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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL No. 143 OF 2006

Dr. Nishikant Bhaskarrao Kulkarni	)..Org. Accused No.1
(since deceased)	)
through his Legal Heirs	)
1. Anuradha Nishikant Kulkarni	)
wife of deceased Dr. Nishikant	)
Bhaskarrao Kulkarni	)
Age 59 years, Occupation Housewife,	)
Presently Residing at Flat No.3,	)
Bhumidarshan Society	)
Harihar Nagar, Dindori Road,	)
Mhasrul, Nashik – 422 004	)
2. Priyanka Tushar Kulkarni	)
Daughter of Deceased Dr. Nishikant	)
Bhaskarrao Kulkarni,	)
Age 38 years, Occupation Housewife,	)
Residing at 90, Hari Om Villa	)
Bopal, Ahmadabad, Gujarat	)
3. Amita Mandar Joshi	)
Daughter of Deceased Dr. Nishikant	)
Bhaskarrao Kulkarni	)
Age 36 years, Occupation Service,	)
Residing at 8, Suvarna Palace	)
Kala Nagar, Dindori Road,	)

Mhasrul, Nashik

)...Appellants

Versus

State of Maharashtra

)

(D.Y.S.P. Anti Corruption Bureau,

)

Nashik)

)...Respondent

WITH

CRIMINAL APPEAL No. 111 OF 2006

Shri Kadar Amin Shaikh

)

Age 35 years, Service – Sweeper

)

Manmad Municipal Council

)

Resident of Idgaha Hutment, Manmad

)

Taluka Nandgaon, Dist. Nasik

)..Appellant

(Org. Accused No.2)

Versus

The State of Maharashtra

)

(Through Dy. S.P., A.C.B., Nasik)

)...Respondent

Mr. Ritesh Thobde for Appellant in Appeal No. 143 of 2006

Mr. Shree Ram Kulkarni a/w. Mr. Devidas Jadhav for Appellant in Appeal No.111/2006

Mr. Y.M. Nakhwa- APP for the State

CORAM : SMT.SADHANA S. JADHAV, J.

DATE : FEBRUARY 14, 2019

P.C.:

1. The Appellants herein are convicted vide judgment and order dated 27.12.2005 in Sessions Case No. 16 of 1999 passed by the Additional Sessions Judge and Special Judge, Malegaon. The Appellant (in Criminal Appeal No. 143 of 2006) – Original Accused No.1 is convicted for the offence punishable under Section 13 (1) (d) r/w. 13 (2) of the Prevention of Corruption Act, 1988 and sentenced to suffer R.I. for 1 year and to pay fine of Rs.1,000/-, in default, to suffer S.I. for 2 months. The Appellant (in Criminal Appeal 111 of 2006) – Original Accused No.2 is convicted for the offence punishable under section 7 r/w. 12 of the Prevention of Corruption Act and sentenced to suffer R.I. for six months and to pay fine of Rs.500/-, in default, to suffer S.I. for one month. Hence, this appeal.

2. Such of the facts necessary for decision of the appeal are as under.

3. The Appellant - Dr. Nishikant Kulkarni in Criminal Appeal No. 143 of 2006 was officiating as a Medical Officer at Manmad Municipal Hospital in the year 1987. Appellant in Criminal Appeal

No. 111 of 2006 was serving as a peon in the said hospital. On 9th September, 1987, Manohar Mulchandani approached the office of the Anti Corruption Bureau at Nasik and lodged a report alleging therein that his brother Puran had expired. He wanted to mutate the name of his brother along with himself in the property extract and, therefore, he was in need of a death certificate of his deceased brother Puran. Initially, he had submitted an application to Dr. Nishkant Kulkarni. However, he was directed to submit the same to the Municipal Council. Thereafter, he had once again approached the Medical Officer and requested him to issue death certificate. There was a demand of Rs.150/- by the doctor. Since Mr. Mulchandani was incapable of paying the same, the amount was negotiated to Rs.100/-. He was unwilling to pay the said amount as a bribe and, therefore, he was constrained to approach the office of the Anti Corruption Bureau at Nasik. He had informed that he was to pay the said amount on the next date i.e. on 9th of September, 1987. The Anti Corruption Bureau, upon hearing the complaint and receiving report in writing, had decided to lay a trap. Two public servants were called upon to act as panchas. The pre-trap panchnama was conducted. Thereafter, on 9th September, 1987, one Mr. Prabhakar Panditrao Dandavate, working as a Joint

Director of Animal Husbandry was called upon to act as a panch, more particularly, as a Shadow Witness and to follow the Complainant. On 9th September, 1987, the Complainant Mulchandani along with Panch Dandavate had approached the office of Medical Officer. Upon his arrival and query, the Medical Officer had assured him that he has kept his medical certificate ready. After some time, one employee of the Hospital (Kadar Shaikh) – Appellant in Criminal Appeal No.111 of 2006 had called upon Mulchandani and they had been to the cabin of the Medical Officer. The Medical Officer had asked the Complainant to hand over the amount of Rs.100/- to the said peon. The peon had accepted the same. The Complainant had given the pre-determined signal. The Complainant had collected the certificate. Thereafter, the raiding party had laid the trap. The tainted notes were seized from the custody of the peon Mr. Shaikh. The first information report was lodged by Dy. S.P. (ACB) on behalf of the State. On the basis of the said report, Crime No. 142 of 1987 was registered against the Appellants for the offences punishable under Section 5(1) (d) r.w. 5(2) of Prevention of Corruption Act, 1947 equivalent to section 13(1) (d) r/w. 13 (2) of Prevention of Corruption Act, 1988 and offences punishable under section 161, 165A of the

Indian Penal Code. After completion of the investigation, the charge sheet was filed. The case was registered as Special Case No. 16 of 1999.

4. At the trial, the de-facto Complainant Manohar R. Mulchandani had proved the contents of his report filed in the office of ACB which is marked as Exhibit 37. He has deposed in consonance with the said report. In the cross examination, he has admitted that there are several cases registered against him at Manmad City Police. He had evaded to answer whether his photo has been displayed at the police station as history sheeteer. He was convicted by the Manmad Court and sentenced to suffer 6 months under the provisions of Bombay Prohibition Act and, thereafter, he has been acquitted by the Appellate Court. According to him, Accused No.1 was a close relative of the judge, who was trying to reach the complainant. It is elicited in the cross examination that Accused No.1 had informed him that he has to file an application to the concerned clerk of the Municipal Council for obtaining a death certificate. He had met Accused No.1 on 7.9.1987. At that time, Accused No.1 was examining a patient. The conversation between him and Accused No.1 was restricted to issuance of death

certificate. He was directed to go through proper channel for obtaining the death certificate. On 8th September, 1987, he had collected the documents from the Municipality and had once again approached Accused No.1. It is admitted in the cross examination that he had first visited the office of Accused No.1 on 20th August, 1987 and that the discussion was going on regarding payment of money since 20.8.1987. According to the Complainant, the first demand was made on 20th August, 1987. It is admitted that he had received the death certificate on 9.9.1987. There are inherent omissions in the evidence of the de-facto complainant.

5. PW2 Madhav Shejul was officiating as Chief Officer of Manmad Municipal Council. He had sanctioned the prosecution of Accused No.2. It is admitted before the Court that the standing committee comprised of the Councilors of the Manmad Municipal Council had already passed the resolution for granting sanction to prosecute. It is admitted that he had accorded the sanction for prosecution as per the resolution of the Standing Committee.

6. PW3- Khanderao Rambhau Pawar is one of the Panchas. He was serving in Animal Husbandry Department. His evidence would

not bear any significance except the fact that Dandavate was working with him and that they both were the members of the raiding party. The shadow panch Mr. Dandavate had expired prior to commencement of the trial and, therefore, he could not be examined by the prosecution. In any case, the evidence of PW3 would be of no significance. He has proved the pre-trap panchnama and the post trap panchnama.

7. PW-4 Dr. Basavraj Mahadeo- Appa Dama was working as Joint Director of Health at Pune. He has admitted in the cross examination that he had received a draft sanction order and he had signed the same. He has also admitted that initially he was of the opinion that there was no prima facie case against Accused No.1 Nishikant Kulkarni. But since he had received the draft sanction order, he had signed the same and sent it to the ACB. Prior to his taking over the office, the sanction order was sent to the respective officers and was not received. Dy. S.P. Radwe, who has carried out the trap, had expired and therefore, PW5 had stepped into the witness box.

8. Heard. The respective counsel for the Appellants in both the Appeals submits as under.

9. That there is no material to show that the amount, which was accepted by Accused No.2, was towards gratification or that he had accepted on behalf of Original Accused No.1. According to Accused No.1, he has been falsely implicated in the case. That he had not solicited any gratification or reward for issuing death certificate and that he has been falsely implicated since defacto complainant was being tried by the judge, who coincidently happens to be his relative. Dandavate had expired prior to commencement of the trial and there is no iota of evidence to show that the amount was issued towards gratification and accepted for the same. It is also submitted that there is no proper application of mind for granting sanction and, therefore, on that sole ground, the Appellants deserve to be acquitted.

10. The incident is more than 30 years' old. The Appellant in Criminal Appeal No. 143 of 2006 has expired and the matter is being prosecuted by the wife and daughter of the Original Accused No.1.

11. Upon perusal of the substantive evidence of PW2, it is more than clear that he had accorded sanction to prosecute only because he was advised by the Municipal Council through a resolution passed by the Council to prosecute Accused No.2.

12. In the case of **Mansukhlal Vithaldas Chauhan Vs. State of Gujarat [(1997) 7 Supreme Court Cases 622]**, the Apex Court has observed as follows:

“ The sanction is not intended to be, nor is an automatic formality and it is essential that the provisions in regard to sanction should be observed with complete strictness. One of the guiding principles for sanctioning authority is to keep in mind the public interest and, therefore, the protection available under Section 6 to a public servant cannot be said to be absolute. Sanction lifts the bar for prosecution. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecutions. Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecution and

is a safeguard for the innocent but not a shield for the guilty.

Therefore, the validity of sanction would depend upon the material placed before the Sanctioning Authority and the fact that all the relevant facts, material and evidence have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material collected during investigation and placed before it. This fact can also be established by the extrinsic evidence by placing relevant files before the Court to show that all relevant facts were considered by the sanctioning authority.

The sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take a decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If

it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution."

13. In the present case also the Municipal Council had exercised advisory jurisdiction by passing a resolution that Accused No.1 deserves to be prosecuted and the sanctioning authority had upheld the said resolution and granted sanction. There is no material on record to indicate that there was a proper application of mind. The same was treated as an idle formality. The sanctioning authority had acted upon the resolution passed by Municipal Council.

14. The learned counsel Mr. Kulkarni for Accused No.2 submits that even if the case of the prosecution is accepted without addition or subtraction, it can not be said that Accused No.2 had personal knowledge that the amount of Rs.100/- accepted by him was towards gratification. That he had not

accepted the amount on behalf of Mr. Kulkarni. In fact, at one stage, the Municipal Council was of the opinion that Accused No.2 should be treated as an approver. In fact the accused No.2 had not made any demand to the complainant. Even according to the defacto Complainant the demand was made by Accused No.1. He had received it, since Accused No.1 had asked the complainant to pay the said amount to him. Implicit reliance can be placed upon the judgment of the Hon'ble Apex Court in the case of **C. Sukumaran Vs. State of Kerala [(2015) 11 Supreme Court Cases 314]** has observed as follows:

“It has been continuously held by this Court in a catena of cases after interpretation of the provisions of Section 7 and 13(1) (d) of the Act that the demand of illegal gratification by the accused is the sine qua non for constituting an offence under the provisions of the act. Thus, the burden to prove the accusation against the appellant for the offence punishable under Section 13(1) (d) of the Act with regard to the acceptance of illegal gratification from the complainant PW2, lies on the prosecution.”

The Hon'ble Apex Court in the case of **Selvaraj Vs. State of Karnataka [(2015) 10 Supreme Court Cases 230]** has observed as follows:

“The allegation of bribe taking should be considered along with other material circumstances. Demand has to be proved by adducing clinching evidence. Recovery of tainted money is not sufficient to convict the accused. There has to be corroboration of the testimony of the complainant regarding the demand of bribe.”

The Apex Court further observed as follows:

“the prosecution has to prove the charge beyond reasonable doubt like any other criminal offence and the accused should be considered innocent till it is proved to the contrary by proper proof of demand and acceptance of illegal gratification, which is the vital ingredient to secure the conviction in a bribery case.”

15. Similarly, from perusal of the substantive evidence of PW4, it is apparent that there was no application of mind and what was sent as the sanction order to the office of ACB was draft sanction, which was sent by ACB for approval. Suffice to say that in the present case the prosecution has failed to prove that there was no valid sanction from the sanctioning authority to prosecute the present Appellant. It is a matter of record that due to non-examination of the shadow panch, there is no corroboration of demand and acceptance and the facts which had transpired between Accused No.1 and the complainant preceding the trap laid by the ACB. It is a cardinal

principle of criminal jurisprudence that in the case of Prevention of Corruption Act the demand is *sine qua non* to prove acceptance as bribe or gratification. The Hon'ble Apex Court in the case of **Panalal Damodar Rathi Vs. State of Maharashtra [(1979) 4 Supreme Court Cases 526]** has held as follows:

“There could be no doubt that the evidence of the complainant should be corroborated in material particulars. After introduction of Section 165-A, IPC making the person who offers bribe guilty of abetment of bribery, the complainant cannot be placed on any better footing than that of an accomplice and corroboration in material particulars connecting the accused with the crime has to be insisted upon.”

16. In view of the above discussion, the Appellants deserve to be acquitted of all the charges leveled against them. Hence the following order:

ORDER

- (i) Both the Appeals viz. Criminal Appeal No. 143 of 2006 and Criminal Appeal No.111 of 2006 are allowed and stand

disposed of.

- (ii) The conviction of the Appellants vide judgment and order dated 27.12.2005 in Sessions Case No. 16 of 1999 by the Additional Sessions Judge and Special Judge, Malegaon is hereby quashed and set aside.
- (iii) The Appellants herein are acquitted of the offences punishable under Section 13 (1) (d) r/w. 13 (2) and under 7 r/w. 12 of the Prevention of Corruption Act of the Prevention of Corruption Act, 1988. The Appellants herein be released forthwith.
- (iv) Bail bonds stand canceled.
- (v) The fine amount, if paid, shall be refunded.

In the view of the disposal of the appeals, no separate orders are necessary to be filed in criminal applications. Hence, Criminal Applications stand disposed of.

[SMT.SADHANA S. JADHAV, J.]