

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No. 316 of 2013

From the judgment and order dated 27.05.2013 passed by the learned Spl. Judge, (Vigilance), Berhampur in G.R. Case No. 46 of 2022(V) (T.R. No.32 of 2003).

Pabitra Nayak

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Appellant

-Versus-

State of Odisha (Vigilance)

Respondent

Advocate(s) appeared in this case :-

For Appellant : M/s. H.K.Mund, A.K.Dei,
R.K.Mishra & B.C.Agrawalla,
Advocates

For Respondent : Mr. M.S. Rizvi,
Addl. Standing Counsel
Standing Counsel (Vigilance)

CORAM:

JUSTICE SASHIKANTA MISHRA

J U D G M E N T

25th November, 2022

SASHIKANTA MISHRA, J.

The Appellant challenges the judgment dated 27th May, 2013 passed by learned Special Judge (Vigilance), Berhampur in G.R. Case No.46/2002(V) whereby he was convicted under Sections 7 and 13(2) of the Prevention of Corruption Act, 1988 (for short the

“Act”) and was sentenced to undergo S.I. for one year and to pay a fine of Rs.5,000/-, in default to undergo further S.I. for three months under Section 7 of the Act and S.I. for two years and fine of Rs.10,000/-, in default to undergo S.I. for four months under Section 13(2) of the Act. All the aforementioned sentences have been directed to run concurrently.

2. The prosecution case, briefly stated, is that one Abdulla Pradhan presented a written report before Superintendent of Police (Vig), Phulbani on 23rd September, 2002 stating that he had applied for solvency certificate in the office of Sub-Collector, Balliguda in the month of July, which was forwarded to Tahasildar, G. Udayagairi for enquiry and report. The said Tahasildar sent the application to R.I., Tikabali for enquiry and report. When the complainant met the R.I. and enquired about his application he was informed that the report was with the certificate clerk namely, Pabitra Nayak (Appellant). When the complainant met the Appellant, he demanded bribe of Rs.1500/- by saying that there was an error in the enquiry report, which was required to be corrected.

The complainant, instead of paying the amount, approached the S.P. (Vig), Phulbani and lodged the report, which led to registration of Phulbani Vigilance P.S. Case No.46/2002 under Sections 7 and 13(1)(d) read with Section 13 (2) of the Act. In course of investigation, it was decided to lay a trap against the Appellant and accordingly, on 24th September, 2002 a trap was laid during which the Appellant was caught red handed while accepting the tainted money of Rs.1500/-. The necessary formalities of the trap were followed and upon completion of investigation and obtaining sanction for prosecution, charge sheet was submitted against the Appellant.

3. The Appellant took the plea of denial and further that he was not dealing with the file relating to solvency certificate.

4. The trial Court framed the following points for determination:-

(i) Whether on 24.9.2002 at G. Udayagiri, the accused named above, who was working as a certificate clerk of Tahasil office, G.Udayagiri, Dist-Kandhamal accepted rupees fifteen hundred from the complainant on the basis of a demand to dispatch the report after correction of the

enquiry report of R.I. for issuance of solvency certificate in the favour of decoy namely Abdula Pradhan as a gratification other than legal remuneration with a motive or reward for doing an official act such as to provide electricity connection and thus thereby committed an offence punishable under Section 7 of the Act ?

(ii) Whether on the date, time and place as alleged by the complainant, the accused being a public servant posted as above corrupt or illegal means or otherwise by abusing his position as a public servant, obtained pecuniary advantage of rupees fifteen hundred for self from the complainant on the purpose mentioned above and thus, thereby committed an offence as specified in Section 13(1)(d) of the Act and made punishable under Section 13(2) of the Act ?

It is not understood why the trial court referred to the motive or reward for doing an official act to 'as to provide electricity connection' when such an allegation has not been made at all rather, the allegation relates to issuance of solvency certificate.

5. Be that as it may, the prosecution examined 9 witnesses and proved 12 documents apart from 6 material objects. Defence did not adduce any evidence.

6. After scanning the oral evidence particularly, that of the complainant decoy (P.W.3) and the

accompanying witness (P.W.5), the trial Court held that the entire case of the prosecution regarding demand of illegal gratification by the Appellant was not proved at all since the complainant himself did not support the prosecution case. The accompanying witness (P.W.5) also did not support the prosecution case. Though both of them were declared hostile, nothing was elicited from them in cross-examination to help the prosecution.

7. As regards the demand of bribe of Rs.1500/-, the trial court, also relying upon the evidence of P.Ws.3 and 5 held that there was absolutely no evidence to show that there was any demand of bribe as alleged by the prosecution. Relying upon a judgment passed by this Court in the case of **Arakhita Nath v. State of Odisha**; reported in (2009) OCR 34, the trial Court held that once the evidence of decoy and the accompanying witness is rejected, there remained little to sustain the prosecution case. Despite holding so, the learned trial Court took into consideration the fact that the recovery of bribe money from the conscious possession of the accused is an incriminating circumstance against him, which can persuade the

Court to raise the statutory presumption under Section 20 of the Act. Analyzing the evidence of the other witnesses namely, P.Ws.1,2,5 and 7, the trial Court held that the tainted money had been recovered from the pant pocket of the Appellant and the hand wash and pant pocket wash had proved that he had accepted the same. Placing the onus on the Appellant to explain as to how the tainted money was recovered from his pocket and finding none, the trial Court held that the defence had not offered proper explanation. On the findings as above, the trial Court held that the evidence relating to recovery of money is adequate to draw the statutory presumption under Section 20 of the Act against the accused and therefore, convicted him for the offences in question and sentenced him as aforesaid.

8. Heard Mr. H.K.Mund, learned counsel for the Appellant and Mr. M.S. Rizvi, learned Addl. Standing Counsel for the Vigilance Department.

9. Assailing the impugned judgment of conviction, Mr. Mund has raised the following points:-

(i) Once the Court finds that there is no evidence of demand or acceptance of illegal gratification, the entire case of the prosecution falls to the ground.

(ii) It is necessary to prove the voluntary acceptance of the illegal gratification for raising presumption under Section 20 of the Act, which the prosecution failed to do.

(iii) Mere recovery of tainted money divorced from circumstances in which it is recovered is not sufficient to convict the accused.

10. Mr. M.S.Rizvi, on the other hand, contends that demand and acceptance of illegal gratification can be proved both by direct as well as circumstantial evidence. In the case at hand, the informant turned hostile and did not support the prosecution case, but on a cumulative examination of the other evidence on record, it can be clearly inferred that the accused had demanded Rs.1500/- as bribe and had also accepted the same. It is further argued that the accused had the opportunity of explaining the recovery of tainted money

from his person but in the instant case, it was found that he had given a false explanation. According to Mr.Rizvi, therefore, the impugned judgment of conviction is correct and does not warrant any interference whatsoever.

11. It goes without saying that to constitute the offence under Sections 7 and 13(1)(d) of the Act, it is essential to prove demand acceptance and recovery of the illegal gratification/bribe money. It is also to be noted that demand has two components, i.e., prior demand and demand during detection. It is the latter which weighs the scales in support of the prosecution. Similarly, only demand without proof of acceptance of bribe money by the accused is of no consequence. Thus, both demand and acceptance are inextricably linked to each other so much so that both need to be proved to the hilt to bring home the charge under Sections 7 and 13(1)(d) of the Act. Recovery of the tainted money by itself however does not occupy such importance as demand and acceptance. It is well settled that mere recovery of tainted money divorced from the circumstances in which it is paid, is not

sufficient to convict the accused, when the substantive evidence in the case is not reliable. The above view was taken by the Apex Court in the case of **State of Kerala vs. C.P. Rao**, reported in (2011) 6 SCC 45.

12. The rival contentions may now be considered in the backdrop of above mentioned legal principles.

Be it noted at the outset that the trial court disbelieved the prosecution evidence regarding demand and acceptance of the tainted money by the accused. The complainant/decoy and the accompany witnesses being examined respectively as P.Ws.3 and 5 did not support the prosecution case at all, which led the trial court to hold that the whole of the prosecution case falls to the ground inasmuch as it utterly failed to prove that the accused demanded and accepted Rs.1500/- from the complainant. This part of the impugned judgment is undoubtedly against the prosecution but there has been no challenge to such finding by the State obviously because the ultimate finding has been in its favour. Nevertheless, just to be satisfied that the finding as above is correct, this Court has carefully travelled through the entire prosecution

evidence. Particularly, the version of P.Ws.3 and 5. Without delving into details, it is suffice to note that the complainant himself deposed as follows:

“XX XX XX XX

When the clerk (appellant) came to the Tahasil office, I enquired my certificate and told that the matter is pending before the Tahasildar. When I offered the money to him, he was reluctant to receive but I kept the money in his pant pocket. Thereafter, the clerk brought out those stated currency notes from his pocket and handed over to me. At that time, the Vigilance staff came and told about the happenings to the vigilance staff.

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13. P.W.3 was declared hostile and was cross examined at length by prosecution but nothing was elicited to discredit his sworn testimony. On the other hand, he admitted in cross-examination that he had been instructed by the vigilance staff any how to give the money to the accused irrespective of demand.

The accompany witness (P.W.5) testified as follows:-

“XX XX XX XX

Informant proceeded ahead of me and I followed him. The informant entered into the office room and the accused was sitting in his chair. As it was not convenient, I did

not enter into the office and remained on the varandah and informant entered inside the office room and stood near the accused. I had instructed the informant to give signal to me after the transaction and as informant gave signal to me, I immediately transmitted the signal to vigilance staff who were outside the Tahasil office at a visible distance.

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In cross- examination, he admitted that he had not heard the conversation between the accused and the informant prior to receiving signal from the informant. Thus, P.Ws.3 and 5 being the most important witnesses of the prosecution have not supported its case even a bit. The trial court therefore, rightly held that the factum of demand of illegal gratification by the accused and acceptance thereof by him was not proved.

After rendering such finding, the trial court dwelt upon the recovery aspect. The evidence in this regard is that the tainted money was recovered from the pant pocket of the accused and the colour of the chemical solution turned to pink on his hand wash and pocket wash being taken. All the other witnesses have deposed more or less in these lines. Being faced with

such evidence, the trial court proceeded on the premise that in a trap case recovery of bribe money from conscious possession is an incriminating circumstance against the accused. It was further held that if it is proved that the accused voluntarily received the bribe money and there exists other surrounding circumstances a statutory presumption can be drawn against the accused. The trial Court thereafter, considered the evidence of P.Ws. 1, 2, 5, 7 and 9 to hold that even though there is no direct or substantial evidence relating to demand and acceptance of bribe by the accused, yet in the absence of proper explanation by the accused, such recovery has to be treated as incriminating in nature. In this regard, it would be apposite to refer to Section 20 of the P.C. Act, (as it stood then) which is extracted hereinbefore.

“20. Presumption where public servant accepts gratification other than legal remuneration.-

(1) Where, in any trial of an offence punishable under section 7 or section 11 or clause

(a) or clause (b) of sub-section (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be

presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable under section 12 or under clause (b) of section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7, or as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-sections (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn.”

14. Mr. H.K. Mund has argued that the presumption under Section 20 is not applicable to Section 13(1)(d) and secondly, such presumption is contingent upon proof of voluntary acceptance of illegal gratification. Mr. Mund has referred to a decision of the Apex Court in the case of **C.P. Rao (supra)** as also in the case of **V. Venkata Subbarao vs. State represented by Inspector of Police, A.P.**, reported in

(2006) 13 SCC 305, wherein it was held as under paragraph-10:-

“10. In C.M. Girish Babu Vs. CBI Cochin High Court Kerala, this Court while dealing with the case under the Prevention of Corruption Act, 1988, by referring to its previous decision in the case of Suraj Mal Vs. State (Delhi Administration), held that mere recovery of tainted money, divorced from the circumstances under which it is paid, is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused. In the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe conviction cannot be sustained.”

15. Learned trial court has relied upon a decision of the Apex court in the case of **Hazari Lal vs State (Delhi Administration)**, reported in (1980) 2 SCC 390, wherein it was held that where the recovery of the money coupled with other circumstances leads to the conclusion that the accused received gratification from some person, the Court would certainly be entitled to draw the presumption under Section (4)1 of the P.C. Act (Old Act).

Mr. M.S. Rizvi has relied upon the following cases in addition to **Hazari Lal (supra)**, namely, **T. Shankar**

Prasad vs. State of A.P., reported in (2004) 3 SCC 753, **Umesh Manan vs. State of M.P.**, reported in (2017) 66 OCR (SC) 732 and **Vinod Kumar Garg vs. State (NCT)**, reported in (2020) 77 OCR (SC) 310 to buttress his contention that the trial court rightly invoked the statutory presumption under Section 20 of the act in view of recovery of the tainted money from the pant pocket of the accused.

After objectively viewing the evidence on record, this Court fails to see as to how the ratio of **Hazari Lal (supra)** can be made applicable to the present case, the reason being, the Apex Court only reiterated the settled principle that recovery of money ‘coupled with the other circumstances’ can justify raising of presumption. But then in the present case when the complainant himself says that he had put the tainted money in the pant pocket of the accused and no contrary evidence being adduced to rebut such positive assertion, it cannot by any stretch of imagination be held that the tainted money found from the possession of the pant pocket of the accused was illegal gratification. In fact, it would be reasonable to suppose that keeping in mind such an

eventuality the legislature in its wisdom employed the expression “has accepted or obtained” in Section 20. In other words, this was obviously done with the intent of protecting a person from false implication. For instance, in a case where a person willfully pushes the tainted money in the hands or pocket of the accused.

16. In the case of **T. Shankar Prasad (supra)**, the Apex Court held that the Court is bound to operate the presumption under Section 20, if the condition precedent for drawing such presumption is satisfied. The ratio of the above case is not applicable to the facts of the present case inasmuch as the Apex court held that the only condition for drawing such a legal presumption under Section 4 of the 1947 Act (Section 20 of the 1988 Act) is that during trial it should be proved that the accused has accepted or agreed to accept any gratification.

In the case of **Umesh Manon (supra)** there was clear proof of the accused being caught red-handed with the tainted money, which is not the case at hand. As regards, the case of **Vinod Kumar Garg (supra)**, the Apex Court reiterated the principle that the

condition precedent to drawing such a legal presumption that the accused has demanded and was paid the bribe money has been proved and established by the incriminating material on record

In the instant case, as has been discussed hereinbefore, there is no evidence regarding demand and acceptance of bribe by the accused.

17. Mr. Rizvi would argue that the fact of recovery of the tainted money from the possession of the petitioner automatically proves demand and acceptance on the principle that both direct as well as circumstantial evidence can be utilized to prove the same. As a legal proposition the above is certainly acceptable but then, it is for the prosecution to show as to what the circumstances are. In the instant case, prosecution has banked upon the evidence relating only to recovery of the accused tainted money from the accused, hand wash/pocket wash solution turning to pink and false explanation submitted by the accused. This much is not sufficient for the Court to raise presumption under Section 20. Unless it is shown that what was recovered had been accepted as gratification,

the presumption would not be available. Hence, the complainant has himself not stated anything about any demand of bribe by the accused and so also the accompanying witness. Such being the evidence, there is no way by which the Court can 'infer' that the money recovered from the accused was illegal gratification paid on demand. What Mr. Rizvi attempts to persuade the Court to view as an incriminating circumstance is, in fact, an inference that he wants the Court to draw, which, as discussed above, is not at all tenable.

18. Another aspect also needs consideration. It is true that if the initial burden is discharged by the prosecution, the onus shifts to the accused. The trial court has laid much emphasis on the so called false explanation submitted by the accused to hold that the presumption under Section 20 was not rebutted. Firstly, this Court finds that if according to the trial court this was an incriminating fact, the same should have been brought to the notice of the accused in his examination under Section 313 of Cr.P.C. before it could be utilized against him. The same was not done in the present case. There can be no gainsaying that in

such a situation the so called incriminating evidence is of no help to the prosecution. Secondly, the question of shifting of burden would arise only when the initial burden is adequately discharged by the prosecution. As has already been discussed hereinbefore, the foundational fact which needs to be established by prosecution in a case of trap is evidence of demand and acceptance of bribe. The trial court has itself held that the prosecution could not establish such a foundation. This Court has also independently scanned the evidence to arrive at similar finding. Under such circumstances, it is not understood as to how the burden would shift to the accused by raising the presumption under Section 20. To reiterate, there can be no quarrel with the proposition that a trap may be proved either by direct or circumstantial evidence, but in the case at hand, there is no direct or circumstantial evidence showing demand and acceptance of illegal gratification by the accused. The trial court must therefore, be held to have committed gross error of law in holding otherwise.

19. In the result, the appeal succeeds and is, therefore, allowed. The impugned judgment of conviction and sentence passed by the trial court is hereby set aside. The appellant being on bail, his bail bond be discharged.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 25th November, 2022/ B.C. Tudu

