K.S.Panduranga vs State Of Karnataka on 1 March, 2013

Equivalent citations: AIR 2013 SUPREME COURT 2164, 2013 (3) SCC 721, 2013 AIR SCW 1382, AIR 2013 SC (CRIMINAL) 869, 2013 (2) AIR KANT HCR 70, 2013 (3) SCALE 152, (2013) 2 CHANDCRIC 134, 2013 (3) CALCRILR 6, 2013 (2) SCC(CRI) 257, 2013 ALL MR(CRI) 1485, (2013) 124 ALLINDCAS 41 (SC), 2013 (3) KCCR 306.1 SN, (2013) 1 ALLCRIR 994, (2013) 116 CUT LT 669, (2013) 3 KANT LJ 685, (2013) 55 OCR 76, (2013) 2 RECCRIR 219, (2013) 1 CURCRIR 639, (2013) 3 SCALE 152, (2013) 2 DLT(CRL) 1, (2013) 2 ALLCRILR 459, (2013) 1 KER LT 874, (2013) 81 ALLCRIC 957, (2013) 2 MAD LJ(CRI) 80, 2013 (2) ALD(CRL) 520

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Bench: Dipak Misra, K. S. Radhakrishnan

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 373 OF 2013
(Arising out of S.L.P. (Crl.) No. 3962 of 2012)

K.S. Panduranga ... Appellant

Versus

State of Karnataka ... Respondent

J U D G M E N T

Dipak Misra, J.

Leave granted.

2. The appellant was convicted for the offences punishable under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (for short "the Act") by the learned Special Judge, Bangalore, and sentenced to undergo one year rigorous imprisonment and to pay a fine of Rs.10,000/-, in default, to suffer a further rigorous imprisonment for two months on the first score and four years rigorous imprisonment and to pay a fine of Rs.15,000/- and on failure to pay fine to

suffer further rigorous imprisonment for three months on the second count, with the stipulation that both the sentences shall be concurrent.

3. In appeal, the High Court of Karnataka by the impugned judgment, confirmed the conviction, but reduced the sentence to two years' rigorous imprisonment from four years as far as the imposition of sentence for the offence under Section 13(1)(d) read with Section 13(2) of the Act is concerned and maintained the sentence in respect of the offence under Section 7 of the Act.

4. The accusations which led to the trial of the accused-appellant are that H.R. Prakash, PW-1, the owner of Prakash Transport, was having a contract for the transport of transformers belonging to Karnataka Vidyuth Karkhane (KAVIKA), Bangalore, and the said agreement was for the period 15.9.2000 to 14.9.2001. Under the said agreement, the transporter was required to transport transformers from Bangalore to various places all over Karnataka. Despite the agreement for transportation, three months prior to the lodgment of the complaint, the transport operator did not get adequate transport work. The appellant, who was working as Superintendent of KAVIKA, Bangalore, was incharge of the dispatch department and, therefore, PW-1 approached him. At that juncture, a demand of Rs.10,000/- was made as illegal gratification to give him more transport loads. The accused-appellant categorically told PW-1 that unless the amount was paid, no load could be allotted to his company. Eventually, a bargain was struck for payment of Rs.5,000/- to get the load. As PW-1 was not interested in giving the bribe amount to the accused, he approached the Lokayukta and lodged a complaint as per Exht. P-1 which was registered as Criminal Case No. 9 of 2001. The investigating agency of Lokayukta, after completing the formalities, got a trap conducted. During the trap, a sum of Rs.5,000/- was recovered from the custody of the accused. After completion of all the formalities, sanction order was obtained from the competent authority and charge sheet was placed before the competent court for the offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the Act.

5. The accused persons pleaded innocence and took the plea of false implication.

6. The prosecution, in order to substantiate the allegations against the accused, examined PWs 1 to 6 and marked the documents, Exhts. P-1 to P- 12, and brought on record MOs-1 to 12. The defence, in order to establish its stand, examined a singular witness, DW-1.

7. The learned trial Judge posed three questions, namely, (i) whether the sanction order obtained to prosecute the accused was valid and proper;

(ii) whether the prosecution had been able to prove that the accused had demanded and accepted the illegal gratification of Rs.5,000/- as a motive or reward for the purpose of showing an official favour to the complainant, i.e., allotting transport loads and thereby committed the offence under Section 7 of the Act; and (iii) whether the prosecution had proven that the accused, by means of corrupt and illegal means, abused his position and obtained a pecuniary advantage in the sum of Rs.5,000/-, as a result of which he committed an offence punishable under Section 13(1)(d) read with Section 13(2) of the Act. The learned Special Judge, analyzing the evidence on record, answered all the questions in the affirmative and came to hold that the prosecution had been able to bring

home the charge and, accordingly, recorded the conviction and imposed the sentence as mentioned earlier.

8. On appeal being preferred, the High Court confirmed the conviction and the sentence on the foundation that the recovery, demand and acceptance of illegal gratification had been established to the hilt.

9. We have heard Mr. S.N. Bhat, learned counsel for the appellant. None has represented the State.

10. The first plank of submission of the learned counsel for the appellant is that the High Court could not have heard the appeal in the absence of the counsel for the accused and proceeded to deliver the judgment. It is urged by him that though at a later stage, the counsel appeared and put forth his contention, yet the fundamental defect in proceeding to deal with the appeal vitiates the verdict. To bolster the said submission, he has commended us to the decision in Mohd. Sukur Ali v. State of Assam[1]. In the said case, the Division Bench held as follows: -

> "5. We are of the opinion that even assuming that the counsel for the accused does not appear because of the counsel's negligence or deliberately, even then the court should not decide a criminal case against the accused in the absence of his counsel since an accused in a criminal case should not suffer for the fault of his counsel and in such a situation the court should appoint another counsel as amicus curiae to defend the accused. This is because liberty of a person is the most important feature of our Constitution. Article 21 which guarantees protection of life and personal liberty is the most important fundamental right of the fundamental rights guaranteed by the Constitution. Article 21 can be said to be the "heart and soul" of the fundamental rights." After so stating, the Bench relied upon the decision of the US Supreme Court in Powell v. Alabama[2] which was cited with approval by this Court in A.S. Mohammed Rafi v. State of Tamil Nadu[3]. Reference was also made to Man Singh and another v. State of Madhya Pradesh[4] and Bapu Limbaji Kamble v. State of Maharashtra[5]. Eventually, the Bench held as follows: -
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> "The Founding Fathers of our Constitution were themselves freedom fighters who had seen civil liberties of our people trampled under foreign rule, and who had themselves been incarcerated for long period under the formula "Na vakeel, na daleel, na appeal" (No lawyer, no hearing, no appeal). Many of them were lawyers by profession, and knew the importance of counsel, particularly in criminal cases. It was for this reason that they provided for assistance by counsel under Article 22(1), and that provision must be given the widest construction to effectuate the intention of the Founding Fathers." After so holding, the learned Judges set aside the impugned judgment of the High Court and remitted the matter to take a fresh decision after hearing the learned counsel for the appellant in the High Court whose name was not shown in the cause list and the name of the former counsel was shown. We may hasten to clarify whether in the said case the matter should have been remitted or not is presently not the concern. The question is whether the ratio laid down by the

> Division Bench that even if the counsel for the accused does not appear because of his negligence or deliberately, then the court should not decide the case against the accused in the absence of his counsel as he should not suffer for the fault of the counsel.

11. At this stage, we think it appropriate to refer to the decisions which have been relied on by the Division Bench. In Bapu Limbaji Kamble (supra), the High Court had convicted the appellant under Section 302 of the IPC on the charge of murdering his wife by strangulating her to death. At the time of hearing of the appeal, the counsel for the accused did not appear. The High Court perused the evidence and decided the matter. In that context, this Court stated thus:-

> "We are of the view that the High Court should have appointed another advocate as amicus curiae before proceeding to dispose of the appeal. We say so especially for the reason that there are arguable points in the appeal such as the delay in giving the report to the police, the material discrepancy between the version in the FIR and the deposition of PW 4 and the non- disclosure by PW 3 of the alleged confession made by the accused after PW 4 came to the house. The question whether there is clinching circumstantial evidence to convict the appellant also deserves fuller consideration. Without expressing any view on the merits of the case, we set aside the impugned order of the High Court and remand the matter for fresh disposal by the High Court expeditiously, after nominating an amicus to assist the Court."

12. From the aforesaid passage, it is demonstrable that this Court has not stated as a principle that whenever the counsel does not appear, the court has no other option but to appoint an amicus curiae and, thereafter, proceed with the case. What has been stated above is that as there were arguable points in appeal and further whether there was clinching circumstantial evidence to convict the appellant or not, deserved a fuller consideration and in that backdrop, the Court directed for nominating an amicus to assist the Court. On a fair reading of the aforesaid passage, it is quite clear that the direction was issued in the special circumstances of the case.

13. In Man Singh and another (supra), the learned single Judge of the High Court had dismissed the appeal preferred by the appellant who had called in question the legal propriety of his conviction for the offence punishable under Section 8/18(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and such other offences. This Court observed that when the appeal was called, the counsel who was appointed through the Legal Aid Committee did not appear and the learned single Judge heard the matter with the assistance of the learned panel lawyer for the respondent State. It was contended before this Court that the High Court should not have dismissed the appeal without engaging another counsel or at least without appointing an amicus curiae. Resisting the said contention, it was contended by the State that the High Court analysed the relevant evidence including the evidence of the two relevant witnesses and, hence, no fault could be found with the judgment. The two-Judge Bench, after recording the said stand and stance, opined thus: -

> "5. We need not deal with the merits of the case as we find that the learned counsel appointed by the Legal Aid Committee did not appear on the date fixed before the

> High Court. The High Court could have in such circumstances required the Legal Aid Committee to appoint another counsel. Considering the seriousness of the offence, it would have been appropriate for the High Court to do so."

14. On a careful reading of the decision in its entirety and what has been aforestated, it is vivid that it has not been laid down as a ratio that in each circumstance, the High Court should appoint a counsel failing which the judgment rendered by it would be liable to be set aside.

15. In A.S. Mohammed Rafi v. State of Tamil Nadu (supra), the Division Bench, after referring to Article 22(1), the dictum in Powell (supra) and Anastaplo, In re[6], the immortal words authored by Thomas Erskine (1750-1823) "The Rights of Man", the Sixth Amendment of the US Constitution, the Biography of Clarence Darrow, i.e, Attorney for the Damned, Harper Lee's famous novel To Kill a Mocking Bird and Chapter II of the Rules framed by the Bar Council of India, opined thus: -

> "24. Professional ethics require that a lawyer cannot refuse a brief, provided a client is willing to pay his fee, and the lawyer is not otherwise engaged. Hence, the action of any Bar Association in passing such a resolution that none of its members will appear for a particular accused, whether on the ground that he is a policeman or on the ground that he is a suspected terrorist, rapist, mass murderer, etc. is against all norms of the Constitution, the statute and professional ethics. It is against the great traditions of the Bar which has always stood up for defending persons accused for a crime. Such a resolution is, in fact, a disgrace to the legal community. We declare that all such resolutions of Bar Associations in India are null and void and the right-minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country. It is the duty of a lawyer to defend no matter what the consequences, and a lawyer who refuses to do so is not following the message of The Gita." Be it noted, in the said case, the Bar Association of Coimbatore had passed a resolution that no member of the Coimbatore Bar Association would defend the accused policemen in criminal case against them in the said case.

16. Prior to that, the Division Bench has quoted the observations of Sutherland, J. (pp. 170-171) from Powell case (supra) that deals with the fate of an accused who is not given the assistance of a counsel. The relevant part is reproduced below: -

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does

not know how to establish his innocence."

17. We have referred to the said judgment in extenso as it has been stated in Mohd. Sukur Ali (supra) that the said passage has been quoted with approval in A.S. Mohammed Rafi (supra).

18. On a studied perusal of the said decision, it is noticeable that the Court has stated about the role of the lawyer and the role of the Bar Association in the backdrop of professional ethics and norms of the Constitution. It has been categorically held therein that the professional ethics require that a lawyer cannot refuse a brief, provided a client is willing to pay his fee and the lawyer is not otherwise engaged and, therefore, no Bar Association can pass a resolution to the effect that none of its members will appear for a particular accused whether on the ground that he is a policeman or on the ground that he is a suspected terrorist. We are disposed to think that in Mohd. Sukur Ali (supra), the aforesaid case was cited only to highlight the role of the Bar and the ethicality of the lawyers. It does not flow from the said pronouncement that it is obligatory on the part of the Appellate Court in all circumstances to engage amicus curiae in a criminal appeal to argue on behalf of the accused failing which the judgment rendered by the High Court would be absolutely unsustainable.

19. At this juncture, it is apt to survey the earlier decisions of this Court in the field. In Shyam Deo Pandey and others v. The State of Bihar[7], a two-Judge Bench of this Court was dealing with a criminal appeal which had arisen from the order of the High Court whereby the High Court, on perusal of the judgment under appeal, had dismissed the criminal appeal challenging the conviction. The Court referred to Section 423 of the Old Code and came to hold that the criminal appeal could not be dismissed for default of appearance of the appellants or their counsel. The Court has either to adjourn the hearing of the appeal or it should consider the appeal on merits and pass final orders. It is further observed that the consideration of the appeal on merits at the stage of final hearing and to arrive at a decision on merits and pass final orders will not be possible unless the reasoning and findings recorded in the judgment under appeal is tested in the light of the record of the case. The Court referred to the earlier Section 421 of the Code which dealt with dismissal of an appeal summarily and was different from an appeal that had been admitted and required to be dealt with under Section 423 of the Code. It is worth noting that reliance was placed on Challappa Ramaswami v. State of Maharashtra[8] wherein reliance was placed on Siddanna Apparao Patil v. State of Maharashtra[9] and Govinda Kadtuji Kadam v. The State of Maharashtra[10].

20. In Ram Naresh Yadav and others v. State of Bihar[11], a different note was struck by expressing the view in the following terms: -

> "It is no doubt true that if counsel do not appear when criminal appeals are called out it would hamper the working of the court and create a serious problem for the court. And if this happens often the working of the court would become well nigh impossible. We are fully conscious of this dimension of the matter but in criminal matters the convicts must be heard before their mattes are decided on merits. The court can dismiss the appeal for non-prosecution and enforce discipline or refer the matter to the Bar Council with this end in view. But the matter can be disposed of on merits only after hearing the appellant or his counsel. The court might as well

appoint a counsel at State cost to argue on behalf of the appellants."

21. In Bani Singh and others v. State of U.P.[12], a three-Judge Bench was called upon to decide whether the High Court was justified in dismissing the appeal filed by the accused-appellants therein against the order of conviction and sentence issued by the trial court for non- prosecution. The High Court had referred to the pronouncement in Ram Naresh Yadav (supra) and passed the order. The three-Judge Bench referred to the scheme of the Code, especially, the relevant provisions, namely, Section 384 and opined that since the High Court had already admitted the appeal following the procedure laid down in Section 385 of the Code, Section 384 which enables the High Court to summarily dismiss the appeal was not applicable. The view expressed in Sham Deo's case (supra) was approved with slight clarification but the judgment in Ram Naresh Yadav's case (supra) was over-ruled. The three-Judge Bench proceeded to lay down as follows: -

> ".....It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code on a plain reading of Ss. 385-386 of the Code. The law does not enjoin that the Court shall adjourn the case if both the appellant and his lawyer are absent. If the Court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial Court. We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to Court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present. If the lawyer is absent, and the Court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so. We are, therefore, of the opinion and we say so with respect, that the Division Bench which decided Ram Naresh Yadav's case (AIR 1987 SC 1500) did not apply the provisions of Ss. 385-386 of the Code correctly when it indicated that the Appellate Court was under an obligation to adjourn the case to another date if the appellant or his lawyer remained absent.
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> 16. Such a view can bring about a stalemate situation. The appellant and his lawyer can remain absent with impunity, not once but again and again till the Court issues a warrant for the appellant's presence. A complaint to the Bar Council against the lawyer for non-appearance cannot result in the progress of the appeal. If another lawyer is appointed at State cost, he too would need the presence of the appellant for instructions and that would place the court in the same situation. Such a procedure can, therefore, prove cumbersome and can promote indiscipline. Even if a case is decided on merits in the absence of the appellant, the higher Court can remedy the situation if there has been a failure of justice. This would apply equally if the accused is the respondent for the obvious reason that if the appeal cannot be disposed of without hearing the respondent or his lawyer, the progress of the appeal would be halted." (Emphasis supplied)

22. From the aforesaid decision, the principles that can be culled out are (i) that the High Court cannot dismiss an appeal for non- prosecution simpliciter without examining the merits; (ii) that the court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent; (iii) that the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so; (iv) that it can dispose of the appeal after perusing the record and judgment of the trial court; (v) that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and (vi) that if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation.

23. In Bapu Limbaju Kamble (supra), and Man Singh (supra), this Court has not laid down as a principle that it is absolutely impermissible on the part of the High Court to advert to merits in a criminal appeal in the absence of the counsel for the appellant. We have already stated that the pronouncement in A.S. Mohammed Rafi (supra), dealt with a different situation altogether and, in fact, emphasis was on the professional ethics, counsel's duty, a lawyer's obligation to accept the brief and the role of the Bar Associations. The principle laid down in Sham Deo Pandey (supra), relying on Siddanna Apparao Patil (supra), was slightly modified in Bani Singh (supra). The two-Judge Bench in Mohd. Sukur Ali (supra), had not noticed the binding precedent in Bani Singh (supra).

24. In Union of India and another v. Raghubir Singh (Dead) by LRs etc.[13], the question arose with regard to the effect of the law pronounced by the Division Bench in relation to a case relating to the same point subsequently before a Division Bench or a smaller number of Judges. Answering the said issue, the Constitution Bench has ruled thus: -

> "It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the Rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges. We may refer to a few of the recent cases on the point. In John Martin v. State of West Bengal[14], a Division Bench of three-Judges found it right to follow the law declared in Haradhan Saha v. State of West Bengal[15], decided by a Division Bench of five Judges, in preference to Bhut Nath Mate v. State of West Bengal[16] decided by a Division Bench of two Judges. Again in Indira Nehru Gandhi v. Raj Narain[17], Beg, J. held that the Constitution Bench of five Judges was bound by the Constitution Bench of thirteen Judges in Kesavananda Bharati v. State of Kerala[18]. In Ganapati Sitaram Balvalkar v. Waman Shripad Mage[19], this Court expressly stated that the view taken on a point of law by a Division Bench of four Judges of this Court was binding on a Division Bench of three-Judges of the Court. And in Mattulal v. Radhe Lal[20], this Court specifically observed that where the view expressed by two different Division Benches of this Court could not be reconciled, the pronouncement of a Division Bench of a larger

> number of Judges had to be preferred over the decision of a Division Bench of a smaller number of Judges. This Court also laid down in Acharya Maharajshri Narandraprasadji Anandprasadji Maharaj v. State of Gujarat[21] that even where the strength of two differing Division Benches consisted of the same number of Judges, it was not open to one Division Bench to decide the correctness or otherwise of the views of the other. The principle was reaffirmed in Union of India v. Godfrey Philips India Ltd.[22]"

25. In N.S. Giri v. Corporation of City of Mangalore and others[23], while taking note of the decision in LIC of India v. D.J. Bahadur[24] in the context of binding precedent under Article 141, the learned Judges observed thus: -

> ".....suffice it to observe that the Constitution Bench decision in New Maneck Chowk Spg. and Wvg. Co. Ltd. v. Textile Labour Assn.[25] and also the decision of this Court in Hindustan Times Ltd. v. Workmen[26] which is a four-Judge Bench decision, were not placed before the learned Judges deciding LIC of India case. A decision by the Constitution Bench and a decision by a Bench of more strength cannot be overlooked to treat a later decision by a Bench of lesser strength as of a binding authority; more so, when the attention of the Judges deciding the latter case was not invited to the earlier decisions available."

26. Another Constitution Bench in Pradip Chandra Parija and others v. Pramod Chandra Patnaik and others[27] has laid down that judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, the reasons why it could not agree with the earlier judgment.

27. In Chandra Prakash and others v. State of U.P. and another[28], the Constitution Bench referred to the view expressed in Raghubir Singh's case and Parija's case and opined that in Parija's case it has been held that judicial discipline and propriety demanded a Bench of two learned Judges to follow the decision of a Bench of three learned Judges.

28. Recently, in Rattiram and others v. State of Madhya Pradesh[29], the three-Judge Bench, referring to the decision in Indian Oil Corporation Ltd. v. Municipal Corporation and another[30] wherein a two-Judge Bench had the occasion to deal with the concept of precedent, stated as follows: -

> "27. In Indian Oil Corpn. Ltd. v. Municipal Corpn. the Division Bench of the High Court had come to the conclusion that Municipal Corpn., Indore v. Ratnaprabha[31] was not a binding precedent in view of the later decisions of the co-equal Bench of this Court in Dewan Daulat Rai Kapoor v. New Delhi Municipal Committee[32] and Balbir Singh v. MCD[33]. It is worth noting that the Division Bench of the High Court

> proceeded that the decision in Ratnaprabha was no longer good law and binding on it. The matter was referred to the Full Bench which overruled the decision passed by the Division Bench. When the matter travelled to this Court, it observed thus: (Indian Oil Corpn. Ltd. case, SCC p. 100, para 8) "8. ... The Division Bench of the High Court in Municipal Corpn., Indore v. Ratnaprabha Dhanda[34] was clearly in error in taking the view that the decision of this Court in Ratnaprabha was not binding on it. In doing so, the Division Bench of the High Court did something which even a later co-equal Bench of this Court did not and could not do."

29. Regard being had to the principles pertaining to binding precedent, there is no trace of doubt that the principle laid down in Mohd. Sukur Ali (supra) by the learned Judges that the court should not decide a criminal case in the absence of the counsel of the accused as an accused in a criminal case should not suffer for the fault of his counsel and the court should, in such a situation, must appoint another counsel as amicus curiae to defend the accused and further if the counsel does not appear deliberately, even then the court should not decide the appeal on merit is not in accord with the pronouncement by the larger Bench in Bani Singh (supra). It, in fact, is in direct conflict with the ratio laid down in Bani Singh (supra). As far as the observation to the effect that the court should have appointed amicus curiae is in a different realm. It is one thing to say that the court should have appointed an amicus curiae and it is another thing to say that the court cannot decide a criminal appeal in the absence of a counsel for the accused and that too even if he deliberately does not appear or shows a negligent attitude in putting his appearance to argue the matter. With great respect, we are disposed to think, had the decision in Bani Singh (supra) been brought to the notice of the learned Judges, the view would have been different.

30. Presently, we shall proceed to deal with the concept of per incuriam. In A.R. Antulay v. R.S. Nayak[35], Sabyasachi Mukharji, J. (as His Lordship then was), while dealing with the said concept, had observed thus: -

> "42. ... 'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

31. Again, in the said decision, at a later stage, the Court observed: -

> "47. ... It is a settled rule that if a decision has been given per incuriam the court can ignore it."

32. In Punjab Land Development & Reclamation Corpn. Ltd. v. Labour Court[36], another Constitution Bench, while dealing with the issue of per incuriam, opined as under:

> "40. The Latin expression 'per incuriam' means through inadvertence. A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a

decision of this Court."

33. In State of U.P. v. Synthetics and Chemicals Ltd.[37], a two-Judge Bench adverted in detail to the aspect of per incuriam and proceeded to highlight as follows:

> "40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (Young v. Bristol Aeroplane Co. Ltd.[38]) Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."

34. In Siddharam Satlingappa Mhetre v. State of Maharashtra[39], while addressing the issue of per incuriam, a two-Judge Bench, after referring to the dictum in Bristol Aeroplane Co. Ltd. (supra) and certain passages from Halsbury's Laws of England and Raghubir Singh (supra), has stated thus:

> "138. The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of Judges of co-equal strength. In the instant case, judgments mentioned in paras 124 and 125 are by two or three Judges of this Court. These judgments have clearly ignored the Constitution Bench judgment of this Court in Sibbia case[40] which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 of the Code of Criminal Procedure. Consequently, the judgments mentioned in paras 124 and 125 of this judgment are per incuriam."

35. In Government of A.P. and another v. B. Satyanarayana Rao (dead) by LRs and others[41] this Court has observed that the rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue.

36. In view of the aforesaid annunciation of law, it can safely be concluded that the dictum in Mohd. Sukur Ali (supra) to the effect that the court cannot decide a criminal appeal in the absence of counsel for the accused and that too if the counsel does not appear deliberately or shows negligence in appearing, being contrary to the ratio laid down by the larger Bench in Bani Singh (supra), is per incuriam. We may hasten to clarify that barring the said aspect, we do not intend to say anything on the said judgment as far as engagement of amicus curiae or the decision rendered regard being had to the obtaining factual matrix therein or the role of the Bar Association or the lawyers. Thus, the contention of the learned counsel for the appellant that the High Court should not have decided the appeal on its merits without the presence of the counsel does not deserve acceptance. That apart, it is noticeable that after the judgment was dictated in open court, the counsel appeared and he was allowed to put forth his submissions and the same have been dealt with.

37. At this juncture, we are obligated to state that in certain cases this Court had remitted the matters to the High Court for fresh hearing and in certain cases the burden has been taken by this Court. If we allow ourselves to say so, it depends upon the facts of the each case. In the present case, as we perceive, the High Court has dealt with all the contentions raised in the memorandum of appeal and heard the learned counsel at a later stage and, hence, we think it apposite to advert to the contentions raised by the learned counsel for the appellant as regards the merits of the case.

38. On merits it has been argued by Mr. Bhat that the essential ingredients of Section 7 of the Act have not established inasmuch as no official work was pending with the accused-appellant and the allotment work was done by the Manager and, hence, he could not have shown any official favour. It has also been contended that mere recovery of bribed money from the possession of the accused is not sufficient to establish the offence and it is the duty of the prosecution to prove the demand and acceptance of money as illegal gratification but the same has not been proven at all.

39. To appreciate the said submission, we have carefully perused the judgment of the learned trial Judge as well as that of the High Court and the evidence brought on record. On a perusal of the Mahazar (Exht.-4), it is evident that a sum of Rs.5,000/- was recovered from the accused. That apart, the factum of recovery has really not been disputed. The plea put forth by the defence is that the accused had borrowed Rs.20,000/- from the complainant and to pay it back he had availed a loan from DW-1, an auto driver. In support of the said stand on behalf of the accused, DW-1, an auto-driver, has been examined, who has deposed that the accused needed Rs.20,000/- to pay back a loan to PW-1 and he had given the said sum to him in his house and, thereafter, had accompanied the accused to his office and PW-1 was taken to a side by the accused where he gave the money to him. The said witness has stated that he had not known for what purpose the accused had given the money to PW-1. He had not even produced any document in support of his deposition that he had given Rs.20,000/- to the accused as a loan. It is interesting to note that the said witness, to make his story credible, has also gone to the extent of stating that he had accompanied the accused to his office where the accused took PW-1 to one side of the room and paid the money. The testimony of this witness has to be discarded as it is obvious that he has put forth a concocted and totally improbable version. The learned Sessions Judge as well as the High Court is correct in holding that the testimony of this witness does not inspire confidence and we accept the same.

40. The next limb of the said submission is that the accused was not in- charge of allotment of work and, hence, could not have granted any benefit to the complainant and the allegation of the prosecution that he had shown an official favour to the complainant has no legs to stand upon. On a scrutiny of the testimony of PW-2, it is demonstrable that there had been demand of money from PW-2 and acceptance of the same. As far as the official favour is concerned, though the allotment of work was done by the Manager, it has come out in the evidence of PW-4 that the immediate assignment of the loads of contractors was the responsibility of the accused. He had the responsibility for assignment of loads and in that connection, he had demanded the bribe. It has also come out from Exht. P-11 that the responsibility of the accused was assignment or identification of lorries. In view of the said evidence, it is difficult to accept the plea that he had no responsibility and, hence, he could not have granted any favour. It is well settled in law that demand and acceptance of the amount as illegal gratification is sine qua non for constitution of an offence under

the Act and it is obligatory on the part of the prosecution to establish that there was an illegal offer of bribe and acceptance thereof.

41. Keeping in view that the demand and acceptance of the amount as illegal gratification is a condition precedent for constituting an offence under the Act, it is to be noted that there is a statutory presumption under Section 20 of the Act which can be dislodged by the accused by bringing on record some evidence, either direct or circumstantial, that money was accepted other than for the motive or the reward as stipulated under Section 7 of the Act. When some explanation is offered, the court is obliged to consider the explanation under Section 20 of the Act and the consideration of the explanation has to be on the touchstone of preponderance of probability. It is not to be proven beyond all reasonable doubt. In the case at hand, we are disposed to think that the explanation offered by the accused does not deserve any acceptance and, accordingly, we find that the finding recorded on that score by the learned trial Judge and the stamp of approval given to the same by the High Court cannot be faulted.

42. In view of the aforesaid analysis, we find that the prosecution has established the factum of recovery and has also proven the demand and acceptance of the amount as illegal gratification. Therefore, the conviction recorded against the accused is unimpeachable. The said conclusion is in consonance with pronouncement of this Court in State of Maharahstra v. Dnyaneshwar Laxaman Rao Wankhede[42].

43. The alternative submission of the learned counsel for the appellant relates to sentence. It is his submission that the appellant has been suffering from number of ailments and there has been immense tragedy in his family life and, hence, the sentence should be reduced to the period already undergone. As is evincible, the appellant has been convicted under Section 7 of the Act and sentenced to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.15,000/- and on failure to pay fine, to suffer further rigorous imprisonment for three months. Section 7 of the Act provides a punishment with imprisonment which shall not be less than six months which may extend to five years and liability to pay fine. Section 13(2) stipulates that a public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to pay fine. On reading of both the provisions, it is clear that minimum sentence is provided for the aforesaid offence. There is a purpose behind providing the minimum sentence. It has been held in Narendra Champaklal Trivedi v. State of Gujarat[43] that where the minimum sentence is provided, it is not appropriate to exercise jurisdiction under Article 142 of the Constitution of India to reduce the sentence on the ground of any mitigating factor as that would tantamount to supplanting the statutory mandate and further it would amount to ignoring the substantive statutory provision that prescribes minimum sentence for a criminal act relating to demand and acceptance of bribe.

44. In view of the aforesaid analysis, we are unable to accept the submission of the learned counsel for the appellant to reduce the period of sentence to the period already undergone in custody. However, regard being had to the facts and circumstances of the case, the age of the accused and the ailments he has been suffering, which has been highlighted before us, we reduce the sentence of imprisonment imposed under Section 13(1)(d) read with Section 13(2) of the Act to one year and

maintain the sentence under Section 7 of the Act. The imposition of sentence of fine on both the scores remains undisturbed.

45. With the aforesaid modification in the sentence, the appeal stands disposed of.

.....J. [K. S. Radhakrishnan] .....J. [Dipak Misra] New Delhi;

March 01, 2013

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[1] (2011) 4 SCC 729
[2] 77 L Ed 158 : 287 US 45 (1932)
[3] (2011) 1 SCC 688
[4] (2008) 9 SCC 542
[5] (2005) 11 SCC 413
[6] 6 L Ed 2d 135 : 366 US 82 (1961)
[7] AIR 1971 SC 1606
[8] AIR 1971 SC 64
[9] AIR 1970 SC 977
[10] AIR 1970 SC 1033
[11] AIR 1987 SC 1500
[12] AIR 1996 SC 2439
[13] (1989) 2 SCC 754
[14] (1975) 3 SCC 836
[15] (1975) 3 SCC 198
[16] (1974) 1 SCC 645
[17] 1975 Supp SCC 1
[18] (1973) 4 SCC 225
[19] (1981) 4 SCC 143
[20] (1974) 2 SCC 365
[21] (1975) 1 SCC 11
[22] (1985) 4 SCC 369
[23] (1999) 4 SCC 697
[24] (1981) 1 SCC 315
[25] AIR 1961 SC 867
[26] AIR 1963 SC 1332
[27] (2002) 1 SCC 1
[28] (2002) 4 SCC 234
[29] (2012) 4 SCC 516
[30] AIR 1995 SC 1480
[31] (1976) 4 SCC 622
[32] (1980) 1 SCC 685
[33] (1985) 1 SCC 167
[34] 1989 MPLJ 20
[35] (1988) 2 SCC 602
[36] (1990) 3 SCC 682
[37] (1991) 4 SCC 139
[38] (1944) 2 All ER 293 (CA)
[39] (2011) 1 SCC 694
[40] (1980) 2 SCC 565

[41] (2000) 4 SCC 262
[42] (2009) 15 SCC 200
[43] (2012) 7 SCC 80
