IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLA No. 143 of 2004

An appeal under Section 374 of Cr.P.C. read with Section 27 of the Prevention of Corruption Act, 1988 against the judgment and order dated 27.04.2004 passed by Special Judge (Vigilance) Bhubaneswar in T.R. Case No. 51 of 1992.

AFR **Shyamasundar Nayak ...... Appellant**

-Versus-

State of Orissa(G.A. Deptt.) .... Respondent

Advocate(s) appeared in this case:-

For Appellants	:	M/s. S.K. Mund, A.K. Dei D.P. Das, J.K. Panda, S.K. Joshi, S. Panigrahi, P.K. Ray, A.K. Lenka, D.K. Panda, Advocates.
For Respondent	:	Mr. M.S. Rizvi, Addl. Standing Counsel for Vigilance Department.

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT
8th December, 2022

SASHIKANTA MISHRA, J. The appellant challenges the judgment dated 27.04.2004 passed by learned Special Judge (Vigilance), Bhubaneswar in T.R. Case No.51 of

1992, whereby he was convicted for the offence under Sections 7 & 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act (in short 'PC Act') and was sentenced to undergo R.I. for one year and to pay a fine of Rs.1,000/-, in default, to undergo R.I. for one month for each of the offences with both the sentences being directed to run concurrently.

2. The prosecution case, briefly stated, is that one Santosh Kumar Jena (complainant), who is an Ex-Army personnel, registered his name in the District Zilla Sainik Board, Cuttack seeking employment. As he remained unemployed for quite some time, he approached the present appellant-accused, who was then the dealing clerk in the Zilla Sainik Board, Cuttack, and requested him to sponsor his name for a suitable service. The accused allegedly demanded Rs.500/- by giving out that the concerned officer would take Rs.300/- and the balance would be kept by him. At that time, the complainant paid Rs.100/- to the accused. On 08.05.1991 when he again met the accused at the Sainik Board, he demanded the balance amount of Rs. 400/- as bribe to

sponsor his name for appointment as a Hostel Superintendent in the Sainik School. When the complainant expressed his inability, the accused asked him to pay Rs.100/- by 09.05.1991. Instead of paying, the complainant submitted a complaint before the S.P., Vigilance, Cuttack on the same day. Basing on his complaint, it was decided to lay a trap and accordingly, all preparations were made. On the next day, the complainant met the accused near a tea stall at Badambadi, where, on demand he paid Rs.100/- and at that time the trap party members rushed to the spot and caught him red handed. After observing all the required formalities, the accused was arrested and forwarded to the Court. Upon completion of investigation, charge sheet was submitted under the aforementioned sections and the accused was put to trial.

3. The accused took the plea of denial and stated that on the date of trap, the complainant having seen him near a tea stall at Badambadi had invited him for tea and when he gave Rs.100/- to the tea stall owner, the latter expressed that he had no change for which the

complainant gave Rs.100/- to the accused who stated that he had the necessary change. At that time, he was caught by Vigilance Police.

4. To prove its case, the prosecution examined 10 witnesses including the complainant as P.W.-1, the overhearing witness as P.W.-3, the tea stall owner as P.W.-9 and the trap laying officer as well as the I.O. as P.W.-10. In course of trial, the complainant (P.W.-1) deposed about the alleged demand being made by the accused and of the payment made by him pursuant thereto. The overhearing witness, P.W.-3, however, turned hostile and was cross-examined by the prosecution. The tea stall owner, P.W.-9 gave a version in line with the defence plea for which he was also declared hostile and cross-examined by the prosecution. Learned Special Judge scanned the evidence of the aforementioned witnesses and also that of the other witnesses to hold that the accused had demanded Rs.100/- from the complainant to sponsor his name for the post of Hostel Superintendent. In arriving at such finding, learned Special Judge was guided by the provision under Section

20 of the P.C. Act which empowers the Court to raise a presumption regarding acceptance of illegal gratification. Learned Special Judge disbelieved the defence version and held the case of prosecution as proved beyond reasonable doubt. Accordingly, the accused was convicted and sentenced as aforesaid by the impugned judgment.

5. Heard Ms. Anima Kumari Dei, learned counsel for the appellant and Mr. M.S. Rizvi, learned Standing Counsel for vigilance.

6. Assailing the impugned judgment of conviction, Ms. A.K. Dei has raised the following grounds:

(i) In the absence of corroboration by the overhearing witness, the version of the complainant regarding demand of bribe by the accused cannot be said to have been proved.

(ii) The defence gave a reasonable explanation for the tainted money being found from his pocket but the same was not considered at all by the trial court.

(iii) Since neither demand nor acceptance as required by the statute was proved beyond reasonable doubt, learned Special Judge committed gross illegality in raising the presumption under Section 20 of the Act.

7. Per contra, Mr. M.S. Rizvi, learned Standing Counsel for Vigilance contends that on the face of direct evidence of the complainant himself and the evidence of the other witnesses (trap party members) as also the fact of recovery of tainted money from the shirt pocket of the accused it was fully justified for the trial court to raise the presumption under Section 20 of the Act. He further submits that the defence plea as raised is entirely unbelievable. Thus, according to Mr. Rizvi, the impugned judgment does not warrant any interference whatsoever.

8. Having considered the rival contentions as above, it would be proper for this Court to examine the evidence on record to be satisfied as to if the impugned judgment warrants any interference.

9. The prosecution case, as already stated, hinges around the allegation made by the complainant that the accused demanded Rs.500/- from him as bribe for sponsoring his name for appointment against the post

of Hostel Superintendent of Sainik School. Out of such amount, Rs.100/- was paid on the date of demand. The exact date on which the said amount was demanded and paid is not forthcoming either from the FIR or from the evidence of the complainant (P.W.-1) himself. Be that as it may, it is the further case of prosecution that on 08.05.1991, when the complainant met the accused and requested to sponsor his name, the latter demanded the balance amount and when the complainant expressed his inability, the accused asked him to pay at least Rs.100/- on 09.05.1991. On the next day, a trap was laid and the accused was caught red handed while allegedly accepting bribe of Rs.100/- paid by the complainant.

10. This being the prosecution case, it was for it to prove that there was demand- both prior and instant - as well as acceptance of illegal gratification by the accused. Prosecution heavily relies upon the evidence of the complainant (P.W.-1), who deposed in the court more or less whatever he had stated in the complaint (Ext.-1). As regards the demand and acceptance of bribe at the spot, the complainant stated as under:

> *"4. A few minutes before 5 P.M. all of us left the Vigilance office for Badambadi. I came to Badambadi on my own scooter and the other members of the raiding party came by Government Jeep. I met the accused near the gate of Badambadi L.I.C. Colony close to tea stall. Being asked by the accused I told that I had come prepared with a sum of Rs.100/-. On his demand I brought out the tainted currency note from my pocket and gave it to him. The accused accepted the currency note from me and kept it in his chest pocket. Immediately thereafter the other members of the raiding party, who had taken positions nearby rushed to the accused and caught hold of him. Two Vigilance Inspectors caught hold of both the hands of the accused. Lingaraj Mohanty, a clerk in the Cuttack Collectorate was also present nearby to witness acceptance of money by the accused. The Vigilance officers took the accused to the Govt. jeep, in which the Executive Magistrate was sitting. Thereafter the Vigilance Officers took the accused to the Vigilance office in Govt. Jeep and I followed them on my own scooter."*

According to the complainant, one Lingaraj Mohanty, a Clerk in the Cuttack Collectorate was also present nearby to witness acceptance of money by the accused. In other words, the said Lingaraj Mohanty was the overhearing witness, who was examined as P.W.-3. Being so examined, P.W.-3 did not whisper a word regarding the any demand being made by the accused to the complainant at the spot. His statement is as follows:

> *"2. Then we all proceeded in Govt. vehicle to the residence of the accused situated at Badambadi. The vehicle stopped near the gate near the colony. Again says the vehicle was parked at the short distance of the gate. Myself and complainant stayed near the gate. The other trap party people*

remained at a short distance. In the meantime after one hour the accused came on a cycle. Seeking the accused the complainant went near him, had some talk and both of them proceeded towards outside of the gate and took tea in a tea stall. After which the complainant inserted one hundred rupee note inside the pocket of the accused, after which I gave the signal and trap party arrived. The vigilance officers caught hold of the accused and took him in the vehicle to the Vigilance office. In the vigilance Magistrate asked the accused if he had taken money from complainant and the accused relied to have received the money from a complainant who gave it forcibly."

Thus, there is absolutely nothing in his version to support the allegation that the accused had demanded any money much less Rs.100/- from the complainant. Prosecution declared him hostile and cross-examined him at length but nothing substantial was brought out thereby to discredit his sworn testimony. Significantly, in cross-examination by the defence, P.W.-3 admitted that from the vigilance office, he went in the Jeep with the vigilance staff while the complainant went on his scooter. Thus, the version of the complainant, P.W.-1 is not corroborated at all by P.W.-3. Another significant aspect that is apparent from the record is what the complainant stated in his cross-examination in paragraph-11 that he was asked by vigilance to prepare another detailed report as his original report did not fully reflect all his grievances. Thus, this is a clear case where the complaint itself was prepared after due deliberation and most probably with inputs from the Vigilance Police. This, by itself, takes away the sanctity of the FIR that was acted upon

11. Notwithstanding the aforementioned lacunae in the evidence adduced by the prosecution, the version of P.W.-9, who was the other person present nearby, i.e. the tea stall owner (P.W.-9) has to be considered. As regards the entire transaction, he had the following to say

> *"I know the accused in dock, who is known as Naik Babu, who is an employee of Sainik Board, Cuttack. In the year 1991, he was staying in one of the quarters of old L.I.C. flats of quarters. In the year 1991 at about 4.30 or 5 P.M. the accused in dock along with a bearded man came to my stall to take tea, and each of them took a glass of tea. The bearded man offered me a one hundred rupee note towards the cost of the tea and I told him that I had no change asked the accused whether he had any change. The accused replied that he had the required change. Then the bearded man handed over the one hundred rupee note to the accused. While the accused was still holding the money in his hand within no time, immediately vigilance people came, caught hold of the hands of the accused and took him with them. I was to get Rs.3/- towards the cost of the tea, which I did not get."*

No doubt, he was declared hostile and cross-examined at length but nothing came out from his mouth to disbelieve or discredit his sworn testimony. If the version of P.W.-9 is compared with the defence plea, as reflected in his answer to question no.3, it would appear to be more plausible and a reasonable explanation for recovery of the tainted hundred rupee note from the shirt pocket of the accused. It is well settled that the defence is required to submit only a reasonable explanation and not prove its case beyond reasonable doubts. If the evidence as discussed above, is considered as a whole, the defence plea appears more plausible than the prosecution story, more so when the basic ingredients of demand and acceptance are not proved.

12. Before examining the justifyability of raising of the presumption under Section 20 by the trial court it would be proper to keep in mind the settled position of law that mere recovery of the 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. Reference in this regard may be had to the decision of the Apex Court in the case of ***State of Kerala vs. C.P. Rao,*** reported in (2011) 6 SCC 45.

13. Keeping the above principle in mind it is to be seen as to how far the evidence on record could have formed the basis for the trial court to raise presumption under Section 20. Section 20 of the Act as it stood then, reads as follows:

> *"**20. Presumption where public servant accepts any undue advantage** - Where, in any trial of an offence punishable under section 7 or under section 11, it is proved that a public servant accused of an offence has accepted or obtained or attempted to obtain for himself, or for any other person, any undue advantage from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or attempted to obtain that undue advantage, as a motive or reward under section 7 for performing or to cause performance of a public duty improperly or dishonestly either by himself or by another public servant or, as the case may be, any undue advantage without consideration or for a consideration which he knows to be inadequate under section 11."*

14. A bare reading of the provision makes it clear that firstly it does not apply to an offence under Section 13(1)(d) and in so far as Section 7 is concerned, it is incumbent upon the prosecution to prove that there was voluntary acceptance by the accused of illegal gratification. In the instant case, prosecution has neither been to establish prior or instant demand of gratification by the accused not acceptance of the same by him at the

spot. Reading of the impugned judgment reveals that the learned trial court brushed aside the fact that there was no corroboration whatsoever of the evidence of complainant relating to prior and instant demand by the accused. The defence explanation was also brushed aside and on the available evidence, an inference was drawn which was given the colour of presumption under Section-20. Be it noted here that a fact can be proved by both direct and circumstantial evidence. Drawing inference on the basis of evidence is not akin to raising presumption permitted by the statute. What learned Special Judge appears to have done is, in the absence of corroboration an inference has been drawn basing on the version of the complainant and the other members of the trap party. This is obviously not conscionable in the eye of law for which the finding of the learned Special Judge is rendered susceptible to interference. This Court is therefore, of the considered view that the impugned judgment of conviction cannot be sustained.

15. For the forgoing reasons therefore, the appeal is allowed. The impugned judgment of conviction and

sentence is hereby set aside. The accused being on bail, his bail bonds be discharged. Before parting, this Court places on record its appreciation for the assistance rendered by Ms. Anima Kumari Dei, learned counsel for the appellant as well as Mr. M.S. Rizvi, learned Addl. Standing Counsel for the Vigilance.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 8th December, 2022/ A.K. Rana, P.A.