

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

CRIMINAL APPEAL NO.67 OF 2010

State of Maharashtra,
through Deputy Superintendent of Police,
Anti-Corruption Bureau,
Seluth, Nagpur.

... **Appellant**

Versus

Omprakash S/o Krishnaji Chauhan,
Aged 57 years,
Occupation Service,
R/o Misal Layout, Indora, Nagpur.

... **Respondent**

Shri I.J. Damle, Additional Public Prosecutor for Appellant.
Shri Amol Mardikar with Shri A. Rangari, Advocates for Respondent.

CORAM : K.R. SHRIRAM, J.
DATE : 20th MARCH, 2023.

ORAL JUDGMENT :

1. Aggrieved by the judgment and order of the Special Court (ACB), Nagpur, delivered on 6th April, 2009, the State has preferred this appeal. The Trial Court has acquitted respondent of offences charged under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (PC Act).
2. PW-1 Manohar Ramchandra Yetikumbhare is complainant; PW-2 Bhola Kisan Gedam is panch witness – shadow witness; PW-3 Dr. Bhushan Kumar Madanmohan Upadhyay is Competent Authority, who gave sanction for

the prosecution; and PW-4 Sunil Vinayak Kelkar is Investigating Officer. The defence also examined one witness called DW-1 Dr. Manohar Parashram Maheshgawai.

3. It is prosecution's case that PW-1 had lodged a complaint on 22nd July, 2003 against one Madhukar Neool, resident of Bharatwada Village. They had a dispute over land. Madhukar Neool also lodged a complaint against PW-1. The complaints filed by both PW-1 and Madhukar Neool were given to accused for enquiry and further investigation.

4. On 7th August, 2003, accused visited Village Bharatwada and conducted an enquiry. Accused that time was working as Assistant Police Sub-Inspector at Kalmeshwar Police Station. It is prosecution's case that during the course of enquiry, accused demanded an amount of Rs.1,000/- as illegal gratification from complainant PW-1 for disposal of enquiry in favour of PW-1. Accused told PW-1 to bring money to the Police Station on 12th August, 2003. As PW-1 was not willing to give any bribe to accused, he went to lodge complaint with the Anti-Corruption Bureau (ACB), Nagpur. Accordingly, on 11th August, 2003, the report of complainant (PW-1) was lodged with ACB, Nagpur.

5. Following the report by complainant PW-1, panch witnesses were called in the office of ACB and panch witnesses and complainant were given instructions regarding the trap. On the basis of the trap laid, PW-1 in the presence of PW-2 gave marked currency to accused. Accused was caught red handed and marked currency was recovered from accused. This was followed by lodging F.I.R.,

investigation, sanction, etc. Charge-sheet was filed before the Trial Court. Accused pleaded not guilty and claimed to be tried.

6. The Trial Court, after considering the evidence of prosecution's witnesses and defence witness, concluded that prosecution has failed to prove the guilt of accused beyond reasonable doubt.

7. Before I proceed further, I have to note that the dispute between Madhukar Neool and complainant (PW-1) was that both were owning adjacent plots of land. Madhukar Neool was under the impression that some portion of the land that belonged to him had been encroached upon by complainant (PW-1). Therefore, both lodged report against each other and accused was given the task of conducting enquiry along with taking preventive action. In this background, the scope of accused was only to conduct enquiry and take preventive action and in other words, it would mean that accused should ensure that there was no law and order situation. Whether there was encroachment by complainant or whether the land in possession of complainant actually belonged to said Madhukar Neool would not have been within the scope of work of the accused and that had to be solved by having the land measured and checked with the title documents. Therefore, it is very difficult to see any reason why accused would demand money from complainant.

8. Shri Damle, learned Additional Public Prosecutor, submitted that if one considers the evidence of PW-1 and PW-2, the theory of demand and acceptance was proved. Shri Damle brought to the notice of this Court the testimony of

DW-1 and made an attempt to discredit the evidence of DW-1. Shri Damle submitted that in the cross-examination of DW-1, it has come to light that complainant (PW-1) met accused for the first time and in such background how would the accused offer a loan of Rs.1,000/- to PW-1. The relevance of this is that the defence of accused is PW-1 was only returning the amount of Rs.1,000/- that he had given as loan to PW-1 in the presence of DW-1. This stand of the accused has been corroborated by DW-1.

9. I have reservations in accepting the submissions of the learned Additional Public Prosecutor inasmuch as just because the witness (DW-1) clarifies in his cross-examination that he is a rich farmer, does not mean that he may not have needed to borrow Rs.2,000/-. Who is a rich farmer is subjective. It is also possible that having retired as Medical Officer from the Armed Forces, DW-1 wanted to boast about his financial position by saying he was a rich farmer. In any view, it is very risky to proceed on conjectures.

10. On the submission of Shri Damle that if complainant has met accused for the first time in the company of DW-1, why would accused give a loan of Rs.1,000/- to complainant. Again going back to what I have said earlier, it is very risky to go on the basis of speculations.

11. Shri Damle, learned Additional Public Prosecutor, relying upon the judgment of the Apex Court in the matter of Neeraj Dutta Vs. State (Govt. of N.C.T. of Delhi)¹, submitted that the proof of demand and acceptance of illegal

¹ 2022 LiveLaw (SC) 1029

gratification by a public servant as a fact in issue by the prosecution is a *sine qua non* in order to establish the guilt of the accused public servant under the provisions of the PC Act. Where there is an offer to pay the bribe and when there is an acceptance, as has happened in this case, and it is evident in the evidence of PW-1, the Trial Court has erred in acquitting the accused.

12. In my view, the aforesaid judgment of the Apex Court, in the facts and circumstances of this case, would not really assist the prosecution's case because that was a case where the Court was considering a situation where the complainant did not support the prosecution and the Apex Court laid down the factors that a Judge, as a matter of prudence, should consider in the evidence of such a witness. The Apex Court felt that such part of the testimony which is creditworthy for the proof of the case must be considered and acted upon.

Paras 67 and 68 of the said judgment read as under :

“67. Therefore, this Court cautioned that even if a witness is treated as “hostile” and is cross-examined, his evidence cannot be written off altogether but must be considered with due care and circumspection and that part of the testimony which is creditworthy must be considered and acted upon. It is for the judge as a matter of prudence to consider the extent of evidence which is creditworthy for the purpose of proof of the case. In other words, the fact that a witness has been declared “hostile” does not result in an automatic rejection of his evidence. Even, the evidence of a “hostile witness” if it finds corroboration from the facts of the case may be taken into account while judging the guilt of the accused. Thus, there is no legal bar to raise a conviction upon a “hostile witness” testimony if corroborated by other reliable evidence.”

“68. What emerges from the aforesaid discussion is summarised as under: (a) Proof of demand and acceptance of illegal gratification by a public servant as a fact in issue by the prosecution is a sine qua non in order to establish the guilt of the accused public servant under Sections 7 and 13 (1)(d) (i) and(ii) of the Act.

(b) In order to bring home the guilt of the accused, the prosecution has to first prove the demand of illegal gratification and the subsequent acceptance as a matter of fact. This fact in issue can be proved either by direct evidence which can be in the nature of oral evidence or documentary evidence.

(c) Further, the fact in issue, namely, the proof of demand and acceptance of illegal gratification can also be proved by circumstantial evidence in the absence of direct oral and documentary evidence.

(d) In order to prove the fact in issue, namely, the demand and acceptance of illegal gratification by the public servant, the following aspects have to be borne in mind: (i) if there is an offer to pay by the bribe giver without there being any demand from the public servant and the latter simply accepts the offer and receives the illegal gratification, it is a case of acceptance as per Section 7 of the Act. In such a case, there need not be a prior demand by the public servant. (ii) On the other hand, if the public servant makes a demand and the bribe giver accepts the demand and tenders the demanded gratification which in turn is received by the public servant, it is a case of obtainment. In the case of obtainment, the prior demand for illegal gratification emanates from the public servant. This is an offence under Section 13 (1)(d)(i) and (ii) of the Act. (iii) In both cases of (i) and (ii) above, the offer by the bribe giver and the demand by the public servant respectively have to be proved by the prosecution as a fact in issue. In other words, mere acceptance or receipt of an illegal gratification without anything more would not make it an offence under Section 7 or Section 13 (1)(d), (i) and (ii) respectively of the Act. Therefore, under Section 7 of the Act, in order to bring home the offence, there must be an offer which emanates from the bribe giver which is accepted by the public servant which would make it an offence. Similarly, a prior demand by the public servant when accepted by the bribe giver and in turn there is a payment made which is received by the public servant, would be an offence of obtainment under Section 13 (1)(d) and (i) and (ii) of the Act.

(e) The presumption of fact with regard to the demand and acceptance or obtainment of an illegal gratification may be made by a court of law by way of an inference only when the foundational facts have been proved by relevant oral and documentary evidence and not in the absence thereof. On the basis of the material on record, the Court has the discretion to raise a presumption of fact while considering whether the fact of demand has been proved by the prosecution or not. Of course, a presumption of fact is subject to rebuttal by the accused and in the absence of rebuttal presumption stands.

(f) In the event the complainant turns 'hostile', or has died or is unavailable to let in his evidence during trial, demand of illegal gratification can be proved by letting in the evidence of any other witness

who can again let in evidence, either orally or by documentary evidence or the prosecution can prove the case by circumstantial evidence. The trial does not abate nor does it result in an order of acquittal of the accused public servant.

(g) In so far as Section 7 of the Act is concerned, on the proof of the facts in issue, Section 20 mandates the court to raise a presumption that the illegal gratification was for the purpose of a motive or reward as mentioned in the said Section. The said presumption has to be raised by the court as a legal presumption or a presumption in law. Of course, the said presumption is also subject to rebuttal. Section 20 does not apply to Section 13 (1) (d) (i) and (ii) of the Act.

(h) We clarify that the presumption in law under Section 20 of the Act is distinct from presumption of fact referred to above in point (e) as the former is a mandatory presumption while the latter is discretionary in nature.

13. The Apex Court in a later unreported order in the case of **Shankarlal Sharma Vs. State of Madhya Pradesh**², has analyzed the judgment of the Constitution Bench in **Neeraj Dutta** (supra). The Apex Court in **Shankarlal Sharma** (supra) observed that the Constitution Bench has reiterated that mere acceptance or receipt of illegal gratification without anything more would not make it an offence under Section 7 or Section 13(1)(d) of the PC Act. The Apex Court has further observed that the Constitution Bench has held that when complainant does not support the prosecution, the demand made by accused can be otherwise proved by prosecution even on the basis of circumstantial evidence and while saying so, the Constitution Bench has reiterated that the offer by the bribe giver and demand by the public servant have to be proved by the prosecution as a fact in issue. Para 5 of the said judgment reads as under :

“5. A Constitution Bench judgment of this Court in a recent decision dated 15th December, 2022 in Criminal Appeal No.1669 of 2009 (Neeraj Dutta vs. State (Govt. of NCT of Delhi) holds that when the complainant does not support the prosecution, the demand made by the accused can be otherwise proved by the prosecution even on the basis of

² Criminal Appeal No.1779 of 2010 dated 23rd February 2023

circumstantial evidence. While saying so, the Constitution Bench has reiterated that the offer by the bribe giver and the demand by the public servant have to be proved by the prosecution as a fact in issue. The Constitution Bench reiterated that mere acceptance or receipt of illegal gratification without anything more would not make it an offence under Section 7 or Section 13(d) of the PC Act. The Constitution Bench also held that only when a proper demand is made by a public servant and is accepted by the bribe giver and in turn, the amount tendered by the bribe giver is received by the public servant, it would be an offence under Section 13(1)(d) and in particular Clauses (i) and (ii) thereof. The Constitution Bench reiterated the well settled law that presumption under Section 20 does not apply to Clauses (i) and (ii) of Section 13(1)(d) of the PC Act.”

14. PW-2 Bhola Kisan Gedam, Panch Witness, who seems to be stock witness, has admitted that in two or three cases of anti-corruption, he was a witness. He has admitted that he had also gone to Yavatmal for acting as a witness. Another Special Case of ACB was shown to him and PW-2 had admitted that he had been a witness in that matter also. Moreover, in the letter that was addressed by the Investigating Officer to the Manager of Government Printing Press at Nagpur, two names of panchas were written, including Shri A.V. Manekar and Shri C.G. Bhatkulkar. The name of Shri C.G. Bhatkulkar has been scored and in black ink, the name of Shri B.K. Gedam as PW-2 was written. When confronted, PW-2 has admitted that he was a witness for ACB in few other cases. Therefore, the panch witness had friendly terms with the Investigating Agency and if they are routinely called as Panch Witnesses to trap government servants, it is most likely they would not be independent but would say what the Investigating Agency has told them to say.

15. The other impediment in the way of prosecution is the contradictions in the evidence of PW-1, PW-2 and Investigating Officer PW-4. Complainant PW-1

states that it was Shri Kelkar (IO) who took the money from the pocket of the accused, whereas PW-2 and PW-4 (IO) say it was Manekar (the other panch witness who has not been examined) who removed the marked notes from the pant of accused. PW-2 states that both PW-2 and Shri A.V. Manekar counted the notes but their hands have not been examined for traces of phelophthalene powder.

16. It has also come in the evidence that PW-4 had recorded the complaint of PW-1 and it was noted in the handwriting of PW-4. That handwritten complaint has not been shown to PW-1 and has not been included in the chargesheet also. It has also come in the evidence of PW-1 that when he initially had gone to Administrative Building looking for the office of ACB, he saw the name of a person Shri Kadam. Shri Kadam made a telephonic call to ACB Office, after which one policeman by name Shri Vaikunthe came there. Shri Kadam has not been examined, though he was the first person to whom PW-1 had told the facts. Complainant (PW-1) then accompanied Shri Vaikunthe to the office of ACB where his statement was recorded. Even, Shri Vaikunthe has not been examined.

17. Another point that goes against the prosecution is PW-2 has stated in his examination-in-chief that the serial numbers of the marked currencies was noted in a piece of paper. Similarly, Investigating Officer PW-4 has also stated that those serial number of notes were noted on a piece of paper. But complainant PW-1 states in his cross-examination that the serial number of the currency notes

produced by him were noted on a file/register in ACB Office. In any event, the piece of paper which according to PW-2 and PW-4 on which the serial number of currency notes was written has not been produced in evidence.

18. With this background, the Trial Court came to conclusion that prosecution has failed to prove the guilt of the accused beyond reasonable doubt.

19. It will be useful to reproduce what a Single Judge of this Court held in the matter of The State of Maharashtra Vs. Mangala Shankar Chinchawade³.

In Paras 8 to 12, it is observed in the said judgment as under :

“8 Ms. Sawant also relied upon an unreported judgment of this Court in State of Maharashtra V/s. Mansing Shankarrao Mane and Anr. Criminal Appeal No.587 of 2004 : [2020 ALL MR (Cri) 1441] dated 2nd March 2020, in which paragraphs 19 and 20 read as under :

“19. The onus is on prosecution to prove beyond reasonable doubt, but even in situation where there are legal presumptions, the onus of accused is only to explain on the basis of preponderance of probabilities. In V. Sejappa V/s. State by Police Inspector Lokayukta, Chitradurga⁴, the Court was considering the presumption under Section 20, when it arises and what was the duty of court while invoking the provisions of Section 20. The Court after observing that the proof of demand is sine-qua-non for considering the offence under Section 7 of PC Act, held that initially burden of proving that accused accepted or obtained the amount other than legal remuneration is upon prosecution. It is only when such initial burden regarding demand and acceptance of illegal gratification is successfully discharged by prosecution, then burden of proving the defence shifts upon accused and a presumption would arise under Section 20 of PC Act. If the evaluation of the evidence and the findings recorded by the Trial Court do not suffer from any illegality or perversity and the grounds on which the Trial Court has based its conclusion are reasonable and plausible, the High Court should not disturb the order of acquittal if another view is possible and the view taken by

³ 2021 ALL MR (Cri) 1561

the Trial Court also is possible, the Appellate Court should not interfere.”

“20. In *State of Gujarat V/s. Navinbhai Chandrakant Joshi & Ors.* the Apex Court held that the presumption under Section 20 of PC Act is rebuttable presumption, and that the burden placed on the accused for rebutting the presumption is one of preponderance of probabilities. Paragraph 11 of the said judgment reads as under: “11. So far as the presumption raised under Section 20 of the Act for the offence under Section 7 of the Act is concerned, it is settled law that the presumption raised under Section 20 of the Act is a rebuttable presumption, and that the burden placed on the appellant for rebutting the presumption is one of preponderance of probabilities. In *C.M. Girish Babu Vs. CBI Cochin, High Court of Kerala* (2009) 3 SCC779, this Court held as under:-

“21. It is well settled that the presumption to be drawn under Section 20 is not an inviolable one. The accuse charged with the offence could rebut it either through the cross-examination of the witnesses cited against him or by adducing reliable evidence.....

22. It is equally well settled that the burden of proof placed upon the accused person against whom the presumption is made under Section 20 of the Act is not akin to that of burden placed on the prosecution to prove the case beyond a reasonable doubt...” Since it is established that the accused was possessing the bribe money, it was for them to explain that how the bribe money has been received by them and if he fails to offer any satisfactory explanation, it will be presumed that he has accepted the bribe.”

“9 Therefore, the demand of illegal gratification by the accused is the *sine qua non* for constituting an offence under the provisions of the Act. The burden to prove the accusation against the accused for the offence punishable under the Act lies on the prosecution. It is also settled law 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.”

“10. The Apex Court in ***Ghurey Lal V/s. State of U.P. (2008) 10 SCC 450 : [2008 ALL MR (Cri) 2873 (S.C.)]*** has formulated the factors to be kept in mind by the Appellate Court while hearing an appeal against acquittal. Paragraph Nos.72 and 73 of the said judgment read as under:

72. The following principles emerge from the cases above:

1. The appellate court may review the evidence in appeals against acquittal under Section 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record.

It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that trial court was wrong.

73. In light of the above, the High Court and other appellate courts should follow the well settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

i) The trial court's conclusion with regard to the facts is palpably wrong;

ii) The trial court's decision was based on an erroneous view of law;

iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

iv) The entire approach of the trial court in dealing with the evidence was patently illegal.

v) The trial court's judgment was manifestly unjust and unreasonable;

vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/ report of the Ballistic expert, etc.

vii) This list is intended to be illustrative, not exhaustive.

2. The Appellate Court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused.

The Apex Court in many other judgments including **Murlidhar & Ors. V/s. State of Karnataka (2014) 5 SCC 730 : [2014 ALL SCR 1571]** has held that unless, the conclusions reached by the trial court are found to be palpably wrong or based on erroneous view of the law or if such conclusions are allowed to stand, they are likely to result in grave injustice, Appellate Court should not interfere with the conclusions of the Trial Court. Apex Court also held that merely because the appellate court on re-appreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view.

We must also keep in mind that there is a presumption of innocence in favour of respondent and such presumption is strengthened by the order of acquittal passed in his favour by the Trial Court.

The Apex Court in **Ramesh Babulal Doshi V/s. State of Gujarat 1996 SCC (cri) 972** has held that if the Appellate Court holds, for reasons to be recorded that the order of acquittal cannot at all be sustained because Appellate Court finds the order to be palpably wrong, manifestly erroneous or demonstrably unsustainable, Appellate Court can reappraise the evidence to arrive at its own conclusions. In other words, if Appellate Court finds that there was nothing wrong or manifestly erroneous with the order of the Trial Court, the Appeal Court need not even re-appraise the evidence and arrive at its own conclusions.

11. There is an acquittal and therefore, there is double presumption in favour of accused. Firstly, the presumption of innocence available to accused under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, accused having secured her acquittal, the presumption of her innocence is further reinforced, reaffirmed and strengthened by the Trial Court. For acquitting accused, the Trial Court rightly observed that the prosecution had failed to prove its case.

12. In the circumstances, in my view, the opinion of the Trial Court cannot be held to be illegal or improper or contrary to law. The order of acquittal, in my view, need not be interfered with.”

20. There is a presumption of innocence in favour of respondent and such presumption is strengthened by the order of acquittal passed in his favour by the Trial Court. In the circumstances, the appeal dismissed.

The Government/Appropriate Authority shall pay over to respondent, within a period of 30 days from the date of receiving a copy of this order, all pensionary or other benefits/dues stalled, in view of pendency of this appeal. If during the service, in view of this matter, the promotions or increments of accused have been affected, the concerned Authority/ Department will pay, proceed and calculate on the basis that there was no such matter ever on record against accused and will factor in all promotions and increments that accused would have been entitled to and all the amounts shall be accordingly paid within 30 days.

After 30 days interest at 12% p.a. will have to be paid by Government/Appropriate Authority to respondent.

It is clarified that this is subject to there being no other complaint or proceedings pending against respondent.

No authority shall demand certified copy for reimbursing the benefits/dues as directed above. All to act on authenticated copy of this order. Certified copy expedited.

(K.R. SHRIRAM, J.)

LANJEWAR