



Judgment

256 appeals726 & 748.04

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

**CRIMINAL APPEAL NO.726 OF 2004
WITH
CRIMINAL APPEAL NO.748 OF 2004**

CRIMINAL APPEAL NO.726 OF 2004

Sunil s/o Dhiren Barai, aged-
about 30 years, 43 years,
occupation : constable,
buckle No.503, resident of
Gadchiroli, tahsil and district-
Gadchiroli. (Dead),

Through LRs :

1. Smt. Gita wd/o Sunil Barai,
aged about 46 years, occupation homemaker.
2. Suraj s/o Sunil Barai,
aged about 32 years, occupation private.
3. Sumit s/o Sunil Barai,
aged about 30 years, occupation private.
4. Shubham s/o Sunil Barai,
aged about 28 years, occupation private.
all r/o Ramnagar, ward No.19,
Netaji Subhashchandra Bose Chowk,
Gadchiroli-442 605. **Appellants.**

:: V E R S U S ::

The State of Maharashtra,
through it's Anti Corruption
Bureau, Gadchiroli, tahsil &
district Gadchiroli.

..... **Respondent.**

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Shri Kunal Pande, Advocate h/f Shri V.R.Deshpande, Advocate for Appellants.
Shri Saurabh Joshi, Additional Public Prosecutor for the State.

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CRIMINAL APPEAL NO.748 OF 2004

Bhaskar Chandrabhan Lohi,
aged about 30 years,
occupation : driving, resident
of Gadchiroli, tahsil and
district Gadchiroli. **Appellant.**

:: V E R S U S ::

The State of Maharashtra,
through it's Anti Corruption
Bureau, Gadchiroli, tahsil &
district Gadchiroli. **Respondent.**

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Shri Sumit Joshi, Counsel for the Appellant.
Shri Saurabh Joshi, Additional Public Prosecutor for the State.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 08/07/2024

PRONOUNCED ON : 30/07/2024

COMMON JUDGMENT

1. By these appeals, appellants Sunil s/o Dhiren Barai
(accused No.1 Sunil Barai) and Bhaskar Chandrabhan Lohi
(accused No.2 Bhaskar Lohi) have challenged judgment and

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order of conviction and sentence dated 23.11.2004 passed by learned Special Judge, Gadchiroli in Special Case No.7/1991.

2. By the said judgment impugned, accused No.1 Sunil Barai is convicted for offence punishable under Section 7 of the Prevention of Corruption Act, 1988 (the said Act) and sentenced to undergo rigorous imprisonment for 6 months and to pay fine Rs.500/-, in default, to undergo rigorous imprisonment for one month.

He is also convicted for offence punishable under Section 13(1)(d) read with 13(2) of the said Act and sentenced to undergo rigorous imprisonment for one year and to pay fine Rs.1000/-, in default, to undergo rigorous imprisonment for two months.

Accused No.2 Bhaskar Lohi is convicted for offence punishable under Section 12 of the said Act and sentenced to undergo rigorous imprisonment for six months and to pay fine Rs.500/-, in default, to undergo rigorous imprisonment for one month.

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3. Learned Judge of the trial court directed that all sentences of accused No.1 Sunil Barai shall run concurrently.

4. During pendency of Criminal Appeal No.726/2004, accused No.1 Sunil Barai died and his legal heirs are brought on record to prosecute the said appeal.

5. Brief facts of the prosecution case are as under:

Mahadeo Nanna Thakre (the complainant), a resident of Churchura, district Gadchiroli, is having landed property. A partition of the landed property took place between him and his brothers and they are residing separately. There used to be quarrels between him and his brother Hulka regarding the agricultural land. The complainant constructed a Bandh in his field, which was allegedly damaged by his brother and, therefore, he threatened his brother that if anybody damages his Bandh, he will beat such person. His brother approached the police station and filed a complaint. On 16.8.1990, accused No.1 Sunil Barai, serving as Head Constable at Gadchiroli Police Station, came to his village and called him in village panchayat

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and informed him that his brother has lodged the report against him and, therefore, he came to arrest him. Accused No.1 Sunil Barai told him that if he pays Rs.200, he would release him and the complaint will be filed. As per allegations, at the relevant time, one Nanduji Gore, serving as Postman, was present. The complainant shown his inability to pay the amount. Then, accused No.1 Sunil Barai shown his readiness to accept Rs.100/-. The complainant assured him that he would bring the amount on the next day at Gadchiroli and if not possible, shall come on Sunday. Thus, it was alleged that accused No.1 Sunil Barai demanded gratification amount Rs.100/-. However, the complainant was not desirous to pay the amount and, therefore, he approached the office of the Anti Corruption Bureau, Gadchiroli and lodged a report.

6. After receipt of the report, officers of the bureau called two panchas. In presence of panchas, the complainant narrated the incident, which was verified by panchas from the complaint. After following a due procedure, it was decided to lay a trap. The complainant produced tainted amount i.e. five currency

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notes of Rs.20/- denomination. The demonstration as to phenolphthalein powder and sodium carbonate was shown. The said solution was applied on the tainted notes and notes were handed over to the complainant. The complainant kept the same in right side pocket of kurta. The complainant and panchas were instructed. The complainant was instructed not to hand over the amount unless it is demanded and pancha No.1 was instructed to stay with the complainant. Accordingly, pre-trap pancha was drawn.

7. On the day of the trap, the complainant and pancha No.1 Sheikh Jamal Sheikh Husain proceeded on bicycle of the complainant and other raiding party members followed them. The complainant and pancha No.1 came in front of Gadchiroli Police Station and by crossing the police station, they went to Indira Chowk just beside the police station and noticed that accused No.1 Sunil Barai was sitting in police uniform in a shoe shop. The complainant and pancha No.1 approached accused No.1 Sunil Barai and accused No.1 Sunil Barai demanded the amount and asked accused No.2 Bhaskar Lohi, an auto rickshaw

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driver, who was standing there, to accept the same. On receipt of a pre-determined signal, accused No.1 Sunil Barai and accused No.2 Bhaskar Lohi were caught. The amount was recovered from accused No.2 Bhaskar Lohi. Accordingly, post-trap panchanama was drawn. After seizure of relevant documents and obtaining a required sanction, on completion of investigation, chargesheet was filed.

8. During trial, the prosecution examined in all eight witnesses namely, Mahadeo Nanna Thakre vide Exhibit-26 (PW1), the complainant; Sheikh Jamal Sheikh Husain vide Exhibit-28 (PW2), the Shadow Pancha; Nandkishor Damodar Gore vide Exhibit-61 (PW3); Tularam Somaji Madhamwar vide Exhibit-63 (PW4), the Police Constable; Ramesh Gangaratan Mishra vide Exhibit-68 (PW5), the Police Naik; Ashok Jagannath Borewar vide Exhibit-69 (PW6), the Assistant Sub Inspector; Gulabrao Ramajo Shende vide Exhibit-71 (PW7), the Trap Officer, and Krushipal Tarachand Raghuwanshi vide Exhibit-82, (PW8), the Sanctioning Authority.

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9. Besides the oral evidence, the prosecution placed reliance on complaint Exhibit-27, pre-trap panchanama Exhibit-30, seizure memos Exhibits-31 to 36, post-trap panchanama Exhibit-42, report against the complainant Exhibit-44, map Exhibit-46, seizure memo Exhibit-56, First Information Report Exhibit-64, duty pass Exhibit-65, report Exhibit-76.

10. After considering the evidence adduced during the trial, learned Judge of the trial court held accused No.1 Sunil Barai and accused No.2 Bhaskar Lohi guilty and convicted and sentenced them as the aforesaid.

11. Heard learned counsel Shri Kunal Pande for accused No.1 Sunil Barai; Shri Sumit Joshi for accused No.2 Bhaskar Lohi, and learned Additional Public Prosecutor Shri Saurabh Joshi for the State. I have been taken through the entire evidence so also the judgment impugned in these appeals.

12. Learned counsel appearing for accused No.1 Sunil Barai and accused No.2 Bhaskar Lohi respectively submitted that neither the evidence of complainant PW1 Mahadeo Thakre nor

the evidence of Shadow Pancha PW2 Sheikh Jamal discloses and proves about the demand and acceptance. The evidence shows that it was the complainant, who without demand, handed over the amount to accused No.2 Bhaskar Lohi. As far as previous demand is concerned, the same was allegedly in presence of one Nandkishor Gore, who has not supported the prosecution story on the demand. At the time of lodging of the report, one Kawdu Mashekhatri was not examined. Shoe shop owner Pralhad Khobragade was also not examined. As far as the sanction is concerned, it is not a valid sanction as it was accorded without application of mind.

13. In support of their contentions, learned counsel appearing for accused No.1 Sunil Barai and accused No.2 Bhaskar Lohi placed reliance on decisions of this court in Criminal Appeal No.265/2005 (**Mohan Bhaiyyalal Shrivastava vs. The State of Maharashtra, through its Police Inspector Anti Corruption Bureau, Akola**) decided on 4.9.2023 and Criminal Appeal No.723/2004 (**Manik s/o Raghoba Mahadule vs. State of**

Mah., thr.the Dy.S.P.Anti Corruption Bureau, Nagpur) decided on 2.2.2024.

14. *Per contra*, learned Additional Public Prosecutor for the State submitted that the evidence of complainant PW1 Mahadeo Thakre is duly corroborated by Shadow Pancha PW2 Sheikh Jamal as to the demand and the amount was recovered. The hand wash of accused No.2 Bhaskar Lohi was collected and the Chemical Analyzer's Report shows that it contains phenolphthalein powder and sodium carbonate substance. The sanction accorded is also valid sanction. The submission of learned counsel appearing for accused No.1 Sunil Barai and accused No.2 Bhaskar Lohi as to the validity of the sanction cannot be accepted in the light of bar under Section 19(3) of the said Act. Thus, the evidence on record sufficiently shows involvement of accused No.1 Sunil Barai demanding and accused No.2 Bhaskar Lohi accepting the amount.

15. In support of his contentions, learned Additional Public Prosecutor for the State placed reliance on decisions of the Honourable Apex Court in cases of **Central Bureau of**

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**Investigation vs. V.K.Sehgal and anr¹ and State of Karnataka,
Lokayukta Police vs. S.Subbegowda².**

16. Since question of validity of the sanction has been raised as a primary point, it is necessary to discuss an aspect of sanction. The sanction order was challenged on ground that the sanction was accorded without application of mind and mechanically and, therefore, it is not a valid sanction.

17. In order to prove the sanction order, the prosecution placed reliance on the evidence of Sanctioning Authority PW8 Krushipal Raghuwanshi, who testified that at the relevant time, he was working as Superintendent of Police and was competent authority to remove police constables or police head constables from their posts. Accused No.1 Sunil Barai, was serving as the Head Constable and posted at Gadchiroli Police Station. He received case papers of investigation. He went through all those papers and satisfied himself that it is a fit case to accord sanction. Accordingly, he accorded the sanction. During his cross examination, he stated that a draft sanction order was not

¹ (1999)8 SCC 501

² 20023 SCC OnLine SC 911

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received by him. He is unable to recollect which documents were forwarded to him. He is unable to recollect whether statement of one Pralhad Khobragade was recorded. Thus, his entire cross examination shows that he is unable to recollect as to which documents he had considered for according the sanction.

Thus, the evidence of the said witness is to the extent that unless and until he looks into papers, he is unable to tell whether he had received the said papers at the relevant time or not. Most of cross examination shows that he is unable to recollect as to which documents he had considered for according the sanction.

Perusal of the Sanction Order reveals that he reproduced the entire prosecution story and mentioned that upon reading papers of investigation, he is of opinion that accused No.1 Sunil Barai should be prosecuted for the offence constituted by the Act.

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18. Whether sanction is valid or not and when sanction can be called as valid, the same is settled by the various decisions of the Honourable Apex Court as well as this court.

19. The Honourable Apex in the case of **Mohd.Iqbal Ahmad vs. State of Andhra Pradesh**³ has held that what the Court has to see is whether or not the sanctioning authority at the time of giving the sanction was aware of the facts constituting the offence and applied its mind for the same and any subsequent fact coming into existence after the resolution had been passed is wholly irrelevant. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecutions and must therefore be strictly complied with before any prosecution can be launched against the public servant concerned.

20. The Honourable Apex Court, in another decision, in the case of **CBI vs. Ashok Kumar Agrawal**⁴ has held that sanction lifts the bar for prosecution and, therefore, it is not an acrimonious

³ 1979 AIR 677

⁴ 2014 Cri.L.J.930

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exercise but a solemn and sacrosanct act which affords protection to the government servant against frivolous prosecution. There is an obligation on the sanctioning authority to discharge its duty to give or withhold sanction only after having full knowledge of the material facts of the case. 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. It has been further held by the Honourable Apex Court that 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. 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 while discharging its duty to give or withhold the sanction. 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. The order

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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. 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.

21. The Honourable Apex Court in the case of **State of Karnataka vs. Ameerjan**⁵, held that it is true that an order of sanction should not be construed in a pedantic manner. But, it is also well settled that the purpose for which an order of sanction is required to be passed should always be borne in mind. Ordinarily, the sanctioning authority is the best person to judge as to whether the public servant concerned should receive the protection under the Act by refusing to accord sanction for his prosecution or not. For the aforementioned purpose, indisputably, application of mind on the part of the sanctioning authority is imperative. The order granting sanction must be

⁵ (2007)11 SCC 273

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demonstrative of the fact that there had been proper application of mind on the part of the sanctioning authority.

22. In the case of **Central Bureau of Investigation vs. V.K.Sehgal and anr** *supra*, as relied upon by learned Additional Public Prosecutor for the State, the Honourable Apex Court held that reversal of conviction and sentence by the Appellate or Revisional Court merely on ground of valid sanction for prosecution is impermissible more so when plea of invalid sanction was raised first time before the Appellate Court.

In the present case, accused No.1 Sunil Barai and accused No.2 Bhaskar Lohi have challenged validity of the sanction before the trial court also.

It is further held that powers of appeal and revision of the High Court conferred by the Code of Criminal Procedure shall be subject to provisions of the 1988 Act. It is worthwhile to notice that a trammel has been imposed on a court of appeal and revision under Section 19(3)(a) of the 1988 Act. It reads thus:

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“19. (3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of or any error, omission or irregularity in the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby.

(b) – (c)

(4) Explanation - for the purposes of this Section,

(a) error includes competency of the authority to grant sanction;"

It is further held that under Section 19(3)(a), no order of conviction and sentence can be reversed or altered by a court of appeal or revision even "on the ground of the absence of sanction" unless in the opinion of that court a failure of justice has been occasioned thereby. By adding the Explanation the said embargo is further widened to the effect that even if the sanction was granted by an authority who was not strictly competent to accord such sanction, then also the appellate as well as revisional courts are debarred from interfering with the conviction and sentence merely on that ground.

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23. As far as the sanction, in the present case, is concerned, the same is not challenged on incompetency of the Sanctioning Authority or on ground of error, omission or absence of sanction or any irregularity in sanction, but it is challenged on ground that there was absence of application of mind.

24. In view of the settled principles of law, it is crystal clear that the Sanctioning Authority has to apply his/her own independent mind for generation of his/her satisfaction for sanction. The absence of description of documents referred by the Sanctioning Authority and only considering grievance made by complainant would show lack of application of mind. Purpose for which an order of sanction is required, the same is to be borne in mind. In fact, the sanctioning authority is the best person to judge as to whether public servant concerned should receive protection under the said Act by refusing to accord sanction for his prosecution or not. The purpose for which an order of sanction is required, the same is to be borne in mind. In fact, the sanctioning authority is the best person to judge as to whether public servant concerned should receive

protection under the said Act by refusing to accord sanction for his prosecution or not.

25. Thus, application of mind on the part of the Sanctioning Authority is imperative. The order granting sanction must demonstrate that he/she has applied his/her mind while according sanction.

26. After going through the evidence of Sanctioning Authority PW8 Krushipal Raghuwanshi, it reveals that after reproduction of the prosecution case, the Sanctioning Authority has accorded the sanction. It nowhere discloses on what basis he came to conclusion that the sanction is to be accorded to launch the prosecution against accused No.1 Sunil Barai. There is no finding by learned Judge of the trial court as to validity of the sanction.

27. Besides the issue of the sanction, the prosecution claims that accused No.1 Sunil Barai has demanded gratification amount and the same was accepted through accused No.2 Bhaskar Lohi. To prove the demand and acceptance, the

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prosecution mainly placed reliance on the evidence of complainant PW1 Mahadeo Thakre; Shadow Pancha PW2 Sheikh Jamal, and PW3 Nandkishor Gore in whose presence the first demand was made by accused No.1 Sunil Barai.

28. The evidence of complainant PW1 Mahadeo Thakre, as far as the demand is concerned, is to the extent that there was a dispute between him and his brother. As his brother damaged Bandh of his agricultural land, there was quarrel between him and his brother and, therefore, his brother approached the police station and made his grievance. The complaint of his brother was handed over to interrogate accused No.1 Sunil Barai and accused No.1 Sunil Barai came in the village and in presence of PW3 Nandkishor Gore demanded amount Rs.200/-. After a negotiation, accused No.1 Sunil Barai shown his willingness to accept Rs.100/- and called him at Gadchiroli. Regarding the demand on the day of the trap, the evidence of the complainant shows that he along with Shadow Pancha PW2 Sheikh Jamal approached accused No.1 Sunil Barai who was sitting in a shoe shop near the police station and he has handed over the money

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to accused No.2 Bhaskar Lohi on the say of accused No.1 Sunil Barai. Accused No.2 Bhaskar Lohi, is auto rickshaw driver. After giving signal, accused No.1 Sunil Barai and accused No.2 Bhaskar Lohi were caught and the amount was recovered from accused No.2 Bhaskar Lohi. The hand wash of accused No.2 Bhaskar Lohi was also collected. The cross examination of complainant PW1 Mahadeo Thakre shows that while lodging the report, one Kawdu Mashsakhatri was along with him who is not examined. Pralhad Khobragade, at whose Shoe Shop accused No.1 Sunil Barai was sitting, is also not examined. The material omission brought on record, that he has not stated before the police that accused No.1 Sunil Barai told him that if he failed to pay the amount, he should sit on his motorcycle.

29. To corroborate the version of complainant PW1 Mahadeo Thakre, as to the demand was made in presence of independent witness PW3 Nandkishor Gore, said Nandkishor Gore has not supported the prosecution case. During the cross examination, he stated that he does not know whether amount Rs.200/- was demanded by accused No.1 Sunil Barai.

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30. Thus, insofar as the previous demand is concerned, the same is not corroborated by independent witness PW3 Nandkishor Gore.

31. As far as the demand on the day of the trap is concerned, the evidence of Shadow Pancha PW2 Sheikh Jamal shows that initially they went to the house of accused No.1 Sunil Barai, but he was not present in the house, thereafter, they went to the police station and accused No.1 Sunil Barai was present in the police station. The said evidence is contrary to the evidence of complainant PW1 Mahadeo Thakre as the complainant nowhere stated that he visited along with the Shadow Pancha at the house of accused No.1 Sunil Barai and, thereafter, to the police station whereat accused No.1 Sunil Barai was present. As per the evidence of the complainant, accused No.1 Sunil Barai was present in front of shoe shop near the police station. Whereas, as per the evidence of Shadow Pancha, accused No.1 Sunil Barai was present in the police station and came outside the police station and, thereafter, came to the shoe shop. As far as the demand is concerned, the evidence of the Shadow Pancha shows

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that accused No.1 Sunil Barai gave a signal towards auto driver accused No.2 Bhaskar Lohi and, therefore, the complainant has handed over the amount to the auto driver.

32. As to the demand also, the evidence of complainant PW1 Mahadeo Thakre and Shadow Pancha PW2 Sheikh Jamal is not consistent. As per the evidence of the complainant, after reaching the shoe shop, he told accused No.1 Sunil Barai that he has brought the thing which he was told and handed over the same amount. Whereas, the evidence of the Shadow Pancha shows that accused No.1 Sunil Barai has given the signal and the amount was handed over to accused No.2 Bhaskar Lohi. Thus, from the evidence of the complainant it nowhere reveals that there was a demand and in pursuance of the said demand, the amount was handed over by the complainant to accused No.2 Bhaskar Lohi. The signal, referred by the Shadow Pancha, by accused No.1 Sunil Barai, is not specifically stated by the Shadow Pancha. The evidence of the Shadow Pancha nowhere shows that in what manner the signal was given to accused No.2 Bhaskar Lohi and thereby the complainant has handed over the

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amount to accused No.2 Bhaskar Lohi. The evidence further nowhere discloses that accused No.2 Bhaskar Lohi was aware that the amount handed over to him was a gratification amount. Thus, there is complete absence of the evidence having knowledge to accused No.2 Bhaskar Lohi as regards the gratification amount.

33. Besides the evidence of complainant PW1 Mahadeo Thakre and Shadow Pancha PW2 Sheikh Jamal, the evidence of Trap Officer PW7 Gulabrao Shende is also material. His evidence is only to the extent that after receipt of the signal, he along with raiding party members caught accused No.1 Sunil Barai and accused No.2 Bhaskar Lohi and the amount was seized from accused No.2 Bhaskar Lohi. He also admitted that at the time of the incident, the complainant and accused No.1 Sunil Barai and accused No.2 Bhaskar Lohi were present in the shoe shop.

Thus, the evidence adduced shows that the alleged incident has taken place at the shoe shop.

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The evidence further shows that the complainant has not stated in his statement that accused No.1 Sunil Barai told accused No.2 Bhaskar Lohi to accept the amount.

Though statement of shoe owner Pralhad Khobragade was recorded, he is not examined by the prosecution.

Thus, the evidence of the Trap Officer is only to the extent of recovery of the amount from accused No.2 Bhaskar Lohi.

34. The evidence of Police Constable PW4 Tularam Madhamwar; Police Naik PW5 Ramesh Mishra, and Assistant Sub Inspector PW6 Ashok Borewar is formal in nature. PW4 Tularam Madhamwar acted as carrier who carried incriminating articles to the Chemical Analyzer and PW6 Ashok Borewar registered the First Information Report.

35. Thus, the earlier demand, which according to the prosecution was in the presence of independent witness PW3 Nandkishor Gore, is not corroborated by the said witness. The second demand is in shoe shop of which owner is Pralhad

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Khobragade, who is also not examined though his statement was recorded.

36. While deciding issue involving offence under the said Act, a fact required to be considered is that the evidence of complainant PW1 Mahadeo Thakre will have to be scrutinized meticulously. The testimony of such person requires careful scrutiny.

37. The Honourable Apex Court in the case of **Mukhtiar Singh (since deceased) through his LR vs. State of Punjab**⁶ held that statement of complainant and inspector, the shadow witness in isolation that the accused had enquired as to whether money had been brought or not, can by no means constitute demand as enjoined in law. Such a stray query ipso facto in absence of any other cogent and persuasive evidence on record cannot amount to a demand to be a constituent of the offence.

38. In the case of **M.O.Shamsudhin vs. State of Kerala**⁷, it has been held that word "accomplice" is not defined in the Evidence

⁶ 2017 SCC ONLine SC 742

⁷ (1995)3 SCC 351

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Act. It is used in its ordinary sense, which means and signifies a guilty partner or associate in crime. Reading Section 133 and Illustration (b) to Section 114 of the Evidence Act together the courts in India have held that while it is not illegal to act upon the uncorroborated testimony of the accomplice the rule of prudence so universally followed has to amount to rule of law that it is unsafe to act on the evidence of an accomplice unless it is corroborated in material aspects so as to implicate the accused.

39. In the case of **Bhiva Doulu Patil vs. State of Maharashtra**⁸ wherein it has been held that the combine effect of Sections 133 and 114, illustration (b) may be stated as follows:

“According to the former, which is a rule of law, an accomplice is competent to give evidence and according to the latter which is a rule of practice it is almost always unsafe to convict upon his testimony alone. Therefore though the conviction of an accused on the testimony of an accomplice cannot be said to be illegal yet the Courts will, as a matter of practice, not accept the evidence of such a witness without corroboration in material particulars.”

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40. Thus, in catena of decisions, it is held that the complainant himself is in the nature of accomplice and his story *prima facie* suspects for which corroboration in material particulars is necessary.

41. In the present case, learned counsel appearing for respective accused persons rightly pointed out the material evidence of complainant PW1 Mahadeo Thakre, as to the demand on the day of the trap, to show that the same is not consistent with the evidence of Shadow Pancha PW2 Sheikh Jamal. As per the evidence of the complainant, he has informed accused No.1 Sunil Barai that he brought the amount. Whereas, as per the evidence of the Shadow Pancha, accused No.1 Sunil Barai, by signal, asked the complainant to hand over the amount to accused No.2 Bhaskar Lohi. Thus, the evidence of these witnesses nowhere reflects that being a demand was made, acceptance was in pursuance of the demand. The evidence adduced by the prosecution nowhere shows that accused No.2 Bhaskar Lohi was having knowledge that the amount is of a gratification.

42. Thus, no attempt was made by the prosecution to satisfy regarding the complainant's assertion of the demand having come from the accused for illegal gratification. While considering the evidence of the prosecution, it is necessary to bear in mind an importance of evidence of prior demand, which if trustworthy makes trap a legitimate to eradicate a corruption, otherwise it could be an illegitimate trap.

43. It is well settled that mere possession and recovery of currency notes from accused without proof of demand would not establish an offence under Section 7 as well as Section 13(1)(d) (i)(ii) of the said Act.

44. It is held by the Honourable Apex Court in paragraph Nos.13 and 14 in the case of **Mukhtiar Singh (since deceased) through his LR vs. State of Punjab** *supra* as follows:

“13. Before averting to the evidence, apt it would be to refer to the provisions of the Act whereunder the original accused had been charged:

“7. Public servant taking gratification other than legal remuneration in respect of an official act. - Whoever, being, or expecting to be a public servant, accepts or obtains or

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agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than three years but which may extent to seven years and shall also be liable to 2 (2014) 5 SCC 103 3 (2016) 11 SCC 357 fine.

13. Criminal misconduct by a public servant – (1) A public servant is said to commit the offence of criminal misconduct, (2).....”

14. The indispensability of the proof of demand and illegal gratification in establishing a charge under Sections 7 and 13 of the Act, has by now engaged the attention of this Court on umpteen occasions. In A.Subair vs. State of Kerala, this Court propounded that the prosecution in order to prove the charge under the above provisions has to establish by proper proof, the demand and acceptance of the illegal gratification and till that is accomplished, the accused should be considered to be innocent.”

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45. Since proof of demand is *sine qua non* for convicting accused in such cases, in the present case, it cannot be said that the prosecution has been successful in proving its case beyond reasonable doubt.

46. In the case of **The State of Maharashtra vs. Ramrao Marotrao Khawale**⁹ this court has held that when a trap is set for proving the charge of corruption against a public servant, evidence about prior demand has its own importance. It is further held that the reason being that the complainant is also considered to be an interested witness or a witness who is very much interested to get his work done from a public servant at any cost and, therefore, whenever a public servant brings to the notice of such an interested witness certain official difficulties, the person interested in work may do something to tempt the public servant to bye-pass the rules by promising him some benefit. Since the proof of demand is *sine qua non* for convicting an accused, in such cases the prosecution has to prove charges against accused. Whereas, burden on accused is only to

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show probability and he is not required to prove facts beyond reasonable doubt.

47. The Honourable Apex Court in the case of **Mohmoodkhan Mahboobkhan Pathan vs. State of Maharashtra**¹⁰ held that the primary condition for acting on the legal presumption under Section 4(1) of the Act is that the prosecution should have proved that what the accused received was gratification. The word "gratification" is not defined in the Act. Hence it must be understood in its literal meaning. In the Oxford Advanced Learner's Dictionary of Current English, the word "gratification" is shown to have the meaning "to give pleasure or satisfaction to". The word "gratification" is used in Section 4(1) to denote acceptance of something to the pleasure or satisfaction of the recipient. If the money paid is not for personal satisfaction or pleasure of the recipient it is not gratification in the sense it is used in the section. In other words unless the prosecution proves that the money paid was not towards any lawful collection or legal remuneration the court cannot take recourse to the presumption of law contemplated in

¹⁰ (1997)10 SCC 600

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Section 4(1) of the Act, though the court is not precluded from drawing appropriate presumption of fact as envisaged in Section 114 of the Evidence Act at any stage.

48. In the case of **State of Maharashtra vs. Rashid B. Mulani**¹¹ it is held that a fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless therefore, the explanation is supported by proof, the presumption created by the provision cannot be said to be rebutted. Something more, than raising a reasonable probability, is required for rebutting a presumption of law. Though, it is well-settled that the accused is not required to establish his explanation by the strict standard of 'proof beyond reasonable doubt', and the presumption under Section 4 of the Act would stand rebutted if the explanation or defence offered and proved by the accused is reasonable and probable.

¹¹ (2006)1 SCC 407

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49. Learned counsel for respective accused persons as well as learned Additional Public Prosecutor for the State placed reliance on the decision of the Constitution Bench of the Honourable Apex Court in the case of **Neeraj Dutta vs. State (Govt. of NCT of Delhi)** *supra* wherein it has been held that 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. It is further held that insofar 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

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has to be raised by the court as a legal presumption or a presumption in law.

50. Thus, it is well settled principle of law that in absence of proof of demand for illegal gratification, recovery of currency notes is not sufficient to constitute such offence. Even, presumption under Section 20 of the Act can be drawn only after demand for an acceptance of illegal gratification is proved.

51. In the present case, as observed earlier, the prior demand by accused No.1 Sunil Barai is not proved by the prosecution. As to the demand, the evidence of complainant PW1 Mahadeo Thakre and Shadow Pancha PW2 Sheikh Jamal is not consistent. The earlier demand in presence of PW3 Nandkishor Gore is also not supported by the said witness.

52. It is already observed that the sanction is without application of mind. On that count also, the prosecution fails.

53. As it has been already observed that it is well settled that granting of sanction is a solemn sacrosanct act which affords protection to the government servants against frivolous

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prosecutions, there is an obligation on the sanctioning authority to discharge its duty to give or withhold sanction only after having full knowledge of the material facts of the case. The sanctioning authority to exercise powers strictly keeping in mind all relevant facts and material and accord the sanctions.

54. Thus, the evidence, as to the demand, is not satisfactory and proof of demand is *sine qua non* to prove charges. The sanction is also not accorded by application of mind.

55. In the light of the aforesaid position, since appeals deserve to be allowed, I pass following order:

ORDER

(1) The criminal appeals are **allowed**.

(2) The judgment and order of conviction and sentence dated 23.11.2004 passed by learned Special Judge, Gadchiroli in Special Case No.7/1991 convicting and sentencing accused No.1 Sunil Barai and accused No.2 Bhaskar Lohi is hereby quashed and set aside.

Judgment

256 appeals 726 & 748.04

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(3) Accused No.1 Sunil Barai and accused No.2 Bhaskar Lohi are acquitted of offences for which they are charged.

Appeals stand **disposed of**.

(URMILA JOSHI-PHALKE, J.)

!! BrWankhede !!

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