The State of Gujarat

Vs

Sh. Manshankar Prabhashankar Dwivedi

Civil Appeals Nos. 190 and 191 of 1969 and 63 and 64 of 1972

(A. N. Grover, M. H. Beg JJ)

26.04.1972

JUDGMENT

GROVER, J. -

1. This judgment will dispose of all the four appeals from the judgment of the Gujarat High Court.

2. Two appeals, i.e. Cr. As. Nos. 190 and 191 of 1969 had been brought by certificate. The certificates being defective for want of reasons they could not be entertained on that short ground. However, two petitions for special leave were filed and the same were granted. Those appeals (Cr. As. Nos. 63 and 64 of 1972) will be dealt with in this judgment.

3. The facts may be stated. Manshankar Prabhashankar Dwivedi was at the material time a Senior Lecturer at the D.K.V. Arts and Science College, Jamnagar which is a Government college. Vallabhdas Gordhandas Thakkar was a legal practitioner conducting cases before the Income-tax and Sales tax Departments. He was also a resident of Jamnagar. It was alleged that in April, 1964, the Physics practical examination for the first year B.Sc. was to be held by the Gujarat University. One of the centers was Surendranagar. Dwivedi had been appointed as an Examiner for Physics practical. He is alleged to have accepted gratification of Rs. 500/- other than legal remuneration for showing favour to a candidate Jayendra Jayantilal Shah by giving him more marks than he deserved in the Physics practical examination. It is stated that he had obtained that amount through Thakkar. Dwivedi was charged with commission of offences under Section 161, Indian Penal Code, Section 5(2), read with Section 5(1)(d) of the Prevention of Corruption Act, 1947, hereinafter called the 'Act'. Thakkar was charged under Section 165-A, Indian Penal Code, and Section 5(2) of the Act read with Section 114 of the Indian Penal Code. The Special Judge who tried both these persons found them guilty of the offence with which they were charged. He imposed a sentences of two years' rigorous imprisonment and a fine of Rs. 1,000/-, (in default further rigorous imprisonment for six months) on each of these persons.

4. Both the convicted persons filed appeals to the High Court. The High Court found that the prosecution case had been proved against both Dwivedi and Thakkar on the merits but on the view which the High Court expressed about the ambit and scope of the sections under which the charges were laid they were acquitted. The present appeals have been filed by the State against both these persons who are respondents before us.

5. It is unnecessary to give the entire prosecution story. We may only refer to what is the last and final stage of that story. According to the prearranged plan it was alleged that Pranlal Mohanlal who was the complainant and who was the brother-in-law of the student Jayendra, went to the college,

where the examination was to take place, along with a panch witness Shivlal. Thakkar was in the porch of the college and he demanded the money for being given to Dwivedi. Pranlal, however, insisted that the money would be paid after he had talked the matter over with Dwivedi and the work was done. Thakkar replied that Dwivedi was busy and would be available after some time. So they all left. Thakkar, followed them. When Pranlal and Shivlal reached the Trolly Station Thakkar came there and asked them to go with him to a place called 'Vikram Lodge' which they did. There Thakkar again demanded money but Pranlal gave the same reply which he had given before. At about 11 a.m. those three persons came back to the college and went to the first floor where the examination hall was situate and stood outside the hall. There Thakkar brought Dwivedi and Dwivedi said "why are you delaying. You are a fool. You will spoil the life of the student. Pay the amount to Thakkar". The Pranlal paid Rs. 500/- to Thakkar in the presence of Dwivedi. Thakkar counted the money and put it in his pocket. Dwivedi went back to his room. Thereafter the signal was given and the raiding party arrived and made the recoveries. Necessary panchnamas were prepared.

6. The High Court agreed with the Special Judge that the prosecution case against the present respondents in respect of the demand and acceptance of bribe of Rs. 500/- for the purpose of giving more marks to Jayendra had been proved. It was, however, argued before the High Court that as regards Section 161, Indian Penal Code, it was necessary that the person committing that offence must be a public servant. Although Dwivedi was a Senior Lecturer in a Government College the bribe was sought to be obtained not in connection with any official act or in connection with the exercise of his official functions as a public servant but in connection with his work as an Examiner of the Gujarat University. An Examiner of the University did not fall within the definition of a "public servant" as given in Section 21 of the Indian Penal Code. It was maintained on behalf of Dwivedi that although he had abused his position as an Examiner but he had not done so as a Government servant in which capacity alone he could be a public servant. The Special Judge had, however, taken the view that even an examiner was a public servant. As regards the offence under the Act the Special Judge had held that it was not necessary that the misconduct should be committed in the discharge of the public servant's duties. Once it was proved that the payment had been obtained by corrupt or illegal means it was not necessary that the accused should abuse his position as a public servant or that he should have obtained the money while acting as a public servant. The High Court did not accept the reasoning or the conclusion of the Special Judge on these points.

7. Section 21 of the Indian Penal Code as it stood at the material time and before the amendments which were made later contained several clauses. The Ninth Clause was in the following terms :

> "Ninth. - Every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government or to execute any revenue-process, or to investigate, or to report, on any matter affecting the pecuniary interests of the Government, or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interests of the Government and every officer in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty."

8. The first question which has to be resolved is whether respondent Dwivedi was a public servant within the meaning of the Ninth clause of Section 21, Indian Penal Code, keeping in view the

capacity in which and the nature of the duties which he was performing as an Examiner of University which, it has been found, had no connection with his being a Government servant. It is well known that Universities appoint Examiners having the requisite academic qualifications who may or may not be Government servants. For instance, a person having the requisite academic qualifications who is working in a private institution can and usually is appointed an Examiner by the University. The question that immediately arises is whether an Examiner of a University as such can be regarded as a public servant within the meaning of Ninth clause of Section 21, Indian Penal Code. It will be useful to look at the scheme of Section 21. There could be no difficulty about the second, third and fourth clauses which deal with the commissioned officers in the Armed Forces, judges and officers of the Courts of Justice whose duties are as such officers to do various matters mentioned in those clauses. The Fifth clause brings within the definition every juryman, assessor or member of a panchayat assisting a Court of Justice or public servant. Under the sixth clause every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice or by any other competent public authority would also fall within the words "public servant". Seventh and eighth clauses deal with persons who perform mainly policing duties. The tenth clause covers officers whose duty it is to take, receive, keep or expend any property, to make any survey or assessment or to levy any rate or tax etc. The eleventh clause relates to persons who hold any office by virtue of which they are empowered to prepare, publish etc., an electoral roll or to conduct an election. The twelfth clause covers every officer in the service or pay of local authority or a corporation engaged in any trade or industry established by the Central, Provincial or State Government or a Government company. In the illustration given it is stated that a Municipal Commissioner is a public servant. According to Explanation 1, persons falling under any of the description given in the twelfth clause are public servants whether appointed by the Government or not. Section 21 was amended in 1964. The ninth clause was retained substantially as it existed previously except that the following words were dropped : "and every officer in the service or pay of the Government or remunerated by fee or commission for the purpose Of any public duty". The twelfth clause was recast and the new provision was in these terms :

> "Twelfth. - Every person -
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> (a) in the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;
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> (b) in the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in Section 617 of the Companies Act, 1956."
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> Thus sub-clause (a) of the twelfth clause, after the amendment corresponds substantially to the last part of the old ninth clause with this change that the expression "every officer" has now been substituted by the words "every person" and after the words "performance of any public duty" it has been added "by the Government".

9. The argument which has been addressed mainly on behalf of the State and which was pressed before the High Court is that the ninth clause, as it stood, when the offences are alleged to have been committed would cover the case of Dwivedi as he was an officer in the service or pay of the Government or was remunerated by the fee or commission for the performance of a public duty. Acting as an Examiner, it has been suggested, is the performance of a public duty. If Dwivedi was remunerated by fee or commission by the University for the performance of that public duty he

would be covered by the last part of the ninth clause as it stood at the relevant time. It is admitted on behalf of the State that after the amendment made in 1964 under the twelfth clause it is only a person in the service or pay of the Government or remunerated by fee or commission for the purpose of any public duty by the Government who would fall within the definition of "public servant" within sub-clause (a) of the twelfth clause. But it is argued that the position was different under the Ninth Clause as the words "by the Government" did not follow the words "performance of any public duty" although at every other appropriate place the word "Government" was to be found in the Ninth clause. The omission of these words show that the clause was wider when it came to the case of an officer who was remunerated by fee or commission for the performance of any public duty and it was not necessary that the remuneration by way of fee or commission should be paid by the Government as is now necessary under sub-clause (a) of the Twelfth clause after the amendment.

10. The High Court gave the following reasons for holding that the last part of the Ninth clause, as it stood before the amendment, would not cover the case of Dewivedi :

> (i) The context of the whole of the Ninth clause indicated that the connection with the Government was necessary either in respect of the payment of remuneration or in respect of the performance of public duty.
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> (ii) The person to be an officer must hold some office. The holding of office implied charge of a duty attached to that office. The person who was remunerated by fee or commission must be an officer. Therefore the use of word "officer" read in the context of the words immediately preceding the last part would indicate that the remuneration contemplated was remuneration by the Government.
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> (iii) The amendment made in 1964 and in particular the addition of the words "by the Government" in sub-clause (a) of clause Twelfth showed the legislative interpretation of the material portion of clause Ninth as it stood before the amendment under consideration.
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> (iv) It is well settled that in a statutory provision imposing criminal liability if there is any doubt as to the meaning of a certain expression or words its benefit should be given to the subject.

11. It has not been shown to us by the learned counsel for the appellant that the reasoning of the High Court on the above point suffers from any infirmity. Apart from the other reasons given by the High Court reason No. (ii) seems to have lot of force. It is supported by the decision in Ram Krishna Dalmia v. Delhi Administration ((1963) 1 SCR 253 : AIR 1962 SC 1821 : (1962) 2 Cri LJ 805.). There a Chartered Accountant had been appointed as an Investigator by the Central Government under the Insurance Act, 1938 to investigate into certain matters and he was to get remuneration for the work entrusted to him. It was held that he did not become an officer as he did not hold any office. He could not, therefore, become a public servant within the latter parts of Ninth Clause of Section 21 of the Indian Penal Code. It is noteworthy that the work of an Investigator was of a nature which could well be regarded as public duty and the remuneration which was to be paid to him was by the Government. Yet it was held that he could not be regarded as holding an office. On that view it is not possible to put the case of a University Examiner in a different category. A University Examiner cannot be considered to hold an office in the sense in which that word had been understood and employed in the Ninth Clause. It is clear from the provisions of the Gujarat

University Act, 1949 that there is no such condition that only that person can be appointed as Examiner who is the holder of an office. Section 20(xxii) provides for appointment of Examiners by the Syndicate. Section 30 empowers the Syndicate to make Ordinances to provide for all or any of the following matters :

> "....
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> (iii) conditions governing the appointment and duties of examiners."

No such Ordinance has been brought to our notice which restricts the appointment of the examiners to persons in the service of the Government or holders of any particular office. Suppose for instance there is a private individual who is not in the regular employment or service of either the Government or any public body or authority. He has the requisite academic qualifications and he is appointed an examiner in a particular subject in which he has attained high academic distinction. He cannot be said to be holding any office when he is appointed for the purpose of examining certain answer books even though that may fall within the performance of a public duty. There is another difficulty in regarding an examiner as a holder of an office. Before the amendment made in Section 21 by Act 40 of 1964 a person who is appointed an examiner and who receives remuneration by fee would fall within the term "public servant" if he is holder of an office. But persons in the regular service of the University would not be covered by the Ninth Clause. If at all, it would be in the Twelfth Clause which would be relevant in their case. It is, however, a moot point whether the University is local authority within the meaning of the first part of the Twelfth Clause before the amendment of Section 21. The expression "local authority" has a definite meaning. It has always been used in a statute with reference to such bodies as are connected with local self Government e.g., Municipalities, Municipal Corporations, Zila Parishads, etc. As a matter of fact Section 3(31) of the General Clauses Act, 1897 defines "local authority" to mean a municipal committee, district broad, body of port commissioners or other authority legally entitled to, or entrusted by the Government with the control or management of a municipal or local fund. It could never be intended that only such officers of the University should be public servants who are remunerated by fee or commission and not those who are in the regular service of the University. We concur with the High Court that a University Examiner cannot be held to be an officer. Once that conclusion is reached, he cannot be covered by the Ninth Clause of Section 21 of the Penal Code.

12. The next point which calls for decision is whether appellant Dwivedi was guilty of an offence under Section 5(1)(d) of the Corruption Act. That provision, as it stood at the material time, was as follows :

> "Section 5(1). - A public servant is said to commit the offence of criminal misconduct in the discharge of his duty -
>
> (d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage."

By the Central Act, 40 of 1964 the words "in the discharge of his duty" were omitted. This court has, however, taken the view in Dhaneshwar Narain Saxena v. Delhi Administration ((1962) 3 SCR 259 : AIR 1962 SC 195 : (1962) 2 SCJ 538 : (1962) 1 Cri LJ 203.), overruling an earlier decision that in order to constitute an offence under clause (d) of Section 5(1) of the Corruption Act it is not necessary that the public servant while misconducting himself should have done so in the discharge

of his duty. Section 2 of this Act provides that for its purposes "public servant" means a public servant as defined in Section 21 of the Indian Penal Code. Dwivedi while committing the offence under Section 5(1)(d) had two positions; (1) he was a lecturer in a Government College and (2) he was an examiner appointed by the Gujarat University for doing examination work on remuneration paid by the University. As a lecturer in Government College he certainly fell within the definition of "public servant" but the act of corruption attributed to him was in his capacity as examiner. A question at once arises whether Section 5(1)(d) will apply to the case of a Government servant who commits an act punishable under the said provision even though when the act is committed by him he is holding a different position which is not that of a Government servant and in which capacity alone he could fall within the definition of a "public servant". The High Court proceeded on the basis that for the purpose of the opening part of Section 5(1) of the Corruption Act, Dwivedi must be held to be a public servant. It was held that his case did not fall within the (sic) clause (d) as he did not abuse his position as a public servant although the means employed were corrupt and illegal.

13. The argument on behalf of the State is that even if Dwivedi was not punishable under Section 161 of the Indian Penal Code with reference to the work in respect of which he accepted an illegal gratification he would nevertheless be liable under Section 5(1)(d) of the Corruption Act because the liability of a public servant has been made absolute and it is wholly immaterial in what capacity he has committed the offence under sub-clause (d) of Section 5(1) of the Corruption Act. He need not have obtained for himself any valuable thing or pecuniary advantage as a public servant. Once he is a Government servant and thus falls within the definition of a public servant and if he uses corrupt or illegal means for obtaining a valuable thing or pecuniary advantage he commits an offence as contemplated by Section 5(1)(d). It need not further be proved that he abused his position as a public servant.

14. We may refer to the previous decisions of this Court relating to the interpretation of Section 5(1)(d) of the Corruption Act. In Dhaneshwar Narain Saxena v. Delhi Administration (supra); Saxena, who was an Upper Division Clerk, was approached by the Ram Narain, a fireman serving in the Delhi Fire Brigade, for assistance in obtaining a licence for a double barrelled shot gun which was, in fact obtained. Saxena was paid certain amount and a promise was made to pay him more. Ram Narain had made a false declaration with regard to his salary in the application for the licence. His allegation was that he had done so on the advice of Saxena. As Ram Narain's licence had been cancelled it was alleged that he again approached Saxena who demanded some amounts for helping him in the matter of restoration of the licence. Ultimately a trap was laid and Saxena was caught while the money was being handed over to him. The main argument in this case centered on the question whether Saxena had committed any misconduct in the discharge of his duty. Overruling the earlier decision of this Court in the State of Ajmer v. Shivji Lal (1959 Supp 2 SCR 739 : AIR 1959 SC 847 : 1959 SCJ 911 : 1959 Cri LJ 1127.), it was held that it was not necessary to constitute the offence under clause (d) of Section 5(1) that the public servant must do something in connection with his own duty and thereby obtain any valuable thing or pecuniary advantage. It was observed that "it was equally wrong to say that if a public servant were to take money from third person by corrupt or illegal means or otherwise abusing his official position in order to corrupt some other public servant without there being any question of his misconducting himself in the discharge of his own duty he had not committed an offence under Section 5(1)(d). It is also erroneous to hold that the essence of an offence under Section 5(2) read with Section 5(1)(d) is that the public servant should do something in the discharge of his own duty and thereby obtain valuable thing or pecuniary advantage". No such question was argued or decided in that case whether for the commission of an offence under Section 5(1)(d) abuse of position as a public servant was of the essence or the essential ingredient of the offence. It is noteworthy that the High Court had, on the

evidence produced by the prosecution, come to the conclusion that Saxena taking advantage of his own position as an employee in the Chief Commissioner's Office and Ram Narain's ignorance and anxiety to get the licence, had induced him to part with the money on the promise that he would get the licence restored. It appears, therefore, that it was in that background that the decision of this Court was given. The case of M. Narayanan Nambiar v. State of Kerala (1963 Supp 2 SCR 724 : AIR 1963 SC 1116 : (1963) 2 SCJ 582 : (1963) 2 Cri LJ 186.), was clearly one in which there had been abuse by a Government servant of his position as a public servant. The court referred to the preamble which indicates that the Corruption Act was passed as it was expedient to make more effective provisions for the prevention of bribery and corruption by public servants. The addition of the word "corruption" showed that the legislation was intended to combat other evils in addition to bribery. The argument on behalf of the accused in that case proceeded on the basis that clause (d) would take in only the case of direct benefit obtained by a public servant for himself or for any other person from a third party in the manner prescribed therein and did not cover the case of wrongful loss caused to the Government by abuse of his power. While analysing Section 5(1)(d), it was said :

> "Let us look at the clause 'by otherwise abusing the position of a public servant', for the argument mainly turns upon the said clause. The phraseology is very comprehensive. It covers acts done 'otherwise' than by corrupt or illegal means by an officer abusing his position. The gist of the offence under this clause is that a public officer abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage. 'Abuse' means mis use i.e. using his position for something for which it is not intended. That abuse may be by corrupt or illegal means or otherwise than those means. The word 'otherwise' has wide connotation and if no limitation is placed on it, the words 'corrupt', 'illegal' and 'otherwise' mentioned in the clause become surplusage, for on that construction every abuse of position is gathered by the clause. So some limitation will have to be put on that word and that limitation is that it takes colour from the preceding words along with which it appears in the clause, that is to say something savouring of dishonest act on his part."

The court entertained no doubt that every benefit obtained by the public servant for himself or for any other person by abusing his position as a public servant fell within the mischief of the said clause.

15. Although in the above decision the question whether the words "abusing his position as a public servant" qualify the word "otherwise" or also the words "corrupt or illegal means" in Section 5(1)(d) was not discussed directly, the observations made seem to indicate that the word "otherwise" refers to means other than corrupt or illegal by which a public servant may abuse his position. There are two ways of looking at the clause; one is that the words "corrupt or illegal means" stand by themselves and as soon as it is established that a public servant has by such means obtained any valuable thing or pecuniary advantage he will be guilty of the offence. The other way of reading this clause is by confining the words "by otherwise" to the means employed. Thus the means employed may be corrupt or illegal or may be of such a nature as would savour of a dishonest act. But the abuse of position as a public servant would be essential whether the means are corrupt or illegal or are of the nature covered by the word 'otherwise'. The analysis of clause (d) made in Narayanan Nambiar's case (supra), by Subba Rao, J., (as he then was) seems to lend support to the view taken by the High Court that the abuse of position as a public servant is essential. The reasoning of the High Court proceeds on these lines. The second part of clause (d) relating to the obtaining of the

valuable thing etc. relates to the object of the public servant, namely, the obtaining of a bribe. The first part concerns the manner of achieving that object. "The manner is the use of means and use of position. As to the use of means the clause expressly mentions corrupt or illegal but the Legislature does not want to limit itself to these means only and so goes on to use the word "otherwise". If the meaning to be given to the word "otherwise" is, as earlier stated, the words "by corrupt or illegal means" or "by otherwise" form a single clause and do not form two clauses. If that is so the abuse of position as a public servant that is referred to is "the abuse by corrupt or illegal means or by otherwise". The High Court also relied on the analysis of Section 5(1)(d) contained in Ram Krishna and Another v. The State of Delhi (1956 SCR 182 : AIR 1956 SC 476 : 1956 SCJ 432 : 1956 Cri LJ 837.), where it was pointed out that the offence created thereby is of four kinds. Bribery as defined in Section 161 of the Indian Penal Code, if it is habitual, falls within clause (a). Bribery of the kind specified in Section 165, if it is habitual, is comprised in clause (b). Clause (c) contemplates criminal breach of trust by a public servant. For that Section 405 of the Indian Penal Code has to be looked at. An argument was advanced in that case that clause (d) seems to create an independent offence distinct from simple bribery. This is what the court observed :

> "In one sense, this is no doubt true but it does not follow that there is no overlapping of offences. We have primarily to look at the language employment and give effect to it. One class of cases might arise when corrupt or illegal means are adopted for pursued by the public servant to gain for himself a pecuniary advantage. The word "obtains" on which much stress was laid does not eliminate the idea of acceptance of what is given or offered to be given, though it connotes also an element of effort on the part of the receiver. One may accept money that if offered, or solicit payment of a bribe, or extort the bribe by threat or coercion; in each case, he obtains a pecuniary advantage by abusing his position as a public servant."

16. Thus in clauses (a), (b) and (c) the abuse of position as a public servant is clearly implied. Clause (e) also carries the same implication. It would, therefore, be reasonable to put on clause (d) a construction which is consistent with the other clauses of the sub-section. According to the High Court such a construction would also keep the offence within the limitation and the object of the Act. The abuse of the position would be the necessary ingredient of the offence; the abuse being either by corrupt or illegal means or by other means of the nature mentioned in Narayanan Nambiar's case (supra).

17. Counsel for the State has not been able to satisfy us that the various reasons given by the High Court as also the observations made in the previous judgments of this Court are not sufficient to sustain the construction or interpretation of Section 5(1)(d) which commended itself to the High Court.

18. As Dwivedi was not a public servant when he was acting as an examiner it could not be said that there had been any abuse by him of his position as a public servant. It was never the case of the prosecution that he had been guilty of any abuse of his position as a lecturer of the Government College. If Dwivedi was not guilty, Thakkar could not be held to be guilty of the offences with which he was charged.

19. We would accordingly uphold the decision of the High Court and dismiss both the appeals.

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