IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.UBAID

FRIDAY, THE 17TH DAY OF DECEMBER 2015/26TH AGRAHAYANA, 1937

CRL.A.No. 174 of 2012 (B)

AGAINST THE JUDGMENT IN CC 13/2005 OF ENQUIRY COMMISSIONER & SPECIAL JUDGE, KOZHIKODE DATED 28-01-2012

APPELLANT/ACCUSED :-

J.JOSEPH FRANCIS @ BOBAN,
THIRUVATHILTHOPPU, KOVILTHOTTAM,
CHAVARA, KOLLAM; (FORMERLY SUB ENGINEER,
KERALA STATE ELECTRICITY BOARD,
ELECTRICAL SECTION OFFICE,
RAJAPURAM, KASARAGOD).

BY ADVS.DR.K.P.SATHEESAN
SRI.M.R.JAYAPRASAD
SRI.P.MOHANDAS (ERNAKULAM)
SRI.ANOOP.V.NAIR

RESPONDENT/COMPLAINANT :-

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM, KOCHI - 31.

R BY SRI.JUSTIN JACOB, PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 24-11-2015, THE COURT ON 18.12.2015 DELIVERED THE FOLLOWING :

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P.UBAID, J.

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Crl.Appeal No.174 of 2012

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Dated this the 17th day of December, 2015

JUDGMENT

The appellant herein was Sub Engineer in the electrical section of the KSEB at Rajapuram, Kasargod, in October-November, 2003. On the allegation that he received an amount of ₹400/- from one Thomas as a reward for giving electricity service connection to his father's house under the OYEC Scheme, on 23.10.2003 and on 06.11.2003, the appellant faced prosecution before the learned Enquiry Commissioner and Special Judge(Vigilance), Kozhikode in C.C.No.13 of 2005. The Deputy Superintendent of Police, Vigilance and Anti Corruption Bureau (V.A.C.B.), Kasargod, registered the crime against the accused on the complaint of the said Thomas, dated 06.11.2003, alleging that "as a reward for giving electricity service connection, the accused demanded a total amount of ₹500/-, but he reduced the claim to ₹400/-, when the complainant met him at his residence on 23.10.2003, the complainant paid ₹250/- then and there, but the accused asked the complainant to bring the balance amount also, the accused repeated the demand for the balance on 05.11.2003, and asked the complainant to come with the amount on 06.11.2003". As the complainant Joseph was not inclined to make payment of bribe any more, he approached the VACB on 06.11.2003, and made complaint. On getting the said complaint, the Deputy Superintendent of Police, VACB arranged a trap, he received the amount of Rs.150/- brought by the complainant, as per mahazar, and after demonstrating the required phenolphthalein test, the VACB instructed the complainant to approach the accused at his office on the same day, and to make payment on demand. Accordingly, the complainant met the accused at his office at about 1.15p.m. on 06.11.2003, and made payment of the phenolphthalein tainted currency. On getting signal from the complainant, the vigilance team led by the Deputy Superintendent of Police reached there, seized the tainted currency, and arrested the accused on the spot. After investigation, the VACB submitted final report before the trial court.

2. The 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 Prevention of Corruption Act(PC Act). The prosecution examined ten witnesses in the trial court, and also marked Exts. P1 to P23 documents. MO1 to MO5 material objects including the tainted currency were identified and marked during trial. When examined under Section 313 Cr.P.C., the accused denied the incriminating circumstances, and submitted that he had not received anything illegal from the complainant, and that the amount of ₹150 was given to him by the complainant under the pretext that it was the expenses for conducting some offerings in his name in the church. On an appreciation of the evidence adduced by the prosecution, the learned trial Judge found the accused guilty. On conviction, he was sentenced to undergo rigorous imprisonment for two years each, and to pay a fine of Rs.2,000/- each under Sections 7 and 13(2) read with Section 13(1)(d) of the PC Act by judgment dated 28.01.2012. Aggrieved by the said judgment of conviction, the accused

has come up in appeal.

3. When this appeal came up for hearing, the leaned counsel for the appellant submitted that the prosecution does not have any evidence to corroborate the interested testimony of the complainant as regards the essentials like demand and acceptance, and that the trap in this case arranged by the VACB, was in fact a vicious trap. The learned Public Prosecutor on the other hand submitted that the evidence given by the complainant is blemishless, it proves all the essentials, and his evidence is well supported by the evidence of the trap witness and the recovery officer.

4. Of the ten witnesses examined by the prosecution in the trial court, PW1 is the complainant Thomas, PW2 is the trap witness arranged by the detecting officer, PW3 to PW6 are the Officers of the KSEB including the Assistant Engineer and the Senior Superintendent who produced some documents during investigation, PW7 is the Chief Engineer who proved the Ext.P18 prosecution sanction, PW8 is an electrician examined to prove that he had, on earlier occasions, given bribe to the accused as a reward for granting electricity connection without delay to different

consumers, PW9 is the Deputy Superintendent of Police who detected the offence, conducted initial investigation, and submitted final report, and PW10 is the Vigilance Inspector who further investigated the case.

5. The main evidence in this case to prove the essentials like demand and acceptance is that of the complainant. Ofcourse, it is true that the prosecution has not examined anybody else to prove the essentials. PW2, the trap witness is not a witness to the acceptance of bribe by the accused. His evidence is only regarding the recovery of the tainted money from the possession of the accused, and also regarding the arrest of the accused on the spot. He has well corroborated the detecting officer on all important aspects including the pre-trap and post trap procedures. His evidence shows that it was he who took the tainted money from the shirt pocket of the accused as instructed by the Deputy Superintendent of Police. This witness has even stated that the arrest of the accused was celebrated by the people of the locality by exploding crackers.

6. PW1 has given consistent and definite evidence proving the essentials. His evidence is fully consistent with

his Ext.P1 complaint. His evidence is that an application for electricity service connection was made by his father in the KSEB office on 16.10.2003, and on 22.10.2003, it was converted as one under the OYEC Scheme (Own Your Electric Connection) as instructed by the accused. On 23.10.2003, he met the accused with request to speed up the matter, at his residence in the evening. When he made the request, the accused made a demand for ₹400/-, and said that without money nothing could be done. When the accused made such a demand, he paid an amount of ₹250/- then and there with the hope that he would get electricity service connection to his father's house without delay. When nothing happened thereafter, he met the accused at his office again on 05.11.2003. On that day, the accused repeated the demand for the balance amount of ₹150/-, and asked him to come with the amount on 06.11.2003. As he was not inclined to make payment again, he approached the Vigilance, and make Ext.P1 complaint. The amount of ₹150/- brought by him was seized, as per mahazar by the Deputy Superintendent of Police, and he was instructed to meet the accused and make payment. PW2 is one of the trap witnesses who accompanied the Vigilance team to the office of the accused. The defence could not bringout anything in the cross-examination of the complainant to discredit his evidence. On all material particulars, his evidence is consistent with the contents of the Ext.P1 complaint. Ofcourse, as regards the payment of ₹250/- at the residence of the accused on 23.10.2003, the learned trial Judge found that it is not fully believable in the absence of corroboration. However, as regards the payment of ₹150/- on 06.11.2003, the learned trial Judge fully believed the evidence of the complainant.

7. The defence projected by the accused during cross-examination is that the amount ₹150/- was paid to him by the complainant under the pretext that it was to meet the expenses for some offerings to be made in his name in the church. This was stoutly denied by the complainant. It appears to be a strange defence also. The complainant stood firm to his versions in cross-examination, and affirmed that he had paid ₹250/- to the accused at his residence in the evening of 23.10.2003, and the balance amount of ₹150/- was paid at his office on 06.11.2003. To prove the essentials like demand and acceptance, there is only the evidence of

the complainant. On an appreciation of the evidence, I find that his evidence is really blemishless.

8. As regards acceptance of ₹150/-, the evidence given by the complainant is further corroborated by the evidence proving the recovery of the tainted money. PW2, the trap witness has given definite evidence that the tainted money was taken by him from the shirt pocket of the accused, as instructed by the Dy.S.P. He has given convincing evidence proving all the post trap and pre-trap procedures regarding the phenolphthalein test and the results of the test.

9. The learned counsel for the appellant submitted that a conviction under Section 7 or 13(2) of the PC Act is not possible in the absence of satisfactory and convincing evidence proving the essentials like demand and acceptance. In **State of Punjab v. Madan mohan Lal Verma [2013(3) KLT SN 91],** the Honourable 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 PC Act. The Honourable Supreme Court also held that for the application of the presumption under Section 20(1) of

the Act, there must be evidence of payment of gratification or acceptance of gratification. In **B.Jayaraj v. State of Andra Pradesh [2014 Crl.L.J. 2433]**, a three Judge Bench of the Honourable Supreme Court held that without the evidence of demand of illegal gratification, there cannot be a conviction under Section 7 of the PC Act. In the absence of proof of demand and acceptance, mere recovery of tainted money from the accused will not suffice for a conviction under Section 7 or 13 of the PC Act. Relying on the earlier decisions of the Honourable Supreme Court, this Court also held in **Prakash Pai v. State of Kerala [2015(3) KLT 989]** that on the basis of recovery of the phenolphthalein tainted currency alone, the accused cannot be found guilty. In the said case, this Court also held that when the prosecution is based on a trap, it must be the concern of the court to examine the whole materials, and find whether the trap is a genuine trap arranged by the police on a genuine complaint, or whether it is a vicious trap which the police happened to make on a mischievous complaint by somebody to trap the pubic servant. Very recently, the Honourable Supre Court held in **Satyanarayana Murthy P. v. District Inspector of Police**

and Another [2015 (5) KHC SN 5(SC)] that mere possession, and recovery of currency notes from an accused without proof of demand would not establish the offence under Sections 7 and 13(1)(d) read with Section 13(2) of the Act. That is also a three Judge bench decision.

10. On an appreciation of the evidence in this case, I find that the appellant is not entitled for the benefit of the decisions cited supra. This is not a case where there is no evidence to prove demand and acceptance. The complainant has given definite and convincing evidence proving payment of ₹250/- as illegal gratification to the accused on 23.10.2003, and payment of another amount of ₹150/- on 06.11.2003. Though the learned trial Judge found that the complainant's evidence regarding payment of ₹250/- on 23.10.2003 is not fully acceptable without independant corroboration, I find, on an appreciation of the entire evidence, that the said evidence is in fact believable. Accordingly, the finding of the learned trial Judge on this aspect will stand reversed. As regards payment of ₹150/- on 06.11.2003, I concur with the learned trial Judge, that such payment stands well proved by the evidence of the complainant. Payment of this amount stands

further proved by the evidence of recovery, given by PW2, the detecting officer, and the other officers of the KSEB.

11. The defence could not bringout anything in the cross-examination of PW1 and PW2 to discredit their evidence. It is pertinent to note that PW2 stated in evidence that the arrest of the accused was celebrated by the people of the locality by exploding crackers. Such an incident was not denied by the defence. The suggestion put by the defence during cross-examination, is not that there was no such incident, but that people exploded crackers there as arranged by the complainant. Recovery of the tainted money of ₹150/- from the shirt pocket of the accused stands well proved by the evidence of PW2 who has no reason at all to give any false evidence against the accused. I find nothing to show that PW1, complainant had any reason to make a false complaint against the accused, or to give any false evidence against him.

12. Following the decision of the Honourable Supreme Court in **Ramjanam Sing v. State of Bihar [AIR 1956 SC 643],** and another decision of this Court in **Cheriyan Lukose v. State of Kerala [AIR 1968 Ker. 60],** this Court held in

Prakash Pai's case cited supra that a trap for a trap at the instigation, or at the instances of somebody who is interested in such a trap, or who is for his own reasons, interested to see that a particular public servant is trapped, cannot be said to be a genuine or legimate trap. But in this case, there is absolutely nothing to show that the trap laid by PW9 was a vicious trap, or an illegitimate trap. The trap was arranged by the Dy.S.P., or a genuine complaint made by PW1. I find that payment of Rs.400/- as illegal gratification stands well proved in this case. The other essential (demand) also stands well proved by the evidence of the complaint. The fact that the people of the locality celebrated the arrest of the accused by exploding crackers also gives some indication regarding the accused and the allegations against him, though PW8, examined by the prosecution to prove acceptance of bribe by the accused on previous occasions, turned hostile to the prosecution.

13. I find no reason to disbelieve the evidence of PW9 who detected the offence. He, and also PW2, have given clear evidence proving the pre-trap and post trap procedures including the arrest of the accused, and recovery of the

tainted currency from the possession of the accused. Once acceptance is proved, the Court will have to apply the presumption under Section 20(1) of the PC Act, that money was received by the accused as a reward for some favours, as meant under Section 7 of the PC Act. Here, the accused made an attempt to explain it away by a defence that it was paid by the complainant under the pretext that it was the expenses for making some offerings in a church. This was stoutly denied by the complainant. Acceptance of amount by the accused stands not explained by him by any satisfactory evidence, rebutting the presumption under Section 20(1) of the PC Act. The accused has no explanation why the people of the locality exploded crackers to celebrate his arrest.

14. The Ext.P18 prosecution sanction stands well proved by the evidence of PW7. The Chief Engineer who granted the sanction has given evidence that he granted the sanction on an independent application of mind, and also on a consideration of all the relevant aspects and materials produced by the Vigilance. There is nothing to show that the sanction was mechanically granted by him. I find that there is a proper prosecution sanction in this case, and it stands

properly and legally proved also.

15. In view of the discussions and findings made above, I find that this appeal is liable to be dismissed as meritless. However, on a consideration of the entire circumstances including the amount recovered from the possession of the accused, I find that there can be some interfere in the sentence in this case. As on the date of the incident, the minimum sentence prescribed under Section 7 of the PC Act was imprisonment for six months, and the minimum sentence under Section 13(2) of the PC Act was imprisonment for one year. Now it is imprisonment for three years, and four years respectively, after 2014. I find that rigorous imprisonment for one year will be the adequate sentence in this case. To that limited extent, this appeal can be allowed in part.

In the result, this appeal is allowed in part to the very limited extent of modifying and reducing the sentence. The conviction against the appellant made by the court below in C.C.No.13 of 2005 under Sections 7 and 13(2) of the PC Act will stand confirmed. However, the sentence imposed by the court below will stand modified and reduced to rigorous imprisonment for one year each under Sections 7 and 13(2) of the PC Act. The fine sentence, with the default sentence thereon, imposed by the trial court, is maintained.

Sd/-
P.UBAID
JUDGE

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P.A. TO JUDGE