2024:BHC-AUG:3641

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.277 OF 2005

Mohd. Abdul Naim S/o. Mohd.
Abdul Halim, Age : 52 years,
Occupation : Service (PHC),
B. No. 71, P. S. Kotwali Police
Station, Parbhani
died through LRs.

1-A. Tyaba Begum w/o. Mohd. Abdul Naim,
Age : 61 years, Occu. : Housewife,

1-B. Aslambahadur S/o. Mohd. Abdul Naim,
Age : 30 years, Occu. : Business,

1-C. Mauzzam Khan S/o. Mohd. Abdul Naim,
Age : 34 years, Occu. : Labour,

All R/o. M.G. Road, Sarfraz Nagar, Parbhani .. **Appellants.**

Versus

State of Maharashtra .. **Respondent.**

...
Mr. Joydeep Chatterji, Advocate for Appellants.
Mr. N. D. Batule, APP for Respondent – State.
...

CORAM : ABHAY S. WAGHWASE, J.
RESERVED ON : 08 FEBRUARY 2024
PRONOUNCED ON : 21 FEBRUARY 2024

JUDGMENT :

1. Dissatisfied by the judgment and order of conviction passed by learned Special Judge, Parbhani in Special Case No.2 of 2004 dated 06.04.2005, accused convict preferred instant appeal, thereby challenging legality, sustainability and maintainability of above judgment.

PROSECUTION CASE IN NUTSHELL IS AS UNDER

2. Prosecution was launched against present appellant on the premise that, he was a constable and he had demanded Rs.3,000/- as bribe for releasing the vehicle involved in one offence registered at Kotwali police station, Parbhani. On negotiations complainant agreed to pay Rs.2,000/-, but he approached Anti Corruption Bureau authority and lodged complaint, as a result of which said authorities laid trap, arranged shadow panch, handed tainted currencies to complainant to be paid on demand and thereafter accused was apprehended after accepting the demand and finally on investigation, he was charge-sheeted and even held guilty for offence under sections 7, 13(1)(d) read with section 13(2) of the Prevention of Corruption Act, 1988. Hence, the appeal.

SUBMISSIONS

On behalf of appellant :-

3. Learned counsel for appellant would question the conviction by submitting that prosecution had miserably failed to bring home the charge by adducing cogent, reliable and trustworthy evidence. According to him, when alleged demand was put up, another constable by name Nawade was present, but he has not been examined by prosecution for best reasons known to him. **Secondly**, according to him, there are material

contradictions in the testimony of complainant as well as panch witness. **Thirdly**, he emphasized that, evidence of complainant categorically shows that there was deliberate attempt to implicate accused by the complainant, who himself was a history sheeter. That, his evidence clearly shows that, there was no acceptance, rather there was deliberate thrusting of currency, i.e. even when there was no demand. **Fourthly**, according to him, complainant claims that accused counted currency and then kept it in pocket, but such crucial aspects of counting is patently missing from the testimony of panch witness, who is important witness in cases of such nature and claiming to be accompanied complainant. **Fifthly** and foremost according to learned counsel, here, there was no application of mind by sanctioning authority which had apparently vitiated the entire trial. According to him, unless sanction is valid, the previous exercise of pre-trap and post-trap is rendered valueless.

4. On this count, he seeks reliance on the decisions in the cases of ***Bhagwan Mahadeo Sathe v. State and Anr., 2011 All.M.R. (Cri.) 1221; CBI v. Ashok Kumar Aggarwal, (2014) 14 SCC 295; The State of Maharashtra v. Chand Beg S/o. Sharfu Beg,*** *Criminal Appeal No. 327 of 2002 (High Court of Bombay Bench at Aurangabad).*

On behalf of prosecution : -

5. Supporting the judgment, learned APP pointed out that, prosecution had established demand and acceptance by adducing evidence of very complainant and shadow panch. They both are consistent and have remained unshaken. Even sanctioning authority has been examined, who had deposed about going through the record, papers and then granting sanction. As such according to him no fault can be found in the findings of the trial Court. Hence for above reasons, he prays to dismiss the appeal.

ANALYSIS

6. Here, prosecution has examined **PW1** Sk. Javed complainant; **PW2** Sudhakar shadow panch; **PW3** Shamsundar a constable in-charge of muddemal and was assigned the duty of sitting in the chamber of police officer and who has verified court order, getting bond executed for release of vehicle; **PW4** Dy.S.P. Pandit Kendre, the Investigating Officer.

7. In the light of above grounds raised, evidence of complainant and shadow panch, which are of significance, are visited and re-examined carefully.

PW1 Sk Javed complainant narrated before the court that, vehicle involved in one crime was ordered to be released by learned Judicial Magistrate First Class and therefore accused a constable was approached, but he conditioned the release of vehicle only on payment of Rs.3,000/-, however negotiated and brought it down to Rs.2,000/- and therefore, complainant approached Anti Corruption Bureau, who carried out rest of the formalities regarding which he deposed in the witness box. His relevant evidence regarding demand is deposed by him in paragraph no.4. On going through the same he is found to be narrating the sequence of events, like initially wishing, accused asking him whether stamp paper has been brought and directing to scribe of recitals, complainant causing signature, then he deposed that, he asked accused whether amount has been brought and that he answered in affirmative and then removed amount from his right side pocket and gave it to accused. He further stated that, accused counted the notes and thereafter kept it in the right chest pocket of his shirt. Thereafter, he went outside and gave pre-determined signal and Investigating Officer entered and apprehended accused, who was in possession of tainted currency.

In cross, omissions are brought about talk with accused regarding return of motorcycle and demand of Rs.3,000/- being made for returning the motorcycle on 09.10.2003. Regarding telephonic conversation with accused at the time of recording complaint, accused asking complainant to approach him in the evening near S.T. stand Parbhani to pay the amount of Rs.1000/-.

8. **PW2** Sudhakar, a shadow panch witness, whose services were extracted is examined at Exh.12 and he also deposed about going to Anti Corruption Bureau office as per directions of superior officer to act as panch, he agreeing for the same, verifying the complaint, watching the demonstration of application of anthracene powder, impact of u/v light and he being directed to keep watch by accompanying complainant. According to him, after formalities of stamp paper were done and signature was obtained by another constable, enquiry was made by accused whether he brought the amount and on answering in affirmative, complainant removed Rs.1,000/- and held it before accused, who collected it and kept in the right chest pocket of his shirt and thereafter complainant going out and giving signal and raiding party apprehending accused.

In cross, this witness admitted that, he did not notice when Investigating Officer entered in the chamber. His cross is of entire denial.

9. Therefore, on carefully re-appreciating the above evidence, as pointed out it is emerging that, what complainant

stated about accused first counting tainted currency and then pocketing it, such version is not finding place in the testimony of shadow panch. Evidence of complainant is also found to be carrying material omissions as is apparent in cross on the point of talks of payment for releasing the vehicle. It is also further emerging that, actual talks of alleged demand were subsequent to execution of stamp/bond i.e. when entire required work was over and not prior to that. Neither complainant nor panch witness speak about any query raised by accused saying that whether amount has been brought as agreed.

10. The main thrust here is on validity of sanction. Focus of learned counsel for appellant is on invalid sanction, which according to him is *sine qua non* and when there is no proper sanction or improper sanction, it is his submissions that, trial gets vitiated. According to him, sanctioning authority has admitted receiving draft and using the same while according sanction. Therefore, it is his submission that on the sole count of want of proper sanction, guilt ought not to have been recorded.

In the light of above submissions and to ascertain whether it is so, it is desirable to reproduce the evidence of PW6 Kumar Shinde, D.S.P., CID, who is a sanctioning authority in that regard :-

> *"I received draft sanction order alongwith the letter of S.P. ACB Nanded. Today I have brought the draft sanction order. It is not true to say that the recitals in the sanction order Exh.55 and the draft sanction order are same in verbatim. I had added my name and date in the draft sanction order. It is true that I got typed the draft sanction order adding my name and date and thereafter, I put my signature thereon. It is not true to say that I have not mentioned the documents which promoted me to accord sanction, in the sanction order Exh.55."*

11. On carefully analyzing the above evidence of sanctioning authority, apparently, which all documents were placed has not been specifically deposed by him. Secondly, PW6 D.S.P. Kumar Shinde categorically seems to have admitted that he had received and used draft sanction order. His such answer inflicts severe blow, thereby completely eliminating the aspect of independent application of mind.

The referred ruling in the case of ***Bhagwan Mahadeo Sathe (Supra)*** and ***Ashok Kumar Aggarwal (Supra),*** it is very categorically held that, when draft has been used by sanctioning authority, serious doubt crops up about independent assessment of material and application of mind by the sanctioning authority.

Here also, there is candid admission by sanctioning authority regarding using draft sanction order.

12. Since way back in 1979 itself, in the case of ***Mohd. Iqbal Ahmed v. State of A.P., (1979) 4 SCC 172***, law has been fairly settled that, it is incumbent upon prosecution to prove valid sanction. Without proper sanction, entire proceedings are rendered *void ab initio*.

13. Apart from above rulings, very recently the Hon'ble Apex Court in the case of ***State of Maharashtra Through C.B.I. v. Mahesh G. Jain,*** *2014 ALL SCR 177* as well as in case of ***CBI v. Ashok Kumar Aggarwal (supra)***, has succinctly and distinctly elaborated the essentials of valid sanction as well as settled principles regarding of sanction are enunciated. It would be fruitful to quote the relevant paragraphs in above both judgments which are as under :-

State of Maharashtra v. Mahesh G. Jain (Supra)

"(a) It is incumbent on the prosecution to prove that the valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out.

(b) The sanction order may expressly show that the sanctioning authority has perused the material placed before him and after consideration of the circumstances, has granted sanction for prosecution.

(c) The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and his satisfaction was arrived at upon perusal of the material placed before him.

(d) Grant of sanction is only on administrative function and the

sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence.

(e) *The adequacy of material placed before the sanctioning authority cannot be gone into by the Court as it does not sit in appeal over the sanction order.*

(f) *If the sanctioning authority has perused all the materials placed before him and some of them have not been proved that would not vitiate the order of sanction.*

(g) *The order of sanction is pre-requisite as it is intended to provide a safeguard to public servant against frivolous and vexatious litigants, but simultaneously an order of sanction should not be construed in a pedantic manner and there should not be hyper technical approach to test its validity."*

CBI v. Ashok Kumar Aggarwal (supra),

"(i) *The prosecution must send the entire relevant record to the sanctioning authority including the FIR, disclosure statements, statements of witnesses, recovery memos, draft charge-sheet and all other relevant material. The record so sent should also contain the material/document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction;*

(ii) *The authority itself has to do complete and conscious scrutiny of the whole record so produced by the prosecution independently applying its mind and taking into consideration all the relevant facts before grant of sanction;*

(iii) *The power to grant sanction is to be exercised strictly keeping in mind the public interest and the protection available to the accused against whom the sanction is sought;*

(iv) *The order of sanction should make it evident that the authority had* *been aware of all relevant facts/materials and had applied its mind to all the relevant material;*

(v) In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law."

14. Taking the above reproduced testimony of sanctioning authority into consideration regarding using draft sanction order, the entire exercise of both pre-trap and post-trap as well as apprehension of accused has gone futile. For all above reasons, here sanction cannot be said to be valid, and therefore, in the considered opinion of this court, case of prosecution ought not to have been accepted as proved. The learned trial court ought not to have recorded the guilt of appellant by holding case of prosecution as proved. Resultantly, appellant succeeds and I accordingly proceed to pass the following order :

ORDER

I) Criminal Appeal No.277 of 2005 stands allowed.

II) The conviction awarded to appellant - Mohd. Abdul Naim S/o. Mohd. Abdul Halim in Special Case No. 2 of 2004, learned Special Judge, Parbhani on 06.04.2005 for the offence punishable under sections 7, 13(1) read with section 13(2) of the Prevention of Corruption Act, 1988, stands quashed and set aside.

III) The appellant stands acquitted of the offence punishable under sections 7, 13(1) read with section 13(2) of the Prevention of Corruption Act, 1988.

IV) Bail bonds furnished by the appellant stands cancelled.

V) The fine amount deposited, if any, be refunded to the appellant after the statutory period.

VI) It is clarified that there is no change as regards the order in respect of disposal of muddemal.

(ABHAY S. WAGHWASE, J.)

Tandale