(2017) 01 MP CK 0110

MADHYA PRADESH HIGH COURT

Case No: 2419 of 2012

Rakesh Kesharwani	APPELLANT
Vs	
Smt. Savita Gupta	RESPONDENT

Date of Decision: Jan. 3, 2017

Acts Referred:

- Code of Criminal Procedure, 1973, Section 374 - Appeals from convictions

Citation: (2017) 01 MP CK 0110

Hon'ble Judges: S.K.Gangele, Subodh Abhyankar

Bench: Division Bench

Advocate: Kunal Dubey, J.K.Jain

Judgement

1. This criminal appeal under Section 374 of the Code of Criminal Procedure has been preferred by the appellant being aggrieved of the judgment dated 6/11/2012 passed by the Second Additional Sessions Judge/Special Judge, CBI, Jabalpur in Special Case No.12/2010, whereby the present appellant has been convicted along with other accused R.C.Mishra and is sentenced as under: Conviction u/s Sentence Default clause 7 of Prevention of Corruption Act RI for 2 years with fine of Rs.10,000/- RI for three months 13(2) of Prevention of Corruption Act RI for 2 years with fine of Rs.1,000/- RI for one month 120-B of IPC RI for 2 years with fine of Rs.500/- RI for one month

2. In brief, the case of the prosecution is that on 21.4.2009 a complaint was filed by the complainant Rakesh Kumar Tiwari (PW-6) before the Central Bureau of Investigation (for short Â€ÂœCBI), Jabalpur wherein it was alleged that he is an authorized officer of M/s Rohit Coal Depot, which is registered with Northern Coal-fields Limited (NCL) to participate in the coal auction and in one such auction they had purchased 1000 metric tons of coal. It is further stated by the complainant that the coal, which is to be lifted, is required to be weighed on the weigh bridge, which is being supervised by the Sales

Manager R.C. Mishra who is asking for a bribe of Rs.50,000/- at the rate of Rs.50/- per ton in order to weigh the coal and because of this reason the lifting of coal is hampered since 14.4.2009 and they are informed by R.C.Mishra that until Rs.50,000/- is given to him, he shall not allow to lift the coal. On this complaint, the CBI came into action and after voice recording of the conversation between the complainant and R.C.Mishra, a trap was arranged. A verification memo (Ex.P-100) was also prepared in this behalf. During the trap proceedings, it was found that R.C.Mishra, after taking amount of Rs.10,000/- from complainant Rakesh Kumar Tiwari, had handed over the same to the present appellant Mintu Dubey, who had kept the amount in the left side pocket of his shirt. Both the accused, R.C.Mishra and Mintu Dubey were caught red-handed on the spot and thereafter when their hands were washed in colourless solution of sodium carbonate, and the same turned into pink. However, the recovery of Rs.10,000/- is duly proved from the possession of the appellant.

3. After completing the investigation, the charge sheet was filed against the accused persons R.C.Mishra and Mintu Dubey. The learned trial Court, after recording the evidence of the prosecution and the plea of the accused persons, convicted and sentenced the appellant and co-accused R.C.Mishra under aforesaid sections as mentioned in para 1 of this judgment. Being aggrieved of the same, present appeal has been preferred by the appellant Mintu Dubey.

4. The learned counsel for the appellant has submitted that appellant Mintu Dubey has been falsely implicated in the matter by the CBI despite there being no evidence on record to connect the present appellant with the alleged offences. Learned counsel for the appellant has further submitted that mere recovery of the bribe amount from the possession of the appellant, without there being any corroborative evidence of demand and acceptance of the bribe by the present appellant, cannot be a ground to record a finding of guilt against him and convict him. Learned counsel for the appellant has also drawn our attention mainly to the testimony of (PW-1) Gaya Prasad Panika who is the Office Superintendent, NCL Singrauli, (PW-2) Sunil Kumar Singh the Head Clerk, West Central Railway, Jabalpur, (PW-4) Shivendra Kumar Mishra, Grade-II Clerk, Weigh Bridge, NCL, Rakesh Kumar Tiwari (PW-6), Complainant of the case, (PW-9) Hari Om Dixit, Inspector, CBI, to contend that the testimony of none of these witnesses can be said to be sufficient to convict the present appellant but still, the learned judge of the special court has convicted the appellant . In fact, even accepting their testimony as it is, the appellant cannot be said to have committed the alleged offence and is liable to be acquitted.

5. On the other hand, Shri J.K.Jain, learned Assistant Solicitor General appearing on the behalf of the respondent/Union of India has submitted that the involvement of the present appellant in commission of the alleged offence along with coaccused R.C. Mishra can be easily culled out from the evidence on record. Learned counsel for the respondent has submitted that it may that in the initial complaint that the name of the present appellant

was missing, but his conduct, his presence on the spot and recovery of Rs.10,000/- from his own pocket are materials, which are sufficient to hold that the present appellant was also actively involved in the conspiracy to obtain the amount of Rs.10,000/- from the complainant and has been rightly convicted by the special court.

6. We have heard the learned counsel for the parties and gone through the evidence available on record.

7. Gaya Prasad Panika (PW-1), who was the Office Superintendent at NCL Singrauli has narrated the procedure to be adopted while lifting the coal from the depot. He has stated that on the date of incident i.e. on 22.4.2009 accused R.C.Mishra was working as Sales Manager on the CHP Weigh Bridge. He has further stated that present appellant Mintu Dubey was also appointed as Dispatch Manager on the Second weigh Bridge, which is known as Sanmar Weigh Bridge, which is an External Weigh Bridge, whereas the other bridge is internal bridge, on which Sales Manager R.C. Mishra was working. He has further admitted in his cross examination that when the co-accused R.C.Mishra was on the internal (see if it is internal or external) weigh bridge, then its entire responsibility was of R.C.Mishra only, and during this time period it was not required by Mishra to consult anything with the present appellant.

8. Sunil Kumar Singh (PW-2) is a Panch Witness, who is the Head Clerk in the Western Central Railway and has proved the cassette wherein the voices of co-accused R.C.Mishra with the complainant has been recorded. Shivendra Kumar Mishra (PW-4), who was the Grade-II Clerk, has stated that the cooperation of all employees concerned of the NCL is necessary. He has admitted in para 12 of his cross examination that the coal, which goes through AB Weigh Bridge, its Incharge is the Sales Manager R.C.Mishra, and he has also admitted that when the Sales Manager is on duty, then he is the only responsible person. He has also admitted that Mintu Dubey has nothing to do with the quality control and the Sales Manager is not required to take any permission or to consult with any other person regarding his work.

9. Rakesh Kumar Tiwari (PW-6) is the star witness and the complainant of the case. He, in his examination-in-chief has stated that he had filed the complaint against accused R.C.Mishra and has also stated that he had recorded the conversation between him and Shri Mishra, which is contained in Articles A, A-1 and A-2. This witness in para 8 of his examination-in-chief has narrated the role ascribed to the present appellant in the following manner:

"VERNACULR MATTER OMITTED"

(emphasis supplied)

It is pertinent to mention here that despite this testimony of this witness Rakesh Kumar Tiwari that he heard that present appellant Mintu Dubey was asking R.C.Mishra about the nature of this amount, this witness has not been declared as hostile witness and has not been cross examined by the prosecution on this point. The legal position regarding the testimony of a hostile witness who has not been declared as Â€Â˜hostileÂ€Â™, has been aptly explained by the Hon''ble Apex Court in the case of Mukhtar Ahmed Ansari Vs. State (NCT of Delhi), (2005) 5 SCC 258 . The Hon''ble Apex Court in para 29, 30 and 31 of the said decision has observed as under :-

Â€Âœ29. The learned counsel for the appellant also urged that it was the case of the prosecution that the police had requisitioned a Maruti car from Ved Prakash Goel. Ved Prakash Goel had been examined as a prosecution witness in this case as PW 1. He, however, did not support the prosecution. The prosecution never declared PW1 "hostile". His evidence did not support the prosecution. Instead, it supported the defence. The accused hence can rely on that evidence.

30. A similar question came up for consideration before this Court in Raja Ram v. State of Rajasthan. In that case, the evidence of the doctor who was examined as a prosecution witness showed that the deceased was being told by one K that she should implicate the accused or else she might have to face prosecution. The doctor was not declared "hostile". The High Court, however, convicted the accused. This Court held that it was open to the defence to rely on the evidence of the Doctor and it was binding on the prosecution.

31. In the present case, evidence of PW1 Ved Prakash Goel destroyed the genesis of the prosecution that he had given his Maruti car to police in which police had gone to Bahai Temple and apprehended the accused. When Goel did not support that case, accused can rely on that evidence.

(emphasis supplied)

10. In respect of the procedure to be adopted by the Court when the prosecution witness not declared hostile, the Hon''ble Apex Court in the case of Assoo vs. State of Madhya Pradesh, (2011) 14 SCC 448 observed as under :-

Â€Âœ10. We have also perused the evidence of PW 3 None Lal, a neighbour, and one of the first to arrive at the spot. He gave a story which completely dislodges the statements of PWs 1 and 2. He deposed in his cross-examination that Shri Bai, a neighbour of the

appellant, had made allegations against the deceased in the presence of Ghaffoor and Ishaq that she was involved in illicit activities while her husband was away and that she would reveal all to her husband when he returned home and that immediately after these remarks the appellant had returned home on which the deceased had gone inside and set herself ablaze. We take it, therefore, as if the prosecution had accepted the statement of PW3 as true, as the witness had not been declared hostile.

(emphasis supplied)

Thus, the appellant can certainly rely upon the testimony of the complainant Rakesh Tiwari whose statement suggests that prior to the trap, the appellant had no knowledge of the nature of the amount which was handed over to him by R.C.Mishra. It is also a matter of record that none of the documents filed by the prosecution suggest the demand of bribe and its acceptance as such by the present appellant.

11. Mahipal Gagrai (PW-8) is also a Panch witness of the trap proceedings. In para 6 to 8 of his statement, he has stated that R.C.Mishra took money from the complainant Rakesh Tiwari and thereafter he gave this amount to appellant Mintu Dubey, who took the amount by his right hand and kept it on the left side of his shirt pocket.

12. Appellant Mintu Dubey in his statement under Section 313 of Cr.P.C. has stated that he is falsely implicated in the matter. In his defence, appellant Mintu Dubey has submitted a written reply as provided under Section 313(5) of Cr.P.C. wherein Mintu Dubey has taken a plea that on 22.4.2009 he was given the amount by R.C.Mishra and when he enquired from R.C.Mishra regarding that money, he was informed by Shri Mishra that he would inform later, hence he (Mintu Dubey) kept the amount in his pocket. He further stated that he has no connection with any allegation leading to the trap proceeding. He has further stated that if he knew that the amount so received by him from R.C.Mishra is of bribe, then he would never have received the same.

13. In the impugned judgment, the learned trial Court has discussed the case of the present appellant from para 82 onwards. The learned Judge has held that even though the complainant Rakesh Kumar Tiwari (PW-6) has stated in his examination-in-chief that he heard Mintu Dubey asking R.C.Mishra regarding the nature of money, that what this money is for, still the same is of no consequence, because the aforesaid statement is not mention in his statement recorded under Section 161 of Cr.P.C. nor it is mentioned in the recovery memo (Ex.P-103). The Learned Judge has further held that since the amount was given by complainant Rakesh Kumar Tiwari (PW-6) to R.C.Mishra in front of the present appellant, hence it was not necessary for the prosecution to declare him hostile and merely if some vague statement is made by the complainant in the court, then its benefit cannot be given to the present appellant. The learned Judge has further held that

even though no demand is raised by the appellant, still the demand made by co-accused persons would be deemed to be made by the present appellant also by relying upon the judgment of the Hon''ble Apex Court in the case of T. Shankar Vs. State of Andhra Pradesh, 2004 CRLJ 884. It is further held that to raise the presumption of commission of offence, it is sufficient if the acceptance of amount other than the legal amount is proved and since the amount is recovered from appellant Mintu Dubey only, the culpability of the appellant is proved and it should be presumed that since the amount was received by him from R.C.Mishra, he knew that the amount was of bribe only.

14. So far as the judgment of the Apex Court in the case of T.Shankar (supra) is concerned, the facts are clearly distinguishable, in that case the accused from whom the amount of bribe was recovered had taken a plea that it was given to him towards the payment of advance tax and after a close scrutiny of evidence, the HonÂ€Â™ble Apex court concluded that there was no necessity of paying the advance tax and on the contrary it was found that the tax was already paid and thus the plea of the accused was not accepted which is not the case in the present case at hand. So far as the conspiracy between the appellant and R.C.Mishra is concerned, the learned Judge has concluded that it cannot be believed that the appellant had no knowledge of the amount being taken by R.C.Mishra from complainant Rakesh Kumar Tiwari and since this amount was given in his presence only, meaning thereby that he had also conspired with R.C.Mishra. The finding so recorded by the learned trial Court apparently suffers from misreading of the evidence on record. It may be observed that initially it was not even the case of the prosecution that appellant Mintu Dubey was also in anyway involved in the demand of bribe. In the complaint lodged by Rakesh Kumar Tiwari (PW-6), he has mentioned that only RC Mishra is the person, who was asking for bribe. In the transcript prepared on the basis of voice recording, there is no reference of present appellant Mintu Dubey and there is no such statement from which it can be inferred that the bribe money was to be distributed/ shared by any other person also. It is only during the course of trap proceedings when the present appellant was also found to be standing and who was given the amount of Rs.10,000/- by co-accused R.C.Mishra, that he has been dragged in the case as a conspirator, but on the basis of the evidence on record it cannot be said that the appellant knew about the bribe which is alleged to be demanded by R.C.Mishra in respect of lifting of coal. Thus, no motive can be attributed to the present appellant to accept any bribe and it appears that he is roped in the alleged offence only because he happened to be present on the spot, where the amount was handed over to him by the co-accused.

15. It is the settled position of law that mere recovery of amount is not sufficient to convict a person under the provisions of Prevention of Corruption Act if the same is not backed by demand and acceptance of bribe as an illegal gratification.

16. In the case of Banarsi Dass vs. State of Haryana, (2010) 4 SCC 450, the Hon''ble Apex Court has reflected upon the inferences which are drawn in trap cases and

conviction of the accused on such inferences. The relevant paragraphs of the same read as under : 1. Â€Âœ19. The above findings recorded by the High Court show that the Court relied upon the statements of PW-10 and PW-11. It is further noticed that recovery of currency notes, Exts. P-1 to P-4 from the shirt pocket of the accused, examined in light of Exts. PC and PD, there was sufficient evidence to record the finding of guilt against the accused. The Court remained uninfluenced by the fact that the shadow witness had turned hostile, as it was the opinion of the Court that recovery witnesses fully satisfied the requisite ingredients. We must notice that the High Court has fallen in error insofar as it has drawn the inference of demand and receipt of the illegal gratification from the fact that the money was recovered from the accused. 1. 20. It is a settled canon of criminal jurisprudence that the conviction of an accused cannot be founded on the basis of inference. The offence should be proved against the accused beyond reasonable doubt either by direct evidence or even by circumstantial evidence if each link of the chain of events is established pointing towards the guilt of the accused. The prosecution has to lead cogent evidence in that regard. So far as it satisfies the essentials of a complete chain duly supported by appropriate evidence. Applying these tests to the facts of the present case, P-10 and P-11 were neither the eye- witnesses to the demand nor to the acceptance of money by the accused from Smt. Sat Pal Kaur (PW-2). 3. 4. 24. In M.K. Harshan v. State of Kerala this Court in somewhat similar circumstances, where the tainted money was kept in the drawer of the accused who denied the same and said that it was put in the drawer without his knowledge, held as under : (SCC pp.723-24, para 8) 1. "8.....It is in this context the courts have cautioned that as a rule of prudence, some corroboration is necessary. In all such type of cases o f b r i b e r y , t w o a s p e c t s a r e important. Firstly, there must be a demand and secondly there must be acceptance in the sense that the accused has obtained the illegal gratification. Mere demand by itself is not sufficient to establish the offence. Therefore, the other aspect, n a m e l y , a c c e p t a n c e i s v e r y important and when the accused has come forward with a plea that the currency notes were put in the drawer without his knowledge, then there must be clinching evidence to show that it was with the tacit approval of the accused that the money had been put in the drawer a s a n i l l e g a l g r a t i f i c a t i o n . Unfortunately, on this aspect in the present case we have no other evidence except that of PW-1. Since PW-1"s evidence suffers from infirmities, we sought to find some corroboration but in vain. There is no other witness or any other circumstance which supports the evidence of PW-1 that this tainted money as a bribe was put in the drawer, as directed by the accused. Unless we are satisfied on this aspect, it is difficult to hold that the accused tacitly accepted the illegal gratification or obtained the same within the meaning of Section 5(1)(d) of the Act, particularly when the version of the accused appears to be probable". 2. 25. Reliance on behalf of the appellant was placed upon the judgment of this Court in the case of C.M. Girish Babu where in the facts of the case the Court took the view that mere recovery of money from the accused by itself is not enough in absence of substantive evidence for demand and acceptance. The Court held that there was no voluntary acceptance of the money knowing it to be a bribe and giving advantage to the accused of the evidence on record, the Court in paras 18 and 20 of the judgment held as

under : (SCC pp.784 & 785-86) "18. In Suraj Mal v. State (Delhi Admn. this Court took the view that (at SCC p. 727, para 2) mere recovery of tainted money divorced from the circumstances under which it is paid is not sufficient to c o n v i c t t h e a c c u s e d w h e n t h e substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused, in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe. * * * 20. A three-Judge Bench in M. Narsinga Rao v. State of A.P. while dealing with the contention that it is not enough that some currency notes were handed over to the public servant to make it acceptance of gratification and prosecution has a further duty to prove that what was paid amounted to gratification, observed: (SCC p. 700, para 24) "24. ... we think it is not necessary to deal with the matter in detail because in a recent decision rendered by us the said aspect has been dealt with at length. (Vide Madhukar Bhaskarrao Joshi v. State of Maharashtra.) The following statement made by us in the said decision would be the answer to the aforesaid contention raised by the learned counsel: (Madhukar case, SCC p. 577, para 12) Â€Âœ12. The premise to be established o n t h e f a c t s f o r d r a w i n g t h e presumption is that there was p a y m e n t o r a c c e p t a n c e o f gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted "as motive or reward" for doing or forbearing to do any official act. So the word "gratification" need not be stretched to mean reward because reward is the outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions a d j a c e n t t o e a c h o t h e r l i k e "gratification or any valuable thing". If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word "gratification" must be treated in the context to mean any payment for giving satisfaction to the public servant who received it." In fact, the above principle is no way derivative but is a reiteration of the principle enunciated by this Court in Suraj Mal case, where the Court had held that mere recovery by itself cannot prove the charge of prosecution against the accused in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money. Reference can also be made to the judgment of this Court in Sita Ram v. State of Rajasthan, where similar view was taken. 26. C.M. Girish Babu case was registered under the Prevention of Corruption Act, 1988, Section 7 of which is in pari materia with Section 5 of the Prevention of Corruption Act, 1947. Section 20 of the 1 9 8 8 A c t r a i s e s a r e b u t t a b l e presumption where the public servant accepts gratification other than legal remuneration, which presumption is absent in the 1947 Act. Despite this, the Court followed the principle that mere recovery of tainted money divorced from the circumstances under which it is paid would not be sufficient to convict the accused despite presumption and, in fact, acquitted the accused in that case. (Emphasis supplied)

17. The learned counsel for the appellant has also relied upon scores of judgements in this regard namely, In addition to the above, in a relatively new decision of the

honÂ€Â™ble Apex court in the case of P. Satyanarayana Murthy vs District Inspector of Police, State of Andhra Pradesh and another, (2015) 10 SCC 152, the Apex Court has reflected upon the acceptance of money by a person and has reiterated that mere acceptance of amount is not sufficient to prove the guilt of the accused. Paragraphs 20, 21 and 23 of the said decision read as under:-

Â€Âœ20. This Court in A. Subair vs. State of Kerala, while dwelling on the purport of the statutory prescription of Sections 7 and 13(1) (d) of the Act ruled that (at SCC p. 593, para 28) the prosecution has to prove the charge thereunder beyond reasonable doubt like any other criminal offence and that the accused should be considered to be innocent till it is established otherwise by proper proof of demand and acceptance of illegal gratification, which are vital ingredients necessary to be proved to record a conviction.

21. In State of Kerala vs. C.P. Rao, this Court, reiterating its earlier dictum, vis - vis the same offences, held that mere recovery by itself, would not prove the charge against the accused and in absence of any evidence to prove payment of bribe or to show that the accused had voluntarily accepted the money knowing it to be bribe, conviction cannot be sustained.

23. The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)(i) & (ii) of the Act and in absence thereof, unmistakably the charge therefor, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to p r o v e t h e d e m a n d f o r i l l e g a l gratification would be fatal and mere recovery of the amount from the person accused of the offence under Sections 7 or 13 of the Act would not entail his conviction thereunder.

(emphasis supplied)

In the case of Selvaraj vs State of Karnataka, (2015) 10 SCC 230, the Apex Court, in respect of demand and acceptance in the Prevention of Corruption cases, has held as under :-

6. Â€Âœ17. In A. Subair V. State of Kerala, this Court has laid down that illegal gratification has to be proved like any criminal offence and when the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest the conviction on such evidence. This Court while recording acquittal, has laid down thus

:(SCC p.594, para 31)

1. Â€Âœ31. When the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence. It is true that the judgments of the Court below are rendered concurrently but having considered the matter thoughtfully, we find that the High Court as well as the Special Judge committed manifest errors on account of unwarranted interferences. The evidence on record in this case is not sufficient to bring home the guilt of the appellant. The appellant is entitled to the benefit of doubt. 2.

8. 18. In State of Kerala v. C.P. Rao, it has been laid down that recovery of tainted money is not sufficient to convict the accused. There has to be corroboration of the testimony of the complainant regarding the demand of bribe and when the complainant is not available for examination during the trial, court has to be cautious while sifting the evidence of other witnesses. Charge has to be proved beyond reasonable doubt. This Court has laid down thus: (SCC pp. 452-53, paras 12-13)

1. Â€Âœ12. Those observations quoted above are clearly applicable in this case. In the context of those observations, this Court in para 28 of A. Subair made it clear that the prosecution h a s t o p r o v e t h e c h a r g e b e y o n d reasonable doubt like any other criminal offence and the accused should be considered innocent till it is proved to the contrary by proper proof of demand and acceptance of illegal gratification, which is the vital ingredient to secure the conviction in a bribery case. In view of the aforesaid settled principle of law, we find it difficult to take a view different from the one taken by the High Court.

(emphasis supplied)

18. Thus, after carefully analysing of the evidence on record, and applying the principles of law as laid down by the HonÂ€Â™ble Apex Court in the cases cited above, we have no hesitation in arriving at the conclusion that the finding of guilt of the present appellant Mintu Dubey by the learned special judge is based on misreading and drawing of uncalledfor inferences of the evidence on record, hence liable to be set aside.

19. In the result, the judgment of the learned Special Court is hereby set aside and the present appeal filed by the appellant is allowed. The appellant is acquitted of all the charges leveled against him. Since the appellant is on bail, therefore his bail bonds shall stand discharged.