(2010) 09 MAD CK 0348

Madras High Court

Case No: Criminal Appeal No. 1007 of 2005

State by Inspector of Police,
Vigilance and Anti-Corruption,
Salem — APPELLANT

Vs

R. Duraisamy — RESPONDENT

Date of Decision: Sept. 2, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Prevention of Corruption Act, 1988 - Section 11, 13(1), 13(2), 20, 5(1)

Citation: (2011) 4 RCR(Criminal) 122 : (2011) 4 RCR(Criminal) 122

Hon'ble Judges: K.N. Basha, J

Bench: Single Bench

Advocate: J.C. Durairaj, for the Appellant; A. Padmanaban, for the Respondent

Final Decision: Dismissed

Judgement

K.N. Basha, J.

This appeal is preferred by the State, challenging the judgment of acquittal passed by the learned Special Judge and Chief Judicial Magistrate, Salem dated 15.6.2005 made in Special C.C. No. 40/2003, acquitting the respondent/accused for the offence under Sections 7 and 13(2) r/w. 13(1)(d) of the Prevention of Corruption Act, 1988.

2. The prosecution case in a nutshell is hereunder:

2.1. The accused was working as Assistant Secretary in Attur Gandhinagar Cooperative Housing Construction Society. PW2 is a resident of Attur Taluk, Ambasamuthiram. He is residing along with his father-in-law. His father-in-law is owning 566 Sq.ft, house site and proposed to construct a house in the said house site. In order to obtain housing loan, PW2 went to Attur Gandhinagar Housing Construction Society and met the accused. The accused wanted to inspect the site and PW2 taken him to the site. After inspection, the accused told PW2 that he would

prepare the plan for the house and for that he has asked Rs. 750/- and the same was given by PW2. He has further instructed PW2 to bring the land records, NOC and plan etc. Accordingly, PW2 met him in the 2nd week of July 2002. The accused informed PW2 that he has to bring his father-in-law for making him as a member of the Society by paying an amount of Rs. 750/-. Thereafter, PW2 along with his father-in-law met the accused on 27.7.2002 and the accused received the amount of Rs. 750/- and thereafter obtained thumb impression of the father-in-law of PW2 for joining him as a member and also obtained his signature as a witness from PW2. After receiving the NOC and other records, he has instructed PW2 to come on 29.7.2002.

2.2. PW2 met the accused on 29.7.2002 and sought for loan of Rs. 1,20,000/-. In order to arrange the said loan, the accused demanded Rs. 5,000/- from PW2. PW2 expressed his inability. PW2 went to his house and informed his father-in-law about the demand made by the accused. As per the instruction of his father-in-law, PW2 went to the house of the accused and asked him to reduce the amount demanded by him. The accused was not available in his house. Again he went to the house of the accused on 6.8.2002 and requested him to reduce the amount and accordingly, the accused reduced one thousand and demanded Rs. 4,000/- and instructed him to give it within a week. He has also further instructed PW2 to give his phone number so that, he can inform him as to where he has to bring the amount. PW2 informed about the happenings to his father-in-law. His father-in-law advised him to give a report to the Vigilance police.

2.3. PW2 went to the Office of the Vigilance and Anti-Corruption Police and met PW9, the Inspector and gave the report orally and the same was recorded by PW9 under Ex.P2. He registered the case in Crime No. 17/AC/2002 for the offence u/s 7 of the Prevention of Corruption Act, 1988. Ex.P23 is the F.I.R.

2.4. PW9, planned to conduct raid and summoned two witnesses viz., PW4 and another. PW2 was introduced to them. He has asked PW4 and other witness to read the F.I.R. Thereafter, he has received the amount of Rs. 4,000/-, M.O.I series, brought by PW2 and demonstrated phenolphthalein test to PW2, PW4 and another. He has taken Phenolphthalein Powder and Sodium Carbonate Powder, M.Os.2 & 3 in a packet and put the seal. Thereafter, he has instructed PW2 to meet the accused. PW4 was instructed to accompany PW2 and watch the happenings. The said proceedings have been recorded by PW9 under Ex.P3.

2.5. The raiding party left the vigilance office at 12.30 noon along with PWs.2,4. At 1.45 p.m. they reached Attur and instructed PW2 to give a phone call as per the instruction of the accused. PW2 found that the accused was in his house, as the accused asked PW2 to come to his house. PW9 instructed PWs.2 & 4 to go to the house of the accused and meet him and the raiding party were hiding near the house of the accused for the prearranged signal.

2.6. PW2 went to the house of the accused along with PW4. The accused asked PW2 whether he has brought the money. Thereafter, PW2 handed over M.O.I series currency notes to the accused. The accused received the amount and counted the same and stated to PW2 that he would make arrangements and climbed the stairs. PWs. 2 & 4 came out of the house of the accused and PW2 gave the prearranged signal at 2.30 p.m. The raiding party rushed to the house of the accused and the accused was identified by PW2.

2.7. PW9 introduced himself and other witnesses to the accused. The accused was perturbed. PW9 conducted phenolphthalein test and the same proved positive. Thereafter, he has enquired the accused about the amount received from PW2. The accused taken them to his bedroom and produced the amount of Rs. 4,000/-. The number of the currency notes tallied with the numbers noted in the Mahazar, Ex. P3. PW9 asked for the documents relating to the loan application of PW2''s father-in-law, for which the accused sated that he has kept the same in his residence and produced the same. PW9 seized the same under Ex.P11. The accused was thereafter arrested. PW9 prepared Mahazar, Ex. P14 in respect of trap proceedings. He has prepared Ex. P15, Rough Sketch of the house of the accused. He searched the house and recovered 33 documents and cash of Rs. 79,930/- under the Search List, Ex. P16. He has given Rs. 5,000/- for household expenses. He has prepared the Observation Mahazar, Ex. P17.

2.8. PW10 the Inspector of Police took up further investigation. He has examined PWs. 2,4 and others. He has examined the accused on 14.9.2002. He has received the Chemical Analysis Report, Ex. P22 and examined PW7 and others. After completion of investigation, he has sent the final report to the Director of Vigilance.

2.9. PW-11, another Inspector of Police took up further investigation and obtained sanction, Ex. P1 to prosecute the accused. Thereafter, he has laid the charge sheet against the accused on 15.10.2003.

3. The prosecution in order to bring home the charges against the accused, examined PWs. 1 to 11, filed Exs. 1 to 24 and marked M.Os.1 to 5.

4. When the accused was questioned u/s 313 of the Criminal Procedure Code in respect of incriminating materials appearing against him, he has denied his complicity. He has not chosen to examine any witness on his side.

5. Mr. J.C. Durairaj, Learned Government Advocate (Crl. side) contended that the learned Trial Judge has committed error of law in rejecting the case of the prosecution by ignoring and overlooking the overwhelming materials available on record to implicate the accused for the offence alleged against him. It is contended that the Trial Court has failed to consider the alleged demand of illegal gratification and acceptance of the same by the accused as proved by the prosecution through the evidence of PW2 and PW4, an independent witness. It is further contended that the evidence of PWs. 2 and 4 regarding the alleged demand and acceptance of

illegal gratification is also corroborated by the evidence of the Investigating Officer, PW9. It is also pointed out that the learned Trial Judge has erred in accepting Ex.D1, the Pronote marked by the defence and the loan theory of the defence. The learned Government Advocate (Crl.side) submitted that the phenolphthalein test conducted by the Investigation Officer, PW9 has also proved positive. It is further contended that :the explanation'' given by the accused to the effect that he has received the amount only towards the repayment of the loan as per the Pronote is unbelievable and as such, it cannot be stated that the accused has rebutted the presumption contemplated u/s 20 of the Prevention of Corruption Act.

6. Per contra, Mr. A. Padmanaban, learned counsel appearing for the respondent/accused vehemently contended that the prosecution has miserably failed to prove its case by adducing clear and consistent evidence. It is contended that PW2 has categorically admitted about the execution of Ex.D1, the Pronote and as such the defence theory of the payment of the amount of Rs. 4,000/- only towards loan is probablised. It is pointed out by the learned counsel that there is no corroboration for the alleged demand said to have been made by the accused prior to the trap as well as on the date of trap, as the evidence of PWs. 2 & 4 is highly artificial and unbelievable.

7. It is further contended that the defence has come forward with the categorical version of payment of loan amount only by PW2 and not as a bribe and the said version is probablised by marking Pronote, Ex.D1 as admitted by PW2. Therefore, it is contended that the accused has given reasonable and probable explanation for the receipt of the amount, as he has admitted the same. It is also pointed out by the learned counsel that it is sufficient for the accused to discharge his burden by rebutting the presumption by placing reliance on the answers elicited from PW2 and other witnesses and by preponderance of probabilities as per the settled principle laid down by the decision of the Hon''ble Apex Court. It is further contended that the learned Trial Judge has pointed out the infirmities and inconsistencies in the prosecution case and further placed reliance on the defence document viz., Ex.D1, Pronote as admitted by PW2 and as such the Trial Court has rightly held that the accused has given reasonable and probable explanation for receipt of the amount of Rs. 4,000/-. It is also pointed out by the learned counsel that the learned Trial Judge has specifically pointed out that the alleged amount of Rs. 4,000/- said to have been received by the accused is also tallied with the Pronote amount. It is contended that there is absolutely no infirmity or illegality in the impugned judgment of acquittal passed by the learned Trial Judge.

8. I have given my careful consideration to the rival contentions put forward by either side and thoroughly scrutinized the entire evidence available on record.

9. Before proceeding to consider the contentions put forward by either side and the reasons assigned by the learned Trial Judge for acquitting the accused, let me refer the law laid down by the Hon''ble Apex Court in respect of powers of this Court to

interfere in the judgment of appeal against acquittal.

10. The Hon''ble Apex Court in State of Karnataka Vs. K. Gopalakrishna, , has held as hereunder:

17. We are conscious of the fact that we are dealing with an appeal against an order of acquittal. In such an appeal the appellate Court does not lightly disturb the findings of fact recorded by the court below. If on the basis of the same evidence, two views are reasonably possible, and the view favouring the accused is accepted by the court below, that is sufficient for upholding the order of acquittal. However, if the appellate court domes to the conclusion that the findings of the court below are wholly un reasonable or perverse and not based on the evidence on record, or suffer from serious illegality including ignorance or misreading of evidence on record, the appellate court will be justified in setting aside such an order of acquittal....

11. In yet another decision in Kallu alias Masih and Others v. State of M.P., reported in 2006(1) R.C.R.(Criminal) 427 : 2006(1) Apex Criminal 135 : (2006)3 SCC (Crl.) 546, the Hon''ble Apex Court has held hereunder:

8. While deciding an appeal against acquittal, the power of the appellate court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible. The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt....

The above well settled principle of law laid down by the Hon''ble Apex Court makes it crystal clear that the power of the High Court to interfere in the judgment of appeal against acquittal is justified only if the findings of the Court below are unreasonable, perverse and not based on the evidence on record. It is also equally well settled that the judgment of appeal against acquittal could be interfered, only if permissible evidence is ignored by the Trial Court.

12. Let me now consider the reliability and acceptability of the evidence adduced by the prosecution through PWs. 2, 4 and 9 and also the reasons assigned by the learned Trial Judge for acquitting the accused with the touch stone of the principle laid down by the Hon''ble Apex Court.

13. At the outset, it is to be stated that the prosecution is bound to discharge its first and foremost burden of establishing the demand of illegal gratification said to have been made by the accused. The perusal of the evidence of PW2 reveals that there is absolutely no corroboration to his version, in respect of, alleged demand of illegal

gratification made by the accused prior to the trap. Though PW2 claimed that the accused demanded illegal gratification on two or three occasions even prior to 29.7.2002, he has categorically admitted in his cross examination that the accused demanded the amount only for the first time on 29.7.2002. It is further categorically admitted by PW2 that while he met the accused five or six times at his residence, the accused never demanded any amount. Therefore, it is crystal clear that PW2 has not come forward with the clear and consistent version in respect of the alleged demand of illegal gratification said to have been made by the accused. Added to such inconsistencies, it is also relevant to note that PW2 further admitted in his cross examination that prior to 29.7.2002, the accused only demanded the loan amount given by him. It is pertinent to note that PW2 has admitted in his cross examination that he was having grievance against the accused as he has demanded the loan amount in the presence of 10 persons. Therefore, this Court is of the considered view that the learned Trial Judge has rightly rejected the version of PW2, as he has not come forward with the clear and consistent version in respect of demand of illegal gratification said to have been made prior to the trap by the accused.

14. Now, coming to the prosecution version relating to the alleged demand of illegal gratification made by the accused at the time of trap, the prosecution is left with the evidence of PWs. 2 and 4. It is the version of PW2 that when he met the accused in his house along with PW4, the accused has only asked him whether he has brought the amount as he has already asked and thereafter he has given the amount. The perusal of the evidence of PW4 discloses that the accused asked PW2 whether he has brought the money which was asked by him earlier. In view, of the specific admission of PW2 in his cross examination to the effect that the accused earlier demanded only the loan amount prior to the trap, by no stretch of imagination, it could be stated that the accused has demanded illegal gratification at the time of trap. Therefore, this Court has no hesitation to hold that the specific and definite admission made by PW2 during the course of cross examination to the effect that the accused only demanded repayment of the loan amount prior to the trap, shatters the prosecution version of demand of illegal gratification said to have been made by the accused prior to the trap as well as at the time of trap.

15. At this juncture, it is relevant to refer to the decisions of the Hon''ble Apex Court in V. Venkata Subbarao v. State represented by Inspector of Police, A.P., reported in 2007(1) R.C.R.(Criminal) 519 : 2007(1) RAJ 321 : (2006)13 SCC 305 wherein the Hon''ble Apex Court has held here under:

24....In the absence of a proof of demand, the question of raising the presumption would not arise. Section 20 of the Prevention of Corruption Act, 1988 provides for raising of a presumption only if a demand is proved. It reads as under:

20. Presumption where public servant accepts gratification other than legal remuneration. -(1) Where, in any trial of an offence punishable u/s 7 or Section 11 or

clause(a) or clause(b)of sub-section(1)of Section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presume, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.

25. Furthermore, even in such a case, the burden on an accused does not have to meet the same standard of proof, as is required to be made by the prosecution.

26. In M.S. Narayana Menon v. State of Kerala, this Court held : (SCC p.55, para 45)

Moreover, the onus on an accused is not as heavy as that of the prosecution. It may be compared with a defendant in a civil proceedings.

In view of the principles laid down by the Hon''ble Apex Court in the decision cited supra and in view of the reasons already assigned, this Court has no hesitation to hold that the evidence of PW2 demolishes the prosecution version in respect of demand of illegal gratification made by the accused prior to the trap as well as at the time of trap. The learned Trial Judge has rightly rejected the prosecution version in respect of demand of illegal gratification said to have been made by the accused.

16. Now coming to the second limb of the prosecution version namely the alleged receipt of the amount of Rs. .4,000/- as illegal gratification, the prosecution is left with the version of PWs. 2,4 and 9. As far as the case on hand is concerned, it is pertinent to note that the accused has come forward with the definite version of admitting the receipt of the amount and given explanation for receipt of the amount of Rs. 4,000/-. It is the explanation of the accused that he has received the said amount only towards the loan given to PW2, under Ex.D1, the Pronote. It is seen that, PW2 has categorically admitted in his cross examination about the execution of Ex.D1 the Pronote for obtaining loan to the tune of Rs. 4,000/- The alleged bribe amount of Rs. 4,000/- is also tallied with the loan amount of Rs. 4,000/-. The fact remains that the explanation given by the accused is also probablised by the categorical admission of PW2 in respect of execution of the Pronote, Ex. D1 and as such, this Court is of the considered view that the learned Trial Judge has rightly arrived at the conclusion that the accused has come forward with the reasonable and probable explanation for the receipt of the amount of Rs. 4,000/-.

17. It is relevant to refer the decision of the Hon''ble Apex Court in T. Subramanian v. State of T.N., re-ported in 2006(1) Apex Criminal 159 : (2006)1 SCC 401, wherein the Hon''ble Apex Court has held here under:

7. Mere receipt of Rs. 200 by the appellant from PW-1 on 10.7.1987 (admitted by the appellant) will not be sufficient to fasten guilt u/s 5(1)(a) of Section 5(1)(d) of the Act,

in the absence of any evidence of demand and acceptance of the amount as illegal gratification. If the amount had been paid as least rent arrears due to the temple or even if it was not so paid, but the accused was made to believe that the payment was towards lease rent due to the temple, he cannot be said to have committed any offence. If the reason for receiving the amount is explained and the explanation is probable or reasonable, then the appellant had to be acquitted, as rightly done by the Special Court.

18. It is also relevant to refer to the principle laid down by the Hon''ble Apex Court in Punjabrao Vs. State of Maharashtra, , wherein the Hon''ble Apex Court has held as under:

3...It is too well settled that in a case where the accused offers an explanation for receipt of the alleged amount, the question that arises for consideration is whether that explanation can be said to have been established. If is further clear that the accused is not required to establish his defence by proving beyond reasonable doubt as the prosecution, but can establish the same by preponderance of probability.

The principles laid down by the Hon''ble Apex Court in the decisions cited supra are squarely applicable to the facts of the instant case, as in this case also the accused has admitted the receipt of the amount and he has given reasonable and probable explanation and as such he has rebutted the presumption contemplated u/s 20 of the Prevention of Corruption Act. All these factors have been carefully considered by the learned Trial Judge and the learned Trial Judge has given categorical reasons for acquitting the accused. This Court is not able to find any infirmity or illegality in the impugned judgment of acquittal. It is further relevant to state that the findings of the Court below cannot be wholly unreasonable or perverse as the findings are based on the evidence available on record and as such, no ground is made out warranting interference of this Court.

19. In view of the aforesaid reasons, the appeal is dismissed and the judgment of acquittal passed by the learned Special Judge and Chief Judicial Magistrate, Salem dated 15.6.2005 made in Special C.C.No. 40/2003 is hereby confirmed.