Chaturdas Bhagwandas Patel vs The State Of Gujarat on 6 April, 1976

Equivalent citations: 1976 AIR 1497, 1976 SCR (3)1052, AIR 1976 SUPREME COURT 1497, 1976 2 SCJ 474, 1976 CRI APP R (SC) 160, (1976) 3 SCC 46, 1976 SCC(CRI) 351, 1976 3 SCR 1052, 17 GUJLR 804, 1976 SC CRI R 269, 1976 MADLJ(CRI) 602

Author: Ranjit Singh Sarkaria

Bench: Ranjit Singh Sarkaria, P.N. Shingal

PETITIONER:
CHATURDAS BHAGWANDAS PATEL.

Vs.

RESPONDENT:
THE STATE OF GUJARAT

DATE OF JUDGMENT06/04/1976

BENCH:
SARKARIA, RANJIT SINGH
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SARKARIA, RANJIT SINGH
SHINGAL, P.N.

CITATION:
1976 AIR 1497 1976 SCR (3)1052
1976 SCC (3) 46

ACT:
Indian Penal Code (Act 45 of 1860), s. 161-Scope of.
Prevention of Corruption Act (2 of 1947), ss. 4(1) and 5(1) and (2)-Statutory presumption under-Rebuttal by accused.
Code of Criminal Procedure (Act 5 of 1898) s. 537-Charge under ss. 161 and 34 I.P.C.-Co-accused acquitted-Conviction under s. 161, simpliciter-Validity.

HEADNOTE:
The appellant (a Head Constable) and the Sub-Inspector of Police were charged with offences under s. 161 read with s. 34 and s. 165A, IPC, and under s. 5(2) read with s. 5(1)(d) Prevention of Corruption Act, 1947. The appellant

admitted the receipt of money and its recovery from him but stated that PWS 1 and 4 came to the Police Station, that PW 4 claimed to be a relative of the Sub-Inspector and that it was PW 4 and not PW 1 who gave him the money to be handed over to the Sub-Inspector who was absent. The prosecution adduced evidence to show that the two accused arranged for the production of PW 1 at the Police Station in connection with the investigation of a charge of abduction of a woman; that the Sub-Inspector directed the appellant to take charge of PW 1 when he arrived; that the appellant demanded a bribe from PW 1 to save himself from the charge as well as the indignity of being handcuffed, locked up and paraded; that a trap was set the next day when PW 1 paid the amount in the presence of PW 4 and that the amount was recovered from the appellant in a raid. The trial court acquitted both the accused, but on appeal, the High Court acquitted the Sub-Inspector but convicted the appellant under s. 161 IPC and s. 5(2). Prevention of Corruption Act.

In appeal to this Court, the appellant contended, (1) that PW 1's evidence regarding the payment of gratification should not be accepted without independent corroboration, (2) that the statutory presumption under s. 4(1). Prevention of Corruption Act that the appellant accepted the gratification as a motive or reward such as is mentioned in s. 161, I.P.C., should not be drawn against the appellant, because, (a) there was, in fact, no complaint whatever against PW 1 in respect of the commission of the offence of abduction; and (b) the effect of the acquittal of the Sub-Inspector was that the money could not be held to have been paid to the appellant pursuant to any 161 demand of bribe; and (c) that since the two accused were charged under s. 161 read with s. 34, on the acquittal of the Sub-Inspector the appellant could not be convicted under s. 161 simpliciter.

Dismissing the appeal,

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HELD: (1) The testimony of PW 1 stood fully corroborated by other independent and reliable testimony and hence could be safely acted upon. The defence version that it was PW4 who paid the money was falsified by the fact that no anthracene powder, with which the notes used in the raid were smeared, was found on PW 4's hands. while it was found on the hands of the accused and PW1. [1057E; 1059B-C]

(2)(a) The mere fact that no complaint of abduction or of any other offence had been made or registered against PW 1 could not take the act of the appellant-in demanding and accepting the gratification from PW 1 in the context of the threat by the appellant-out of the mischief of s. 161, I.P.C. The section does not require that the public servant must,in fact,be in a

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position to do the official act, favour or service at the time of the demand or receipt of the gratification. To constitute an offence under this section it is enough if the

public servant who accepts the gratification takes it by inducing a belief or by holding out that he would render assistance to the giver, with any other public servant, and the giver gives the gratification under that belief. It is also immaterial if the public servant receiving the gratification does not intend to do the official act, favour or forbearance which he holds himself out as capable of doing. The last Explanation and Illustration (c) to the section show that the person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within the purview of the words "a motive or reward for doing". When a public servant, being a police officer, is charged under s. 161, I.P.C., and it is alleged that the illegal gratification was taken by him for doing or procuring an official act, the question whether there was any offence against the giver of the gratification which the accused could have investigated or not, is not material for that purpose. If he has used his official position to extract illegal gratification the requirement of the law is satisfied. [1059F-1060E]

Mahesh Prasad v. State of U.P. [1955] 1 SCR 965; Dhaneshwar Nariam Saxena v. Delhi Admn. [1962] 3 SCR 259; Bhanuprasad Hariprasad Dave and anr. v. State of Gujarat [1969] 1 SCR 22 and Shiv Raj Singh v. Delhi Administration [1969] 1 SCR 183, followed.

In the present case, on the day of the payment the Sub-Inspector was away and the appellant was actually in charge of the police station. It was he who called PW 1 and asked if he had brought the money and when PW 1 replied in the affirmative but hesitated to hand over the money, represented that the money should be handed over to him, and that he would pass it on to the Sub-Inspector, and that PW 1 would have nothing to fear. [1059C-F]

(b) The only effect of the acquittal of the Sub-Inspector is that it cannot be urged that the Sub-Inspector had demanded any bribe from PW 1. It does not in any way discount the evidence that PW 1 was called to the police station and was informed by the appellant that a charge of abduction was against him and that the appellant demanded and received a bribe from him. [1058H-1059B]

(c) The burden on the accused to displace a presumption is not as onerous as that on the prosecution to prove its case, but the accused has to discharge it by adducing evidence, circumstantial or direct, which establishes with reasonable probability that the money was accepted by the accused other than as a motive or reward such as is referred to in the section. In the present case,the appellant had failed to show such a balance of probability in his favour. [1060E-G]

(3) The language of the charge shows that in addition to the charge under s.161 read with s. 34, the appellant was in substance also being charged under s. 161 simpliciter.

All the material circumstances appearing in evidence, constituting an offence under s. 161, were put to him during his examination under s. 342, Cr.P.C. The objection that he could not be convicted under s. 161 simpliciter was not raised in any of the courts below. No prejudice has, therefore, been caused to him because of this technical defect of there being no express charge under s. 161 simpliciter, and the irregularity if any, is cured under s. 537, Cr.P.C. [1061B-D]

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 250 of 1971.

Appeal by special leave from the judgment and order dated the 1st July, 1971 of the Gujarat High Court at Ahmedabad in Criminal Appeal No. 33 of 1970.

N. N. Keswani, for the appellant.

S. N. Anand and M. N. Shroff, for the respondent.

The Judgment of the Court was delivered by SARKARIA, J. The appellant in this appeal was Accused No. 2 in the trial court. He was a Head Constable (Jamadar) posted at the relevant time in Police Station, Zinzuwada. His co-accused (No. 1) was a Police Sub-Inspector posted in the same station. One Bai Sati,was alleged to have been abducted by Ghanshyamsinh alias Ghanuba. She was in the Police Station on the 10th and 11th of July, 1968. Accused 1 recorded her statement and thereafter asked one Fateh Sinh (PW 7) to bring and produce his cousin Ghanshamsinh. Fateh Sinh accordingly produced Ghanshamsinh before Accused 1 on July 11, 1968. Accused 1 directed the appellant to take charge of Ghanshamsinh. The appellant did likewise and told Ghanshamsinh that if he wanted to get rid of the charge, he should gratify the Sub-Inspector. The appellant backed up the suggestion with a threat to handcuff Ghanshamsinh and put him in the police lock up. The appellant further demanded a bribe of Rs. 2,000/-. At first Ghanshamsinh expressed his inability to pay the amount. Ultimately at the intervention of Accused 2, the demand was scaled down to Rs. 1,000/- and it was agreed that out of the amount, a sum of Rs. 500/-would be paid on the following evening at the latest. Ghanshamsinh was then allowed to go. He then talked about this deal to his cousin, Fatehsinh.

On the following day, Ghanshamsinh went to Ahmedabad and contacted Shri R. R. Desai (PW 8), Inspector of the Anti-Corruption staff of Police and made a complaint which was recorded. Shri Desai then in the presence of Panchas, supplied a sum of Rs. 500/-in five currency notes of the denomination of Rs. 100/- each to Ghanshamsinh for use in the trapping the accused persons in the act of taking the bribe. The notes were smeared with anthracene powder and Ghanshamsinh was directed to hand over the same on demand to the accused, and then signal to the raiding party. After settling the plan, the party came to Zinzuwada on July 12, 1968. Ghanshamsinh was sent ahead with

the tainted money to the Police Station. On seeing Ghanshamsinh along with Panch Mahendra going to the residence of Accused 1, the appellant called him and took him to his office room in the Police Station. Ghanshamsinh informed the appellant that he had brought the money as agreed for payment to Accused 1. The appellant told him that Accused 1 being away, he was the acting Station House Officer and the money should be paid to him, adding that he would, in turn, pass it on to Accused 1 on his return. Ghanshamsinh then handed over those five currency notes to the appellant who accepted the same and placed them in the drawer of his table. All the three persons then came out of the room. The appellant locked the room. On receiving the agreed signal from Ghanshamsinh, the police party rushed in and caught hold of the appellant by the hand. With the key found on the person of the appellant, Inspector Desai unlocked the room and recovered the currency notes from the drawer of the appellant's table. The hands of the complainant Ghanshamsinh, Panch Mahendra and the appellant were examined in the light of an ultra-violet lamp. Such examination revealed anthracene powder on the hands of the appellant and Ghanshamsinh; but no such powder was seen on Panch Mahendra. Shri Desai prepared the Panchnama. Certain police papers on the demand of Inspector Desai were produced by the Writer- Constable, Kansanbhai. These are: (1) Statement, dated July 11, 1968 of Bai Sati recorded by Accused 1; (2) Statement dated July 11, 1968 of Koli Mana Jiva, recorded by Accused 1; (3) the writing sent by Police Sub-Inspector, Dasuda under Javak No. 2991 dated July 10, 1968 as per endorsement dated July 18, 1968 to the Police Inspector, Zinzuvada; (4) The Statement of Bai Sati recorded by the Police Sub- Inspector at Dasuda on July 10, 1968. The Inspector seized these records.

After completing the investigation, the police sent both the accused under a charge-sheet for trial before the Special Judge, Surendranagar on charges under s. 161 read with s. 34 and s. 165A of the Penal Code and under s. 5(2) read with s. 5(1)(d) of the Prevention of Corruption Act. The trial Judge acquitted both the accused of all the charges levelled against them.

On appeal by the State, the High Court of Gujarat, reversed the acquittal of the appellant and convicted him on two counts, namely, one for an offence under s. 161, Penal Code and the other under s. 5(2) read with s. 5(1)(d) of the Prevention of Corruption Act and sentenced him to suffer rigorous imprisonment for two years on the latter count. No separate sentence under s. 161, Penal Code was inflicted.

Hence this appeal by special leave.

The mainstay of the prosecution case is the testimony rendered by Ghanshamsinh (PW 1) and Panch Mahendra (PW 4) and Police Inspector Desai. The first two are witnesses of the demand of the tainted currency notes and the acceptance thereof by the appellant from PW 1. Inspector R. R. Desai, PW 8, was the Head of the raiding party who recovered the tainted notes.

Examined under s. 342, Cr. P.C., the appellant while denying the demand of the bribe on the 11th July, 1968 from Ghanshamsinh, gave this account of what happened on the 12th July 1968:

> "...the complainant Ghanubha Champubha and his companion came up to me. I asked Ghanubha as to why he had come.... He informed me that his companion was

> related to the P.S.I.,and that he had some work with him. He told me that he had accompanied him to show him the police station. I offered them seats, and gave them water. I questioned the above person about his relationship with the Sub-Inspector. He replied to me that he was the agnate of P.S.I. Joshi, and that he had come to hand over money to him as his son was sick and that, the said money was sent by his family from Ahmedabad. I instructed him to approach his wife and give money to her. He told me that if he met her, he would have to stop for the night, so that he would not be able to attend the H.L. College in the morning. He told me to take the money and give it to P.S.I. Joshi, and that, I should arrange for his transport to Ahmedabad in some motor truck proceeding there. He gave me Rs. 500/- in five G. C. Notes, which are now before the Court at Art. 2. I placed them in a cloth purse, and kept it in my drawer, over the said application of Narubha Ex. 51. I offered them tea and asked them to wait outside. I also told him that I would arrange for his lift in the motor truck carrying salt to Ahmedabad. So saying, we came out of the police station. I locked my room because in it, are placed arms and ammunitions. I was leaving the Police Station and going to the hotel for placing an order for tea, when two men held me by my two hands. They brought me in the compound of the Police Station. Other 3, 4 men turned up, and one Saheb from amongst them asked me to produce the money. I exclaimed, "What money": I told him if the money, that was required, was the same, which the cousin of P.S.I. Joshi had handed over to me. The officer insisted that the money must be produced. I was then perplexed. He took the key from one of my hands and opened my room, and took out the money. I was seated in the verandah and was not allowed to go inside...I then learnt that the said brother of the P.S.I. was none else but Panch No. 1. The Officer asked from me the papers of investigation against Ghanubha. I said that I had no such papers, and that I had not made any such investigation against him. He then attached some papers from the Writer Constable Karsan Talshi."

Thus, the appellant had admitted the acceptance of the tainted currency notes which were not his legal remuneration. In variance with the prosecution case, he, however, alleged that this money was handed over to him by Mahendra, PW 4, with the representation that he was a cousin of P. S. I. Joshi (who was then away) and the money was to be passed on to Mr. Joshi. The appellant, further, admitted that after the recovery of the money, when his hands were examined in the light of the ultra violet lamp, shining powder was found thereon. He expressed ignorance if the hands of Ghanshamsinh and Mahendra were also similarly examined. He expressed a desire to appear in the witness box and make a statement on oath. Subsequently, however, he did not do so, but examined one Naruba Dosubha (D.W. 1) in defence, who more or less supported the version of the appellant with regard to the receipt of Rs. 500/- by the appellant from PW Mahendra.

The trial Judge instead of appraising the evidence of the witnesses produced by the prosecution in the light of the admission made by the appellant in regard to the acceptance of money, rejected the prosecution case in toto against both the accused on grounds which were manifestly erroneous and unreasonable. Without there being any evidence, he came to the conclusion that Ghanshamsinh was a tool in the hands of one Parbhat Singh Jhala, Girasdar of Ahmedabad, who was inimically

disposed towards all the members of Zanzuwada Police, including the appellant. He brushed aside the evidence of Mahendra with the puerile observation that he "as a trainee Press Reporter would be beguiled into getting this first class report of a sensational raid by acting as a panch witness in this raiding party, at the instance of Mr. Desai.....and in that event, Mahendra would be too willing to accompany the raiding party and in that context would be under the intelligent thumb of police, not by means of pressure, but as a result of human inquisitive, willingness induced in him."

The trial Judge further stressed the fact that Mahendra had accompanied the raiding party from Ahmedabad to Zunzuwada and had travelled in the police van for over three hours and this in his opinion was sufficient to show that the witness was "not so much independent as he professed to be." He further found it unbelievable that the appellant would accept the sum of Rs. 500/- as a bribe from Ghanshamsinh in the presence of a stranger (Mahendra).

The conclusions reached by the trial Judge had no foundation in evidence. They belonged to the realm of purespeculation. Apart from mere suggestions put to the prosecution witnesses, in cross-examination, (which were emphatically denied), there was no evidence to show that Parbhat Singh Girasdar was in any way hostile or inimically disposed towards the appellant. There was no justification for the conjecture that Panch Mahendra was under the thumb of Inspector Desai and as such, was an interested witness. We have examined the evidence of Mahendra and are satisfied that the High Court rightly found him a truthful and trustworthy witness who had no axe of his own to grind. The defence version to the effect, that it was Mahendra who had actually passed on the tainted money to the appellant by holding himself out as a relation of the Sub-Inspector, was falsified by the circumstance that no anthracene powder was found on Mahendra when immediately after the recovery of the tainted notes, his hands were examined in the light of ultra-violet lamp; while such powder was admittedly found on the hands of the appellant, and Ghanshamsinh. This circumstance was deposed to by Inspector Desai (PW 8) whose version on this point was not challenged in cross- examination. Thus, while DW 1 told a lie on this point, this uncontroverted circumstance could not.

The presence of Mahendra (PW 4) at the time of the receipt of the tainted notes was admitted by the appellant himself. In the face of this admission, there was no justification for the surmise made by the trial Court, that the appellant, an experienced Head-Constable, could not be so stupid as to receive Rs. 500/- as a bribe in the presence of an unknown person.

Thus it had been indubitably established that the appellant, a public servant accepted a gratification, that is, a sum of Rs. 500/- which was not his legal remuneration, from Ghanshamsinh (PW 1). On proof of this fact, the statutory presumption under s.4(1) of the Prevention of Corruption Act was attracted in full force and the burden had shifted on to the appellant to show that he had not accepted this money as a motive or reward such as is mentioned in s. 161, Penal Code.

Mr. Keswani contends that the appellant had rebutted this presumption by bringing on record circumstances which militate against it. The first and the foremost of these circumstances, according to the Counsel, is that no complaint whatever against Ghanshamsinh in respect of the commission of an offence was under investigation with the police; that no F.I.R had been lodged by any person

complaining of the abduction of Bai Sati against Ghanshamsinh or any other person. Our attention has been drawn to the statement of Bai Sati, which is said to have been recorded by Accused 1 on the 11th January in which it is recorded that she had not been kidnapped or abducted by any person but had gone away from her father's house of her own accord. The second circumstance stressed by the Counsel is that Accused 1 has been acquitted of the charge of demanding a bribe directly or indirectly through the appellant, from Ghanshamsinh. It is urged that the effect of the acquittal of Accused 1 is that the money passed on to the appellant on the 12th cannot be held to have been paid pursuant to any demand of bribe made by Accused 1 or by the appellant. The third circumstance, pointed out by the Counsel is that Ghanshamsinh had a grudge against the appellant and a motive to falsely implicate him, because the appellant had previously investigated a criminal case under s. 324, Penal Code against the appellant, who being aware of it, would be least disposed to accept the amount, as a bribe, for himself or for the Sub-Inspector. It is further contended that PWs Fatehsinh and Ghanshamsinh were persons of questionable antecedents, and their evidence in the absence of reliable independent corroboration in regard to the demand and acceptance of the money as a bribe could not be safely accepted.

We are unable to accept the contention that the presumption under s. 4(1) of the Prevention of Corruption Act had been rebutted.

While it is true that no report or complaint had been made or registered in the Police Station that Ghanshamsinh had abducted Bai Sati, there was credible evidence on the record to believe that both the accused had asked Fatehsinh, PW 7, to produce his cousin Ghanshamsinh in the Police Station in connection with the investigation of a charge of abduction of Bai Sati against him. Fatehsinh conveyed this message to Ghanshamsinh on July 10, 1968. Consequently on July 11, 1968, Ghanshamsinh was produced by Fateh Singh before the Police Sub-Inspector at the latter's residence, and thereafter Accused 2, the appellant, took him into the Police Station and made him sit in his room. It was the appellant who then accused Ghanshamsinh of having abducted Bai Sati and warned him that in case he did not pay money to the Sub Inspector, he would be arrested and paraded in handcuffs around the village. Evidence of PWs Ghanshamsinh and Fatehsinh with regard to the summoning of Ghanshamsinh to the Police Station to answer a supposed charge of abduction, received assurance from the circumstance that on the 10th and 11th July 1968, Bai Sati was in the Police station.

It is no doubt correct that the High Court has not disturbed the acquittal of Accused 1 on the ground that Ghanshamsinh's evidence with regard to the demand of the bribe by accused 1 on the 11th, had not been corroborated by other independent evidence. The only effect of the acquittal of Accused 1, however, is that it cannot be now urged that Accused 1 had demanded any bribe from Ghanshamsinh on the 11th. But his acquittal does not in any case discount the fact or obliterate the evidence in regard to the fact that Ghanuba was called to the Police Station and was told by the appellant that there was a charge of abduction of Bai Sati against him. Nor does the acquittal of Accused 1 have the effect of exonerating the appellant of the demand of bribe on the 11th and again on the 12th.

As already noticed, the testimony of Ghanshamsinh both with regard to the demand of the gratification by the appellant and its payment to him, on the 12th stood fully corroborated by the independent and reliable testimony of Panch Mahendra. Thus, so far as the appellant is concerned the testimony of Ghanshamsinh, having been fully confirmed by other trustworthy evidence, could safely be acted upon.

As regards the contention that the appellant was not in a position to show any favour or disfavour to Ghanshamsinh in connection with his official duties, it may be noted, in the first place, that on the 12th July at the relevant time, the Sub-Inspector being away, the appellant was actually incharge of the Police Station. This fact is borne out by the entry Ex. 47 in the Station Diary. On seeing Ghansham and Mahendra going towards the residence of the Sub- Inspector, the appellant called them and enquired from Ghanshamsinh if he had brought the money. Ghanshamsinh replied in the affirmative but hesitated to hand over the money to him saying that the Sub-Inspector was not present. Thereupon, the appellant represented that he was the P.S.I. and that the money should be handed over to him, adding that he would pass it on to the P.S.I. on his return. Thereupon, Ghanshamsinh paid the amount to the appellant saying that he should not be harassed any more, and that the demand for the balance be mercifully dispensed with. The appellant while accepting the money assured Ghanshamsinh that he had nothing to fear so long as the appellant was concerned in that affair.

Secondly, this demand for payment and acceptance of the money by the appellant on the 12th July had to be appreciated in the context of the representation made by the appellant on the preceding day, to the effect, that if Ghanshamsinh would not pay the gratification, he would be arrested, handcuffed and paraded for the offence of abducting Bai Sati.

The proof of the foregoing facts was sufficient to establish the charge under s. 161, Penal Code. The mere fact that no case of abduction or of any other offence had been registered against Ghanshamsinh in the Police Station or that no complaint had been made against him to the Police by any person in respect of the commission of an offence, could not take the act of the appellant in demanding and accepting the gratification from Ghanshamsinh, out of the mischief of s. 161, Penal Code. The Section does not require that the public servant must, in fact, be in a position to do the official act, favour or service at the time of the demand or receipt of the gratification. To constitute an offence under this section, it is enough if the public servant who accepts the gratification, takes it by inducing a belief or by holding out that he would render assistance to the giver "with any other public servant" and the giver gives the gratification under that belief. It is further immaterial if the public servant receiving the gratification does not intend to do the official act, favour or forbearance which he holds himself out as capable of doing. This is clear from the last Explanation appended to s. 161, according to which, a person who receives a gratification as a motive for doing what he does not intend to do, as a reward for doing what he has not done comes within the purview of the words "a motive or reward for doing." The point is further clarified by Illustration (c) under this Section. Thus, even if it is assumed that the representation made by the appellant regarding the charge of abduction of Bai Sati against Ghanshamsinh was, in fact, false, this will not enable him to get out of the tentacles of s. 161, although the same act of the appellant may amount to the offence of cheating, also (see Mahesh Prasad v. State of U.P.,Dhaneshwar Narain Saxena v. Delhi Admn.

Indeed, when a public servant, being a police officer, is charged under s. 161 Penal Code and it is alleged that the illegal gratification was taken by him for doing or procuring an official act, the question whether there was any offence against the giver of the gratification which the accused could have investigated or not, is not material for that purpose. If he has used his official position to extract illegal gratification, the requirement of the law is satisfied. It is not necessary in such a case for the Court to consider whether or not the public servant was capable of doing or intended to do any official act of favour or disfavour (see Bhanuprasad Hariprasad Dave and anr. v. State of Gujarat, and Shri Raj Singh v. Delhi Administration.

In the light of what has been said above, it is clear that the appellant has failed to rebut the presumption arising against him under s. 4(1) of the Prevention of Corruption Act. It is true that the burden which rests on an accused to displace this presumption is not as onerous as that cast on the prosecution to prove its case. Nevertheless, this burden on the accused is to be discharged by bringing on record evidence, circumstantial or direct, which establishes with reasonable probability, that the money was accepted by the accused, other than as a motive or reward such as is referred to in s. 161. The appellant had hopelessly failed to show such a balance of probability in his favour.

Thus the charge under s. 161, Penal Code had been fully brought home to the appellant. The charge under s. 5(1)(d) read with s. 5(2), also had been proved against him to the hilt. Clearly he had obtained the money by grossly abusing his position.

Lastly, towards the fag end, in reply, Mr. Keswani attempted to assail the conviction recorded by the High Court on a ground which had not been raised in the courts below. The charge against the appellant was that he had committed an offence under s. 161, read with s. 34, Penal Code. No charge under s. 161 simpliciter was separately drawn up against him. This being the case, contends 'Mr. Keswani, the High Court was not, in the event of the acquittal of Accused 1, competent to convict the appellant under s. 161 with the aid of s. 34 Penal Code.

The contention must be repelled. Firstly, the High Court has not convicted the appellant with the aid of s. 34, Penal Code. Secondly, although in the charge, only s. 161, read with s. 34, Penal Code was mentioned, the language of the charge, could leave the appellant in no doubt that in addition to the vicarious charge under s. 161, read with s. 34, he was being charged with the commission of an offence under s. 161, simpliciter also. This was manifest from the words : "You Accused 2 directly accepted from Shri Ghanshamsinh Champublia Zala Rs. 500/- . . . " All the material circumstances appearing in evidence constituting an offence under s. 161, Penal Code simpliciter were put to him during his examination. This objection was not raised in any of the courts below at any stage. No prejudice has therefore, been caused to the appellant by this technical defect in the charge. In any case this irregularity stood cured under s. 537, Criminal Procedure Code.

For the foregoing reasons, the appeal fails and is dismissed.

V.P.S. Appeal dismissed.