

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

Criminal Appeal No. 338 / 2011

With

Criminal Application No. 2542/ 2022

in

Criminal Appeal No. 338 / 2011

Rahim Baig Mirza Baig Mogal,

Age 53 years, Occu. Service,

R/o. House No.5-5-51, Jubilee Park,

Aurangabad.

...Appellant

Versus

The State of Maharashtra,

Copy to be served on Public Prosecutor

High Court of Judicature at Bombay,

Bench at Aurangabad.

...Respondent

Mr. M. A. Tandale, Advocate for the Appellant

Mr. Y. G. Gujarati, APP for Respondent/State

CORAM : KISHORE C. SANT, J.

RESERVED ON : 15th FEBRUARY, 2023.

PRONOUNCED ON : 12th MAY, 2023

JUDGMENT :

1. This appeal is against the judgment and order dated 27.06.2011 passed by the learned Special Judge and Additional Sessions Judge, Beed in Special Case No. 33/2001, whereby the present appellant-accused is held guilty for the offence punishable under Section 7 and 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988 ('P.C. Act' for short). He is sentenced to suffer Rigorous Imprisonment (R.I.) for one years and to pay fine of Rs.20,000/- in default to suffer Simple Imprisonment (S.I.) for six months for the offence under Section 7 of P.C. Act. He is further sentenced to suffer R.I. for three years and to pay fine of Rs.30,000/- in default to suffer S.I. for one year for the offence under Sections 13(1)(d) read with 13(2) of P.C. Act. Both the substantive sentences are directed to run concurrently.

2. The story of the Prosecution in short is as below:

The present appellant/accused was working as Executive Engineer in the Public Works Division (PWD), Ambejogai. The complainant namely Mohan Kale was given a contract by the

PWD. He was given the work of construction. As such he submitted his monthly bills. For release of bill of Rs.50,00,000/-, he met his close contact Ratnakar Kulkarni. Mr. Kulkarni told complainant that he has to pay some commission. On 08.03.2000, he came to complainant and told that he met the accused and the accused has made a demand of Rs.1,00,000/- towards the commission. Mr. Kulkarni further told the accused was on leave from 9th to 12th March, 2000. On 10.03.2000, complainant lodged the complaint to the Office of Anti Corruption Bureau. Mr. Bhokare/ACB Officer asked the complainant to come on 13.03.2000. Complainant went at 06.45 am to the ACB office and noticed that the trap was decided to be laid on 13.03.2000.

3. As decided complainant with two other persons proceeded towards the office of the accused, while going, he was told by one Jay Anna that the accused left the office at 10:30 pm. to attend the marriage ceremony. The raiding party still went to the house of the accused, it was found to be locked. Thus it was decided to lay a trap on 23.03.2023. Even the trap on

23.03.2023 as failed it was informed that the accused had left the office and went to Nashik. Ultimately the trap succeeded on 24.03.2023 in 5th attempt. On that the prosecution came to be launched and after the trial, the appellant is held to be guilty.

4. The learned Advocate for the appellant made submission in details. His main contention was that when the first alleged demand was made on 03.03.2000 and thereafter the trap failed on four occasions and it is only in fifth attempt, trap is said to be successful. This clearly shows that there was no demand by the accused and therefore earlier traps could not become successful. On the point on sanction, he submits that the authority who has granted sanction was not the proper authority in this case as the appellant was working as Executive Engineer at the relevant time and therefore the sanction by the Deputy Secretary is not valid sanction.

5. The learned APP opposed the appeal stating that the prosecution has proved the trap. Accused has demanded and accepted the amount at the time of trap. He submits that the

prosecution made the trap successful with great persuasion and efforts.

6. There are total five witnesses examined by the prosecution. The first witness is the complainant namely Mohan Kashinathrao Kale (PW-1). In his evidence, he deposed that he lodged the complaint with the ACB since the accused had demanded bribe. Since the bills were pending he wanted to see the accused and requested the accused for an appointment. On which, accused told not to come only for meeting, but come with the commission amount. Bribe amount was settled at a commission of Rs.1 Lakh. Accused told to pay Rs.65000/- for the earlier bills and Rs.25000/- for the further bills. Accused told one Jay Anna to accept responsibility of the commission and Jay Anna agreed to the same. He deposed about failed attempts and further deposed that on 24.03.2000 at 06:00 a.m., complainant with all members of the raiding party went to the ACB Office. Instructions were repeated. Even a tape recorder was given for recording the conversations. Again complainant contacted the accused on his landline phone and asked whether he should come with the amount. On which accused

said that he will talk after the complainant reaches at the place of the accused. After reaching to the residence of the accused, his peon came from inside and told that accused was in the house, where one Deputy Engineer Tode and Contractor Pasha were also there in the house. Therefore complainant and the panch waited in the meeting hall. After 5/6 minutes, he was called inside and they went inside the house. There was a chamber having size 8x10. The accused had a talk with the complainant about slow speed of the work. He also told that he had visited 3/4 sites, where the work of complainant was going on and found that the work was not being done.

7. After that, the accused asked this witness as to whether he brought amount of commission. On replying, he asked to give amount by saying 'De Dalo'. The complainant took the amount from his right side pocket of his trouser with his right hand. The accused asked him to keep the amount in the drawer of the table. The complainant stood up and kept the amount in the drawer of the table and sat on his chair. The accused asked the complainant to close the drawer. Thereafter accused told that he will make payment of

Rs.30 Lakh after submission of the bills, however, it may take some time. Complainant asked about the due bills of Ratnakar Kulkarni. Upon that, the accused asked his peon to call Ratnakar Kulkarni. After Kulkarni came in the chamber, discussion started between accused and Kulkarni and the complainant came out of the chamber and gave signal. On receiving signal, Investigating Officer and panch witnesses came in the chamber. Officer asked panch no.1 and this witness, what had happened. Panch no.1 and complainant narrated about the event. Thereafter panchnama was drawn and the procedure was followed.

8. In the cross-examination, this witness could not give the details of the bills, which were submitted by him. He could not also give details of the amount he received towards the said bills. He accepted that even in the complaint, he could not give the cheque number and the amount on the cheque. He accepted that by that time Dhanashri construction was not in operation. He accepted that the tainted note amount was not observed in the light of ultra violet lamp on 23rd & 24th March, 2000, before applying anthracene powder. About the actual incident, he accepted in the cross, that he

was asked about the Ratnakar Kulkarni, filing complaint against accused, alleging misappropriation in the funds raised for Kargil etc. He could not tell whether second application was filed on 27.11.1999 by the complainant. A suggestion was given about that when Rode and Pasha were sitting in the chamber, accused had gone inside for about 10 minutes, which is denied. He accepted that in complaint, there is no mention of Kulkarni coming to the house of the complainant. He also accepted that in the statement dated 25.03.2000 recorded by police, the complainant did not tell that on 21.03.2000, accused had asked him as to whether he had come with the amount. He accepted that on 08.03.2000, Jay Anna did not give any message.

9. The next witness is the panch viz. Shrikant Shankarrao Anarse (PW-2), who was serving as a Additional Treasury Officer at Jalna at the relevant time. In his evidence, he deposed that he was called by the ACB on 11.03.2000. He was again asked to appear on 12.03.2000 at 09:00 pm. Upon which, he appeared with another panch in ACB Office at Beed. ACB Officer from Jalna gave their identity to ACB Officer, Beed and instructed them to remain present

on 13.03.2000 at 06:00 am. As per instructions, they came to the office and were introduced to the complainant. After giving necessary instructions and showing the demonstration of the Anthracene Powder, they proceeded to the residence of Kale. They met one person, who was known to Mr. Kale by name Jay Anna, who was then Deputy Executive Engineer at Georai. They came to know that one person namely Rahim Baig was out of station and therefore the trap was decided to be deferred till 23.03.2000. The raiding party had been to the house of Rahim Baig and found that the same was locked. After returning to ACB Office, Beed, second panchnama was prepared. The trouser of Mohan Kale was removed for the purpose of tainted notes, which were in the pocket of the said pant. The said pant was kept in a cup-board. Other pant was given to Kale by giving instructions to all to maintain confidentially and attend ACB office on 23.03.2000 at 06:00 am. On 23.03.2000, they took search of Mohan Kale, nothing was found with him. Mohan Kale was given pant with the tainted amount and anthracene powder was again applied to the tainted amount. Then both bundles of tainted amount were kept in Kale's right side pant pocket. The raiding party again proceeded from the house of Kale.

Mr. Kale made a phone call to Rahim Baig by keeping phone on the speaker mode or hand free and then Rahim asked Kale to come after 07:30 pm. On that, the raiding party waited till 07:30 pm. at the residence of complainant/Kale. In the evening again call was made, however the same was not replied by the accused. At 10:00 p.m. phone call was made from the house of Kale, at that time also, there was no reply from the accused. After 10:30 pm. the raiding party went back to A.C.B. and tainted amount was removed from Kale by resealing and the same was kept in a cupboard. The party was again asked to come on the next day at 06:00 am. The trap panchnama was prepared.

. On 24.03.2000, again raiding party went for a trap. Instructions were freshly given. From the house of the complainant, again call was made to the accused. In reply, accused told complainant to come after half an hour. Though the complainant tried to speak something more, accused asked him to come personally. At 08:30 a.m., complainant made another call and told that he would come within 10 minutes to the house of the accused. That time also complainant tried to speak something more, however accused told him to come to home and then talk. On reaching to

the house of the accused, panch and complainant were dropped from the vehicle in front of the house of the accused. A peon came out from the house and told that there are two more persons sitting with the accused. On giving message, complainant went in the house and sat in a white coloured chair. This witness tried to go in chamber however the accused stopped him by giving a signal by his hand.

10. The next witness is Ratnakar Kulkarni (PW-3), who was working as Executive Engineer PWD at Beed. He was cross-examined by the Prosecution, as he was in the house of Mogal, when the alleged incident took place. On 24.03.2000, he had been to the house of the accused and was standing outside the office of the accused. This witness was called after 5-10 minutes by the accused. He saw the complainant was sitting there with the accused. Complainant recommended to sanction his bill and accused told that he would sanction the said bill. He met the complainant and when he was discussing with the accused, two persons entered in the office of the accused. One of them asked the officer as to where the amount was kept that was demanded by the accused. He replied that accused asked complainant to drop the amount in the drawer of

writing table. On that, accused was apprehended.

11. The next witness is Rashid Sayed (PW-4), who was working in PWD as Under Secretary to the Government. He deposed that he received proposal for prosecution of the accused alongwith copies of complaint and other documents. He deposed that the Secretary has the powers on behalf of Government. As per Rule 13 of Rules of Business of Maharashtra Government, Secretary has a power to exercise the power. He deposed that he examined the proposal and sanction order.

. In the cross-examination, he accepted that the papers were also examined by the Chief Minister. However he did not mention this fact in the sanction order. He submits that if Home Department has refused sanction, papers of ACB used to be sent to his department. If Chief Minister refuses sanction, Under Secretary, cannot accord sanction for prosecution. The hirachi is Under Secretary, Deputy Secretary, then Joint Secretary and then Secretary. At the relevant time, there were two secretaries in Public Works Dept. Government of Maharashtra is appointing and removing authority of the accused. He further accepted that though the Audio Cassette was sent to him,

he did not play the Cassette in Tape Recorder, as the Tape Recorder was not available with him. He also did not feel it necessary to verify transcript of tape recorded dialogue/ conversation submitted by the ACB.

12. The last witness is Mahendra Bhokare (PW-5), who investigated this matter. He deposed about the entire episodes, attempts and earlier traps. In the chief itself he submitted that the accused gave immediate statement which was read over before two panchas who thereafter put their signatures on the same.

. Since his evidence is not much relevant, it is not discussed here.

13. On all this evidence, the learned Advocate submits that in this case initially sanction was refused by the Higher Authority of the Sanction Authority-PW-4. The sanction was refused initially by the Chief Minister. It is only thereafter this witness gave the sanction. He submits that though the Audio of Cassette was provided with the record, still he has not listened to the same.

14. So far as the evidence of complainant is concerned, learned

Advocate for the appellant submits that there is no demand at all. In this case, what needs to be proved is that the person has accepted the amount voluntarily knowing that the amount is towards the bribe. In this case all the panch became interested witnesses as they were interested in making the trap successful and therefore there were number of repeated attempts. Even the panch witness stayed in the house of the informant for three days and therefore every person in the raiding party and the panch became interested witnesses.

. From the evidence of PW-2, he submits that this evidence cannot be relied upon for the purpose of recording the conviction. In his evidence he has deposed about the attempts which were made earlier and could not become successful for some or the other reasons. The first attempt was made on 13.03.2000, it was told that when Jay Anna on duty as Executive Engineer, the accused is transferred. Therefore, he went to Mumbai for cancellation of transfer and trap was deferred. On 23.03.2000, again they proceeded to the house of accused. Again trap was failed and again on 24.03.2000, they went to the office of ACB, where the instructions were given and the trap was arranged.

15. It is submitted that in evidence of panch, he clearly stated that he was not allowed to come in chamber and therefore he stayed outside and was trying to listen to the conversation. It is the informant who opened the drawer of table and kept two bundles of notes and sat in the chair. Thus, he submits that in the entire episode, there is no demand seen by the accused. Making earlier three attempts of raid clearly shows that any how prosecution wanted to make trap successful. Hands of the accused were not showing blue shining shows that the accused did not accept any amount.

16. From the cross of panch witness, he submits that this witness did not receive any letter from ACB office, Beed. He had received oral instructions to come on 22.03.2000. He submits that he told Mr. Bhokare that he was not given entry inside the chamber of accused and therefore he could not see the amount of bribe being exchanged between complainant and accused and even he could not listen the conversation between them. However, this was not considered.

17. From the evidence of PW-3, he submits that he has not stated

anything about the incident and therefore his evidence need not be considered. About sanctioning authority, he submitted that the accused was Executing Engineer, Class-I Officer and thus grant of sanction by the Deputy Secretary is beyond his powers. He submits that he is the same person, who is held as not a proper authority in the judgment reported in 2008(2) Bom. C.R.(Cri.) 380 in the case of State of Maharashtra Vs. Ramchandra Sudam Ingale. This witness did not listen to tape recorded conversation.

18. The learned APP submits that the learned Special Court has rightly appreciated the evidence and therefore no interference is required. For the purpose of sanction, he relied upon the notification dated 03.04.2000. As regards the judgment in 2008, he submits that in that case the accused was Engineer. He further submits that in this case authority was delegated to PW-4 under the rules of business. He submits that once the authority has come to conclusion that the case requires sanction, it is for that authority to consider. On sanction order, there is discussion about the facts of the case clearly showing application of mind. He submits that from Marathi deposition recorded in Marathi, it is not found that this witness

stated that the Chief Minister refused the sanction. Therefore the submission of the accused need not be considered. He further submits that a case of prosecution clearly proved that there was demand and acceptance of the bribe. The presence of PW-3 is natural. He further submits that PW-2 was watching from the window and therefore his evidence cannot be discarded.

19. In rejoinder, the learned Advocate for the appellant submits that in fact PW-3 was black mailing accused person as the accused/appellant was not disbursing the amount without measurement book submitted by him. From the evidence of PW-2, it is clear that the sanctioning authority has not followed the procedure. He has not stated that the powers were delegated to him by the Government. It was accepted that the file was pending with the Chief Minister for sometime alongwith papers and still he has not granted any sanction and same amounts to refuse. It was necessary to mention the said fact in the sanction order.

20. Before going to the facts and the material on record in this case, it would be proper to consider the following judgments cited

by the learned Advocate for the appellant.

(a). The first judgment relied upon by the learned Advocate for the appellant is in the case of **Mohd. Iqbal Ahmed Vs. State of A.P.**, reported in AIR 1979 SC 677. It is held that the sanctioning authority necessarily has to record as to on what basis it arrived at a satisfaction that sanction is required. It is necessary to place the evidence before the sanctioning authority. In this case, though the cassette in which the conversation was recorded was placed before the sanctioning authority, however still the sanctioning authority has not bothered to listen to the same. This shows that authority has not considered the entire material placed before him. There is no justification coming as to why the sanctioning authority has not listened to conversation.

(b). The next judgment is in the case of **K. Shanthamma Vs. State of Telangana**, reported in (2022) 4 SCC 574, wherein it is held that the prosecution has to prove the demand and acceptance, which is sine quo non for establishing the offence under Section 7 of the P.C. Act. In that case, the prosecution could not prove the demand and acceptance by the accused and thus the conviction was set aside.

(c). The next judgment relied upon by the learned Advocate for the appellant, is in the case of **Ram Prakash Arora Vs. The State of Punjab**, reported in AIR 1973 SC 498. The Hon'ble Apex Court has considered that the evidence of interested and partisan witnesses, who are concerned in the success of the trap must be tested in the same way as that of any other interested witnesses. In this reported case, one of the witnesses was held to be with the complainant and thus was interested witness. They were also found to be a concerned in the trap and in that view, the Hon'ble Apex Court has considered that in such cases, there needs to be corroboration to the evidence. In the present case, it is seen that the same panchas and the members of the raiding party were involved on earlier three occasions, when the trap failed. It is in this view, the submission is made that all these witnesses were therefore interested to make the trap successful. It can be certainly inferred that each of the member of the raiding party was interested and therefore independent corroboration was required.

(d). In the judgment of full bench in the case of **B. Jayaraj Vs. State of A.P.**, reported in 2014 ALL SCR 1619. Wherein it is held that the possession and recovery of currency notes from accused

without proof of demand cannot constitute offence under Section 7, when the demand and acceptance itself is not proved no presumption under Section 20 be drawn.

(e). The next judgment in the case of **State of Maharashtra Vs. Ramchandra Sudam Ingale**, wherein this Court held that it is in respect of the same, sanctioning authority, which has accorded sanction even in this case. It is further held that in that case, where the accused was a person for whom, the Government is the appointing authority it was necessary to show that it is the Government who has accorded the sanction. It was held on the basis of circular dated 03.04.2000, wherein it is specifically observed that the consent of Chief Minister or Deputy Chief Minister should be obtained before according sanction against person/officer in clause no.1 and 2. In this case, there is no dispute that the appellant was Class-I Officer and therefore it was necessary to obtain sanction from the State. Even as per the evidence of PW-4 who stated that he has powers of according sanction by Rules, in view of business Rules under the Government of Maharashtra, however the same is not produced on record.

(f). The next judgment in the case of **M.K. Harshan Vs. State of Kerala**, reported in (1996) 11 SCC 720. This case is in respect of the contradictory evidence of the witnesses.

(g). He relied upon the last judgment in the case of **Vineet Narain and Others Vs. Union of India and Another**, reported in (1998) 1 SCC 226. Wherein the Hon'ble Apex Court has issued certain guidelines in respect of grant of sanction to prosecute the accused. Clause No.15 of paragraph no.58 of the said judgment, is quoted below.

"15. Time-limit of three months for grant of sanction for prosecution must be strictly adhered to. However, additional time of one month may be allowed where consultation is required with the Attorney General (AG) or any other law officer in the AG's office."

. It is seen in this case that the proposal of sanction was sent in December 2000, whereas the sanction was granted in August, 2001 i.e. after nine month. This also is one of the circumstances appearing against the prosecution.

21. The learned APP relied upon the judgment in the case of **Neeraj Dutta Vs. State (Govt. of N.C.T. of Delhi)**, reported in 2022 SCC OnLine SC 1724. Wherein it is held that when the

Special Court appreciated evidence and the facts, no interference is required. In the judgment as regards in the case of Ramchandra Sudam Ingale (supra), he submitted that in that case the accused was Engineer and same analogy cannot be applied. He submitted that from the evidence of PW-4, it is clearly established that he had gone through the entire material that is submitted before him. From the case of Neeraj Dutta (supra), he also pointed out that the presumption of fact with regard to the demand and acceptance or obtainment of an illegal gratification may be made by the Court of law by way of the inference. However in the said case, the Court has clearly held that for that purpose, the factual facts must be proved. In this case, this Court finds that in fact the factual facts itself are not proved and therefore presumption cannot be drawn.

22. This Court finds in the present case that it has come on record that thrice there were attempts made of trap, however those failed. Still the Investigating Officer and the Machinery wanted to make the trap successful in any case. If there was real demand from the accused, the accused would not have avoided meeting with the complainant. It is seen that the raiding party was seriously following

up the accused and were trying to trap him. Even at the time of incident, it has clearly come on record that the shadow panch was not present when the alleged demand was made. He clearly stated he was standing out side as he was not allowed by the accused to come inside. Even he could not listen the entire conversation. The amount was put in drawer by the complainant also shows that the accused did not take the amount. This fact also creates a serious doubt about the care of the prosecution.

23. Adverse interference also needs to be drawn of the fact that though there is conversation recorded in the cassette of tape recorder, however the same is not played in the Court. Even the sanctioning authority did not bother to hear the conversation. Such of the evidence was available with the prosecution, naturally a question comes that as to why it is not produced before the Court by playing the cassette. As regards the sanction is concerned, the Hon'ble Court has already held in the **C.B.I. Vs. Ashok Kumar Aggarwal**, reported in AIR 2014 SC 827, that the prosecution has to establish that the sanction was duly accorded by applying mind and the entire material was placed before the sanctioning authority etc.

. In this case, the prosecution clearly failed to prove that the entire material was placed before the sanctioning authority. There is also substance in the submission about the power in the PW-4 to grant sanction. It is admitted position that the accused is Class-I Officer and it was Government, that was competent to appoint and remove the appellant and still there is no endorsement of the Chief Minister or the Minister of the Department on the sanction order. This also creates doubt about the validity of the sanction order. Firstly for non application of mind and secondly want of authority.

24. Considering all these aspects and considering the above position, the prosecution has failed to prove the guilt of the accused beyond the reasonable doubt. The learned Judge has not properly appreciated the defence of the accused and has arrived at conclusion and recorded finding of the guilt. The same finding and the conviction deserves to be set aside. The appeal therefore succeeds. Hence the following order.

O R D E R

- (i) The Criminal Appeal is allowed.

- (ii) The judgment and order dated 27.06.2011 passed by the learned Special Judge and Additional Sessions Judge, Beed in Special Case (ACB) No. 33/2001 is quashed and set aside.
- (iii) The appellant is acquitted of the offences punishable under Sections 7 and 13(1)(d) read with 13(2) of the Prevention of Corruption Act, 1988.
- (iv) Amount of fine deposited in the Trial Court be refunded to the Appellant.
- (v) Bail bonds of the Appellant stand cancelled.
- (vi) Appellant to furnish fresh bail bonds with sureties as per Section 437-A of the Code of Criminal Procedure, 1973.

25. With this, the Criminal Appeal is disposed off.

26. In view of the disposal of the appeal, nothing survives in Criminal Application No.2542/2022, the same is disposed off.

[KISHORE C. SANT, J.]