

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 4TH DAY OF SEPTEMBER 2015/13RD BHADRA, 1937

CRL.A.No. 223 of 2001 ()

AGAINST THE JUDGMENT IN CC 59/1999 of ENQUIRY COMMISSIONER & SPL.JUDGE,
TRIVANDRUM DATED 26-02-2001

APPELLANT/1ST ACCUSED:

BHARGAVAN PILLAI,
EXCISE INSPECTOR,
EXCISE ENFORCEMENT AND
ANTI NARCOTIC SPECIAL SQUAD,
PATHANAMTHITTA, RETIRED NOW RESIDING
AT R.I. VEEDU, KUTTIKADU P.O,
KADAKKAL

BY ADV. SRI.B.S.SWATHY KUMAR

RESPONDENT/COMPLAINANT:

STATE OF KERALA REP.BY THE
DEPUTY SUPERINTENDENT OF POLICE,
VIGILANCE AND ANTI CORRUPTION BUREAU,
PATHANAMTHITTA.

BY PUBLIC PROSECUTOR SMT. V.H. JASMINE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 04-09-2015,
ALONG WITH CRA. 224/2001, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

“CR”

K. RAMAKRISHNAN, J.

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Crl.A.No.223 of 2001

&

Crl.A.No.224 of 2001

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Dated this the 4th day of September, 2015.

JUDGMENT

The first accused in C.C.No.59/1999 on the file of the Court of the Enquiry Commissioner & Special Judge, Thiruvananthapuram is the appellant in Crl.A.No.223/2001 while, the second accused in that case is the appellant in Crl.A.No.224/2001. Both these accused were charge sheeted by the Deputy Superintendent of Police, Vigilance & Anti Corruption Bureau, Pathanamthitta in V.C.No.3/98/PTA under sections 7,13(1)(a) and (d) read with section 13(2) of the Prevention of Corruption Act (hereinafter referred to as the “Act” for short).

2. The case of the prosecution in nutshell was that PW4 - Shaji was conducting toddy shop No.10 at Chattankary on the basis of some agreement/sub contract from one Balakrishnan and another, who were the licencees of the said toddy shop. On 16.2.1998, the excise squad consisting of accused 1 and

2 and others had conducted raid of the said shop alleging that illicit liquor was sold from that shop and by taking an empty can, a case was registered against the worker of that shop by name Sasi -CW24 and he was taken to the office of the first accused. CW24 was produced before the magistrate court on the next day. PW4 was told by the first accused that unless ₹50,000/- was paid, he would also be arrayed as an accused in the excise case. PW4 went to the squad office on 17.2.1998 and after bargaining, the amount was reduced to ₹30,000/-. As per the direction of the first accused, PW4 paid ₹5,000/- to the second accused on 17.2.1998 itself and PW4 had undertaken to pay the balance amount on 19.2.1998. Later, it was agreed between them that, out of ₹30,000/-, ₹10,000/- would be paid on 19.2.1998 and the balance had to be paid within two days thereafter. Accordingly, on 19.2.1998, after complying with the formalities and filing complaint, PW4 went to the office of accused 1 and 2 and as demanded by them, he paid the amount separately for themselves and the Circle Inspector of Excise Enforcement and Anti Narcotic Special Squad, Pathanamthitta as illegal gratification and that was received

by them on their behalf and on behalf of the Circle Inspector, which they are not entitled to receive, on the promise of doing some favour to PW4 misusing their official position and thereby they have committed the offences punishable under sections 7, 13(1)(a) and 13(1)(d) read with section 13(2) of the Act.

3. After investigation, final report was filed and the case was taken on file as C.C.No.59/1999 against the present accused persons alone as Circle Inspector was deleted from the party array as no evidence could be collected against him.

4. When the accused appeared before the court below, after hearing both sides, learned Special Judge framed charge under sections 7 and 13(1)(a) and 13(1)(d) read with section 13 (2) of the Act and the same was read over and explained to them and they pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 11 were examined and Exts.P1 to P18 and Mos 1 to 12 and MO9(a) were marked on the side of the prosecution. After closure of the prosecution evidence, the accused were questioned under section 313 of the Code of Criminal Procedure (hereinafter referred to the 'Code' for short) and they denied all the incriminating circumstances brought

against them in the prosecution evidence. They have further stated that they have not committed any offence and they are innocent of the same and they have been falsely implicated in the case on account of animosity for PW4 against them as he was accused in several cases of committing excise offences of that office. No defence evidence was adduced on their side. After considering the evidence on record, the Special Judge found the appellants not guilty under section 13 (1)(a) read with section 13(2) of the Act and acquitted them of that charge under section 248(1) of the Code. But both the accused were found guilty under sections 7 and 13(1)(d) read with section 13(2) of the Act and they were convicted thereunder and the first accused was sentenced to undergo rigorous imprisonment for four years and also to pay a fine of Rs.30,000-, in default to undergo rigorous imprisonment for one year under section 7 of the Act and further sentenced to undergo rigorous imprisonment for four years and also to pay a fine of Rs.30,000/- in default to undergo rigorous imprisonment for one year under sections 13(1)(d) read with section 13(2) of the Act. The second accused was sentenced to

undergo rigorous imprisonment for 4 years and also to pay a fine of Rs.20,000/-, in default to undergo rigorous imprisonment for one year under section 7 of the Act and further sentenced to undergo rigorous imprisonment for 4 years and also to pay a fine of Rs.20,000/- in default to undergo rigorous imprisonment for one year under section 13(1)(d) read with section 13(2) of the Act and directed the substantive sentences to run concurrently. Aggrieved by the same, the respective accused have filed the above appeals. Since both these appeals arose out of the same judgment, I am disposing of both these appeals by a common judgment.

5. Heard counsel for the appellants Sri. Swathi Kumar and senior counsel Sri.P.Vijayabhanu and Sri. Vipin Narayan respectively in both the appeals and Public Prosecutor Smt. V.H. Jasmine and perused the records.

6. Counsel for the appellants argued that there is no evidence to prove either the demand or acceptance of any illegal gratification as alleged by the prosecution. Further, the evidence of PW4 is not believable as there was no raid conducted on 16.2.1998 by the special squad consists of the

appellants in the toddy shop, which is said to have been conducted by PW4 under some agreement basis with its original licencees, Balakrishnan and another, and no case was registered as claimed by him on that basis. The allegation was that CW24 - Sasi, his servant, was arrested by the excise officials from his shop and he was threatened by the excise officials that, if he did not pay the required amount claimed by them, he would be implicated as an accused. But, in fact, the documents produced by the prosecution itself will go to show that CW24 was said to have been arrested by the excise officials from the side of the road while he was said to have been carrying arrack. So, there was no possibility for the accused persons to demand any amount as claimed by the prosecution. Further, the complainant in this case namely PW4, turned hostile and he did not fully support the case of the prosecution. The decoy witnesses did not see the actual demand or acceptance of the amount and they have only hearsay knowledge about what PW4 had stated to them when they completed the trap, which is inadmissible in evidence. Further, the evidence will go to show that there are contradictions regarding the manner in which the amount was

recovered as well. So under the circumstances, it cannot be said that the prosecution has proved beyond reasonable doubt that the accused persons have demanded and accepted the illegal gratification. Merely because some amount was seized from the office of the excise officials where accused 1 and 2 were found and certain portion of the amount was recovered from them alone are not sufficient to convict them for the offences alleged. Further, there is nothing on record to show that even assuming that the accused persons have accepted the amount, they had accepted the same knowing that it is illegal gratification and that was intended to be given for doing some favour to the complainant. They have also argued that evidence of PW4 cannot be believed as he is accused in several cases and it is not safe to rely on his evidence without corroboration for convicting the appellants. They have relied on the decisions reported in **Banarsi Das v. State of Haryana** (2010 (4) SCC 450), **Harshan v. State of Kerala** (1996 (1) KLT 88) and **Trilok Chand Jain v. State of Delhi** (1975 (4) SCC 761) in support of their case.

7. It is also argued on the side of the appellants that

certain amounts were found on the ground as some of the officials found in the excise office had thrown them and it was made to be taken by the accused persons and as such it cannot be said that the tainted currency notes were recovered from the possession of the accused so as to prove either the demand or acceptance by the accused persons in order to convict them for the offences alleged. Further, in this case, the complainant had some grudge to grind against the excise officials and the fact that he was prepared to offer some amount even without any hesitation on the date of demand itself will go to show that he is a person of promoting corruption and in such circumstances, the evidence of such witness has to be scrutinized with caution and it is not safe to rely on such evidence without corroboration from the independent witness to prove the fact intended to be proved by the prosecution before convicting the accused persons for the offences alleged. According to the counsel for the appellants, prosecution has failed to prove the offences against the accused beyond reasonable doubt and they are entitled to get acquittal of the charge levelled against them giving them the benefit of doubt.

8. On the other hand, learned Public Prosecutor, Smt. Jasmine, argued that once prosecution has proved the demand and acceptance of tainted money and if the accused were red handedly caught with the tainted amount, then in the absence of any explanation forthcoming from the side of the accused regarding nature and character of the amount received or found to be in their possession, the presumption under section 20 of the Act has to be drawn by the court to come to a conclusion that the amount recovered from the accused is the illegal gratification obtained by them for getting some unlawful advantage for themselves or to do some favour to any other person misusing their official position as public servants. In this case, though the complainant turned hostile, on certain material aspects, he was firm in his evidence regarding the demand and acceptance of bribe by the accused persons. He had also deposed that he went to the office and paid the amount and that was received by them and they asked as to whether he had brought the amount as asked for. Though he had made some deviation in his evidence regarding the complicity of the first accused, it will be seen from the

evidence adduced that he is now trying to help the first accused as he had retired from service and he has got some soft corner for him and that was the reason why he was not fully supporting the case of the prosecution. Further, it will be seen from the records and also from the judgment of the lower court that when the case was posted for trial on an earlier occasion, it was adjourned at the request of the defence and after a long time, the complainant was examined, which will go to show that the time taken by the accused to get the case adjourned to a future date itself was with a view to overcome the prosecution witness namely the complainant and it is thereafter that PW4 had changed his version so as to help the defence. Further, there is no explanation forthcoming from the side of the accused regarding the amount found to be in their possession either in the 313 examination or even when suggestions were given to the witnesses and they are not able to explain the source of that amount or the purpose for which it was obtained by them as well. She had relied on the decisions reported in **Narinder Singh v. State of Himachal Pradesh** (AIR 2014 SC 3766), **Mahendra Amratlal Kayastha v. State**

of Gujarat (2012 Crl.L.J.959), **Shaji E.V. v. State of Kerala** (2012 KHC 720), **Sureshkumar Labshankar Joshi v. State of Gujarat** (2012 Crl.L.J.2703), **Joseph James @ Jose v. State of Kerala** (2010 Crl.L.J.3551), **Vinod Kumar v. State of Punjab** (2015 (1) KHC SN 17 (SC) and **Phula Singh v. State of Himachal Pradesh** (2014 (2) Crimes 38 (SC) in support of her case. So according to the prosecution, the court below was perfectly justified in convicting the appellants for the offence alleged.

9. The points that arise for consideration are:

(i) Whether the court below was justified in holding that the appellants have made demand as illegal gratification for doing some favour to the complainant misusing their official position as public servants?

(ii) Whether the court below was justified in holding that the prosecution has proved beyond reasonable doubt that the accused persons have accepted illegal gratification and made unlawful advantage to themselves by misusing their official position?

(iii) Whether the court below was justified in holding that

the accused persons committed misconduct by accepting illegal gratification to their advantage misusing their official position to do some favour or promising to do some favour to the complainant?

(iv) Whether the court below was justified in holding that the accused persons have committed the offences punishable under Sections 7 and 13 (1)(d) read with Section 13(2) of the Act?

(v) If so, the sentence imposed is proper and legal?

10. Points 1 to 4:

The case of the prosecution as emerged from the prosecution witnesses was as follows:

PW4 - the complainant was conducting toddy shop No.10 at Chathankari on the basis of an agreement with one Balakrishnan and another, who were the licencees of the said shop. According to the prosecution, on 16.2.1998 the excise squad consisting of accused 1 and 2 and others conducted raid in the said shop when they got information that illicit arrack was being sold from that shop. They found an empty can having smell of arrack and on that basis they registered

Ext.P12 crime and occurrence report as Crime No.No.6/1998 under sections 55(a) and 8 of the Abkari Act against CW24-Sasi and he was taken to the office of the first accused namely the squad office and he was produced before the court on the next day. The first accused told PW4 that unless an amount of ₹50,000/- was paid, he would also be implicated as an accused in the case and on 17.2.1998, PW4 went to the squad office and after bargaining, the amount was reduced to ₹30,000/- and as per the directions of the first accused, he paid ₹5,000/- to the second accused on 17.2.1998 itself and he had undertaken to pay the balance amount on 19.2.1998. Later it was agreed between them that out of the balance amount of ₹25,000/-, ₹10,000/- had to be paid on 19.2.1998 and the balance had to be paid within two days thereafter. Aggrieved by the demand made and also the threat made by the accused persons, he went to the office of the Dy.S.P Vigilance (PW6) and gave Ext.P8 complaint to PW6, on the basis of which Ext.8(c) First Information Report was registered as V.C.No.3/1998/PTA against three accused persons including the present appellants originally for the offence under section 7 of the Act.

11. As per the request of PW6, the District Collector sent PW1, the Deputy Tahsildar of Revenue Recovery and CW3 to assist PW6 in the trap to be arranged in the matter. When PW1 and CW3 went to the office of PW6, Ext.P8 complaint was read over to them and PW4 admitted the contents to be true and correct. PW4 handed over ₹10,000/-, the amount intended to be given as bribe to accused 1 and 2 and the Circle Inspector of the squad, to PW6. The particulars of the numbers were entered in the mahazer. Phenolphthalein powder was smeared on those currency notes. Thereafter PW6 had demonstrated the Sodium Carbonate - Phenolphthalein test to PW1, CW3 and PW4 and instructed as to how the trap will be conducted and also instructed PW4 how to give signal after the amount was paid. Thereafter the solution which was prepared for the purpose of making demonstration which turned pink after the Phenolphthalein test was collected in MO1, sealed and Mark 'A' was put and Ext.P1 entrustment mahazer was prepared. Thereafter the trap team went to the office of accused 1 and 2. PW4 went inside the office while others stayed back at a distance from where they could watch the

transaction.

12. When PW4 went inside the office, the Circle Inspector was not there. But accused 1 and 2 and others were present. At that time the first accused repeated the demand and thereafter PW4 paid ₹2,000/- to him which was the money intended to be given to him as per the understanding. The first accused asked PW4 to give money which had to be given to the Circle Inspector and a sum of ₹3,000/- which was agreed to be paid to the Circle Inspector was also received by the first accused on his behalf. Then the second accused made a demand for the amount due to him and for other excise guards there and accordingly PW4 had paid the balance amount of ₹5,000/- to the second accused and thereafter he went out side and gave the signal as instructed by PW6. Thereafter PW6, PW1 and CW3 and others entered the squad office. PW6 introduced himself and the other officials to the persons present there. At that time some of the excise officials ran away from the scene and some of them threw away the currency note bundles outside the squad office and near the compound wall of squad office. The vigilance officials chased the excise

officials, who ran away from the place and brought them back. The vigilance police men were directed by PW6 to guard the currency notes thrown on the ground by the excise officials.

13. After that PW6 asked PW2 as to what happened and he told that he gave ₹2,000/- to the first accused Bhargavan Pillai and he told that the Circle Inspector was not there and wanted to give the amount payable to him. Accordingly, he had given ₹3,000/- payable to the Circle Inspector also. Both the amounts were received by the first accused. He had further stated that when he entered the office, the first accused asked him as to whether he had brought the amount and he told that he had brought ₹10,000/-. Out of that, ₹2,000/- was given to the first accused, which he received and kept in his left pant pocket. Thereafter he received the amount payable to the Circle Inspector and kept that also in his pocket. He had further stated that when he gave the amount to the first accused, the second accused Purushothaman asked as to whether he had not brought the amount payable to him and accordingly he gave ₹5,000/- to the second accused and thereafter he told that he will bring the balance amount on the

next day and it is thereafter that he had shown the signal.

14. After PW4 narrating the incident, PW6 had conducted Sodium Carbonate Phenolphthalein test by dipping the hands of PW1 and CW3 and there was no colour change occurred and he had collected that sample in MO2 bottle and sealed the same and put mark 'B' on that. In another solution prepared as instructed by PW6, the first accused dipped his fingers and it became pink and that solution was collected in MO3 bottle and mark 'C' was put on that and thereafter in another solution so prepared as requested by PW6, the second accused Purushothaman dipped his fingers and that became pink and that solution was collected in MO4 bottle and marked as 'D' and it was sealed and labelled. When he enquired with the first accused, he told that he had received the amount and thrown it out when he ran away and he had further stated that he had thrown the notes near the compound wall of south eastern corner of the property and he had shown that place to them. Further the second accused had shown the currency notes which he had thrown among the waste papers collected inside the room. Thereafter, after providing a dothi to the first

accused, his pant was removed and when that pant was shaken, a bundle was fell down from his pant pocket and when that was subjected to sodium carbonate phenolphthalein test, it became pink and that solution was collected in MO5 bottle and mark 'E' was put in the same and as directed by PW6, PW1 had taken the notes which fell down from the pant pocket of the first accused. On verification, it was found that the initials put by PW1 was seen on those notes. The notes so taken are MO6 series namely ₹3000/- consists of 5 hundred rupee notes. When the second set of notes fell down from the pocket was verified, it contained initials of PW1 and it consists of 20 hundred rupee notes which was described in Ext.P1 entrustment mahzer and those notes are MO7 series. The currency notes which were thrown and taken from among the waste paper collected by the second accused is MO8 series. When it was verified with Ext.P1 mahazer, it tallied with the numbers mentioned therein. It contained 50 hundred rupee notes. Further apart from these things, there were ten currency notes of hundred rupees each in another cover which contained the name of 'Vennikulam'. Those notes

were identified as MO9 series and the cover was identified as MO9(a). It was told that the amount was received from Vennikulam shop as 'Masappadi'. Apart from these amounts, there were 40 hundred rupee notes (Rs.4000/-) found in the pocket of the first accused which he told that it was the balance amount in the salary and so it was handed over back to him. The amounts thrown by the guard Babu were examined and found that it contained 12 hundred rupee notes, 4 fifty rupee notes and 6 ten rupee notes (total Rs.1,460) and that was seized and when he enquired about the same with Babu, he told that it did not belong to him and that was taken into custody by PW6 and the notes so taken by him were MO10 series. Accordingly, the notes thrown by Unnikrishnan, another excise guard, was taken from the northern corner of the room and when examined it contained 103 hundred rupee notes and one fifty rupee note (total Rs.10,350/-) and when he enquired with Unnikrishnan, he disowns its ownership and that was seized by PW6 and the notes so seized by him are MO11 series. The pant seized from the first accused is MO12. PW6 has described the things happened there and seized the

articles as per Ext.P2 mahazer. Thereafter they were arrested by PW6.

15. The investigation was conducted by PW11. He questioned the witnesses and recorded their statements. After getting Ext.P15, he again questioned PW8 and recorded his statement. Thereafter he gave Ext.P17 report to delete the name of original first accused shown in the First Information Report. He had given Ext.P18 report to add Section 13(1)(a) and 13(1)(d) read with section 13(2) of the Act and section 34 of the Indian Penal Code as it was revealed during investigation that those offences were also committed. He obtained Ext.P14 plan of the place of occurrence with the help of PW7, the Village Officer. He had collected Ext.P10 attendance register containing Ext.P10 (a) entry regarding attendance of the present accused persons on the date of commission of the offence, Ext.P11 general diary containing Ext.P11(a) entry regarding registration of case against Sasi-CW24 on 16.2.1998. Ext.P12 is the certified copy of the occurrence report in OR.No.6/1998 registered against CW24 Sasi, Ext.P13 seizure mahazer prepared in that case as

produced by PW5. He completed investigation and submitted final report in the case.

16. Before considering the facts in this case, I may consider the principle and precedents relevant for disposal of the case. In order to attract the offences under sections 7 and 13(1)(d) read with section 13(2) of the Act, it must be proved by the prosecution that the accused had made the demand and accepted the illegal gratification pursuant to the demand for the purpose of doing some favour to any person or getting unlawful advantage for themselves misusing their official position. It is also settled law that once the demand and acceptance were proved by the prosecution, unless the contrary is proved by the accused, the court shall presume that the accused had made demand and accepted illegal gratification involving section 20 of this Act. It is also settled law that mere recovery of tainted currency notes from the accused alone is not sufficient to convict the accused for the said offence and the prosecution has got primary responsibility of proving the demand and acceptance by cogent evidence. It is also settled law that the burden cast on the accused is not

so heavy as in the case of prosecution proving the case and the accused can rebut the presumption either by direct or circumstantial evidence or even by cross examining the prosecution witnesses so as to prove that his case is more probable than the case of the prosecution. It is also settled law that mere suggestion given by the defence alone is not sufficient to rebut the presumption and the explanation given by the accused for coming into possession of the amount must be explained by the defence which appears to be probable and plausible to exonerate the accused from the criminal act of receiving alleged illegal gratification. It is also settled law that the evidence of complainant in cases like this though that of an accomplice, it is not always necessary for the court to insist for corroboration by independent witnesses as it is very difficult to prove demand and acceptance of bribe in such cases by direct evidence. But, at the same time, if the court feels that evidence of the complainant suffers some legal infirmities and not safe to rely on, then the court may insist for corroboration from independent witnesses to prove the case of the prosecution. This was so held in the decisions

reported in **M.R. Purushotham v. State of Karnataka** (2015 Crl.L.J.72), **Jayaraj B v. State of Andhra Pradesh** (2014 KHC 4199), **Banarsi Dass v. State of Haryana** (AIR 2010 SC 1589), **Panalal Damodar Rathi v. State of Maharashtra** (1979 (4) SCC 526), **C.M. Girish Babu v. CBI, Cochin, High Court of Kerala** (2009 (2)SCC(Cri) 1, **M.K. Harshan v. State of Kerala** (AIR 1995 SC 2178), **Narinder Singh v. State of Himachal Pradesh** [2014 (3) Crimes 276 (SC)], **State Rep. By C.B.I, Hyderabad v. G. Prem Raj** (AIR 2010 SC 793), **Subbu Singh v. State by Public Prosecutor** (2009 (6) SCC 462), **Raghubir Singh v. State of Haryana** (1974 (4) SCC 560), **M. Narsinga Rao v. State of A.P** (2001 (1) SCC 691), **State of U.P v. Zakaullah** (1998 Crl.L.J.863), **T.Shankar Prasad v. State of A.P** (2004 SCC (Cri)870), **State of Kerala & another v. C.P. Rao**(2011(2) SCC (Cri)1010), **A.K. Sudhamma v. State of Kerala** (2013 Crl.L.J.4963), **State of Punjab v. Madan Mohan Lal Verma** (2013 Crl.L.J.4050), **Narendra Champaklal Trivedi and another v. State of Gujarat** (2012 KHC 4330), **Khilli Ram v. State of Rajasthan** (1984 (2) Crimes (SC)909), **Rajath Prasad & another v. C.B.I** (2014 KLD (1) 872), **Mahendra**

Amratlal Kayastha v. State of Gujarat (2012 Crl.L.J.959), **Shaji E.V. v. State of Kerala**, (2012 KHC 720), **Joseph James alias Jose v. State of Kerala** (2010 Crl.L.J. 3551), **Vinod Kumar v. State of Punjab** (2015 (1) KHC SN 17(SC), **Phula Singh v. State of Himachal Pradesh** (2014 (2) Crimes 32 (SC), **Narinder Singh v. State of Himachal Pradesh** (AIR 2014 SC 3766) and **Trilok Chand Jain v. State of Delhi** (1975 (4) SCC 761). With these principles, the case in hand has to be considered by this Court.

17. The gist of the prosecution case was that accused 1 and 2 made demand to PW4 for not to implicate him in an abkari case which was detected by them on 16.2.1998 and consequent to the same, he made a complaint to the vigilance wing and as instructed by the vigilance trap laying officer, on 19.2.1998, he went to the office of accused 1 and 2 and as demanded by them, he paid the amount. Prosecution relies on the evidence of PW1 - the decoy witness, PW4-the complainant, PW6 – the trap laying officer and Ext.P1 entrustment mahazer, Ext.P8 complaint, Ext.P2 mahazer and MO series to prove their case. PW1 is the Deputy Tahsildar of Revenue Recovery

Wing of Collectorate, Pathanamthitta, who has been deployed by the District Collector along with CW3 as requested by PW6 to help him to conduct the trap. He had deposed that, on 19.2.1998, he went to the office of PW6 along with CW3 and at that time PW4 was also present there. PW6 had read Ext.P8 complaint given by PW4 and the contents of Ext.P8 were admitted by PW4. Thereafter PW6 introduced all of them to each other and asked PW4 as to whether he had brought the amount, which was intended to be given as bribe to the accused persons, and he handed over ₹10,000/- containing 5 five hundred rupee notes and 75 hundred rupee notes. He had also stated that his initials were put in the five hundred rupee notes and hundred rupee notes having numbers ending with one. He had also explained the demonstration made by PW6 about the phenolphthalein test and preparation of Ext.P1 entrustment mahazer. He had further stated that thereafter the trap laying team along with the complainant went to the office of accused 1 and 2 and they waited outside as decided earlier. They sent PW4 alone to the office of accused 1 and 2 and instructed him to pay the amount on demand. Thereafter he will have to give

signal by raising the sleeves of his shirt. Accordingly, PW4 went inside the office and came back after some time and gave signal as instructed and thereafter he along with CW3, PW4, PW6 and other officials entered the office of accused 1 and 2 and PW6 introduced himself to the persons present there. Accused 1 and 2 were present in the office along with others. When PW6 was about to start the procedure, the excise officials including the second accused ran away from the place and some of them had thrown the amounts with them and as instructed by PW6, they were chased and brought back. Thereafter PW4 was called and When PW6 asked as to what happened, he described the entire transaction before them and thereafter the amount of ₹2,000/- and ₹3,000/- given to the first accused were recovered from his pant pocket along with MO9 series with MO9(a) cover containing the name Vennikulam. Thereafter the second accused had taken the amount thrown by him from among the waste paper collected there and on verification, it was found that they were some of the currency notes entrusted by PW4 to be handed over to the accused for this purpose. When conducted Sodium Carbonate -

Phenolphthalein test on the dress of the first accused and hands of both the accused, the result was positive.

18. Though he was cross examined at length, nothing was brought out to discredit his evidence regarding these aspects. Though his evidence is not helpful to prove the actual demand and the acceptance of money, but his evidence will prove the conduct of the excise officials including the accused persons of running away from the place throwing the amounts from their possession and recovery of the tainted amounts from accused 1 and 2. The conduct of the accused immediately after the trap team entered the office is also relevant for the purpose of proving the guilty mind of the accused persons. If they were innocent and they did not commit any offence and they have been falsely implicated, then there was no necessity for them to run away from the place. It is also brought out from the evidence of PW1 that the amounts were handed over by the accused persons when demanded by PW6. There were no explanation forthcoming from the accused person as to how that amount had come into their hands and any relation with those amounts with the accused persons at the relevant

time. There is no explanation forthcoming from the accused person or given by the accused persons regarding the same as well at the time when recovery was effected by PW6.

19. Then the prosecution relies on the evidence of PW4, the complainant. It is true that the complainant had not fully supported the case of the prosecution as described in Ext.P8 complaint. But he had stated in the chief examination that on 16.2.1998, the excise officials including accused 1 and 2 came to his shop and conducted search and thereafter arrested CW24-Sasi, his employee and when they were about to go, they wanted PW4 to give ₹50,000/- as illegal gratification so as to avoid he being implicated in the case. It is also stated by PW4 that they threatened him that if the amount was not paid, he would be implicated in the case. He had further admitted in his examination that he gave Ext.P8 complaint and whatever stated by him in Ext.P8 was true and correct. He had also admitted in his evidence in the chief examination about the demonstration made by PW6 about the trap to be conducted and handing over of ₹10,000/- to PW6 as amount demanded by the excise officials namely accused 1 and 2 and the Circle

Inspector and preparation of Ext.P1 entrustment mahazer. He had also admitted in his evidence that as instructed by PW6, he along with the trap laying team went to the office of accused 1 and 2 and others stood outside from where they could see the varanda of the office and as instructed by PW6, he went inside and at that time, the Circle Inspector was not there, but accused 1 and 2 and other excise officials were there. He had also stated that the first accused had demanded the amount and accordingly he gave ₹2,000/- to him and then he asked as to whether he had brought the amount payable to the Circle Inspector and then, he entrusted another ₹3,000/- to him and thereafter the second accused demanded amount and accordingly, he paid ₹5,000/- to him and thereafter he had stated that he came outside and gave signal and thereafter PW6 came and recovered the amount. He had also stated that when PW6 and trap laying officers came to the office along with PW4, after he paid the amount, the excise officials ran away from there leaving the amount in their possession and they were caught and brought back by the vigilance officials. But he had made some deviation in his statement

which were marked as Ext.P8(a) and Ext.P8(b) and he had evasively made an attempt to save the first accused by stating that he had not made any demand. So he was declared hostile by the prosecution and he was subjected to cross examination.

20. But in the cross examination by the legal advisor, he had made certain admission regarding Ext.P8 and also statements recorded by PW6. In the chief examination he had stated regarding the demand as follows:

സലാഹുദ്ദീനെന്ന സർക്കിൾ ഇൻസ്പെക്ടർ എന്നോടു പറഞ്ഞു, പത്തനംതിട്ട ഓഫീസൽ വരണമെന്ന് ടിയാൻ പറഞ്ഞു. അങ്ങിനെ പറയുമ്പോൾ A1 ഉണ്ടായിരുന്നു. A1 അടുത്തു തന്നെ നിൽക്കുന്നുണ്ടായിരുന്നു.

It was also deposed by him that, on 16.2.1998 at about 3 p.m, the accused persons had come to his shop and he identified both the accused from court as well. He had also stated that at the time when he came to the office on 17.2.1998 as directed by the Circle Inspector and he repeated the demand for the amount, accused 1 and 2 and others were also present. He had also stated in the chief examination that on 17.2.1998 he had given ₹5000/- to one Preventive Officer and that was entrusted by him as instructed by the first accused as well. He

had also reiterated that the amount was demanded by the officials including accused 1 and 2 and they did not say anything against such demand. Though he had denied having stated in Ext.P8(a) namely as requested by them, he went to Pathanamthitta enforcement office on 17.2.1998 at about 10 a.m but he had admitted that :

അന്ന് Dy.S.P. (cw42) എഴുതിയെടുത്തതെല്ലാം സത്യമാണ്. അങ്ങിനെ അതിൽ ഞാൻ മൊഴി കൊടുത്തിട്ടുള്ളത് ശരിയാണ്.

21.He had further stated that the amount was placed on the table as instructed by the Excise Guard - Panicker and at that time accused 1 and 2 were also present and they heard what Panicker has said. He had further stated that he came to know about the arrest of the accused persons from the paper and he had further stated that :

അത് കണ്ട് എനിക്ക് വിഷമം ഉണ്ടായില്ല. കാരണം കൈകൂലി അവർ ആവശ്യപ്പെട്ടത് കൊടുത്ത് അവർ വാങ്ങിയത് കൊണ്ടാണ് എനിക്ക് വിഷമം ഉണ്ടാവാതിരുന്നത്.

He had further stated that he had denied having stated in Ext.P9 and Ext.P10, in his 161 statement. He had further stated that :

സത്യമായ കാര്യമാണ് പറഞ്ഞ് കൊടുത്തത്. ആ സംഗതി ശരിയാണ്.

22. He had further stated that :A1 ന്റെ കാര്യത്തിൽ എനിക്ക് ഇപ്പോൾ സങ്കടം തോന്നുന്നുണ്ട്. അതുകൊണ്ട് A1 നോട് എനിക്കൊരു soft corner ഉണ്ട്. A1 ന് Case ൽ എന്തെങ്കിലും വിഷമമുണ്ടാകുന്നതിൽ എനിക്ക് വിഷമം ഉണ്ട്.

He had also stated that he had not paid any amount to the second accused on 19.2.1998. In the reexamination he had stated that Dy.S.P Varghese George (PW6.)ന് ഞാൻ പറഞ്ഞു കൊടുത്ത കാര്യങ്ങൾ ശരിയായ കാര്യങ്ങളാണ്. ആ കാര്യങ്ങളാണ് Dy.SP. Varghese George എഴുതിയെടുത്തത്. കളവായ കാര്യങ്ങൾ അദ്ദേഹം എഴുതിയിട്ടില്ല.. ശരിയായ കാര്യങ്ങൾ എഴുതിയെടുത്തതിലാണ് ഞാൻ ഒപ്പിട്ട് കൊടുത്തത്.

There was no further cross examination of the witness in this regard by the accused persons.

23. It is also seen from the records that witnesses were earlier present when the case was posted for trial on the earlier occasion and it was adjourned at the request of the accused persons and it was after adjournment of the case when it was again posted for evidence, PW4 was trying to give evidence not fully supporting the case of the prosecution so as to favour the accused persons.

24.In the decision reported in **Vinod Kumar v. State of**

Punjab (2015 (1) KHC SN 17(SC) also, complainant though resiled from his previous statement and was cross examined by the prosecution, PW7 in his examination in chief supported the prosecution case in all aspects, but in cross examination, resiled from his examination in chief and he was declared hostile, in the trial court judgment it was held that though the complainant had not supported the case of the prosecution, yet prosecution had been able to prove the demand and acceptance of the bribe and recovery of the tainted money from the accused and therefore the presumption as envisaged under section 20 of the Act would get attracted and accordingly, convicted the accused and this was confirmed by the High Court and while it was challenged before the Apex Court, the Apex Court had dismissed the appeal holding that though the complainant had resiled from his earlier statement, if there are other materials available including materials brought out in the cross examination of the complainant that the prosecution has proved the demand and acceptance then, that is sufficient to attract the presumption under section 20 of the Act and convict the accused persons

if there is no probable or plausible cause given by the accused for coming into possession of the tainted currency notes.

25. In this case also, it will be seen from the evidence of PW4 - the complainant that, though he was not fully supporting the case of the prosecution, he had given evidence more or less supporting the case of the prosecution on material aspects. His evidence will go to show that he was trying to help the accused persons that he was retreating from his earlier statement. His conduct will go to show that he is affirming the action of making the complainant and proving the demand and acceptance of the amount by the accused persons. Merely because he was accused in abkari cases, alone was not sufficient to come to a conclusion that he was giving false evidence against the accused persons in the circumstances of the case.

26. It is brought out in the evidence of PW5 that, on 16.2.1998 they arrested CW24-Sasi while he was carrying the arrack and Ext.P13 seizure mahazer was prepared and Ext.P12 occurrence report was registered in respect of the same. It is also brought out in the evidence of PW5 that

accused 1 and 2 were present in the patrol party along with the Circle Inspector of Excise. It is true that it will be seen from Exts.P12 and P13 that the crime was detected not from the shop of PW4, but on the side of the road and it is also seen from the evidence of PW5 that they had not conducted any search in the shop of PW4 on that day and that was not recorded in Ext.P11 general diary. But it will be seen from the evidence of PW5 that, if no raid was conducted in the shop even if they went to the shop, it will not be found a place in Ext.P11 general diary. So, when it was revealed that CW24-Sasi was an employee of the complainant-PW4, they going to the shop of PW4 to enquire about the same cannot be ruled out. If such a possibility is there, the possibility of the accused persons and other excise officials threatening the complainant and making any such illegal demand to avoid implication of PW4 in a case like this also cannot be ruled out especially when he was accused in several cases of abkari offences and in one such case, he was convicted as well. So, the apprehension of the compliant that he is likely to be implicated in the case and going to the excise office to discuss

about the alleged demand made, also cannot be ruled out in such circumstances. It may be mentioned here that it is not possible for the prosecution to prove the demand made prior to the acceptance by direct evidence. The court will have to consider the attendant circumstances which lead to an inference regarding existence of such fact from the evidence adduced on the side of the prosecution. If such evidence is available, then court is at liberty to draw such inference against the accused persons unless it is rebutted by the accused by cogent evidence. So, under the circumstances, from the evidence of PW4 and the attendant circumstances narrated by him in Ext.P8 complaint and also other circumstances brought out against previous conduct of PW4 in involving in abkari offences, the court below was perfectly justified in believing PW4 in coming to a conclusion that there was demand made by the accused persons misusing their official position by promising certain favour in favour of the complainant-PW4 and thereby they have committed the offence punishable under sections 7, 13(1)(d) read with section 13(2) of the Act and rightly convicted them for the said offence.

27. The explanation given by accused 1 and 2 that on account of the enmity for PW4, he gave Ext.P8 false complaint and came along with the vigilance officials to the office of the accused persons and thereafter spread over the tainted money in the office and thereafter it was made to take by the accused persons and falsely implicated them in a case like this is not probable or believable from the circumstances of the case especially when decoy witness PW1 had categorically denied these aspects. Further, there is no explanation forthcoming from the side of the accused as to how so much amount had come into their possession, which has not been properly accounted by entering in any of the registers in a suspicious circumstance into their possession. In the absence of such evidence adduced on the side of the accused, the court below was perfectly justified in relying on the presumption under section 20 of the Act on the basis of the evidence available on record and rightly came to the conclusion that the accused have demanded illegal gratification and accepted the same so as to get unlawful advantage by misusing their official position by promising some favour to the complainant

and thereby they have committed the offence punishable under sections 7, 13(1)(d) read with section 13(2) of the Act. So I do not find any reason to interfere with the finding of the court below in convicting the accused persons for the above said offences. The points are answered accordingly.

28. Point No.V:The counsel for the appellants submitted that the sentence imposed is harsh. The court below had sentenced the first accused to undergo rigorous imprisonment for 4 years and also to pay a fine of ₹30,000/-, in default to undergo rigorous imprisonment for one year for the offence under section 7 of the Act and further sentenced to undergo rigorous imprisonment for 4 years also to pay a fine of ₹30,000/- in default to undergo rigorous imprisonment for one year under section 13(1)(d) read with section 13(2) of the Act. The court below sentenced the second accused to undergo rigorous imprisonment for 4 years and also to pay a fine of ₹20,000/- in default to undergo rigorous imprisonment for one year under section 7 of the Act and further sentenced to undergo rigorous imprisonment for 4 years and also to pay a fine of ₹20,000/-, in default to undergo rigorous imprisonment

for one year for the offence under section 13(1)(d) read with section 13(2) of the Act and directed the substantive sentences to run concurrently. Set off was also given for the period of detention if any already undergone by them in connection with this case under section 428 of the Code of Criminal Procedure.

29. In the decision reported in **Narendra Champaklal Trivedi and Another v. State of Gujarat** (2012 KHC 4330) = (2012 (7) SCC 80), the Apex Court had considered the sentencing policy in cases of corruption. It has been observed in the decision that:

“Where the minimum sentence is provided, we think it would not be at all appropriate to exercise jurisdiction under Art.142 of the Constitution of India to reduce the sentence on the ground of the so-called mitigating factors as that would tantamount to supplanting statutory mandate and further it would amount to ignoring the substantive statutory provision that prescribes minimum sentence for a criminal act relating to demand and acceptance of bribe. The amount may be small but to curb and repress this kind of proclivity the legislature has prescribed the minimum sentence. It should be paramountly borne in mind that

corruption at any level does not deserve either sympathy or leniency. In fact, reduction of the sentence would be adding a premium. The law does not so countenance and, rightly so, because corruption corrodes the spine of a nation and in the ultimate eventuality makes the economy sterile”.

30. The persons in excise department are expected to do their duty diligently and strictly in accordance with law and they have got a duty to book the persons who have committed the offence in violation of the provisions of the Abkari Act so as maintain peace and harmony among the public and misuse of provisions of the Act by the offenders so as to affect the society at large. Their duty is akin to that of police in maintaining public order. If such persons commit offence under the Act, then it must be dealt with very seriously and if any leniency is shown in favour of such persons, that will give a wrong indication to the society as such. Punishing such persons with appropriate sentence, is not a only a sentencing policy of punishing the offenders, but also give a message to the other persons, who are discharging similar duties, to be careful and maintaining integrity in their professional conduct so as to

avoid corruption in such filed.

31. Considering the facts proved in this case and also finding large unaccounted money being seen in the office in the possession of the excise officials including the accused, the sentence imposed by the court below cannot be said to be harsh. I do not find any reason to interfere with the sentence imposed by the court below as well as it appears to be just and proper. So the appellants are not entitled to get any reduction in sentence as the sentence imposed is just and proper considering the circumstances of the case. The pint is answered accordingly.

In the result, both the appeals fail and the same are hereby dismissed. The order of conviction and sentence passed by the court below against the appellants under section 7 and section 13(1)(d) read with section 13(2) of the Act are hereby confirmed.

Office is directed to communicate a copy of this order to the concerned court immediately. Sd/-

K. RAMAKRISHNAN, JUDGE.

Crl.A.No.223 of 2001
&
Crl.A.No.224 of 2001