

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.224 OF 2010

The State of Maharashtra
Through Police Inspector
Anti-Corruption Bureau,
Jalna

... Appellant

Versus

1. Syed Imam S/o Syed Yakub
Age: 42 years, Occu.: PSI
R/o Pensionpura, Jalna,
Dist. Jalna.
2. Durgadas Babulal Kaushalye,
Age: 38 years, Occu.: Police Naik,
R/o Jalna, Narimannagar,
Jalna, Dist. Jalna.

... Respondents

.....
Mr. P. G. Borade, APP for Appellant-State.
Mr. Satej S. Jadhav, Advocate for respondents.
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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 06-02-2020.

JUDGMENT :

Present appeal has been filed by the State challenging the acquittal of the respondents by the learned Special Judge and Ad-hoc Additional Sessions Judge-1, Jalna in Special Case (PCA) No.06 of 2004

dated 26-07-2007.

2. The present respondents-original accused persons stood prosecuted for committing offence punishable under Sections 7 read with Section 12, 13(1)(d) and 13(2) of Prevention of Corruption Act (hereinafter referred to as "PC Act").

3. It is not in dispute that present respondent No.1 was serving as Police Sub Inspector at Sadar Bazar Police Station, Jalna in January 2004 and accused No.2 was serving as Police Head Constable with the same police station.

4. The original complainant-Mohammad Abdul Kalim had filed complaint with Anti Corruption Bureau stating that he used to run business at Agrasen Chowk, Aurangabad Road, near Nasrulla Shah Kadri Dargah since about 5 years prior to the said complaint. He used to run the said business from the shed (Tapari) which was installed on the open space of Marathwada Waqf Board. It is stated that Mutawalli Shri Jahiroddin was the possessor of the said open space, who had executed a registered lease deed for 99 years in favour of Kalim on 02-08-2002. The agreed rent for the shed was Rs.100/- per year. According to the complainant, accused No.1 went to him on 07-01-

2004 and told that a complaint has been received stating that Kalim has made encroachment by erecting shed and it should be removed. It was then disclosed by the complainant to accused No.1 that he has taken that premises on rent under that Kararnama. However, accused No.1 insisted complainant that he should remove the said shed, otherwise it would be broken. Accused No.1 had refused to disclose the name of the person who had made complaint, when it was asked by the complainant to accused No.1. It is then alleged that, accused No.1 demanded amount of Rs.15,000/- assuring that if that amount is paid, he would see that the shed is not broken and he would manage that person who has made the complaint. Kalim expressed inability to pay the amount as he was not having. However, accused No.1 told him to bring that amount on the next day and insisted that if that amount is not given he would remove that shed. The complainant says that due to fear, he did not open the shop on 08-01-2004 and went to Deogaon, Tq. Badnapur. He returned at about 8.00 p.m. and found that his tin shed was not at place therefore, he went to Bhokardan Naka Police Chowky and found his tin shed behind the Chowky, but accused No.1 was not available and therefore, he went to police Chowky on the next day i.e. on 09-01-2004. He met accused No.1 and asked as to why the shed has been removed and brought there. Accused No.1 told that as he has not paid the amount it has been brought. Again accused No.1 told that if Kalim pays amount of Rs.5,000/-, then the

shed will be returned to him and no case would be filed against him. Accused No.1 also gave threat that if the amount is not given he would file case against Kalim. Kalim gave assurance and went home. It is also stated that accused No.1, before Kalim left, had obtained his signature on a piece of paper and photocopy of the rent note was also taken. Thereafter, complainant went to police chowky on 13-01-2004, but accused No.1 was not available. But Kalim went to Sadar Bazar Police Station at about 8.00 p.m. and contacted accused No.1. He had made request to accused No.1 to return the shed and at that time accused No.1 demanded Rs.5,000/-. Settlement was done for Rs.2,000/-. It was told by the complainant that he would pay that amount on 14-01-2004. As the complainant had no intention to give that amount as bribe, he went to Anti-Corruption Bureau, Jalna and lodged complaint.

5. After the complaint was reduced into writing, panchas were arranged. Pre-trap panchanama was prepared after giving instructions and demonstration in respect of those activities which would be carried out at the time of trap, all of them went to police station. Karim, his brother and panch No.1 went ahead. After the signal was given as decided, the raiding party went in police station. The tainted amount was recovered from accused No.2. The shirt of accused No.2 was seized. Documents regarding the case

were seized. Post-trap panchanama was executed. Thereafter, police inspector attached to Anti-Corruption Bureau lodged First Information Report against the accused persons on behalf of State.

6. After the registration of crime, investigation was carried out. Statements of the witnesses were recorded. Sanction to prosecute both the accused was obtained. Accused came to be arrested in the crime and after the completion of the crime, charge sheet was filed.

7. After both the accused appeared, charge was framed at Exhibit-11 for the offence punishable under Section 7 of PC Act against accused No.1. Further, the charge under Section 7 read with Section 12 of PC Act was also framed against both the accused and against accused No.1, it was also under Section 13(1) (d) read with Section 13(2) of PC Act.

8. Contents of the charge were read over and explained to the accused persons in vernacular. They pleaded not guilty and therefore, trial has been conducted.

9. Prosecution has examined in all five witnesses to bring home the guilt of the accused persons. Since incriminating evidence had come,

statement of the accused persons under Section 313 of the Code of Criminal Procedure has been recorded. Accused has examined a defence witness. After hearing both sides and perusing the evidence on record, the learned Special Judge has acquitted both the accused persons from all the charges. Hence, the present appeal.

10. Heard learned APP Mr. P. G. Borade for appellant-State and learned Advocate Mr. S. S. Jadhav for respondents-original accused persons. Perused the record.

11. It has been vehemently submitted on behalf of the appellant that the learned trial Judge has not appreciated the evidence properly. The prosecution witnesses have corroborated with each other on all aspects. The complainant has deposed that amount was demanded from him by accused No.1 for not filing any case against him and for the return of the shed belonging to him, which was seized. Though initial demand was Rs.15,000/-, yet, it was then changed to Rs.5000/- and ultimately settled at Rs.2000/-. The complainant and panch No.1 both have stated that such demand for money was made by accused No.1. On the say of accused No.1, the amount was given to accused No.2 and therefore, it has been recovered from the pocket of his shirt. There is no explanation by the accused as to

how Anthracene powder was found on their hands. Rather they have admitted in their defence that they have accepted the amount. It is their defence that it was a settlement amount to be given to D.W.-1 Nashrulla, who had made complaint against the complainant. The testimony of D.W.-1 is absolutely not believable. In fact, in his cross, he says that complainant might have obtained premises from Waqf Board on rent. If there is registered instrument of lease for a period of 99 years, between the complainant and the Waqf Board regarding the tin shed and the Waqf Board, who is admittedly the owner of the open space where the shed was erected, then no amount was due from complainant to D.W.-1 Nashrulla. He could not have asked any amount as damages caused to him from the complainant. The defence has been unnecessarily believed by the learned trial Judge. If we brush aside the testimony of the defence witness, then what remains is the acceptance of the tainted amount by the accused persons. When that amount was not due from the complainant to the accused persons, then definitely it is an “illegal gratification” for which they ought to have been punished. Very technical approach has been adopted by the learned trial Judge.

12. Per contra, learned Advocate appearing for the respondents supported the reasons given by the learned trial Judge. It was also submitted that there are major contradictions and omissions in the evidence adduced by

the prosecution. The sanction to prosecute the accused has not been properly proved by examining the sanctioning authority. The defence that has been taken by the accused has been properly explained. The presumption under Section 20 of the PC Act is a rebuttable presumption. The standard of proof to rebut the presumption is not equivalent to the standard of proof that is expected from prosecution to prove guilt, beyond reasonable doubt, however, it should rest on preponderance of probabilities. When the person who had made complaint against the complainant had come before the Court, stated about it and it has also been stated that the complainant had agreed to pay the damages to him, the accused persons who had taken active part in the redressal of the grievance of the defence witness had accepted the said amount on behalf of him. That amount cannot be said to be an illegal gratification. Therefore, on the basis of probable defence, the accused persons have been rightly acquitted.

13. At the outset, it is to be noted that the sanction order was given by Special Inspector General of Police, Aurangabad region, Aurangabad on 06-04-2004 and it has been admitted by the accused persons and therefore, it came to be exhibited as Exhibit-23. Now, they cannot raise any question in respect of the sanction order.

14. PW-1 is the panch witness No.1. PW-2 is the complainant. PW-3 is the panch witness No.2, PW-4 is head constable, who had taken complaint application on 07-01-2004 given by one Liyakat Khan. PW-5 was then serving as ASI with Sadar Bazar Police Station, Jalna, who was writing a report when the talk between the complainant and accused were going on 14-01-2004. PW-6 is the investigating officer.

15. At the outset, it is to be further noted that conjoint reading of the testimony of PW-1 and PW-2 would give many contradictions and omissions. Though the broad story told by them is in consonance with the prosecution story, yet, there are material contradictions. First of all, when the alleged demand was made by accused No.1 to the complainant on 07-01-2004 and 09-01-2004, he was alone and there is no corroboration to his testimony. Here, reliance will have to be placed on the decision in ***Avinash Sitaram Garware v/s. State of Maharashtra*** reported in **2008 (1) LJSOFT 20 : 2007 (4) Bom L. R. 2579**; wherein it has been held that, *“Once the prior demand is not proved the rest of the prosecution case regarding money allegedly demanded by the accused will have to be read with great caution and circumspection”*.

In such cases of Anti Corruption, the evidence of the complainant is required to be minutely scanned on the background that as an

accomplice. Reliance can be placed on the decisions in ***Gulam Mahmood A. Malek v/s. State of Gujarat*** reported in 1980 (Supp) SCC 684; wherein it has been held that, *“the testimony of complainant himself is in the nature of an accomplice and his story is prima-facie suspect for which corroboration in material particulars is necessary”*. Similar ratio has been laid down in ***Panalal Damodar Rathi v/s. State of Maharashtra*** reported in AIR 1979 SC 1191. Further it has been held in ***Deepakkumar s/o. Shashikumar Mishra v/s. State of Maharashtra*** reported in 2011 (4) LJSOFT 146 that, *“After introduction of section 165 – A of IPC making the person who offers bribe guilty of abatement of bribery, the complainant cannot be placed on any better footing than that of an accomplice. The uncorroborated testimony of complainant is not sufficient to uphold the conviction of the appellant”*. Thus, by keeping this legal position in mind, the evidence is required to be assessed. Since there is no corroboration to the story of demand and there was no verification panchanama, the prosecution story becomes doubtful.

16. Only corroboration as per the evidence given by these two witnesses would be restricted to the incident dated 14-01-2004. According to the complainant, his brother was accompanying him. Said brother has not been examined in this case. Further, the testimony of PW.-2 would show that, the dialogues which he has narrated as the conversation between accused

No.1 and complainant appear to be contrary to those dialogues which were written in the spot panchanama as well as post-trap panchanama. The dialogues are given by him on oath show that there was absolutely no demand from accused No.1 in presence of panch No.1. But, it was the complainant, who was himself saying that he has brought the amount as told by accused No.1. If that is to be related to the earlier demand, then there is absolutely no corroboration to that effect. Further, surprisingly, P.W.-5 ASI Gulam Mohammad is also posed as eye witness and he says that he was sitting in the police station as he was to submit a report. He clearly states that though he was sitting in the same room, he had not heard their talk. He rather says that accused No.1 was telling complainant to get prepared a bond from Tahsil Court and it was the only sentence he had heard. This witness has not been declared hostile. Thus, if the two witnesses that is P.W.-1 and P.W.-5, who were in the same room, are not giving the same version, then it cannot be said that the prosecution was able to prove the demand and acceptance of the amount as illegal gratification.

17. As aforesaid, P.W.-1 i.e. panch No.1 has given the conversation different from what has been told by the complainant himself as well as what is written in the spot panchanama and the post-trap panchanama. The conversation rather shows that the complainant was interested in sorting out

the matter and the prosecution witness PW-5 himself had stated that the accused No.1 was insisting the complainant that he should bring bond from Tahsil office. The said material discrepancies have been rightly considered by the learned trial Judge.

18. PW-1 i.e. panch witness No.1, who had accompanied complainant and was supposed to keep a watch on the conversation between complainant and accused No.1 and also on demand and acceptance of the amount has half heartedly supported the prosecution story, but later on he has not supported the prosecution and under that circumstance, the prosecution has put questions in the nature of cross to him. Thereafter, he has given many admissions, but we will have to consider that when the suggestions have been put to him, he has accepted them. That means, on his own, he has not stated and supported the prosecution, but when it came in the form of cross examination, he has supported. Under such circumstance, the learned trial Judge has rightly disbelieved him.

19. The accused persons have admitted that they had accepted the tainted currency, but according to them that amount was the settlement amount of the dispute between the complainant and D.W. Nashrulla Khan and Liyakat Khan. Prosecution itself has not denied that Liyakat Khan had

given complaint application to accused No.1 on 07-01-2004 against the complainant for removal of encroachment by the complainant. D.W.-1 has specifically stated that he had made that complaint and amount of Rs.2,000/- was agreed by the complainant to be paid to him towards the damages. It appears that the prosecution has not examined the officer from Waqf Board from whom the complainant had taken the open space on lease for a period of 99 years. Though, D.W.-1 Liyakat Khan admits that the complainant might have entered into that lease document, yet, he was firm enough in saying that, that property belongs to him/in possession of the witness and therefore, he had lodged the complaint stating that the complainant had made encroachment. Another aspect that is required to be noted is that though the complaint was filed on 07-01-2004 against the complainant and it was informed by accused No.1 to the complainant on the same day and asked him to remove the shed; the complainant had not approached the Court in order to protect his rights over the open space contending that he has taken it on lease. When he had the opportunity to exhaust legal remedy, he has not undertaken it. His complaint, therefore, will have to be considered as tainted as he has not adopted the legal remedy, but made allegations that the accused No.1 had asked bribe from him. Such person who fails to adopt legal remedy, can not be considered as trustworthy person.

20. The prosecution evidence also discloses that even just prior to the trap, accused No.1 was insisting that he would institute case against the complainant under Section 107 of the Code of Criminal Procedure. He had also suggested the complainant to get bond from Tahsil office. The assurance was also in the said communication by accused No.1 that if he gets that bond, then he would return the shed to the complainant. If this was the approach of accused No.1, then it is hard to believe that the amount would have been accepted as bribe. Further, by examining the defence witness, the accused persons have created a possibility that the said amount would have been accepted by the accused persons as settlement amount for giving it to D.W.-1 Liyakat Khan. Another point also to be noted is that accused No.2 was never in picture earlier. Evidence of the prosecution shows that, he had absolutely no idea that any amount (if any) was demanded by accused No.1, but then he accepted that amount at that moment on the directions given by accused No.1. Prosecution has not come with a case and has not adduced any evidence that at any earlier point of time, accused No.2 had agreed to collect the amount on behalf of accused No.1.

21. Taking into consideration all these aspects, it has been rightly held by the learned trial Judge that the presumption under Section 20 of the PC Act has been rightly rebutted by the accused persons, though they have

admitted that the tainted amount was recovered from them.

22. When there is proper appreciation of evidence by the learned trial Judge, then this Court cannot interfere in the view taken by the learned trial Court. Merely because two views are possible, this Court cannot take the view against the accused as the learned trial Judge has given benefits of certain facts to the accused persons. Hence, no case is made out to convert the acquittal into conviction. Appeal deserves to be dismissed. Accordingly, it is dismissed.

[SMT. VIBHA KANKANWADI, J.]

SCM