

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.656 of 2015

Arising Out of PS. Case No. -71 Year- 2006 Thana -C.B.I CASE District- PATNA

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SANTOSH KUMAR SON OF SHRI HIRA CHAUDHARY RESIDENT OF
VILLAGE- ALAMGANJ, P.S LAHERI, DISTRICT NALANDA.

.... **APPELLANT/S**

VERSUS

THE STATE OF BIHAR THROUGH VIGILANCE BIHAR, PATNA

.... **RESPONDENT/S**

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Appearance:

For the Appellant/s : Dr. Uma Shankar Prasad, Sr. Adv.
Mr. Kamlakant Tiwary, Adv.

For the Vigilance : Mr. Rama Kant Sharma, Sr. Adv. Law Officer, Vig.
Mr. Rabindra Kumar, AC to Law Officer, Vig.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 18-07-2018

Appellant, Santosh Kumar has been found guilty under Section 7 of the PC Act and sentenced to undergo R.I. for two and half years as well as to pay fine appertaining to Rs.10,000/- and in default thereof, to undergo S.I. for three months, additionally under Section 13(2) read with Section 13(1)(d) of the p.C. Act and sentenced to undergo R.I. for two and half years as well as to pay fine appertaining to Rs.5000/- and in default thereof to undergo S.I. for two months additionally with a further direction to run the sentences concurrently by the Special Judge, Vigilance (Trap), Patna in connection with Vigilance Case No.71/2006, Special case no.61/2006 vide judgment of conviction and sentence dated 01.10.2006.

2. Kripa Shankar Tiwari (PW.7) made written complaint before the vigilance alleging inter alia that he happens to be Secretary of Shri Shankar Primary cum Middle Sanskrit School,



Mokar, Sasaram. Vide letter no.4398 dated 25.07.2006 the Bihar Sanskrit Shiksha Board, Patna had issued order directing the District Education Officer, Rohtas, Sasaram to make payment to the teachers since 24.08.2004. In this connection, when he met with District Education Officer, Rohtas, Sasaram, the aforesaid District Education Officer directed his assistance Santosh Kumar to prepare note sheet relating to payment of salary. When he met with Santosh Kumar subsequently, he demanded Rs.5000/- as bribe and said that after payment of the aforesaid amount only note sheet will be drawn up. Because of the fact that he is not inclined to pay bribe whereupon, written complaint is being made.

3. It is further evident that aforesaid allegation was verified by Santosh Kumar (PW.4) in whose presence deal was finalized over Rs.4000/- and, after having verification report at the end of aforesaid Santosh Kumar, it was ordered to constitute a trap team coupled with, follow up action. It is further evident that trap team was constituted at whose instance pre-trap demonstration was duly effected and then, on 02.11.2006 trap team arrived at the office and apprehended red-handed the appellant Santosh Kumar who, after accepting the tainted money counted and then kept in his pocket, searched out, gone through sodium bicarbonate test and then, post trap eventualities were formalized. That happens to be the basis of instant prosecution.

4. After institution of the case, investigation commenced and concluded by way of submission of charge sheet followed with trial meeting with the ultimate result, subject matter of instant



appeal.

5. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has also been pleaded that there was no existence of Shri Shankar Primary cum Middle Sanskrit School, Mokar, Sasaram. The complainant happens to be a person of dubious character who, only to pressurize upon the government officials to succumb before him by way of giving undue advantage and having failed on that very score, got this case filed taking the authority and the vigilance in his collusion. In order to substantiate the same ocular as well as documentary evidence has also been produced.

6. In order to substantiate its case prosecution had examined altogether nine PWs who are PW.1-Anil Kumar, PW.2-Sudhir Kumar, PW.3-Ram Naresh Singh, PW.4-Santosh Kumar, PW.5-Kamleshwar Prasad Singh, PW.6-Binod Kumar Singh, PW.7-Kripa Shankar Tiwary, PW.8-Saroj Kumar, PW.9-Baidya Nath Prasad. Side by side also exhibited Ext.1-FSL Report, Ext.1/1-Forwarding letter, Ext.2-Post trap memorandum, Ext.2/1-Pre trap memorandum, Ext.2/2-Signature of Saroj Kumar and Santosh Kumar over pre trap memorandum, Ext.3-Signature of Santosh Kumar over post trap memorandum, Ext.3/1-Signature of Sudhir Kumar over post trap memorandum, Ext.3/4 and 3/5-Signature of Binod Kumar Sah over pre trap memorandum, Ext.3/6-Signature of Saroj Kumar over pre trap memorandum, Ext.3/7-Post trap memorandum, Ext.4-endorsement, Ext.5-verification report, Ext.5-



Signature of Dy.S.P., Vigilance over verification report, Ext.6-FIR, Ext.6/1-Signature of PW.7 over formal FIR, Ext.7-Report submitted by Ram Naresh Singh (PW.3), Ext.7/1-Signature of Dy.S.P. Manju Jha over the report, Ext.7/2-Signature of other officials, Ext.8-Sanction order, Ext.9-complaint petition filed by PW.7, Ext.10-Letter address to PW.7 by the District Education Officer. Material Ext.I-, Material Ext.II to VII-tainted money.

7. On the other hand defence had also examined four DWs, DW.1-Arun Kumar Sinha, DW.2-Saket Singh, PW.3-Sudhir Kumar Pandey, PW.4-Appellant/Accused himself Santosh Kumar. Side by side had also exhibited the open letter published at the end of PW.7 as Ext.A.

8. While assailing the judgment of conviction and sentence, it has been submitted on behalf of learned counsel for the appellant that in the background of persistence of infirmities, the finding so recorded by the learned lower court is not at all found justifiable. In order to support the same, it has been submitted that from the evidence available on the record, it is apparent that there was no occasion for the appellant to demand the bribe for getting the note sheet with regard to payment of salary relating to the teachers of Shri Shankar Primary cum Middle Sanskrit School because of the fact that (a) in spite of specific disclosure in the written report that the order for the payment was at the end of Bihar Sanskrit Shiksha Board vide letter no.4398 dated 25.07.2006, the same has not been made an exhibit. That being so, whether there was any occasion for the complainant Kripa Shankar Tiwary to approach the District



Education Officer with regard thereto and further, there was an occasion to justify that the bribe money was demanded by the appellant in the background of direction so given by the District Education Officer to prepare the note sheet on that very score. (b) The District Education Officer has not been examined and so, whether there was any kind of oral instruction given by the District Education Officer to the appellant in presence of complainant, did not been supported. In the background of aforesaid missing link when the evidence of PW.7 is taken together that Ext.10, it is apparent that there would not have been any kind of order at the end of Bihar Sanskrit Shiksha Board in the background of the fact that no school was found established as per rules. Furthermore, according to Ext.10 there was surprise visit on 21.09.2006 on which date, none of the school authority had produced relevant registers to justify running of the school in accordance with government circular and for that, the Secretary was directed to visit the place of District Education Officer with the relevant registers. There happens to be absence at the end of the prosecution at least at the end of PW.7 on which date he had produced the documents before the District Education Officer and what was ordered on that very score. The aforesaid Ext.10 supports the defence plea that existence of school was very much under cloud. Furthermore, keeping mum at the end of PW.7 is another circumstance which speaks a lot putting question over genuine conduct of PW.7. On the other hand, smacking that his fraudulent activity has been intercepted in midst of way by the Education Department, managed the thing and got the appellant



trapped under mischievous plan.

9. It has also been submitted that even accepting for a moment only for an argument sake but not admitted that appellant was trapped, there was recovery of tainted money from his possession, would not justify the conviction and sentence when, there happens to be no occasion for him to demand and accept.

10. It has also been submitted that so far status of witnesses are concerned, they happens to be worthless because of the fact that save and except PW.7 none are over the *mens rea* on the other hand they happens to be the vigilance officials as well as the witness having procured at its instance divulging pre-trap, post trap eventualities. While PW.1 is the FSL official who had examined the material exhibit as well as the solution which were prepared during course of pre-trap as well as post trap exercise.

11. On the other hand, the learned senior counsel representing the vigilance had vehemently controverted the submission having made on behalf of learned counsel for the appellant and submitted that so far applicability of Section 7 as well as 13(2) read with Section 13(1)(d) of the P.C. Act are concerned, from the record it transpires that same has been duly satisfied. In order to substantiate the same it has also been submitted that so far case of trapping is concerned, there should be demand and acceptance. The demand may be for one reason or other which, appears to be in contravention of service condition by a public servant. Whether the demand was for preparing note sheet relating to salary of the teachers or it was a note sheet to be prepared in



compliance of an order or even in worst case was to be recorded to give some undue advantage to the PW.7 on account of his status being illegal, but there was demand and that demand was followed with an acceptance and that happens to be reason behind recovery of tainted money from the possession of the appellant and the same is found duly substantiated. Thus, such activity having been duly satisfied at the end of the prosecution would attract application of Section 7 as well as Section 13(2) read with Section 13(1)(d) of the P.C. Act and that being so, the judgment of conviction and sentence is fit to be affirmed.

12. Mere recovery of tainted money would not justify the conviction and sentence unless and until there happens to be an occasion that means to say motive for getting the same. In **Mukhtiar Singh v. State of Punjab** reported in **(2017) 8 SCC 136**, it has been held:

“**12.** Before averting to the evidence, apt it would be to refer to the provisions of the Act whereunder the original accused had been charged:

“7. Public servant taking gratification other than legal remuneration in respect of an official act.—Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of Section 2, or with any public



servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than three years but which may extend to seven years and shall also be liable to fine.

* * *

13. Criminal misconduct by a public servant.—(1) A public servant is said to commit the offence of criminal misconduct—

* * *

13. The indispensability of the proof of demand and illegal gratification in establishing a charge under Sections 7 and 13 of the Act, has by now engaged the attention of this Court on umpteen occasions. In *A. Subair v. State of Kerala (2009) 6 SCC 587*, this Court propounded that the prosecution in order to prove the charge under the above provisions has to establish by proper proof, the demand and acceptance of the illegal gratification and till that is accomplished, the accused should be considered to be innocent. Carrying this enunciation further, it was expounded in *State of Kerala v. C.P. Rao (2011) 6 SCC 450* that mere recovery by itself of the amount said to have been paid by way of illegal gratification would not prove the charge against the accused and in absence of any evidence to prove payment of bribe or to show that the accused had voluntarily accepted the money knowing it to be bribe, conviction cannot be sustained.

14. In *P. Satyanarayana Murthy (2015) 10 SCC 152*, this Court took note of its verdict in *B. Jayaraj v. State of A.P. (2014) 13 SCC 55* underlining that mere possession and recovery of currency notes from an accused without proof of demand would not establish an offence under Section 7 as well as Sections 13(1)(d)(i) and (ii) of the Act. It was recounted as well that in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. Not only the proof of demand thus was held to be an indispensable essentiality and an inflexible statutory mandate for an offence under Sections 7 and 13 of the Act, it was held as well qua Section 20 of the Act, that any presumption thereunder would arise only on such proof of demand. This Court thus in *P. Satyanarayana Murthy (2015) 10 SCC 152* on a survey of its earlier decisions on the pre-requisites of Sections 7 and 13 and the proof thereof summed up its conclusions as hereunder: (SCC p. 159, para 23)



“23. The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)(i) and (ii) of the Act and in absence thereof, unmistakably the charge therefor, would fail. *Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under Sections 7 or 13 of the Act would not entail his conviction thereunder.*”
(emphasis supplied)”

13. That being so, the first priority in order to adjudge the finding recorded by the learned lower court is with regard to find out whether *mens rea* has been substantiated at the end of the prosecution.

14. From the written complaint Ext.9, it is apparent that there happens to be clear cut averment that Bihar Sanskrit Shiksha Board, Patna vide letter no.4398 dated 25.07.2006 had directed the District Education Officer to make payment of salaries to the teachers right since 24.08.2004 and for that purpose, he had gone to District Education Officer and, after hearing him patiently, he (DEO) directed the appellant Santosh Kumar, a Class-III employee to prepare the note sheet on that very score. The aforesaid application is of dated 30.10.2006. Ext.10 a letter address to the Secretary Shri Shankar Primary cum Middle Sanskrit School, Mokar, Sasaram by the District Education Officer divulging the fact that there was surprise visit on 21.09.2006 and during course thereof, no relevant registers were found and accordingly, the Secretary was directed to place the same within a week much prior to the filing of complaint.



By way of exhibiting the aforesaid letter, it appears that complainant PW.7 had tried to convince that the school was running since before but, he failed to disclose whether the aforesaid direction was complied with or not and if so, on which date. In likewise manner, there happens to be no disclosure on which date complainant had met with DEO. Further when the so alleged letter no.4398 dated 25.07.2006 has also not been made an exhibit. Had there been proper disclosure at the end of the PW.7, then in that circumstance, the question of payment of salary would have visualized. That means to say there was volatile situation prevailing in between which could be perceived after going through the cross-examination of the PW.7 whereunder he had disclosed so many events, such as that his school has not been recognized as, he had not gifted the land to the State, disclosed that he made oral gift, disclosed that there was gazette notification relating to his school but, all those things remained wrapped. That means to say whether there was any letter as referred in the written complaint issued by Bihar Sanskrit Shiksha Board directing the District Education Officer for making payment to the teachers since 24.08.2004 and due to non-examination of DEO, meeting with him direction at his end to the accused to prepare note sheet found to be gulled in absence thereof, and further the non-compliance of the direction as enumerated under Ext.10 speaks a lot with regard to the activity of the complainant casting doubt over authenticity/opportunity for demand and in likewise manner, also cast doubt over the verification report having at the end of the PW.4. The subsequent event, be it a pre trap exercise or post trap exercise, recovery of tainted money



from the possession of the appellant could not give a lifeline to the prosecution more particularly in the background of deficiency persisting on the record, as indicated hereinabove. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court is set aside. Appeal is allowed. Appellant is on bail hence is discharged from its liability.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/ NAFR	A.F.R.
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