



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 475 OF 1998

RAJARAM BANDERAO KULKARNI ..APPELLANT
VS.
THE STATE OF MAHARASHTRA ..RESPONDENT

Adv. Aditi Rajput a/w Adv. Sanjeev Kadam a/w Adv. Pratik
Deshmukh a/w Adv. Prashant Raut for the Appellant.

Ms. S.D. Shinde, APP for the State.

CORAM : M. S. KARNIK, J.

DATE : JANUARY 18, 2024

ORAL JUDGMENT:

1. This appeal challenges the judgment and order of conviction in respect of case No. 16 of 1994 dated 15/04/1998 arising out of C.R. No. 251 of 1994 registered with Barshi Police Station passed by the Special Judge Solapur for the offences punishable under Sections 7 and 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereafter referred as "PC Act" for short). The appellant by the impugned judgment and order has been sentenced to suffer rigorous imprisonment for 1½ years and to pay the fine in the sum of Rs.1000/-. The appellant was further convicted for the offences punishable

under Section 7 of the PC Act and sentenced to suffer rigorous imprisonment for 9 months and to pay the fine in the sum of Rs.500/-.

2. The appellant at the relevant time was working as a Revenue Circle Officer, Division Pangari, Taluka Barshi, District Solapur. On 24/05/1994, an application was submitted by the complainant - PW-4 for effecting a mutation entry to the appellant. It is the case of the prosecution that the appellant demanded a bribe amount of Rs.500/- for effecting such mutation entry. Accordingly, a trap was laid. The complainant visited the residence of the appellant on 29/05/1994 and paid the bribe amount which had been smeared with Anthracene powder. The investigation was carried out by PW-5 who at the relevant time was working as a Police Inspector (hereafter referred to as "P.I." for short) of the Anti-Corruption Bureau (hereafter referred to as "ACB" for short).

3. Learned counsel for the appellant Ms. Aditi Rajput submitted that the appeal must succeed only on the ground that the investigation was carried out by PW-5, an officer

not empowered to carry out such investigation which does not accord with the mandatory condition enumerated in Section 17 of the PC Act. In support of her submissions, learned counsel for the appellant relied on the decision of the Supreme Court in State Inspector of Police, Vishakhapatnam Vs. Surya Sankaram Karri¹. Reliance is also placed on the decision in Vishnu Kondaji Jadhav Vs. State of Maharashtra².

4. Learned APP in response invited my attention to the letter addressed from the office of the Deputy Superintendent of Police, ACB, Solapur which is at Exhibit 17 to urge that the conditions requisite for carrying out the investigation in terms of Section 17 are sufficiently complied with. In support of her submissions, learned APP relied upon the decision of this Court in Manikrao Abaji Thonge Vs. The State of Maharashtra³ to submit that this issue was never raised before the trial Court at an early stage and hence it is not open for the appellant to agitate this issue for the first time in this appeal.

¹ (2006) 7 Supreme Court Cases 172

² 1995 Supp (4) Supreme Court Cases 408

³ 1993 CRILJ. 3796

5. I have heard learned counsel for the parties. I have perused the paperbook, notes of evidence and the materials on record. I have gone through the judgment and order of the trial Court.

6. In the present case, the investigation was carried out by the P.I. - PW-5. The question is whether the PW-5 is authorised to investigate the offence in view of the mandate of Section 17 of the PC Act. In the examination in chief of PW-5, it is stated that he was working as P.I., ACB from September 1989 to August 1996. The complaint recorded by him is at Exhibit 48. There is no dispute that the investigation was carried out by PW-5. On 28/05/1994, a request letter was sent by PW-5 to S.P. (Rural), Solapur, to depute one lady constable to the PW-5 office on the same day at 5.30 p.m. This letter though from the office of Superintendent of Police, was addressed by the PW-5 and not by the Superintendent of Police. In cross-examination, PW-5 deposed that at the time of joining ACB, his rank was in the cadre of Police Sub-Inspector (PSI). He deposed that the rank had not changed. In cross-examination, PW-5

specifically stated that during the relevant period, Deputy Superintendent of Police, Shri Chavan was his superior. PW-5 admitted that he did not obtain any permission from the Deputy Superintendent of Police or Magistrate to arrange the trap. Though the learned counsel for the appellant urged that PW-5 at the relevant time was discharging duties as PSI, in any case, even accepting the contentions of the learned APP one thing is very clear that PW-5 was not above the rank of P.I.

7. Let me proceed on the footing that the PW-5 at the relevant time was discharging his duties as P.I. It is the contention of the learned APP that the objection as regards the competency of the PW-5 to investigate the case was never raised before the trial Court. From the deposition of PW-5, it clearly reveals that the competency of the PW-5 to carry out the investigation was the specific case of the appellant before the trial Court.

8. The trial Court in paragraph No.91 of the impugned judgment and order observed thus:-

"91. Added to this, objection as regards breach of

mandatory provisions in the matter of investigation and resultant prejudice to the accused must be taken at the earliest possible opportunity. It has been held by the Supreme Court in *Din Dayal Sharma -vs- State* (AIR 1959 SC 831) that where the investigation was made by an officer below the rank of Deputy Superintendent of Police in contravention of the provisions of Sec. 5A (Old Act) the objection should have been taken at a sufficiently early stage. Reverting to the present case, charge was framed against the accused at Exh. 2 on 26th June, 1996. That time the accused did not raise any objection by filing any application or by making any oral statement. The accused submitted to the charge and pleaded not guilty. He then submitted to the trial. Then the trial proceeded. It was only after the entire evidence was recorded and trial was over, the accused has raised this objection. Had the objection being taken at earliest possible opportunity the court would have directed re-investigation or any other suitable order. This conduct of the accused also needs to be considered while testing the objection as regards competency of PI Shaikh to investigate the matter. In this background and for the aforesaid reasons I turn down the objection that the investigation was conducted by incompetent Police Officer and trial is vitiated."

(emphasis supplied)

It is thus seen that the trial Court was of the opinion that it was only after the entire evidence was recorded and the trial was over, the accused raised this objection.

9. In my view, the observations of the trial Court are in the teeth of Section 17 PC Act. The appellant had during the course of cross-examination of PW-5 clearly elicited the

admission from the PW-5 that he did not obtain any permission from the Deputy Superintendent of Police to arrange a trap nor was any permission was obtained from the Magistrate to arrange the trap. Moreover, in the synopsis of the argument on behalf of the appellant (Exhibit 73), the point whether the investigation is legal, valid and proper on the ground that mandatory conditions of Section 17 are not complied with, is specifically raised. Thus from the evidence of PW-5, it is observed that he was not authorised to investigate the offence. One thing is clear that the investigation was done by the person not authorised to conduct the investigation in terms of Section 17 of the PC Act. The observations of the trial Court that the objection was raised by the appellant only after the entire evidence was recorded is not sustainable. The Investigating Officer was examined as PW-5. It is during the course of his examination that the appellant cross examined him in a manner such that it clearly revealed that he was not the person authorised to investigate the offence. In any case, I will discuss on the resultant prejudice which has a direct

impact on the fairness of the investigation in the present facts.

10. It is important to refer to Section 17 of the PC Act, which reads thus:-

"Section 17- Persons authorised to investigate.

Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no police officer below the rank,--

(a) in the case of the Delhi Special Police Establishment, of an Inspector of Police;

(b) in the metropolitan areas of Bombay, Calcutta, Madras and Ahmedabad and in any other metropolitan area notified as such under sub-section (1) of section 8 of the Code of Criminal Procedure, 1973 (2 of 1974), of an Assistant Commissioner of Police;

(c) elsewhere, of a Deputy Superintendent of Police or a police officer of equivalent rank,

shall investigate any offence punishable under this Act without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make any arrest therefor without a warrant:

Provided that if a police officer not below the rank of an Inspector of Police is authorised by the State Government in this behalf by general or special order, he may also investigate any such offence without the order of a Metropolitan Magistrate or a Magistrate of the first class, as the case may be, or make arrest therefor without a warrant:

Provided further that an offence referred to in clause (b) of sub-section (1) of section 13 shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police."

11. The Supreme Court had an occasion to consider a

somewhat similar question that arose in Vishnu Kondaji Jadhav (supra). Their Lordships were dealing with Section 5-A of the Prevention of Corruption Act, 1947. So far as the persons authorised to investigate an offence are concerned, Section 5-A is similarly worded as Section 17 of the PC Act. In paragraph Nos. 5 and 6 Their Lordships held thus:-

"5. It is clear from the provisions of the section that for investigation into every offence under the Act, it was necessary for the Inspector of Police who was admittedly not authorised by the State Government either by general or special order, to take the prior permission of the Magistrate. The High Court has rejected this contention on the ground that the permission was taken by the Inspector of Police on earlier two occasions and the second permission taken on 20-6-1975 accrued for the benefit of the investigation into the demand for bribe made by the appellant on 6-7-1975. For the purpose, the High Court relied upon a decision of this Court in State of U.P. v. Bhagwant Kishore Joshi. We are afraid that the High Court has misled itself by relying upon the said decision. In that case, the accused had committed a criminal breach of trust in respect of a certain sum of money and he was booked for the said breach of trust and the investigation was made in respect of the same offence although the permission to investigate under the present Act was taken at a later stage. It is on these facts that the Court held that the investigation being indivisible as it was related to the very same act of the breach of trust, the permission taken once accrued for the entire investigation, whatever the stages in the investigation.

6. In the present case, admittedly, on three different occasions, the demand for money was made. The first was on 13-5-1975, the second on 20-6-1975

and the third on 5-7-1975. Each demand constituted an offence by itself to investigate which permission for investigation was necessary under Section 5-A of the Act. Each investigation in the circumstances constituted an independent investigation into an independent offence. Hence, for investigating the offence for the demand of bribe made on the third occasion, i.e. on 5-7-1975, it was necessary to take a separate and independent permission from the Magistrate which was admittedly not done. Since the provisions of Section 5-A relating to the obtaining of the permission from the Magistrate are mandatory before investigation is launched into the offence, the appellant is entitled to succeed."

Thus, Vishnu Kondaji Jadhav (*supra*) was a case where on three different occasions the demand for money was made. Their Lordships held that each demand constituted an offence by itself to investigate which permission for investigation was necessary under Section 5-A of the Act. It was held that each investigation in the circumstances constituted an independent investigation into an independent offence. Their Lordships held that Section 5-A relating to obtaining permission from the Magistrate is mandatory before the investigation is launched into the offence.

12. It is also important to note that the second proviso of Section 17 came up for consideration before the Supreme

Court in the case of State Inspector of Police, Vishakhapatnam Vs. Surya Sankaram Karri (supra). In paragraph No.13, the Hon'ble Supreme Court observed thus:-

"13. Provisions of the 1988 Act, no doubt, like the 1947 Act seek to protect public servant from a vexatious prosecution. Section 17 provides for investigation by a person authorised in this behalf. The said provision contains a non obstante clause. It makes investigation only by police officers of the ranks specified therein to be imperative in character. The second proviso appended to Section 17 of the Act provides that an offence referred to in clause (e) of sub-section (1) of Section 13, shall not be investigated without the order of a police officer not below the rank of a Superintendent of Police. Authorisation by a Superintendent of Police in favour of an officer so as to enable him to carry out investigation in terms of Section 17 of the Act is a statutory one. The power to grant such sanction has been conferred upon the authorities not below the rank of a Superintendent of Police. The proviso uses a negative expression. It also uses the expression "shall". Ex facie it is mandatory in character. When the authority of a person to carry out investigation is questioned on the ground that he did not fulfil the statutory requirements laid down therefor in terms of the second proviso, the burden, undoubtedly, was on the prosecution to prove the same. It has not been disputed before us that the investigating officer, PW 41, did not produce any record to show that he had been so authorised. Shri K. Biswal, the Investigating Officer, while examining himself as PW 41, admitted that he had not filed any authorisation letter stating: "I have received the specific authorisation from SP, CBI, to register a case but I have not filed the said authorisation letter."

(emphasis supplied)

It is also necessary to refer to paragraph Nos. 19, 20 and 21 where Their Lordships have observed thus:-

"19. Illegality apart, the manner in which the investigation was conducted, is condemnable. The least that a court of law would expect from the prosecution is that the investigation would be a fair one. It would not only be carried out from the stand of the prosecution, but also the defence, particularly, in view of the fact that the onus of proof may shift to the accused at a later stage. The evidence of PW 41 raises doubts about his bona fides. Why he did not examine important witnesses and as to why he had not taken into consideration the relevant documentary evidence has not been explained. He did not even care to ascertain the correctness or otherwise of the status of both the respondent and his wife before the Income Tax Department. Above all, he did not produce before the court the statements made by the respondent, his wife and those of his sons, although they were relevant. Had the statements of DW 3 and DW 4 been produced before, the learned Special Judge might not have opined that the sons of the respondent, other than DW 2, did not make any contribution to their parents at all. If such statements were made by the said witnesses before the investigating officer, omission on the part of DW 1, the wife of the respondent, to state the same before the Special Judge might have taken a back seat and the statements of other sons of the respondent, namely, DW 3 and DW 4 might not have been ignored by the learned Special Judge.

20. The courts are obliged to go into the question of prejudice of the accused when the main investigation is concluded without a valid sanction.

(See State of A.P. v. P.V. Narayana.)

21. It is true that only on the basis of the illegal investigation a proceeding may not be quashed unless miscarriage of justice is shown, but, in this case, as we have noticed hereinbefore, the

respondent had suffered miscarriage of justice as the investigation made by PW 41 was not fair."

(emphasis mine)

13. I have no hesitation in holding that the investigation is illegal as it was carried by an officer not authorised to investigate the offence. There is no authorisation in favour of PW-5 by a general or special order by the State Government. Neither has the PW-5 obtained permission from the Judicial Magistrate First Class to investigate into the offence.

14. Now let me examine the prejudice of the appellant-accused. In the cross-examination, PW-5 deposed that he had one brother - Abdul Latif Saheblal Shaikh. His father had three real sisters by the name Daulatbai, Habibbi and Aminabi. PW-5 admitted that Aminabi is the wife of the brother of the complainant. PW-5 voluntarily says that he was not knowing this fact till 28/06/1994. PW-5 denies the suggestion that his voluntary statement is false. It is material to note that PW-5 admits that subsequent to the trap he had written a letter to Tahasildar Barshi to do the work of the complainant and send a report. It is also

pertinent to note on being questioned by the Court during the cross-examination as regards with what object the communication was sent to the Tahasildar Barshi to do the work of the complainant, PW-5 said that despite the reminder, the work of the complainant was not done. PW-5 deposed that form No.9 was attached to the papers and a copy of the same was sent to the Tahasildar so that the complainant's work was not withheld for the want of form No.9. According to me, it is highly improbable that PW-5, a P.I., would be blissfully unaware that he is so closely related to the complainant. The question is whether, the task of getting the complainant's work done from the Tahasildar, is a part of the investigation and if not, why would PW-5 oblige the complainant in this manner by going out of his way. It is obvious that this indulgence was because PW-5 is a close relative of the complainant. It is evident that PW-5 is not truthful when he deposes that he was not knowing that he was related to the complainant till 28/06/1994. This clearly indicates that PW-5 was interested in the success of the investigation being a close relative of the complainant.

The manner in which PW-5 deposed and has gone all out of his way to get the complainant's work done which was not part of his duty as an Investigating Officer creates a serious doubt on the fairness of the investigation. The appellant has thereby suffered a serious miscarriage of justice as the investigation made by PW-5, an officer not authorised to carry out the investigation, cannot be regarded as fair.

15. For the reasons above-mentioned, I am of the opinion that the impugned judgment and order of conviction in respect of case No. 16 of 1994 needs to be quashed and set aside.

16. The appeal is, therefore, allowed. The appellant stands acquitted. The fine amount be refunded to the appellant.

17. The appeal is disposed of accordingly.

(M. S. KARNIK, J.)