

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.586 OF 2015

The State of Maharashtra, Through
Deputy Superintendent of Police,
Anti Corruption Bureau, Jalna,
Tq. and Dist. Jalna.

... Appellant

... Versus ...

Ramesh Tukaram Wagh,
Age 48 yrs., Occ. Service,
Police Head Constable, B. No.586,
Police Station Taluka Jalna,
Dist. Jalna.

... Respondent

...

Mrs. Vaishali Patil-Jadhav, AGP for appellant
Mr. Joydeep Chatterji, Advocate for respondent

...

CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 07th SEPTEMBER, 2020

JUDGMENT :

1 Present appeal has been filed by the prosecution challenging the acquittal of the respondent in Special Case (PCA) No.4/2012 by learned Adhoc Additional Sessions Judge-3, Jalna on 04.03.2015, thereby acquitting

him from the offences punishable under Section 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as, "P.C. Act").

2 The present respondent i.e. original accused is a Police Head Constable, serving with Jalna Taluka Police Station in October, 2011.

3 Original complainant Gunappa Babuappa Barshe was resident of village Mandwa, Tq. Badnapur, Dist. Jalna. He is an agriculturist. He lodged complaint with Anti Corruption Bureau, Jalna on 12.10.2011 contending, that he has five brothers, who are residing separately with their respective family members. The wife of the complainant is the owner of 35 R land bearing Gat No.143 in village Mandwa. In the same Gat number, 92 R land is in the name of father of the complainant and it was in possession of Ramappa-brother of the complainant. The complainant contended, that he had dispute with his brother, in connection with the boundary of the lands from the said Gat number. When such dispute arose on 05.10.2011 and he was abused by his brother Ramappa and sons of brother Ramappa, the said dispute was resolved by other brothers and nephew. Complainant had gone to Jalna Police Station and lodged complaint against his brother Ramappa and his three sons, which was in respect of non cognizable offence. When he was coming out of the Police Station, his brother Ramappa went inside the

Police Station. Thereafter, when he was in Jalna city itself, at that time, the present accused gave a phone call to him and disclosed that offence has been registered against him by Ramappa and he should come to Police Station, however, he did not go. Accused went to complainant's house in Mandwa at about 8.00 p.m. on 06.10.2011 and asked, as to why he has not visited the Police Station though informed on phone. It was also informed that Ramappa has given complaint against him, his two brothers and nephew. Accused then asked all those four persons to come to Police Station on the next day. Complainant and his younger brother Bhimappa went to Police Station on 07.10.2011 and they met accused. It was told, that it was a trifle dispute, however, Ramappa has given a false complaint. But then accused told, that since offence has been registered they would be required to be arrested. When complainant requested that the accused shall not arrest them, then accused told, that the way out is, that if they pay Rs.20,000/- to him, he would produce them before the Court immediately after arrest and immediately they would be released thereafter on bail. Complainant told, that they are poor persons and cannot afford to give amount. Then accused told, that the said amount can be negotiated. The complainant left Police Station by stating, that he would make arrangement for money within 4-5 days. Accused had thereafter given phone call on the mobile of Bhimappa 4-5 times and demanded the amount. However, as the amount was not

arranged they did not contact accused. Complainant then met accused in Police Station on 12.10.2011 and told, that they cannot arrange for the money as told by him, and therefore, he should lower the amount. Initially the accused lowered it to Rs.10,000/- and thereafter the amount was settled at Rs.7,000/-. It was told by the accused, that minimum amount should be given to him then only he would show their arrest and send them for bail to the Court. He threatened, that if amount is not given then after arrest they would be put in lockup and would be produced only on the next day. As no option was left, the complainant agreed to give the amount. But promised that it would be given till 11.00 a.m. on the next day. In the meanwhile the complainant approached Anti Corruption Bureau and lodged the complaint.

4 After the complaint was lodged, two panchas were arranged and in their presence verification panchnama was carried out. At the time of verification the complainant had given phone call in presence of ACB officer Mr. Pagare and the two panchas. The recording of the conversation has been done. After the verification was done it was decided to carry out raid. ACB officer explained the entire procedure, as to how the raid would be carried out, gave instructions to complainant and both the panchas. It was also explained to them, as to how the anthracene powder applied on the amount brought by the complainant would act and demonstration was shown. Pre

trap panchnama was carried out.

5 After the complainant went along with panch No.1 to the Police Station, there was conversation. It is the prosecution story that the accused accepted the amount, which was an illegal gratification for showing the arrest of the complainant and his brothers nominally and then helping then in getting bail before the Court. After the raid was completed, panchnama was carried out. The accused was found with the tainted money. ACB officer Mr. Pagare lodged complaint against the accused on behalf of State and carried out further investigation.

6 During the course of the investigation the statement of witnesses were recorded, accused came to be arrested, sanction was obtained and after the completion of investigation charge sheet was filed.

7 After the accused had appeared before the Special Judge, charge was framed at Exh.10 against the accused. The contents of the charge were read over and explained to him in vernacular. He pleaded not guilty and his trial has been conducted. In all six witnesses have been examined. After considering the evidence on record and hearing both sides the present respondent-original accused came to be acquitted. The said acquittal is under challenge in this appeal.

8 Heard learned APP Mrs. Vaishali Patil-Jadhav for appellant-State and learned Advocate Mr. Joydeep Chatterji for respondent-accused. Perused the paper book and evidence.

9 It has been vehemently submitted by the learned APP, that learned Trial Judge has not appreciated the evidence properly. The demand and acceptance of the amount, which was definitely an illegal gratification, was proved by the prosecution beyond reasonable doubt. The learned Trial Judge went wrong in even issuing notice to the complainant for taking action under Section 344 of the Code of Criminal Procedure, however, he failed to even discuss regarding demand and acceptance. In fact, complaint was well supported by oral evidence. PW 1 Gunappa has proved the contents of his complaint. The only fact, which prevailed upon the learned Special Judge, was the alleged admission by the complainant, that he had forcibly put the amount into the pocket of accused and accused had not demanded it. Learned Judge said, that when he had thrust the amount in the pocket of the accused, it does not prove the demand and acceptance. The testimony of the complainant was well supported by PW 2 Eknath Pawar. It was categorically stated by him, that the said amount was offered on the demand of the accused by the complainant, and therefore, there is no question of thrusting. The panch witness has proved the verification panchnama, pre

trap panchnama and post trap panchnama. It was specifically brought on record, that the fingers of the accused, the pocket of the shirt of the accused had glittering and the tainted money was recovered from the accused. There is absolutely no explanation in his statement under Section 313 of Cr.PC. by the accused. In question No.35, which was to the tune, that why the witnesses were deposing against him, the accused had stated, that the complainant had tried to keep the amount without his permission in his pocket and at that time ACB had arrested him. If the said explanation of the accused is to be accepted, then he wants to paint a picture that he had not touched the tainted currency notes. But then he is not explaining the anthracene powder found on his fingertips, palm etc.. The sanctioning authority has been examined and there is no illegality found in the sanction order. There was proper application of mind by the sanctioning authority. No doubt, the hotel owner, whose hotel is in front of the Police Station and in his hotel the acceptance and demand had taken place, was examined. He has turned hostile. Yet, the corroboration was sufficient from PW 2, the panch witness. The learned Trial Judge has failed in appreciating evidence in proper manner and given importance to those trifling admissions. Therefore, the acquittal of the accused is wrong and illegal, it deserves to be set aside. She prayed for allowing the appeal and convicting the respondent.

10 Per contra, the learned Advocate for respondent supported the reasons given by the learned Judge while acquitting the accused and further submitted, that the important point that is required to be considered is, that in clear words the complainant has admitted that he had thrust the amount in the pocket of accused. Further evidence of PW 2 Eknath Pawar, panch witness would show, that the complainant was not having amount of Rs.7,000/- with him, and therefore, that amount was taken from the office of ACB. This fact has been told by the panch witness in his examination-in-chief itself. This shows, that by any means Anti Corruption Officer wanted to show that the raid was successful. Even if we accept that there was anthracene powder on the hands of the complainant; yet, these admissions given by both the witnesses are sufficient to acquit the accused. There is absolutely no necessity to interfere with the Judgment and order passed by the learned Special Judge. He prayed for the dismissal of the appeal.

11 Taking into consideration the above submissions, following points arise for determination, findings and reasons for the same are as follows.

POINTS

- 1 Whether the prosecution has proved demand and acceptance of the bribe by the accused from the complainant ?

- 2 Whether interference is required in the decision of acquitting the present respondent ?

REASONS

12 At the outset, while deciding any case involving the offence under Anti Corruption Laws, the fact is required to be borne in mind, that the complainant's evidence will have to be scrutinized meticulously. Giving bribe is also an offence but then in order to arrest a person, who has demanded and then would be accepting the bribe, it has to be given; then the testimony of such person requires to be carefully tested. In **Pannalal Damodar Rathi vs. State of Maharashtra, AIR 1979 SC 1191**; it has been held that "There could be no doubt that the evidence of the complainant should be corroborated in material particulars After introduction of Section 165-A of the Indian Penal Code 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".

12.1 Further, in **M.O. Shamsudhin vs. State of Kerala, (1995) 3 SCC 351**; wherein it has been held that "the word 'accomplice' is not defined under the Indian Evidence Act. It is used in its ordinary sense, which means and signifies a guilty partner or associate in a crime. Reading section 133

and illustration (b) to section 114 of the Evidence Act together, the courts in India have held, that while it is not illegal to act upon the uncorroborated testimony of accomplice, the rule of prudence so universally followed has to amount to rule of law, that it is unsafe to act in the evidence of accomplice unless it is corroborated in material aspects so as to implicate the accused". In this case the Hon'ble Supreme Court has thoroughly discussed as to how the evidence of bribe giver is required to be appreciated.

12.2 Further, reliance can be placed on the decision in **Bhiva Doulu Patil vs. State of Maharashtra, AIR 1963 SC 599**; wherein it has been held that "the combined effect of section 133 and 114, illustration (b) may be stated as follows : according to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice is almost always unsafe to convict upon his testimony alone. Therefore, though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal, yet the courts will, as a matter of practice, nor accept the evidence of such a witness without corroboration in material particulars".

12.3 Further, reliance can be placed on the decision in **Gulam Mahmood A. Malek vs. State of Gujarat, 1980 (Supp) SCC 684**; wherein it has been held that "the complainant himself is in the nature of an accomplice

and his story is prima-facie suspect for which corroboration in material particulars is necessary”.

13 Now, after taking note of the legal requirement as to how the evidence of complainant is required to be appreciated, we would see the testimony of PW 1 Gunappa in this case. He has stated each and every fact as per his complaint and the happenings thereafter, however, there appears to be some change in the chronology of events. We need not give importance to the same, since his entire evidence will have to be considered. On the basis of his examination-in-chief the learned APP has submitted, that the demand and acceptance was proved. However, in order to appreciate evidence of a witness his entire testimony i.e. examination-in-chief, then cross-examination by the other side and re-examination, if any, is required to be considered. In his cross-examination he has admitted, that the police had given him a mobile phone having recording facility. The complainant has further admitted, that all the conversations between him and accused, since the filing of the complaint till accused was apprehended, were recorded in the said mobile. However, perusal of the entire evidence would show, that the prosecution has not led any evidence to bring that recording on record and get the tape recorded evidence proved. The discussion on the point of appreciation of tape recorded version and how the panchnama to that effect;

though stated to have been proved through PW 2 Eknath Pawar the panch witness, could be appreciated, would be dealt with later. However, it can be seen further that the complainant has admitted, that he had insisted that the accused should have arrested his brother on the basis of his report. The accused has refused that offer and there is categorical admission, that he had forcibly put that amount into the pocket of accused and accused had not demanded it. On the basis of this evidence the learned APP submits, that in fact, when the 'demand and acceptance' has been proved the accused ought to have been convicted. The learned Trial Judge has specifically observed, that after the last admission was given regarding thrusting, the prosecution has not taken permission for re-examination and has not sought any kind of clarification from the witness. Those observations are correct. In fact, when there was ambiguity between the examination-in-chief and the cross, the prosecution ought to have taken re-examination. The complainant in his examination-in-chief has stated, that after the amount was demanded by the accused he had given it to him, thereby trying to convey indirectly that there was no thrusting. But in the cross he has, then by taking somersault admitted, that though the money was not demanded by the accused he himself has thrust the said amount in the pocket of the accused.

considered is, that the amount, which the complainant was asked to give or he has shown his readiness to give, was to get some favour from the accused, which was not legal. Important point to be noted is, that the copy of First Information Report lodged by the nephew of the complainant PW 1 Gunappa with the police has been produced. Crime No.303/2011 was lodged against the complainant on 05.10.2011 regarding the incident, that had occurred on the same day. Offence was registered under Section 341, 323, 504 read with Section 34 of the Indian Penal Code. All these offences are bailable. The complainant says, that the present accused had informed him about the lodging of the report against him on the same day i.e. on 05.10.2011. Thereafter, the accused is stated to have met the complainant at his residence on the next day i.e. on 06.10.2011. Yet, it appears that the complainant has not sought legal advice and no attempt was made to get bail. If the parameters were satisfied, he could have then avoided his arrest by legal mode. But then the entire evidence of the complainant would show, that he wanted to avoid his arrest by the accused, by some illegal means, and then he says, that the accused had then insisted on him, that he should pay the amount settled. No doubt, corruption is a menace to the society and now it is so deeply rooted, that it would be only a dream to see a corruption free society. But unless people stop giving bribe or asking for the favours and then adopt legal method or mode, we cannot curb corruption. Here, when

the offences against the complainant were bailable, the complainant and his co-accused would have been released on bail by the Court immediately and in fact, there was nothing in the hands of the accused or he would not have showed any leniency to the complainant and his co-accused. We cannot forget that the complainant is a rustic villager and agriculturist, and therefore would have believed the accused in whatever manner he was conveying. But then we cannot forget that there was an element in the mind of complainant, that he and his brothers, who are the accused in that rival complaint, should not be put to any harassment, and therefore, he agreed to give bribery, and therefore, in view of the aforesaid decisions further minute scrutiny is required while appreciating the evidence of the complainant and to see whether the prosecution has brought on record corroboration.

15 Now, turning towards the testimony of PW 2 Eknath Pawar, who is the panch witness No.1 and was under instructions from the Investigating Officer to watch and hear the conversation between complainant and accused. In his examination-in-chief itself he has stated, he and complainant went to Taluka Police Station and met the person, who allegedly had demanded the amount from the complainant. But then he says that on inquiry about the location, opposite party had stated that he is in Taluka Jalna Police Station. However, when the location of the complainant was asked,

complainant told, that he is in Mondha. Accused asked the complainant to come, but complainant told, that he has short of some amount. The complainant also stated, that he would reach Police Station after making adjustment of the amount. Then the panch says, that there was demand of Rs.7,000/-. He has stated that the verification panchnama Exh.18 was then carried out. At this stage, if we consider the verification panchnama Exh.18 then we can see, that the mobile phone of one of the police having facility of recording was made available to the complainant and the complainant was instructed how to operate it. Thereafter, phone call was given to accused and there was conversation, which was recorded. The said conversation has been reproduced in verification panchnama Exh.18. It is also stated, that the recorded conversation was played again and it was tallied with the conversation, that was physically heard and reduced to writing. This conversation has not been told as substantive evidence neither by complainant nor by PW 2 Eknath Pawar. It is also to be noted, that the testimony of the Investigating Officer is also short of giving details about the verification panchnama. The prosecution has not produced the said conversation in any form before the Trial Court. It was the best corroborative piece of evidence to support the oral testimony. When such corroborative piece of evidence was available, yet it was not produced by the prosecution, then definitely adverse inference is required to be drawn. When the

prosecution has come with a case, that conversations were recorded from time to time, however, neither they are produced nor they were played in Court room and their verification was not got done, when the trial was in progress, then a best piece of evidence can be said to have been withheld by the prosecution for the reasons best known to it. Mere production of the extract of the recorded version is not sufficient. Each time when the conversation has been reproduced, it is stated, that it has been got verified from the recorded conversation, then even before the trial Court it ought to have been produced and proved by admissible mode. Hon'ble Supreme Court in **Ziyauddin Burhanuddin Bukhari vs. Brijmohan Ramdas Mehta, AIR 1975 SC 1788** clearly laid down that "The tape recorded speeches were "documents" as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs". Further, in **R.M. Malkani vs. State of Maharashtra, AIR 1973 SC 157**, it has been held that "tape recorded conversation is held admissible if it is relevant, if the voice is identified and the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape recorded conversation". Here, in this case the prosecution has not come with a case that there was some technical difficulty in producing and proving the recorded conversation, and therefore, it does not want to rely upon the same. If after production of such evidence if it is rejected or held to be inadmissible, that does not mean that it would affect

the substantial evidence. Evidence in the form of tape-recorded conversation is corroborative piece of evidence, therefore, admissibility and proof of substantial evidence would definitely on a different footing. Here in this case, when evidence of the complainant necessarily requires corroboration, then such corroborating evidence can not be withheld by the prosecution without any genuine reason. When there is intentional suppression of evidence, though available, then the substantial evidence, to which that corroborated evidence would have corroborated, will have to be viewed with doubts. In **Ram Singh vs. Col. Ram Singh, AIR 1986 SC 3**, following guidelines have been laid down by the Hon'ble Supreme Court for admissibility of tape recorded conversation :

- 1) The voice of the speaker must be duly identified by the maker of the record or by others who recognize his voice. Where the maker has denied the voice it will require very strict proof to determine whether or not it was really the voice of the speaker.
- 2) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence directly or circumstantial.
- 3) Every possibility of tampering with or erasure of a part of the tape recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.
- 4) The statement must be relevant according to the rules of Evidence Act.
- 5) The recorded cassette must be carefully sealed and kept in safe or official custody.
- 6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbance.

16 Here, the mobile phone of a Police Constable has been used to record the conversation, and therefore, that being an electronic device and the fact, that Section 65-A and 65-B were inserted by Act, 21 of 2000 w.e.f. 17.10.2000 and the date of incident in this case is 13.10.2011, there ought to have been a compliance of Section 65-B of the Indian Evidence Act., if that recorded conversation would have been produced and relied by the prosecution. At the costs of repetition, the prosecution has not come with a case, that since there is no compliance under Section 65-B of the Indian Evidence Act, the prosecution does not want to place that piece of evidence on record. Thus, it can be seen that though the Investigating Officer had taken help of modern technique; yet the said piece of evidence has not been produced nor tried to be proved. Oral evidence of panch about hearing of conversation, hearing of recorded conversation by him verifying those contents and statements in the panchnama to that effect, are not sufficient to prove the recorded evidence, unless the voice of maker is identified before the Court and the parameters laid down in **Ram Singh's** case (supra) are fulfilled, we cannot accept the said piece of evidence. Further, the act of getting the conversation stored in CD had taken place and a panchnama to that effect has been produced at Exh.23. However, the testimony of PW 6 Mr. Pagare is silent on the point, that the said CD or copy of the same was sent to

Forensic Laboratory for analysis and also for verification. It also appears that sample of voices were not taken. Then for what purpose earlier, at the time of verification panchnama, the said recording was got done is rather unanswered. Perusal of the pre trap or post trap panchnama does not show, that again the same mobile was given to the complainant and he was asked to record the conversation. After taking into consideration all these aspects it will have to be observed that the prosecution story itself is doubtful, as there is suppression of piece of evidence.

17 PW 2 Pawar has further deposed in his chief, that amount of Rs.7,000/- was taken from office. In his cross by accused he has further stated, that the said amount of Rs.7,000/- was given by Mr. Pagare i.e. Investigating Officer to the complainant. This shows the fact, that complainant was not having that much amount with him and the amount was then supplied by the Investigating Officer himself. This fact has been revealed in the examination-in-chief of the panch witness. Yet, clarification was not further sought on behalf of the prosecution, as to why he has made that statement. This fact, that the Investigating Officer himself had supplied the amount to the complainant, is required to be viewed very seriously. It cannot be the job of the Investigating Officer to supply amount to the complainant from his office just to make the raid successful. PW 6 Mr.

Pagare, the Investigating Officer has stated, that the said amount of Rs.7,000/- was in fact brought by the complainant himself. Thus, it can be seen, that there is a contradiction between these two witnesses of the prosecution regarding the source of the amount, which was to be offered as bribe. Further, in the examination-in-chief, PW 2 Pawar has stated, that the complainant had put those currency notes of Rs.7,000/- in the right side pocket of his trouser, after the anthracene powder was applied to them, when they were about to proceed to police station. That means, at that stage itself the complainant had glittering on his fingers. In his cross-examination, the panch witness has stated, that complainant had counted the amount after applying the anthracene powder. This is also contrary to the contents of the panchnama, wherein it is stated, that the complainant had not handled the amount after the anthracene powder was applied to it till he had offered that amount to accused and then accused had accepted it.

18 Now, as regards the thrusting of the amount is concerned, no doubt, PW 2 and PW 3 are not saying the said fact, that the complainant had thrust the amount in the pocket of accused. However, when the APP, conducting the case before the Trial Court, had not taken pains to get the clarification in re-examination of the complainant, then the said fact will have to be viewed against the prosecution.

19 As aforesaid, though the electronic evidence was not at all proved, yet, if we consider the contents of verification panchnama Exh.18, the conversation mentioned therein will not show, that there was utterance of words 'Rs. 7000/-' by the accused. It is rather by the complainant and not by accused. From the said recitals about the conversation, it cannot be said that 'demand' was proved beyond reasonable doubt. As regards the acceptance is concerned, definitely the amount was found from the pocket of the accused. But at the costs of repetition, it can be said, that though two witnesses are saying that after acceptance the accused had put that amount in his pocket; yet, the complainant himself is saying, that he has thrust that amount in the pocket of the accused. The accused has given a clarification in his statement under Section 313 of Cr.PC., that while he was resisting the thrusting he got anthracene powder of his hand. Thus, he has tried to explain the circumstance, which appears to be a probable circumstance, taking into consideration the admission given by the complainant.

20 Taking into consideration all the above said evidence, scanning thereof and the reasons aforesaid, it will have to be held, that the prosecution has miserably failed in proving the charge levelled against the accused, and therefore, the first point is answered in the negative. Point No.2 is also required to be given in negative, as interference in the Judgment and order

passed by the Special Judge is absolutely not called for. There is no merit in the present appeal, it deserves to be dismissed. Accordingly, it is dismissed.

(Smt. Vibha Kankanwadi, J.)

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