(1994) 07 BOM CK 0132

Bombay High Court (Nagpur Bench)

Case No: Criminal App. No. 287 of 1991

Vishwanath Londhe		APPELLANT
	Vs	
The State of Maharashtra		RESPONDENT

Date of Decision: July 26, 1994

Acts Referred:

- Penal Code, 1860 (IPC) - Section 161

Citation: (1996) 1 BomCR 641 : (1995) CriLJ 2571 : (1996) 1 MhLj 114

Hon'ble Judges: V.S. Sirpurkar, J

Bench: Single Bench

Advocate: B.V. Gaikwad, for the Appellant; Kishor Pande, Additional Public Prosecutor, for the Respondent

Judgement

1. The accused/appellant challenges his conviction in this appeal for the offence punishable under S. 13(2) of the Prevention of Corruption Act, 1988 and the consequent sentence passed by the Special Judge, Yavatmal.

2. First the basic facts :-

The accused/appellant at the relevant time was working as a Clerk and was posted as the Court Shirestedar of the Court of Judicial Magistrate First Class. He was posted at Pusad. Complainant Ramesh who was a regular court-bird was facing number of prosecutions against him. Not only he but his brother Suresh Arya also faced several prosecutions. It is the prosecution case that on one occasion when complainant Ramesh failed to attend the Court, a non-bailable warrant was issued against him. It was on 1-8-1986 that the complainant Ramesh came to know that the arrest warrants were issued against his brother Suresh Arya also who was a co-accused in one case and, therefore the accused had asked him to attend the Court on 4-8-1986. It is the prosecution case that on that day complainant attended the Court and since his brother Suresh could not attend the Court, the complainant made a query to the accused as to whether the arrest warrant issued against him

(the brother) could be cancelled whereupon the accused informed him that he had received the unserved warrant of Suresh and in case it was to be cancelled, the complainant would have to pay a bribe of Rs. 100/- to him. It is the prosecution case that on that day itself the complainant paid him the bribe of Rs. 20/- and the remaining Rs. 80/- were to be paid on 8-8-1986 when the case was to be fixed. In short, the prosecution claims that it was on 4-8-1986 that the first demand of bribe was made and the further meeting was arranged on 8-8-1986 as the accused fixed the case on 8-8-1986 because the accused was not sure that the complainant would turn up and pay the rest of the money. It is the prosecution case that on 7-8-1986 the complainant approached the Anti-Corruption Bureau at Yavatmal and expressed desire to lodge a complaint. P.W. 6 Pathan enquired into the complaint as to whether he had brought the amount of Rs. 80/- and since the said amount was not with the complainant, Pathan is alleged to have asked the complainant to come with the amount on the next day, i.e. on 8-8-1986 around 8 a.m. Accordingly, the complainant attended the Anti-Corruption Bureau and lodged his complaint Exh. 16. Thereafter two witnesses were summoned by Pathan from the office of the Sub-Divisional Officer they being Maroti Patil P.W. 2 and Chandrahas Gujar whom the prosecution has not chosen to examine. The complainant is supposed to have apprised the panchas of the illegal demand of bribe by the accused and then he produced the amount of Rs. 80/-. There were in all four currency notes, one of Rs. 50/- denomination and three of Rs. 10/- denomination. Pathan demonstrated the use of phenolphthalein powder and the liquid of Soda bicarb. After the demonstration was given and understood by panchas, the notes were treated with the phenolphthalein powder. It is the case of the prosecution that the panch P.W. 2 Maroti was to accompany the complainant and it was only in case that the accused had demanded the said money, that the money was to be given to him. The money was kept in the right side pocket of the pyjama worn by the complainant and the complainant was instructed strictly not to touch the money till it was asked for by the accused. On the money having been paid, the complainant was to give a signal by inserting his finger in his ear. First panchanama was executed there and the party then proceeded to Pusad.

3. It is the prosecution case that the party reached Pusad at about 2 O''clock in the afternoon and the two-some, namely, the complainant and the panch Maroti Patil then went to the Court only to find that the accused was not on his seat. Presuming that he had gone to the hotel, the two-some went to the nearby restaurant where they found the accused. According to the prosecution, the complainant asked the accused as to whether he had cancelled the warrants of his brother on which the accused answered him in the affirmative and asked about the money which was decided to be paid. The prosecution urges that the complainant thereafter paid him Rs. 80/- which were kept with him and which were treated with the phenolphthalein powder. On the agreed signal having been given, the officers who were lying in wait pounced upon the accused and held him. The usual demonstrations followed. It is

the case of the prosecution that the money was found in the right side pocket of the pant of the accused and his right hand was stained with phenolphthalein powder. The usual investigation thereafter followed. The second panchnama was executed. The records were seized and the sanction was obtained from the District and Sessions Judge, Yavatmal who was the appointing authority of the appellant/accused. On this basis, the charge-sheet came to be filed before the Special Judge.

4. The Special Judge, Yavatmal seems to have framed the charges not under the old Act but under the new Act of 1988. As a matter of fact, the charges under S. 13 of the Prevention of Corruption Act, 1988 could not have been framed particularly in view of the fact that the new Act was not on the statute book on the day when the offence took place, i.e. in the year 1986. Be that as it may, the Additional Public Prosecutor also did not take any exception to this course being adopted nor did the accused feel aggrieved by the framing of this charge and indeed the accused has not in any manner shown that he was prejudiced or that he was claiming a prejudice even before this Court. Shri B. V. Gaikwad, the learned counsel for the accused, did not claim the prejudice on account of the charges not having been framed under the old Act and contended that the charges were properly understood and it could be deemed as if the charge was under S. 5(1)(d) read with S. 5(2) of the Prevention of Corruption Act and S. 161 of the IPC.

5. The accused raised a defence that as a matter of fact, it was because of him that the complainant was put behind the bars and the complainant felt estranged on account of this act on the part of the accused and, therefore, the complainant had deliberately laid this trap and got the accused falsely implicated. His further case is that he never demanded the money, muchless the bribe nor did he accept the money on 8-8-1986 as was the claim of the prosecution. He claimed that the money was pushed into the pocket of the accused and since he held the hand of the complainant while he was doing so, his hands might have been stained. At least that appears to be the explanation of the staining of the hand of the accused. On this material, the trial Court accepted to evidence of the complainant and the two other witnesses and proceeded to convict the accused.

6. Shri B. V. Gaikwad, the learned counsel for the accused/appellant, has fairly submitted that he would not claim any prejudice on the ground of the charge having been framed of the offences as defined under the new Act, i.e. 1988 Act. His first contention is that even if the charges are framed under the provisions of the new Act, yet in fact the learned Special Judge has erred in firstly convicting the accused as the incident itself has not been proved at all. His further contention is that the prosecution had not discharged its burden that he had demanded and accepted the bribe from the complainant in his capacity as a public servant to do or forbear to do something in his official capacity. He, therefore, claims that on the facts themselves if the prosecution has failed to prove its case, then it would be

immaterial as to whether the charge was proved under the provisions of the old Act or the new Act.

7. Shri Kishor Pande, the learned Additional Public Prosecutor appearing on behalf of respondent/State, strenuously, argued that the prosecution has proved its case properly and that in fact the Special Judge was right in convicting the accused of the concerned offences.

8. Shri Gaikwad initially attacked the sanction as the sanctioning officer Shri S. N. Mardikar, the then District & Sessions Judge, Yavatmal was not examined. It will be seen that the sanction order has been admitted by the defence. The Sanction order has come on the record thus through a concession. The argument of the learned counsel is that even if there is a well-written sanction order, if the sanctioning authority is not examined then the sanction is rendered bad. In support of his contention Shri Gaikwad has relied upon a reported decision Jagannath Maruti Tekade v. State of Maharashtra 1991 MLJ 976 and more particularly on the following observations :-

"..... Court will have to take judicial notice of the fact that in the Government set-up, the orders are often times drafted out by a department and put up to an authority for signature and, therefore, it would be extremely dangerous to conclude even if the sanction order is correctly or perfectly drafted, that the authority who signed it must have applied his mind in the absence of his deposing before the Court that he had in fact done so."

Shri Gaikwad, therefore, contends that non-examination of Shri Mardikar, the Sanctioning Authority, was fatal to the sanction. As a matter of fact, this authority which is by a Single Bench (Saldanha, J.) of this very Court is ordinarily binding on me. However, it is obvious from the judgment that the decision in Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh, was not brought to the notice of the Court. If the judgment in Jagannath Maruti Tekade''s case is considered, it will have to be held that in all the sanction cases the examination of the sanctioning authority is sine qua non before the sanction is acted upon. The absence of such evidence would be fatal because there would be no other way in which the application of mind to the sanction could be proved before the Court of law. In the case of Mohd. Iqbal Ahmed, this is what the Supreme Court has held :-

"It is incumbent on the prosecution to prove that a valid sanction has been granted by the Sanctioning Authority after it was satisfied that a case for sanction has been made out constituting the offence. This should be done in two ways; either (1) by producing the original sanction which itself contains the facts constituting the offence and the grounds of satisfaction and (2) by adducing evidence aliunde to show the facts placed before the Sanctioning Authority and the satisfaction arrived at by it. Any case instituted without a proper sanction must fail because this being a manifest defect in the prosecution, the entire proceedings are rendered void ab

initio ....."

In view of the fact that the sanction order in the present case does show a clear-cut application of mind, it will be open for this Court to accept the said sanction order. One look at the sanction order will show that the facts constituting the offence have been properly written out there and the authority who was none else but a District & Sessions Judge himself has chosen to grant the sanction. That by itself is sufficient to hold that the sanction was given with an adequate application of mind. If the law laid down in Jagannath Tekade''s case is to be followed, then it will have to be held that the moment sanctioning authority is not examined, the sanction becomes defective. Now such is really not the case. In the afore-mentioned case of Mohd. Iqbal, the Supreme Court has clearly held that the sanction order itself can provide the clue to hold as to whether the sanction was given after the application of mind or not. In Jagannath Maruti Tekade''s case, the case of Mohd. Iqbal Ahmed has not been referred to at all or at least it does not seem that this was so cited or brought to the notice of the Court. In view of the clear pronouncement of law by the Apex Court that the sanction order itself can be read and if the sanction order is self-contained and its language can show that there was an application of mind by the Sanctioning Authority, it is a good sanction. The contrary view expressed in Jagannath Maruti Tekade v. State of Maharashtra 1991 MLJ 976 will have to be ignored as Jagannath Tekade''s case is decided per incuriam of the afore-mentioned judgment. It will have, therefore, to be held that the sanction in this case was a valid sanction.

9. Considering the rival submissions on merits it will have to be seen that the whole case rests in a very narrow compass. It is indeed an admitted position that the complainant herein is a court-bird. It has come in the evidence that the complainant was facing half a dozen prosecutions, though the details of the prosecutions have not been brought on record. The complainant who is thus a regular court-bird was estranged because of the action on the part of the accused of pointing him to the constable whereby the constable arrested him. The cross-examination of this witness and more particularly at paragraph 10 is telling. He admits that he was terribly annoyed since he had to remain in custody and other litigants were harassed. The story put forth by this witness is that in fact there were warrants pending against him and the period of warrant was upto 4-8-1986 and, therefore, he approached the Court on 4-8-86 to apply for cancellation. He claimed that on 30-7-1986 he attended the Court and the warrant was not cancelled by the Court and he remained in custody for 2 days and ultimately on 1-8-1986 he was fined for Rs. 100/- in a different case and it is on that date for the first time that he came to know that warrants were issued against his brother as well. We are not really concerned with the warrants against the complainant since that is nor the subject on which the accused has allegedly demanded the bribe. It is his case that the accused asked him to attend the Court on 4-8-86 and, therefore, on 4-8-86 he alone and not his brother Suresh attended the court. It seems that he has asked the

accused as to whether the warrant could be cancelled against Suresh. Now it is a matter of common knowledge that it was not in the hands of the accused at all to cancel the warrant. That was the job of the court. It is rather difficult to swallow the case that the complainant who was a journalist by profession and facing half a dozen prosecutions and attending the court often, would not know that the warrants are to be cancelled with the order of the Magistrate and that a Court Shirestedar has no authority to cancel the warrant. The weakness in the prosecution case starts right from the inception. It is further pleaded by him that the accused, therefore, asked him for the bribe of Rs. 100/- and upon that he paid Rs. 20/- out of this Rs. 100/- and agreed to pay the remaining Rs. 80/- on the date to be fixed by the accused and, therefore, the accused fixed the date on 8-8-1986. This position has also been demolished in the cross-examination inasmuch as it has been shown that the date which was fixed on 8-8-1986 was not fixed on 4-8-1986 as was the claim of the accused but was fixed later on, on 5-8-1986. Shri Gaikwad, therefore, rightly contended that the initial story of fixing the date was itself suffering from suspicion. This is an extremely important factor as it is the prosecution case that it was decided on 4-8-1986 that the graft money would be paid on 8-8-1986 and for that purpose, the date came to be fixed. If the date was not fixed really on that date, then the fixation of the time, the date and the place for accepting the graft money comes into serious jeopardy. It is the further case of the complainant that thereafter he went to the office of the Anti-Corruption Bureau at Yavatmal. One fails to understand that if the bribe was demanded on 4-8-1986 why the complainant did not lodge the report till 7-8-1986 or 8-8-1986 as the case may be. His assertion that he went to the Anti-Corruption Bureau office on 7-8-1986 also appears to be doubtful as there is no support to the theory that he had gone to the Anti-Corruption Bureau office on 7th. In short, the complainant failed to report the matter and to lodge a complaint of corruption for 4 days. Considering that he is a journalist and was probably fighting for injustice, this delay appears to be rather strange.

10. So far as the question of the actual payment on 8-8-1986 is concerned, his case appears to be that he along with panch went to the Court and found that the accused was not present in his seat and, therefore, he went to the nearby restaurant. In the restaurant he found the accused and asked him as to whether the warrants were cancelled by the accused and that the accused had stated in affirmative. On that the accused asked him as to whether he had brought the amount and he told him that he had brought the amount and on the demand of the accused he paid the amount there on the table. From the tenor of his evidence in examination-in-chief it is certain that the complainant wants us to believe that the money was paid when everybody was sitting. Now it is to be remembered that the accused was not sitting alone. Admittedly the accused was sitting with two other persons, namely, one Ambalkar and one Diwakar Mohdarkar, who has been examined as P.W. 3 in this case. Surprisingly enough, Mohdarkar is completely silent in this behalf. Shri K. G. Pande, the learned Additional Public Prosecutor, reiterated

that as a matter of fact, P.W. 3 Mohdarkar was not a witness on the trap but was examined only to prove the duties of the accused, that it was for the accused to prepare the warrants, to send them, also to give the dates and to write the order-sheets, etc. Certainly this could not have been the sole purpose for which P.W. 3 was examined. When it had come in the evidence that P.W. 3 was the person present, then the silence on the part of P.W. 3 as regards the actual incident is rather sinister. The said silence does not definitely further the case of the prosecution but acts as a counter to that case. Apart from that, Mohdarkar has also some other different versions to state but that will be considered when I consider the evidence of Mohdarkar.

11. P.W. 1 Ramesh further insisted that it was thereafter there at the tea-table that he gave the signal and the signal was watched by the investigating officer. Surprisingly enough, the investigating officer has in his evidence also stated that he was in a position to see the movements of the complainant and the accused. The investigating officer who must have been watching the accused and the complainant with all the possible concentration has, however, strangely not stated anything about his having seen the money passing from the complainant to the accused. If the money had really passed at the table, the investigating officer would not have missed this vital fact. The silence of the investigating officer on this aspect is also much more telling. Therefore, according to the complainant, the money passed from him after the conversation at the tea-table and it was thereafter that the accused rose up, took out his handkerchief and went upto the counter being followed by rest of the party. This was the claim made by the complainant in his examination-in-chief. In the cross-examination, however, the complainant has given an altogether different version. He has accepted the presence of Mohdarkar P.W. 3. He has also accepted this position that he was behind the accused. A suggestion has been given to him that he by force planted the amount in the pocket of the accused while the police were entering and the accused shouted as to why the money was being put into his pocket. There is surprisingly no cross-examination of the complainant on the aspect of the conversation which allegedly took place at the tea-table. There is really speaking nothing which has been put to him in the cross-examination. The defence instead has chosen a different strategy, i.e. cross-examining the panch in this behalf.

12. The panch P.W. 2 Maroti Patil has in his examination-in-chief repeated the story which the complainant gave and it is also the tenor of the evidence of the panch that the give and take of money took place on the tea-table only. The panch has also referred to the conversation between the accused and the complainant and has almost given the identical version regarding the conversation. The panch stated that Ramesh gave the currency notes to the accused and he received them in right hand and the accused put the currency notes in the right pocket of the pant and Ramesh gave the signal and it was immediately that Pathan and party came there. Now the panch has also not stated about the accused leaving the place or anybody following

the accused upto the counter. He has merely stated that everything has obviously taken place at the tea-table. In cross-examination, however, the panch has taken a complete somersault. He has in the cross-examination admitted that where the accused and others were taking tea, there were other people and when the two-some, i.e. the panch and the complainant approached the accused, the panch in fact sat not at the place as indicated by the P.W. 1 but at some different place. Now according to the P.W. 1 the panch was sitting with him only but according to the panch, he was sitting not even on the same table where the accused and the complainant were sitting. Instead the panch stated that he sat at the tea-table which was in front of the accused. He accepted in his cross-examination that due to the crowd, the conversation was not properly heard. Now this was the most unkindest cut of all in so far as the prosecution case is concerned. Here was a panch who had asserted in the examination-in-chief regarding the whole conversation and had given a graphic description which description completely tallied with the description given by the complainant. However, in the cross-examination the panch ate his own words and had to admit that because of the din there he was not able to properly hear the conversation. This was an ambiguity left by the cross-examining Counsel and the said ambiguity could have been cleared in the re-examination. However, the learned Additional Public Prosecutor sat over the matter and did not get this ambiguity cleared, thereby it will have to be presumed that the panch was referring to the conversation which he was supposed to hear and for hearing which he was specifically deputed. Not only this but the panch thereafter has changed the whole sequence by stating that after taking tea, the accused started leaving and the complainant Ramesh P.W. 1 followed the accused and tried to keep the amount in his right hand. Now there is some ambiguity here also. One fails to understand that if the amount was already passed when the concerned persons at the tea-table and the whole transaction was over, where was the need for the complainant to go after the accused and then try to keep the amount in his right hand. I have examined myself the evidence as recorded in Marathi. The word "right" is absent there. The learned trial Judge who has recorded the evidence was not alive to the depositions which were recorded in Marathi. A specific care in that behalf should have been taken. Be that as it may, here is a panch who has accepted this suggestion that after the tea was over, the accused left the place, he was followed by complainant who was behind the accused and while he was behind the accused he tried to put the money into the hand of the accused. This admission assumes a great importance in the wake of the suggestion given to the complainant himself that he was behind the accused when the accused was near the counter and it was at that place that the complainant had inserted the money into the right hand side pocket of the pant of the accused. Such admission, therefore, completely demolishes the theory of conversation as also completely demolishes the theory of the accused having accepted the money at the tea-table in pursuance of the conversation. The matters do not stop here.

13. Thereafter the prosecution has taken an insane risk of examining the third witness, namely, P.W. 3 Diwakar Mohdarkar. this person is nobody else but a co-worker of the accused. Strangely enough he is coming as a prosecution witness and truly enough beyond saying that on 8-8-1986 between 2 to 2-30 p.m. he had gone to the hotel of Shamlal to take tea and that the officers of the Anti-Corruption Bureau caught the accused near the counter in the said hotel, he has said nothing. Whether he was supposed to depose anything is a different question but when the prosecution has presented a witness who admittedly was present at the spot, who had the best possible opportunity to watch the whole incident, to hear the witnesses and to note everything, then it would have been very unreal on the part of the defence not to have cross-examined him on the main event. His silence regarding the incident and apathy on his part to speak about the incident can really be understood. Afterall he was not a witness in the scheme of the investigation but he happened to be there by chance but once the prosecution took a chance of examining him, then one would have expected something from this witness particularly because he was present and in the know of everything and he was admittedly present and was sitting besides the accused. Now the silence on the part of this witness goes a long way against the prosecution. Apart from this, there is no effort on the part of the Additional Public Prosecutor to elicit anything in the examination-in-chief or to cross-examine him. The witness has very specifically stated :

"..... After Ambalkar came he was called for tea and he sat beside the accused on the bench. Ramesh Ariya was sitting on another bench. There was no talk between the accused and P.W. Ramesh. After tea was over, Ambalkar started leaving. The accused followed him and I followed, the accused. Ramesh also followed the accused. Accused was then rubbing his hand with handkerchief. The accused informed the man sitting on the counter to enter charges of tea in his account. At that moment P.W. Ramesh was behind the accused. At the same time the Anti-corruption party reached there. When Anti-corruption party came there, the accused had caught hold of the hand of P.W. Ramesh."

It is not necessary to state that this was the last nail in the coffin of the prosecution. As a matter of fact, the prosecution had given a god-sent opportunity to accused by examining such a witness as a prosecution witness. As if that was not sufficient, the prosecution after this kind of cross-examination also failed to cross-examine the witness further. Afterall if this witness had seen something and if the witness had stated everything that was nothing but the defence of the accused, nothing prevented the Additional Public Prosecutor from cross-examining this witness. Nothing was done. The witness has specifically proved, therefore, as in case of the panch, that nothing happened on the tea-table, the money did not pass on the tea-table and there was no conversation at the tea-table. These two witnesses have, therefore, taken out the whole wind out of the shield of the prosecution and have completely white-washed the evidence given by the complainant. The whole

incident, therefore, has been shrouded in mystery.

14. Shri B. V. Gaikwad, therefore, contended that really speaking on the basis of the evidence of these 3 witnesses alone, the whole prosecution had to be thrown out. He pointed out that the evidence of the complainant could not have been believed firstly because he was himself a court-bird and was facing number of prosecutions and as such, the fabric of his evidence was extremely coarse. He further pointed out that the complainant was inimically disposed and specifically accepted in paragraph 10 of his cross-examination that he was extremely annoyed with the accused. In the wake of this story, therefore, there was nothing unusual if the complainant who was a journalist also had decided to falsely implicate the accused. There is also a history. The complainant was candid enough to admit that at his behest one more person was trapped. Therefore, the learned counsel contends that the evidence of the complainant himself alone would be of extremely suspicious nature and it would not be safe to rely on that evidence alone.

15. Shri K. G. Pande, the learned Additional Public Prosecutor, submits that as a matter of fact, it was clear that the accused had accepted money from the complainant and that there was absolutely no cross-examination of the complainant in respect of either the demand of the money or acceptance thereof. It was also found that the right hand of the accused was stained and so was the right hand side pocket of his pant. He, therefore, claims that if the conversation is read with the further act of acceptance of the money, then it was clear that the money was accepted and the presumption under S. 4 of the old Act or as the case may be under S. 20 of the new Act was liable to be raised against the accused. Shri Gaikwad counters this argument by submitting that there has to be a volition on the part of the accused in accepting the money before such presumption could be raised. Now let us see whether the presumption can be raised on the basis of the evidence of the complainant alone. It is true that the complainant''s evidence does not help us in this manner. Under such circumstances, if there was no other evidence in the shape of evidence of panch and/or P.W. 3, probably the evidence of complainant could have been acted upon. However, here in this case the prosecution has come out with conflicting evidence to that of the panch''s evidence. While complainant would make us believe that everything took place on the tea-table and nothing at all took place after the tea was over, here is a specific admission by the panch that he was not able to near any conversation. Even if we ignore this admission saying that he did not actually hear the conversation between the complainant and the accused, the further admission on his part is more damaging and conflicting with the testimony of the complainant. He has gone to the extent of saying that after the tea was taken the accused rose up, left his seat, started proceeding towards the counter when he was followed by the accused who tried to keep the money in his hand. This completely contrary position taken during the cross-examination would completely white-wash the evidence of the complainant and would run definitely counter to the evidence of the complainant. The prosecution cannot present the conflicting

witnesses. The Court cannot accept one witness and reject another where the conflicting witnesses are presented by the prosecution. Then the whole story has to be disbelieved. I am afraid, the same course will have to be taken in this case. As a matter of fact, because of this conflicting evidence which was further reiterated by the evidence of P.W. 3 it is difficult in this case to raise a presumption. The trial Court has also not raised the presumption under S. 4 or under S. 20 as the case may be. Here was a case where though the complainant claimed that the money as paid at the tea-table, there are two versions which suggest that the money was not paid there and there was no conversation regarding the give and take of money. Now taking the evidence of P.W. 3 as the standard as he was so-called independent witness, if the conversation did not take place at the tea-table, then the question is where did the conversation take place ? In that case, we do not have any evidence that the conversation took place after the tea was taken or that it took place near the counter. Under such circumstances, the whole theory of demand and offer of the money becomes suspicious. If that becomes suspicious, then merely finding of the money in the pockets of the accused cannot have the effect of raising the presumption. It has indeed come in the evidence of P.W. 2 panch and P.W. 3 Diwakar Mohdarkar that there was an effort on the part of the complainant to put the money either into the pocket of the complainant or in his hands. It has also come in the evidence that the complainant''s hands did come in contact with the hands of the accused if that be so, then the staining of the hands of the accused is easily explained. In not explaining the ambiguities created in the cross-examination of the panch and in not clearing the position taken by the P.W. 3, the prosecution has taken very costly chances and must suffer for the same.

16. There are other circumstances on record to show that the prosecution case is not really as sparking as it is pointed out to be. I have already pointed out the apathy on the part of the investigating officer to watch. If the investigating officer like PW. 6 who was with his open eyes seeing all the movements of PW. 1, PW. 2 and the accused and if he had the best possible opportunity to watch, he would have been able to see the passing of the money. He does not speak even one word about passing of the money, whether that money passed at the tea-table or on the counter, whether it was outside the hotel or whether it was inside the hotel. In short, the investigating officer did not want to take any chances as probably he would have given still third or fourth version as the case may be.

17. The further circumstance that would further the case of the defence is the fact that in fact the date, i.e. 8-8-1986 was not fixed on 4-8-1986 at all. The evidence shows that this date was fixed on 5-8-1986. If there was no time for that meeting fixed and if the version in that behalf of the prosecution is conflicting, then it would be difficult to hold that in fact there was a demand on the part of the accused on 4-8-1986 and that he reiterated that demand on 8-8-1986.

18. In view of the aforementioned discussion, it will have to be held that the prosecution has not been able to prove beyond the reasonable doubt the case contended before it and the benefit of such doubt, therefore, will have to be given to the accused. In that view of the matter, the appeal will have to be allowed. Hence, the following order :-

The Criminal Appeal is allowed. The impugned judgment and order awarding conviction and sentence are set aside. The accused/appellant is acquitted of all the offences charged with and his bail bonds are ordered to be cancelled. Fine if paid be refunded to the accused/appellant.

19. Appeal allowed.