ABC 2019 (I) 184 BOM
ACQUITTAL & BAIL CASES

HIGH COURT OF BOMBAY

(S. M. Gavhane, J.)

Criminal Appeal No. 265 of 2005

Decided on 2 November, 2018

Aurangabad Bench

JAGGANATH DIVANRAO BARSE - Appellant(s).

Versus

STATE OF MAHARASHTRA - Respondent(s).

Law Covered:- *(A) Prevention of Corruption Act, 1988 — Sections 7, 13 (1)(d) & 13 (2) — Conviction under — Evidence of pach witness — in conformity with the defence of accused — Panch witness & other witnesses turned hostile —Cross-examination — Complainant admitted almost all suggestions put by the accused — Complainant admitted the defence of the accused — non-examination of the owner of the jeep — Held, withheld material piece of evidence at whose instance the complaint was lodged — Held, prosecution is doubtful — benefit should go to the accused. (Para 35, 40 & 41)*

(B) Prevention of Corruption Act, 1988 — Sections 7, 13 (1)(d) & 13 (2) — Demand of bribe — Specific amount to be paid to the accused — not mentioned by witness — the complainant did not claim that the witness specified the amount to be paid — fatal to prosecution. (Para 27)

(C) Prevention of Corruption Act, 1988 — Sections 7, 13 (1)(d) & 13 (2) — Trap case — Acceptance — Talk between Complainant & accused before tainted amount was paid to the accused — Inconsistency in the evidence of Complainant & Shadow panch — fatal to prosecution. (Para 29)

(D) Prevention of Corruption Act, 1988 — Section 20 — presumption under — Acceptance proved but demand not proved — Held, mere recovery of currency notes from the accused would not be sufficient to attract presumption u/s 20. (Para 36)

(E) Prevention of Corruption Act, 1988 — Sections 7, 13 (1)(d) & 13 (2) — Tainted amount was found in possession of accused but prosecution failed to prove demand of illegal gratification — it is to be seen whether the accused has given probable explanation of said amount in the light of his defence. (Para 37)

(F) Prevention of Corruption Act, 1988 — Sections 7, 13 (1)(d) & 13 (2) —Specific defence of the accused — he had given handloan to the complainant from time to time & as he used police language to the complainant for repayment of said handloan the complainant has filed false case against him— complainant accepted said fact— Evidence of panch witness — admitted that accused said to ACB Officer when he caught accused that he had not taken any bribe & that he received back amount advanced by him. (Para 37 & 38)

(G) Code of Criminal Procedure, 1973 — Section 313 — Statement under — the accused had give immediate explanation about the amount received by him — Defence raised by the accused is probable defence — found acceptable — Prevention of Corruption Act, 1988 — Sections 7, 13 (1)(d) & 13 (2). (Para 39)

(H) Prevention of Corruption Act, 1988 — Sections 7, 13 (1)(d) & 13 (2) — Pre-trap panchnama — Evidentiary value —Held, when complainant's evidence about demand is doubtful mere mention of first demand in pre-trap panchanama is of no help to the prosecution case. (Para 40)

Facts:- *As per the complaint on the day of a weekly Bazar the accused, a Police Naik, used to take installment of ₹.200/- from the complainant by stopping his jeep and he used to threat the complainant that if no money is given to him, he would park the jeep in the police station and he would file case against him. The complainant told this to the owner of jeep who was not willing to pay bribe and he told the complainant to lodge complaint with the ACB.*

A trap was arranged and tainted money was given to the accused by the complainant in the presence of Shadow panch and another PW after a talk. Thereupon, pre-arranged signal was given by the complainant to the raiding party and tainted currency notes were recovered from the appellant. After arrest case was registered and the appellant was convicted for the offences punishable u/s 7, 13 (1)(d) and 13 (2) of the PC Act.

In the present appeal it was observed that the accused had not disputed the acceptance it was further observed that the complainant has in clear terms stated that he was taking handloan of some amount from the accused since long. He obtained many times handloan of some amount from the accused and returned to him said amount. Taking note of suggestion on behalf of the accused to the shadow panch that immediately after the accused was caught by ACB he said he had not taken any bribe and that he has received back the amount advanced by him it was held that the acceptance

was not established. Holding defence of the accused as probable defence and benefit of doubt was given.

Law of relief:- ***If tainted amount is recovered from accused but demand was not proved, it is to be seen whether the accused has given probable explanation in his defence. (Para 37)***

Held:- This evidence shows that the complainant introduced Shaikh Nazimoddin (PW-4) to the accused as a owner of the jeep and told the accused to have a talk with Shaikh Nazimoddin. Then there was talk between them. Then on the say of Shaikh Nazimoddin the complainant paid amount to the accused. This evidence does not at all show that on the day of trap on 26.08.2003 at about 15.50 hours the complainant asked the accused about his work of allowing him to carry passengers on Khultabad to Fulambri road by the jeep and then accused made demand of Rs.200/- to him. Said evidence further does not show that for the said work after meeting the complainant, shadow panch and Shaikh Nazimoddin the accused demanded agreed bribe amount of Rs.200/- to the complainant and thereupon the complainant (PW-1) paid said amount to the accused. The evidence clearly shows that it is the Shaikh Nazimoddin who told the complainant to pay the amount to the accused and then the complainant paid the amount to the accused. Even the complainant does not claim that Shaikh Nazimoddin told him to pay Rs.200/- to the accused and then he paid Rs.200/- to the accused. Thus, the above referred evidence of complainant is not at all sufficient to state that on the day of trap the accused demanded bribe amount of Rs.200/- to complainant as per the prosecution case. (Para-27)

Thus, there is inconsistency in the evidence of complainant and PW-2 Shadow panch in respect of talk between Shaikh Nazimoddin and the accused before amount was paid to the accused. (Para-29)

Naturally, therefore, it can be said that said amount was accepted by the accused. The accused also does not dispute the said fact as it is clear from suggestion on his behalf to the PW-2 shadow panch that immediately after he was caught by PI Naik he (accused) said he had not taken any bribe and that he has received back the amount advanced by him. (Para-35)

As observed earlier the prosecution has failed to prove first demand made by the accused to the complainant (PW-1) 23.08.2003 at

about 04.00 pm and second demand made on the day of trap i.e. on 26.08.2003 at about 15.50 hours beyond reasonable doubt. But the prosecution has only proved that tainted amount of Rs.200/- was recovered from the accused. Therefore, now it is to be seen whether the presumption under Section 20 of the said Act would arise in favour of the prosecution when the prosecution has not proved the demands and only proved acceptance of amount by the accused. I hold that as in the present case the prosecution has failed to prove the initial demand/first demand dated 23.08.2003 made by the accused to complainant and second demand made on the day of trap i.e. 26.08.2003 mere recovery of currency notes from the accused would not be sufficient to attract presumption under Section 20 of the said Act to state that the prosecution has proved the offences under Section 7 and under Section 13(1)(d) punishable under section 13(2) of the said Act. (Para-36)

It is held that the prosecution has failed to prove demand of illegal gratification made by accused to complainant beyond reasonable doubt and it is proved that tainted amount was found in possession of accused. Therefore, it is to be seen whether the accused has given probable explanation of said amount in the light of his defence. It is the specific defence of the accused that he had given handloan to the complainant (PW-1) from time to time and as he used police language to the complainant for repayment of said handloan the complainant has filed false case against him. (Para-37)

As referred earlier in paragraph Nos. 6 and 7 of his deposition the complainant has in clear terms stated that he was taking handloan of some amount from the accused since long. He obtained many times handloan of some amount from the accused and returned to him said amount. On 26.08.2003 i.e. on the day of trap he was to repay Rs.200/- to the accused towards handloan obtained by him. He admitted that prior 26.08.2003 accused had made demand to him for repayment of Rs.200/- and as he could not get sufficient business he could not repay the same amount. So also, he stated that he was annoyed since accused had used police language while claiming Rs.200/- to him, he lodged the false complaint against the accused. Moreover, as referred earlier PW-2 shadow panch has admitted that accused said to Naik when Naik (PW-6) caught accused that he had not taken any bribe and that he received back amount advanced by him. (Para-38)

From the above evidence of complainant (PW-1), PW-2

shadow panch and answer to question No.61 in the statement under Section 313 of the Criminal Procedure Code given by the accused, as the accused had give immediate explanation about the amount received by him I find that defence of the accused that the complainant had taken some handloan from him and when he insisted for its repayment in police language the complainant has falsely involved him is appearing probable and acceptable. (Para-39)

The trial Court in paragraph no.15 of the judgment observed that panch witness namely Keshav (PW-2) and Sudhir (PW-3) as well as companion of complainant namely Shaikh Nazimoddin (PW-4) and Ramesh Pawar (PW-5) have turned hostile. Further the trial Court has observed that the complainant Shaikh Kalomoddin (PW-1) has also not supported the prosecution whole heartedly and admitted almost all suggestions put to him during the course of examination on behalf of the accused trying to dilute the prosecution story and to turn it in favour of the accused. However, the trial Court only relying upon the evidence of PI Naik (PW-6) the Investigating Officer and on the basis of complaint (Exh.11) filed by the complainant (PW-1) and pre- trap panchanama (Exh.16) held that the prosecution has proved the offences against the accused with which he was charged. It appears that according to the trial Court there is nothing on record to show as to why the complainant narrated all false story in complaint (Exh.11) before PI Naik (PW-6) and abefore panchas (PW-2 & 3). For the reasons discussed earlier while appreciating the evidence of complainant (PW-1), PW-2 shadow panch and Shaikh Nazimoddin (PW-4) it is observed that their evidence is not sufficient to state beyond doubt that the accused made first demand on 23.08.2003 and second demand on the day of trap on 26.08.2003 due to inconsistencies noted in the evidence of these witnesses. It is also observed that the contents of the complaint (Exh.11) cannot be read as a substantive evidence. It is observed that when the complainant's evidence about demand is doubtful mere mention of first demand in pre-trap panchanama (Exh.16) is of no help to the prosecution case. (Para-40)

Another aspect to be noted is that when the evidence of complainant (PW-1) material witness of the prosecution is not sufficient to prove demands made by the accused to him and admitted the defence of the accused of giving handloan to him and that an amount of Rs.200/- was due to him on the day of trap i.e. on 26.08.2003 and as the prosecution has not examined Mohd.Muzafar owner of the jeep

and as such withheld material piece of evidence at whose instance the complaint was lodged and when the defence of the accused is probable as observed earlier the observations of the trial Court that the defence of the accused does not appear to be probable are not correct. As such I hold that the case of the prosecution is doubtful and its benefit should go to the accused. (Para-41)

Counsel:- ***For Appellant(s):*** *Mr.Govind Kulkarni, Mr.Rajendra Deshmukh, Advs.*

For Respondent(s): *Mr.P.G.Borade, Adv.*

Cases Referred:-

P. Satyanarayana Murthy Vs Dist. Inspector Of Police And Another, 2015 Air (Sc) 3549, (Para-7)

JUDGMENT

S.M. GAVHANE, J.: - *1.* The appellant/accused has challenged the judgment and order dated 29.03.2005 in Special Case No.26/2003 passed by the II-Special Judge at Aurangabad thereby convicting him for the offences punishable under Section 7 and Section 13 (1)(d) punishable under Section 13 (2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'the said Act') and sentencing him to suffer rigorous imprisonment for one year and to pay a fine of Rs.500/-, in default, to suffer further rigorous imprisonment for one month on each count. Both the sentences of imprisonment have been ordered to run concurrently.

2. Facts of the prosecution case, in short, are as under:-

A] The complainant Shaikh Kalimoddin S/o. Shaikh Najimoddin (PW-1) who is resident of Khultabad, Dist. Aurangabad was driver on the private Kali-Pili Trax/Taxi bearing No.MH-19-C-5565, (hereinafter referred to as 'the jeep') owned by one Mohd. Muzafar (whose name is Shaikh Muzafar Shaikh Akbar in the list of witnesses in the charge- sheet, who is hereinafter referred to as Mohd. Muzafar) resident of Khultabad since one year prior to the complaint dated 26.08.2003. At that time the appellant Barse was Police Naik attached to the Police Station Fulambri, Dist. Aurangabad. The complainant was running the aforesaid jeep on Khultabad to Fulambri road for carrying the passengers. It is alleged that the appellant was taking Hafta of Rs.200/- from the complainant on the weekly Bazar day of Fulambri and on failure of the complainant to

give said Hafta to the appellant he used to threat the complainant that he would not allow the complainant to run the jeep to carry passengers. Due to rainy reason there was no sufficient business of carrying passengers on Khultabad to Fulambri road and therefore, the complainant and owner of jeep had requested the appellant that they are unable to give Hafta to him. Thereupon, the appellant had threatened them that they have to stop the business and if they have to do the business they will have to pay Rs.200/- on every Bazar day to him.

B] Further it is the case of the prosecution that on 23.08.2003 at about 16.00 hours while the complainant was taking jeep towards Fulambri from Khultabad with passengers, the appellant stopped the jeep near Deogiri Sugar Factory and demanded Hafta amount of Rs.200/-. At that time the complainant told him that on asking Sheth i.e. his master he would give said amount to him in the after noon of Bazar day of Fulambri. Thereupon, the appellant allowed the complainant to go. Thereafter, the complainant narrated said incident to jeep owner Mohd. Muzafar. Thereupon, owner of the jeep showed his unwillingness to give Hafta of Rs.200/- on weekly Bazar day to the appellant and asked the complainant to lodge the complaint with the Anti Corruption Bureau, Aurangabad. Accordingly, in the morning on 26.08.2003 the complainant went to the office of Anti Corruption Bureau at Aurangabad and narrated incident as above to the Police Inspector Naik (PW-6) who reduced the complaint (Exh.11) into writing. It is further alleged in the complaint that on 26.08.2003 the appellant would accept Hafta amount of Rs.200/- from complainant on Khultabad to Fulambri road between Deogiri Sugar Factory to Fulambri.

C] After the complaint as above PI Naik called two Panchas in the office of Anti Corruption Bureau at Aurangabad. After giving necessary instructions to panchas and complainant by PI Naik (PW-6) pre- trap panchanama (Exh.16) was prepared and an amount of Rs.200/- i.e. one currency note of 100 denomination, one currency note of 50 denomination, two currency notes of 20 denomination and one currency note of 10 denomination which were produced by the complainant were given to him after the said currency notes were smeared with anthracene powder. Then the complainant (PW-1), Panch No.1-Keshav Jadhav (PW-2) Shadow panch, Shaikh Nazimoddin (PW-4) and Police Constables Pathan and Awale proceeded by jeep to meet the appellant on the spot on Khultabad to

Fulambri road as agreed to give Hafta amount to the appellant and they went to Fulambri where other jeeps were parked.

D] At Fulambri the appellant having Khaki Pant, Khaki Shirt, Colour T-shirt on his person came on motorcycle. The complainant (PW-1), Jadhav-(PW-2) Shadow panch and PW-4-Najimoddin went to the appellant. There was talk between PW-4-Najimoddin and the appellant. Then the complainant gave tainted currency notes to the appellant. He accepted said currency notes by right hand and kept the same in the pocket of his T-shirt. Thereupon, pre-arranged signal was given by the complainant to the raiding party. Then the Investigating Officer (PW-6), (PW-3)-Panch No.2 with other members in the raiding party came near the appellant and tainted currency notes were recovered from the appellant. Accordingly, detailed post trap panchanama (Exh.17) was prepared. The appellant was arrested. Then on behalf of the State the complaint was filed by Police Inspector Naik (PW-6) in Police Station, Fulambri against the appellant for the aforesaid offences and Crime No.14/2003 came to be registered against him. Necessary sanction to prosecute the appellant was obtained. After completion of the investigation PI Naik filed charge-sheet in the Special Court.

E] The Special Judge, Aurangabad framed charge against the accused for the offence under Section 7 and 13(1)(d) read with Section 13 (2) of the said Act. The appellant pleaded not guilty and claimed to be tried.

F] Defence of the appellant is that the complainant had taken some hand loan from him. When he insisted him for its repayment in police language he thached this false story. The Police Inspector Naik wanted to complete his quota of cases and hence he took help of PW-2 and PW-3 and involved him in false case at the instance of the complainant. PW-4 is relative of complainant and hence he is deposing false.

G] The prosecution has examined in all six witnesses namely complainant Shaikh Kalimoddin S/o. Shaikh Nazimoddin (PW-1), Keshav Rambhau Jadhav- Shadow Panch/Panch No.1 (PW-2), Sudhir Hari Mahalpure (PW-3) Panch No.2, Shaikh Najimoddin Shaikh Alimoddin (PW-4), Ramesh Mansubrao Pawar (PW-5) and Police Inspector Mandar Wasudeo Naik, Investigating Officer (PW-5) and relied upon aforesaid panchanams, complaint and sanction order.

H] On considering the evidence adduced by the prosecution and defence of the appellant, the learned Special Judge convicted and sentenced the appellant for the offences with which he was charged as stated earlier in the opening para of this judgment by the impugned judgment. Aggrieved thereby this appeal by the appellant/accused.

3. The sentence of imprisonment recorded against the appellant was suspended by the trial Court and by order dated 28.04.2005 this Court continued the said order of suspension of sentence and the appellant was ordered to be released on bail on fresh bond of same amount as in the trial Court.

4. Mr.Govind Kulkarni, learned Advocate h/f Mr.Rajendra Deshmukh, learned Advocate for the appellant has submitted that there is no consistency in the evidence of the complainant (PW-1) and PW-2 (Panch No.1) in respect of talk between the complainant and the accused at the material time of incident on 26.08.2003. Moreover, the complainant did not support the prosecution case and admits the defence of the appellant that the appellant had given hand loan of Rs.200/- to the complainant and he made repayment of the same to the appellant. Further it is submitted by the learned Advocate that PW-3 (Panch No.2), PW-4 Najimoddin and PW-5 Ramesh Pawar have also not supported the prosecution case and they have been declared hostile by the prosecution. Therefore, the evidence of PW Nos.1 and 2 is not sufficient to hold that the prosecution has proved initial demand of bribe amount of Rs.200/- made by the appellant to complainant (PW-1) on 23.08.2003 or demand of said bribe amount made by the appellant to the complainant on the day of trap on 26.08.2003. As such, according to the learned Advocate the prosecution has failed to prove demand of bribe of Rs.200/- as Hafta made by the appellant to the complainant to allow the complainant to run jeep to carry the passengers.

5. Learned Advocate for the appellant submitted that even, if it is said that the appellant has accepted an amount of Rs.200/- from the complainant on the date of trap, mere acceptance of amount is not sufficient to raise presumption under Section 20 of the said Act against the appellant when the prosecution has failed to prove demand of bribe amount of Rs.200/- made by the accused to the complainant as Hafta. Learned Advocate submitted that in such circumstances the question of rebuttal of aforesaid presumption by

the appellant does not arise. However, on the basis of evidence of the complainant (PW-1) when he has in clear terms admitted that there was money transaction between him and the appellant/accused, that he used to obtain hand loan of Rs.100/- or Rs.200/- from the appellant and when PW-1 has admitted that on 26.08.2003 i.e. on the date of trap he was to repay Rs.200/- to the appellant towards hand loan obtained by him and as the evidence of PW- 2 (Panch No.1) shows that the appellant said to Police Inspector Naik (PW-6) when he was caught hold that he had not taken any bribe and that he has received back the amount advanced by him, defence of the appellant is probable.

6. Learned Advocate for the appellant further submits that as per the prosecution case the complainant lodged the complaint with the office of the Anti Corruption Bureau at Aurangabad as the owner of the jeep Mohd. Muzafar asked him to lodge the same, as he was not willing to give Hafta to the appellant. When the complainant as referred above did not support the prosecution case and in the cross-examination admitted the defence of the appellant/accused it was necessary for the prosecution to examine said Muzafar owner of the jeep to prove the fact that really the appellant made initial demand/ first demand of Hafta of Rs.200/- on 23.08.2003 to the complainant and that the complainant told him that he would give said Hafta to the appellant on weekly Bazar day of Fulambri on asking the owner of jeep. But, admittedly the prosecution has not examined the jeep owner Mohd. Muzafar. Failure of the prosecution to examine him creates a doubt about the initial demand of Hafta of Rs.200/- made by the appellant on 23.08.2003 as alleged by the prosecution. Learned Advocate for the appellant submitted that when the defence of the appellant is probable and the appellant immediately gave explanation of an amount of Rs.200/- allegedly given by the complainant to him, the conviction and sentence recorded against the appellant as per the impugned judgment is not sustainable and the same is liable to be set aside by giving benefit of doubt to the appellant and the appellant needs to be acquitted of the offences for which he has been convicted and sentenced by allowing the appeal.

7. To support his submissions that even if there is acceptance of amount by the appellant as no demand of bribe amount by the appellant is established by the prosecution, no presumption under Section 20 of the said Act arise, the learned Advocate has relied on the decision of Hon'ble Supreme Court in the case of ***P. Satyanarayana Murthy Vs Dist.***

***Inspector of Police and another* 2015 AIR (SC) 3549**. In the said case in paragraph Nos. 20,23,24,25, and 26 it was observed thus:

> 20. In a recent enunciation by this Court to discern the imperative pre-requisites of Sections 7 and 13 of the Act, it has been underlined in B. Jayaraj (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 Section 7 as well as 13(1)(d)(i) & (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) & (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.
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> 23. The sheet anchor of the case of the prosecution is the evidence, in the facts and circumstances of the case, of PW1-S.Udaya Bhaskar. The substance of his testimony, as has been alluded to hereinabove, would disclose qua the aspect of demand, that when the complainant did hand over to the appellant the renewal application, the latter enquired from the complainant as to whether he had brought the amount which he directed him to bring on the previous day, whereupon the complainant took out Rs.500/- from the pocket of his shirt and handed over the same to the appellant. Though, a very spirited endeavour has been made by the learned counsel for the State to co-relate this statement of PW1-S.Udaya Bhaskar to the attendant facts and circumstances including the recovery of this amount from the possession of the appellant by the trap team, identification of the currency notes used in

the trap operation and also the chemical reaction of the sodium carbonate solution qua the appellant, we are left unpersuaded to return a finding that the prosecution in the instant case has been able to prove the factum of demand beyond reasonable doubt. Even if the evidence of PW1-S. Udaya Bhaskar is accepted on the face value, it falls short of the quality and decisiveness of the proof of demand of illegal gratification as enjoined by law to hold that the offence under Section 7 or 13(1)(d)(i) & (ii) of the Act has been proved. True it is, that on the demise of the complainant, primary evidence, if any, of the demand is not forthcoming. According to the prosecution, the demand had in fact been made on 03.10.1996 by the appellant to the complainant and on his complaint, the trap was laid on the next date i.e. 04.10.1996. However, the testimony of PW1-S Udaya Bhaskar does not reproduce the demand allegedly made by the appellant to the complainant which can be construed to be one as contemplated in law to enter a finding that the offence under Section 7 or 13(1)(d)(i)& (ii) of the Act against the appellant has been proved beyond reasonable doubt. 13(1) which in our estimate, to hold on the basis of the evidence on record that the culpability of the appellant under Sections 7 & (d)(i) & (ii) has been proved, would be an inferential deduction is impermissible in law. Noticeably, the High Court had acquitted the appellant of the charge under Section 7 of the Act and the State had accepted the verdict and has not preferred any appeal against the same. The analysis undertaken as hereinabove qua Sections 7 and 13 (1)(d)(i)&(ii) of the Act, thus, had been to underscore the indispensability of the proof of demand of illegal gratification.

24. In reiteration of the golden principle which runs through the web of administration of justice in criminal cases, this Court in Sujit Biswas Vs State of Assam (2013) 12 SCC 406 had held that suspicion, however grave, cannot take the place of proof and the prosecution cannot afford to rest its case in the realm of 'may be' true but has to upgrade it in the domain of "must be" true in order to steer clear of any possible surmise or conjecture.

25. It was held, that the Court must ensure that miscarriage of justice is avoided and if in the facts and

circumstances, two views are plausible, then the benefit of doubt must be given to the accused.

26. The materials on record when judged on the touch stone of the legal principles adumbrated hereinabove, leave no manner of doubt that the prosecution, in the instant case, has failed to prove unequivocally, the demand of illegal gratification and, thus, we are constrained to hold that it would be wholly un-safe to sustain the conviction of the appellant under Section 13(1)(d)(i)&(ii) read with section 13(2) of the Act as well. In the result, the appeal succeeds. The impugned judgment and order of the High Court is hereby set -aside. The appellant is on bail. His bail bonds stands discharged. Original record be sent back immediately.

8. On the other hand Mr.Borade, learned APP for the respondent/State supported the impugned judgment. According to him sanction accorded to prosecute the appellant is not disputed. So also, the appellant does not dispute acceptance of amount of Rs.200/- from the complainant. He submitted that in paragraph No.16 of the judgment the trial Court has considered the evidence and rightly held that demand of bribe made by the appellant to the complainant is established. According to him there is no reason to interfere with the impugned judgment and findings recorded by the trial Court and claimed to dismiss the appeal.

9. I have carefully considered the submissions made by the learned Advocate for the appellant and learned APP. I have gone through the evidence and impugned judgment.

10. There is no dispute that at the material time of incident on 26.08.2003 the appellant was Police Naik attached to the Fulambri Police Station and was a public servant. There is no dispute that sanction to prosecute him was accorded by Superintendent of Police (Rural), Aurangabad as per order dated 18.11.2003 (Exh.27).

11. There is also no dispute that the jeep No. MH-19-C-5565 was owned by one Mohd. Muzafar and the complainant was driver on the said jeep at the relevant time of incident.

12. The appellant was charged for the offences under Sections 7 & 13(1)(d) read with 13(2) of the said Act. As per the prosecution case the complainant Shaikh Kalimoddin (PW-1) was driver on the jeep owned by one Mohd. Muzafar. He was carrying passengers by

the said jeep between Khultabad to Fulambri. Moreover, as per the prosecution case, the accused Police Naik on two occasions demanded bribe of Rs.200/- from the complainant Shaikh Kalimoddin (PW-1) to allow the complainant to carry the passengers by the jeep. First demand i.e. pre- trap demand of bribe of Rs.200/- was made on 23.08.2003 at 04.00 pm by the accused. The second demand of bribe of Rs.200/- was made by the accused on 26.08.2003 at about 03.50 pm on the day of trap.

13. To prove first demand of 23.08.2003 the prosecution has relied upon the complaint (Exh.11), the evidence of complainant Shaikh Kalimoddin (PW-1) and pre-trap panchanama (Exh.16). It is stated in the complaint (Exh.11) that there used to be weekly Bazar at Fulambri on every Tuesday. On the day of Bazar the accused used to take installment of Rs.200/- from the complainant by stopping the jeep and he used to threat the complainant that if no money is given to him, he would park the jeep in the police station and he would file case against him. Further it is stated in the complaint that on 23.08.2003 on Saturday there was rush of passengers coming to Khultabad for Darshan of Bhadra Maroti and on that day at 16.00 hours while the complainant was taking passengers by the jeep from Khultabad to Fulambri near Deogiri Sugar Factory the accused stopped the jeep and demanded installment of Rs.200/- to the complainant. At that time the complainant told accused that he would ask Seth and he would give money on the day of Bazar at Fulambri. Thereupon, the accused allowed him to go. Thereafter, the complainant told in this respect to the owner of jeep Mohd. Muzafar. Mohd. Muzafar was not willing to give Rs.200/- as installment on every Bazar day to the accused and he, therefore, told the complainant to lodge complaint with the Anti Corruption Bureau, Aurangabad. The complaint further shows that therefore, the complainant went to the office of Anti Corruption Bureau at Aurangabad and narrated complaint as above which was reduced into writing. As per said complaint the accused was to accept the installment of Rs.200/- on 26.08.2003 on Khultabad-Fulambri road.

14. The above contents of complaint (Exh.11) cannot be read as substantive evidence. Those contents can be used for corroboration and to contradict the complainant who has filed the complaint. Therefore, before relying or otherwise on the contents of complaint (Exh.11) it is necessary to consider the evidence of the complainant.

15. The complainant Shaikh Kalimoddin (PW-1) in his evidence at Exh.10 as regards the first demand made by the accused to him on 23.08.2003 deposed in paragraph No.2 of his deposition as under:-

> 2. About a year ago Saturday on 23rd of English month while I was proceeding near the Devgiri Sakhar Karkhana by the above vehicle Barse asked me whether I had brought the amount I told him that I would bring the amount on Tuesday by telling the owner of the vehicle. I told this fact to Md.Mujaffhar who carried me to Naik of Anti Corruption at Aurangabad on Tuesday. I told the above facts to Naik. He reduced my complaint into writing. I have signed that complaint. Now I am shown the complaint dated 26.08.2003. It is the same, it bears my signature, its contents are true. It is at Exh.11. I have no dispute with accused Barse. There was money transaction between myself and Barse occasionally, I used to obtain the hand loan of Rs.100/- or Rs.200/- from Barse. The demand made by Barse on Saturday was to be paid by me towards the above vehicle as agreed per week. In case of non payment of the weekly 'Hafta' to Barse he used to stop my vehicle and keep it idle.

16. Moreover, in the cross-examination in paragraph 6 and 7 of his deposition the complainant (PW-1) has deposed as under: -

> 6. It is true that I was taking the hand loan of some amounts from the Barse since long. I obtained many time handloan of some amounts from Barse and returned to him the said amount and then again took and returned that amount whenever I needed. It is not true that on the day of this incident I have not given the amount of Rs.200/- to Barse as gratification. It is true that on 26.08.2003 I was to repay Rs.200/- to Barse towards the handloan obtained by me. It is true that even today also I am in due of Rs.200/- to Barse. It is true that prior to 26.08.2003 Barse had made the demand to me for repayment of Rs.200/-. It is true that I could not get sufficient business and hence I could not repay the amount. It is true that prior to 26.08.2003 I had told Barse I would bring the owner of the vehicle is and would repay the amount.

7. It is true that there was rush of people in the bazzar of Phulambri due to weekly Bazzar on 26.08.203. It is true that on the day also there was no talk between myself and Barse about the payment of installments. Police did not record my statement on that day after Barse was taken into custody. It is true that the complaint lodge by me against Barse was in Hindi language. It is true that I had got annoyed since Barse had give police language while claiming Rs.200/- to me. It is true that I have lodge the false complaint against Barse.

17. As per the prosecution case in the complaint (Exh.11) on 23.08.2003 on Khultabad- Fulambri road at 04.00 pm on Saturday the accused made first demand of bribe of Rs.200/- as Hafta and the complainant told the same to the jeep owner Mohd. Muzafar and as per his instructions he went to the office of Anti Corruption Bureau at Aurangabad and lodged the complaint (Exh.11). On oath as referred earlier the complainant deposed that he told the fact of first demand made to him by the accused to Muzafar and Muzafar carried me to Naik of Anti Corruption Bureau at Aurangabad on Tuesday and then he told above facts to Naik and he reduced the complaint (Exh.11) into writing. In the complaint (Exh.11) it is not stated that Mohd. Muzafar owner of the jeep accompanied the complainant when he had gone to the office of Anti Corruption Bureau at Aurangabad on 26.08.2003 to lodge the complaint. On the contrary, the complaint (Exh.11) shows that as per the advice of Mohd.Muzafar the complainant went to the office of Anti Corruption Bureau at Aurangabad. Thus, there is no consistency in the evidence of complainant and the contents of complaint as to whether Mohd. Muzafar owner of the jeep accompanied the complainant when he had gone to the Anti Corruption Bureau at Aurangabad to lodge the complaint.

18. Moreover, in the complaint (Exh.11) as referred earlier the complainant has stated that he is not in enimical terms with the accused and he is not having his personal financial transaction with the accused. As referred earlier in the examination- in-chief itself the complainant has stated that he has no dispute with the accused. There was money transaction between him and the accused occasionally. He used to obtain handloan of Rs.100/- or Rs.200/- from Barse/accused. The demand made by Barse/accused on Saturday was to be paid by him (witness). Moreover, as referred earlier in Paragraph No.6 of his deposition the complainant has admitted that he was taking handloan from the accused, on 26.08.2003 he was to repay Rs.200/- to the

accused towards handloan obtained by him and prior to 26.08.2003 the accused had made demand to him for repayment of Rs.200/-. Thus, there is no consistency in the evidence of the complainant and the complaint that there was no money transaction between the complainant and the accused prior to the incident in this case.

19. Due to above inconsistencies in the evidence of complainant (PW-1) and the complaint (Exh.11) lodged by him and particularly when he admitted that prior to 26.08.2003 the accused had made demands to him for repayment of Rs.200/-handloan which was given to him by the accused and he was to repay Rs.200/- on 26.08.2003 evidence of complainant regarding first demand of bribe of Rs.200/- made by the accused to him on 23.08.2003 is doubtful.

20. When as per the case of the prosecution the jeep which the complainant was running as driver on Khultabad to Fulambri road and in respect of which bribe of Rs.200/- was demanded by the accused was owned by one Mohd.Muzafar resident of Khultabad and when after the first demand made by the accused to the complainant on 23.08.2003 the complainant informed the same to Mohd.Muzafar owner of the jeep and then when as per evidence of the complainant he had gone to the Anti Corruption Bureau at Aurangabad on Tuesday and Mohd. Muzafar had carried him to the said office the prosecution was required to examine Mohd.Muzafar owner of the jeep to make the court believe that really first demand was made by the accused to the complainant on 23.08.2003 and after said demand the complainant informed the same to the owner of the jeep Mohd.Muzafar and then said Mohd.Muzafar had taken the complainant to lodge complaint (Exh.11) in Anti Corruption Bureau at Aurangabad, when evidence of complainant as regards first demand is doubtful as observed earlier. Moreover, the prosecution should have examined Muzafar being owner of the jeep because the complainant driver of the jeep had no reason to pay any amount to the accused at his own as bribe to run jeep on Khultabad to Fulambri road to carry passengers, without permission of owner of jeep. This is because in the complaint (Exh.11) itself, the complainant has stated that at the time of first demand on 23.08.2003 he told accused that he would inform in respect of demand of Rs.200/- made by the accused to him, to Mohd.Muzafar owner of the jeep. Therefore, the prosecution should have examined Mohd.Muzafar owner of the jeep. Admittedly, the prosecution has not examined Mohd.Muzafar owner of the jeep, though his statement was recorded by the PI Naik (PW-6)

the Investigating Officer during investigation. Thus, the prosecution has withheld material evidence of Mohd. Muzafar owner of the jeep who could have thrown light on the prosecution case as regards the first demand made by the accused to the complainant of bribe of Rs.200/- on 23.08.2003 and it was necessary on the back ground that the complainant has admitted that on 26.08.2003 on the day of trap an amount of Rs.200/- taken by him as a handloan was to repay the accused.

21. In the above circumstances merely because there is a reference in pre-trap panchanama (Exh.16) regarding first demand that on 23.08.2003 the accused made demand of Rs.200/- to the complainant, which is made on the basis of complaint (Exh.11), is of no help to the prosecution especially when the evidence of complainant in respect of the said demand is doubtful as observed earlier.

22. In paragraph No.5 of his deposition the complainant (PW-1) has stated that he knows the accused since last 5 to 6 years and he resides at Fulambri. His driving license and all the papers of the vehicle used to be up to date. The police have not filed any criminal action against him in respect of this vehicle/jeep. He admitted that police have not made to stand his vehicle on the road at any time. If the jeep which the complainant was running to carry passengers was not made to stand on the road by police any time, papers of the said jeep were up to date, no criminal action was filed against the complainant in respect of jeep case of the prosecution regarding first demand of bribe of Rs.200/- made by the accused to the complainant on 23.08.2003 by stopping the jeep on Khultabad to Fulambri road near Sugar factory is not believable. The above evidence suggests that there was no occasion for accused to make demand on 23.08.2003 as alleged by the prosecution.

23. For all the reasons discussed above I hold that the complaint (Exh.11), the evidence of complainant (PW-1) referred to above and pre-trap panchanama (Exh.16) are not sufficient to state beyond doubt that on 23.08.2003 at 04.00 pm accused made initial/ first demand of Rs.200/- to the complainant as alleged by the prosecution. As such I hold that the prosecution has failed to prove said first demand of bribe made by the accused to the complainant.

24. As regards second demand of bribe made by the accused to the complainant (PW-1) is concerned, as per the prosecution case said demand was made on the date of trap on 26.08.2003 at Fulambri

at about 15.50 hours i.e. at about 03.50 pm. To prove said demand prosecution has relied upon the evidence of complainant (PW-1), Panch No.1 Keshav Jadhav (PW-2) Shadow Panch, and Shaikh Nazimoddin (PW-4).

25. Before considering above said evidence on second demand, it is necessary to refer the evidence of complainant in respect of procedure followed by the Investigating Officer PI Naik (PW-6) while giving tainted currency notes to the complainant after they were smeared with anthracene powder, which were to be handed over to the accused by the complainant after the second demand on the day of trap. In this respect the complainant has stated thus:

> On Tuesday he had gone to the office ACB, Aurangabad. Naik (PW-6) Police Inspector had called two panchas. He told that he had brought Rs.210/- and an amount of Rs.200 i.e. one currency note of 100, one currency note of 50, two currency notes of 20 and one currency note of 10 were given to Naik and anthracene powder was smeared to the said currency notes and then they were put in his left chest pocket of shirt. He as well as both the panchas were given instructions by the PI Naik the Investigating Officer. He was specifically instructed to give said tainted amount to the accused, if he would claim else not. Then he alongwith two panchas and Nazimoddin (PW-4) maternal uncle of Mohd. Muzafar owner of the jeep proceeded in the jeep towards Fulambri.

26. Now let us consider the evidence of complainant (PW-1), PW-2 Shadow Panch and Shaikh Nazimoddin (PW-4) on the second demand on the day of trap i.e. on 26.08.20063. The complainant (PW-1) has stated that at about 01.00 to 01.30 pm on that day he, two panchas, Shaikh Nazimoddin, Pathan and one another person started from Office of Anti Corruption Bureau at Aurangabad by the jeep. Both panchas were sitting in his jeep. They reached to Khultabad and then started towards Fulambri. They reached Fulambri. But they did not find accused Barse on way, then he parked his jeep/vehicle and waited for arrival of the accused. Another vehicle was also parked at some distance. After 15 minutes accused came there on motorcycle. He had uniform on his person and also had T-shirt on it. Another jeep driver came there, paid Rs.200/- to Barse /accused and then went away. Barse took out a diary from his pocket and wrote some in it. He

(witness) did not see what he wrote in diary. Thereafter, he (witness), Shaikh Nazimoddin (PW-4) and one Panch went to Barse. Thereafter, he introduced Shaikh Nazimoddin with Barse telling him that he was the owner of the vehicle i.e. jeep. He told Barse to have talk about money with Shaikh Nazimoddin. Shaikh Nazimoddin talked and said that there was no business for him. Then Barse told that he should pay whatever he had brought. Shaikh Nazimoddin then told him (witness) to pay an amount whatever he had. He took out the amount and paid to Barse. The accused accepted the amount and kept in left chest pocket of his shirt. Barse/accused counted those notes and put in his pocket. Then complainant gave signal. Then Naik came and caught hold Barse. Then Barse/accused was made to sit into vehicle and panch witness was also made to sit into the vehicle. The complainant stated that he does not know what happened thereafter since he was out of the vehicle.

27. Above is the only evidence of the complainant on second demand on the day of trap. Above evidence shows that the complainant, Shaikh Nazimoddin and one panch, who must be PW-2 Shadow panch though the complainant has not specifically stated so, went to the accused after parking the jeep at Fulambri after they saw that the accused came on motorcycle. This evidence shows that the complainant introduced Shaikh Nazimoddin (PW-4) to the accused as a owner of the jeep and told the accused to have a talk with Shaikh Nazimoddin. Then there was talk between them. Then on the say of Shaikh Nazimoddin the complainant paid amount to the accused. This evidence does not at all show that on the day of trap on 26.08.2003 at about 15.50 hours the complainant asked the accused about his work of allowing him to carry passengers on Khultabad to Fulambri road by the jeep and then accused made demand of Rs.200/- to him. Said evidence further does not show that for the said work after meeting the complainant, shadow panch and Shaikh Nazimoddin the accused demanded agreed bribe amount of Rs.200/- to the complainant and thereupon the complainant (PW-1) paid said amount to the accused. The evidence clearly shows that it is the Shaikh Nazimoddin who told the complainant to pay the amount to the accused and then the complainant paid the amount to the accused. Even the complainant does not claim that Shaikh Nazimoddin told him to pay Rs.200/- to the accused and then he paid Rs.200/- to the accused. Thus, the above referred evidence of complainant is not at all sufficient to state that on the day of trap the

accused demanded bribe amount of Rs.200/- to complainant as per the prosecution case.

28. The next evidence on the second demand is of PW-2 shadow panch who was with the complainant (PW-1) all the while on the day of trap after they had left office of Anti Corruption Bureau at Aurangabad for trap as instructed by PI Naik. PW-2 has stated that Naik (PW-6) instructed him to be with the complainant Kalimoddin who was also instructed to hand over the amount to the accused on demand only. Thereafter, he has stated all about giving of currency notes of Rs.200/- smeared with anthracene powder to the complainant and that they proceeded to Fulambri by the jeep. Material evidence of PW-2 Shadow Panch in respect of second demand is in paragraph 3 of his deposition and said material portion of his evidence is re-produced as under:-

> "After a while that motorcyclist called Kalimoddin to him. Hence, Kalimuddin and thereafter Nijamuddin and thereafter myself all went to that motorcyclist. That motorcyclists was Mr.Barse. I say so because his name was mentioned in the panchanama Exh.16. None told me there his name to be Barse. The motorcyclist claimed the amount and Kalimuddin paid the amount. The motorcyclist asked as to whether the amount was brought. Kalimuddin told that, he had brought the amount. Then motorcyclist asked to pay the amount. Accordingly, Kalimuddin put his right hand in his left side chest pocket of his shirt and took out the anthracene powder applied notes of Rs.200/- and handed over them to that motorcyclist. The motorcyclist accepted those notes in his right hand put them in the left chest pocket of his inner uniform shirt. The motorcyclist also counted the notes and amount in his hand. Now I again say that I do not remember as to whether that fellow put the notes in his covered ordinary shirt pocket or inner uniform shirt pocket. Then Kalimoddin gave the agreed signal by lifting his hands as we do in case of lazyness and then Naik and his companions stood near by area came to us and caught hold of that motorcyclist. That motorcyclist did not talk with Najimuddin in my presence. Thereafter we all carried that motorcyclist in a jeep vehicle in the police Stn. At Fulambri. Prior to that, that motorcyclist was made to sit in the jeep vehicle. Nothing was done then there. The motorcyclist told his name to be Jagannath Barse, after he was caught. After the

motorcyclist was made to sit in the jeep vehicle, his personal search was taken and some amount was found with him. Naik took out the amount from the pocket of that motorcyclist. The pocket from where the amount was taken was the pocket of the uniform shirt and left chest pocket."

29. From the above evidence of PW-2 it is seen that the motorcyclist i.e. the accused asked whether the amount was brought. Thereupon, the complainant Kalimoddin told that he had brought the amount. Then motorcyclist /accused asked to pay the amount and accordingly complainant gave tainted amount of Rs.200/- to the accused. This evidence is not consistent with the evidence of complainant (PW-1) as the complainant has not stated that the accused demanded amount to him and then he paid amount to accused. On the contrary the evidence of the complainant is that there was talk between Shaikh Nazimoddin (PW-4) and the accused and on the say of Shaikh Nazimoddin he paid amount to the accused. Another aspect to be noted is that PW-2 shadow panch has stated that the motorcyclist i.e. accused did not talk with Shaikh Nazimoddin in his presence. As mentioned earlier the complainant states that Shaikh Nazimoddin had a talk with the accused. Thus, there is inconsistency in the evidence of complainant and PW-2 Shadow panch in respect of talk between Shaikh Nazimoddin and the accused before amount was paid to the accused.

30. Moreover, after PW-2 was declared hostile by the prosecution, the learned APP put certain leading questions to the said witness and he has admitted that person sitting before the Court was the motorcyclist and was Barse/accused. Said Barse asked as to how much amount was brought, to complainant Kalimoddin and Shaikh Nazimoddin. He stated that he does not remember that Kalimoddin said that he had brought Rs.200/- as installment as agreed. He admitted that thereafter Barse said that the amount should be paid and that accordingly the complainant Kalimoddin paid that amount and then Barse put that amount in his T-shirt pocket on his person. Further, PW-2 in answer to the question for what these Rs.200/- were to be paid to Barse, replied that the amount was to be paid weekly. He also admitted that said amount was to be paid as installment to allow complainant/Kalimoddin to drive the jeep and said amount was paid to accused so that police should not take action against plying the jeep.

31. In the cross-examination on behalf of the accused PW-2 admitted that he had told to police only that after he, complainant and Shaikh Nazimoddin went near Barse, Barse claimed amount and Shaikh Nazimoddin paid it to him. He further admitted that thereafter Barse said to Naik when Naik caught hold him that he had not taken any bribe and that he has received back amount advanced by him. The above said testimony of PW-2 is contrary to his evidence in examination-in-chief that the complainant paid amount to the accused. So also, aforesaid evidence does not show that on asking the complainant to the accused about his work the accused demanded bribe amount of Rs.200/- as instructed to the complainant by the Investigating Officer PI Naik (PW-6).

32. In view of the inconsistencies noted earlier in the evidence of the complainant and PW-2 shadow panch and in view of the fact that the evidence of PW-2 panch regarding demand of amount made by the accused to the complainant is shattered in the cross-examination as he stated that Barse/accused claimed the amount and Shaikh Nazimoddin (PW-4) paid it to accused which is contrary to his evidence in examination-in-chief and when he stated that immediately the accused gave explanation to PI Naik that he received back the amount advanced by him, his uncorroborated evidence regarding alleged second demand of amount is not sufficient to state beyond doubt that really on the day of trap i.e. on 26.08.2003 accused demanded bribe of Rs.200/- to the complainant as per the prosecution case.

33. The next is the evidence of Shaikh Nazimoddin (PW-4) which is relied upon by the prosecution to prove second demand made by the accused on the day of trap. As per the prosecution case he was with the complainant and PW-2 shadow panch when the accused demanded bribe to the complainant. His evidence as regards demand is concerned is that on 26.08.2003 they had left Office of Anti Corruption Bureau at Aurangabad by the jeep and reached at Khultabad at 02.00 pm. They halted near Bombay Hospital, Khultabad. Thereafter the complainant collected some passengers and thereafter they all proceeded to Fulambri. They reached there by 03.00 pm. Their vehicle was stopped near bus stand and they got down and waited for a while. After some time the police officer came there. The complainant gave Rs.200/- to him, he accepted that amount. Thereafter, anti-corruption men caught hold him. The complainant told him that the person caught was Police Officer. Then he and the

complainant returned to Khultabad. He stated that no talk took place between complainant Kalimoddin and accused in his presence. He stated that it did not happen that the complainant Kalimoddin introduced him to accused saying that he was owner of the jeep and that the accused should talk to him about Hafta.

34. From the evidence of Shaikh Nazimoddin (PW-4) it can be said that the complainant Kalimoddin gave Rs.200/- to the accused and accused accepted the said amount and there was no talk between the complainant and accused in his presence. Thus, though this witness was with the complainant/PW-1 and PW-2 shadow panch when allegedly the accused made second demand on the day of trap i.e. on 26.08.2003 this witness has not stated that the accused demanded bribe of Rs.200/- to the complainant to allow the complainant to run the jeep to carry passengers and thereupon the complainant paid said bribe amount to the accused as alleged by the prosecution. As mentioned earlier while discussing the evidence of complainant/PW-1, PW-1 has stated that he had introduced Shaikh Nazimoddin to the accused as owner of jeep and there was talk between Shaikh Nazimoddin and the accused, but this witness Shaikh Nazimoddin has not stated so as mentioned earlier. Another aspect to be noted is that this witness Shaikh Nazimoddin claims that on 26.08.2003 he came to Aurangabad on the request of complainant Shaikh Kalimoddin and he accompanied him to the office of Anti Corruption Bureau at Aurangabad. The complainant PW-1 has not stated in this respect in the complaint Exh.11 or while depositing before the Court. Therefore, it is doubtful whether Shaikh Nazimoddin had really accompanied the complainant (PW-1) on the day of trap at Fulambri. For the above reasons the evidence of Shaikh Nazimoddin (PW-4) is of no help to the prosecution to prove second demand allegedly made by the accused to the complainant on the day of trap.

35. So far as recovery of tainted amount of Rs.200/- from the accused is concerned the evidence of PW-2 shadow panch shows that after the accused was caught he was made to sit in the jeep. His personal search was taken and some amount was found with him. So also, PW-2 has admitted that PW-3 Panch No.2-Sudhir at the instance of PI Naik took out two bundles of notes and pocket diary from the pocket of T-shirt on the person of the accused. One of the bundles of currency notes was consisting of a note of Rs.100/-, a note of Rs.50/-, two notes of Rs.20/- and a note of Rs.10/-. Number of all said notes

were tallied with the numbers of notes noted down in the pre-trap panchanama. Similarly PW-3 panch No.2- Sudhir has stated that on asking Naik he took out notes from the pocket of accused. They were notes of Rs.100/- a note of Rs.50/-, two notes of Rs.20/- each and one note of Rs.10/-. Moreover, the evidence of PI Naik (PW-6) shows that currency notes as deposed by PW-2 and PW-3 panchas were recovered from the accused. The evidence of above all witnesses in respect of recovery of above amount from the accused has not been shattered in the course of their examination on behalf of the accused. Thus, on the basis of evidence of above witnesses and contents of post -trap panchanama (Exh.17) in respect of recovery of aforesaid amount of Rs.200/- from the accused it can be said that tainted amount of Rs.200/- was recovered from the accused. Naturally, therefore, it can be said that said amount was accepted by the accused. The accused also does not dispute the said fact as it is clear from suggestion on his behalf to the PW-2 shadow panch that immediately after he was caught by PI Naik he (accused) said he had not taken any bribe and that he has received back the amount advanced by him.

36. As observed earlier the prosecution has failed to prove first demand made by the accused to the complainant (PW-1) 23.08.2003 at about 04.00 pm and second demand made on the day of trap i.e. on 26.08.2003 at about 15.50 hours beyond reasonable doubt. But the prosecution has only proved that tainted amount of Rs.200/- was recovered from the accused. Therefore, now it is to be seen whether the presumption under Section 20 of the said Act would arise in favour of the prosecution when the prosecution has not proved the demands and only proved acceptance of amount by the accused. Learned Advocate for the appellant has relied upon the decision in the case of *P. Satyanarayana Murthy* (supra) to support his argument that mere possession and recovery of notes from the accused without proof of demand would not establish a offence under Section 7 as well as under Section 13 (1)(d)(i)&(ii) of the Act as observed in paragraph Nos. 20 and 21 of the said decision. Thus, applying the ration laid down in the case of P. Satyanarayana Murthy (supra) I hold that as in the present case the prosecution has failed to prove the initial demand/first demand dated 23.08.2003 made by the accused to complainant and second demand made on the day of trap i.e. 26.08.2003 mere recovery of currency notes from the accused would not be sufficient to attract presumption under Section 20 of the said Act to state that the prosecution has proved the offences under

Section 7 and under Section 13(1)(d) punishable under section 13(2) of the said Act.

37. It is held that the prosecution has failed to prove demand of illegal gratification made by accused to complainant beyond reasonable doubt and it is proved that tainted amount was found in possession of accused. Therefore, it is to be seen whether the accused has given probable explanation of said amount in the light of his defence. It is the specific defence of the accused that he had given handloan to the complainant (PW-1) from time to time and as he used police language to the complainant for repayment of said handloan the complainant has filed false case against him.

38. As referred earlier in paragraph Nos. 6 and 7 of his deposition the complainant has in clear terms stated that he was taking handloan of some amount from the accused since long. He obtained many times handloan of some amount from the accused and returned to him said amount. On 26.08.2003 i.e. on the day of trap he was to repay Rs.200/- to the accused towards handloan obtained by him. He admitted that prior 26.08.2003 accused had made demand to him for repayment of Rs.200/- and as he could not get sufficient business he could not repay the same amount. So also, he stated that he was annoyed since accused had used police language while claiming Rs.200/- to him, he lodged the false complaint against the accused. Moreover, as referred earlier PW-2 shadow panch has admitted that accused said to Naik when Naik (PW-6) caught accused that he had not taken any bribe and that he received back amount advanced by him. So also, in answer to question No.61 i.e. why prosecution witnesses are deposing so? in the statement under Section 313 of the Criminal Procedure Code the accused has answered as under:-

> "Kalimoddin had taken some hand loan from me. When I insisted him for its repayment in the police language he thached this false story. Naik wanted to complete his such quota of cases and hence he took the help of Keshav Jadhav PW-2 and Sudhir Mahalpure PW-3 and involved me falsely at the instance of Kalimoddin.
>
> At the instance of Naik, Keshav and Sudhir both panch witnesses are deposing false.
>
> Najimoddin PW-4 is the relative of Kalimoddin and hence at his instance he is deposing so.

Ramesh Pawar PW-5 had also taken some hand loan from me and he repaid the amount to me on that day"

39. From the above evidence of complainant (PW-1), PW-2 shadow panch and answer to question No.61 in the statement under Section 313 of the Criminal Procedure Code given by the accused, as the accused had give immediate explanation about the amount received by him I find that defence of the accused that the complainant had taken some handloan from him and when he insisted for its repayment in police language the complainant has falsely involved him is appearing probable and acceptable.

40. The trial Court in paragraph no.15 of the judgment observed that panch witness namely Keshav (PW-2) and Sudhir (PW-3) as well as companion of complainant namely Shaikh Nazimoddin (PW-4) and Ramesh Pawar (PW-5) have turned hostile. Further the trial Court has observed that the complainant Shaikh Kalomoddin (PW-1) has also not supported the prosecution whole heartedly and admitted almost all suggestions put to him during the course of examination on behalf of the accused trying to dilute the prosecution story and to turn it in favour of the accused. However, the trial Court only relying upon the evidence of PI Naik (PW-6) the Investigating Officer and on the basis of complaint (Exh.11) filed by the complainant (PW-1) and pre- trap panchanama (Exh.16) held that the prosecution has proved the offences against the accused with which he was charged. It appears that according to the trial Court there is nothing on record to show as to why the complainant narrated all false story in complaint (Exh.11) before PI Naik (PW-6) and abefore panchas (PW-2 & 3). For the reasons discussed earlier while appreciating the evidence of complainant (PW-1), PW-2 shadow panch and Shaikh Nazimoddin (PW-4) it is observed that their evidence is not sufficient to state beyond doubt that the accused made first demand on 23.08.2003 and second demand on the day of trap on 26.08.2003 due to inconsistencies noted in the evidence of these witnesses. It is also observed that the contents of the complaint (Exh.11) cannot be read as a substantive evidence. It is observed that when the complainant's evidence about demand is doubtful mere mention of first demand in pre-trap panchanama (Exh.16) is of no help to the prosecution case.

41. Another aspect to be noted is that when the evidence of complainant (PW-1) material witness of the prosecution is not

sufficient to prove demands made by the accused to him and admitted the defence of the accused of giving handloan to him and that an amount of Rs.200/- was due to him on the day of trap i.e. on 26.08.2003 and as the prosecution has not examined Mohd.Muzafar owner of the jeep and as such withheld material piece of evidence at whose instance the complaint was lodged and when the defence of the accused is probable as observed earlier the observations of the trial Court that the defence of the accused does not appear to be probable are not correct. As such I hold that the case of the prosecution is doubtful and its benefit should go to the accused.

42. For all the reasons discussed above, I hold that the prosecution has failed to prove that on 26.08.2003 at Fulambri the appellant/accused a public servant demanded and accepted Rs.200/- from the complainant as a gratification as motive to allow the complainant to run the jeep without having permit to carry passengers and obtain said gratification amount from the complainant by corrupt or illegal means for himself by abusing his position as a public servant which amounts to criminal misconduct and failed to prove the offences under Section 7 and 13(1)(d) read with Section 13(2) of the said Act against the accused beyond reasonable doubt and as such he is entitled to be acquitted by giving benefit of doubt. Therefore, the findings recorded by the trial Court that the prosecution has proved aforesaid offences against the accused are not sustainable. Consequently, the impugned judgment and order convicting and sentencing the appellant/accused for the aforesaid offences is liable to be quashed and set aisde by allowing the appeal. In the result following order is passed.

ORDER

a] The appeal is allowed.

b] The impugned judgment and order dated 29.03.2005 in Special Case No.26/2003 (PC Act) passed by the II-Special Judge (PC Act) Aurangabad convicting and sentencing the appellant/accused for the offences under Section 7 and Section 13(1)(d) punishable under Section 13(2) of the Prevention of Corruption Act is hereby quashed and set aside.

c] The appellant/accused Jagganath Divanrao Barse is acquitted of the offences punishable under Sections 7 and 13(1)(d) punishable under Section 13(2) of the Prevention of Corruption Act.

d] The bail bond of the appellant stands cancelled.

e] Fine amount as per the impugned judgment and order, if deposited by the appellant be refunded to him.

f] Order regarding disposal of the Muddemal property passed by the trial Court is maintained.

g] Record and proceeding in Special Case No.26/2003 be sent to the trial Court forthwith.

Result:- Appeal allowed.

ABC 2019 (I) 212 BOM
ACQUITTAL & BAIL CASES

HIGH COURT OF BOMBAY

(Ravi K. Deshpande & V. G. Joshi, JJ.)
Criminal Appeal No. 280/2016
Decided on 2 November, 2018
Nagpur Bench

MANGAL @ MANGESH HUSEN MESHRAM - Appellant(s).

Versus

STATE OF MAHARASHTRA - Respondent(s).

Law Covered:- ***(A) Indian Penal Code, 1860 — Section 323 & 376 — Assault & repeated Rape — Sole testimony of victim — None of the circumstance corroborates her version—Medical evidence — totally against the prosecution case— Delay in FIR — Non examination of relevant witness — Chemical Analyser's Report does not support the prosecution case — Held, the evidence of victim is not of such quality so as to place implicit faith to base conviction— Acquittal. (Para 17)***

(B) Indian Evidence Act, 1872 — Section 3 — Relevant fact — Repeated rape— Conduct of witness —repeated rape means that the alleged occurrence took considerable time as there was gap between two occurrences — victim must have raised alarm or tried to run away, but nothing of that kind happened — doubtful — Indian Penal Code, 1860 — Section 376. (Para 12)

(C) Criminal Jurisprudence — Rape — offence of — Establishing of — Presence of injuries on the person of the accused — relevance of — Held, though injuries are not must for establishing the