

- ABC 2017 (I) 151 GUJ**
ACQUITTAL & BAIL CASES
HIGH COURT OF GUJARAT
(R.P. Dholaria, J.)
Criminal Appeal No. 1297 of 2004
Decided on 23 January, 2017
- a
- b **SARDARBHAI RAMJIBHAI PATEL** - Appellant(s).
Versus
STATE OF GUJARAT - Respondent(s).
- c **Law Covered:-** (A) *Prevention of Corruption Act, 1988 – Sections 7 & 13(1)(d)(i) & (ii) – Standard of proof – Possession & Recovery – Held, mere possession and recovery of currency notes from an accused without proof of demand would not establish an offence. (Para 14)*
- d (B) *Prevention of Corruption Act, 1988 – Sections 7 & 13(1)(d)(i) & (ii) – Illegal gratification – Demand – Proof of – absence of – Held, use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. (Para 14)*
- e (C) *Prevention of Corruption Act, 1988 – Sections 7 & 13 – Standard of proof – Held, proof of demand is an indispensable essentiality and of permeating mandate. (Para 14)*
- f (D) *Prevention of Corruption Act, 1988 – Section 20 – Presumption under – Applicability & non-applicability of – Held, the presumption is extendable only to an offence under Section 7 and not to those under Section 13(1)(d)(i) & (ii). (Para 14)*
- g (E) *Prevention of Corruption Act, 1988 – Section 20 – Statutory presumption under – Held, in absence of proof of demand, such legal presumption would also not arise. (Para 14)*
- h (F) *Code of Criminal Procedure, 1973 – Section 374 – Appeal against conviction – Duty of appellate Court – Held, the Court is required to scrutinize the evidence to ascertain whether there is proper, reliable and cogent evidence beyond reasonable doubt to confirm the judgment and sentence awarded by learned trial Court – If there is no such evidence on record – the conviction cannot be sustained as the onus lies on the prosecution to prove its case beyond reasonable doubt. (Para 15)*

(G) *Prevention of Corruption Act, 1988 – Section 13(1)(d)(i) & (ii) – Conviction under – Prosecution case neither supported by complainant nor independent witnesses – their oral evidence is also fully getting support from the documentary evidences – Official panch witness – evidence of – nothing to prove demand – on his own will and volition, the complainant, in absence of the appellant accused, placed the money on the table – Evidence of witnesses – the amount in question came to be tendered by the complainant to the appellant towards the price of grass which he purchased in the public auction – Held, the vital ingredients as regards to pre-demand, demand at the time of trap, acceptance and recovery not proved – conviction not sustainable – Acquittal. (Para 16 & 17)*

(H) *Prevention of Corruption Act, 1988 – Section 13(1)(d)(i) & (ii) – Indian Evidence Act, 1872 – Section 3 – Relevant fact – Direct & preliminary evidence – as regards to demand & acceptance which used to come from the mouth of the complainant is missing – fatal to prosecution. (Para 16)*

Facts:- *It was alleged that appellant demanded bribe of `5000/- from the complainant for allotments of the plots for which the accused paid Rs.1900/- to the appellant and it was stated by the appellant that after receiving remaining Rs.3100/-, the further action for allotment of plot would be undertaken. As the complainant did not want to pay the amount of bribe, he approached the ACB office and lodged the complaint. Therefore, the trap was arranged and the appellant accused caught red handed. Learned trial Court convicted the accused therefore the present appeal.*

On overall appreciation of the evidence on record, it was observed that the complainant himself did not support the case of the prosecution and the evidence on record clearly indicates that the said amount came to be tendered by the complainant to the appellant towards the price of grass which he purchased in the public auction. It was held that prosecution miserably failed to prove the vital ingredients as regards to pre-demand, demand at the time of trap, acceptance and recovery. It was also held that direct and preliminary evidence as regards to demand and acceptance used to come from the mouth of the complainant were missing. In absence of specific and clinching evidence conviction recorded by learned trial Judge was set aside.

Law of relief:- *Absence of direct & preliminary evidence regarding demand & acceptance, which usually comes from the mouth of the complainant, is fatal to prosecution.*

Held:- In a recent enunciation by the Honourable Apex Court to discern the imperative pre-requisites of Sections 7 and 13 of the Act, it has been underlined in *B.Jayraj (AIR 2014 SC (Supp) 1837) = ABC 2014(II) 309(SC)*(supra) in unequivocal terms, that mere possession and recovery of currency notes from an accused without proof of demand would not establish an offence under Sections 7 as well as 13(1)(d)(i) and (ii) of the Act. It has been propounded that in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. The proof of demand, thus, has been held to be an indispensable essentiality and of permeating mandate for an offence under Sections 7 and 13 of the Act. Qua Section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under Section 7 and not to those under Section 13(1)(d)(i) and (ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under Section 20 of the Act would also not arise. (Para 14)

In the present case, this Court is required to scrutinize the evidence to ascertain whether there is proper, reliable and cogent evidence beyond reasonable doubt to confirm the judgment and sentence awarded by learned trial Court. If there is no such evidence on record, in that event, the conviction cannot be sustained as the onus lies on the prosecution to prove its case beyond reasonable doubt. (Para 15)

In the backdrop of the aforesaid factual as well as legal position and on overall analysis of the evidence of the complainant on record, it appears that neither the complainant nor independent witnesses i.e. PW 3 and PW 4 are supporting the case of the prosecution. On the contrary, they have put up different theory. So far as the amount tendered by the complainant to the appellant accused at the time of trap is concerned, it appears that the said amount was tendered towards the price of grass which came to be auctioned in favour of the complainant in the auction took place on 6.7.1997. It is also pertinent to note that similar evidence is

forthcoming from the mouth of the aforesaid three witnesses including the complainant and their oral evidence is also fully getting support from the documentary evidences at Exhs.42 and 91 to 95. Not only that, but on evaluation of the evidence of PW 2 who was requisitioned as official panch on its face value, then also nothing is coming out from his evidence that the appellant accused has ever demanded any amount from the complainant. On the contrary, on his own will and volition, the complainant, in absence of the appellant accused, placed the money on the table in the panchayat office and that PW 3 in order to save the said money from flying away, put his hand over it. In this view of the matter, even the evidence of PW 2 who was official panch accompanying the complainant at the time of trap is considered, the same is not leading the prosecution case any further to link the accused with the crime in question. (Para 16)

In view of the aforesaid nature of evidence, the prosecution has miserably failed to prove the vital ingredients as regards to pre-demand, demand at the time of trap, acceptance and recovery. Even otherwise, the nature of evidence of PW 2 is in the nature of corroborative only and that direct and preliminary evidence as regards to demand and acceptance used to come from the mouth of the complainant which is missing and even the evidence of PW 2 is also not sufficient to link the accused with the crime in question. Therefore, as stated above, in absence of specific and clinching evidence to prove all such acts by the accused, conviction recorded by learned trial Judge is not sustainable. (Para 17)

Counsel:- For Appellant(s): Mr. K.J. Panchal, Advocate For Mr. J. M. Panchal, Advocate

For Respondent(s): Mr Chintan Dave, APP.

Cases Referred:-

1. A.Subair Vs State of Kerala, (2009) 6 SCC 587 : (2009 AIR SCW 3994). (Para 12)
2. State of Kerala and another Vs C.P.Rao (2011) 6 SCC 450 : (AIR 2012 SC (Supp) 393), (Para 12)
3. B. Jayraj (AIR 2014 SC (Supp) 1837) = ABC 2014(II) 309(SC) (Para 12)

JUDGMENT

R.P. DHOLARIA, J.: - 1. The appellant has preferred the present appeal under section 374 of the Code of Criminal Procedure, 1973 against the judgment and order of conviction dated 28.7.2004

February 2017

rendered by learned Additional Sessions Judge, 6th Fast Track Court, Banaskantha at Palanpur in Special Case No.72 of 1998.

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2. The short facts giving rise to the present appeal are that the complainant made the application to the T.D.O. On 29.11.1995 for allotment of four plots by way of sale and the said application was forwarded to the Sarpanch of the Gram Panchayat, Vansol for doing needful in the matter. It is alleged that the complainant requested the appellant time and again and ultimately on 1.5.1997, the appellant demanded Rs.5000/- from the complainant for which the complainant paid Rs.1900/- to the appellant and it was stated by the appellant that after receiving remaining Rs.3100/-, the further action for allotment of plot would be undertaken. As the complainant did not want to pay the amount of bribe, he approached the ACB office and lodged the complaint. Therefore, the trap was arranged and the appellant accused caught red handed.

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3. In pursuance of the complaint, the Investigating Officer carried out the investigation and filed the chargesheet against the appellant accused. The charge was framed against the accused. The accused pleaded not guilty to the charge and claimed to be tried.

3.1 In order to bring home the guilt, the prosecution has examined witnesses and also produced documentary evidences.

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3.2 At the end of the trial, after recording the statement of the accused under section 313 of the Code of Criminal Procedure and hearing the arguments on behalf of the prosecution and the defence, learned trial Court delivered the judgment and order, as stated above.

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4. Being aggrieved by the same, the appellant has preferred the aforesaid Criminal Appeal before this Court.

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5. By way of preferring the present appeal, the appellant has mainly contended that learned trial Court has failed to appreciate the evidence on record and wrongly recorded the order of conviction. It is further contended that learned trial Judge has not appreciated the evidence on record in its proper perspective and in fact, there was no appreciation of evidence so far and hence, the impugned judgment and order of conviction is required to be reversed, as such.

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6. Mr. K.J. Panchal, learned advocate for the appellant has taken this Court through the charge as well as evidence of material witnesses and argued that neither the complainant nor other witnesses who were party during the course of trap had supported

the case of the prosecution and even the prosecution miserably failed to establish predemand as well as demand at the time of trap. He further submitted that on the contrary, evidence on record clearly emerges that the appellant accused was Sarpanch and he was managing three temples situated within the periphery of the village and that agricultural land is also belonging to the said temples. He submitted that the grass grown up in the said agricultural land was to be auctioned by inviting tenders and the highest bidder is to be sold away the said grass and as the complainant was the highest bidder, the grass was to be sold to him and he was required to pay the price of bid of Rs.3101/-. He submitted that the accused has paid the said bid price to the appellant Sarpanch in the panchayat office and the said fact is clearly established in the evidence of the complainant as well as PW 3 - Kuberbhai Lalabhai Senma and PW 4 - Meghrajbhai Joitabhai Chaudhry. He submitted that evidence the said witnesses is also getting corroboration from other documentary evidences which came to be tendered during the course of trial at Exhs.42 and 91 to 95. He, therefore, submitted that there is no iota of evidence as regards to demand and acceptance and hence there was no question of demanding any amount against illegal gratification. He submitted that the amount paid by the complainant was towards lawful dues which was required to be cleared by the complainant. He further submitted that even the recovery is not effected from the appellant accused and the test of anthracene powder and ultra violate lamp was not found positive on the person of the appellant. He further submitted that in view of catena of decisions rendered by the Honourable Apex Court, by now, the law on the issue raised in this appeal has become very clear wherein the prosecution has to establish the case beyond reasonable doubt in clear and conjoint evidence as regards to demand and acceptance thereof and unless that is established, no conviction can be recorded in such cases. Lastly, Mr.Panchal requested this Court to allow the present appeal.

7. On the other-hand, Mr.Chintan Dave, learned APP has supported the judgment rendered by learned trial Court. He submitted that the evidence of Panch No.1 - PW 2 is consistent and he has supported the case of the prosecution and that panch no.1 has clearly deposed that at the time of trap, the appellant accused demanded Rs.3100/- as illegal gratification and as per his direction, the same was delivered to PW 3 - Kuberbhai Lalabhai. He, therefore, submitted that taking into consideration other contemporaneous

documentary evidence which are in the nature of corroborative evidence and therefore the order of conviction is based on sound evidence available on record. He submitted that learned trial Court has recorded ample reasons based on the evidence on record for convicting the appellant and ingredients as regards to demand, acceptance and recovery are proved in accordance with law and, therefore, this Court should not disturb the finding recorded by learned trial Court, as such.

8. This Court has heard Mr. K.J. Panchal, learned advocate for the appellant and Mr. Dave, learned APP for the respondent State.

9. This Court has minutely gone through the impugned judgment rendered by learned trial Court as well as the evidence on record in the nature of paper book. As per the prosecution version, on 1.5.1997, the complainant applied to the Taluka Panchayat for getting four plots in the village area of Vansol, for which, the complainant contacted the appellant Sarpanch for doing needful. It is alleged that the appellant demanded Rs.5000/- as illegal gratification and he also recovered Rs.1900/- and rest of the amount was required to be paid to him. As the complainant was not willing to pay the bribe amount, he approached the ACB office on 19.9.1997 and lodged the complaint. In pursuance of the complaint, the appellant was caught red handed along with tainted currency notes and thereby the appellant committed the offence, as alleged.

10. PW 1 - Jesingbhai Meghrajbhai Chaudhry has been examined at Exh.31. The witness has deposed that the village people have made application to the Taluka Panchayat for grant and allotment of gamtal land in village Vansol and therefore, the witness met the appellant accused as he was Sarpanch of the village. The witness has deposed that it was stated by the appellant that he will not be able to do the work but if the witness pays the amount of Rs.3100/- towards bid price of the grass, then he will do the needful. The witness has deposed that therefore he felt that the appellant is demanding illegal gratification and hence, he approached the ACB office and lodged the complaint. The witness has deposed that at the time of trap, he was accompanied by Panch No.1 - PW 2 and when they reached the office of the Sarpanch, the witness told the complainant that he has brought the money and thereafter he placed the money on the table. The witness has deposed that in order to save the money from flying away, PW 3 took away the said amount

in his hand, at that time, Panch No.1 raised alarm as per pre-arrangement and hence, the members of the raiding party arrived there. However, the witness is declared hostile. In the cross examination, the witness did not support the case of the prosecution. However, in the cross examination of the defence, the witness has admitted that there are three temples in his village and the appellant is one of the trustees of the said temples. The witness has admitted that the said temples are having agricultural land where grass has grown up which was to be auctioned in the public and used to be sold the highest bidder and the auction was held on 6.7.1994. The witness has admitted that he was one of the highest bidders and that initially, he raised the bid price at Rs.2200/- and thereafter it was raised to Rs.3101/- which was found to be the highest bid price and therefore, his bid was accepted. The witness has deposed that the said amount of bid price was not paid to the appellant accused and therefore, the appellant accused demanded the said amount repeatedly and therefore, he got annoyed and lodged the complaint.

11. PW 2 - Rajnikant Bhagwandas Brahmhatt has been examined at Exh.44. The witness has deposed that he was requisitioned as official panch No.1 who was serving as Assistant in the GEB office. The witness has deposed that he was made to understand as to how the trap is to be carried out and he was directed to accompany the complainant. The witness has deposed that at the time of trap, he along with the complainant entered the office of the appellant, at that time, the appellant as well as Talati-cum-Mantri were present in the office. The witness has deposed that he took his seat in front of the Sarpanch and thereafter they initiated some formal talk with the complainant and the complainant took out money from his pocket and tendered to the appellant accused. The witness has deposed that therefore the appellant asked why the money and in turn, the complainant replied that it was for the plot and hence, the appellant accepted the said amount. The witness has deposed that therefore alarm was raised and the members of the raiding party arrived there. The witness has deposed that test of anthracene powder and ultra violate lamp was found negative on the person of the appellant and his cloth. In the cross examination, the witness has admitted that at the time of trap, he visited along with the complainant and that five persons were present in the office of the appellant.

12. PW 3 - Kuberbhai Lalabhai Senma has been examined at Exh.45. The witness has deposed that he was present in the Panchayat office at the time of trap and Sarpanch, complainant, Talati and other persons were present therein. The witness has deposed that at the time of trap, the complainant arrived in the panchayat office and he tendered Rs.3100/- being the amount of grass and the same was placed on the table, at that time, the appellant went out from the office and as the windows were opened and money was lying on the table, he put his hand on money and in the meantime, a mob of 7 to 8 persons came in the office and afterwards, they were found to be members of the raiding party. The witness has deposed that at that time, the members of the raiding party inquired from the appellant as regards to money and the appellant replied that the money is for the price of the grass.

13. PW 4 - Meghrajbhai Jitabhai Chaudhry has been examined at Exh.48. The witness has deposed that he was serving as Talati-cum-Mantri in Vansol Gram Panchayat at the relevant time and at the time of trap, the Sarpanch of the village has demanded the price of grass from the complainant and the said complainant placed the money on the table, at that time, Kuberbhai put his hand on the currency notes in order to save the same from flying due to wind.

14. Over and above the aforesaid oral evidence, documentary evidence in the nature of panchnama which came to be drawn prior to and post trap are also relevant, more particularly, at page 127 of the paper book, it clearly emerging out that the complainant tendered the amount to the appellant, at that time, the appellant inquired as to why the complainant is giving the money and in turn, the complainant said that he wants to purchase four plots. Further more, Exh.42 is contemporaneous document indicating the result of the auction taken place on 6.7.1997 wherein the bids of all the parties including the complainant is also disclosed wherein he was found to be the highest bidder of Rs.3101/- and his bid being the highest came to be accepted and therefore, the signatures of the trustees as well as the complainant being the highest bidder are also reflecting in the said document at Exh.42. Exh.91 discloses that three temples are under the administration of Patel Sardarbhai Rambhai - appellant herein and Mevada Kantilal since 22.7.1977. The revenue record discloses that the agricultural land is belonging to the above referred temples and grass has grown up in the said land.

12. At this stage, it would be fruitful to make reference to the decision of the Honourable Apex Court in *A.Subair Vs State of Kerala*, (2009) 6 SCC 587 : (2009 AIR SCW 3994), while dwelling on the purport of the statutory prescription of Sections 7 and 13(1)(d) of the Act ruled that 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. a

13. In *State of Kerala and another Vs C.P.Rao* (2011) 6 SCC 450 : (AIR 2012 SC (Supp) 393), the Honourable Apex Court reiterating its earlier dictum, vis-a-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. b

14. In a recent enunciation by the Honourable Apex Court to discern the imperative pre-requisites of Sections 7 and 13 of the Act, it has been underlined in *B.Jayraj* (AIR 2014 SC (Supp) 1837) = ABC 2014(II) 309(SC)(supra) in unequivocal terms, that mere possession and recovery of currency notes from an accused without proof of demand would not establish an offence under Sections 7 as well as 13(1)(d)(i) and (ii) of the Act. It has been propounded that in the absence of any proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. The proof of demand, thus, has been held to be an indispensable essentiality and of permeating mandate for an offence under Sections 7 and 13 of the Act. Qua Section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under Section 7 and not to those under Section 13(1)(d)(i) and (ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, it was held that in absence of proof of demand, such legal presumption under Section 20 of the Act would also not arise. c
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15. In the present case, this Court is required to scrutinize the evidence to ascertain whether there is proper, reliable and cogent evidence beyond reasonable doubt to confirm the judgment and sentence awarded by learned trial Court. If there is no such evidence on record, in that event, the conviction cannot be sustained as the onus lies on the prosecution to prove its case beyond reasonable doubt.

16. In the backdrop of the aforesaid factual as well as legal position and on overall analysis of the evidence of the complainant on record, it appears that neither the complainant nor independent witnesses i.e. PW 3 and PW 4 are supporting the case of the prosecution. On the contrary, they have put up different theory. So far as the amount tendered by the complainant to the appellant accused at the time of trap is concerned, it appears that the said amount was tendered towards the price of grass which came to be auctioned in favour of the complainant in the auction took place on 6.7.1997. It is also pertinent to note that similar evidence is forthcoming from the mouth of the aforesaid three witnesses including the complainant and their oral evidence is also fully getting support from the documentary evidences at Exhs.42 and 91 to 95. Not only that, but on evaluation of the evidence of PW 2 who was requisitioned as official panch on its face value, then also nothing is coming out from his evidence that the appellant accused has ever demanded any amount from the complainant. On the contrary, on his own will and volition, the complainant, in absence of the appellant accused, placed the money on the table in the panchayat office and that PW 3 in order to save the said money from flying away, put his hand over it. In this view of the matter, even the evidence of PW 2 who was official panch accompanying the complainant at the time of trap is considered, the same is not leading the prosecution case any further to link the accused with the crime in question.

17. On overall appreciation of the evidence on record, when the complainant himself has not supported the case of the prosecution and the evidence on record clearly indicates that the said amount came to be tendered by the complainant to the appellant towards the price of grass which he purchased in the public auction held on 6.7.1997. In view of the aforesaid nature of evidence, the prosecution has miserably failed to prove the vital ingredients as regards to pre-demand, demand at the time of trap, acceptance and recovery. Even

otherwise, the nature of evidence of PW 2 is in the nature of corroborative only and that direct and preliminary evidence as regards to demand and acceptance used to come from the mouth of the complainant which is missing and even the evidence of PW 2 is also not sufficient to link the accused with the crime in question. Therefore, as stated above, in absence of specific and clinching evidence to prove all such acts by the accused, conviction recorded by learned trial Judge is not sustainable.

18. For the reasons recorded above, the appeal succeeds. The impugned judgment and order dated 28.7.2004 rendered by learned Additional Sessions Judge, 6th Fast Track Court, Banaskantha at Palanpur in Special Case No.72 of 1998 is quashed and set aside. The appellant is acquitted from the charges levelled against him. Bail bond, if any, stands cancelled. Fine, if any, paid by the appellant be refunded to him. R & P be sent back to the trial Court, forthwith.

Result:- Appeal allowed.

**ABC 2017 (I) 162 GUJ
ACQUITTAL & BAIL CASES
HIGH COURT OF GUJARAT**

(Z.K. Saiyed, J.)

Criminal Revision Application (Against Conviction) No. 820 of 2006

Decided on 24 January, 2017

DAXESHKUMAR DILIPBHAI BHATT - Applicant(s).

Versus

STATE OF GUJARAT - Respondent(s).

Law Covered:- (A) *Indian Evidence Act, 1872 – Section 3 – Relevant fact – Post-mortem report – Cause of death – Cardiac failure and not due to accident in question – fatal to prosecution. (Para 17)*

(B) *Indian Penal Code, 1860 – Section 304-A – Conviction under – Indian Evidence Act, 1872 – Section 3 – Relevant fact – Involvement of the accused – non production of any evidence – No reference of the name of the present applicant while giving the*

February 2017