

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.UBAID

THURSDAY, THE 9TH DAY OF JULY 2015/18TH ASHADHA, 1937

CRL.A.No. 773 of 2007 ()

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CC 21/2002 of ENQUIRY COMMISSIONER & SPECIAL JUDGE,KOZHIKODE
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APPELLANT/ACCUSED::

**DR.T.BHARGAVAN, S/O. KANARAN
"HARIKRIPA", MADIYOORKUNI, KALPETTA
WAYNAD., (SUPDT., GOVERNMENT HOSPITAL
KALPETTA)**

**BY ADVS.SRI.M.ASOKAN
SRI.DEVAPRASANTH.P.J.**

RESPONDENT/COMPLAINANT::

**STATE OF KERALA
REPRESENTED BY DY.S.P. VIGILANCE AND
ANTI-CORRUPTION BUREAU, WYNAD, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA.**

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 09-07-2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:**

SD

Crl.Appeal No.773 of 2007

Dated this the 09th day of July, 2015

JUDGMENT

A Civil Surgeon in Government service, who accepted excess fee for private consultation or for medical certificate, has been facing the trauma of prosecution under the Prevention of Corruption Act (for short, 'the P.C.Act') for fifteen years. The Vigilance and Anti Corruption Bureau (VACB) initiated prosecution against him on the complaint of one Biju Kumar. Smt. Chandrika, wife of Biju Kumar, had undergone a sterilisation operation in the Community Health Centre, Kalpetta. Her husband Biju Kumar filed a complaint before the VACB, Wayanad Unit, that the doctor who conducted operation (appellant herein) had accepted an amount of Rs.500/- on 03.08.2000 as fee for conducting operation, and when he approached the doctor for a medical certificate after the operation, the doctor demanded an amount of Rs.350/- for issuing the certificate. Accepting the demand, Biju Kumar left the residence of the doctor, and straight away went to the Vigilance office to make a complaint. On his complaint, the Dy.S.P., VACB, Wayanad Unit registered a crime,

and made arrangements for a trap. The amount of Rs.350/- brought by Biju Kumar was received as per mahazar for the purpose of trap, the Dy.S.P. arranged a public servant as trap witness, demonstrated phenolphthalein test to the complainant and the witness, and instructed the complainant Biju Kumar to hand over the phenolphthalein tainted currency to the doctor, on demand. Accordingly, Biju Kumar went to the residence of the doctor at about 6.50 p.m. on 07.08.2000 and paid the amount. On getting signal from the complainant, the Vigilance team led by the Dy.S.P. reached at the residence of the doctor, seized the phenolphthalein tainted currency, and arrested the doctor. After investigation, the VACB submitted final report before the learned Enquiry Commissioner and Special Judge (Vigilance), Kozhikode.

2. The appellant herein faced trial before the learned Special Judge in C.C.No.21/2002, and pleaded not guilty to the charge framed against him by the trial court under Section 7 of the P.C.Act, 1988. The prosecution examined twelve witnesses in the trial court including the complainant, Biju Kumar, and the Dy.S.P., who arranged the trap, and also marked Exts.P1 to P20 documents. The material objects including the phenolphthalein

tainted currency seized from the accused were identified and marked as MO1 to MO8 during trial. When examined under Section 313 Cr.P.C., the accused denied the incriminating circumstances and maintained his definite defence that he had not demanded or accepted anything illegal, and that the money received by him was only the legitimate fee as part of his private practice, by way of professional fee and certificate fee. Though opportunity was granted by the trial court, no evidence was adduced by the accused in defence. During trial, the complainant, Biju Kumar, turned fully hostile to the prosecution. However, the prosecution proceeded to prove the trap by examining the Dy.S.P., who arranged the trap, and also the other witnesses cited by the prosecution, including the public servant arranged by the Dy.S.P. to witness the trap. In fact, the said public servant also had not actually witnessed the alleged acceptance of amount by the doctor. However, relying on the evidence of the Dy.S.P., who arranged the trap, and on the basis of the recovery of phenolphthalein tainted currency from the possession of the accused, the learned trial Judge found the accused guilty under Section 7 of the P.C. Act. On conviction, he

was sentenced to undergo rigorous imprisonment for two years, and to pay fine of Rs.2,000/- as per judgment dated 13.04.2007. Aggrieved by the said conviction and sentence, the accused has come up in appeal.

3. The appellant herein allegedly accepted illegal gratification for issuing a medical certificate, on 07.08.2000, when he had good practice as Civil Surgeon (ENT). Now, it is fifteen years since the prosecution against him commenced. The appellant must have now crossed the age of superannuation. Still, the stigma on his professional prospects continues. The said stigma cannot be erased very soon.

4. Of the twelve witnesses examined by the prosecution in the trial court, PW1 is the complainant Biju Kumar, and PW2 is a public servant arranged by the Dy.S.P. to witness the trap. PW11 is the Dy.S.P. (Vigilance), who arranged the trap in this case and detected the offence, and PW12 is the Vigilance Inspector, who conducted the investigation. PW3 to PW5 and PW7 to PW10 are the doctors and nurses including the District Medical Officer, examined to prove some medical documents including the service particulars of the accused as a doctor in Government service, and

the case sheet relating to the wife of the complainant. Their evidence need not be discussed in this case, except a portion of the evidence of PW3 that the appellant is authorised under the law to accept fee for medical certificate, and for private consultations.

5. The very short point for decision in this appeal is whether the appellant herein had demanded and accepted an amount of Rs.350/- from PW1 as alleged by the prosecution, as illegal gratification, or whether the doctor accepted the said amount as his fee, as part of his private practice.

6. The complainant, Biju Kumar, turned fully hostile to the prosecution. Ext.P1 is the complaint made by him. In this complaint, his case is that on 03.08.2000, the appellant accepted Rs.500/- from him for conducting his wife's sterilisation operation, and when he later approached the doctor for medical certificate for official purposes, the doctor demanded Rs.350/-. He agreed to pay the amount and returned from the residence of the doctor saying that he will come in the evening. He straight away went to the Vigilance office and lodged a complaint. When he stated in evidence in examination in chief itself that the

appellant herein had not demanded or accepted any amount from him, and he had not paid any illegal gratification to the doctor, the learned legal advisor of the VACB sought permission of the court to cross examine the complainant. In cross examination also, he denied everything, and stood firm to his versions, that he had not paid anything to the doctor as illegal gratification. His evidence in cross examination by the prosecution would indicate that he and his wife had private consultations on many occasions at the residence of the appellant, and that he used to pay reasonably to the doctor. The prosecution could not bring out anything to incriminate the accused, or to show that the appellant herein had demanded or accepted anything as illegal gratification or bribe from him for his wife's operation or for issuing the required medical certificate.

7. PW2 is the public servant arranged by the detecting officer to witness the trap. He has given evidence regarding the seizure of the phenolphthalein tainted currency from the possession of the accused. This witness had not gone along with the complainant to the residence of the doctor, and he has no case that he had witnessed the complainant paying the amount

to the doctor, or the doctor accepting the amount from the complainant. Thus, practically the evidence of PW2 is only regarding recovery of phenolphthalein tainted currency from the possession of the accused. Another witness examined by the prosecution is PW6, the Police constable. He has also no case that he had witnessed the complainant paying any amount to the doctor, or the doctor accepting anything from the complainant. His evidence is only that as instructed by the Dy.S.P., he had accompanied the complainant for verifying the demand for bribe alleged by the complainant. That apart, this witness has nothing to say. In fact he is not a witness to the trap. Thus, practically there is only the evidence of the complainant to prove the alleged demand and acceptance. But the complainant turned fully hostile to the prosecution.

8. Now, the question is whether a conviction in this case is possible solely on the basis of the evidence of the detecting officer. True it is, that PW11, the detecting officer, has given evidence regarding the trap arranged by him, and also regarding the recovery of the phenolphthalein tainted currency from the possession of the accused. There is no reason why PW2 was not

asked to accompany the complainant to witness the acceptance of bribe. There is nothing in the evidence of PW2 to prove the essential aspects of demand and acceptance, and his evidence is practically on the recovery of phenolphthalein tainted currency made by the detecting officer.

9. A perusal of the impugned judgment shows that the learned trial Judge relied on the evidence of detecting officer, and also applied the presumption under Section 20(1) of the P.C.Act to convict the accused. In **Banarasi Dass v. State of Haryana [AIR 2010 SC 1589]**, the Honourable Supreme Court held that a conviction under the P.C.Act on the allegation of acceptance of illegal gratification is not possible in the absence of substantive evidence proving demand and acceptance of illegal gratification. In **B.Jayaraj v. State of Andhra Pradesh [2014 CRI.L.J. 2433]**, a three Judge Bench of the Honourable Supreme Court held that in the absence of any evidence proving demand of illegal gratification, a conviction cannot be made under Section 7 of the P.C.Act, solely on the basis of recovery of tainted money from the accused. The Honourable Supreme Court also held that proof of acceptance of illegal gratification is essential for drawing

the presumption against the accused under Section 20(1) of the P.C.Act. In **Meena (Smt) W/o. Balwant Hemke v. State of Maharashtra [2000 Supreme Court Cases (Cri) 878]**, a three Judge Bench of the Honourable Supreme Court held that the trap evidence given by the detecting officer will have to be corroborated, and that mere recovery of the currency and positive result of phenolphthalein test is not enough to establish the guilt of the accused under the P.C.Act. In **C.Sukumaran v. State of Kerala [2015 CRI.L.J.1715]**, the Honourable Supreme Court held that demand of illegal gratification by the accused is the sine-quo-non for constituting the offence under Section 7 of the P.C.Act, and that in the absence of some positive evidence proving demand and acceptance of illegal gratification, a conviction under Section 7 of the P.C.Act is not possible. In **Vinod Kumar v. State of Panjab [AIR 2015 Supreme Court 1206]**, the Honourable Supreme Court held that the fact that the complainant turned hostile would not by itself result in collapse of the whole prosecution case, and that even in such cases where the complainant turned hostile, demand or acceptance can be proved by the prosecution by other evidence and circumstances

possible.

10. It stands well settled by the Honourable Supreme Court that in a case where there is no sort of evidence; direct or circumstantial to prove demand of illegal gratification by the accused, a conviction is not possible under Section 7 of the P.C.Act. It is true that just because of the complainant turned hostile, the prosecution case would not collapse, and the prosecution can prove the case by other evidence possible. On a reading of the judgment of the trial court, I find that the learned trial Judge mainly relied on the presumption under Section 20(1) of the P.C.Act to convict the appellant herein. Presumption is only rule of evidence, and not substantive evidence. In **M. Narasinga Rao v. State of Andhra Pradesh [(2001) 1Supreme Court Cases 691]**, a three Judge Bench of the Honourable Supreme Court held that the requisite elements for drawing the presumption under Section 20(1) of the P.C. Act can be proved even by factual presumption, and not necessarily by direct evidence. It is settled that for applying the presumption the prosecution must prove acceptance of illegal gratification by the accused. Even in a case where acceptance is well proved,

what is resumed is not the guilt of the accused, but only the purpose for which acceptance was made. In short, what is presumed is only the motive or reward for which acceptance was made by the accused. The decision of the Honourable Supreme Court is that even when there is no direct evidence to prove acceptance for drawing presumption, the prosecution can rely on factual presumptions to prove acceptance. In **T.Shankar Prasad v. State of Andhra Pradesh [2004 Supreme Court Cases (Cri) 870]**, the Honourable Supreme Court held that the court is bound to apply the presumption under Section 20(1) of the P.C.Act, if the condition precedent for drawing presumption is satisfied. The Honourable Supreme Court also held that in such cases where the essential element for presumption is sought to be proved by factual presumptions, such facts and circumstances must be strong enough to prove acceptance.

11. Even in a case where acceptance of gratification is proved by direct evidence or by circumstances, or even by factual presumptions as explained by the Honourable Supreme Court for applying the presumption under Section 20(1) of the P.C.Act, the accused can very well rebut the presumption and prove that the

amount was not received by him as motive or reward for something illegal, or that he received the amount as authorised under the law, or for some legal purpose. Here, the accused is a doctor in Government service. There is no dispute regarding the fact that doctors working in Government hospitals can have private practice at their residence. The evidence of the complainant, though he turned hostile, would indicate that he and his wife had private consultations with the appellant on many occasions, and that he had made payment of fee to him reasonably on all occasions. The defence case is that what the appellant received is in fact the fee required for medical certificate and for private consultation. PW3 has given evidence that even doctors in Government service are authorised to receive fee for medical certificates. Even if a doctor in Government service accepts excess fee for consultation or for medical certificate, it cannot be branded as illegal gratification, and such a doctor cannot be prosecuted under the P.C. Act. Demanding or accepting excess fee is not culpable or punishable under the P.C.Act. If a doctor or other professional in service demands fee in excess of what is authorised under the law, it will

have to be dealt with appropriately by the concerned authority including the employer. PW3 would admit that a doctor can accept fee for medical certificate also. To be culpable and punishable under the P.C.Act, the accused must have received something illegally as a motive or reward for doing something which he is otherwise bound to do even without fee or gratification. What the Vigilance Dy.S.P. admittedly seized from the possession of the accused is the amount paid by the complainant for medical certificate. What he accepted is, no doubt, excess fee. When a doctor is authorised under the law to accept consultation fee, or to accept medical certificate fee, and if the doctor demands or accepts something in excess of what is authorised under the law, the said doctor cannot be prosecuted under the P.C.Act. In such circumstances what is possible is appropriate action against the doctor by the concerned authority like the medical council, or the Government, who is the employer. Accepting illegal gratification and accepting excess fee are different.

12. On an appreciation of the evidence, I find in this case that the defence case is acceptable. In fact, demand stands not

proved by any material. In a case where there is no material to prove acceptance except recovery of the tainted money from the possession of the accused, the presumption under Section 20(1) of the P.C.Act cannot be applied. A conviction is not possible under Section 7 of the P.C.Act. when demand is not proved. I find that the conviction against the appellant herein is liable to be set aside in appeal, and the appellant is entitled for an acquittal.

In the result, this appeal is allowed. The appellant is not found guilty of offence under Section 7 of the P.C. Act, 1988, and accordingly, he is acquitted of the said offence in appeal, under Section 386(b)(i) Cr.P.C. The conviction and sentence against the appellant in C.C.No.21/2002 of the court below will stand set aside, and he will stand released from prosecution. The bail bond, if any, executed by him will stand discharged.

Sd/-

P. UBAID, JUDGE

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