IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.78 OF 2011

DATTATRAYA BHAGWAN OMASE)...APPELLANT

V/s.

THE STATE OF MAHARASHTRA)...RESPONDENT

Mr.Niranjan Mundargi a/w. Mr.Prasanna Bhangale i/b. Ms.Swapna Kode, Advocate for the Appellant

Mr.Prashant Jadhav, APP for the Respondent - State.

CORAM : A. M. BADAR, J.

DATE : 10th JANUARY 2018 & 11th JANUARY 2018.

<u>ORAL JUDGMENT</u> :

1 This appeal is taken up for hearing in terms of the following order of the Hon'ble Supreme Court in Petition for Special Leave to Appeal (Cri.) No.2334 of 2011 passed on 15th March 2011 :

> "Taken on board.
>
> The petition is dismissed.
>
> The petitioner was convicted by the trial court

> under Prevention of Corruption Act and his appeal is pending before the High Court. We direct the High Court to decide the appeal expeditiously."

2 By this appeal, the appellant – convicted public servant is challenging the judgment and order dated 17th January 2011 passed by the learned Special Judge under the Prevention of Corruption Act, Pune, in Special Case No.12 of 2007 convicting him of offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988. For the offence punishable under Section 7 of the Prevention of Corruption Act, the appellant/accused is sentenced to suffer rigorous imprisonment for 1 year apart from direction to pay fine of Rs.1,000/-, in default, to undergo further rigorous imprisonment for a period of 3 months. For the offence punishable under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, he has been sentenced to suffer rigorous imprisonment for 1 year apart from directing him to pay fine of Rs.1,000/-, in default, to undergo further rigorous imprisonment for a period of 3 months.

3 Facts leading to the prosecution of the appellant/accused projected from the police report can be summarized thus :

(a) Complainant Prasanna Akkalkotkar runs a workshop under name and style of Fabex Engineers at Nandedgaon area of Pune. The Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as MSEDCL for the sake of brevity) has provided electricity connection to this workshop.

(b) The appellant/accused, at the relevant time, was working as Assistant Engineer with the MSEDCL and he was member of the flying squad deputed for the purpose of checking electric meters provided to the consumers.

(c) According to the prosecution case, at about 1.15 p.m. of 21st January 2006, Ashok Shetty, Manager of Fabex Engineers, informed his employer Prasanna Suryakant Akkalkotkar (PW2) that the appellant/accused Dattatraya Bhagwan

Omase along with his two colleagues have come to the workshop for inspection of the electric meter. PW2 Prasanna Akkalkotkar met the appellant/accused. Electric meter in the premises of the Fabex Engineers came to be checked by the appellant/accused. The appellant/accused informed PW2 Prasanna Akkalkotkar that the electric meter is running slow by 25%. He further informed that action for recovering damages would have to be taken. Another employee by name Shri Kudale from the Electric Distribution Company was called. The electric supply meter was again checked. The appellant/accused accompanied by PW2 Prasanna Akkalkotkar and other employees of the MSEDCL then went to the office of the said Company. One form was got filled from the appellant/accused.

(d) According to the prosecution case, at about 4.30 p.m. of 21st January 2006, the appellant/accused came to the Fabex Engineers. He met PW2 Prasanna Akkalkotkar. The appellant/accused in his own handwriting prepared an application (Exhibit 14) on behalf of PW2 Prasanna Akkalkotkar. However, PW2 Prasanna Akkalkotkar got the separate application (Exhibit 13) prepared, signed it and gave the same to the appellant/accused. Thereupon, the appellant/accused informed PW2 Prasanna Akkalkotkar that he will have to pay fine of Rs.15,000/- and apart from that, a case would be filed against him. Upon request of PW2 Prasanna Akkalkotkar, the appellant/accused informed him that PW2 Prasanna Akkalkotkar would be required to pay him an amount of Rs.2,500/- and then neither the case would be filed nor fine of Rs.15,000/- would be imposed. In the next bill, arrears of Rs.5,000/- would be shown and the matter will be closed. Left with no alternative, PW2 Prasanna Akkalkotkar showed his willingness to pay illegal gratification. The appellant/accused insisted for immediate payment. PW2 Prasanna Akkalkotkar informed him that he is not having money. The appellant/accused then gave his cell phone number to PW2 Prasanna Akkalkotkar and asked him to keep money ready on Monday i.e. 23rd January 2006.

(e) According to the prosecution case, on 23rd January 2006, PW2 Prasanna Akkalkotkar telephonically contacted the appellant/accused from his office telephone. The appellant/ accused informed him that he will come to Fabex Engineers after the afternoon.

(f) As PW2 Prasanna Akkalkotkar was not willing to pay illegal gratification to the appellant/accused, he immediately went to the office of the Anti Corruption Bureau (ACB), Pune, on 23rd January 2006 itself and lodged a complaint (Exhibit 15) which was recorded by PW4 Arun Waikar, Deputy Superintendent of Police, ACB, Pune.

(g) According to the prosecution case, two panch witnesses, namely, PW3 Vijay Phulpagare and Uday Suryawanshi were summoned. Pre-trap formalities were then conducted and recorded in Pre-trap panchnama dated 21st January 2006 (Exhibit 17). PW2 Prasanna Akkalkotkar tendered currency notes amounting to Rs.2,500/- which were smeared with anthracene powder. Those were kept in the pocket of PW2 Prasanna Akkalkotkar. The panchas as well as complainant PW2 Prasanna Akkalkotkar were made aware about the use of anthracene powder. Accompanied by panch witnesses and complainant PW2 Prasanna Akkalkotkar, team of ACB then went to Fabex Engineers after preparing Pre-trap panchnama (Exhibit 17).

(h) Panch witness PW3 Vijay Phulpagare accompanied by PW2 Prasanna Akkalkotkar then entered in the premises of Fabex Engineers and waited for the appellant/accused in the cabin located at the first floor of the workshop. Other members of the trap team including panch no.2 Uday Suryawanshi waited at the ground floor. This happened at about 2.30 p.m. of 23rd January 2006. However, the appellant/accused did not come to Fabex Engineers up to 5.30 p.m. Therefore, it was decided to withdraw the trap, and accordingly panchnama Exhibit 18 in respect of withdrawal of the trap was prepared. Currency notes smeared with anthracene powder were taken back from PW2 Prasanna Akkalkotkar and other currency notes worth Rs.2,500/- were given to him.

(i) It is case of the prosecution that on 25th January 2006, receptionist working at Fabex Engineers received a telephone call from the office of the Electric Supply Company. However, prior to PW2 Prasanna Akkalkotkar conversing on that phone call, it got disconnected. Hence, PW2 Prasanna Akkalkotkar telephonically contacted the appellant/accused. The appellant/accused informed him that it was he who had made the earlier call. The appellant/accused asked PW2 Prasanna Akkalkotkar to come to his office in the afternoon. However, PW2 Prasanna Akkalkotkar insisted the appellant/accused to come to the Fabex Engineers in the afternoon. The appellant/accused agreed.

(j) PW2 Prasanna Akkalkotkar then again contacted the office of the ACB. Then again, PW3 Vijay Phulpagare and co-panch Uday Suryawanshi were called. Pre-trap formalities were conducted. PW2 Prasanna Akkalkotkar then again produced five currency notes, each of Rs.500/- denomination. Numbers of those currency notes were noted in the pre-trap panchnama Exhibit 20. These currency notes were smeared with anthracene powder. Mrs.Shintre – an employee from the ACB then kept those currency notes in the left chest pocket of the shirt of PW2 Prasanna Akkalkotkar. Suitable instructions were imparted to PW2 Prasanna Akkalkotkar not to touch those currency notes and to give those currency notes only on demand by the appellant/accused. PW3 Vijay Phulpagare was asked to work as shadow panch. Suitable instructions were also instructed to him. The proceedings were recorded in the Pre-trap panchnama Exhibit 20. Accompanied by the complainant and panch witnesses, the trap team of the ACB then again went to the premises of Fabex Engineers. This happened at about 3.10 p.m. of 25th January 2006. PW2 Prasanna Akkalkotkar accompanied by PW3 Vijay

Phulpagare waited at the premises of the Fabex Engineers whereas members of the trap team accompanied by the co-panch Uday Suryawanshi waited outside the workshop. Even after lapse of one hour, the appellant/accused did not come to the Fabex Engineers. Therefore, PW2 Prasanna Akkalkotkar telephonically contacted him at about 4.25 p.m. of 25th January 2006. The appellant/accused informed him that if the vehicle is made available by the office, he will come, or else, he be contacted after half an hour. Thereafter, despite waiting for one hour, the appellant/accused did not come to the workshop of PW2 Prasanna Akkalkotkar. Hence, the appellant/accused was again contacted telephonically at about 5.25 p.m. of 25th January 2006. At that time, the appellant/accused informed that he is not having vehicle, and therefore, PW2 Prasanna Akkalkotkar should come to his office.

(k) The prosecuting agency i.e. the ACB then decided to sent PW2 Prasanna Akkalkotkar accompanied by PW3 Vijay

Phulpagare to the office of the appellant/accused. At about 6 p.m. of 25th January 2006, along with members of the trap team, PW2 Prasanna Akkalkotkar and PW3 Vijay Phulpagare reached the office of the Electric Supply Company at Parvati area of Pune. At about 6.05 p.m., PW2 Prasanna Akkalkotkar accompanied by PW3 Vijay Phulpagare entered in the office of the MSEDCL.

(l) It is case of the prosecution that the appellant/accused was found to be in the cabin of the Executive Engineer accompanied by others. Hence, PW2 Prasanna Akkalkotkar and PW3 Vijay Phulpagare waited for him outside his cabin. After waiting period of about twenty minutes, the appellant/accused came to his cabin. PW2 Prasanna Akkalkotkar and PW3 Vijay Phulpagare thereupon met the appellant/accused in his cabin. The appellant/accused then demanded the amount of illegal gratification and asked PW2 Prasanna Akkalkotkar to keep the same on the paper used for printing in the computer. Accordingly, PW2

Prasanna Akkalkotkar kept the tainted currency notes on the computer printing paper. The appellant/accused lifted that computer printing paper containing the currency notes, folded those currency notes with the help of that paper and kept it in the drawer of his table. PW2 Prasanna Akkalkotkar then gave the pre-determined signal to the trap team. Accordingly, members of the trap team, accompanied by co-panch Uday Suryawanshi, rushed to the cabin of the appellant/accused. Complainant/PW2 Prasanna Akkalkotkar informed that the currency notes are in the drawer of the appellant/accused. Co-panch Uday Suryawanshi took out those currency notes from the drawer of the table of the appellant/accused. Their serial numbers matched with the number recorded in the pre-trap panchnama. Hands and clothes of the appellant/accused were checked under ultra violet rays. However, anthracene powder was not detected on either his hands or clothes. The same was, however, detected on hands of co-panch Uday Suryawanshi. It was detected on the paper on which those currency notes were kept. Those currency notes were then seized apart from the paper on which those were kept. Necessary inquiry was made from PW3 Vijay Phulpagare. Post-trap panchnama (Exhibit 21) incorporating all these details came to be prepared.

(m) After completing all these formalities, First Information Report (FIR) (Exhibit 25) came to be lodged by PW4 Arun Waikar, Deputy Superintendent with Swargate Police Station which resulted in lodging of Crime No.3036 of 2006. Necessary investigation followed and the appellant/accused came to be charge-sheeted.

(n) The Charge for offences punishable under Sections 7 and 13(2) read with 13(1)(d) of the Prevention of Corruption Act came to be framed and explained to the appellant/accused. He abjured his guilt and claimed trial.

(o) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all four witnesses.

Sanctioning Authority Narayan Misal, Chief General Manager (Technical) of the MSEDCL came to be examined as PW1. The order sanctioning prosecution of the appellant/accused is at Exhibit 7. Complainant Prasanna Akkalkotkar is examined as PW2. The complaint lodged by him is at Exhibit 15. Shadow panch Vijay Phulpagare is examined as PW3. Exhibits 17 and 18 are Pre-trap and Post-trap panchnama dated 21st January 2006. Exhibit 20 is the Pre-trap panchnama dated 25th January 2006 whereas Exhibit 21 is the Post-trap panchnama of the same date. Investigating Officer Arun Waikar, Deputy Superintendent, is examined as PW4. Report lodged by him is at Exhibit 25.

(p) The defence of the appellant/accused is that of total denial. According to the appellant/accused, on the date of inspection of the electric meter, he had submitted his report through the Divisional Accountant and on processing it had reached up to a Clerk named Chutke. PW2 Prasanna Akkalkotkar was aggrieved by the utterance of the appellant/accused to the effect that every thief says that he is innocent, and therefore, he is falsely implicated in the crime in question. The appellant/accused did not enter in defence, but he has filed his written statement.

(q) After hearing the parties, by the impugned judgment and order, the learned trial court came to the conclusion that the appellant/accused had demanded and accepted the illegal gratification amounting to Rs.2,500/- as a motive or reward for showing official favour to PW2 Prasanna Akkalkotkar. He has committed criminal misconduct by obtaining pecuniary advantage of Rs.2,500/-. Evidence adduced by the prosecution was held to be trustworthy, cogent and reliable, and the learned trial court came to the conclusion that the defence of the appellant/accused is not probable. Accordingly, the appellant/accused is convicted and sentenced as indicated in the opening paragraph of this judgment.

4 I have heard Shri Mundargi, the learned advocate appearing for the appellant/accused. He vehemently argued that the demand allegedly made by PW2 Prasanna Akkalkotkar at 4.30 p.m. of 21st January 2006 is not proved. The said demand was not got verified by the prosecuting agency, though there was enough time to get that demand verified. This aspect, according to the learned advocate appearing for the appellant/accused assumed importance because the case in hand reflects two failed traps coupled with the fact that the appellant/accused had not telephonically contacted the complainant during all this period, even for once. By drawing my attention to the cross-examination of PW2 Prasanna Akkalkotkar, the learned advocate appearing for the appellant/accused argued that as the appellant/accused referred PW2 Prasanna Akkalkotkar as a "thief", in order to take revenge, he lodged a false complaint and got the appellant/accused falsely implicated in the crime in question. My attention was drawn to the answer given to Question No.49 by the appellant/accused in his examination under Section 313 of the Code of Criminal Procedure. It is further argued that, it was PW2

Prasanna Akkalkotkar who was repeatedly calling the appellant/accused and the appellant/accused never visited the workshop of the complainant after 21st January 2006. This demonstrates that there was no demand for illegal gratification. The learned advocate further argued that versions of PW2 Prasanna Akkalkotkar and that of PW3 Vijay Phulpagare – shadow panch, so far as it relates to demand and acceptance of illegal gratification on 25th January 2006 at the cabin of the appellant/accused are divergent. Because of variance in version of both these witnesses in respect of the events allegedly took place in the evening hours of 25th January 2006 at the cabin of the appellant/accused, the Charge needs to be held as failed.

5 The learned advocate for the appellant/accused placed reliance on judgment of the Hon'ble Apex Court in the matter of **P. Satyanarayana Murthy vs. The District Inspector of Police and Another**[1] to demonstrate that mere possession and recovery of currency notes from the appellant/accused without proof of demand is not sufficient for establishing the alleged offence.

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Reliance is further placed on judgment of this court in the matter of **Shri Balkrishna Bhau Desai vs. The State of Maharashtra**[2] to demonstrate that for seeking conviction for alleged offences, satisfactory evidence regarding demand is necessary.

6 The learned APP supported the impugned judgment and order of conviction and sentence by contending that there is no requirement of law that the demand needs to be verified by sending a shadow panch. The demand can be proved through the version of the complainant and in the case in hand, evidence of the complainant is satisfactory. Hence, the appellant/accused, in submission of the learned APP, is rightly convicted of alleged offences.

ADJOURNED TO 11th JANUARY 2018 AS COURT TIME IS OVER
RESUMED ON 11th JANUARY 2018

7 I have carefully considered the rival submissions and also perused the record and proceedings including oral as well as documentary evidence adduced by the prosecution.

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8 The case in hand is a trap case, wherein, according to the prosecution, on 21st January 2006, the appellant/accused – public servant, demanded gratification amounting to Rs.2,500/- on the pretext that the electric meter at Fabex Engineers owned by PW2 Prasanna Akkalkotkar is running slow and thereby showing less consumption. According to the prosecution, the demand of gratification other than legal remuneration was for showing favour in the official act by not taking any legal action against PW2 Prasanna Akkalkotkar and for charging Rs.5,000/- only as difference of cost of actual consumption of electricity in billed amount instead of recovering actual damages amounting to Rs.15,000/-. Considering the charges leveled against the appellant/accused, in the case in hand, the prosecution will have to prove that the appellant/accused had demanded and accepted gratification other than legal remuneration amounting to Rs.2,500/- as a motive or reward for showing favour in the official act. It will have to be established that by corrupt or illegal means and by abusing his position, the appellant/accused had obtained

for himself pecuniary advantage. It will have to be proved by cogent evidence that -

(a) at the time of the alleged offence, the appellant/accused was a public servant;

(b) he demanded and accepted or obtained for himself gratification other than legal remuneration;

(c) such gratification was accepted as a motive or reward for official act.

If these ingredients are established by the prosecution, then the Charge can be held to be proved. The third requirement in respect of motive or reward for doing official act is generally difficult to prove against the public servant. Therefore, the legislature has enacted Section 20 which prescribes rule of presumption. The presumption specified therein will arise only upon proof that accused has accepted any gratification other than legal remuneration. This mandatory presumption of law is required to be understood in terrorum i.e. in tone of command (see **M. Narsinga Rao vs. State of Andhra Pradesh**[3]).

3 (2001) 1 SCC 691

9 At this juncture, it is also apposite to note the burden of proof expected from the appellant/accused for rebutting the presumption as envisaged by Section 20 of the Prevention of Corruption Act. In the matter of **Trilok Chand Jain vs. State of Delhi**[4] the Hon'ble Apex Court has held thus :

> "If at such a trial, the prosecution proves that the accused has accepted or obtained gratification other than legal remuneration, the court has to presume the existence of the further fact in support of the prosecution case, viz., that the gratification was accepted or obtained by the accused as a motive or reward such as mentioned in Section 161, Penal Code. The presumption however, is not absolute. It is rebuttable. The accused can prove the contrary. The quantum and the nature of proof required to displace this presumption may vary according to the circumstances of each case. Such proof may partake the shape of defence evidence led by the accused, or it may consist of circumstances appearing in the prosecution evidence itself, as a result of cross-examination or otherwise. But the degree and the character of the burden of proof which Section 4(1)

4 AIR 1977 SC 666

> casts on an accused person to rebut the presumption raised thereunder, cannot be equated with the degree and character of proof which under Section 101, Evidence Act rests on the prosecution. While the mere plausibility of an explanation given by the accused in his examination under Section 342, Cr.P.C. may not be enough, the burden on him to negate the presumption may stand discharged, if the effect of the material brought on the record, in its totality, renders the existence of the fact presumed, improbable."

Keeping in mind this position of law, let us examine evidence adduced by the prosecution in order to establish its case. This being an appeal, there is no embargo on reviewing the entire evidence or rather it becomes duty of this court to re-appreciate the entire evidence, this court being the last fact finding court in the subject matter.

10 I have set out the case of the prosecution in detail in order to avoid repetition of congruous evidence coming on record from mouth of complainant PW2 Prasanna Akkalkotkar and

shadow panch PW3 Vijay Phulpagare. Let us ascertain from the evidence adduced by these two witnesses coupled with the evidence of Investigating Officer PW4 Arun Waikar, Deputy Superintendent, whether the prosecution has established by cogent and trustworthy evidence demand of illegal gratification and acceptance thereof. Undisputedly, the alleged demand of illegal gratification was not got verified by the ACB. However, there is evidence of PW2 Prasanna Akkalkotkar on record, so far as this demand is concerned. The defence has not disputed that this witness is owner of the workshop known as Fabex Engineers. There is no challenge to the fact that on 21st January 2006, the appellant/accused accompanied by other employees of the Electricity Supply Company visited the workshop for taking electric meter supply. Version of PW2 Prasanna Akkalkotkar, owner of workshop is in tune with the prosecution case to that effect, set out in earlier paragraphs. The demand of illegal gratification is seen to be emanating for the first time at about 4.30 p.m. of 21st January 2006, i.e., the second visit of the appellant/accused to the workshop of PW2 Prasanna Akkalkotkar.

This witness deposed that after the first visit of the appellant/accused in the morning hours for inspecting the meter with colleagues, the appellant/ accused revisited his workshop at 4.30 p.m. on 21st January 2006, all alone. At that time, the appellant/accused prepared an application on behalf of PW2 Prasanna Akkalkotkar in Marathi language, showing willingness of PW2 Prasanna Akkalkotkar to deposit the balance amount for electricity consumption. That application is at Exhibit 14. As per version of PW2 Prasanna Akkalkotkar, he did not agree with contents of that application, and therefore, he got another type written application, which is at Exhibit 13. Perusal of this application shows that PW2 Prasanna Akkalkotkar had, by this application communicated to the Executive Engineer of the Electric Supply Company that he is ready to pay the difference of consumption charges for the period from July 2005 to January 2006. As per version of PW2 Prasanna Akkalkotkar, he gave application which is at Exhibit 13 to the appellant/accused and had obtained acknowledgment of the appellant/accused on the said application. Then, as stated by PW2 Prasanna Akkalkotkar, the appellant/accused communicated to him that he should pay an amount of Rs.2,500/- and the matter would be settled for a fine of Rs.5,000/-. The appellant/accused demanded the amount of Rs.2,500/- immediately. PW2 Prasanna Akkalkotkar further deposed that he informed the appellant/accused that he is not having money, and therefore, the appellant/accused informed him to keep that much amount ready on Monday i.e. on 23rd January 2006. The appellant/accused also gave his cell phone number to PW2 Prasanna Akkalkotkar and then left the workshop.

11 It has come in evidence of PW2 Prasanna Akkalkotkar that on 23rd January 2006, he telephonically contacted the appellant/accused on cell phone of the appellant/accused. The appellant/accused then agreed to come to the workshop. As per version of PW2 Prasanna Akkalkotkar, he then approached the ACB as he was not willing to pay illegal gratification to the appellant/accused and lodged complaint Exhibit 15. Perusal of this complaint Exhibit 15 lodged by PW2 Prasanna Akkalkotkar also shows that there was demand of illegal gratification

amounting to Rs.2,500/- at 4.30 p.m. of 21st January 2006. The complaint at Exhibit 15 further shows that on 23rd January 2006, complainant PW2 Prasanna Akkalkotkar contacted the appellant/ accused and the appellant/accused agreed to come to the workshop after the afternoon.

12 What happened subsequently, has come on record through version of PW2 Prasanna Akkalkotkar, PW3 Vijay Phulpagare and PW4 Arun Waikar, Deputy Superintendent, ACB. After making preparations for trap and recording those preparations in pre-trap panchnama Exhibit 17 on 23rd January 2006 accompanied by panch witnesses, raiding party went to the Fabex Engineers. These witnesses have spoken about what had happened on 23rd January 2006 at the Fabex Engineers and the same is also reflected from trap withdrawal panchnama of the same day, which is at Exhibit 18. After conducting necessary formalities of recording complaint Exhibit 15, raiding team, complainant PW2 Prasanna Akkalkotkar and panch witnesses reached Fabex Engineers at 2.30 p.m. of 23rd January 2006. PW2

Prasanna Akkalkotkar accompanied by shadow panch PW3 Vijay Phulpagare then went to first floor cabin and waited there for the appellant/accused. Other members of the raiding team with another panch waited in the vicinity for arrival of the appellant/accused. It is seen from evidence of these three witnesses, so also from trap withdrawal panchnama Exhibit 18 that till 5.30 p.m. of 23rd January 2006, the appellant/accused had not come to the workshop of PW2 Prasanna Akkalkotkar. Evidence of PW2 Prasanna Akkalkotkar further shows that despite waiting, as the appellant/accused had not come to his workshop, PW2 Prasanna Akkalkotkar had contacted the appellant/accused telephonically during the course of the trap. However, the appellant/accused had informed PW2 Prasanna Akkalkotkar that he will come. PW2 Prasanna Akkalkotkar further deposed that despite this telephonic message, the appellant/accused did not come to his workshop on 23rd January 2006. PW2 Prasanna Akkalkotkar further deposed that he again tried to call the appellant/accused but the appellant/accused was unreachable thereafter. This is how the prosecuting agency then prepared panchnama Exhibit 18 for withdrawal of the trap on 23rd January 2006, at about 6.00 p.m.

13 What happened on 25th January 2006 is deposed by PW2 Prasanna Akkalkotkar by stating that on that day his receptionist got a phone call from the office of the Electricity Company but that call got cut prior to conversing, and therefore, he himself had again called the appellant/accused telephonically. At that time, the appellant/accused told him that he is coming to the workshop of the complainant in the afternoon. Therefore, again PW2 Prasanna Akkalkotkar went to the office of ACB. Again panch witnesses were called, pre-trap panchnama Exhibit 20 was prepared. Currency notes smeared with anthracene powder were kept in the shirt pocket of PW2 Prasanna Akkalkotkar and taking the panch witnesses with them, the raiding party accompanied by complainant PW2 Prasanna Akkalkotkar went to his workshop Fabex Engineers.

14 Evidence of PW2 Prasanna Akkalkotkar, PW3 Vijay Phulpagare and PW4 Arun Waikar is congruous in respect of happenings which took place on 25th January 2006. Events which took place are also recorded in post-trap panchnama of 25th January 2006 which is at Exhibit 21. Evidence of these witnesses examined by the prosecution and contemporaneous documents i.e. post-trap panchnama Exhibit 21 reveals that on 25th January 2006 at 3.15 p.m., PW2 Prasanna Akkalkotkar and PW3 Vijay Phulpagare – shadow panch entered in the workshop named Fabex Engineers belonging to PW2 Prasanna Akkalkotkar. Other members of the raiding party with the co-panch waited in the vicinity. Despite wait for one hour, the appellant/accused did come. Then, at about 4.25 p.m., PW2 Prasanna Akkalkotkar telephonically contacted the appellant/accused. The appellant/ accused told him that he could not get vehicle but he will come. He should be contacted telephonically after half an hour. It is seen from the evidence of the prosecution, and particularly post-trap panchnama Exhibit 21 that despite further wait for one hour, the appellant/accused did not come to the Fabex Engineers.

Therefore, at 5.25 p.m. of 25th January 2006, PW2 Prasanna Akkalkotkar again called the appellant/accused. Upon that, the appellant/accused informed that he is not having vehicle and asked PW2 Prasanna Akkalkotkar to come to his office.

15 It was then decided to trap the appellant/accused at his office itself, and therefore, as seen from evidence of PW2 Prasanna Akkalkotkar, PW3 Vijay Phulpagare and PW4 Arun Waikar, Deputy Superintendent, ACB, coupled with contemporaneous post-trap panchnama Exhibit 21 that at about 6.05 p.m. of 25th January 2006, PW2 Prasanna Akkalkotkar and PW3 Vijay Phulpagare went inside the office of the MSEDCL vide PW2 Prasanna Akkalkotkar carrying tainted currency notes in his pocket. Other members of the trap party and the co-panch waited in the vicinity of that office till getting prearranged signal at 6.38 p.m. of 25th January 2006.

16 What transpired during that period of 33 minutes has come on record through evidence of PW2 Prasanna Akkalkotkar

and PW3 Vijay Phulpagare. PW2 Prasanna Akkalkotkar has deposed that when they went to the office of the appellant/accused, the appellant/accused was found sitting in the cabin of the Executive Engineer. Similar is the version of PW3 Vijay Phulpagare who has stated that he had seen the appellant/accused sitting in the cabin of the Executive Engineer with three other persons. Both these witnesses congruously deposed that then they waited for the appellant/accused to come out of the cabin of the Executive Engineer. PW3 Vijay Phulpagare has categorically stated that he along with PW2 Prasanna Akkalkotkar sat on the bench kept outside the cabin of the appellant/accused waiting for his arrival. As per version of PW3 Vijay Phulpagare, after waiting for half an hour outside the cabin of the appellant/accused, the appellant/accused came out of the cabin of the Executive Engineer and came towards his own cabin. PW2 Prasanna Akkalkotkar has stated that they were required to wait for the appellant/accused for fifteen to twenty minutes. Both these witnesses then stated that they entered in the cabin of the appellant/accused along with the appellant/accused. It is apposite to note that as seen from evidence of PW3 Vijay Phulpagare, that when they entered in the cabin of the appellant/accused, they found that only one extra chair was available there. Therefore, as stated by PW3 Vijay Phulpagare, PW2 Prasanna Akkalkotkar went outside the cabin and brought one more chair for himself. This evidence goes to show that when the appellant/accused was with the Executive Engineer in the cabin of the Executive Engineer, PW2 Prasanna Akkalkotkar and PW3 Vijay Phulpagare were waiting for him outside the cabin of the appellant/accused, for about a period of half an hour. Even post-trap panchnama Exhibit 21 shows that both these witnesses were in the office of the appellant/accused from 6.05 p.m. to 6.38 p.m. of 25th January 2006.

17 So far as actual demand and acceptance of illegal gratification at the time of the trap which took place on 25th January 2006 is concerned, PW2 Prasanna Akkalkotkar has deposed that firstly, the appellant/accused informed him that he has imposed fine of Rs.15,000/- and then when PW2 Prasanna

Akkalkotkar started leaving, the appellant/accused asked him to stop and told him that he has charged fine of Rs.5,000/- only. Then the appellant/accused asked him about his work and PW2 Prasanna Akkalkotkar informed him that he had brought the amount. The appellant/accused raised suspicion about presence of of PW3 Vijay Phulpagare and then he was informed that PW3 Vijay Phulpagare is a relative. Then the appellant/accused opened the drawer and put the papers used for printing in computer on the table and asked PW2 Prasanna Akkalkotkar to keep the amount on those papers. That is how PW2 Prasanna Akkalkotkar kept the five tainted currency notes on those papers. The appellant/accused folded those currency notes with the help of the papers on which those currency notes were kept and placed them in the drawer of his table. Version of PW3 Vijay Phulpagare, in this regard, is also similar. However, he has not spoken about folding of the currency notes kept on the papers along with the papers. This witness has stated that the appellant/accused lifted those currency notes with the help of the papers on which those were kept and kept them in the drawer and closed the drawer.

18 This is principally the evidence regarding demand and acceptance of illegal gratification by the appellant/accused.

19 Law regarding appreciation of evidence of trap witnesses as well as the complainant can be found in catena of judgments delivered by the Hon'ble Apex Court as well as by this court. In the matter of **Sudhakar Jadhao vs. State of Maharashtra**[5] it is held thus :

> "After all, P.W.1. is himself the complainant and therefore, interested in the success of the prosecution of his complaint. The evidence of an interested witness cannot be accepted by itself. It is unsafe to accept the evidence of interested witness unless corroborated by independent witnesses."

Similarly, the Hon'ble Apex Court in the matter of **Jaswant Sing vs. State of Punjab**[6] has held thus :

> "As P.W.1. is the complainant, his evidence will have to be considered with great caution and it will not be ordinarily safe to accept his interested testimony unless there is material corroboration found in the other evidence adduced by the prosecution."

5 2004 ALL MR (Cri.) 648
6 AIR 1973 SC 707

In the matter of **<u>Ramprakash Arora vs. State of Punjab</u>**[7] the Hon'ble Apex Court has given guidelines guidelines regarding appreciation of evidence of trap witnesses and has held that they are concerned with the success of the trap and their evidence must be tested in the same way as that of other interested witnesses and in a proper case, the court may look for independent corroboration.

20 In the case in hand, perusal of the charge-sheet shows that Ashok Shetty, Manager of PW2 Prasanna Akkalkotkar was cited as a witness. Evidence of this complainant shows that when the appellant/accused revisited his workshop at about 4.30 p.m. of 21st January 2006, he did not accept the draft of application prepared by the appellant/accused which is at Exhibit 14 but got prepared a typed application in English which is at Exhibit 13. Evidence of PW2 Prasanna Akkalkotkar shows that at the time of initial visit in the morning hours of 21st January 2006, the appellant/accused was introduced to him by his Manager Ashok Shetty. PW2 Prasanna Akkalkotkar has not spoken that at the

7 AIR 1973 SC 498

time of visit of the appellant/accused to his workshop at 4.30 p.m. of 21st January 2006, his Manager Ashok Shetty was not there. PW2 Prasanna Akkalkotkar has not deposed that whatever talk took place between him and the appellant/accused at 4.30 p.m. of 21st January 2006 did not take place in presence of any of his employees. PW2 Prasanna Akkalkotkar has not deposed that he himself had got the application at Exhibit 13 typed by himself without taking the aid of any of his employees. In normal course it seems that PW2 Prasanna Akkalkotkar, who was owner of the Fabex Engineers, must have sought help of his employees for getting the application at Exhibit 13 typed. The charge-sheet is citing Ashok Shetty, Manager of Fabex Engineers, as one of the witnesses, but he has not been examined. It will have to be seen whether available evidence is lacunic in order to infer implications of non-examination of Ashok Shetty as witness by the prosecution.

21 As stated in foregoing paragraphs, on occasion of the first trap i.e. on 23rd January 2006, though it is the prosecution case that the appellant/accused was to visit the workshop for

acceptance of illegal gratification, the appellant/accused had not chosen to come to the workshop of PW2 Prasanna Akkalkotkar for accepting the amount of illegal gratification. It is seen from his evidence that even on 23rd January 2006, during the course of the trap, PW2 Prasanna Akkalkotkar was telephonically contacting the appellant/accused for inviting him to his workshop for accepting the amount towards illegal gratification. Despite alleged assurance by the appellant/accused, he did not come to the workshop of PW2 Prasanna Akkalkotkar on 23rd January 2006 for the whole day, which has resulted in withdrawal of the trap by preparing panchnama Exhibit 18, after 6.00 p.m. What is the normal consequence of such withdrawal of the trap panchnama can be found in the judgment of this court reported in **Ramdas Shahane vs. State of Maharashtra**[8]. Relevant observations found in paragraph 10 of the said judgment read thus :

> "That apart, the further story that the raiding party waited for the accused to come firstly on the same night and secondly for almost the whole day on the next day appears to be really puzzling. If the accused did not come as per the version of the

8 1996 CRI.LJ. 1848

> complainant, then that should have been normally the end of it. In this case, the Investigating Officer seems to have gone a step ahead in giving a hot chase to the accused having waited for the accused and seeing that the accused had not turned up, the trap should have been dissolved."

22 This withdrawal of the trap on 23rd January 2006 did not end the matter but has resulted in laying down another trap on 25th January 2006. On that day also, though according to the prosecution case, the appellant/accused had assured to come to the Fabex Engineers of PW2 Prasanna Akkalkotkar for accepting the amount of illegal gratification, despite the ACB team waiting there for about more than two hours, the appellant/accused did not come there. Then, the ACB decided to sent PW2 Prasanna Akkalkotkar and shadow panch PW3 Vijay Phulpagare to the office of the appellant/accused.

23 As stated by me in foregoing paragraphs, PW2 Prasanna Akkalkotkar and PW3 Vijay Phulpagare were in the office of the appellant/accused for about thirty-three minutes, as

seen from post-trap panchnama Exhibit 21. Out of this period, atleast for a period of twenty minutes, they both were sitting outside the cabin of the appellant/accused waiting for him. Evidence of PW3 Vijay Phulpagare makes it clear that no peon was entrusted to the appellant/accused for taking care of his vacant cabin. This is writ large from the fact that after entering in the cabin along with the appellant/accused, PW2 Prasanna Akkalkotkar was required to come out again for taking a chair from outside, as there was only one spare chair in the cabin of the appellant/accused. Thus, the open cabin of the appellant/accused was totally unguarded and as per version of PW2 Prasanna Akkalkotkar and PW3 Vijay Phulpagare, they both were sitting outside that cabin for a period of 20 minutes for arrival of the appellant/accused. Needless to mention that, they both were having tons of opportunities to enter in that cabin prior to arrival of the appellant/accused for planting money.

24 Post-trap panchnama Exhibit 21 categorically points out that clothes and hands of the appellant/accused were scanned

under ultra violet rays, but no traces of anthracene powder were found either on his hands or clothes. However, traces of anthracene powder were found on the papers on which tainted currency notes were kept. At this juncture, evidence of PW2 Prasanna Akkalkotkar assumes importance. He has categorically stated that the appellant/accused has handled the papers on which the tainted currency notes were kept for folding those currency notes. Post-trap panchnama Exhibit 21 shows that currency notes were found in folded condition in the computer printing paper. Even PW3 Vijay Phulpagare has spoken about handling by the appellant/accused of the computer printing paper on which the tainted currency notes were allegedly kept by PW2 Prasanna Akkalkotkar. Thus, in every probability, atleast right hand of the appellant/accused ought to have been found smeared with anthracene powder. This did not happen. A lurking doubt arises in the judicial mind as to whether in the available time of twenty minutes, when PW2 Prasanna Akkalkotkar and PW3 Vijay Phulpagare were waiting outside the unguarded cabin of the appellant/accused, the tainted currency notes were planted in the drawer of the appellant/accused? This possibility is not excluded by the prosecution by adducing the cogent evidence. The prosecution case becomes suspect on this aspect and the doubt so created is from the evidence adduced by the prosecution itself.

25 In the light of the foregoing discussion, as the available evidence adduced by the prosecution is not trustworthy and reliable, non-examination of Ashok Shetty, Manager of the Fabex Engineers, assumes importance. The prosecution could have gained corroboration to the initial demand of illegal gratification from the mouth of Ashok Shetty, Manager – a cited witness, as in every probability, he must have accompanied his master while dealing with the appellant/accused at 4.30 p.m. of 21st January 2006.

26 The entire evidence adduced by the prosecution reflects that except the so called telephonic call received by the receptionist of the Fabex Engineers, there was not a single phone call by the appellant/accused to PW2 Prasanna Akkalkotkar. The

appellant/accused is alleged to have demanded illegal gratification amounting to Rs.2,500/- from complainant/ PW2 Prasanna Akkalkotkar. The entire team of the ACB coupled with panch witnesses and the complainant lay in wait for the appellant/accused on two days, i.e., on 23rd January 2006 as well as 25th January 2006, at the premises of the Fabex Engineers. However, the appellant/accused did not even visit the premises of the Fabex Engineers on both these days for accepting the amount of illegal gratification despite repeated invitations by the complainant. This conduct of the appellant/accused reflected from the version of prosecution does not appear to be the normal conduct of a bribe seeker. The complainant as well as the trap witnesses were virtually out to implicate the appellant/accused and the appellant/accused was virtually being trapped by them. To crown this all, despite having time from 23rd January 2006 to 25th January 2006, no attempt was made by the prosecuting agency to get the demand verified by sending the shadow panch along with the complainant to the appellant/accused. Though this is not requirement of law, facts of the present case warranted such exercise because of withdrawal of the two traps at the premises of the Fabex Engineers and when the prosecuting agency decided to go ahead by giving a hot chase to the appellant/ accused for contacting him at his office. The learned advocate for the appellant/accused has rightly relied on the judgment in the matter of **P. Satyanarayana Murthy (supra)** and paragraphs 19, 20 and 21 of the said judgment needs reproduction. They read thus :

> **"19** In **State of Kerala and another vs. C.P.Rao (2011) 6 SCC 450**, this Court, reiterating its earlier dictum, vis-à-vis the same offences, held that mere recovery by itself, 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."

> **"20** In a recent enunciation by this Court to discern the imperative pre-requisites of Sections 7 and 13 of the Act, it has been underlined in **B. Jayaraj (supra)** in unequivocal terms, that mere

possession and recovery of currency notes from an accused without proof of demand would not establish an offence under Sections 7 as well as 13(1)(d)(i)&(ii) of the Act. It has been propounded 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. The proof of demand, thus, has been held to be an indispensable essentiality and of permeating mandate for an offence under Section 7 and 13 of the Act. Qua Section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under Section 7 and not to those under Section 13(1)(d)(i)&(ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under Section 20 of the Act would also not arise."

> "**21** The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)(i)&(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."

27 In the light of the foregoing discussion and stated reasons, it cannot be said that the prosecution has established its case beyond all reasonable doubts that the appellant/accused had demanded and accepted an amount of Rs.2,500/- from PW2 Prasanna Akkalkotkar and thereby obtained pecuniary advantage. This acceptance of amount of illegal gratification which leads to presumption, as envisaged by Section 20 of the Prevention of Corruption Act, 1988, can be drawn only if it is proved that the appellant/accused had accepted any illegal gratification. In the case in hand, there is doubt whether the appellant/accused has really accepted the amount of illegal gratification or whether with

all opportunities available with them, PW2 Prasanna Akkalkotkar and PW3 Vijay Phulpagare had planted that amount in the drawer of the table of the appellant/accused. Thus, the appellant/ accused deserves benefit of doubt and as such the order :

ORDER

i) The appeal is allowed.

ii) The impugned judgment and order dated 17th January 2011 passed by the learned Special Judge under the Prevention of Corruption Act, Pune, in Special Case No.12 of 2007 convicting him of offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988, is quashed and set aside.

iii) The appellant/accused is acquitted of the offences alleged against him. His bail bonds stand cancelled.

iv) Fine amount, if any, imposed on the appellant/accused, and paid by him, be refunded to him.

(A. M. BADAR, J.)