

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.UBAID

TUESDAY, THE 30TH DAY OF JUNE 2015/9TH ASHADHA, 1937

CRL.A.No. 973 of 2005 ()

AGAINST THE JUDGMENT IN CC 14/2003 of ENQUIRY COMMISSIONER AND
SPECIAL JUDGE, THIRUVANANTHAPURAM DATED 23-05-2003

APPELLANT/ACCUSED(S):

G.THANKAPPAN, AGED 57,
S/O.GOVINDAN, FORMERLY SECRETARY, GRAMA PANCHAYAT
MYLOM AND NOW RESIDING, AT ANIL BHAVAN, UCHAKKADA
KULATHOOR VILLAGE, NEYYATTINKARA TALUK.

BY ADV. SRI.P.S.VASAVAN PILLAI

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA, REPRESENTED BY
PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SMT.V.H.JASMINE

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON
30-06-2015, THE COURT ON 2.6.2015 DELIVERED THE FOLLOWING:

P.UBAID, J.

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**Crl.A No.973 of 2005**

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Dated this the 30th June, 2015

J U D G M E N T

The appellant herein was the Secretary of the Mylam Grama Panchayath in June, 2002. On the allegation that he received illegal gratification from one Saji George for issuing licence for starting a cashew nut roasting unit in the name of his wife Shiji, on 13.06.2002, and on 18.06.2002, the appellant faced prosecution before the Enquiry Commissioner and Special Judge (Vigilance), Thiruvananthapuram in C.C.No.14/2003. On the complaint of Saji George, the Dy.S.P., Vigilance and Anti-Corruption Bureau (VACB), Kollam unit registered a crime and arranged a trap. The amount brought by the complainant was treated with phenolphthalein, and he was instructed to hand it over to the appellant, on demand. Accordingly, the complainant approached the appellant in his office on 18.06.2002, and paid the illegal gratification. Within no time he was arrested by the Dy.S.P., and the tainted money was seized as per mahazar. After investigation, the

Vigilance submitted final report in the trial court under Sections 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act (for short, 'the P.C.Act').

2. The appellant (accused) pleaded not guilty to the charge framed against him by the trial court under Sections 7 and 13(2) read with Section 13(1)(d) of the P.C.Act, to which he pleaded not guilty. The case thus proceeded for trial. The prosecution examined nine witnesses in the trial court, and marked Exts.P1 to P18 documents and also MO1 to MO7 properties. When examined under Section 313 Cr.P.C., the accused denied the incriminating circumstances. No oral evidence was adduced in defence by the accused. However, Exts.D1 to D3 were marked. On an appreciation of the evidence the learned trial Judge found the accused not guilty under Section 13(1)(d) of the P.C.Act, but found him guilty under Section 7 of the P.C.Act. On conviction he was sentenced to undergo rigorous imprisonment for one year, and also to pay a fine of ₹5,000/-, by judgment dated 23.05.2005. Aggrieved by the said judgment of conviction, the accused has come up in appeal.

3. Before this Court in appeal, the appellant pleaded

for discharge on the contention that the conviction under Section 7 of the P.C Act is legally unsustainable in view of the finding of the trial court that the alleged demand for illegal gratification stands not proved. The learned counsel for the appellant submitted that, on facts also the appellant is entitled for acquittal because the complainant himself turned practically hostile to the prosecution, and the evidence of the other witnesses including the Detecting Officer is not sufficient for a conviction under Section 7 of the P.C Act. The learned Public Prosecutor on the other hand submitted that the finding of the trial court regarding demand is really erroneous and that the trial court has wrongly found that conviction under Section 13 (2) of the P.C Act is not possible when demand is not proved. Thus, the learned Public Prosecutor pleaded for a conviction under Section 13 (2) of the P.C Act on the basis of the available evidence.

4. Of the nine witnesses examined by the prosecution, PW2 is the complainant, who made Ext.P13 complaint, PW6 is his wife in whose name the application for D& O Traders Licence was applied for, PW3 is the trap

witness arranged by the Vigilance, and PW9 is the Deputy Superintendent of Police, who detected the offence.

5. In Ext.P13 complaint, the case of PW2 is that for issuing D&O Traders Licence in the name of his wife (PW6) on Ext.P9 (a) application, the accused demanded an amount of ₹ 2000/- inclusive of ₹ 240/- as profession tax and ₹ 50/- as licence fee, and as the first installment, the accused accepted ₹ 500/- at his office on 13.6.2002. He demanded the balance amount, and asked the complainant to come with the amount on 18.6.2002. Accordingly, he made a complaint before the vigilance, and as instructed and arranged by the vigilance, he paid an amount of ₹ 1000/- to the accused on 18.6.2002. But in court, the complainant did not fully support the prosecution. In examination in chief itself, he stated that when the accused delayed granting licence, he thought of making a complaint before the vigilance. His case is not that he preferred complaint when the accused demanded illegal gratification. To extract him “എന്റെ ഭാര്യ പേരിൽ അങ്ങനെ licence കിട്ടാതെ വന്നപ്പോൾ ഞാൻ വിജിലൻസിൽ പരാതി കൊടുത്തു”. (I made complaint before the vigilance when I felt that I will not get licence in

the name of my wife). Again the witness stated like this:

“ലൈസൻസ് ഞാൻ പ്രതിയോട് ചോദിച്ചപ്പോൾ licence തരാമെന്ന് പ്രതി പറഞ്ഞു. പക്ഷേ തന്നില്ല. അത് മനപ്പൂർവ്വം കാലതാമസപ്പെടുത്തുന്നതാണെന്ന് തോന്നി.” (I made request to the accused for licence, but it was not granted. Then I felt that it was being deliberately delayed by the accused). Thus, the evidence of the complainant in court indicates that he in fact made complaint before the vigilance and the VACB arranged a trap when the complainant believed that he will not get licence from the accused without initiating some action against him. This part of the evidence which is very important, raises genuine doubt regarding the genuineness of the trap in this case. There is reason to believe that the trap in this case was in fact a trap for a trap and not a genuine trap on a genuine complaint. Another portion of the evidence of PW2 is, “ഞാൻ പ്രതിയോട് ലൈസൻസ് ആവശ്യപ്പെട്ടു. അപ്പോൾ തരാമെന്ന് പ്രതി പറഞ്ഞു. ഞാൻ MO1 series എടുത്ത് പ്രതിയുടെ മേശയുടെ മുകളിൽ വച്ചു.” (I made request for licence to the accused, and then he stated that he will grant the licence. Then I took MO1 series currency and placed it on the office table of the accused). This statement will

strengthen the suspicion, whether this is in fact a case of acceptance of illegal gratification.

6.. The complainant examined as PW2 was declared hostile during trial by the learned Public Prosecutor representing the VACB, and he was cross-examined with the permission of the court. Finding that this witness will damage the whole prosecution, further examination of the witness was deferred, and the witness was recalled on 10.3.2005. In further examination by the learned Public Prosecutor, after he was recalled on 10.3.2005, the learned Public Prosecutor elicited something in favour of the prosecution. A reading of this portion of evidence will show that PW2 gave such statements on 10.3.2005, as instructed by the prosecution. So I am not inclined to consider this part of the evidence of PW2 given on 10.3.2005. In examination in chief, the witness stated so many things against the prosecution, practically probalising the defence that this is a vicious trap and that the complaint is not genuine at all. Finding that the prosecution will fail, the learned Public prosecutor got further examination of the complainant deferred, and later elicited many things from

his evidence. That is why I said that the evidence given by the complainant in the cross-examination made by the learned Public Prosecutor on 10.3.2005 cannot have any value. I find that the evidence given by the complainant in this case is fully against the prosecution.

7. As regards the essential element of demand for a prosecution under Section 7 of the P.C Act, the learned trial Judge came to a finding against the prosecution on the basis of the evidence of PW2. His case in the complaint is that the first installment of ₹ 500/- was paid by him on 13.6.2002 at about noon at the office of the accused. But the defence could disprove this very well by documentary evidence. As rightly found by the trial court, Ext.P14 (a) document will show that the appellant herein was in his office on 13.6.2002 only till 10 a.m, and that at 10.a.m he left the office to attend a conference at Kollam. This is proved by the other official witnesses also. The case of the complainant that he made payment of ₹ 500/- at noon on 13.6.2002 is unbelievable. The case of the complainant is that when he made payment of ₹ 500/- on 13.6.2002, the accused made a further demand for the balance amount of

₹ 1500/-. Accordingly, ₹ 1000/- was paid on 18.6.2002. I find no reason to reverse the finding of the trial court that the demand alleged in this case stands not proved. The trial court came to such a finding on the basis of the clear evidence including Ext.P14 (a) document produced by the prosecution.

8. When the evidence of the complainant is not in favour of the prosecution, or practically against the prosecution, what remains is the evidence of PW3 (the trap witness) and the evidence of PW9 (detecting officer). Now the question is whether simply on the basis of seizure of the phenolphthalein tainted currency from the office of the accused or from his possession, the accused can be convicted under Section 7 of the P.C Act or under Section 13 (2) of the P.C Act. Of course, PW3 and PW9 have given evidence regarding the trap, and also regarding the recovery of the MO1 series from the possession of the accused on 18.6.2002. The complainant is definite in evidence that he paid ₹1000/- to the accused in the presence of CW15. His evidence shows that CW15 was very much there as an independent witness, witnessing the

payment of ₹ 1000/- to the accused. PW2 stated in evidence that CW15 is his relative, and that the amount was paid in his presence. The prosecution has no explanation why CW15 was not examined as an independent witness. When an independent witness was very much present at the scene, witnessing the whole transaction of acceptance of illegal gratification, and when the said witness is not examined by the prosecution, the court will not attach much value to the evidence given by the trap witness. An independent witness, who happened to witness the incident and a trap witness arranged by the vigilance, cannot be treated equally by the court. The evidence of the detecting officer will have supportive value when the case stands proved otherwise by the evidence of the complainant or other independent witnesses. Here, the prosecution conveniently omitted to examine the independent witness. In fact, an appreciation of the evidence of PW3 will show that this witness could not have in fact clearly witnessed the payment of amount to the accused by the complainant.

9. In **Banarsi Dass v. State of Haryana** [AIR 2010 SC 1589], the Hon'ble Supreme Court held that to

constitute an offence punishable under the P.C Act the prosecution has to prove that there was demand of money and the same was voluntarily accepted. In **State of Punjab v. Madan Mohan Lal Verma [(2013) 14 SCC 153]**, the Hon'ble Supreme Court held that mere recovery of tainted money from the possession of the accused is not enough to enter a conviction under Section 7 of the P.C Act. The Hon'ble Supreme Court also held that once acceptance of gratification is proved and the presumption under Section 20 (1) of the P.C Act is applicable, the burden will shift to the accused to rebut the statutory presumption. In this case, there is no question of applying the presumption because the case of acceptance of amount is really suspicious. In **B.Jayaraj v. State of Andhra Pradesh [2014 Crl.L.J 2433]**, a three Judge Bench of the Hon'ble Supreme Court held that in the absence of proof of demand, mere recovery of tainted money from the accused will not suffice for a conviction under Section 7 or 13 of the P.C Act. The Hon'ble Supreme Court further held that proof of acceptance of illegal gratification is essential for applying the presumption under Section 20 (1) of the P.C Act. Again, in

C.Sukumaran v. State of Kerala [2015 Crl.L.J.1715],

the Hon'ble Supreme Court held that demand of illegal gratification by the accused is the *sine qua non* for constituting an offence under Section 7 and 13 (1) (d) of the P.C Act, and that mere recovery of tainted money alone cannot be the basis for a conviction in the absence of substantive evidence proving demand and acceptance. Thus, the position is settled that for a conviction under Section 7 of the P.C Act, the prosecution must necessarily prove demand by the accused. Here, the evidence on demand is unbelievable, and the evidence on acceptance is suspicious. I find that the trial court came to the right finding that demand stands not proved.

10. The prosecution has no explanation why the independent witness (CW15) was not examined during trial. The evidence of PW3 and PW9 is only regarding the recovery of the phenolphthalein tainted currency from the possession of the accused. But the Hon'ble Supreme Court has made it clear that in the absence of some other evidence proving acceptance of illegal gratification on demand, a conviction is not possible solely on the basis of

recovery of the tainted money.

11. On an appreciation of the evidence as discussed above, I find that the prosecution case is really suspicious. The finding of the learned trial Judge is that proof of demand is necessary for a conviction under Section 13 (2) of the P.C Act, but such proof of demand is not required under Section 7 of the P.C Act. In fact, the legal position is otherwise. For a conviction under Section 7 of the P.C Act, the prosecution must necessarily prove demand for illegal gratification by the accused. When there is no evidence to prove demand as the essential element, a conviction under Section 7 of the P.C Act is not possible at all. In this case, acceptance of bribe also stands not properly proved beyond reasonable doubt. The conviction made in this case by the trial court is under Section 7 of the P.C Act. When there is no evidence to prove demand, the conviction under Section 7 of the P.C Act cannot be legally sustained. Thus, I find that the appellant is entitled for acquittal. The whole prosecution case is suspicious.

In the result, this appeal is allowed. The appellant herein is found not guilty of the offence under Section 7 of

the P.C Act, and accordingly, he is acquitted of the said offence in appeal under Section 386 (b) (i) of Cr.P.C. Accordingly, the conviction and sentence against the appellant in C.C No.14 of 2003 of the court below will stand set aside and the appellant will stand released from prosecution. The bail bond, if any, executed by the appellant will stand discharged.

Sd/-
P.UBAID
JUDGE

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/True copy/

P.S to Judge