

Bail Slip

The Petition/Appellant/Accused namely S.P. Chidambaram male 72 years was directed to be released on bail by the orders of this court dated 10.03.2018 and made in Crl.MP.NO.2518 of 2016 in Crl. A.181/16.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 03.07.2018	Pronounced on: 10.07.2018
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C O R A M

The Honourable Dr.Justice G.JAYACHANDRAN

Criminal Appeal No.181 of 2016

SP.Chidambaram,
(Former Executive Engineer,
Public Works Department,
WRO, Aiyaru Basin Division Ariyalur) ..Appellant/Accused

/versus/

The State represented by the
Deputy Superintendent of Police,
Vigilance and Anti Corruption,
Trichy.
Crime No.7 of 2011 ..Respondent/Complainant

PRAYER: Criminal Appeal is filed under Section 374 (2) of Criminal Procedure Code, to set aside the judgment of the conviction and sentence in Special Case No.3 of 2012 on the file of the Chief Judicial Magistrate/Special Judge, Ariyalur.

For Appellant : Mr.A.R.L. Sundaresan, Senior Counsel
for AL.Ganthimathi

For Respondent : Mr.K.Prabakar,
Additional Public Prosecutor

J U D G M E N T

The appellant Mr.SP.Chidambaram, Former Executive Engineer, Public Works Department suffered conviction and sentence made in Special Case No.3 of 2012 on the file of the Chief Judicial Magistrate/Special Judge, Ariyalur, dated 25.02.2016. This appeal is directed against the said judgment

which has held the appellant guilty and sentenced to undergo 5 years Simple Imprisonment and to pay fine of Rs 25,000/-, in default to undergo further 1 year S.I for the offence under section 7 of the Prevention of corruption Act, 1988 and to undergo 7 years simple imprisonment and to pay fine of Rs.25,000/-, in default to undergo further 1 year S.I for the offence under section 13(2) r/w 13(1)(d) of the Prevention of corruption Act, 1988.

2. Brief facts of the case

The appellant Mr.SP.Chidambaram was the Executive Engineer, WRO-Public Works Department at Ariyaru Basin Division, Ariyalur during September 2001. On 03.09.2001, Thiru K.Sundararajan [PW.2] of Poolambadi Village a registered contractor for the Poolambadi Panchayat Union met the appellant and requested to give him the Form to apply for registration as a PWD contractor. The appellant told him to come after 15 days. On 17.09.2001 when K.Sundararajan (PW-2) met the appellant and asked for Form, the appellant demanded illegal gratification of Rs.3,000. PW-2 pleaded to give the Form without money. The appellant refused to give the Form without bribe but reduced his demand to Rs.2,500/- and told PW-2 to bring the money on Thursday (20.09.2001).

3. PW-2 [K.Sundararajan] was not interested in getting the Form by bribing the appellant. So, he went to the Vigilance and Anti-Corruption Office at Tirchy on 20.09.2001 and gave his written complaint (Ex.P-2) about the demand of illegal gratification by the appellant. Thiru. M.Sureshkumar (PW-12) Deputy Superintendent of Police of Vigilance & Anti-Corruption, Tirchy received the complaint and registered the First Information Report (Ex.P-16) at 11.45 am. He summoned Thiru. Lakshminarayanan (PW-3) and Sachidhanantham (PW-6) to Vigilance and Anti-Corruption Office to be the witnesses for the trap proceedings. On their arrival to the Vigilance and Anti-Corruption Office at 13.30 hrs, phenolphthalein-sodium carbonate solution demonstration was conducted in their presence. The unique numbers in the currency (25 numbers of 100 rupees notes) brought by PW-2 were noted and thereafter, the currency was smeared with phenolphthalein. The tainted money was given back to PW-2. Thiru.Lakshminarayanan (PW.3) was instructed to accompany PW-2 [K.Sundararajan] to P.W.D Office at Ariyalur. The pre trap proceedings and entrustment of tainted money were reduced into writing in the presence of the witnesses as entrustment mahazar (Ex.P- 4).

4. The defacto complainant K.Sundrarajan (PW-2), the shadow witness Thiru. Lakshminarayanan (PW-3) and the trap team lead by M.Suresh kumar (PW-12) reached the P.W.D office, Ariyalur at about 18.00 hrs. PW.2 [Sundararaj] and PW.3

[Lakshminarayanan] went to the seat of the appellant. PW-2 [Sundararaj] informed the appellant that he has brought the necessary records and requested the appellant to arrange for registration. The appellant after gazing PW-2 [Sundararaj] for a while raised his eye-brow, shock his head by gesture meaning 'what happened'. PW-2 [Sundararaj] after clarifying and confirming with the appellant whether he mean about bribe money, gave the tainted Rs.2,500/- to the appellant. The appellant received the money in his right hand and kept it in his right side pant pocket. Thereafter called Thiru.Kannaiyan [PW.4] to find out whether Thiru.Venugopalan [PW-5] Junior draftsman is in office and if he is still in office ask him to come to his room. PW-4 conveyed the message of the appellant to PW-5 [Venugopalan] who was in the computer room. This was noticed by another draftsman Mr.Santhanakrishnan [PW.7]. When PW.5 [Venugopalan] went to the room of the appellant he saw PW.2 [Sundararaj] and another person. The appellant gave the documents of PW-2 and asked him to verify whether they are in order. After verifying the documents, PW-5 left the room of the appellant. Following PW.5 [Venugopalan], PW.2 [Sundararaj] and PW.3 [Lakshminarayanan] also left the room of the appellant. PW.2 [Sundaraj] gave the pre-arranged signal of lighting the cigarette.

5. M.Sureshkumar, Deputy Superintendent of Police, (PW.12) along with the trap team entered the room of the appellant. Conducted test on his hands to find out whether phenolphthalein is present. The right hand of the appellant turned light red on dipping it in the colourless sodium coronate solution. Thus it proved positive for the presence of phenolphthalein. Therefore, PW.12 enquired the appellant about the money he received from PW.2. The appellant took out the money from his right side pant pocket and handed over it. The currency numbers were verified with the currency numbers recorded in the entrustment mahazar and found tallied. The tainted money Rs.2,500/-. (MO.1 series), bottles containing the samples of phenolphthalein - sodium carbonate solution collected during the test (MO.2 and MO.3), the solution samples of pant pocket wash (MO.4) and the pant (MO.5) were recovered along with documents like solvency certificate Ex.P.5, Sales Tax Clearance certificate Ex.P.6, Income Tax Clearance Certificate Ex.P.7, and Commercial Tax Department Certificate of Registration Ex.P.8 were recovered under mahazar Ex.P.9. PW-12 has prepared the observation mahazar Ex.P.10 regarding the scene of crime in the presence of the witnesses.

6. The residential quarters of the appellant was searched between 23.45 hrs to 24.00hrs on the same day. No incriminating materials recovered. After completion of the trap, PW-12 had handed over the investigation to PW-13 [Mr.Govindarajan] as per the instruction of the Director, Vigilance and Anti Corruption.

7. In corroboration to the evidence of PW -2, PW-3 and PW-12, Sachidhanantham (PW-6) had deposed about his presence during the pre-proceedings, witnessing the entrustment mahazar, recovery of tainted money from the appellant. Signing the recovery mahazar and the observation mahazar as one of the witnesses.

8. Thiru. Santhanakrishnan (PW.7), Draftsman at Ariyalur Executive Engineer Office of PWD had deposed about the procedure followed in case of registering a contractor in PWD. Besides, he has also deposed about his presence in the office on the day of trap and had corroborated the evidence of PW.4 [Kannaiyan] and PW.5 [Venugopalan] regarding the fact that appellant called PW.5 [Venugopalan] through PW.4 [Kannaiyan] and in response to that, PW.5 went to the room of the appellant.

9. Thiru. Veeramani [PW-8], Thiru Ranganathan [PW-9], Thiru.Howard Devisser [PW-10] and Smt.Vijayalakshmi [PW-11] had deposed about the Solvency Certificate Ex.P-5, No due certificate of Commercial tax department Ex.P.6, Income Tax clearance certificate Ex.P.7 and Chemical Analysis report Ex.P.14 respectively.

10. Thiru.Govindarajan, [PW.13] who had taken up the investigation from Suresh Kumar [PW.12] had recorded statements of witnesses. Received report for the samples sent to the state forensic laboratory at Chennai for chemical analysis, obtained the sanction order Ex.P.1 from Thiru.Kutralingam, I.A.S., (PW.1) to prosecute the appellant and filed the final report on completion of the investigation.

11. In defence, besides putting suggestions to the prosecution witnesses, examined Thiru.Diveegan, Executive Engineer as DW.1. Marked Ex.D.1 and Ex.D.2 the circulars of the District Collector Perumbalur fixing target of Rs.7,000/- for the Executive Engineer of Ariyalur P.W.D. An attempt made to probablise that the money recovered from the appellant was given by PW.2 as flag day donation, but even before he could issue receipt for the donation. PW.2 left the room and came with vigilance team.

12. The trial court found that the demand and acceptance of illegal gratification of Rs.2,500/- is proved. The defence explanation for receipt of the money was negatived assigning reasons.

13. The learned Senior Counsel appearing for the Appellant attacks the impugned judgement on multifold. His first contention is regarding delay in FIR. It is contended that

though the alleged demand of bribe was on 17.09.2001, the complaint Ex.P.2 was lodged only on 20.09.2001. The prosecution witness has not come out with any explanation for the delay of 3 days to lodge his complaint. The unexplained delay in First Information Report is fatal to the prosecution case. PW-1 [Kutralingam, I.A.S.,] who has accorded sanction is not the authority competent to remove the appellant. Ex.P.1, the sanction order to prosecute the appellant is defective for want of authority and non application of mind. The prosecution has failed to prove demand both prior to the alleged trap or on the day of trap. Proof of demand and acceptance of illegal gratification beyond doubt, which is sine qua non to draw presumption under section 20 of the Prevention of Corruption Act. The prosecution has not proved demand of illegal gratification by the appellant. Despite that, the trial Court has erroneously drawn presumption against the appellant. The appellant as Executive Engineer of PWD division of Ariyalur, was directed by the District Collector to collect Flag Day donation of Rs.7,000/- by 30.11.2001. The communications of the District Collector, Perambalur are marked as defence exhibits D-1 and D-2. Through DW-1 who succeed the appellant Office of Executive Engineer Ariyalur the factum of target fixed by the District Collector is also proved. While so, the trial court has declined to accept the explanation of the appellant that he received the money given to him by PW-2 under the impression that it is for the flag day donation. The degree of proof to rebut the statutory presumption is only the preponderance of probability. Unlike for prosecution it is not proof beyond reasonable doubt. The appellant having discharged his burden of rebuttal the trial court ought not to have drawn presumption against the appellant. The contradictions in the ocular evidence of PW.2, PW.3 and PW.6 regarding the the alleged sequence of events during the trap proceedings vis a viz the documentary evidence such as entrustment mahazar Ex.P.4 and recovery mahazar Ex.P.9 can only give an inference that the prosecution witnesses are whole unreliable. None of the prosecution deposed that the appellant demanded money from PW-2. The gesture and sign like raising the eye-brow and shaking head alleged to have made by the appellant are not proof of demand. In the absence of proof that the appellant accept money as reward to do any favour abusing the official position, mere recovery of money from the appellant is sufficient to convict the appellant. In the light of the explanation given by the appellant, which is possible and reasonable, the trial court judgment deserves reversal.

14. In support of his argument, the learned senior counsel rely upon the following judgments:-

1. State of Tamil Nadu vs. S.Krishnamurthy reported in (2002) 9 SCC 530.

2. V.Sejappa vs State of Police Inspector Lokayukta, Chitradurga reported in (2016) 12 SCC 150.

3. State rep.by Superintendent of Police, Vigilance and Anti-Corruption, Chennai Vs. Subramaniam and Others reported in (2006) 2 MLJ (Cr1) 1001

4. S.Dharmalingam Vs. State, rep. By The Deputy Superintendent of Police, Vigilance and Anti-Corruption, Chennai City-I Detachment, Chennai reported in (2017) 3 MLJ (Cr1) 563

15. Per contra the Learned Additional Public Prosecutor would submit that, the contention of the appellant is not sustainable either on law or facts. The three days delay in filing the complaint is not fatal to the case of the prosecution since, the complaint is only to set criminal law into motion. In the trap proceedings, pursuant to the complaint had exposed the appellants involvement in the commission of crime. In this case, the demand was on 17.09.2001 however as per the complaint, the appellant has demanded the money to be given on 20.09.2001. The complaint was given on that day and the trap was laid. The delay in lodging the complaint by PW.2 does not given room for any suspicion or concoction.

16. As far as the defects pointed out in the sanction order, the learned Additional Public Prosecutor would submit that, PW.1 [Kutralingam, I.A.S.,], The Secretary of Public Works Department is the competent authority to issue sanction order on behalf of the Government. Therefore, there is no infirmity or illegality in the sanction order. Ex.P.1, is the Government Order issued by order of the Governor is in accordance with law.

Demand of illegal gratification by the appellant on 17.09.2001 is reflected in the complaint [Ex.P.2] which has set the law in motion. On the date of demand through gesture the appellant has demanded the money and received the money from PW.2 [Sundararaj]. This has witnessed by PW.3 [shadow witness].

Unless, there was previous demand, the offering of Rs.2,500/- by PW.2 [Sundararaj] and same being accepted by the appellant and keeping it in his pant pocket would not occur. Demand of money on 20.09.2001 through gesture is a follow up of the earlier demand made on 17.09.2001.

17. The conduct of the appellant obtaining the tainted money and keeping it in his pant pocket squarely attracts the necessary ingredient of Section 7 of Prevention of Corruption Act. The explanation of the appellant that he received the money for Flag Day donation has no material evidence. The Ex.D.1 and Ex.D.2 only indicates the target for collecting Flag

Day donation. It doesn't give any inference that the money received by the appellant on 20.09.2001 from PW.2 is to achieve that target. A bald explanation without any material particulars will not dislodge a proven fact. The prosecution has proved through oral and documentary evidence that the appellant has pivotal responsibility in issuing the application form for registration as contractor. To issue the form he had demanded Rs.2,500/- from the prospective contractor. Only after receiving the money he had started the process of scrutinising the documents submitted by PW.2 [Sundararaj]. PW.5 [Venugopalan] and PW.7 [Sachidhanantham] had spoken about the role of appellant as Executive Engineer in issuing the application form and scrutinising the application form for registration. The trial Court has rightly rejected the explanation offered by the appellant for receiving the money. The conduct of the appellant after receiving the money was not in consonance with this explanation. If, really he had received the money for Flag Day donation, he should have prepared the receipt and given to PW.2 [Sundararaj] immediately. Contrarily he had kept the money in his pant pocket and say that PW.2 [Sundararaj] left his room after donating money without collecting receipt. The learned Additional Public Prosecutor would submit that the judgment of the trial Court is fortified with proper appreciation of evidence and law, therefore need not interference.

18. Points for consideration

"Whether the grounds raised by the appellant adequate to reverse the finding of the trial Court?"

19. The appellant herein who has found guilty by the trial Court for receiving illegal gratification of Rs.2,500/- has challenged the judgment of conviction and sentence on the following grounds.

- (A). Delay in complaint.
- (B). Defect in sanction order.
- (C). Demand of illegal gratification not proved.
- (D). Acceptance of illegal gratification not proved.
- (E). Explanation for receiving the money otherwise than the illegal gratification not considered.

(F). Excessive sentence disproportionate to the crime and age of the appellant.

- A) Delay in complaint

The delay in filing the complaint per se will not be fatal to the case of the prosecution. Delay in recording the F.I.R cannot be a ground to reject the case of the prosecution unless, there is any material placed before the Court to suspect concoction. The object of the F.I.R from the point of view of the informant is to set the Criminal Law into motion. The mind set of the complainant, the nature of the complaint has to be taken into account while, considering the plea of delay in complaint.

20. In this case, the complaint discloses that PW.2 [Sundararaj] went to the Office of the appellant on 03.09.2001 and sought for application Form. He was asked to come after 15 days. On 17.09.2001, for the 2nd time he went to the Office of the appellant and met the appellant. On that day the appellant had demanded Rs.3,000/- for issuing the Application Form, later he has reduced the bribe amount to Rs.2,500/- and also instructed PW.2 [Sundararaj] to come on 20.09.2001. one should take into note of the fact that PW.2 [Sundararaj], has lodged a complaint against an Executive Engineer of a department from whom he expects contracts for his livelihood. Lodging complaint to the Vigilance & Anti Corruption, Tiruchy cannot be a spontaneous act but requires lot of contemplation. In the said circumstances, it is an inordinate delay which requires explanation.

21. This view is well fortified through the judgment of Hon'ble Supreme Court in Amar Singh vs. Balwinder Singh reported in AIR 2003 SC 1164 which reads as under:-

"There is no hard and fast rule that any delay in lodging the FIR would automatically render the prosecution case doubtful. It necessarily depends upon facts and circumstances of each case whether there has been any such delay in lodging the FIR which may cast doubt about the veracity of the prosecution case and for this a host of circumstances like the condition of the first informant, the nature of injuries sustained, the number of victims, the efforts made to provide medical aid to them, the distance of the hospital and the police station, etc. have to be taken into consideration. There is no mathematical formula by which an inference may be drawn either way merely on account of delay in lodging of the FIR"

22. Therefore, without substantiating how the delay has prejudice him the point raised by the learned counsel for the appellant that, the delay in lodging the complaint is fatal to the case of the prosecution, deserves to be rejected.

B) Defect in sanction order

Ex.P.1 is the Government Order, according sanction to prosecute the appellant. The said order dated 11.07.2002 has been issued by PW.1 the Secretary to the Government PWD department by order of the Governor. Mr.Kutralingam, I.A.S., then Secretary to Public Works Department has issued this order. He had deposed before this Court as PW.1. In his deposition, he has stated that after considering the documents placed before him, he has been satisfied with the material available to prosecute the appellant for offences under Section 7 and 13 (1) (d) of Prevention of Corruption Act, 1988. Therefore, he has issued the sanction order Ex.P.1. In the cross examination he has stated that after perusing the documents, he asked Joint Secretary to draft the sanction order and after perusing the draft order and found to be correct, he has issued the Government Order. He has further deposed that Governor has delegated his power to the Secretaries of the respective department. He has issued the sanction order after perusing the records placed before him and being satisfied that there is enough material to prosecute the appellant.

Section 19 of the Prevention of Corruption Act reads as below:

(1) No court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant, except with the previous sanction,-

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises as to whether the previous sanction as required under sub-section (1) should be given by the Central Government or the State

Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings. Explanation.—For the purposes of this section,—

(a) error includes competency of the authority to grant sanction;

(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature.

23. The administrative procedure as contemplated under the Constitution and Secretariat Rules, Government Orders shall be issued in the name of the Governor since the Executive Power of the State is vested with the Governor Article 154 and Article 166 of the Indian Constitution reads as under:—

Article 154: Executive Power of State

(1) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution

(2) Nothing in this article shall

(a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority; or

(b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor

Article 166 Conduct of business of the Government of a State

(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instruction which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion

24. Therefore there shall be no doubt about PW.1 [Kuttralingam, I.A.S.,] Secretary to Public Works Department is the competent authority to remove the Executive Engineer of P.W.D. Just because the sanction order being issued by order of the Governor it does not mean that PW.1 is incompetent to issue sanction order and the sanction order Ex.P.1 is an invalid one.

25. In Shivendra Kumar vs State Of Maharashtra reported in AIR 2000 SC 3079 when identical plea was raised, the Hon'ble Supreme Court has settled this issue holding that the Secretaries in the Department of State issuing sanction order in the name of the Governor is in consonance with Article 166 of

Indian Constitution. Such orders cannot be challenged on the ground of lack of competence of the authority who pass the order.

26. In the present case, PW.1 [Kutralingam, I.A.S.,] Secretary to Public Works Department had issued the sanction order [Ex.P.1] after perusing the records and applying his mind. After being satisfied that it is a fit case to accord sanction for prosecuting the appellant, he has issued the order Ex.P.1.

The perusal of the sanction order and the deposition of PW.1 does not indicate any non-application of mind or lack of authority. In the light of Clause (4) to Section 19 and the explanation appended which is extracted above. If even there was any error or omission, in the absence of any failure of justice it cannot be a ground to vitiate the trial.

C) Demand, Acceptance and Recovery

The learned Senior Counsel appearing for the appellant would contend that, except the complaint of PW.2 there is no other evidence to prove the demand of illegal gratification by the appellant on 17.09.2001. The case of the prosecution is that on 20.09.2001, the appellant raised his eye-brow and shake his head. On seeing that PW.2 took out the tainted money from his pant pocket and gave it to the appellant this gesture is not a proof for demand of illegal gratification. The appellant has received the money offered by PW.2 towards Flag Day collection. Pointing out the suggestion to PW.2 during the cross examination that the witness has mistook the request for Flag Day donation as demand of illegal gratification, he would submit that the appellant has discharged his burden.

27. The learned Senior Counsel appearing for the appellant would submit that the uncorroborated evidence of PW.2 in respect of alleged demand of illegal gratification has to be tested by the evidence of Ex.D.1 and Ex.D.2 and the suggestions put to the witnesses in the cross examination.

28. The above submission of the learned senior counsel appearing for the appellant requires an incisive analysis of law and fact.

29. The appellant admits the receipt of Rs.2,500/- from PW.2 on 20.09.2001 he does not dispute the presence of PW.3 [Lakshminarayanan] shadow witness or the recovery of tainted money from his pant pocket. He does not dispute the fact that the Trap Laying Officer conducted phenolphthalein test of his hands and pant pocket. He does not dispute the affixing of the signature in the recovery mahazar, except suggesting that he was nervous after the trap proceedings. Due to duress, he has affixed his signature in the mahazar [Ex.P.9]. His explanation for the receipt of money from PW.2 towards Flag Day donation not been considered by the Trap Laying Officer.

30. The earliest case, on this point is the judgment of the Hon'ble Supreme Court in Suraj Mal Vs. State (Delhi Administration) reported in AIR 1979 SC 1408 in the said Case the Hon'ble Supreme Court has observed as under:

"In our opinion, mere recovery of money divorced from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. Moreover, the appellant in his statement under Section 342 has denied the recovery of the money and has stated that he had been falsely implicated. The High Court was wrong in holding that the appellant had admitted either the payment of money or recovery of the same as this fact is specifically denied by the appellant in his statement Under Section 342 Cr. PC Thus mere recovery by itself cannot prove the charge of the prosecution against the appellant, in the absence of any evidence to prove payment of bribe or to show that the appellant voluntarily accepted the money. For these reasons, therefore, we are satisfied that the prosecution has not been able to prove the case against the appellant beyond reasonable doubt. We, therefore, allow the appeal set aside the conviction and sentences passed against the appellant. The appellant will now be discharged from his bail bonds."

31. In B.Jayaraj Vs. State of Andhra Pradesh the Supreme Court has reaffirmed the above principle referring the judgments of Hon'ble Supreme Court in C.M.Sharma Vs. State of Andhra Pradesh reported in [(2010) 15 SCC 1] and C.M.Girish Babu Vs. C.B.I, Cochin, High Court of Kerala reported in [2009 (3) SCC 779] the Hon'ble Supreme Court has reiterated that:-

"In so far as the offence under Section 7 is concerned, it is a settled position in law that demand of illegal gratification is sine qua non to constitute the said offence and mere recovery of currency notes cannot constitute the offence under Section 7 unless it is proved beyond all reasonable doubt that the accused voluntarily accepted the money knowing it to be a bribe. The above position has been succinctly laid down in several judgments of this Court. By way of illustration reference may be made to the decision in C.M.Sharma Vs. State of Andhra Pradesh and C.M. Girish Babu Vs. C.B.I."

32. This judgment has been followed and relied upon in the subsequent judgments. The latest in the line Mukhtiar Singh Since (Decd.) Vs. The State of Punjab.

33. The point under scored in all the above judgments stated supra is that, mere recovery of money itself would not prove the charge against the accused. In the absence of evidence to prove payment of bribe or to show that the accused had voluntarily accepted the money knowing it to be bribe.

34. The defence of the appellant in this case is that, on the day of trap there is no demand on his part and the money received by him was towards Flag Day donation. Though the submission appears to carry semblance of probability it vanishes immediately in the light of the overwhelming evidence of PW.2, PW.3 and PW.12. If, there was no demand at all by the appellant on the day of trap or on previous occasion i.e., on 17.09.2001 there is no necessity or need for PW.2 to go to the respondent police and lodged the complaint. There is no need for him to take out Rs.2,500/- and give it to the appellant. If there was no demand either on 17.09.2001 or 20.09.2001 then when PW.2 offered Rs.2,500/- to the appellant the appellant should have asked what for he is offering this money. Contrarily without posing any query, the appellant had received the money and kept in his pocket without even correcting it, or in alternate. If the appellant has received this money on a bonafide belief that PW.2 has offered this money towards Flag Day donation then there must be some material evidence to indicate atleast PW.2 had prior knowledge about the Flag day donation. In the absence of such material facts it is very hard to accept the explanation offered by the appellant.

35. The learned counsel for the appellant would submit that the degree of proof required on the part of the appellant is only preponderance of probability and not beyond reasonable doubt. Therefore, the evidence of DW.1, Ex.D.2 and Ex.D.3 is sufficient to probabilise the defence theory.

36. It is to be pointed that the defence evidence DW.1 and Ex.D.1 and Ex.D.2 are in fact neither speak about the relevant fact or fact in issue. The facts spoken by DW.1, Ex.D.1 and Ex.P.2 though not relevant can become a relevant fact under Section 11 of Evidence Act only if the said fact makes the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. The prosecution witnesses had deposed that this money was received by the appellant towards reward for doing the official act namely issuing application form. PW.5 [Venugopalan] had spoken about the documents furnished by PW.2 [Sundararaj] which is prerequisite for issuance of application form. According to PW.2 [Sundararaj]

after receiving the money the appellant called PW.5 [Venugopalan] and handed over the documents which are marked as Ex.P.5 to Ex.P.8.

37. Through PW.7, the procedure followed in PWD Office for registering a contractor is elicited. It is elicited that on receiving the request for application in writing along with requisite documents as annexures, the Executive Engineer has to forward it to the clerk for verification. After verifying the documents annexed and if they are in order, then the D-4 clerk will initial it and forward it to the Manager. Manager in turn verify and sent it to Superintendent. Superintendent in turn will verify and send it to Tapal clerk for necessary entry in the register. The Tapal Clerk after making entry in the register will place the paper again to D.4 clerk who will prepare an Office note and place it before the Executive Engineer seeking his permission whether Registration Form can be issued to the applicant. If the Executive Engineer grant permission to give registration form, then the applicant has to pay Rs.229/- for the costs of the Registration Form. The filled up form has to be submitted along with registration fees of Rs.1,000/- paid through Bank. Again the scrutiny/verification of the application and the documents has to be done at various level and if every thing is in order, then the Registration Certificate will be issued. As per the records maintained at PWD office, Ariyalur the name of PW-2 not found in the register for Registered Contractor. Thus it is evident that unless the appellant given permission application

38. Demand need not be a verbal demand. A non verbal communication conveying the demand is sufficient. A person can make a demand by showing his pocket, opening his table drawer or through "toss" sign. In this case, both PW.2 [Sundararaj] and PW.3 [Lakshminarayanan] had in unison deposed that the appellant demanded the money by raising his eye brow and shaking his head. This gesture has been understood by PW.2 as demand of bribe in the light of the earlier demand made by the appellant on 17.09.2001 which has culminated in the complaint [Ex.P.2]. The gesture of the appellant and the act of the appellant receiving the money and keeping it in his pant pocket, considered along with the content of the complaint, it is very clear that the money received is only towards motive to do favour for PW.2.

39. Rebuttal of Statutory presumption:-

The explanation by producing the circular for fixing the target for Flag Day donation is no explanation at all. The Principal of preponderance of probability can be pressed into service if the fact propounded by the appellant probablises the explanation offered. Here the fact propounded by the appellant is the target of Rs.7,000/- fixed by the District Collector for collection of flag day. However, his action of

receiving Rs.2,500/- from PW.2 who came for receiving application form and keeping the money in his pant pocket improbable the fact attempted to be propounded.

40. In State of Tamil Nadu Vs. S.Krishnamurthy reported in (2002) 9 SCC 530 relied upon by the learned counsel for the appellant, the Hon'ble Supreme Court taken note of the fact that the defacto complainant a frequent visitor of the Taluk Office and had earlier donated Rs.100/- for the teachers day. Therefore, the tainted money of Rs.300/- on the day of trap would have been received by the accused for Teachers day and not as illegal gratification to show any official favour. The fact of the present case is entirely different. There is no such material particulars to presume any such thing in favour of the appellant.

41. The other judgments cited by the learned counsel for the appellant also relates to the explanation offered by the appellant for the receipt of money as Flag Day donation. The practise prevalent in the Government Office collecting Flag day Fund and Teacher's day Fund cannot be a shield or excuse for a corrupt Officer to get immune from prosecution under Prevention of Corruption Act. If without any material particulars in support of the explanation offered by the accused person, merely because some target has been fixed by the higher authority for collection of Flag day donation will not give any immunity or protection to the erring Government servant making pecuniary advantage by abusing his official position.

42. The explanation for receiving the money is brought out by way of suggestion to the prosecution witnesses like PW.2 defacto complainant, shadow witness PW.3 and the Trap Laying Officer PW.12 in their cross examination. Also appellant relies upon the evidence of DW.1, Ex.D.1 and Ex.D.2. However, the explanation of the appellant immediately after recovery of the tainted money from him was entirely different. As per the recovery mahazar and the evidence of PW.2, PW.3 and PW.12, so seeing the trap team the appellant got perplexed and nervous. Pleaded mercy saying he is likely to retire in few months. The explanation as found in the mahazar the contemporaneous document where the appellant has also affixed his signature is different from the explanation adduced during the trial.

43. The Trial Court after due consideration of the judgments of Hon'ble Supreme Court and the facts in hand had rightly arrived at the conclusion of holding the appellant guilty for offences under Section 7 and 13(1)(d) of Prevention of Corruption Act. The prosecution has proved the case beyond reasonable doubt through overwhelming evidence, the demand and

acceptance of illegal gratification of Rs.2,500/- from PW.2 for issuing application Form. Whereas in contra the explanation offered by the appellant lack material facts to probabilise the explanation. Therefore, this Court finds no error in the judgment of the Trial Court.

Sentence:

44. Insofar as the sentence imposed on the appellant, the learned Counsel appearing for the appellant would submit that the appellant was trapped few months before his superannuation. He had lost all his retirement benefits and suffering for the past 17 years. Presently 74 years old with ailments relating to old age.

45. In this context, this Court wish to extract the following observation of the Hon'ble Supreme Court in Madhukar Bhaskarrao Joshi vs. State of Maharashtra reported in 2000 (8) SCC 571

"When corruption was sought to be eliminated from the polity all possible stringent measures are to be adopted within the bounds of law. One such measure is to provide condign punishment. Parliament measured the parameters for such condign punishment and in that process wanted to fix a minimum sentence of imprisonment for giving deterrent impact on other public servants who are prone to corrupt deals. That was precisely the reason why the sentence was fixed as 7 years and directed that even if the said period of imprisonment need not be given the sentence shall not be less than the imprisonment for one year. Such a legislative insistence is reflection of Parliaments resolve to meet corruption cases with very strong hand and to give signals of deterrence as the most pivotal feature of sentencing of corrupt public servants. All public servants were warned through such a legislative measure that corrupt public servants have to face very serious consequences. If on the other hand any public servant is given the impression that if he succeeds in protracting the proceedings that would help him to have the advantage of getting a very light sentence even if the case ends in conviction, we are afraid its fallout would afford incentive to public servants who are susceptible to corruption to indulge in such nefarious practices with immunity. Increasing the fine after

reducing the imprisonment to a nominal period can also defeat the purpose as the corrupt public servant could easily raise the fine amount through the same means."

46. As far as sentence is concern it is to be conceded that, it is always left to the discretion of the judge subject to minimum sentence (if any) prescribed in the statue and no policy on sentence formulated so far in the Indian Criminal Jurisprudence unlike some Western Countries. The reason for not formulating a uniform sentencing policy is to allow the trained judicial mind to independently decided about sentence based on the facts of the case in hand and not upon some hypothetical guidelines. However trained a judicial mind be, err in human. Judges may fail in their assessment regarding sentence. For which Section 386(a)(iii) of the Criminal Procedure Code provides remedy by empowering the Appellate Court to alter the nature or extent of sentence while confirming the finding of the Court below. The facts of this case warrants such interference.

47. This Court with due reverence to observation of the Hon'ble Supreme Court, in Madhukar Bhaskara Rao case cited supra, taking note of the mitigating factors placed before the Court by the learned Counsel for the appellant, alters the period of sentence as under:-

Conviction under Section	Sentence imposed by the Trial Court	Sentence alters by this Court.
Under Section 7 of P.C. Act	To undergo 5 years S.I and to pay a fine of Rs.25,000/- in default of payment in fine to undergo further 1 year Simple Imprisonment	To undergo 1 (one) year S.I. and to pay a fine of Rs.25,000/- in default of payment in fine to undergo further 1 year S.I.
Under Section 13(2) r/w 13(1) (d) of P.C. Act	To undergo 7 years S.I and to pay a fine of Rs.25,000/- in default of payment of fine to undergo 1 year S.I.	To undergo 2 (two) years S.I and to pay a fine of Rs.25,000/- in default of payment of fine to undergo 1 year S.I.

48. The sentence imposed by this Court shall run concurrently. The period of sentence already undergone shall be set off.

49. In the result, with above modification in the period of sentence, the Criminal Appeal No.181 of 2016 is dismissed. The trial Court is directed to secure the custody of the appellant and commit him to the prison to undergo remaining period of sentence as modified by this Court.

Sd/-
Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

bsm
To

1. The Deputy Superintendent of Police,
Vigilance and Anti Corruption,
Trichy.
2. The Chief Judicial Magistrate/Special Judge,
Ariyalur.
3. The Additional Public Prosecutor,
High Court, Madras.
4. The Superintendent Central Prison, Trichy.

Criminal Appeal No.181 of 2016

VGI (CO)
EU(23/07/2018)

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