard anything about demand of money allegedly made by the appellant-accused to the complainant after PW 2 complainant entered the chamber. The cross-examination in para 18, thus, shows that the evidence of Panch witness in so far as the alleged demand is concerned, cannot be believed, since he did not go inside the cabin along with PW 2 Pramod, nor had an occasion to hear about the demand particularly when PW 2 Pramod was speaking in a low voice and two other persons were also sitting there, whose statements were not recorded, nor were they examined by the prosecution.

PW 4 Vinod Punwatkar is another Panch witness. He did not go towards the chamber of the appellant with the complainant PW 2 – Pramod and Panch 1 PW 3 – Laxman, but he remained away with the raiding party. His evidence on 'demand', therefore, is of no relevance. Still in para 13 in cross-examination, he stated thus:-

“13. It is true that on that day I do not know what happened inside the office. I myself had not made any attempt to know those facts. I had seen the cabin where the accused used to sit. I made no inquiry from Gajbhiye as to how much time he was inside that cabin.”

09. It is noteworthy that the prosecution filed application

[Exh.35] on 9th February, 2005, and stated therein that the prosecution wanted to cross-examine the witness PW 2 – Complainant - Pramod because he resiled from his earlier statement on the point of demand made by the accused on 13th August, 1999 and has given answers in the cross-examination contrary to his earlier version. The Trial Court passed the order on the same date, stating that since the complainant has shown hostility to the prosecution by stating that no demand was made by the accused, the permission was granted. Despite this application being allowed, the prosecutor cross-examined the witness at length in the re-examination and still did not declare the witness as hostile to the prosecution. It is, thus, clear that evidence of PW 2 – Pramod is totally unbelievable, since he stated in favour of the prosecution in the Examination-in-Chief and in favour of the accused in cross-examination, for which the accused cannot be blamed and the prosecution has to thank itself.

10. Looking at the manner in which PW 2 has behaved in the Court at the time of his evidence, it is not possible to hold that the prosecution proved its case according to law. The conviction could be based only on the legal evidence and the settled legal principles. The decisions of the Supreme Court are consistent on this aspect. Instead of quoting various judgments, it would be proper if I quote paragraphs

7 and 8 from the Judgment of a Three-Judge Bench of the Supreme Court which has been subsequently followed. In the case of **B. Jayaraj Vs. State of Andhra Pradesh** [(2014) 13 SCC 55] [cited supra], the Apex Court in paras 7 and 8 of its Judgment held thus:-

“7. Insofar as the offence under Section 7 is concerned, it is a settled position in law that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of this Court. By way of illustration reference may be made to the decision in *C.M. Sharma v. State of A.P. And C.M. Girish Babu v. CBI*.

8. In the present case, the complainant did not support the prosecution case insofar as demand by the accused is concerned. The prosecution has not examined any other witness, present at the time when the money was allegedly handed over to the accused by the complainant, to prove that the same was pursuant to any demand made by the accused. When the complainant himself had disowned what he had stated in the initial complaint [Exh.P-11] before LW 9, and there is no other evidence to prove that the accused had made any demand, the evidence of PW 1 and the contents of Ext. P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused. We are, therefore, inclined to hold that the learned trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7.

The above also will be conclusive insofar as the offence under Sections 13 (1) (d) (I) and (ii) is concerned as in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established."

In the said Supreme Court case, complainant was declared hostile which is not even the case at hand. In the light of the law laid down by the Apex Court regarding demand, I have no other alternative, but to hold that the demand of illegal gratification was not proved by the prosecution in this case and the facts are similar.

11. The Trial Court appears to have got disturbed with PW 2 Pramod's conduct and that is reflected in paras 20 and 21 of his Judgment, which I quote hereunder:-

"20. The complainant further supported accused by changing his stand in cross-examination by deposing that the accused did not demand bribe on 6.8.1999 as well as before raid on 13.8.2009. However, PW 3 Mr. Kurwade falsified such belated stand of complainant in his cross-examination, as PW 3 deposed that he heard that accused demanded money from the complainant and thereafter only complainant gave that amount to accused. Therefore also complainant deposed falsely. There are series of new story brought forth by complainant in cross-examination of defence counsel. A story was brought that accused refused to employ complainant and also that there was dispute between him and complainant regarding construction of his own house. If that is so, then there was no need for the

accused to chit-chat with the complainant for long 45 minutes before the raid. No suggestion was given by defence to the complainant as to why he offered money to the accused and why accused accepted the same. A story was brought that complainant was having close relation with superior of accused and at the instance of his superior, accused was implicated in this case. However, prosecution story revealed complainant was aware that superior of accused will issue demand note and if that superior is close with complainant, then there was no need for the complainant to approach accused and he would have straight way went to that superior officer. If at all that superior officer Shri Amzare was aware of the complaint of complainant, then he would have advised the complainant that file has come to him and therefore, raid should not be made. Thus, it appears that unnecessarily accused tried to malign his superior by introducing a false story through complainant after conniving with complainant after his examination-in-chief.

21. It appears that complainant's examination-in-chief completed on 4.2.2005 and when his cross-examination started on 9.2.2005, complainant changed his version in favour the accused and thus he was won over by that time by accused. Therefore, those uncorroborated version of complainant which was brought in favour of accused in defence cross-examination deserves to be ignored. However, upto the day of recording of his examination-in-chief whatever he deposed, was well corroborated by independent panchas. Evidence of hostile witness need not be ignored altogether but when I can dissect true part of it, same can be accepted for corroboration. I infer that complainant deposed truly in examination-in-chief only which can be relied upon being corroborated by panchas and circumstantial evidence."

Thus, the Trial Court decided to rely on the Examination-in-Chief only by ignoring the cross-examination that too when no witness

was declared hostile and PW 3 Laxman does not support the demand. However, I find that the Court is bound by whatever evidence is tendered before it and cannot choose to rely on Examination-in-Chief. Recording of conviction for want of legal evidence would be contrary to the aforesaid Supreme Court Judgment. That being so, the present appeal will have to be allowed. Hence the following order:-

O R D E R

- [a]** Criminal Appeal No. 9 of 2010 is **allowed**.
- [b]** The Judgment and Order dated 31st December, 2009 passed by Special Judge, Wardha, in Special [ACB] Case No. 2 of 2000, is set aside.
- [c]** The accused-appellant is acquitted of the charge under Sections 7 and 13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, and he is held not guilty and is acquitted.
- [d]** His bail bonds stand cancelled.

Judge

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