

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.705 OF 2000

The State of Maharashtra	)....Appellant
V/s.	
Gopal Ambadas Gawali	)
Age : Adult,	)
R/o Keshav Nagar Police Station	)
Block No.1, Solapur, Dist. Solapur	)....Respondent

Ms.Anamika Malhotra, APP for appellant.
Mr.Subodh N.Pathak for respondent.
[Mr.Jehangir Jejeebhoy Amicus Curiae.]

CORAM : K.R.SHRIRAM,J
DATE : 22.1.2020

ORAL JUDGMENT :-

1. This is an appeal filed by the State of Maharashtra impugning an order and judgment dated 20.7.2000 passed by the Special Judge, Solapur acquitting respondent of charges under Section 7 (*Offence relating to public servant being bribed*), read with section 13(1)(d) and 13(2) (*Criminal misconduct by a public servant*) of the Prevention of Corruption Act, 1988.

2. On 6.1.2020 when the matter was called out, as respondent (hereinafter referred to as accused) was unrepresented, this court

appointed Mr.Jehangir Jejeebhoy as an Amicus Curiae. Of course, subsequently Mr.Subodh Pathak appeared for accused. Before I proceed with the case, I must express my appreciation for the distinguished assistance rendered by Mr.Jejeebhoy, learned amicus curiae.

3. Heard the counsel and also perused the record & proceedings, the evidence as well as the impugned judgment.

4. The prosecution's story in brief :

(a) Accused was working as a Police Head Constable at Solapur, Taluka Police station, Solapur Rural, Dist. Solapur at the relevant time. On 18.2.1997 at about 2.00 p.m., complainant Dhanaji H.Rathod (PW-3) met accused at his residential quarter in Keshav nagar at which time accused told complainant, i.e., PW-3 that PW-3 was involved in a prohibition case under section 66-B of the Bombay Prohibition Act under Taluka Police Station Jurisdiction and accused was investigating that case, and PW-3 was going to be arrested and probably extorted and to show favour demanded a sum of Rs.1500/- as bribe. PW-3 claims to have fallen at the feet of accused saying that no such action be taken against him, at which time accused demanded Rs.1500/- as bribe. PW-3 pleaded his inability to give such a large

amount because he was unemployed, has given up all his illicit liquor business and now working only as a part time labour.

(b) PW-3 bargained and brought down the amount to Rs.1000/- and accused informed PW-3 to bring the amount on 19.2.1997 at about 10.00 to 10.30 a.m. in Suresh Cycle Mart near S.T.bus stand. When PW-3 went to Keshav Nagar, i.e., to the resident of accused, he was taken on motor cycle by brother-in-law of PW-3 one Dhanaji Pawar, who has not been examined. Dhanaji Pawar, after PW-3 met accused, dropped PW-3 at about 2.30 p.m. near one Panjarapol chowk. PW-3 thought over the matter and felt that accused will not let him live in peace and decided to complain to Anti Corruption Bureau. PW-3 thereafter went over to the office of Anti Corruption Bureau, met API Ghuge (PW-8) who is the Investigating officer and narrated his complaint to PW-8. PW-8 patiently heard PW-3 and noted down the complaint in his handwriting but in the words of PW-3. Simultaneously, PW-8 addressed a letter to M.S.E.B to depute two persons as panch witnesses and those persons reached office of A.C.B at 5.30 p.m. After narrating the facts and completing the preliminaries, a pre trap panchanama was prepared by PW-8. After pre trap panchanama was prepared, complainant and panch witness were directed by PW-8 to report again in the office of A.C.B at 6.00 a.m. on 19.2.1997. After detailed instructions were given,

complainant, the panch witnesses, PW-8 who is the Investigation officer (I.O) and Deputy Superintendent of Police one Mr.Thorat and few other constables being the raiding party went to trap accused. I have to note that apart from PW-1 who was a panch witness, PW-3 who is complainant and PW-8 the Investigating officer, none of the others who were part of the raiding party have been examined by prosecution. Not summoning Mr.Thorat to testify, is a very material lapse because as the Deputy Superintendent of Police he could have been the best witness. I am saying this because the case of accused, which we will deal with later, is PW-8, the I.O., was hand in glove with PW-3 and PW-6 to trap accused with the false case of corruption.

(c) The raiding party reached the meeting point at 10.00 a.m. PW-1 & PW-3 went to Suresh Cycle Mart and the others were strategically waiting near the S.T.bus stand exit gate. PW-8, from where he was waiting, could see everything that was happening in Suresh Cycle Mart. At about 11.45 a.m. accused arrived in his two wheeler at Suresh Cycle Mart. PW-3 greeted accused who reciprocated and then PW-1, PW-3, accused and PW-7 one Suresh Chavan who was the owner of Suresh Cycle Mart, went to a tea stall close by to have tea. All four had tea and came back to Suresh Cycle Mart where accused accepted the bribe amount and kept it in the left pocket of his shirt. Thereafter accused called out to one Ashok Dilpak (PW-4), a

Police Naik who was going on a two wheeler and PW-4 stopped the motor cycle and turned around. Accused went to speak to him, at which stage, PW-3 gave a signal as agreed and the raiding party rushed to accused and caught him red handed. When accused saw the raiding party, he pulled out his handkerchief from the right side pocket of his trouser and took the amount of bribe which was in his left shirt pocket with the said handkerchief in such a manner that the handkerchief with the folded bribe amount inside was in the right hand of accused when PW-8 caught both hands of accused. Thereafter post trap panchanama was prepared, statements were recorded and after collection of all documents, case paper was sent to higher authority for sanction of prosecution. The note for sanction was submitted sometime on 19.2.1998 and the sanction order was passed on 19.6.1998 by PW-2. After receiving sanction, charge-sheet was submitted against accused to face the trial under Section 7, and section 13(2) read with section 13(1)(d) of Prevention of Corruption Act, 1988.

5. Accused pleaded not guilty to the charges. In his statement recorded under Section 313 of Cr.P.C., accused denied all allegations and also says that the prosecution witnesses were deposing against him only at the instance of PW-3, Dhanaji Pawar (who was not a

witness), and Vikas Mali (PW-6) because he chargesheeted these three persons under section 66-B of the Bombay Prohibition Act. Accused also adds that it is a false case filed against him by PW-8, I.O., at the instance of PW-3 by joining hands with prosecution witness Vikas Mali (PW-6) who were engaged in transportation of illicit liquor by committing breach of Bombay Prohibition Act. According to accused, as stated in his additional statement dated 13.7.2000, on 18.2.1997 he was on emergency duty at pharmacy next to police station and he did not even go home at all or meet PW-3. On 18.2.1997 at 8.00 p.m. he was informed by Inspector Mujawar to arrest Rathod (PW-3). On 19.2.1997 he was at district police station and left home at about 11.00 to 11.15 a.m. to arrest Rathod. He was driving his motor cycle towards S.T. stand when Rathod (PW-3) saw him and called out to him. When he stopped his vehicle, Rathod, PW-3, requested him not to arrest him and he replied he will have to arrest him. He also says that Rathod informed him that he has stopped all his illicit liquor business and he is in severe financial constraints. Since Suresh Cycle Mart was nearby, he took Rathod there and informed persons there that he has to arrest Rathod and asked two of those present there to be panch witnesses. He asked Rathod to give whatever articles or valuables he had with him and Rathod gave him 20 X Rs.50/- notes. He says he counted those notes and asked him if this was Rs.1000/-

and Rathod confirmed it was Rs.1000/-. He then kept that Rs.1000/- in his pocket. At that time he saw police constable (PW-4) passing through and he called out to him. Accused asked PW-4 to help him to write the panchanama for arrest of Rathod. At the same time 4 to 5 other persons approached him and grabbed his hand. He says at that time there was only a handkerchief in his hand and because of the inspector grabbing his hand, he could not write Rathod's arrest panchanama. Those people took him to Bhau Cycle Mart, which is a shop adjoining to Suresh Cycle Mart, where he showed to PW-8 the warrant for arrest of Rathod. Investigating officer (PW-8) did not listen to him and told him whatever he wanted to say, the same may be said in the police station. The panchanama has not been typed in front of him and the copy of the same is also not given to him. Accused also says that they did not check his hands or clothes under ultra violet lamp and false case has been filed against him. He says sanctioning authority (PW-2) has not even read his matter and has mechanically signed. Even the authority of Pw-8 to investigate has also been challenged.

6. The trial court after considering the evidence, passed an elaborate order and judgment running into almost 80 pages acquitting accused.

7. To drive home the charge, prosecution led evidence of 8 witnesses viz. Subhash Dashrath Jadhav, a panch witness as (PW-1); Ragur Kuppuswami Padmanaban, the sanctioning authority as (PW-2); Dhanaji Harishchandra Rathod, complainant as (PW-3); Ashok Namdeo Dilpak, Police Naik as (PW-4); Sidram Ramchandra Tad, Havaladar as (PW-5); Vikas Ashok Mali (PW-6); Suresh Nagnath Chavan, the owner of Suresh Cycle Mart as (PW-7); and Anil Piraji Ghuge, Police Inspector as (PW-8).

8. In the charge-sheet, the prosecution has listed 17 witnesses including Mujawar who had given the arrest warrant to accused on 18.2.1997 at 8.00 p.m. and H.B.Thorat, Dy.Superintendent of Police who was part of the raiding team. Both these persons, as noted earlier, have not been examined. Even Dhanaji Pawar who is supposed to have accompanied PW-3 on 18.2.1997 when he met accused at his residence and this Dhanaji Pawar also was present at the time of raid on 19.2.1997 has not been examined. In my view, these 3 are very material witnesses who ought to have been examined. The Apex court in *S.Harnam Singh Vs. The State (Delhi Administration)*¹ has also held that non production of material

¹ 1976 2 SCC 819

witnesses will cause miscarriage of justice. I would say, in this case, it amounts to serious irregularity vitiating the trial.

9. Learned APP Ms.Malhotra submitted that there is a presumption under Section 20 of the Act for the offence under Section 7 of the said Act.

It is settled law that the presumption raised under Section 20 of the Act is a rebuttable presumption and that the burden placed on respondent for rebutting the presumption is one of preponderance of probability. It is also settled that accused need not step into the box to prove his innocence but he could rebut the presumption even by cross-examination of witnesses cited against him [*State of Gujarat Vs. Navinbhai Chandrakant Joshi*²].

10. It is also settled law that if two views are possible, the appellate Court should not interfere with the acquittal of the lower court unless material on record leads to an escapable conclusion of the guilt of accused. [*V.Sejappa Vs. State by Police Inspector, Lokayukta, Chitradurga*³] In *V.Sejappa (supra)* the Apex Court has also laid down the factors that must be kept in mind by the appellate court dealing with the appeals against acquittal and the same can be found

² 2018 CRI.L.J.3733

³ AIR 2016 SUPREME COURT 2045

in paragraph-22 of the said judgment which reads as under :-

“..... It is not necessary to deal with these cases individually. Suffice it to say that this Court has consistently held that in dealing with appeals against acquittal, the appellate court must bear in mind the following :

(i) There is presumption of innocence in favour of an accused person and such presumption is strengthened by the order of acquittal passed in his favour by the trial court ;

(ii) The accused person is entitled to the benefit of reasonable doubt when it deals with the merit of the appeal against acquittal ;

(iii) Though, the powers of the appellate court in considering the appeals against acquittal are as extensive as its powers in appeals against convictions but the appellate court is generally loath in disturbing the finding of fact recorded by the trial court. It is so because the trial court had an advantage of seeing the demeanour of the witnesses. If the trial court takes a reasonable view of the facts of the case, interference by the appellate court with the judgment of acquittal is not justified. Unless, the conclusions reached by the trial court are palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, the reluctance on the part of the appellate court in interfering with such conclusions is fully justified; and

(iv) Merely because the appellate court on reappreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. The evenly balanced views of the evidence must not result in the interference by the appellate court in the judgment of the trial court.....”

11. The law on the issue of section 7 of the Prevention of Corruption Act, 1988 is well settled that demand of illegal gratification is sine quo non for constituting an offence. 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 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 the 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. [*State of Punjab Vs. Madan Mohan Lal Verma*]⁴

12. The Apex Court in *Suraj Mal Vs. State (Delhi Administration)*⁵ under the Prevention of Corruption Act 1947 has held that mere recovery of tainted currency is not sufficient to infer the guilt of the accused. It is well settled where witnesses make two inconsistent statements the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances, no conviction can be based on the evidence of such witnesses.

13. A learned single Judge of this court in *Khushalchand Yashwant Gaikwad Vs. The State of Maharashtra*⁶ also has held that it is well settled law that mere possession and recovery of currency notes without proof of demand will not bring home the offence under Section 7 since the demand of illegal gratification is sine qua non to

4 (2013) 14 Supreme Court Cases 153

5 (1979) 4 SCC 725

6 2018 SCC Online Bom. 1073

constitute the offence. The same will also be conclusive in so far as offence under section 13 (1) (d) is concerned, as in the absence of any proof of demand of 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. It is only on the proof of acceptance of illegal gratification that presumption can be drawn under section 20 of the said Act that such gratification was received for doing or forbearing to do any official act. Unless there is proof of demand of illegal gratification, proof of acceptance will not follow. Paragraph-12 of the said judgment reads as under :-

“It is well settled law 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 gratification is sine-qua-non to constitute the said offence. The same also will be conclusive insofar as the offence under Section 13 (1)(d) 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 to public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established. It is only on proof of acceptance of illegal gratification that presumption can be drawn under Section 20 of the Prevention of Corruption Act that such gratification was received for doing or forbearing to do any official act. Unless there is proof of demand of illegal gratification proof of acceptance will not follow. Reliance is placed on (i) N.Sunkanna v. State of Andhra Pradesh; (ii) T.K.Ramesh Kumar v. State through Police Inspector Bangalore; (iii) Khaleel Ahmed v. State of Karnataka; ((iv) Suraj Mal v. The State

(Delhi Administration); and (v) Sita Ram v. The State of Rajasthan.”

14. Therefore, recovery of tainted currency is not sufficient to hold a person guilty. Demand has to be unequivocally proved.

15. Now let us consider whether the foundational facts have been established by the prosecution and those foundational facts are :
(a) whether there has been a demand; and (b) payment of bribe/that the money was taken voluntarily as a bribe.

16. The trial court has in its very elaborate judgment listed the various inconsistencies and contradictions which, for the sake of brevity, I do not wish to re-produce. Having considered the evidence, I have my own list of contradictions/inconsistencies/omissions which prevents me for accepting the case of the prosecution-Appellant.

17. The primary eye witnesses to the demand on 18.2.1997 were PW-3-complainant Dhanaji Harishchandra Rathod (an interested witness) and Dhanaji Pawar. Dhanaji Pawar has not been examined. Accused says he never went home on 18.2.1997 for lunch when PW-3 is supposed to have met him and the demand of Rs.1500/- reduced to

Rs.1000/- was made. It is the case of accused that he was on Davakhana Entry duty on 18.2.1997 from 8.00 a.m. upto 8.00 a.m. on 19.2.1997, 24 hours duty. PW-5 who was attached to the Solapur Taluka Police station states that there was no bar on accused for moving out of the police station when he has been assigned Davakhana Entry duty but before he goes out, he has to obtain the necessary permission from his Superior officer and such an entry must be taken by the police station officer (P.S.O). The prosecution has not shown any such permission was given by the P.S.O. This itself shows that the prosecution has not proved that accused left the police station on 18.2.1997 in the afternoon to go to his house. In addition accused in his statement under Section 313 of Cr.P.C. states that Inspector Mujawar gave him the warrant of arrest on 18.2.1997 with instructions to arrest PW-3. Warrant of arrest has been found and it is acknowledged by PW-3 (Exh.51). Mujawar has not been called to give evidence though listed as one of the witnesses. I see no reason why adverse inference should not be drawn against prosecution because Mujawar may have confirmed the stand of accused.

As against this, PW-3 was admittedly involved in transportation of illicit liquor against whom cases under Bombay Prohibition Act were pending.

18. There has also been a suggestion that the warrant of arrest Exh.51 itself is a fake document. Prosecution does not produce any document or any record from the court of JMFC to prove that such a warrant was never issued against PW-3. Therefore, I would say that the demand on 18.2.1997 has not been proved beyond reasonable doubt.

19. As regards the panch witness PW-1, in my opinion, he did not know what he was saying when his evidence was recorded. In examination-in-chief PW-1 says on 18.2.1997 he attended the office of A.C.B Solapur at 5.30 p.m. on the instructions of the Superior officer and met PW-8 Ghuge who directed them to report again on 19.2.1997 at 6.00 a.m. In his cross-examination PW-1 says "It is not true to say that I was directed to attend the office of A.C.B on 18.2.97 by my superior officer". Then he says "There was oral directions given to me and another pancha Shri Pawar by my superior officer to attend the office of A.C.B". Then he again says "it is not true to say that both the panchas were directed by my superior officer to co-operate the Police Inspector Shri Ghuge. On the first day there was no acquaintance with police officer Shri Ghuge". Then he again says "Police officer Ghuge directed us to attend the office of A.C.B at 6.00 a.m. vide dated i.e., on the next day". Then again he says "There was no inquiry made by

Police officer Ghuge to both panch witnesses regarding our employment in M.S.E.B and directions given by our Superior officer to attend the office of A.C.B. as per request of Shri Ghuge”.

In his examination-in-chief PW-1 says that when complainant met accused at Suresh Cycle Mart, accused took out one paper from his pouch and informed complainant PW-3 that he was going to be arrested and also made reference of previous cases. Thereafter they went to have tea and on return, accused took out one blank form from his pouch, complainant PW-3 thereafter was directed by accused to sign the blank form which was taken out from the pouch of accused and then the said form Exh.51 was thereafter kept in the pouch of accused, after which demand of bribe amount was made.

In his cross-examination, however, he says till the arrival of Investigating officer, accused did not take out any paper from his pouch and the police officer Ghuge saw the things in the pouch of the accused in our presence.

In his examination-in-chief, PW-1 says accused took out one blank form from his pouch but in his cross-examination, says accused took out one written paper from his pouch and told complainant that he will have to be arrested in the crime but he has not seen that paper. So in examination-in-chief he says blank paper and in his cross-examination he says written paper.

PW-1 and PW-3 say that accused counted the 20x50 notes and asked “Ek Hazar Rupayech Ahet ka?” means it is Rs.1000/- correct or whether it was Rs.1000/-? Why would a man after counting ask whether it was Rs.1000/-. Such type of ensuring would indicate that the story of defence is more probable that at the time of arresting or before arresting accused was checking how much money was on PW-3.

20. In the post-trap panchanama Exh.55, PW-1 says it is not mentioned that accused asked Rathod for the money and he collected the money from his right hand then counted with both his hands and kept it on left pocket of his shirt. In his cross-examination he admits that there is no Marathi word “तुम्ही सांगितल्या प्रमाणे ” being mentioned by PW-3. He also admits that what he has stated in examination-in-chief that after returning to the cycle shop from the canteen, the owner of Suresh Cycle Mart was thereafter found busy in his work, is not mentioned in his statement recorded by Police and it is also not so mentioned in Exh.55 post trap panchanama. PW-1 says “It is true that except complainant Rathod we entered in the shop of Suresh Cycle Mart when both the hands of accused were hold by police officer Ghuge”. PW-4 Ashok Dilpak says in his examination-in-chief that he got down from the motor bike and accused proceeded towards him and they talked. He says at that time from the side of S.T. stand he

witnessed that the members of raiding party coming towards accused and the members of raiding party caught hold both the hands of accused Gavali. Therefore, from the evidence of PW-4 it appears that raiding party caught hold of the hands of accused outside the cycle shop at the road, whereas PW-1 says we entered in the shop of Suresh Cycle Mart when both the hands of accused were caught hold by Ghuge. Moreover, PW-1 says that when the Police officer Ghuge along with raiding party approached, he told that accused was the same person by name Gavali who demanded bribe to complainant Rathod and money was in his right hand covered with handkerchief. He also says that this was the time when accused was talking to PW-4. PW-4 does not say that when the raiding party came, PW-1 informed raiding party and pointed out to accused. He also does not say that accused took a handkerchief and removed the money kept in the shirt pocket with the help of handkerchief.

PW-1 & PW-3 say that when accused called out to PW-4, PW-4 turned his motor cycle and came near Suresh Cycle Mart. PW-4 does not say that he turned the motor cycle and went towards Suresh Cycle Mart. PW-4 says he got down from the motor bike and proceeded towards accused and on witnessing his arrival, accused also got up and proceeded towards him. PW-1 and PW-3 do not say that accused got up and proceeded towards PW-4 but it was PW-4 who

went to accused and spoke. Though some of these may appear as minor inconsistencies, we should keep in mind that this is a case under Prevention of Corruption Act and even to prosecute, sanction of the higher authority is required. Wrongful prosecution or conviction would result in the entire life of not only the accused but his whole family being ruined.

21. PW-3 is an interested and partisan witness who is concerned with the success of the trap and his evidence also must be tested very carefully as held in ***State of Maharashtra Vs. Dnyaneshwar Laxman Rao Wankhede***⁷.

PW-3, we must also keep in mind, is an accused in various crimes under the provisions of Bombay Prohibition Act in connection with carrying illicit liquor. PW-3 says that when he opened the talk and inquired with the accused about his work, accused took out one form from his pouch and told him that already two criminal cases were pending against him and there is one more case to be filed and ultimately he will be arrested and also he will be externed. PW-1 who was a panch witness accompanying complainant does not corroborate what PW-3 has stated. PW-3 states that accused stated in Marathi “मी सांगितलेले पैसे आणले का?” Whereas PW-1 says accused said “मी

7 (2009) 15 SCC 200

सांगितल्या प्रमाणे पैसे आणले का?”.

PW-3 states that accused took out one form from his pouch, directed him to sign and he signed the form after which it was handed over to accused and he kept the same in his bag and thereafter accused demanded the amount of bribe. Per contra, PW-1 says accused took out one blank form from his pouch.

In his cross-examination PW-3 also admits that in his complaint, it is not mentioned that PW-3 inquired at Taluka police station about whereabouts of accused and that he got information that accused has gone to his house for meal etc. PW-3 also admits that what he has stated in the examination in chief that accused told Dhanaji Pawar on 18.2.1997 to go away from the place where PW-3 and accused were standing, is not mentioned in the complaint at Exh.60. PW-3 also admits that in his statement recorded under Section 161 as well as in the complaint, it is not recorded that he informed accused that he has stopped carrying illicit liquor or he has stopped business of carrying illicit liquor. PW-3 also admits that he did not inform Ghuge (PW-8) that accused was holding a warrant in his hand and it was not a simple paper.

Very importantly PW-3 also admits that there is no reference in his statement that he requested accused not to arrest in prohibition case as stated in his examination in chief. In view of the

above, the evidence of PW-3 is not reliable.

22. So far as reliability of PW-4, he says that accused was caught by PW-8, then he stood at the back of the raiding party at which time one officer inquired with him as to who he was and he replied that he was a police person belonging to Police department, Solapur. At which time, police officer told him to wait but he does not know what was his name. If one sees the list of raiding party, as mentioned by PW-1, PW-3, & PW-8, there were only two officers i.e., PW-8 and Mr.Thorat and all others were constables. To say he did not know Mr.Thorat was a Dy. Superintendent of Police because Ghuge (PW-8) was holding accused, is difficult to believe.

23. As regards PW-5, there is an omission in as much as he admits that in his statement recorded on 24.2.1997 by PW-8 there is no reference regarding duties of police constable or head constable. This is very relevant because this statement of PW-5 also would have been placed before the sanctioning authority (PW-2) and if it was brought to the notice of the sanctioning authority regarding the duty that was assigned to accused (Davakhana entry duty from 8.00 a.m. on 18.2.1997 to 8.00 a.m. on 19.2.1997) one does not know what would have been the decision of PW-2. PW-2 might have called for

the permission to leave entry made by PSO and in its absence might have disbelieved there was a demand on 18.2.1997.

24. PW-6 who is also an accused in some of the cases under Bombay Prohibition Act, appears to be a tutored witness. He says in his cross-examination that it is true to say that he has not stated in the statement before police on 21.7.1997, what he has stated in examination-in-chief, of accused taking breakfast and nashta without payment of money. According to him, it was not told to him by the police to state the said fact and hence he did not say in the statement what he has now stated in his examination-in-chief. He also says that he did not state in the statement that accused demanded Rs.400/- and his maternal uncle paid that amount because such information was not asked by police officer Ghuge. In the examination-in-chief he says that at the time of incident he was 15 years and he was a student of 8th standard but in the statement recorded by police, it is shown that his education was upto 9th standard and on 21.7.1997 he was 19 years old. We have to keep in mind he is an interested witness because he is one of the accused along with PW-3 in cases filed under Bombay Prohibition Act.

25. PW-7-cycle shop owner has been declared hostile because he stated that nobody went to have tea before the raid, as stated by PW-1 and PW-3.

26. Coming to PW-8 who is the Investigating officer, in his cross-examination he has admitted in paragraph-17 various omissions. He says that there is no reference in the statement of complainant Rathod in Marathi language “ तुम्ही सांगितल्या प्रमाणे ” but there is a reference of “पैसे आणले”. He admits there is no reference in the statement of complainant Rathod that owner of Suresh cycle mart was busy in his work after taking tea in the Amruttulya Tea House.

There is no reference that complainant Rathod told him that his brother-in-law disclosed that he was requested to see accused. Such type of reference is absent in the complaint dated 18.2.1997, and also in his statement dated 21.2.1997.

There is no reference in the complaint dated 18.2.1997 that the complainant Rathod and his brother-in-law had been to the police station i.e., the Taluka Police Station at about 1.30 to 1.45 p.m. in order to know the whereabouts of accused. The same remarks also hold good in respect of statement of Dhanaji Rathod (PW-3) which was subsequently recorded on 21.2.1997.

There is no reference that they were told by the police

station officer, that accused had been to his house for taking meals.

There is no reference that complainant Rathod and his brother-in-law were informed by P.S.O. of Taluka Police station that they should take search of accused nearby bakery situated at Keshavnagar.

There is no reference that accused told the brother-in-law of Dhanaji Rathod to stand at a distance while talking with Dhanaji Rathod.

There is no reference that the prosecution witness Vikas (PW-6) stated before him in his statement that accused and his friends were not paying the charges of foods supplied to them in his hotel at village Mardi road.

There is no reference by PW-6 of acceptance of amount of Rs.400/- by accused through his maternal uncle.

PW-8 says Vikas (PW-6) told his age was 19 years in his statement before the police, and his education was upto 9th standard, Marathi medium examination.

27. On these grounds alone, the order of acquittal should not be interfered with.

28. One more point, of course which is going against accused is the sanction given by PW-2. PW-2 says he received the papers of this case on 19.2.1998 from the office of A.C.B, Pune and he accorded the sanction on 18.6.1998. There is no explanation for the delay of 4 months, though PW-2 says he perused all the papers etc., and signed on a draft sanction that was sent along with the report. This would only show that there has been non application of mind by PW-2. Learned APP submitted that even for a moment, the court holds that there is non application of mind by the sanctioning authority, the Madhya Pradesh High Court in Ram *Swaroop Rathore Vs. State of M.P.*⁸ has held that accused can only be discharged and not acquitted and it is a rectifiable error. In my view that is immaterial at this stage.

29. The sanctity of sanction has been considered and laid down by the Apex court in *Balbhadra Parashar vs. State of Madhya Pradesh*⁹. The Apex court held that grant of sanction is not empty formality and order of consent should not be construed in a pedantic manner and the purpose for which order of sanction is required to be passed should always be borne in mind, and there has to be application of mind in support of the sanction. Paras-5 & 6 read as under :-

8 2000 CRI L.J. 1882

9 AIR 2016 SC 1554

"5. It is contended that the grant of sanction is not an empty formality and there has to be application of mind in support of the said sanction. We have been commended to Mansukhlal Vithaldas Chauhan v. State of Gujarat, 1997(4) R.C.R.(Criminal) 236 : (1997) 7 SCC 622 wherein a two-Judge Bench while dealing with grant of sanction has observed:-

"18. The validity of the sanction would, therefore, depend upon the material placed before the sanctioning authority and the fact that all the relevant facts, material and evidence have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it. This fact can also be established by extrinsic evidence by placing the relevant files before the Court to show that all relevant facts were considered by the sanctioning authority. (See also Jaswant Singh v. State of Punjab, AIR 1958 SC 124, and State of Bihar v. P.P. Sharma, 1991(2) S.C.T. 397 : 1992 Supp. (1) SCC 222.)

19. Since the validity of "sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows that the sanctioning authority has to apply its own independent mind for the generation of genuine satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take a decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If it is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the

order will be bad for the reason that the discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution."

6. *In State of Karnataka v. Ameerjan, 2007(4) R.C.R.(Criminal) 375 : 2007(5) Recent Apex Judgments (R.A.J.) 202 : (2007) 11 SCC 273, while dealing with the grant of sanction, it has been held thus:-*

"9. We agree that an order of sanction should not be construed in a pedantic manner. But, it is also well settled that the purpose for which an order of sanction is required to be passed should always be borne in mind. Ordinarily, the sanctioning authority is the best person to judge as to whether the public servant concerned should receive the protection under the Act by refusing to accord sanction for his prosecution or not.

10. For the aforementioned purpose, indisputably, application of mind on the part of the sanctioning authority is imperative. The order granting sanction must be demonstrative of the fact that there had been proper application of mind on the part of the sanctioning authority. We have noticed hereinbefore that the sanctioning authority had purported to pass the order of sanction solely on the basis of the report made by the Inspector General of Police, Karnataka Lokayukta. Even the said report has not been brought on record. Thus, whether in the said report, either in the body thereof or by annexing therewith the relevant documents, IG Police, Karnataka Lokayukta had placed on record the materials collected on investigation of the matter which would prima facie establish existence of evidence in regard to the commission of the offence by the public servant concerned is not evident. Ordinarily, before passing an order of sanction, the entire 82 (2007) 11 SCC 273 records containing the materials collected against the accused should be placed before the sanctioning authority. In the event, the order of sanction does not

indicate application of mind as (sic to) the materials placed before the said authority before the order of sanction was passed, the same may be produced before the court to show that such materials had in fact been produced."

30. The Apex court in ***State of Maharashtra Vs. Mahesh Jain***¹⁰ has held that grant of sanction is a sacrosanct act and is intended to provide safeguard to a public servant against frivolous and vexatious litigations. Grant of sanction is an administrative function and the sanctioning authority is required to prima facie, reach the satisfaction that relevant facts would constitute the offence. Satisfaction of the sanctioning authority is essential to validate an order granting sanction.

31. The Apex court in *Mahesh Jain (supra)* has referred to ***Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh***¹¹ where the Apex court held "it is well settled that any case instituted without a proper sanction must fail because this being a manifest defect in the prosecution, the entire proceedings are rendered void, ab initio.

32. I have to also note that the Maharashtra State Anti Corruption and Prohibition Intelligence Bureau has issued a manual of

10(2013) 8 SCC 119
11(1979) 4 SCC 172

instructions. At the request of the court, learned APP gave a copy of the revised 2nd edition of 1976. Learned APP is not aware whether any later edition has come. Amicus Curiae Mr. Jejeebhoy also states that website does not indicate any later edition. Chapter-12 of this manual deals with prosecution. On the sub-head of sanction to prosecute, it expressly provides, “.....*It should, however, be remembered that the question has to be formed and content of the sanction is matter within the discretion of the competent authority. It should not be requested to accord sanction in any particular form nor should draft sanction be sent to it.....*”. Therefore, the manual expressly provides a draft sanction should not be sent to the competent authority. In this case admittedly a draft sanction was sent and PW-2 has signed the said draft sanction. In my view, therefore, the sanction itself will get vitiated because it is contrary to the manual of instructions. Moreover, learned single Judge of this court (S.B. Shukre, J) in ***State of Maharashtra through Deputy Superintendent of Police ACB Nagpur Vs. Devidas s/o Narayanrao Bobde***¹² has held that signing on draft sanction order submitted by A.C.B would indicate non application of mind and by signing the draft sanction order the sanctioning authority has not ascertained the root cause of the demand of bribe by respondent. Moreover, PW-5 in his cross-examination as noted earlier,

12 2014 SCC Online Bom.1045

admits that in his statement recorded on 24.2.1997 by PW-8 under section 161, there is no reference regarding duties of police constable or head constable.

33. There is an acquittal and therefore, there is double presumption in favour of accused. Firstly, the presumption of innocence available to accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court. For acquitting accused, the Trial Court observed that prosecution had failed to prove its case.

34. In the circumstances, in my view, the opinion of the trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, cannot be interfered with.

35. Appeal dismissed.

36. The State Government/Appropriate Authority shall pay over to respondent, within a period of 30 days from today, all

pensionary or other benefits/dues stalled, in view of pendency of this appeal. No authority shall demand certified copy for reimbursing the benefits/dues as directed above.

All to act on authenticated copy of this order.

Certified copy expedited.

(K.R.SHRIRAM,J)