IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 405 OF 2013

The State of Maharashtra,
Through Anti Corruption Bureau,
Amravati, District : Amravati.

…. **APPELLANT.**

// **VERSUS** //

Vijay S/o. Vishnu Pagare,
Aged about 40 years,
Occupation: Service,
Police Sub-Inspector,
Rajapeth Police Station,
Amravati.

…. **RESPONDENT.**

Shri S.A.Ashirgade, A.P.P. for Appellant/State.
Shri P.R.Agrawal, Advocate for Respondent/State.

CORAM : ANIL S. KILOR, J.
DATE OF RESERVING THE JUDGMENT :06/05/2022
DATE OF PRONOUNCING THE JUDGMENT:27/06/2022

JUDGMENT :

1. This is an appeal filed under Section 378(1) of the Code of Criminal Procedure against acquittal. This appeal is arising out of

judgment and order dated 21/05/2012 passed by learned Additional Sessions Judge, Amravati in Special (A.C.B.) Case No.5 of 2002, thereby acquitting the respondent / accused-Vijay Vishanu Pagare of the offence punishable under Sections 7(13)(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the Act of 1988").

2. It is the case of prosecution that accused is a P.S.I. formerly attached to Police Station, Rajapeth, Amravati City. The prosecution on the accused, has been launched on a complaint made by one Kishore Pande to Anti Corruption Bureau, Amravati. It is alleged that on 13/12/2000 his brother Ashok while returning from Rajkamal Chowk on Hero Honda Motorcycle gave dash to one Hero Puch vehicle belonging to one Subhash Jangade. Thereupon, said Subhash Jangade lodged a report. Hence, the crime was registered against Ashok Pande for the offence punishable under Sections 279 and 337 of the Indian Penal Code (I.P.C.).

3. It is further case of the prosecution that there was compromise between Subhash Jangade and Ashok Pande on payment of repair charges and therefore, they decided to withdraw the report. When

brother of Ashok Pande, namely Kishor Pande, PW-1 (Complainant) approached Police Station, Rajapeth, that time one Head Constable Thakare asked him to come in the evening along with Ashok Pande.

4. Thereafter, in the evening when complainant PW-1 took Ashok to Police Station, Rajapeth, Head Constable Thakare did not meet him. Hence, on the next day they went again. That time accused who is PSI was present there, who called them in the evening as Mr. Thakare, Head Constable, was absent.

5. When in the evening at 08:30 p.m. PW-1 and Ashok went to the Police Station at that time accused Pagare asked them that to release Ashok on bail, they will have to pay Rs.1,700/-, but PW-1 and Ashok refused and returned back.

6. It is further case that on 11/01/2001 accused called them and inquired about money and at that time PW-1 paid Rs.1,000/- to him. Thereupon, the accused asked them to bring remaining amount of Rs.700/- on the next day at 02:00 p.m. i.e. on 23/01/2001, in the Police Station, Rajapeth. Since PW-1 was not interested to pay bribe, he approached the office of Anti Corruption Bureau and reported the matter.

7. Thereupon, the Anti Corruption Bureau (ACB) Inspector called two panch witnesses i.e. Suresh Soni (PW-2) and Shivdas Chavan (PW-3). They were introduced with complainant-PW-1. Thereafter usual demonstration of use of Anthrocin powder was shown to panchas and the complainant.

8. It is further case of the prosecution that after preparing first panchnama of this situation, the PW-1, his brother Ashok and PW-2 went to the Police Station, Rajapeth while the Raiding Party followed them.

9. On demand of amount of Rs.700/- by the accused and acceptance of it from the complainant-PW-1, Kishor Pande later gave pre-determined signal to the Raiding Party and then the Raiding Party reached to the spot. The bribe amount of Rs.700/- came to be seized from him, the documents for which bribe was accepted were also seized and fingers and pocket of the accused/ respondent were seen in ultraviolet light and found glittering blue. Thereafter, number of notes were got tallied on preparing second panchnama.

10. It is further case of the prosecution that the Anti Corruption Bureau through Investigation Officer (I.O.) Mr. Deshmukh then lodged report to the Police Station, Rajapeth, Amravati on the basis of which First Information Report No.3016/2001, under Sections 7, 13(1)(d) and 13(2) of the Prevention of Corruption Act has been registered against the accused persons/ respondent.

11. Thereafter, on completion of investigation the investigating papers were referred to the sanctioning authority and on receiving the same, the ACB Officer submitted the charge-sheet before the Special Court for the offences punishable under Sections 7, 13(1)(d) and 13(2) of the Prevention of Corruption Act.

12. The learned Additional Sessions Judge thereupon, framed the charges against accused for the offence punishable under Sections 7 for the offence punishable under section 13(1)(d) read with Section 13(2) of the Act of 1988, and after explaining the contents thereof, recorded the statement of the accused. The accused pleaded not guilty and claimed to be tried. The defence of the accused is of total denial and false implication in prosecution case.

13. In order to bring home the guilt of the accused, the prosecution has examined in all 5 witnesses. The complainant-Kishor Pande as P.W. No.1, Shri Suresh Soni Panch No.1 as P.W.No.2, Shri Shivdas Amarsingh Chavan Panch No.2 as P.W. No.3, Shri Subhash Chandra Jivandas Malhotra, then D.I.G. as P.W. No.4, Shri Panjabrao Himmatrao Deshmukh, the then Dy. S.P. ACB, Amravati as P.W. No.5, the investigating officer, who conducted the entire process.

14. The learned Special Judge after marshaling and scrutinizing the role as well as documentary evidence, acquitted the appellant herein.

15. I have heard the learned counsel for the respective parties.

16. Shri Ashirgade, learned A.P.P. for the appellant submits that the learned Sessions Court erred in acquitting the respondent inspite of cogent and reliable evidence on the point of demand as well as acceptance of alleged illegal gratification of Rs.700/-.

17. The learned A.P.P. submits that for rebuttal of presumption under Section 20, the accused has to bring 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 Section 7 of the Act of 1988. It is submitted that the accused has failed to rebut the presumption in this case.

18. It is submitted that the prosecution has established the demand and acceptance by examining five witnesses and bringing on record sufficient documentary evidence in support of the case of the prosecution. It is submitted that in absence of any rebuttal of presumption under Section 20, it cannot be said that the offence under the provision of Act of 1988, was not proved against the accused.

19. On the other hand Shri Agrawal, learned counsel for the respondent-accused argues 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 of or under Section 13(1)(d) or 13(2) of the Act of 1982. It is submitted that demand and acceptance of illegal gratification is *sine qua non* to attract the provisions of Section 7, 13(1)(d) as well for the presumption under Section 20 of the Act of 1988.

20. Shri Agrawal, learned counsel for the respondent would submit that the burden to prove the accusations against the respondent for the offence punishable under Sections 7, 13(1)(d) of the Act of 1988

with regard to the acceptance of the illegal gratification lies on the prosecution. It is submitted that the prosecution did not examine material witnesses.

21. It is further submitted that the indication alleged to have made by the accused of whether the money being brought or not, does not constitute the demand. It is submitted that mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, *de hors* the proof of demand, *ipso facto* would does not sufficient to bring home the offence under the provisions of Act of 1988.

22. To consider the contentions of the rival parties, I have perused the record and gone through the relevant judgments on the point of acceptance and demand.

23. The Hon'ble Supreme Court of India while dealing with the law on 'demand of illegal gratification', in the case of *State of Punjab v/s Madan Mohan Lal Verma*[1] has held thus:

> "11.The law on the issue is well settled that 'demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in

1 2013(14)SCC153

> 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 person."

24. In the case of *B. Jairaj ..vs.. State of Andhra Pradesh*[2] while considering the issue whether mere possession and recovery of the currency notes from the accused is sufficient to hold that there was a demand of bribe, the Hon'ble Supreme Court of India held thus:

2 2014(13) SCC 55

> "8. … We are, therefore, inclined to hold that the learned trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by the accused himself. Mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7. The above also will be conclusive insofar as the offence under Sections 13 (1) (d) (I) and (ii) 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 a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established. 9. Insofar as the presumption permissible to be drawn under Section 20 of the Act is concerned, such presumption can only be in respect of the offence under Section 7 and not the offences under Sections 13 (1) (d) (I) and (ii) of the Act. In any event, it is only on proof of acceptance of illegal gratification that presumption can be drawn under Section 20 of the Act that such gratification was received for doing or forbearing to do any official act. Proof of acceptance of illegal gratification can follow only if there is proof of demand. As the same is lacking in the present case the primary facts on the basis of which the legal presumption under Section 20 can be drawn are wholly absent."

25. The Hon'ble Supreme Court of India has followed the said view in the case of *C. Sukumaran Vs. State of Kerala*[3], *N. Vijaykumar Vs.*

3 2015(11) SCC 314

State of Tamil Nadu[4] *and K. Shanthamma* Vs. The State of Telangana passed in Criminal Appeal No. 261/22 dated 21/02/2022.

26. In the case of *Chaturdas Bhagwandas Patel* ..vs. *State of Gujrat*[5], the Hon'ble Supreme Court of India has observed thus :

> *"21. ………. The section does not require that the public servant must, in fact, be in a position to do the official act, favour or service at the time of the demand or receipt of the gratification. To constitute an offence under this section, it is enough if the public servant who accepts the gratification, takes it by inducing a belief or by holding out that he would render assistance to the giver "with any other public servant" and the giver gives the gratification under that belief. It is further immaterial if the public servant receiving the gratification does not intend to do the official act, favour or forbearance which he holds himself out as capable of doing".*

27. Thus from the above referred judgments, it is clear that demand of illegal gratification is *sine qua non* for constituting an offence under the Act of 1988. It is further clear that mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable. Proof of acceptance of illegal gratification can follow, only if, there is proof of demand.

4 2012(3) SCC 687
5 (1976) 3 SCC 46

28. As held in the case of *Mukhtiar Singh Vs. State of Punjab*[5], by the Hon'ble Supreme Court of India that, the prosecution in order to prove the charge under the provisions of Sections 7 and 13 of the Act, has to establish by proper proof, the demand and acceptance of illegal gratification and till that it is accomplished, the accused should be considered to be innocent and mere possession and recovery of the currency notes from the accused without proof of demand would not establish an offence under Section 7 as well as Section 13 (1) (d) read with Section 13(2) of the Act.

29. In the teeth of above referred well settled principle of law as regards demand and acceptance, I will proceed to scrutinize the evidence in this case, in this regard. For the said purpose, the oral evidence of P.W.1 Kishor Pande (Complainant), P.W.2 Suresh Soni (Panch No.1) is relevant.

30. The PW-1 Kishor Pande deposed that when his brother Ashok Pande riding Hero Honda motor-cycle, his motor cycle gave dash to Hero Puch two wheeler owned by one Jangid who thereupon lodged the report and accordingly an offence was registered against his brother

5 2017(8) SCC 136

Ashok Pande. He further deposed that the matter was settled between Jangid and his brother. Thereafter, the father of PW-1 and said Jangid went to Police Station, Rajapeth where one police officer told them as the offence was already registered the matter could be settled only in the Court and he further informed that the investigation was with P.S.I. Pagare. He further states that two-three days thereafter one police constable came to their house. He told that P.S.I. Pagare had called Ashok.

31. PW-1 further deposed that in the evening he and his brother Ashok went to police station Rajapeth. However, P.S.I. Pagare was not present there, therefore they returned back. About two days thereafter, P.S.I Pagare came to their house that time the accused told PW-1 that if PW-1 would pay the amount of Rs.1,700/- to him he would not arrest his brother Ashok and would see that the case of his brother would be settled out of Court.

32. PW-1 states that at that time he refused to pay that amount. Thereupon, the accused said that if PW-1 would not pay the amount he would arrest his brother and would take him to Police Station.

Thereupon, PW-1 pay Rs.1,000/- to the accused. Thereafter, the accused asked PW-1 to bring amount of Rs.700 in the police station by next morning. PW-1 then went back to his house and informed it to his father. However, his father stated that they would not be able to pay the amount. Therefore, PW-1 and his father went to the office of ACB and lodged the complaint.

33. P.W. No.1 further deposed about the trap. He states that he left the office of ACB at 1.15 p.m. with his brother Ashok and P.W. No.2. He further states that he went to the Police Station and at that time the accused was sitting in the verandah of Police Station. He called them to one room in the Police Station accordingly they went in the room. Thereafter, the accused made query with PW-1 about PW-2. Thereupon, the PW-1 told him that PW-2 was his uncle having jewellery business in Sarafa Market in Amravati. Then, PW-2 made inquiry with the accused as to what was the matter and thereafter the accused asked PW-1 with indication of his finger and thumb whether the PW-1 had brought the amount. Whereupon, PW-1 told him that he had brought the amount. Thereafter PW-1 took out the tainted notes from the chest pocket of his shirt and gave the same in the right hand of the accused. The accused

took the amount in his left hand and then he kept the tainted notes in his left pocket with his left hand. Thereafter the accused asked to the Head Constable to nullify the case against Ashok and accordingly the Head Constable took the papers of case of Ashok and started writing. Thereafter P.W. No.1 came in the verandah of Police Station and gave signal to officers of Anti Corruption Bureau by raising hands as was told to P.W. No.1 by officers of ACB to be done. Thereupon the officers of ACB rushed and caught the hands of accused.

34. Thus, this is the evidence of PW-1 in chief as regards the demand. Now, I will consider the cross-examination of PW-1.

35. In cross-examination PW-1 admits that after going to Police Station, Rajapeth at the time of trap PW-1 and PW-2 searched for Head Constable Thakare but they could not find him out. He further admits that till the date of trap he did not know the accused before the court. He further admits that when they could not find Head Constable Thakare, PW-1 handed over the said amount to the accused, saying that he should pay the said amount to Shri Thakre. He further states "It is true that after the accused was caught by police of ACB, he saw his name strip and I came to know the name of the accused".

36. Thus, from the cross-examination of PW-1 it can be seen that at the time of trap, PW-1 made attempts to search for Head Constable Thakare and when he could not find him he handed over the tainted amount to the accused saying that he should give the amount to Shri Thakare.

37. The story narrated by PW-1 in his examination-in-chief about the demand and acceptance of amount of illegal gratification by the accused, needs to be considered and appreciated in the light of cross-examination of PW-1 wherein, he has admitted that the officers of ACB had given xerox of his complaint and statement to read and to state the facts before the Court accordingly.

38. PW-1 further states in cross-examination that after the recess he went out of the Court then Constable Killekar of ACB met him and he was with him till he entered in the Court. He further states that in the meanwhile the Officer of ACB were called PW-1 in the Court premises in their police van, where he and his father were told that he should depose properly or else he would be convicted and he should tell what is written the complaint Exh.15.

39. In the above referred backdrop, one more admission by PW-1 in his cross-examination, is significant. PW-1 in cross-examination states that complaint (Exh.14) is not in his handwriting and it is not a written complaint which he had given in the office of ACB. He further admits that he put his signature on complaint (Exh.14) only because police of ACB had asked him to put his signature thereon.

40. Thus, considering the above referred admission of PW-1 in cross-examination, it creates doubt as regards credibility of PW-1 on the evidence of demand and acceptance, particularly in the light of admission of PW-1 that they searched for Head Constable Thakare but they could not find out him and therefore, PW-1 handed over the tainted amount to the accused, saying that he should pay the same to Shri Thakare.

41. In addition to this, there are omissions for which no reason is assigned by PW-1 as to why it is not mentioned in either in his complaint or statement that the accused asked him if the amount of Rs.1700 is paid, he would not arrest his brother.

42. Similarly, PW-1 failed to assign any reason as to why it is not mentioned in his report that he went to accused at Sainagar square and at

that time accuse asked him that he should pay him Rs.1000/- and asked him to pay the remaining amount on next date.

43. In the above referred backdrop of evidence of PW-1, I will now proceed to consider the evidence of P.W.No.2 (Panch witness no.1).

44. PW-2 states in his Chief that the accused inquired with the informant as to whether he has brought the balance money verbally as well as by making gestures with his right hand, thumb and index finger. The informant replied that as per directions he had brought the balance amount of Rs.700/-. The accused told the informant to hand over the said amount to him. The informant took out the currency notes by his right hand from the left front pocket of his shift and offered those currency notes to the accused. The accused put those currency notes in his right hand initially. Thereafter he kept those currency notes in the left side pocket of trouser.

45. Thus, from the above referred evidence of PW-2, it can be seen that there are material discrepancies in the evidence of PW-1 and PW-2 about the demand and acceptance of amount. PW-1 has deposed

that the accused made demand with indication by his finger and thumb whether the money was brought. Whereas, PW-2 has deposed that demand was made by accused, verbally as well as making gesture with his right hand thumb on index finger.

46. Furthermore in his cross-examination PW-2 admits that when the summons to appear as witness, was served to him the copy of statement was delivered to him. He further admits that he has deposed before the Court in terms of said statement.

47. Thus, it can be seen that PW-1 and PW-2 both were given the copies of their statements and asked to depose before the Court in terms of their statements.

48. It is well settled principle of law that there would be nothing wrong in the witness refreshing his memory, but that ought to be done before the court and not outside the court. In order to test the veracity of witness he would be required to recollect the incident out of his own memory and should be falter in some material aspect, he could be allowed to refresh his memory with reference to the contemporaneous record of the incident created by the police. It would not be permissible

for such a witness to stealthily refresh his memory before entering the court and deposing about the entire evidence giving minute details as if he was reeling them out from his memory.

49. Moving further, the PW-2 further admits in his cross-examination that the report was not scribed in his presence. He further admits that the pre-trap panchnama was not scribed in his presence. He further admits that he had not known the contents which the officers of ACB were scribing the documents. He further admits that the officers of ACB asked him to put signatures on the documents which were scribed by them and accordingly PW-2 put signatures thereon.

50. In the light of above referred discussion, I have no hesitation to hold that the prosecution has failed to establish by proper proof the demand and acceptance of illegal gratification and thus without proof of demand, it cannot be said that offence under Section 7 as well as 13(1)(d) and 13(2) of Prevention of Corruption Act is established in this case. Thus, I do not find any error committed by the learned Additional Sessions Judge Amravati in acquitting the respondent under Section 235(1) of Code of Criminal Procedure of the offence punishable under

Section 7 (13)(1)(d) and 13(2) of the Act of 1988. In the circumstances, I proceed to pass following order:

The Criminal Appeal stands **dismissed** accordingly.

JUDGE

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