

# Corruption Conviction Overturned Due to Lack of Evidence

**Case Name:** Fahim Khan S/O Jahangir Khan v. Central Bureau of Investigation, Anti Corruption Bureau

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**Citation:** 2024:BHC-NAG:11821

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**Act:** Prevention of Corruption Act, 1988

Case Brief & MCQs on this case is  
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Judgment

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**IN THE HIGH COURT OF JUDICATURE AT  
BOMBAY, NAGPUR BENCH, NAGPUR.**

**CRIMINAL APPEAL NO.525 OF 2012**

Fahim Khan s/o Jahangir Khan,  
aged about ..... years, occupation none,  
r/o Mujavar Pura, ward No.14,  
Patur, district Akola. .... **Appellant.**

**:: V E R S U S ::**

Central Bureau of Investigation,  
Anti Corruption Bureau, through its  
Inspector, Nagpur. .... **Respondent.**

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Shri S.V.Sirpurkar, Counsel for the Appellant.  
Shri P.Sathianathan, Special Public Prosecutor for the  
Respondent/.

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**CORAM : URMILA JOSHI-PHALKE, J.**  
**CLOSED ON : 04/10/2024**  
**PRONOUNCED ON : 19/10/2024**

**JUDGMENT**

1. By this appeal, the appellant (the accused) has challenged judgment and order dated 10.12.2012 passed by learned Special Judge (CBI) and Additional Sessions Judge-2, Amravati (learned Special Judge) in Special (CBI) Case No.8/2008.

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2. By the said judgment impugned, the appellant (the accused) is convicted for offence punishable under Section 7 of the Prevention of Corruption Act, 1988 (the said Act) and sentenced to undergo rigorous imprisonment for three years and to pay fine Rs.1000/-, in default, to undergo rigorous imprisonment for two months.

The accused is further convicted for offence punishable under Section 13(1)(d) read with 13(2) of the said Act and sentenced to undergo rigorous imprisonment for three years and to pay fine Rs.1000/-, in default, to undergo rigorous imprisonment for two months.

Learned Special Judge directed that all sentences shall run concurrently.

3. The case of the prosecution, in brief, is as under:

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On 23.5.2008, one Mohd.Rafi (the informant), resident of Badnera, approached the office of the Central Bureau of Investigation (CBI) at Nagpur and lodged a complaint on allegations that the accused, serving as Constable with the Railway Police Force (RPF), demanded Rs.3000/- as gratification from him so as to allow him to sale foodstuff at Railway Platforms and in trains passing through Badnera Railway Station. It was further alleged that the accused asked him to pay the amount on 24.5.2008 when he would come at Badnera Railway Station by Kurla-Howrah Express Train. As the informant was not willing to pay the amount, he lodged the complaint.

4. After receipt of the complaint, officers of the CBI called two panchas. The complaint was read over to panchas and panchas also obtained information from the informant. The informant produced four currencies of Rs.100/- and eight currencies of Rs.50/-, total amounting to Rs.800/- before officers of the CBI. The demonstration as to phenolphthalein powder and

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sodium carbonate was shown to the informant and panchas. The informant was asked to have telephonic communication with the accused. The conversation between the informant and the accused was recorded in a Micro Cassette Recorder. Accordingly, the conversation was reduced into writing. A separate panchanama, as to procedure, was drawn. The solution was applied on the tainted notes and the said notes were kept in left side shirt pocket of the informant. The informant was instructed to give a signal after acceptance of the amount. Pancha No.1 was also instructed to stay along with the informant and observe all events. Whereas, pancha No.2 was instructed to stay along with other raiding party members. Accordingly, pre-trap panchanama was drawn. Before proceeding for the trap, the Micro Cassette Recorder was kept in pocket of the informant and the informant and pancha No.1 proceeded towards Railway Platform and other raiding party members followed them. At about 9:20 am, Shalimar Express arrived and the accused got down from the said

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train. During communication, the informant picked the amount from his pocket and gave it to the accused as the accused demanded the same by gestures. The accused accepted the said amount and kept in right side pocket of his trouser. On receipt of a signal, raiding party members caught the accused. The Micro Cassette Recorder was removed from the pocket of the informant and switched off. The amount was seized from the accused. The hand wash of the informant as well as the accused was collected. The pocket of the trouser was dipped into the solution and the said solution was also collected. Accordingly, post-trap panchanama was drawn. After obtaining a sanction, chargesheet was filed against the accused.

5. To substantiate allegations, the prosecution examined in all seven witnesses namely Mohd.Rafi Mohd. Hashim vide Exhibit-37 (PW1), the informant; Nishant Wakode vide Exhibit-44 (PW2), the Shadow Pancha; Achyutanand Zha vide Exhibit-55 (PW3), the Sanctioning Authority; Dipak Sontakke vide Exhibit-60 (PW4), the RPF

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Officer; Ramesh Satpute vide Exhibit-63 (PW5), the BSNL employee; Rajivkumar Rishi vide Exhibit-68 (PW6), the Trap Officer; and Krishnakumar Ranjit Singh vide Exhibit-78 (PW7), the Investigating Officer.

6. Besides the oral evidence, the prosecution placed reliance on transcription of Audio Recording Exhibit-45, verification panchanama Exhibit-46, pre-trap panchanama Exhibit-47, seizure memo Exhibit-48, Audio Recording transcription Exhibit-49, post-trap panchanama Exhibit-50, map Exhibit-51, transcription panchanama Exhibit-52, Voice Sample Panchanama of the accused Exhibit-53, Sanction Order Exhibit-56, Call Details Exhibit-64, complaint Exhibit-69, First Information Report Exhibit-70, Chemical Analyzer's Report Exhibit-71, Voice Sample Analysis Exhibit-95.

7. After considering the evidence adduced during the trial, learned Special Judge held the accused guilty as the aforesaid.

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8. Heard learned counsel Shri S.V.Sirpurkar for the accused and learned Special Public Prosecutor Shri P.Sathianathan for the CBI. I have been taken through the entire evidence so also the judgment impugned in the appeal.

9. Learned counsel for the accused submitted that during the trial, the informant did not support the prosecution case and he turned hostile. During his cross examination, nothing transpired. The evidence of Shadow Pancha PW2 Nishant Wakode is only to the extent that the accused made gestures and informant PW1 Mohd.Rafi paid the amount and the accused accepted the same. Thus, as far as the demand is concerned, neither the informant stated nor the Shadow Pancha disclosed about the demand. As far as gestures are concerned, there is no specific evidence. The Shadow Pancha admitted that no description was given in the panchanama as to gestures. As far as the Audio Recording is concerned, nowhere it shows that the demand was made and, thereafter, the amount was



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handed over to the accused. In fact, the defence of the accused was that the informant had obtained the hand loan and agreed to pay the same by installments and in that context, it appears in the transcription that the informant agreed to pay the amount in installments. Thus, as far as the demand is concerned, there is absolutely no evidence to corroborate aspect of the demand. Thus, the demand and the acceptance was not proved, but learned Special Judge did not consider the same and he convicted the accused. As to the sanction also, the same was not accorded after application of mind.

10. In support of his contentions, learned counsel for the accused placed reliance on following decisions:

**1. Panalal Damodar Rathi vs. State of Maharashtra<sup>1</sup>;**

**2. Dattatraya s/o Udaji Warkad vs. State of Maharashtra, through ACB Office, Buldana<sup>2</sup>;**

<sup>1</sup> (1979)4 SCC 526

<sup>2</sup> Criminal Appeal No.319/2000 decided by Nagpur Bench on 7.9.2017

**3. Dr.Kiran Deshpande vs. The State of Maharashtra, through Anti Corruption Bureau, Nagpur<sup>3</sup>;**

**4. Soundarajan vs. State Rep.By the Inspector of Police vigilance Anti Corruption, Dindigul<sup>4</sup>,and**

**5. B.Jayaraj vs. State of Andhra Pradesh<sup>5</sup>.**

11. *Per contra*, learned Special Prosecutor for the CBI submitted that though informant PW1 Mohd.Rafi did not support the prosecution case, the evidence of Shadow Pancha PW2 Nishant Wakode is consistent as to the demand and acceptance. As far as defence of the accused is concerned, there was no immediate explanation as soon as he was caught by raiding party members. The sanction was also after application of mind. The electronic evidence, i.e. transcription panchanama, shows that there was a demand and acceptance. The electronic evidence in the nature of transcription panchanama shows involvement of the accused in the alleged crime.

3 2018 SCC OnLine Bom 95

4 Criminal Appeal No.1592/2022 decided by the Hon'ble Apex Court on 17.4.2023

5 (2014)13 SCC 55

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12. In support of his contentions, learned Special Prosecutor placed reliance on following decisions:

**1. Shriram s/o Tanbaji Dhamane vs. Government of India (through CBI Nagpur)<sup>6</sup>;**

**2. Tarsem Lal vs. State of Haryana<sup>7</sup>, and**

**3. Ghalappa Sardar Nadgeri and anr vs. The State of Maharashtra<sup>8</sup>.**

On the basis of the evidence adduced, he claimed that no interference is called for in the judgment impugned in the appeal.

13. The validity of the sanction was questioned by the accused and it was challenged on ground that it was accorded without application of mind.

14. In order to prove the sanction, the prosecution examined Sanctioning Authority PW3 Achyutanand Zha, whose evidence shows that at the relevant time, he was serving as Divisional Security Commissioner of Railway Protection Force, Central Railway, Bhusawal Division.

<sup>6</sup> Criminal Appeal No.632/2005 decided by this court on 21.8.2024

<sup>7</sup> AIR 1987 SC 806

<sup>8</sup> 2018 ALL MR (cri) 5096

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As per RPF Rules, 1987, the Divisional Security Commissioner is the Appointing Authority and has powers to remove persons of a rank of Constable. He received a request letter from the office of the CBI to grant sanction to launch prosecution against the accused. After going through the First Information Report, other documents like pre-trap; post-trap, and seizure panchanamas and other documents, he was satisfied and, therefore, he accorded the sanction.

15. The cross examination of Sanctioning Authority PW3 Achyutanand Zha shows that the sanction was challenged on ground that the Chief Security Commissioner is the Appointing Authority, which is denied by the said witness. He clarified that in Rule 39, it nowhere stated that powers of the Divisional Security Commissioner are contemplated and it nowhere stated that the Divisional Security Officer is the Appointing Authority.

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Thus, an attempt was made that the Sanctioning Authority is not competent person to accord the sanction.

His cross examination further shows that after scrutiny, he prepared a draft and accorded the sanction.

Thus, as far as application of mind is concerned, his evidence sufficiently shows that after application of mind, he accorded the sanction.

The sanction order also discloses that on examining and fully satisfying as to copy of the complaint, the First Information Report, verification panchanama, pre-trap and post-trap panchanamas, recovery of memo, copy of transcription panchanama, other relevant documents, he accorded the sanction.

16. Whether sanction is valid or not and when sanction can be called as valid, is settled by various decisions of the Hon'ble Apex Court as well as this Court.

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17. The Hon'ble Apex in the case of **Mohd.Iqbal Ahmad vs. State of Andhra Pradesh**<sup>9</sup> held that what the court has to see is whether or not the Sanctioning Authority at the time of giving the sanction was aware of the facts constituting the offence and applied its mind for the same and any subsequent fact coming into existence after the resolution had been passed is wholly irrelevant. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to government servants against frivolous prosecutions and must therefore be strictly complied with before any prosecution can be launched against the public servant concerned.

18. In view of the settled principles of law, it is crystal clear that the Sanctioning Authority has to apply his/her own independent mind for generation of his/her satisfaction for sanction. The sanction order should speak for itself. It is well settled that sanction order should not be so elaborate like an order of court

9 1979 AIR 677

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containing detailed reasons, but it should be after application of mind. Ultimately, an object of grant of sanction should be able to consider evidence and material before it and the Sanctioning Authority shall come to a conclusion that whether the prosecution in the circumstances be permitted or forbidden. It is further well settled that sanction is solemn and sacrosanct act. The law does not require sanction to be in a particular form. The sanction should be given in respect of facts constituting offence charged equally which applies to the sanction under Section 19 of the said Act.

19. As observed earlier, sanction order is not required to be passed as of a court order.

20. Sub section (4) of Section 19 of the said Act states that in determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice, the Court shall have regard to the

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fact whether the objection could and should have been raised at any earlier stage in the proceedings.

21. In the light of the above well settled legal position, if the sanction order is perused, Sanctioning Authority PW3 Achyutanand Zha, specifically stated that he received all investigation papers and on examining and verifying the same, he accorded the sanction. The evidence shows that he has not only gone through papers of investigation but also, on satisfying himself, accorded the sanction.

22. Thus, the issue of sanction cannot be put at such pedestal as it would make impossible for the prosecution to prove the same. The object and purpose of grant of sanction and protection contemplated thereby does not mean that technical and trivial objections to legality and validity of sanction are to be entertained. When all relevant materials placed before the Sanctioning Authority are found to be taken into



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consideration in correct perspective, the sanction accorded is by application of mind.

23. The sanction is also challenged on ground that Sanctioning Authority PW3 Achyutanand Zha, is not competent person.

24. In view of legal position, as per Section 19(3) of the said Act and Explanation, term "Error" includes competency of the authority to grant sanction and competency to grant sanction would not be open to be questioned. Moreover, it was for opponent to demonstrate, what prejudice he has suffered.

25. As far as prejudice is concerned, the accused has not shown anything that too demonstrate that due to the sanction by the incompetent person, prejudice is caused to him.

26. Besides the issue of the sanction, the prosecution claimed that the accused demanded the amount of gratification and accepted the same.

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27. To prove the charge, the prosecution mainly placed reliance on the evidence of informant PW1 Mohd.Rafi. Though he has lodged the complaint against the accused, alleging that the demand was made by the accused for permitting him to sale foodstuff at platforms of the Badnera Railway Station as well as in running trains, he has not supported the prosecution case and left loyalty towards the prosecution. Though he was cross examined at length by Public Prosecutor, nothing transpired to show that there was a demand by the accused and in pursuance of the said demand, the amount was accepted. On the contrary, during cross examination, the informant admitted that he had borrowed Rs.3000/- from the accused and the accused was insisting him to repay the same and, therefore, he paid Rs.800/-, out of the said amount.

28. Besides the evidence of informant PW1 Mohd.Rafi , the prosecution examined Shadow Pancha PW2 Nishant Wakode. Perusal of his evidence shows that his superior asked him to attend the office of the CBI at Amravati.

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Another pancha was also present. Thereafter, officer of the CBI took them at BSNL Inspection Bungalow. The informant was also present there. They verified from the informant as well as the written complaint and revealed to them that the accused, who was serving as RPF Constable, demanded Rs.3000/- for permitting him to sale foodstuff at Railway Platforms and inside trains. In their presence, CBI officer asked the informant to have a telephonic talk with the accused and the said talk was recorded in a Micro Cassette Recorder. The transcription of the said communication was recorded, which is at Exhibit-45 and separate panchanama is at Exhibit-46. On 24.5.2008, pre-trap panchanama was drawn. He narrated about events carried out during the pre-trap panchanama. He also narrated about instructions given to them. As to the demand, his evidence is that he along with the informant proceeded towards the RPF Police Station. In front of the police station, the accused by gestures asked the informant to give the amount and the informant removed the amount from his pocket and gave

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it to the accused. The accused accepted the amount by his right hand and kept the same in right side pocket of his trouser and, thereafter, the informant gave a signal and the accused was caught. Amount Rs.800/- was seized from the accused. The hands of the informant and the accused and right side pocket of his pant were dipped in the said solution and the said solution was seized. The conversation between the accused and the informant was also transcribed as well as transferred the same to another cassette. Accordingly, post-trap panchanama was drawn.

29. Thus, as per the evidence of Shadow Pancha PW2 Nishant Wakode, the demand was made by gestures. During cross examination, the Shadow Pancha admitted that he did not confirm whether the person, who was talking on mobile phone, was the accused himself. His evidence further shows that platforms remain crowded on arrival of trains. The Micro Cassette Recorded, if kept on, voice of crowd would be recorded. He further admitted that description of gestures, which the accused

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made for demanding the amount, are not mentioned in the panchanama.

Thus, the evidence, as to the demand, shows that the demand was made by telephonic communication as well as by gestures when they met the accused.

Exhibit-45 is the transcription of the telephonic communication. Perusal of the entire communication nowhere reveals that the accused demanded any amount and informant PW1 Mohd.Rafi agreed to pay the same. On the contrary, the communication shows that it was the informant who assured the accused that he will pay Rs.800/- and remaining amount will be paid in installments and he will NIL the account. The transcription recorded in the Micro Cassette Recorder is also transcribed, which also shows that it was the informant who informed the accused that he is unable to pay the amount in lump-sum and he will pay in installments. The communication further shows that the

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accused only asked how much he brought and he informed that he has brought Rs.800/-.

Thus, as far as the demand is concerned, even transcription transcribed in the Micro Cassette Recorder nowhere shows that there was a demand by the accused. As far as the demand by gestures is concerned, admittedly, no specific gesture is narrated either by the informant or by the Shadow Pancha.

30. Besides Shadow Pancha PW2 Nishant Wakode, the prosecution examined RPF Officer PW4 Dipak Sontakke. As far as the demand and acceptance is concerned, his evidence is not helpful to the prosecution. On the contrary, his evidence shows that he has not received any complaint against the accused. He has also not received any complaint of informant PW1 Mohd.Rafi that he is doing unlawful vending at platforms or in trains. He specifically admitted that he had not seen the informant doing such vending at platforms of Badnera Railway

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Station. He further stated that he observed the accused working sincerely and his confidential reports were good.

31. PW5 Ramesh Satpute is the Vigilance Officer serving in BSNL Department at Nagpur. His evidence shows that there was a call between informant PW1 Mohd.Rafi and the accused.

32. PW6 Rajivkumar Rishi is Trap Officer and PW7 Krishnakumar Ranjit Singh is Investigating Officer.

Insofar as the evidence of Trap Officer PW6 Rajivkumar Rishi is concerned, he narrated about various events took place during pre-trap and post-trap panchanamas. As far as demand and acceptance is concerned, the same was not in his presence. His cross examination shows that when the accused alighted from the train, he was going with informant PW1 Mohd.Rafi telling to him that in conversation recorded there was a noise of crowd. He admitted that in Exhibit-59 he has not mentioned about noise of crowd. In Exhibit-65 also, no information is mentioned as regards mobile phones

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used for conversation standing in names of the informant and the accused. He also admitted that in post-trap panchanama Exhibit-50, nothing is mentioned about gestures as to what were specific gestures of the accused.

Thus, his evidence also shows that there were no specific gestures mentioned in the post-trap panchanama.

Insofar as Investigating Officer PW7 Krishnakumar Ranjit Singh is concerned, he conducted further investigation, who also admitted that during the investigation, it was revealed that SIM Cards used were not standing in names either of the accused or the informant.

33. Besides the oral evidence, the prosecution placed reliance on the Chemical Analyzer's Report as well as Voice Samples Analysis. The Chemical Analyzer's Report Exhibit-71 shows Exhibits-B, D, E, F, and G i.e. the solutions collected were analyzed containing presence of



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phenolphthalein powder and sodium carbonate. The Voice Sample Analysis Report also shows that the Voice Sample collected of the accused matches with the voice in the Audio Cassette Recorder.

34. It is vehemently submitted by learned Special Prosecutor that the evidence of Shadow Pancha PW2 Nishant Wakode, corroborated by circumstantial evidence in the nature of Chemical Analyzer's Report and the Voice Sample Analysis Report, sufficiently shows involvement of the accused.

In support of his contentions, he placed reliance on the decision of the Hon'ble Apex Court in the case of **Tarsem Lal vs. State of Haryana** *supra* wherein it is held that no explanation is given by accused at the time of search and recovery. Explanation given at trial, is liable to be rejected and the accused is liable to be convicted.

As to the demand by gestures, he placed reliance on the decision of this Court in the case of **Ghalappa**

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**Sardar Nadgeri and anr vs. The State of Maharashtra** *supra* wherein it is held that gesture is a movement of a limb or the body as an expression of thought or feeling. It is further held that the demand by gesture as defined in Black's Law Dictionary was a calculated movement to emphasize a certain point and that was the demand of tainted currency notes.

35. Learned counsel for the accused placed reliance on the decision of the Hon'ble Apex Court in the case of **Panalal Damodar Rathi vs. State of Maharashtra** *supra* and submitted that as far as the demand is concerned, it is not corroborated in material particulars. There was no corroboration of testimony of the Shadow Pancha regarding the money.

As to the demand by gestures, he placed reliance on the decision in the case of **Dattatraya s/o Udaji Warkad vs. State of Maharashtra, through ACB Office, Buldana** *supra* wherein it is held that a conclusive and definite demand must be proved beyond

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any reasonable doubt for constituting office under the said Act.

He further placed reliance on the decision of the Hon'ble Apex Court in the case of **Soundarajan vs. State Rep.By the Inspector of Police vigilance Anti Corruption, Dindigul** *supra* wherein the Hon'ble Apex Court by referring decision in the case of **Neeraj Dutta vs. State (Govt. of NCT of Delhi)**<sup>10</sup> reiterated that presumption under Section 20 of the said Act can be invoked only on proof of facts in issue, namely, the demand of gratification by the accused and the acceptance thereof.

36. On appreciation of the evidence, it reveals that admittedly, informant PW1 Mohd.Rafi has not supported the prosecution case and, therefore, the entire reliance is on the evidence of Shadow Pancha PW2 Nishant Wakode.

<sup>10</sup> 2022 SCC OnLine SC 1724

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As far as the earlier demand is concerned, as the informant has not supported the case of the prosecution, there is no other evidence to prove the earlier demand.

As to the demand, regarding on the day of the trap, as per the evidence of the Shadow Pancha, there was a telephonic talk prior to the trap to verify genuineness of the demand. The transcription of the said telephonic call nowhere discloses that it was the accused who made the demand, but it discloses that it was the informant who assured him to pay the entire amount by way of installments. At the time of the trap, as per the Shadow Pancha, the demand was made by gestures, but he has not narrated the nature of gestures. Not only the Shadow Pancha but also Trap Officer PW6 Rajivkumar Rishi admitted that in the post-trap panchanama what were exact gestures were not mentioned.

37. Thus, neither the oral evidence of Shadow Pancha PW2 Nishant Wakode discloses about exact gestures nor

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the post-trap panchanama shows what were exact gestures by the accused.

38. As far as reliance placed by learned Special Prosecutor on the decision of this Court in the case of **Ghalappa Sardar Nadgeri and anr vs. The State of Maharashtra** *supra* is concerned, in the said decision evidence was adduced as to exact gesture and, therefore, this Court held that demand by gesture is proved. In paragraph No.20 of the said decision, it is specifically mentioned that PW4 has stated that accused No.2 had called him by giving a signal by neck.

39. Here, such type of evidence is absent and, therefore, the decision of this Court to prove the demand by gestures is not helpful to the prosecution. As far as the demand by gestures is concerned, in view of the settled legal position, a conclusive and definite demand must be proved beyond any reasonable doubt for constituting offence under the said Act.

40. In the decision of the Hon'ble Apex Court in the case of **Mukhtiar Singh (since deceased) through his LR vs. State of Punjab**<sup>11</sup> also it is held that the statement of complainant and inspector, the shadow witness in isolation that the accused had enquired as to whether money had been brought or not, can by no mean constitute demand as enjoined in law. Such a stray query *ipso facto* in absence of any other cogent and persuasive evidence on record cannot amount to a demand to be a constituent of the offence.

41. The Hon'ble Apex Court, in the case of **Mukhtiar Singh** *supra*, held that the statement of complainant and inspector, the shadow witness in isolation that the accused had enquired as to whether money had been brought or not, can by no mean constitute demand as enjoined in law. Such a stray query *ipso facto* in absence of any other cogent and persuasive evidence on record cannot amount to a demand to be a constituent of the offence.

11 2017 SCC ONLine SC 742

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42. It is well settled that mere possession and recovery of currency notes from accused, without proof of demand, would not establish an offence under Section 7 as well as Section 13(1)(d)(i)(ii) of the said Act.

43. The Hon'ble Apex Court, in the case of **Jagtar Singh vs. State of Punjab**<sup>12</sup> also, by considering the judgment of the Constitution Bench in the case of **Neeraj Dutta vs. State (Govt. of NCT of Delhi)**<sup>13</sup> summarized discussion and reproduced paragraph No.74, which is as under:

“74. What emerges from the aforesaid discussion is summarised as under:

(a) Proof of demand and acceptance of illegal gratification by a public servant as a fact in issue by the prosecution is a sine qua non in order to establish the guilt of the accused public servant under Sections and 13(1)(d)(i) and (ii) of the Act.

(b) In order to bring home the guilt of the accused, the prosecution has to first prove the

12 2023 SCC OnLine SC 320

13 2023 SCC OnLine SC 280

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demand of illegal gratification and the subsequent acceptance as a matter of fact. This fact in issue can be proved either by direct evidence which can be in the nature of oral evidence or documentary evidence.

(c) Further, the fact in issue, namely, the proof of demand and acceptance of illegal gratification can also be proved by circumstantial evidence in the absence of direct oral and documentary evidence.

(d) In order to prove the fact in issue, namely, the demand and acceptance of Criminal Appeal No.1669 of 2009 illegal gratification by the public servant, the following aspects have to be borne in mind:

(i) if there is an offer to pay by the bribe giver without there being any demand from the public servant and the latter simply accepts the offer and receives the illegal gratification, it is a case of acceptance as per Section 7 of the Act. In such a case, there need not be a prior demand by the public servant.

(ii) On the other hand, if the public servant makes a demand and the bribe giver accepts the demand and tenders the demanded gratification which in turn is received by the public servant, it is a case of obtainment. In the case of obtainment, the prior demand for illegal



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gratification emanates from the public servant. This is an offence under Section 13(1)(d)(i) and (ii) of the Act.

(iii) In both cases of (i) and (ii) above, the offer by the bribe giver and the demand by the public servant respectively have to be proved by the prosecution as a fact in issue. In other words, mere acceptance or receipt of an illegal gratification without anything more would not make it an offence under Section 7 or Section 13(1)(d), (i) and (ii) respectively of the Act. Therefore, under Section 7 of the Act, in order to bring home the offence, there must be an offer which emanates from the bribe giver which is accepted by the public servant which would make it an offence. Similarly, a prior demand by the public servant when accepted by the bribe giver and in turn there is Criminal Appeal No.1669 of 2009 a payment made which is received by the public servant, would be an offence of obtainment under Section 13(1)(d) and (i) and (ii) of the Act.

(e) The presumption of fact with regard to the demand and acceptance or obtainment of an illegal gratification may be made by a court of law by way of an inference only when the foundational facts have been proved by relevant oral and documentary evidence and

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not in the absence thereof. On the basis of the material on record, the Court has the discretion to raise a presumption of fact while considering whether the fact of demand has been proved by the prosecution or not.

Of course, a presumption of fact is subject to rebuttal by the accused and in the absence of rebuttal presumption stands.

(f) In the event the complainant turns 'hostile', or has died or is unavailable to let in his evidence during trial, demand of illegal gratification can be proved by letting in the evidence of any other witness who can again let in evidence, either orally or by documentary evidence or the prosecution can prove the case by circumstantial evidence. The trial does not abate nor does it result in an order of acquittal of the accused public servant.

(g) In so far as Section 7 of the Act is concerned, on the proof of the facts in issue, Section 20 mandates the court to raise a presumption that the illegal gratification was for the purpose of a motive or reward as mentioned in the said Section. The said presumption has to be raised by the court as a legal presumption or a presumption in law. Of course, the said Criminal Appeal No.1669 of 2009 presumption is also subject to rebuttal. Section 20 does not apply to Section 13(1)(d) (i) and (ii) of the Act.

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(h) We clarify that the presumption in law under Section 20 of the Act is distinct from presumption of fact referred to above in point (e) as the former is a mandatory presumption while the latter is discretionary in nature.”

44. The Constitution Bench of the Hon’ble Apex Court in the case of **Neeraj Dutta vs. State (Govt.of NCT of Delhi)** *supra* held that in order to bring home the guilt of the accused, the prosecution has to first prove the demand of illegal gratification and the subsequent acceptance as a matter of fact. This fact in issue can be proved either by direct evidence which can be in the nature of oral evidence or documentary evidence. The Hon’ble Apex Court, while discussing expression “accept”, referred the judgment in the case of **Subhash Parbat Sonvane vs. State of Gujarat**<sup>14</sup> observed that mere acceptance of money without there being any other evidence would not be sufficient for convicting the accused under Section 13(1)(d)(i). In Sections and 13(1) and (b) of the said Act, the Legislature has

<sup>14</sup> (2002)5 SCC 86

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specifically used the words 'accepts' or 'obtains'. As against this, there is departure in the language used in clause (1)(d) of Section 13 and it has omitted the word 'accepts' and has emphasized the word 'obtains'. In sub clauses (i) and (ii) (iii) of Section 13(1)(d), the emphasize is on the word "obtains". Therefore, there must be evidence on record that accused 'obtained' for himself or for any other person any valuable thing or pecuniary advantage by either corrupt or illegal means or by abusing his position as a public servant or he obtained for any person any valuable thing or pecuniary advantage without any public interest.

While discussing the expression "accept", the Hon'ble Apex Court observed that "accepts" means to take or receive with "consenting mind". The 'consent' can be established not only by leading evidence of prior agreement but also from the circumstances surrounding the transaction itself without proof of such prior agreement. If an acquaintance of a public servant in expectation and with the hope that in future, if need be,

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he would be able to get some official favour from him, voluntarily offers any gratification and if the public servant willingly takes or receives such gratification it would certainly amount to 'acceptance' and, therefore, it cannot be said that as an abstract proposition of law, that without a prior demand there cannot be 'acceptance'. The position will however, be different so far as an offence under Section 5(1)(d) read with Section 5(2) of the 1947 Act is concerned. Under the said Sections, the prosecution has to prove that the accused 'obtained' the valuable thing or pecuniary advantage by corrupt or illegal means or by otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under Section 4(1) of the 1947 Act as it is available only in respect of offences under Section 5(1)(a) and (b) and not under Section 5(1)(c), (d) or (e) of the 1947 Act. According to this court, 'obtain' means to secure or gain (something) as the result of request or effort. In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be

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a primary requisite for an offence under Section 5(1)(d) of the 1947 Act unlike an offence under Section 161 of the Indian Penal Code, which can be established by proof of either 'acceptance' or 'obtainment'.

45. Thus, it is well settled that to prove offences under Sections 7 and 13(1)(d) of the said Act, proof of demand is *sine qua non*. As far as applicability of presumption is concerned, it would be attracted only when the foundational facts have been proved by relevant oral and documentary evidence and not in the absence thereof. On the basis of the material on record, the Court has the discretion to raise a presumption of fact while considering whether the fact of demand has been proved by the prosecution or not. Of course, a presumption of fact is subject to rebuttal by the accused and in the absence of rebuttal presumption stands.

46. In the instant case, as observed earlier, prior demand by the accused is not proved by the prosecution. Informant PW1 Mohd.Rafi has not supported the

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prosecution and the evidence of Shadow Pancha PW2 Nishant Wakode nowhere discloses as to exactly what gestures were made by the accused to demand the amount. The said gestures were also not mentioned in the post-trap panchanama. Mere possession of gratification amount is not sufficient to hold the accused guilty.

47. Since proof of demand is *sine qua non* for convicting the accused, in such cases, it cannot be said that the prosecution has been successful in proving its case beyond reasonable doubt. The sanction accorded is without application of mind and, therefore, it is not a valid sanction.

48. In the light of the above discussion, as the appeal succeeds and deserves to be allowed, following order is passed:

**ORDER**

(1) The Criminal Appeal is **allowed**.

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(2) Judgment and order dated 10.12.2012 passed by learned Special Judge (CBI) and Additional Sessions Judge-2, Amravati in Special (CBI) Case No.8/2008 is hereby quashed and set aside.

(3) The accused is acquitted of offences for which he was convicted and sentenced.

Appeal stands **disposed of**.

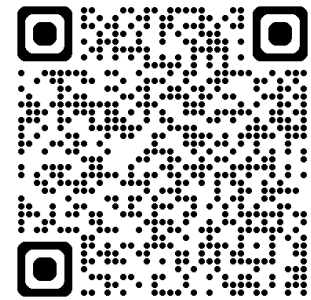
**(URMILA JOSHI-PHALKE, J.)**

!! BrWankhede !!



Case Brief & MCQs on "Fahim Khan S/O Jahangir Khan v. Central Bureau of Investigation, Anti Corruption Bureau" (2024:BHC-NAG:11821) is available in the eBook:

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