

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

CRIMINAL APPEAL NO.898 OF 2012

Pratap M. Ghadge
Age - 56 years, Occupation - Service,
R/at. 12, Pitruच्या Niwas,
Sarvodaya Nagar, Bhandup (W),
Mumbai - 400 078 .. Petitioner

Vs.

The State of Maharashtra
(At the instance of ACB Worli,
Mumbai, vide C.R.No.10/2000) .. Respondent

**WITH
CRIMINAL APPEAL NO.818 OF 2012**

Sanjay S/o. Shriram Lad
Age - 47 years, Occupation - Service,
R/at. Room No.11/54,
Andumbar Swami, Sec-2A, Airoli,
Navi Mumbai .. Petitioner

Vs.

The State of Maharashtra .. Respondent

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Mr.Vaibhav Bagade, Advocate for the Appellant in Appeal
No.898 of 2012.
Mr.Satyavrat Joshi, Advocate for the Appellant in Appeal
No.818 of 2012.
Mrs.Jyoti S. Lohokare, APP for Respondent - State.

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CORAM : PRAKASH D. NAIK, JJ.

JUDGMENT RESERVED ON : AUGUST 4, 2018.

LISTED FOR DIRECTION/CLARIFIATION : JULY 1, 2019.

JUDGMENT DELIVERED ON : JULY 9, 2019

JUDGMENT :

The Appellant in both Appeals were convicted for the offence punishable under Section 7 of Prevention of Corruption Act, 1988 (hereinafter referred to as "PC Act", for short) and sentenced to suffer Rigorous Imprisonment for three years and to pay fine of Rs.5,000/-, Rs.3,000/-, respectively, and, in default of payment of fine, to suffer simple imprisonment for one month. They were also convicted for the offence under Section 13(1)(d) punishable under Section 13(2) of PC Act and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.3,000/- and Rs.2,000/-, respectively and in default of payment of fine, to suffer simple imprisonment for one month. The order of conviction was passed by the Special Judge for ACB Greater Bombay on 12th June, 2012 in ACB Special Case No.93 of 2002. Appeals were listed for

direction/clarification on 1st July, 2019 and again judgment was reserved.

2 The prosecution case is as under:

- (a) The complainant is having business of milk and bakery. He conducts business in his shop by name “R.K. Stores” at Santacruz, Mumbai. His brother-in-law is looking after the business. Complainant is also having another shop by name “Ajay Dairy”, at Dattamandir Road, Santacruz (East), Mumbai. His younger brother helps him in his business of milk.

- (b) On 8th March, 2000, the complainant was informed by his son that two persons are quarreling with his brother-in-law. Complainant visited shop. Two persons were found quarreling with his brother-in-law Munnilal. Complainant made inquiries with the said persons. They gave their names as Sanjay Lad and Rane. They also informed that they are police constables attached

to Narcotic Cell, Andheri (East), and, that two small packets of Ganja were recovered from R.K. Store. They also showed him two small packets of Ganja. Munnilal informed the complainant that the said persons had not searched the shop and small packets were not found in their shop. However, the said persons insisted that the recovery was done from his shop and the complainant has to visit their office at Andheri. They took the complainant with them in a taxi. They stopped the taxi in front of Vihar hotel. After alighting from the vehicle, accused no.2 had talk on mobile. Accused no.2 told the complainant that he had talk on his mobile with Ghadge, who is the officer of Narcotic Cell Andheri. and as per his directions they are taking him to Narcotic Cell Andheri. They also stated that Ghadge is also coming from Mulund. By walk, they reached near Shivmani hotel. At that time accused no.2 (Sanjay Lad) and Rane demanded Rs.1 lakh, as a bribe from the complainant for not taking action for recovery of two packets of Ganja from his shop. They also told him that

the said amount is demanded for themselves and for their superior officer Ghadge.

- (c) Complainant was taken to Andheri police station, Narcotic Cell office and again there was a demand of Rs.1 lakh from him. One person arrived in the said room of Narcotic Cell office. Sanjay Lad (accused no.2) introduced him as officer Ghadge (accused no.1). Accused no.2 and accused no.3 Rajendra Rane informed accused no.1 that two packets of Ganja are found in complainant's shop. Accused no.1 stated that the matter is very serious and told the complainant to settle the matter by paying Rs.1 lakh as a bribe amount or else offence would be registered against him and he will be arrested. The complainant told them that he is not in a position to pay such a big amount. The accused suggested that the complainant can pay some amount on same day i.e. 8th March, 200, and the balance amount in installments. They demanded Rs.15,000/- from the complainant on the same day. Accused no.1

informed accused no.2 and accused no.3 to accompany complainant to his shop and to collect Rs.15,000/-. Accused nos.2 and 3 visited the shop of the complainant. Sufficient amount was not available in the shop, hence, the complainant requested his friend to part with an amount of Rs.10,000/- and handed over Rs.15,000/- to accused nos.2 and 3. At that time, complainant's brother, his son, servants and his friend were present in the shop. Accused also advised the complainant to pay Rs.10,000/- on 10th March, 2000, at Narcotic Cell Andheri.

- (d) Complaint was lodged on 10th March, 2000. Offence was registered vide C.R.No.10 of 2000 against the accused. Pre-trap procedure was followed. Anthracene powder was applied to currency notes. The trapping party along with the complainant and two panchas proceeded to Narcotic Cell at Andheri. The complainant entered into the police station. Accused no.2 was present. He asked the complainant to wait outside. The

members of raiding party were standing outside near Ganesh Zunka Bhakar Kendra. Accused no.2 came there, he accepted tainted currency notes from the complainant and kept the same in his left side pant pocket. On giving signal, the raiding party members arrived there and apprehended accused no.2.

- (e) Post trap panahnama was prepared. Tainted currency notes were recovered from left side pocket of accused no.2. The effect of Anthracene powder was noted on his left hand and also on the opening portion of the left side pant pocket. Apart from the tainted currency notes, Rs.10,000/- were also recovered from the pocket of accused no.2. After completing the post trap procedure, panchanama was prepared. During the investigation, statements of witnesses were recorded and after receiving sanction, charge - sheet was filed against the three accused. Accused no.3 was reported to be dead and the case against him was abated.

dated 10th December, 2018 under Section 7 and Section 13(1) (d) read with 13(2) of the PC Act.

4 Prosecution has examined five witnesses. PW 1 Baliram Ramakaran Yadav is the complainant. P.W.2 Hemant Manohar Lade, panch witness for pre-trap and post trap panchanama. P.W 3 M.N. Singh is Commissioner of Police who accorded sanction for prosecution. P.W.4 Ajay Baliram Yadav is the son of the complainant. P.W.5 Ashok Vastrad is the investigation officer.

5 The appellant in Criminal Appeal No.898 of 2012, was arrayed as accused no.1 while the appellant in Criminal Appeal No.818 of 2012 was impleaded as accused no.2. Accused no.3 died before the commencement of trial. The trial Court gave a finding that the appellants are public servants and sanction for prosecution has been validly granted. Accused nos.1 and 2 demanded bribe amount of Rs.1 lakh from the complainant for not registering the criminal case against him under NDPS Act on 8th March,

2000 and accepted gratification of Rs.15,000/-, as a first installment on 8th March, 2000. Accused no.2 demanded and accepted the gratification of Rs.10,000/-, as an installment out of Rs.1,00,000/- from the complainant on 10th March, 2000 for himself and accused no.1 as an installment out of Rs.1,00,000/-. Accused nos.1 and 2 being Government servants by corrupt and illegal means, by abusing their position, obtained pecuniary advantage of Rs.10,000/- from the complainant.

6 Learned advocate Shri Bagade appearing for the appellant in Criminal Appeal No.898 of 2012 and learned advocate Shri Joshi representing appellant in Criminal Appeal No.818 of 2012, submitted that the trial Court has committed an error in convicting the appellant accused. The sanction to prosecute the accused was invalid. Trial Court has failed to consider inherent improbabilities in the case of prosecution. The sanction was accorded without application of mind. PW 3 who accorded the sanction had not deposed anything about correctness of its contents. The prosecution failed to prove the sanction order. PW 3 has mechanically

accepted the draft sanction and approved the same. The evidence of PW1 and PW 4 is doubtful. There are various infirmities in the nature of improvements in their evidence. There is no recovery of tainted amount from accused no.1. He was not present at the time of the alleged trap. Police did not conduct verification of the complaint. FIR was not registered immediately. Demand has not been established about the charge under Section 12 of the PC Act and or Section 109 of IPC was not framed and hence accused no.1 from whom there was no recovery of the tainted amount and not found accepting the bribe amount ought not to have been prosecuted for the offences charged against him. The entire case of the prosecution stands vitiated.

7 It is submitted that the demand is sine-qua-non for a prosecution under PC Act and it needs to have an independent corroboration since the complainant is no better than accomplice in the case of corruption. The demand has not been proved since except the evidence of complainant, there is no evidence on record to corroborate the version of the complainant. The complainant has not stated in the

evidence that hands of the accused were checked under an ultra violet lamp. Panch witness has given a different version as regards demand on the day of the trap and hence in the absence of independent corroboration, the prosecution case would fail. There are two contrary versions as regards the incident of trap. PW 2 panch witness has not fully supported the prosecution case and he was declared hostile. The letter dated 2nd November, 2000, forwarded by ACB to PW 3 for grant of sanction (Exhibit – 25) indicate that 2051 pages (set of copies of evidence) were enclosed with the said letter although charge – sheet was not prove then 100 pages which shows that extraneous material for forwarded and considered by PW 3 while according sanction.

8 Learned APP supported the judgment of the trial Court. According to her, there is no infirmity in the impugned judgment. The complainant and his son PW 4 has proved the demand made by the accused. The evidence of the said witnesses has not been discarded in any manner by the defence. All the three accused were present at the time of demand. Although accused no.1 was not present at the time

of acceptance of the amount, the demand made by him at the police station and the demand by the co-accused and acceptance of the amount for themselves and accused no.1 clearly establishes the prosecution case. Since the demand of acceptance were proved and all of them made demand, there was no necessity of framing charge under Section 12 of the PC Act. The presumption under Section 20(1) would support the prosecution case wherein any trial of an offence punishable under Section 7 or section 11 or Clause (a) or Clause (b) of Sub-Section (1) of Section 13, it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate. It is further submitted that since the

receipt of gratification was proved, the Court could presume that such gratification was accepted as a reward for doing the public duty. Learned APP further submitted that Section 114 of Evidence Act cast absolute discretion to the Court to presume the existence of certain facts in the matter specified therein.

9 I have scrutinized the evidence on record. The prosecution has examined five witnesses in support of its case. PW 1 Baliram Ramkaran Yadav has deposed that he is conducting the business of selling Bakery items and milk. He was informed that two persons have visited R.K. Stores (Bakery Shop) and they are quarreling with Munilal (Brother-in-law of PW 1). Complainant visited the said shop and found two persons arguing with his brother-in-law. They had conducted search and they found two small packets of Ganja in the shop. They also disclosed their names as Sanjay Lad and Rane and that they were from Narcotic Division. Sanjay Lad showed two small packets to PW 1. However, his brother-in-law informed him that no such search was conducted and no packets were found in the shop. Accused then told the

complainant that it is a grave offence and he will have to come with them at their office at Andheri. Accused took the complainant with them in a taxi. They stopped the taxi at Vihar Hotel, Santacruz. Accused no.2 got down from the taxi, and, talked on mobile phone with somebody and than told complainant to pay tax fare. All of them walked towards Shivmahal Hotel, Santacruz alighted from taxi. Accused nos.2 and 3 demanded an amount of Rs.1 lakh for settling the matter outside and not taking an action against him for themselves as well as for their higher officer Shri Ghadge. The complainant showed his inability to pay such big amount. He was taken the premises situated behind Andheri police station by auto-rickshaw. He was taken to a room on ground floor. Board was displayed outside the premises that it is office of Narcotic Cell. PW 1 identified accused no.2. Accused again demanded Rs.1 lakh from him. One person entered the room. Accused no.2 told PW 1 that he is his superior Shri Ghadge. He identified accused no.1 in Court. Accused nos.2 and 3 appraised Shri Ghadge about recovery of two packets of Ganja from the shop of the complainant. Ghadge (accused

no.1) demanded Rs. 1 lakh for settling the matter. PW 1 showed inability to pay the amount. He was warned him that he would remain in custody for a longer period. All the accused had discussion between them and advised him to pay Rs.1,00,000/- by installments. He was asked to pay an amount of Rs.15,000/- on same day. To avoid custody, complainant agreed to pay the amount. Accused no.1 told other accused to accompany complainant to his shop for collecting rs.15,000/-. Complainant arranged the amount after collecting Rs.10,000/- from his friend Santosh Singhand handed over the same to accused nos.2 and 3 in presence of his brother, two servants, son, Santosh Singh and Jagdev Trivedi. Accused also told him to bring Rs.10,000/- on 10th at 4:00 p.m. Complainant visited ACB's office on 9th, but he had no money and hence came back. He was asked to come with money on 10th. He then visited ACB's office on 10th at 10:30 a.m. He narrated the said fact to PW 5. His complaint was recorded. Panchas were called. Currency notes were produced. Anthracene powder were applied to currency notes. Tainted notes were kept in left pocket of his shirt. Pre-

trap panchanama was recorded. He was instructed to move his left hand on his head after acceptance of those notes by the accused. Panch Lade was asked to stay with him, hear the conversation about the demand and also watch the transaction. Other panch Pacharkar was instructed to stay with raiding party. Raiding party proceeded from office of ACB in two vehicles. Complainant and panch witness entered the room of Narcotic Cell. Accused was sitting. He was asked to wait outside. Accused no.2 then inquired about the amount for him and others. Complainant told him that he has brought the money. All of them came to Zunka Bhakhar Centre. Accused no.2 then asked whether he has brought his amount. He replied that he has brought Rs.10,000/-. Accused no.2 demanded money. PW1 took out tainted notes from the pocket of his shirt and gave it to accused no.2. The amount was accepted by accused no.2. complainant then gave signal to the raiding party. The accused was apprehended. Since civilian had gathered, the accused was taken to Andheri Police station. Amount was recovered from the accused. His palms and cloths were checked in the special lamp. In the

cross-examination PW 1 has stated that on 9th March, 2000, he had expressed his grievance to PW 5 in ACB office. On that day his statement was not recorded. He was asked to bring trap amount on 10th March, 2000. PW 5 did not make any further enquiry with him. On 9th March, 2000, PW 5 had asked him about description of the person who demanded bribe. On 9th March, 2000, nothing was written by PW 5. He gave description of accused no.1. On 10th March, 2000, he did not give facial expression of accused no.1 except colour whitish complex. On 9th March, 2000, he did not gave facial description of accused no.1. When he first visited Narcotic Cell only two persons i.e. accused nos.2 and 3 were present. He had stated before ACB that accused no.1 told him that he would stay in custody for a long period. He had also stated that accused nos.1 to 3 had discussed amongst themselves and asked him to pay an amount of Rs.1 lakh by installments. The words "discussion amongst them", was noted as omission. He did not lodge any complaint about the incident of 8th March, 2000 to Vakola Police station. He did not discuss about the incident of 8th March, 2000 with any other person.

He was aware that the offence under NDPS Act is of serious nature. He was frightened that he may be put behind bar. He was avoiding registration of case against him and his arrest. On 9th March, 2000 and 10th March, 2000, he went to ACB office alone. He did not lodge any complaint nor discussed with superior of the accused regarding threats by accused of arrest. On 10th March, 2000, accused no.2 was in Narcotic Cell and talking with one civilian. He cannot say whether any officer or employee were present in the Narcotic Cell, Andheri. Bribe amount was not taken in custody at Zunka Bhakar Kendra by ACB.

10 PW 2 Hemant Lade is the panch witness. He deposed that he visited the office of ACB along with the other panch Ganesh Pacharker. Complainant produced currency notes. One constable applied powder to the notes. The tainted notes were given to the complainant. He put them in his right shirt pocket. Some writing took place, which is signed by him. He went towards Anti Narcotic Cell, Andheri in the premises of Andheri Police Station along with the complainant. The other members of raiding party were

following them. He along with the complainant came near the door of Anti Narcotic Cell. Complainant spoke to one person who was inside Anti Narcotic Cell and enquired with him, *"Saheb Aahet Ka, Amhi Paise Anle aahet"*. The person told them to wait outside. They went to tapari. The persons who was inside the Anti Narcotic Cell came along with one person at the tapari. Complainant said, "should I pay the money". The said person to whom they spoke in Anti Narcotic Cell told the complainant *"Chalega"*. The complainant took out tainted notes from his pocket by his right hand and gave it to the said person. The said person took tainted notes by his right hand and was keeping the said notes in his right pant pocket. The complainant gave signal to raiding party. The person who accepted the amount was apprehended. Witness identified accused no.2 as person who caught on the spot. As the accused in the Court stood up during case, he can say that he is the same person. Accused no.2 threw the said notes at the ground in the tapari itself which were collected by panch no.2 from the ground and thereafter they went to Andheri police station. Accused No.2 examined under special

light and powder was noted on his right hand and pant. Panch no.2 was asked to search accused no.2. Since the witness was not supporting the prosecution case on some material points, permission was granted to APP to put questions to the witness by cross-examination. Learned APP conducted extensive cross-examination of PW 2. Several suggestions put up to the witnesses by learned APP were denied by him. He denied that he deliberately deposed in examination-in-chief that the person who applied powder on the notes, given the said notes to the complainant and he put the same in his right shirt pocket. He also stated that it did happen that complainant was apprised to hand over the notes only after demand by accused no.2, till then he should not touch the notes. He was instructed to move his left hand over his head as a signal of acceptance money. It did happen that he was instructed to remain with the complainant to observe the transaction and hear conversation. It did not happen that accused no.2 saw them near the door of Anti Narcotic Cell and told them to wait outside as he would be coming. He did state the said facts to ACB. He had stated to ACB that

complainant himself told that he had brought the amount, but the said fact is not appearing in his statement. Accused no.2 asked the complainant whether he has brought amount for him and Mr.Gadge, which was replied in affirmative. He did not state to police that accused accepted notes by right hand and put them in right pant pocket. It did happen that at Zunka Bhakar Kendra, the complainant told accused no.2 *"Sahab Ab Mera Kya Hoga"*. Thereafter, accused no.2 told that everything will be okay and demanded the amount. It is not correct to state that he deliberately stated in examination-in-chief that accused no.2 thrown the notes on the ground and panch no.2 took out the said notes. Witness was also cross-examined by the defence. In the said cross-examination, he deposed that the name of Mr.Ghadge as accused no.1 do not appearing in any of the panchanama. While he was in the Court earlier, he was allowed to read panchanama as well as statement. After reading panchanama, he deposed that the incident had taken place accordingly since it is mentioned in the panchanama. In the Court Question, he clarified that the incident had transpired,

therefore, he deposed. Zunka Bhakar Kendra is situated towards North of the police station. While at the door of Anti Narcotic Cell he could see only accused no.2. Before examination of accused and his pant, the hands of the raiding party and panchas were not examined under the UV Light. From the time when accused was apprehended till his pant was taken in charge, he did not change his clothes. He understand the difference between jeans pant and plain pant.

11 PW 3 Mahesh Narayan Singh was working as a Commissioner of Police of Mumbai in the rank of Director General of Police (DGP) His office received the letter dated 2nd November, 2000, of ACB for seeking sanction for prosecution of accused. Alongwith the letter, he received draft sanction order and investigation papers. Opinion of the legal advisor was sought. He had gone through the investigation papers and report submitted by ACB. He applied his mind and came to the conclusion that *prima facie* case was made out for according sanction against the accused. Accordingly, he accorded sanction. With the help of

draft sanction order, the sanction was prepared. From the draft sanction order, the order was typed order and the said typed was corrected by him and thereafter sanction order was prepared. The appointment letter of accused no.1 was signed by DIG. The Commissioner of Police for Mumbai with the rank of DGP is higher than the rank of DIG. Office of Police Commissioner Mumbai is part of Maharashtra Police headed by D.G.M.S. Police Commissioner as well as D.G. Maharashtra State is appointed under Bombay Police Act. He accorded sanction in the capacity having power of removal and dismissal to PSI. He did not feel it necessary to mention that he was appointing authority. Appointment of letter was assigned by DIG on behalf of DGMS Mumbai. He cannot operate or have power beyond the jurisdiction of Mumbai. DG Maharashtra State has control all over Maharashtra. Post of accused no.1 belongs to State Cadre. Commissioner of Police cannot appoint a Sub-inspector in a State Cadre. He had mentioned in the sanction order that he has exercised power conferred under Section 19 of the Act which means that he can issue sanction order under Section 19 of PC Act.

There is no material change in draft sanction order and sanction order. The sanction order does not reflect exact word which he has deposed in examination-in-chief for *prima facie* case for according sanction. It conveys the same meaning.

12 PW 4 Ajay Baliram Yadav is the son of PW 1. He referred to the incident dated 8th March, 2000, which had occurred in the shop of R.K. Store. He informed about the visit of the accused at the said shop to PW 1. He deposed that Accused nos.2 and 3 took PW 1 by taxi. He was brought back at about 11:30 p.m. by accused nos.2 and 3. he also stated that Rs.15,000/-, was given to accused nos.2 and 3. PW 1 had told him that he has to pay Rs.10,000/- to accused no.1 on 10th April, 2000 at Andheri Narcotic Cell. In the cross-examination, conducted on behalf of accused no.2, he stated that he had visited the Court along with his friend who is an advocate. He is present in the Court. His statement was recorded at the shop. He was not called for identification of accused no.2.

13 PW 5 Ashok Vastrad was attached to ACB at the relevant time. He conducted investigation. He recorded statements of witnesses. He has deposed about investigation, pre-trap, post-trap panchanama, recovery of tainted notes etc. On completing investigation, final report is filed before the court. On 10th March, 2000, he had no contact with complainant PW 1. He denied that on 8th March, 2000 and 9th March, 2000, complainant had contacted him personally and since he had intention to prepare false case against accused no.1, he did not record his complaint on that dates and recorded it on 10th March, 2000. Entry at Serial No.3 on Exhibit- 37 though shows that accused no.1 was deputed on Court duty on 10th March, 2000, there is no entry in station diary regarding his leaving the police station and returning back to police station to attend Court duty. He collected from the police station, station diary entry dated 8th, 9th and 10th March, 2000. There is no documents filed with the charge-sheet to show that mobile number assigned to accused no.1 was also provided by him in his office. FIR was dispatched to the Court on 11th March, 2000 at 10:30 a.m. The complainant

had not disclosed him while lodging the FIR that accused no.1 had stated that he would stay in custody for a long period and that accused had discussion between them and asked him to pay Rs.1 lakh by installment and that the remaining amount to be paid at the earliest. It was necessary to conduct verification of the complaint given by the complainant. Usually the verification of the complaint needs to be done prior to lodging of FIR. The verification can be done only if it is necessary. In this case, the verification of the complaint was not done according to the procedure at that time. He did not collect documentary evidence nor filed the same with the charge-sheet to show that the complainant owns grocery shop and milk dairy. He had collected the station diary entry and the entries in movement register dated 8th March, 2000 in respect of duty of accused no.2 from Andheri Police station. Due to lapse of time, without verifying documents i.e. station diary and movement register, he cannot state exactly the timing of duty performed by accused no.2 on 8th March, 2000. Zunka Bhakar Kendra is situated on the North side of compound wall of Andheri police station.

Zunka Bhakar Kendra is situated on the left side of Andheri police station. He had not personally seen the incident and heard the conversation. The panchanama was prepared as narrated by the panchas. It is not mentioned in panchanama Exhibit-22 that the contents of the panchanama were narrated by panchas.

14 On completing the recording of evidence of witnesses, statement of the accused was recorded under Section 313 of Code of Criminal Procedure. Accused no.1 had stated in the said statement that on 8th March, 2000, he had left the office of Narcotic Cell, Andheri at about 8:00 p.m., as his duty time was over and his cousin had been to his house for his treatment of Cancer. On 10th March, 2000, he took his cousin to Dombivali for treatment. On the same day, he attended the case in Bhoiwada Court after 3:00 p.m. Then he attended Shivaji Park Police station. In the evening, he came to know that trap has been conducted by ACB office. He had not deputed accused no.2 for any duty on 8th March, 2000. He did not ask to collect money from complainant or any one

else. Accused no.2 has filed a written statement vide Exhibit-42 by way of his explanation vide Section 313 of Cr.P.C. He stated that he has never demanded or accepted the amount in the form of gratification or otherwise. On the day of incident, complainant met him on footpath. He inquired about whereabouts of Mr.Rai, who is friend of the complainant and frequently visits police station. He attempted and thrust some amount in his hands forcibly. He did not accept the amount which fell on the ground. Nothing was recovered from his possession. No traces of anthracine powder were seen or found on his clothes and his hands.

15 On analysing the evidence of the aforesaid witnesses, it can be seen that the prosecution case is based on the fact that accused nos.2 and 3 had visited shop of the complainant. They threatened the complainant of consequence of the involvement, arrest in the NDPS case. They demanded an amount of Rs.1 lakh. The complainant was taken to the police station. Demand was made by all the accused. He agreed to make payment of Rs.15,000/-, as a part of the bribe amount. He parted with the said amount.

The complainant was supposed to make the further payment on 10th March, 2000. The complaint was made to ACB. Pre-trap panchanama was recorded. The amount was given to accused no.2 on 10th March, 2000. He was apprehended. Amount was recovered. Post-trap panchanama was recoded. Thus, admittedly, accused no.1 was not found present in the company of accused no.2 at the time of alleged incident of acceptance of money and recovery of the same. The complaint was recorded on 10th March, 2000. The complaint was not verified. The amount of Rs.15,000/-, was allegedly accepted by accused nos.2 and 3 on 8th March, 2000. Except version of PW 1 and PW 4, there is no independent evidence to corroborate the said fact. However, complaint was recorded on 10th March, 2000. There was no verification of said assertion by ACB, although, the incident was of serious nature viz. acceptance of Rs.15,000/-, the recovery of Ganja from the shop of PW 1, he was to be implicated in a serious case. It is also pertinent in the aforesaid circumstances that no complaint was lodged with the police about the threats, acceptance of the amount and demand of bribe, immediately

after the incident. The evidence of the independent witness i.e. PW 2 does not inspire confidence. Since he did not support the prosecution on material point, he was extensively cross-examined by prosecution. Even in cross-examination although he admitted certain facts qua prosecution, on many aspects, he has deviated from case of prosecution and hence veracity of his evidence is under the clouds of suspicion. Investigating officer has denied that PW 1 had visited ACB office on 9th March, 2000 for reporting the matter as deposed by PW 1. Accused no.1 was not present on the day when he was supposed to receive the amount of gratification. The prosecution is relying upon bare words of complainant and there is no independent corroboration. No bribe amount was found with accused no.1. Prosecution has failed to collect the additional evidence of presence of accused no.1 on the first day of alleged demand. The statement of the person on duty at the police station were not recorded. There is no corroborative evidence to establish that the call was made by accused no.2 to accused no.1 on the first day of the alleged incident. There were omissions in the evidence of PW 1. PW 4

who is son of PW 1 has not deposed anything against accused no.1.

16 There is no material on record to show that complainant is having shop and incident took place in relation to his shop. Prosecution has to prove voluntary acceptance of bribe. There is no corroboration to version of complainant and panch. Demand prior to trap is based on evidence of PW 1 and there is no independent corroboration. Complaint/prosecution has not produced document regarding R.K. Store to support theory of Ganja, demand of bribe etc. PW 4 do not refer to demand by accused. Panch witness stated that amount was thrown by accused on ground, which contrary to evidence of PW 1. There is omission about warning by accused no.1 that complainant would stay in custody for long and accused had discussion and demanded ten lakhs.

17 Complaint was not immediately reduced to writing. This creates a doubt on the version of the Complainant vis-a-vis the fact that though he had visited the

office of the ACB on 9th March, 2000, his statement was not immediately recorded neither was there a previous complaint. The fact that the Complaint of the complainant herein was not reduced to writing forthwith creates a heavy doubt regarding genuineness the entire prosecution case. Panch no.1 has introduced a new story wherein he has stated that accused No.2 threw the tainted currency notes on the ground at the time when they were in the Tapari. Paragraph 19 of the cross-examination of said witness indicates that the panch was allowed to read the panchanama as well as statement when he was in Court on an earlier occasion. It is in these circumstances, that the panch has stealthily chosen to read the panchanama and other documents. Panch could have been permitted to refresh his memory in presence of the Court, however, instead the prosecution has provided him with the documents which leads to an inference that the witness must have been tutored. The evidence of the Investigating Officer, who conducted the investigation, is to the effect that in cross-examination at paragraph 9 he has admitted that there was no verification of the demand done

prior to the registration of the FIR. This aspect is significant in the facts of this case. He has also admitted in paragraph 10 of the cross-examination that he had collected the Station Diary entries and entries in the movement Register dated 8th March, 2000, in respect of accused No.2. However, he could not narrate duty performed by the accused no.2.

18 The investigating machinery has not taken charge of documents to show presence of accused no.1 in the office to substantiate demand made by him. Statements of persons on duty at police station were not recorded. There is no whisper against accused no.1 in evidence of PW 2. PW 4 narrated incident of PW 1 coming back for collection of amount on return from Andheri Narcotic Cell. The disclosure made by PW 1 to him have not involved accused no.1. Panch witness has changed his version in respect of keeping the amount by accused no.2 in his pant pocket. In paragraph 4 of examination in chief of PW 2 it was stated as follows:

“Witness now says that accused no.2 threw the said notes at the ground in tapari itself which

were collected b panch no.2 Pacharkar from the ground and thereafter we went to Andheri Police Station.”

In paragraph 19 of his evidence he admitted that earlier he was allowed to read panchanama and statement. After reading panchanama, he deposed that the incident had taken place accordingly because it is mentioned in panchanama. However, to Court question he replied that the incident has transpired, therefore, he deposed. PW 5 states that in the panchanama it is not written/incorporated that he had heard the conversation between complainant and accused no.2.

19 Sanction order was challenged on the ground of non-application of mind. Evidence of PW 3 indicates that sanctioning authority had gone through investigation papers and was of the opinion that the accused should be prosecuted of the offences constituted by the acts stated therein. Thus, there is no infirmity in sanction order. However, on the other infirmities as stated above, it will have to be opined that the

prosecution have failed to prove its case beyond doubt. Considering the nature of evidence, benefit of doubt must be given to the accused.

20 Learned APP had relied upon decision of the Supreme Court in the case of ***M. Narsinga Rao Vs. state of A.P.***¹. In the said decision, it was observed that:

“17 Presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the court is only applying a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. Presumption in Law of Evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the court can draw an inference and that would remain until such inference is either disproved or dispelled. For the purpose of reaching one conclusion the court can rely on a factual presumption. Unless the presumption is

1 2001 SCC (Cri) 258

disproved or dispelled or rebutted, the court can treat the presumption as tantamounting to proof. However, as a caution of prudence we have to observe that it may be unsafe to use that presumption to draw yet another discretionary presumption unless there is a statutory compulsion. This Court has indicated so in Suresh Budharmal Kalani Vs. State of Maharashtra². A presumption can be drawn only from facts - and not from other presumptions by a process of probable and logical reasoning."

The Apex Court in the said decision has considered the effect of Section 20(1) of the PC Act. Paragraphs 12 to 14 of the said decision reads as follows:

"12 While advertng to the first contention of the learned counsel we may reproduce Section 20(1) of the Act. [That sub- section is virtually the same as Section 4(1) of the predecessor Act of 1947].

"20(1) Presumption where public servant accepts gratification other than legal remuneration. -(1) Where, in any trial of an offence punishable under Section 7 or Section 11 or clause (a) or clause (b) of sub-section (1) of Section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself,

or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

- 13 *Before proceeding further, we may point out that the expressions may presume and shall presume are defined in Section 4 of the Evidence Act. The presumptions falling under the former category are compendiously known as factual presumptions or discretionary presumptions and those falling under the latter as legal presumptions or compulsory presumptions. When the expression shall be presumed is employed in Section 20(1) of the Act it must have the same import of compulsion.*
- 14 *When the sub-section deals with legal presumption it is to be understood as in terrorem i.e. in tone of a command that it has to be presumed that the accused accepted the gratification as a motive or reward for doing or forbearing to do any official act etc., if the condition envisaged in the former part of the section is satisfied. The only condition for drawing such a legal presumption under Section 20*

is that during trial it should be proved that the accused has accepted or agreed to accept any gratification. The section does not say that the said condition should be satisfied through direct evidence. Its only requirement is that it must be proved that the accused has accepted or agreed to accept gratification. Direct evidence is one of the modes through which a fact can be proved. But that is not the only mode envisaged in the Evidence Act."

In paragraph 21 of the said decision, it is observed that those proved facts the Court can legitimately draw a presumption that the accused received and accepted the currency notes on his own volition. Of course, the said presumption is not an inviolable one, as the accused could rebut it either through cross-examination of witnesses cited against him or by adducing reliable evidence. If the accused fails to disprove the presumption, the same would stick and then it can be held by Court that the prosecution has proved that the accused received the amount.

21 However, in the present case, the prosecution case suffers from serious infirmities. There is doubt about the veracity of the evidence of the witnesses. There is no cogent

independent evidence to corroborate the prosecution witnesses. The evidence of P.W.1 and PW 4 is doubtful, and, therefore, in the light of the nature of evidence in the present case, it cannot be said that the prosecution has established its case of demand and acceptance beyond doubt.

22 The defence counsel had relied upon the decision in the case of ***Jawansingh Ramsingh Gaud & Anr. Vs. State of Maharashtra***³, wherein it was observed that in the event of serious infirmities in the case of the prosecution such as not proving the initial demand of bribe satisfactorily, not verifying the version of the complainant, version of panch witnesses being not reliable, the accused is entitled for benefit of doubt. Reliance is also placed on the decision of this Court in the case of ***Khushalchand Yashwant Gaikwad Vs. State of Maharashtra***⁴, wherein it was observed that mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7, since the demand of illegal

3 2016(2) Bom.C.R. (Cri.) 421

4 Criminal Appeal No.522 of 2012, decided on 18.4.2018

gratification is *sine-qua-non* to constitute the said offence. It is only of proof of acceptance of illegal gratification that the presumption can be drawn under Section 20 of PC Act that such gratification was received for doing or forbearing to do any official act. Learned counsel also relied upon the decision of this Court in the case of Anna Mahadu Arote Vs. State of Maharashtra⁵, wherein it was observed that demand of illegal gratification is *sine-qua-non* for constitution of offence under the provisions of the PC Act.

23 In the case of ***Ninaji Wagh Vs. State of Maharashtra***⁶, it was observed that the testimony of complainant as to payment of illegal gratification has to be proved by corroboration in material particulars connecting the accused with the crime. In the case of ***Chandrasen Chavan Vs. State of Maharashtra***⁷, this Court has observed that except bare words of the complainant that there was alleged demand of Rs.500/-, by accused, there is no independent evidence to corroborate his version. The court

5 Criminal Appeal No..433 of 2004, decided on 07.07.2018

6 All MR (Cri.) 1157

7 2011 All MR (Cri.)1250

relied upon several decisions of the Apex Court and had arrived at the conclusion that the prosecution has not established its case beyond doubt. In the case of ***Shrikant Borade Vs. State of Maharashtra***⁸, this Court had observed that the demand of illegal gratification has to be corroborated by independent witnesses. Complainant's evidence is not reliable.

24 In the case of ***B. Jayraj Vs. State of A.P.***⁹, in paragraph 8, it was observed as follows:

“8..... there is no other evidence to prove that the accused had made any demand, the evidence of P.W.1 and the contents of Ext.P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused. We are, therefore, inclined to hold that the learned trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact such

8 2011 All MR (Cri.) 1247

9 (2014) 13 SCC 55

possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under section 7. The above also will be conclusive insofar as the the offence under Sections 13(1) (d)(i) and (ii) is concerned as 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 established.

(emphasis supplied)

In the decision of Apex Court in **State of Punjab Vs. Madan Mohen Lal Verma¹⁰**, in paragraph 11 it was observed as follows:

“11 The law on the issue is well settled that demand of illegal gratification is sine-qua-non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove

¹⁰ (2013) 14 SCC 153

payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act. By bringing on record evidence either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the

same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convicting the accused person.”

25 In the case of ***N. Sankarnna Vs. State of Andhra Pradesh***¹¹, it is observed that, it is settled law that, mere possession and recovery of currency notes from accused without proof of demand will not bring home offence under Section 7. The same principle is also applicable to offence under Section 13(1)(d) of PC Act. In ***T.K. Rameshkumar Vs. State through Police Inspector Bangalore***¹² Court has referred to decision in the case of B. Jayraj (Supra) and reiterated same principle. In the case of ***Khaleel Ahmed Vs. State of Karnataka***¹³, it was held that Section 20 do not apply to Section 13(1)(d). Regarding presumption raised under Section 20 for the offence under Section 7, it is settled law that, presumption is rebuttable and the burden placed on accused to rebutt the same is one of preponderance of probabilities, as soon as he succeeds in

11 (2016) 1 SCC 713

12 (2015) 15 SC 629

13 (2015) 16 SCC 350

doing the burden is shifted to prosecution which still has to discharge its original onus that never shifts i.e. that of establishing on the whole case the guilt of the accused beyond a reasonable doubt.

26 As stated above, there are serious infirmities in the evidence of the prosecution witnesses, the nature of evidence clearly shows that the case is not proved beyond doubt and benefit of doubt has to be given to the appellants. Hence, the conviction is required to be set aside.

27 Hence, I pass the following order:

:: ORDER ::

- (i) Criminal Appeal Nos.898 of 2012 and 818 of 2012, are allowed;
- (ii) The impugned judgment and order dated 12th June, 2012, passed in Special Case No.93 of 2002, passed by Special Judge for Greater Bombay in ACB Special Case No.93 of 2002, is quashed and set aside and the

Appellants/accused Nos.1 and 2 are acquitted of the offences for which they were charged and convicted.

(iii) Criminal Appeals stand disposed of.

(PRAKASH D. NAIK, J.)