(2014) 12 MAD CK 0287

Madras High Court (Madurai Bench)

Case No: Criminal Appeal (MD) No. 101 of 2009

A. Kanagarajan		APPELLANT
	Vs	
State		RESPONDENT

Date of Decision: Dec. 1, 2014

Acts Referred:

- Constitution of India, 1950 - Article 136
- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 161
- Prevention of Corruption Act, 1988 - Section 13(1)(d), 13(2), 20, 7

Citation: (2015) 1 MLJ(Cri) 567

Hon'ble Judges: R. Mala, J

Bench: Single Bench

Judgement

R. Mala, J.

The appellant/accused has come forward with this appeal challenging his conviction and sentence passed by the learned Special Judge (V&AC)-cum-Chief Judicial Magistrate, Sivagangai, dated 16.04.2009 made in C.C. No. 1 of 2003, whereby and whereunder, the appellant was convicted for the offences punishable under Sections 7 and 13(1)(d) r/w Section 13(2) of Prevention of Corruption Act and sentenced him to undergo 4 years RI, to pay a fine of Rs. 1,000/- in default to undergo 1 year RI for the offence punishable under Section 7 of Prevention of Corruption Act and sentenced to undergo 4 years RI and to pay a fine of Rs. 1,000/- in default to undergo 1 year RI for the offence punishable under Section 13(1)(d) r/w Section 13(2) of Prevention of Corruption Act.

2. The case of prosecution, in a nutshell, is as follows:

(i) The father of P.W. 2 Saravanan, while working as Assistant, died in harness on 24.12.2000 and claiming appointment on compassionate ground, his wife and P.W. 2, being the elder son, made an application on 07.06.2001. That application was returned

several times for rectifying certain defects and after rectification, it was represented by P.W. 2 on various dates and lastly, presented before the office of Executive Engineer, Sivagangai. On 06.03.2002 at 04.30 p.m., when P.W. 2 along with P.W. 3 went to the office of the Executive Engineer, the accused asked him to pay a sum of Rs. 250/- as bribe for recommending the application for compassionate appointment.

(ii) Having not interested to give the amount as bribe, on 11.03.2002 at 09.30 a.m., P.W. 2 gave a complaint to P.W. 13, the Inspector of Police, Vigilance and Anti-Corruption, Sivagangai, which resulted in registering a case in Crime No. 4 of 2002, for the offence punishable under Section 7 of Prevention of Corruption Act, 1988 and after initiating trap proceedings, it was proved that the accused was accepted the illegal gratification of Rs. 250/- from P.W. 2.

(iii) After recording the statements of the prosecution witnesses, P.W. 13 referred the case to P.W. 14 for further investigation. P.W. 14, after recording the statements of witnesses and receiving the report, laid the final report against the accused for the offences punishable under Sections 7, 13(1)(d) r/w 13(2) of Prevention of Corruption Act, 1988.

(iv) The learned trial Judge, after following the procedures, framed necessary charges against the accused. Since the accused denied the same in toto and pleaded not guilty, to prove the charges, P.Ws. 1 to 14 were examined and Exs. P. 1 to P. 31 were marked along with M.Os. 1 to 4 on behalf of the prosecution. On completion of the examination of the witnesses on the side of the prosecution, the accused was questioned under Section 313 Cr.P.C., as to the incriminating circumstances found in the evidence of the prosecution witnesses and he denied the same as false. On behalf of the defence, Ex. D. 1 was marked and no witness was examined.

3. The learned trial Judge, after considering the oral and documentary evidence, convicted and sentenced the appellant as stated above, against the which, the present appeal has been preferred.

4. Assailing the conviction and sentence passed against the appellant, the learned counsel for the appellant would submit that the evidence of P.W. 2 de facto complainant is not fully reliable. The appellant is not a competent person to give appointment on compassionate ground. That factum was not considered by the Trial court. Even though P.W. 3 was examined to prove the first demand, he has not deposed about the first demand. In his evidence, he had stated that he was directed to go out from the seat where the appellant was sitting. That factum was also not considered by the Trial Court. The second demand was also not proved by the prosecution. According to the prosecution, no shadow witness has been accompanying P.W. 2, while tendering the amount. P.W. 4 is an attest or of the recovery. As such, with regard to second demand, there is no corroboration with the evidence of P.W. 2. Acceptance was also not proved by the prosecution, because the amount has been placed in the drawer of the appellant. The

drawer was not under lock and key. Till today, P.W. 2 was unable to get his appointment on compassionate ground, since one of the family members has got employment in Jail Department. That factum was not considered by the Trial Court. To substantiate his argument, he relied upon the following decisions of the Apex Court and prayed for setting aside the conviction and sentence:

(i) Panalal Damodar Rathi Vs. State of Maharashtra, .

(ii) State of Punjab Vs. Madan Mohan Lal Verma, .

(iii) Rakesh Kapoor Vs. State of Himachal Pradesh, .

(iv) B. Jayaraj Vs. State of A.P., .

(v) Smt. Meena Hemke Vs. The State of Maharashtra, .

(vi) R. Gunalan Vs. The State by Deputy Superintendent of Police, vigilance and Anti-Corruption Department, Erode Wing, Erode District, .

5. Resisting the same, the learned Government Advocate (Criminal side) would submit that it is true that the appellant is working as Superintendent in the Public Works Department at Sivagangai. He is the person, who is dealing with the application given by P.W. 2. The evidence of P.W. 2 has been corroborated by P.W. 3 Sathiyan, who is none other than his friend. She would further submit that at the time of tendering the amount, no official witness has been accompanying him. It is not fatal to the case of the prosecution. To substantiate the same, she relied upon a decision of the Apex Court in C.M. Sharma Vs. State of A.P. Th. I.P., . She would further submit that the appellant himself has returned the application several times for compliance. The evidence of P.W. 2 and P.W. 4 and trap laying officer P.W. 13 has proved the acceptance and recovery and phenolphthalein test ended in positive and after considering all the factors, the Trial Court has rightly convicted him for the offences as stated above. Hence, she prayed for dismissal of the appeal.

6. Considering the rival submissions made by both sides and on perusal of the typed-set of papers, it is seen that the appellant is the Superintendent in Executive Engineer''s office, Public Works Department. P.W. 2''s father by name Subramanian, while working as Selection Grade Assistant, died in harness on 24.12.2000, leaving behind him P.W. 2, his widow and two daughters and another son as his legal heirs. The second son got appointment in Jail Department. But, admittedly, P.W. 2 and his mother gave an application on 07.06.2001 claiming appointment on compassionate ground. Admittedly, that application was returned periodically for rectifying certain defects. The case of the prosecution is that on 06.03.2002 at 04.30 p.m., the appellant herein has made a first demand of Rs. 250/- for recommending the application given for appointment on compassionate ground. At the time, P.W. 3 was accompanying P.W. 2. However, P.W. 2 and P.W. 3 have categorically stated that on 06.03.2002 at 04.30 p.m., when both were

entered into the room of the appellant, the appellant made enquiry about P.W. 3 and he directed P.W. 3 to go out of the place. Therefore, P.W. 3 is not witnessing the first demand dated 06.03.2002.

7. Likewise, in respect of the second demand, admittedly, on 11.03.2002 at 04.15 p.m., the trap proceedings have been conducted and at that time, no shadow witness has been accompanying P.W. 2.

8. It is the well settled dictum of the Apex Court that there are three types of evidence. One is wholly reliable, which is not required any corroboration. Another is partly reliable, which requires corroboration and third one is not fully reliable.

9. Applying the dictum of the Apex Court, now, this Court has to decide whether the evidence of P.W. 2 is reliable?.

10. On going through the chief and cross-examination of P.W. 2, this Court has come to the conclusion that his evidence is not fully reliable. It is partly reliable, which needs corroboration. P.W. 5, in his evidence, had stated that on his instructions only, the application has been returned by the appellant for compliance. In page No. 42 of the typed-set of papers, he has specifically mentioned that the application given by P.W. 2 has been returned twice only on his direction and he fairly conceded that the application has been scrutinized by the accused, but whereas it was returned on his instructions only. He has gone to the extent of saying that without his instructions, the accused will not return the application. In such circumstances, there is no evidence to show that wantonly the appellant herein has returned the application for want of illegal gratification. In page No. 44 of the typed-set of papers, P.W. 5 himself had stated that the appellant herein has not committed any mistake in respect of the application given by P.W. 2.

11. P.W. 6 is the Assistant. Since the father of P.W. 2 died while he was rendering his service at Sivagangai, his mother made an application for compassionate appointment and after rectifying some defects, P.W. 6 sent the same to the Superintendent. P.W. 7 is working as Superintendent in the Public Works Department from 02.02.2000. He had stated that on the death of Subramanian, his wife has given an application for providing appointment on compassionate ground to his son on 07.06.2001. He transmitted the same to higher officials. P.W. 8 is an Assistant working in the office of Chief Engineer Region. In his cross, he had stated that the application was returned thrice for rectifying certain defects. It is appropriate to consider the fact that till date, no appointment has been given. Therefore, the evidence has clearly proved that the appellant is not a competent person to return the application, if it is in order, because as per the evidence of P.W. 5, the higher official, the appellant is a person to scrutinize the application, who, in turn, returned the same only on his instructions. In such circumstances, I am of the view that the prosecution has failed to prove that the appellant is a competent person to provide appointment on compassionate ground.

12. Now, as already stated, it is pertinent to note that till today, P.W. 2 has not provided with the appointment on compassionate ground on the death of his father Subramanian on 24.12.2000. In his evidence, he had fairly conceded that his younger brother got the appointment in Jail Department prior to the death of his father and he is not residing with them. Admittedly, there are so many conditions followed while granting appointment on compassionate ground.

13. This Court has already held that the evidence of P.W. 2 is not fully reliable. It is partly reliable which requires corroboration. In respect of the first demand, P.W. 3 has clearly conceded that the accused has asked him to go out of the place and then, he left the place and he do not know as to whether the accused made a demand. As per the prosecution case, during trap proceedings, no one has been accompanying P.W. 2, the de facto complainant. Hence, the evidence of P.W. 2 is not corroborated by any other evidence.

14. At this juncture, it is appropriate to consider the decision relied upon by the learned Government Advocate (Criminal side) in C.M. Sharma Vs. State of A.P. Th. I.P., cited supra. It is appropriate to incorporate paragraph No. 12 of the said judgment, in which, it was specifically stated that shadow witness has accompanied the de facto complainant, which reads thus:

"12. Further, corroboration of evidence of a witness is required when his evidence is not wholly reliable. On appreciation of evidence, witnesses can be broadly categorised in three categories viz. unreliable, partly reliable and wholly reliable. In case of a partly reliable witness, the court seeks corroboration in material particulars from other evidence. However in a case in which a witness is wholly reliable, no corroboration is necessary. Seeking corroboration in all circumstance of the evidence of a witness forced to give bribe may lead to absurd result. Bribe is not taken in public view and, therefore, there may not be any person who could see the giving and taking of bribe. As in the present case, a shadow witness did accompany the contractor but the appellant did not allow him to be present in the chamber. Acceptance of this submission in abstract will encourage the bribe-taker to receive illegal gratification in privacy and then insist for corroboration in case of prosecution. Law cannot countenance such a situation. In our opinion it is not necessary that the evidence of a reliable witness is necessarily to be corroborated by another witness. Not only this corroboration of the evidence of a witness can be found from the other materials on record. Here in the present case there does not seem any reason to reject the evidence of the contractor PW 1, M. Venka Reddy. His evidence is further corroborated by the evidence of the shadow witness PW 2, G.T. Kumar. The shadow witness has stated in his evidence that when he entered into the chamber, the appellant was asked by the Inspector as to whether he had received any amount from the contractor, he denied and then removed the currency notes from his trouser pocket and threw the same. He had further stated that sodium carbonate test was conducted in which the solution turned pink when the appellant''s fingers and the right side trouser pocket were rinsed. From the aforesaid one can safely infer that the evidence of the contractor is

corroborated in material particulars by the shadow witness."

14.1. But, in the case on hand, P.W. 2 has not accompanied shadow witness. It is not the case of the prosecution that the appellant has directed the shadow witness to go out of the place during the trap proceedings. As per the evidence of P.W. 2 itself, he went independently without accompanying anybody and no reason has been assigned as to why shadow witness has not been accompanying P.W. 2. Therefore, the said judgment is not applicable to the facts of the present case.

15. Now, this Court has to consider the decision relied upon by the learned counsel for the appellant in Panalal Damodar Rathi Vs. State of Maharashtra, , wherein it was held that the version of the complainant that the appellant asked the complainant whether he had brought the money and that the complainant told him that he had and that the appellant asked him to pay the money to the second accused is not spoken to by P.W. 3. It is appropriate to incorporate Paragraph Nos. 9 and 10 of the said judgment, which read thus:

"9. It will be seen that the version of the complainant that the appellant asked the complainant whether he had brought the money and that the complainant told him that he had and that the appellant asked him to pay the money to the second accused is not spoken to by the panch witness PW 3. According to panch witness on the complainant asking the appellant whether his work will be achieved, the appellant assured him in the affirmative and the appellant told the complainant what was to be given to the second accused. It is significant that PW 3 does not mention about the appellant asking the complainant whether he had brought the money and on the complainant replying in the affirmative asking the complainant to pay the money to the second accused. Omission by PW 3 to refer to any mention of money by the appellant would show that there is no corroboration of testimony of the complainant regarding the demand for the money by the appellant. On this crucial aspect, therefore, it has to be found that the version of the complainant is not corroborated and, therefore, the evidence of the complainant on this aspect cannot be relied on.

10. Finding that the version of the complainant is lacking corroboration, the learned appearing for the State sought to support the conviction on the testimony of P.W. 3 the panch witness. It is unnecessary for us to set out in detail the attack made against the witness by Mr. Lalit, the learned Counsel appearing for the appellant except mentioning that the case of the panch witness that he heard the talk between the complainant and the appellant, is not mentioned either in the complaint or in the first information report. It cannot be denied that the account of conversation as spoken to by the panch witness, P.W. 3, is not in conformity with the version given by the complainant. According to P.W. 3, the complainant asked the appellant whether his work will be achieved and the appellant assured him in the affirmative and then the appellant asked the complainant what was to be given to Dalvi. There is no mention of any demand by the appellant for payment of the money or the direction by the appellant to the complainant to pay the

money to the second accused. In the circumstances, we feel it is unsafe to base a conviction on the sole testimony of the panch witness. We have found that the evidence of the complainant is not corroborated on these material particulars."

15.1. The said judgment is also not applicable to the case on hand, since no shadow witness has been accompanying P.W. 2, the de facto complainant.

16. Relying upon the judgment in State of Punjab Vs. Madan Mohan Lal Verma, , the learned counsel for the appellant would submit that before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. At this juncture, it is appropriate to incorporate paragraph No. 7 of the judgment, which reads thus:

"7. The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused when substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as a bribe. Mere receipt of the amount by the accused is not sufficient to fasten guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification. Hence, the burden rests on the accused to displace the statutory presumption raised under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the 1988 Act. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness. In a proper case, the court may look for independent corroboration before convicting the accused person."

17. He also relied upon the judgment in Rakesh Kapoor Vs. State of Himachal Pradesh, . In the said case, it was held that the demand was made over phone, but the call details have not been summoned and hence, in the absence of demand and acceptance, the accused is entitled to the benefit of doubt. It is appropriate to incorporate paragraph No. 10, which reads thus:

"10. Coming to the next argument that there was absolutely no demand for bribe and in the absence of such claim by the accused duly established by the prosecution, the conviction cannot be sustained. In support of the above claim, learned counsel for the appellant relied on the decision of this Court in Banarsi Dass Vs. State of Haryana, . It was an appeal under Article 136 of the Constitution of India filed against the judgment

and order of conviction dated 20.11.2002 passed by the learned single Judge of the High Court of Punjab and Haryana at Chandigarh. In that case, it was contended before this Court that there is no evidence to prove demand and voluntary acceptance of the alleged bribe so as to attract the offence under Section 5(2) of the Prevention of Corruption Act, 1947. The other contentions were also raised regarding merits with which we are not concerned. The accused was charged for the offence punishable under Section 5(2) of the 1947 Act as well as Section 161 (since repealed) of the IPC. In para 23, this Court held that "to constitute an offence under Section 161 IPC, it is necessary for the prosecution to prove that there was demand of money and the same was voluntarily accepted by the accused".

It was further held that "similarly in terms of Section 5(1)(d) of the Act, the demand and acceptance of the money for doing a favour in discharge of his official duties is sine qua non to the conviction of the accused". In para 25, this Court quoted the decision rendered in C.M. Girish Babu Vs. CBI, Cochin, High Court of Kerala, and held that mere recovery of money from the accused by itself is not enough in the absence of substantive evidence of demand and acceptance. In the same para, a reference was also made to Suraj Mal Vs. State (Delhi Administration), wherein this Court took the view that mere recovery of tainted money from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. This Court further held that 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..... "

18. Relying on the decision in Smt. Meena Hemke Vs. The State of Maharashtra,], the learned counsel would submit that since shadow witness turned hostile, his evidence is to be eschewed. Paragraph No. 10 of the said judgment reads thus:

"10. We have bestowed our careful thought on the submissions made on either side, in the light of the evidence on record. We are of the view that neither the quality of the materials produced nor their proper evaluation could, in this case, be held sufficient to convince or satisfy the judicial conscience of any adjudicating authority to record a verdict of guilt, on such slender evidence. Indisputably, the currency note in question was not recovered from the person or from the table drawer, but when the trap party arrived was found only on the pad on the table and seized from that place only. The question is as to whether the appellant accepted it and placed it on the table or that the currency note fell on the pad on the table in the process of the appellant refusing to receive the same by pushing away the hands of PW 1 and the currency, when attempted to be thrust into her hands. PW 2, one of the panch witnesses, who accompanied PW 1, as a shadow witness, when he tried to give the bribe, did not support the prosecution case. He has been treated hostile and his evidence eschewed from consideration by the courts below..... "

19. He also relied upon the judgment in R. Gunalan Vs. The State by Deputy Superintendent of Police, vigilance and Anti-Corruption Department, Erode Wing, Erode District, , wherein at paragraph No. 17, it was observed as follows:

17. The necessity for "independent witness" in cases involving trap cases is emphasised in various decisions as the evidence of bribe giver is in the nature of an accomplice and therefore, his story, prima facie, would be of suspect. It is held that before any court could act on his testimony, corroboration in material particulars is necessary. In C.M. Girish Babu Vs. CBI, Cochin, High Court of Kerala, , the Honourable Supreme Court, while dealing with the case under the Prevention of Corruption Act, 1988, by referring to its previous decision in Suraj Mal Vs. State (Delhi Administration), held that mere recovery of tainted money, divorced from the circumstances under which it is paid, is not sufficient to convict the accused, when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the Prosecution against the accused and the said view is reiterated in a recent decision of the Honourable Supreme Court reported in State of Kerala and Another Vs. C.P. Rao, ."

19.1. Considering the above citations, there is no independent witness involved in the case, because the first demand has not been proved and for the second demand and acceptance, no shadow witness has been accompanied him. As per the dictum of the Apex Court in C.M. Girish Babu"s case, the de facto complainant, the bribe giver is in the nature of an accomplice and, therefore, his story, prima facie, would be of suspect. It needs corroboration. But, admittedly, there is no corroboration for second demand and acceptance.

20. He also relied upon the judgment of the Apex Court in B. Jayaraj Vs. State of A.P., , wherein at paragraph No. 8, it was held thus:

"8. In the present case, the complainant did not support the prosecution case in so far as demand by the accused is concerned. The prosecution has not examined any other witness, present at the time when the money was allegedly handed over to the accused by the complainant, to prove that the same was pursuant to any demand made by the accused. When the complainant himself had disowned what he had stated in the initial complaint (Exbt. P-11) before LW-9, and there is no other evidence to prove that the accused had made any demand, the evidence of PW-1 and the contents of Exhibit P-11 cannot be relied upon to come to the conclusion that the above material furnishes proof of the demand allegedly made by the accused. We are, therefore, inclined to hold that the learned trial court as well as the High Court was not correct in holding the demand alleged to be made by the accused as proved. The only other material available is the recovery of the tainted currency notes from the possession of the accused. In fact such possession is admitted by the accused himself..... "

21. The evidence of P.W. 2 is not corroborated by any other evidence and the amount has been recovered from the drawer of the appellant and the phenolphthalein test has

been in positive and it is not under lock and key.

22. The followings are the main ingredients for proving the accused guilt under the provisions of the Prevention of Corruption Act:

(i) Initially there was a demand;

(ii) during trap proceedings, before tendering the amount, there must be a second demand;

(iii) acceptance;

(iv) recovery; and

(v) phenolphthalein test has to be positive.

23. The phenolphthalein test has been in positive and that has been proved by the evidence of P.W. 12. However, the second demand and acceptance have not been proved by the prosecution beyond all reasonable doubt. In such circumstances, the respondent has not sought for any rescue of Section 20 of the Prevention of Corruption Act, 1988, since the basic ingredients have not been proved by the prosecution, as per the dictum laid down by the Apex Court.

24. In view of the foregoing reasons, I am of the view that the prosecution has not proved the guilt of the accused beyond all reasonable doubt and hence, the benefit of doubt shall be given in favour of the appellant and the appeal is liable to be allowed. Accordingly, the appeal is allowed. The conviction and sentence passed by the learned Special Judge (V&AC)-cum-Chief Judicial Magistrate, Sivagangai, dated 16.04.2009 made in C.C. No. 1 of 2003, are set aside. The appellant is acquitted from the charges levelled against him. The fine amount, if any, paid by the appellant shall be refunded to him. The bail bond, if any, executed by the appellant shall stand cancelled.