



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 704 OF 2005

Nasibkhan Gulabkhan Pathan,
Age : 51 years, Occ: Service,
Asst. Public Prosecutor,
Osmanabad.
Died through LRs
Khadirunisa Begum w/o Nasibkhan Pathan,
R/o Jawahar Colony, Parbhani,
Taluka and District Parbhani.

... Appellant
[orig. Accused]

Versus

The State of Maharashtra.

... Respondent

**WITH
CRIMINAL APPEAL NO. 711 OF 2005**

Balasaheb s/o. Gunvantrao Yadav
Age: 36 yrs., Occ: Advocate's Clerk,
R/o: Hasegaon (Kaij), Taluka Kallam,
District Osmanabad.

... Appellant

Versus

The State of Maharashtra

... Respondent

.....
Mr. Mayur Salunke, Advocate h/f Mr. V. D. Salunke, Advocate for the
Appellant in Criminal Appeal No. 704 of 2005.

Mr. S. S. Panale, Advocate for the Appellant in Criminal Appeal No.
711 of 2005.

Mrs. Ashlesha S. Deshmukh, APP for the Respondent-State.

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CORAM : ABHAY S. WAGHWASE, J.

Reserved on : 18.10.2024

Pronounced on : 12.11.2024

JUDGMENT :

1. In both appeals, exception has been taken to the judgment and order dated 29.09.2005 passed by learned Special Judge, Osmanabad in Special Case (AC) No. 4 of 2003 recording guilt of appellants for offence punishable under sections 7, 13(1)(d) r/w 13(2) and Section 12 of the Prevention of Corruption Act, 1988 [PC Act] respectively.

CASE OF PROSECUTION IN BRIEF

2. In brief, case of prosecution is that anti corruption department received complaint from PW1 Chandrakant, who reported that one Regular Criminal Case was on the file of learned JMFC, Kallam against Gorba Sukale and three others, at his instance. In that connection, informant had approached accused no.1, who was Assistant Public Prosecutor [APP] in said court, and appellant accused demanded Rs.1,000/- to put up the case properly before the court and to take further steps of issuing warrant. Unwillingly, PW1 paid part amount and balance of Rs.500/- was decided to be paid later on. As he was not willing to pay illegal gratification, he lodged report Exhibit 54, which was entertained by PW6 Dy.S.P. Gavali, and on the strength of the same, he arranged panchas, planned trap, prepared pre-trap panchanama Exhibit 35, gave necessary instructions to the

complainant and the shadow pancha. On their instructions, both, complainant and shadow pancha, visited court. There, accused no.1 demanded illegal gratification and when informant was paying the same, it was directed to be paid to accused no.2, after which pre-determined signal was relayed by informant, leading to further trap and apprehension of accused persons. Thereafter, PW6 lodged report, carried out investigation, chargesheeted both accused, who were made to face trial before learned Special Judge vide above referred Special Case No. 4 of 2003 and on appreciating prosecution evidence as well as defence witnesses, learned trial Judge, by impugned order dated 29.09.2005, held both accused guilty of offence punishable under Sections 7, 13(1)(d) r/w 13(2) and Section 12 of the PC Act, respectively. Said judgment is now subject matter of the appeals before this Court.

SUBMISSIONS

On behalf of the appellant in Criminal Appeal No. 704 of 2005 :

3. Learned counsel Mr. Salunke appearing for the appellant accused no.1 submitted that appellant accused was working as APP. During pendency of appeal, he expired and therefore, his heir has continued the prosecution of appeal. It is his submission that there

was no demand of illegal gratification as, according to him, deceased appellant was APP and therefore, there was no need for putting up any demand. He further pointed out that in this case, very informant did not support prosecution. Therefore, case of prosecution had suffered severe blow. He pointed out that entire case of prosecution is rested on the evidence of PW2 shadow pancha, but he was not present at the time of previous conversation of demand and therefore, his testimony has no evidentiary value and that he was tutored before being examined. That, his cross renders his testimony doubtful.

4. Learned counsel further submitted that here, there is no proper sanction, as said authority was not in charge, and therefore authorized, to issue sanction. Even learned trial Judge has held that PW3 was not in-charge, but still sanction accorded by him has been considered. Learned counsel submitted that appellant accused no.1 has not accepted the amount. There is no recovery at his instance and for all above reasons, he prays to set aside the judgment of conviction.

Learned counsel seeks reliance on the judgment of this Court (Nagpur Bench) in ***Suresh Purushottam Ashtankar v. State of Maharashtra and another*** 2015 All M.R. (Cri) 4243.

On behalf of the appellant in Criminal Appeal No. 711 of 2005:

5. Learned counsel Mr. Panale, pleading innocence of his client, would submit that accused no.2 was mere clerk. He had no reason to put up demand. He was merely looking after the work assigned to him by his employer. Therefore, there is no question of demand or acceptance of any illegal gratification. He pointed out that here, there is nothing to show that, with full knowledge and conscientious, amount accepted by him was illegal gratification and even there is no evidence that accused no.1 directed him to accept the illegal gratification. Learned counsel points out that several clients pay for their fees. Therefore, mere acceptance or possession of currency ought not to have been held sufficient to hold the charge of Section 12 of the PC Act proved. According to learned counsel, learned trial court has failed to consider and appreciate the evidence as well as settled law and therefore he also prays to set aside the judgment by allowing the appeal.

Learned counsel seeks reliance on the ruling of Hon'ble Apex Court in the case of *Suraj Mal v. State (Delhi Administration)* (1979) 4 SCC 725.

On behalf of respondent State :

6. Countering the above submissions on behalf of both appellants, learned APP submits that case of prosecution has been proved beyond reasonable doubt. She submits that, no doubt complainant has retracted, but his entire testimony need not be discarded. His evidence which is of use to the prosecution and supports prosecution version, can definitely be taken recourse to. She pointed out that evidence of shadow pancha is clear, cogent and convincing. He was accompanying complainant. He was also party to the demand as well as acceptance. His evidence had remained unshaken and therefore, according to learned APP, no fault can be found in the appreciation or conclusion reached at by learned trial Judge. In support of her above submissions, she seeks reliance on the case of *Neeraj Dutta v. State (Govt. of N.C.T. of Delhi)* 2022 LiveLaw (SC) 1029.

EVIDENCE BEFORE THE TRIAL COURT

7. In support of its case, prosecution has examined in all six witnesses. Their role and status and the sum and substance of their evidence is as under :

PW1 Chandrakant is the complainant. In his evidence at Exhibit 31, he deposed as under :

"1. I went to police station at Kallam and lodged the complaint against Gorba Sukale, and three others. The chargesheet was submitted against all the four members in the court at Kallam. It was bearing RCC No. 147/93 and pending before JMFC Kallam.

2. I left Kallam and went to Kalyan. I stayed in Kalyan for about 5 to 6 years. About 3 to 4 years back I came to my native place from Kalyan. My brother told me to attend the court. Accordingly I attended the court. I met one Balu Yadav, Clerk of an Advocate. Balu Yadav told me that the sum of Rs.500/- were required to be spend by me in my criminal matter. He told me that this amount was to be paid to an advocate. I told Balu Yadav that I can not afford to pay the sum of Rs.500/- to an Advocate. Balu Yadav told me that unless I pay Rs.500/- to an Advocate, my work cannot be accepted. I did not inquire from Balu Yadav, as to whom the amount was to be paid towards Advocate's fee. I was feeling that though I was a complainant in the Criminal case before JMFC, Kallam, the clerk was saying that I had to pay the fees of an Advocate. Therefore I came to the Anti-corruption Bureau at Osmanabad and narrated all these facts before G. S. Gavali, Dy.S.P. Dy. S.P. Gavali told me that since I was the complainant in the criminal case, pending before JMFC Kallam, I was not required to pay the fees of an Advocate. I gave the complaint in the Anti-Corruption Bureau. It is now shown to me. Its contents are false. However I have signed at the foot of the complaint. The name of accused No.1 which is appearing in the complaint, was narrated by Balu

Yadav. The accused No.2 is Balu Yadav. Dy. S.P. Gavali had asked me to attend the Bureau on the next day in the morning."

In para 4 he deposed that when he visited and came out of office of accused no.1, accused no.2 met him and asked him whether he brought the amount. Complainant told him that he brought the amount and paid him Rs.500/- and he was caught by trap party. Therefore, finding him not supporting, learned APP sought permission of the court to cross examine the witness and then he is further cross examined from para 6 onwards.

PW2 Rajendra, shadow pancha, in his evidence at Exhibit 34, initially deposed about being called by ACB authorities, being introduced to complainant, hearing his grievance about demand of illegal gratification by accused no.1, then he going through the complaint, pre-trap panchanama Exhibit 35 being drawn, and thereafter demonstration and necessary instruction about trap being given by ACB officer. He deposed that on 30.07.2002, when he accompanied complainant to the prosecutor's office in the court building, that time complainant wished accused no.1 and questioned about progress of the case after which, accused no.1 told him that he would come for tea in the hotel after short time. Around 12 noon, complainant talked to unknown person. Thereafter accused no.1 came out and they all went to the hotel. There, complainant asked accused to give proper attention to the case and that time, accused no.1 asked complainant whether he has brought the sum of Rs.500/- and then accused no.1 asked complainant to

pay the sum to another person sitting on his right side and then complainant paid to such unknown person who collected, counted and gave it to accused no.1. Thereafter complainant went out and gave signal.

Above witness is subjected to extensive cross on the point of distance between Government Poly-technique and ACB office, permission given by Principal, reason for choosing him to act as pancha, about his qualification, about Dy.S.P. giving instructions. In para 18 he admitted about complainant informing that previously he paid Rs.500/- to the Advocate. Then he is questioned about panchanama drawn on 28.07.2002 and 29.07.2002. He admitted that panchanama dated 30.07.2002 is silent about numbers of tainted currency and effect of anthracene powder. He answered that on 29.07.2002, they did not meet both accused. He admitted that his evidence to that extent in para 6 of his chief is false. He admitted that trap against accused no.1 did not succeed on 29.07.2002. He was unable to state whether on 30.07.2002, before leaving ACB Office, hands of the trap party members were checked. He admitted that pant of the complainant, which was given for use to the complainant, was also not checked under ultra violet rays. Rest is all denial.

Apart from above two witnesses, prosecution has also adduced evidence of sanctioning authority PW3. His evidence at Exhibit 45 can be summarized as under:

PW3 Shaukat Hakim, Deputy Secretary to the Government of Maharashtra, in chief, deposed about receiving file from ACB along with model draft of sanction order and according to him, after going through the file, he found substance in the allegation and accorded sanction Exhibit 46.

While under cross, he admitted that Secretary of the Home Department is the appointing and removing authority of APP, but powers are delegated to even Deputy Secretary. He admitted in para 4 about preparing sanction order Exhibit 46 as per model draft sanction and preparing cyclostyle copies of the same. He also admitted that he did not receive original file, nor he called for it.

PW4 Akshay Deshpande is the Special APP in the court of Kallam.

PW5 Sandip Ghodke is Stenographer in the court of Kallam.

PW6 Ganesh Gavali, Dy. S.P. attached to ACB, Osmanabad, is the Investigating Officer.

Both accused have also examined following witness in their defence.

DW1 Govind is the witness on behalf of accused no.2, who deposed that he was Advocate and he had appointed accused no.2 as his clerk since 1995. He deposed about RCC 147/1993 at the

instance of complainant PW1 pending on the file of 2nd JMFC Kallam. According to him, he was requested to submit *vakalatnama* by cousin of Chandrakant and he had demanded Rs.1,000/-, out of which, Rs.500/- were paid and Rs.500/- were agreed to be paid afterwards and he accordingly filed *vakalatnama*. He further stated that on 30.07.2002, as he had been to Bhoom for attending court work, he had instructed accused no.2 to given adjournment application and also instructed to collect fees from litigants.

DW1 Narayan is the APP and he is examined on behalf of accused no.1. This witness stated about accused no.1 appointed as APP by order dated 13.06.2001 and about there to be three courts in Kallam and accused no.1 to be regular APP in the court of 2nd Joint CJJD along with two other APPs and accused no.1 to be the senior most APP.

8. In the line of arguments advanced by both learned counsel for both accused, as well as learned APP, entire evidence is re-appreciated. It is emerging that accused no.1 was working as APP whereas accused no.2 was a clerk of DW1 Govind. Admittedly, very complainant, who set law into motion, has retracted and not supported prosecution and therefore prosecution was required to cross examine its own witness.

9. According to learned APP, though PW1 complainant turned hostile, his entire testimony need not be discarded and his evidence, more particularly answers given by in cross paragraph 9, can be taken recourse to.

However, here, what PW1 complainant has deposed is that on his complaint, RCC 147/1993 was pending before JMFC court and he speaks of approaching accused no.2, i.e. clerk of an Advocate, and being told about requirement of Rs.500/-. Therefore, his evidence does not refer to accused no.1. He also in chief itself stated that name of accused no.1 was narrated by accused no.2. He does not speak of any conversation with accused no.1 or any demand being made. Therefore, even if in para 9 complainant has answered about attending ACB office, trap being planned and he and pancha being given necessary instructions and thereafter they initially visiting on 29.07.2002 and subsequently on 30.07.2002, the very essence of demand of illegal gratification by accused no.1 is missing in his evidence.

10. It is true that shadow pancha narrated about meeting complainant, going through the complaint, being party to the instructions and about pre-trap panchanama. However, he has

admitted in cross that before he was made to step in the witness box, he was given necessary instructions. He speaks of complainant making conversation with unknown person and accused no.1 allegedly demanding amount and further directing it to be paid to the unknown person. Evidence of PW2 in para 8 is regarding the events that took place on visit by complainant and this witness to the office of accused no.1. It is emerging from evidence of PW2 that accused no.1 asked complainant whether he brought sum of Rs.500/- and thereafter accused no.1 directed complainant to pay the amount to another person sitting on the right side and according to this witness, accused no.1 thereafter allegedly told complainant that he would ask Shri Deshpande Advocate to look into the matter and to apply for warrant against the accused. If such is the version of shadow pancha, then question arises is, for what purpose accused no.1 demanded illegal gratification, as he was already a prosecutor. Complainant himself has in the witness box stated about amount being demanded by accused no.2 and he has not referred to accused no.1 at all, either on the point of demand or acceptance. Therefore, with such evidence of shadow pancha, prosecution version comes under shadow of doubt.

11. Defence put up by both is that, **firstly** there was no demand by accused no.1 and there is no corroboration and **secondly**, amount

accepted by accused no.2 was towards legal remuneration on direction of DW1 Govind. Here, evidence of DW1 Govind has not been rendered doubtful. Therefore, when defence is merely expected to probabalize its defence, by examining DW1 Govind, said defence is substantially proved.

12. Both learned counsel for appellants have also pointed out that there is no proper and valid sanction also. Admittedly, though PW3, who accorded sanction, was a Deputy Secretary, he himself has admitted that Secretary is the appointing and removing authority. Though he spoke of powers being delegated to that extent, document in that regard is not placed on record. Further, his cross shows that he had prepared sanction order as per the model draft and then got it cyclostyled. He has also admitted that he did not receive original papers, nor he called for it. He merely stated that he went through the file and found substance, but reasons and application of mind, or about what documents were studied by him, has not been elaborated by him. Law is settled that sanction cannot be passed in mechanical manner. Here, the quality of evidence of PW3 prompts this Court to hold that there is no proper application of mind while exercising the powers of sanction.

13. To sum up, here, complainant has retracted and not supported prosecution. Shadow pancha is the sole witness, but there is ambiguity as regards to whom complainant talked to and whom accused directed amount to be paid to. Repeated attempts are taken to execute the trap. Accused no.1 has not accepted amount from complainant. Accused no.2, who accepted, has probalilized his defence of taking amount towards legal remuneration. Therefore, prosecution case is not free from doubt.

14. Perused the judgment under challenge. Learned trial court has, on the evidence of only PW2 shadow pancha and some answers given by complainant while under cross by prosecutor, drawn inference that case is proved beyond reasonable doubt. Apparently, defence taken and evidence of defence witnesses has not been taken into account while accepting the prosecution version. Therefore, there is reason to interfere in the findings recorded by trial Judge. Accordingly, I proceed to pass the following order:

ORDER

I. Both the appeals are allowed.

- II. The conviction awarded to the appellants i.e. Nasibkhan Gulabkhan Pathan (Criminal Appeal No. 704 of 2005) and Balasaheb s/o. Gunvantrao Yadav (Criminal Appeal No. 711 of 2005) by learned Special Judge, Osmanabad in Special Case (AC) No. 4 of 2003 under Sections 7, 13(1)(d) r/w Section 13(2) and Section 12, respectively, of the Prevention of Corruption Act, 1988, on 29.09.2005 stands quashed and set aside.
- III. The appellant Nasibkhan Gulabkhan Pathan stands acquitted of the offence punishable under Sections 7, 13(1)(d) r/w 13(2) of the PC Act and the appellant Balasaheb s/o. Gunvantrao Yadav stands acquitted of the offence punishable under Section 12 of the PC Act.
- IV. The bail bonds of the appellants stand cancelled.
- V. Fine amount deposited, if any, be refunded to the appellants after the statutory period.
- VI. It is clarified that there is no change as regards the order regarding disposal of *muddemal*.

[ABHAY S. WAGHWASE, J.]