

Bail Slip

The Appellant/Sole Accused Ghanshyam Aggarwal, Male aged 60 / 2016, S/o.Sivanarayana Agarwal, residing at D.No.460, 6th Cross Street 4th Main Road, J.P. Nagar (3rd Phase), Bangalore, was directed to be released on bail as per order of this Court dated 18.01.2016 and made in CRL MP(MD)No.434 of 2016 in CRL A(MD)No.15 of 2016.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.12.2020

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

CRL A (MD) No.15 of 2016

Ghanshyam Aggarwal

... Appellant / Accused

Vs.

The State,
rep.by the Deputy Superintendent of Police,
Vigilance & Anti Corruption Department,
Sivagangai.
(Crime No.548 of 2007)

... Respondent / Complainant

Prayer : This Criminal Appeal filed under Section 374 of Criminal Procedure Code, to call for the records in relating to the judgment dated 22.12.2015 made in Spl.Case No.28 of 2014 passed by the learned Special Judge for Vigilance and Anti-Corruption Cases, Sivagangai and set aside the same.

For Appellant : Mr.V.Gopinath
Senior Counsel for Mr.R.Sanjay Ramaswami

For Respondent : Mr.A.Robinson,
Government Advocate (crl.side)

JUDGMENT

This criminal appeal is directed against the judgment dated 22.12.2015 passed by the learned Special Judge for Trial of PC Act Cases, Sivagangai. By the impugned judgment, the appellant had been convicted for the offence under Section 12 of the Prevention of Corruption Act, 1988 and sentenced to undergo three years rigorous imprisonment and levied with fine of Rs.5,000/-. Default sentence was also imposed.

The case of the prosecution is as follows :

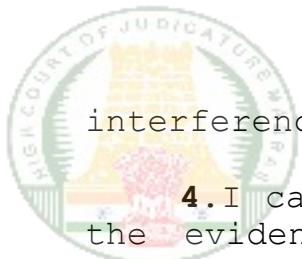
On 21.08.2007 at about 09.30 A.M, PW.1 Thiru.M.A.Siddique, IAS., the District Collector of Sivagangai, was in his camp office signing the files brought by the Head Assistant of the Collectorate. The accused/appellant met the District Collector and handed over a



private conversation with the District Collector. But PW.1 told him to spell it out there itself. At that point of time, the accused stood up and was taking out an envelop from his pocket and stated that a gift is to be given to him. Thereupon, PW.1 told him that he does not take any gift. The accused was accompanied by another person by name Vishal Bohra. PW.1 asked both of them to wait outside. He told them that he would discuss the issue with the mining officials and thereafter call them. After the accused left the room, PW.1 attempted to contact the Deputy Superintendent of Police, V&AC, Sivagangai. Since he could not establish contact, he instructed the Special Branch Inspector to bring the Inspector of Police Thiru.P.Sivakumar, Town Police Station, Sivagangai to his camp office. PW.1 also conveyed to him the subject matter. Thereupon, at around 09.45 A.M, Thiru.P.Sivakumar, the Inspector of Police, Sivagangai Town Police Station came to the camp office of PW.1 along with police party. PW.1 identified the accused to him. In the presence of PW.1 and his subordinate officials, namely, R.Sridhar and S.Pasupatheeswaran, the said Inspector of Police Sivakumar searched the accused and recovered khaki envelop from his right pant pocket. It was found to contain a sum of Rs.25,000/-. The currency notes were in denomination of thousand rupee notes.

2.PW.2 lodged Ex.P1 complaint alleging that the accused and Vishal Bohra had brought the said amount for giving bribe to PW.1. The said complaint was registered as Crime No.548 of 2007 on the file of the Sivagangai Town Police Station by the Deputy Superintendent of Police, Sivagangai for the offence under Section 12 of the Prevention of Corruption Act, 1988. It was later handed over to the respondent. The respondent thereafter filed final report before the jurisdictional special court. The learned Special Judge took cognizance of the offence under Section 12 of the Prevention of Corruption Act, 1988 and issued summons to the accused. Charge was framed against the accused for the aforesaid offence. The accused denied the charge and claimed to be tried. The prosecution to establish its case examined PW.1 to PW.12 and marked Exs.P1 to P7. MO.1 to Mo.3 were also marked. Incriminating circumstances were put to the accused. The accused characterized them as false. The accused examined his companion Vishal Bohra as DW.1. The learned Trial Judge after a detailed consideration of the evidence on record, found the appellant guilty of the offence with which he was charged and sentenced him as mentioned above. Challenging the same, this criminal appeal came to be filed.

3.The learned Senior Counsel appearing for the appellant reiterated all the contentions set out in the memorandum of grounds of appeal and in the written submissions. The learned Senior Counsel wanted this Court to set aside the impugned judgment and acquit the appellant and allow this appeal. Per contra, the learned Government counsel submitted that the impugned judgment does not call for any



interference.

4.I carefully considered the rival contentions and went through the evidence on record. The learned Senior Counsel for the appellant presented two fold arguments. His contention was that even if this Court were to hold that the accused had made an offer of bribe, that would not attract the offence under Section 12 of the Prevention of Corruption Act, 1988. He placed reliance on the decision of the Kerala High Court in Crl.A.No.527 of 2005 on 03.06.2015 (**N.R.Sekharan vs. State of Kerala**). The learned Judge of the Kerala High Court in the said decision held as follows :

"12.For a prosecution under Section 12 of the P.C Act as a case of abetment, there must be something more than of a mere offer. When illegal gratification is paid, the Public Servant will have two options. He can either accept it knowing that it is illegal gratification, in which case he will be liable to prosecution under the P.C Act. The person who paid the amount also will be liable as abettor under Section 12 of the P.C Act. The other option available to him is to reject the amount, and proceed against the person who paid the amount, under Section 12 of the Act. Anyway, a mere offer to give illegal gratification will not invite a prosecution under Section 12 of the Act as a case of abetment of an offence punishable under Section 7 of the P.C Act. When there is no demand, and when there is no acceptance of the amount also, a prosecution under Section 12, as a case of abetment, is not possible."

The same principle was subsequently reiterated in the decision rendered on 26.05.2015 in Crl.A No.52 of 2006(C) (**N.A.Abdul Rahiman vs. State of Kerala**). He would also contend that the very same view was taken by a learned Judge of this Court in the decision rendered on 27.03.2007 in Crl A No.880 of 2000 (**Kancharla Veeraiah vs. State**). The Hon'ble Division Bench of the Bombay High Court in **Kishor Khachand Wadhwani And Anr vs The State Of Maharashtra** in Writ Petition No.2925 of 2019 as modified on 02.08.2019 held as follows :

"16.Section 12 of the PC Act sets out the penalty for abetment of an offence punishable under Section 7 or 11, whether or not that offence is committed in consequence of that abetment. The PC Act, 1988 does not define as to what the term "abetment" means and conveys for the purpose of Section 12 of the PC Act. Therefore, we will have to fall back to Section 107 of the IPC. Perusal of Section 107 of the IPC would reveal that to constitute abatement of an offence there must be some instigation to do an act, which would amount to an offence, or the alleged abettor must have intentionally aided or facilitated the commission of a crime, or the alleged abettor must have engaged in some conspiracy



WEB COPY

with one or more other person or persons for the commission of an offence. It thus contemplates existence of some nexus between the acts of the alleged abettor and the act of offence abetted. Prior to the amendment of 2018, the mere offer of bribe was not constituting an offence and the offence relating to public servants being bribed and offence relating to offering of bribe to public servant came to be introduced on 26/07/2018. Prior to substitution of Sections 7, 8, 9 and 10, what was punishable was an act of public servant accepting gratification other than legal remuneration in respect of an official act. The payment of bribe would be covered under Section 12 of the PC Act if such payment of illegal gratification was made as motive or reward as referred to in Section 7 of the PC Act. The act of offering a bribe to a public servant became an offence only with effect from 26/07/2018 and commensurating with the introduction of the said provision, Section 12 of the Act is also amended and by the amended provision whoever abets any offence punishable under the Act, whether or not that offence is committed in consequence of that abetment, shall be liable for punishment for abetment of offence. The public servant, who accepts the bribe was liable for penalty under Section 7 of the PC Act but now any person who gives or promises to give an undue advantage to another person or persons, with intention to induce a public servant to perform improperly a public duty; or to reward such public servant for the improper performance of public duty is liable for penalty under Section 8 of the PC Act. The act of mere offer voluntarily made by the petitioners without any demand from the complainant cannot be made punishable under Section 12 of the PC Act since the said act was not attracting any offence prior to 26/07/2018 even though the amount has been found on the table of the complainant in the trap laid."

5.The learned Senior Counsel strongly pressed that I ought to set aside the impugned judgment by adopting the view taken by the Hon'ble Kerala High Court in the aforesaid cases. I shall consider this contention first. Let me extract the relevant statutory provisions. Section 7, 11 and 12 of the Prevention of Corruption Act read as under :

"Section 7.Public servant taking gratification other than legal remuneration in respect of an official act.—Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than



legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.

Section 11. Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant.—Whoever, being a public servant, accepts or obtains or agrees to accept or attempts to obtain for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

Section 12. Punishment for abetment of offences defined in section 7 or 11.—Whoever abets any offence punishable under section 7 or section 11 whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine."

It is necessary to bear in mind that the Indian Penal Code, 1860 contained similar provisions in Section 161 to 165A and that they were omitted in view of Section 31 of the Prevention of Corruption Act, 1988. Section 161 and Section 165 A of IPC were as follows :

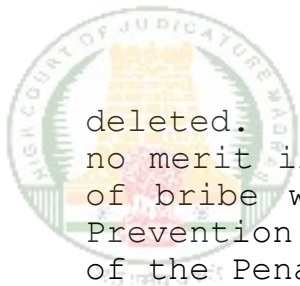
"Section 161. Public servant taking gratification other than legal remuneration in respect of the official act.—Whoever, being or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or



forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central or any State Government or Parliament or the Legislature of any State, or with any local authority, corporation or Government company referred to in section 21, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

"Section 165 A. Punishment for abetment of offences defined in Section 161 or Section 165.-Whoever abets any offence punishable under Section 161 or Section 165, whether or not that offence is committed in consequence of the abetment, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

One can safely conclude after a comparison of Section 12 of the Prevention of Corruption Act, 1988 and Section 165 A of IPC that they are almost similar. One can even note that there is completely no difference in the phraseology of the aforesaid provisions. Of course, while Section 12 of the Act prescribes a minimum sentence, Section 165 A of the Penal Code did not. Section 165 A of IPC was considered by the Hon'ble Supreme Court in quite a few cases. **Mahadev Dhanappa Gunaki and Ors. vs. The State of Bombay (AIR 1953 SC 179)**, appears to be one of the earliest. Dr.B.R.Ambedkar was the counsel who unsuccessfully argued for the appellant accused. **Badri Rai and Ors. vs. The State of Bihar (AIR 1958 SC 953)** is another. In **Yusufalli Esmail Nagree vs. The State of Maharashtra (AIR 1968 SC 147)**, the offer of bribe made by the accused was also tape recorded. When the counsel claimed protection under Article 23 of the Constitution against the use of the statement that was recorded in tape, the Hon'ble Apex Court denied the constitutional protection available under the said Article. Some of the cases arising under Section 165 A of IPC are **Hira Lal vs. The State of Haryana (1970)3SCC 933**, **Kishan Narain vs. State of Maharashtra (1974)3SCC 368**, **(1974) 3 SCC 361 (Mohandas Lalwani vs. The State of Madhya Pradesh)** and **(1976) 1 SCC 15 (Bhagwan Singh vs. The State of Rajasthan)**. Though some of these cases ended in acquittal, the point to note is that the offer of bribe was always treated as a substantive offence under Section 165 A of IPC by the Hon'ble Supreme Court. The Prevention of Corruption Act is an Act to consolidate and amend the law relating to the prevention of corruption and for matters connected therewith. Para 4 of the statement of objects and reasons states that the provisions of sections 161 to 165 A are incorporated in the present Act and that was why the corresponding provisions in the Penal Code were to be



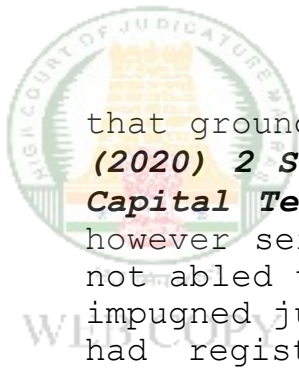
deleted. This being the legislative history, there is absolutely no merit in the contention of the learned Senior Counsel that offer of bribe would not constitute an offence under Section 12 of the Prevention of Corruption Act, 1988. Illustration (a) of Section 116 of the Penal Code is as follows :

"A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B refuses to accept the bribe. A is punishable under this section."

6.Shri.A.Robinson, the learned Government Advocate (crl.side) drew my attention to a direct decision rendered by the Hon'ble Madhya Pradesh High Court in **Sharad Kumar vs. State of Madhya Pradesh 2009 0 ILR(MP) 229**. The Hon'ble Madya Pradesh High Court in its scholarly decision had held that offer of bribe itself is an offence.

7.In view of the foregoing discussion, I have to express my respectful disagreement with the views of the Hon'ble Kerala High Court as well as that of the Bombay High Court and I hold that offer of bribe to a public servant even without anything more does constitute a substantive offence punishable under Section 12 of the Prevention of Corruption Act, 1988. This was always the position and the recent amendments have not made any difference.

8.Coming to the facts of the case, I have to express my surprise over the manner in which the investigation had been conducted. PW.1 had attempted to contact the Deputy Superintendent of Police, V&AC to lodge his complaint. Since he was not available, PW.1 intimated the local police through the Special Branch Inspector. PW.5 Sivakumar arrived at the camp office of PW.1 District Collector and seized a sum of Rs.25,000/- from the accused/appellant. PW.4, the Deputy Superintendent of Police received Ex.P1 complaint from PW.1 and registered Crime No.548 of 2007 on the file of the Inspector of Police, Sivagangai Town Police Station under Section 12 of the Prevention of Corruption Act, 1988 at around 11.00 A.M on 21.08.2007. Thereafter, FIR was forwarded to the Judicial Magistrate No.I, Sivagangai. Only in February 2008, the case was transferred to the respondent herein. PW.12 Govindarajan was the DSP, V&AC during the relevant time and he took over the investigation from PW.4. I fail to understand as to why the FIR was not registered by V&AC Police in the first instance. I am not able to appreciate the long delay in taking over the investigation by PW.12. PW.4 was definitely not an officer authorised under Section 17 of the Prevention of Corruption Act to conduct investigation. Though the breach of the provisions set out in the Vigilance Manual as well as the statute in the matter of conducting of investigation are quite serious and they were strongly pressed into service by the learned Senior Counsel, I am of the view that the trial proceedings cannot be said to be vitiated on



that ground. The Hon'ble Supreme Court in the decision reported in **(2020) 2 SCC 88 (Vinod Kumar Garg vs. State (Government of National Capital Territory of Delhi))** held that defects in the investigation however serious will not vitiate the conviction if the accused is not able to show any prejudice. Therefore, the contention that the impugned judgment will have to be set aside for the reason that PW.4 had registered the case and conducted a major part of the investigation is to be rejected.

9. It is the case of the prosecution that after the offer of bribe was made to PW.1, the accused was made to wait outside along with his companion and that the police was summoned in the meanwhile. PW.5 recovered the sum of Rs.25,000/- from the accused. PW.1 would state that after searching and effecting seizure, PW.5 brought the accused into his room and appraised him. But, PW.2 Sridhar who is said have been present when the offer of bribe was made deposed that the search took place inside the camp office room of PW.1. He would go to the extent of stating that based on the instruction of PW.1, PW.5 effected the search and seizure. PW.3 Pasupatheeswaran would depose that PW.1 instructed him to come inside his room along with the accused Vishal Bohra and that he instructed PW.5 Sivakumar to search the accused and recovered the sum of Rs.25,000/-. Thus, there is a clear discrepancy as regards the venue of search while PW.2 and PW.3 would state that the search took place inside the camp office room of PW.1, PW.5 would state that the search and seizure took place outside the room of PW.1.

10. Ex.P4 is the mahazar evidencing the recovery which was prepared only at 11.30 P.M in the Sivagangai Town Police Station. There was no contemporaneous preparation of mahazar. Be that as it may, the specific case of the prime witnesses, namely, PW.1, PW.2 and PW.3 is that the seizure was made along with the khaki envelop in which the amount of Rs.25,000/- was contained. To a specific question, PW.2 as well as PW.3 would state that the khaki envelop was also recovered and handed over to PW.5. But strangely, the said envelop was not produced before the court below or marked during trial.

11. The learned Government Counsel would draw my attention to the decision of the Hon'ble Supreme Court reported in **(2004) 12 SCC 29 (State of W.B v. Kailash Chandra Pandey)** in which it has been mentioned that nothing turns on non-production of envelop. But that was a case of acceptance of bribe money. If the phenolphthalein test had been positive, then non recovery of the envelop in which the tainted money was brought will not make any difference. But the case on hand arises under Section 12 of the Prevention of Corruption Act. The specific case of PW.1 and PW.2 was that the accused tried to take out a khaki envelop from his pant pocket. Ex.P1 complaint mentioned this. Recovery of a sum of

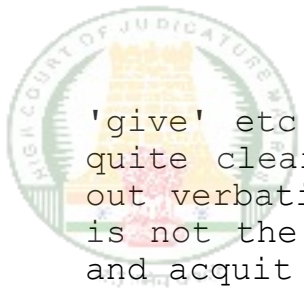


Rs.25,000./- from the person of a Marwari business man cannot be a circumstance against him. Non-recovery of the envelop which is spoken to by the witnesses and which is specifically mentioned in the complaint is a serious lacunae.

12.More than anything else, one other feature of the case seriously disturbs me. The charge has been framed in English and the accused pleaded not guilty by contending that the case against him was false. The accused had written down his response in English. The accused obviously does not know Tamil. All the questions framed during examination under Section 313 of Cr.Pc are in Tamil. The accused had replied that the incriminating circumstances put to him are not true and that they are false. After the accused was found guilty, the court had questioned him regarding sentence only in English and the response of the accused was also in English. Therefore, conducting of the examination under Section 313 in Tamil is a serious flaw and in my view has caused miscarriage of justice. Ex.P1 complaint is in Tamil. The testimony of PW.1 is also in Tamil. The appellant could not have spoken in Tamil. He would have probably spoken in broken English. The manner in which the trial was conducted has violated the appellant's right to fair trial. Putting questions to the accused in a language not known to the accused renders the entire exercise farcical.

13.Ex.P1 does not set out verbatim what the accused did. The Hon'ble Supreme Court observes in one case that one would not offer bribe in the presence of others. When the appellant met PW.1, PW.2 Sridhar was present. Of course, PW.1 would state that the appellant expressed a wish to discuss something with PW.1 in private and that PW.1 declined to do so and asked the appellant to spell it out then and there. PW.1 was the District Collector during the relevant time. The accused is a business man and they were meeting for the first time. It does not appear to be probable that the accused would straightaway try to pass on an envelop containing a sum of Rs.25,000/-. It is quite possible that the accused had in his mind some improper motive and he could have blurted out words like gift etc., PW.1 probably smelt something fishy and feeling offended wanted to teach the accused the lesson of his life. But, whether an offer of bribe was actually made is not quite evident. This is because the exact words uttered by PW.1 have not been re-produced verbatim either in the complaint or in the deposition.

14.The appellant is not a public servant. It is the duty of the prosecution to prove its case beyond reasonable doubt against the appellant. The circumstances set out above do create a genuine doubt in the mind of this Court as to whether the improper motive that was in the mind of the appellant found culmination in the form of an offer of bribe. That the appellant is an unscrupulous businessman is evident from the request made by him to PW.1 to have a private discussion and by the utterance of the words 'gift',



'give' etc., But, whether an actual offer of bribe was made is not quite clear. If the words uttered by the accused have been spelt out verbatim, then I would have taken a different view. Since that is not the case here, I reluctantly set aside the impugned judgment and acquit the appellant by giving him the benefit of doubt.

WEB COPY

15.The impugned judgment is set aside. The appellant is acquitted. The fine amount shall not be refunded to the appellant. The bail bond executed by the appellant shall stand cancelled.

Sd/-

Assistant Registrar(T & P)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

Skm

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The Special Judge for Vigilance and Anti-Corruption Cases,
Sivagangai.

2.The Deputy Superintendent of Police,
Vigilance & Anti Corruption Department,
Sivagangai.

3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

Copy to
The Record Keeper,
Criminal Records,
Madurai Bench of Madras High Court, Madurai(2 copies).

CRL A (MD) No.15 of 2016
18.12.2020

ES(CO)
TR(24.03.2021) 10P 6C