ANDHRA PRADESH HIGH COURT

D.V. Narasimham

Vs

State

(Sharfuddin Ahmed and V Rao, JJ.)

20.12.1967

JUDGMENT

Sharfuddin Ahmed, J.

1. The question that has been referred to us viz, 'whether the conduct of the accused can be taken into consideration when the crime is committed in the presence of the Police arose in Criminal Appeal NO. 580 of 1965 before our learned brother Mohammed Mirza, J. The learned Judge felt that there was no direct case on the point and therefore, referred it to the Bench. The facts necessary to appreciate the contentions on either side may briefly be stated:The appellant in Criminal Appeal No. 580 of 1965 was working as Station Superintendent. Vijayawada, Southern Railways at the relevant period. On 21-6-1964 he demanded and accepted a sum of Rs. 100 from one of his subordinates as illegal gratification for having posted him to Outward Parcel seat and for retaining him in that capacity. It was stated that P. W. 1 Senior Assistant Parcel Clerk in the Parcel Office. Vijayawada Railway Station was working in that capacity for 21/2 years. He was formerly in-charge of loading and unloading parcels on and from station platform. He had been working in the Outward Parcel seat since 20-5-1964. The posting was done by the accused-appellant and subsequent to the posting, he called him and asked him to pay a bribe since the seat to which he was posted was a fetching seat in the sense that there was opportunity there to realise excess money. P. W. 1 accordingly paid Rs. 50 to the accused on 22-5-1964. Five days later the accused asked for a further amount. P. W. 1 was unable to meet the demand. The accused was frequently demanding P. W. 1 to part with some money. On or about 18-6-1964 he demanded a sum of Rs. 100 and threatened to remove him from the Outer parcel Seat if he did not pay the money.P. W. 1 contacted D. S. P. of the Special Police Establishment who was camping at Vijayawada on 20-10-1964 and complained to him of the demands made by the accused. Accordingly a trap was arranged with the assistance of some Government servants. P. W. 1 was asked to go to the office of the Superintendent and pay the money in the presence of an accompanying witness. P. W. 1 was provided with ten currency notes of Rs. 10 denomination and

their numbers were noted in the panchanama that was drawn by P. W. 3. The notes were treated with phenolphthalein powder. P. W. 1 was directed to proceed to the railway station and give the currency notes to the accused if he demanded to pay the money. P. W. 2 was asked to follow P. W. 1 The D. S. P. and other officers followed P. Ws. 1 and 2 to the railway station at some distance. According to this arrangement P. W. 1 entered the room of the accused and found him seated in his chair. P. W. 1. wished him and the latter asked if he had brought the money. Then P. W. 1 took out the money and handed it over to the accused. He took the money and put it in the right pocket of his trousers. P. W. 2 witnessed the incident from the adjacent staff room. After delivering the money, the witness gave a prearranged signal and thereupon D. S. P. and S. P and two mediators rushed into the room of the accused. Disclosing his identity, the D. S. P. recovered the amount from the right pocket of the trousers of the accused. which was seized under a mahazar. A tumbler full of water with Sodium carbonate was brought and the accused was asked to put his fingers in the tumbler. The colour of the liquid became pink. The two mediators compared the number of currency notes and the relevant articles were seized under a mahazar.

2. On this material, a charge-sheet was framed against the accused under Section 161, I. P. C. and Section 5 (2) read with Section 5 (1) (d) of the prevention of Corruption Act, 1947. The accused denied the commission of the offence. He pleaded that as he was exercising strict control over the staff some members of the staff had conspired together to set up a case against him. With regard to the amount recovered from him he said that he was the president of the Co-operative Society and P. W. 1 had given him this amount towards the value of ten shares in the Railway employees' consumers society. P. W. 1 told him that the Secretary of the society was out of station and therefore, requested him to keep the amount.

3. The learned Special Judge, S. P. E. Cases Secunderabad who tried the case as C.C. No. 30 of 1964 on examining 10 witnesses on behalf of prosecution and five on the side of defense found the accused guilty under Section 161, I. P. C. and Section 5 (1) (d) read with S.5 (2) of the Prevention of Corruption Act, 1947 and sentenced him to various terms of imprisonment. In arriving at that conclusion he also took into consideration the fact that the accused had not offered any explanation to the D. S. P. at the time of seizure of the amount and if he had done so it could have been recorded in the panchanama that was drawn. immediately after the concurrence. His comments on the conduct of the accused are as under:-

> "From the conduct of the accused in receiving the copy of the panchanama and acknowledging the receipt of the copy thereof without voicing any protest that the panchanama did not refer to the explanation furnished by him regarding the nature of the transaction and his conduct in not reporting to his superior officers at any time thereafter that the money received by him from P. W. 1 in good faith towards the value of shares

> which P. W. 1 intended to take in the Co-operative Stores was given the garb of a bribe and that he explanation offered by him regarding the nature of the transaction was not referred to in the panchanamma, and that the panchanama of which a copy was furnished to him was not drawn up in his presence, an inference adverse to the accused has to be drawn."

4. It was urged in the appeal that the trial Judge was not justified in drawing an adverse inference against the accused from the fact that the accused had not made any exculpatory statement before the investigating officer at the time the amount was seized from him. The learned Judge, as stated above, felt that fact and as there was no direct case on that point viz., "whether it was open to the Court to take into account the conduct of the accused when the crime was committed in the presence of the Police' he directed to post the matter before the Bench. That is how the case is before us.

5. Before we deal with the submissions made by Shri T. V. Sharma, learned counsel for the appellant, some more facts which have a bearing on the appreciation of the points raised may briefly be stated. In regard to the recovery of the tainted money the prosecution witnesses in their chief examination, whether it be of the investigating officer or of panchas, never stated of any explanation given by the accused nor did they say that no explanation was given by the accused. The relevant portion of the statement of P. W. 1 made on this aspect is as follows:-

> "Immediately after entering the room, the Deputy Superintendent of Police, shoed his identity card to the accused and introduced himself to him. He then asked the accused to produce the amount which the later had taken from me. The accused stood up and after little while produced from the right pocket of his trousers the money given by me. The accused placed the currency notes on the table."

6. In cross-examination however a suggestion was made to which the witness gave the following reply:

> "It is not true to say that the accused wanted to say something when he was caught with the money and that the Deputy Superintendent of Police and other officials did not allow him to have his say and told him that it would be in his own interest if he said as little as possible."

7. Similar is the statement of other witnesses in this regard. While examined under Section 342, Cr. P. C. the accused came forward with the explanation that P. W. 1 had given this amount to him towards the share amount of the Railway Employees Consumers' Co-operative Stores of which the accused was the president, and when he offered this explanation he was not allowed to

make such a statement. The lower Court on a consideration of this aspect drew the inference that if the accused had offered explanation he would have insisted upon the same being recorded in the panchanama that was drawn by the mediators in his presence immediately after the occurrence. Therefrom he drew an inference adverse to the accused and held the explanation offered by him to be an after thought. The grievance of the learned counsel for the appellant is that no evidence was admissible in respect of a statement made or not made to the Police by the accused in corroboration of the statement under Section 342. Cr. P.C. so as to induce the Court to draw an adverse inference against the accused. AS noted above, it was never the case of prosecution that the accused offered any explanation or did not any explanation and the information regarding the explanation was elicited from the witnesses by the counsel for the accused-appellant in cross-examination obviously to substantiate the plea that the accused was likely to make under Section 342, Cr. P. C.As to the conduct of the accused, the prosecution witnesses in their chief-examination merely stated that the accused was a 'little stunned' when the D. S. P. revealed his identity and asked him to hand over the money. Apart from that there was no reference either to any explanation or statement made by the accused. The mischief, so to say, was the result of elicitation made by the cross-examining counsel. The learned counsel seeks to set aside the conviction on the ground that such a statement whether made in the chief-examination or elicited in the cross-examination was hit by Section 162, Cr. P. C. and therefore, the lower Court was not justified in referring to it or drawing an inference adverse to the accused therefrom.

8. Broadly speaking there is no difficulty in accepting the contention of the learned Counsel for the appellant Mr. Sharma that any statement made by the accused during course of investigation was hit by Section 162, Cr. P.C. The section reads as under:

"(1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it: nor shall any such statement or any record thereof. Whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused and with the permission of the Court, by the prosecution , to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act 1872 (1 of 1872). and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination"

9. The provisions of this section are , attracted when the statement is made in the course of investigation under Ch. XIV of the Code and obviously it would not be applicable if the said statement was not made in the course of such investigation. This is the scope of Section 162, Cr. P. C. which has been explained in the various cases cited before us viz, *K M Nanavati v. State of Maharashtra and Emperor v. Nga Tha Din*[1], In this latter case it has been observed that:

> "The provisions of Section 162 as now amended absolutely bar the use of statements, both oral and written. and make those statements inadmissible for any purpose under the Evidence Act in any enquiry or trial except for one purpose, and that is by the accused to contradict a prosecution witness in the manner provided by Section 145, Evidence Act."

10. This is the view taken by almost all the High Courts and considering the language of the section, we do not think any other interpretation would have been possible. The only variation has been as to whether a particular statement made or recorded was in the course of investigation or before the investigation had commenced and that is more or less a question of fact, depending on the circumstances of each case. The peculiar feature of this case is that the prosecution never referred to any explanation either inculpatory or exculpatory made by the accused at the time of the recovery of the tainted money, It was only in the cross-examination that the information was sought to be elicited obviously to make out a case in favour of the accused that had come forward with a reasonable explanation which the witness denied, so that there was no case so far as prosecution is concerned of making use of any statement made by the accused during the investigation. The case is, therefore, distinguishable from some of the cases cited before us in which the prosecution had actually sought to make use of the statement made by the accused for the purpose of sustaining the conviction.

11. The learned counsel for the appellant urged that even though the statement was elicited in the cross-examination the Judge should not have allowed the question as being inadmissible and much less relied on it for the purpose of arriving at an inference against the accused. According to the learned Public Prosecutor this statement could have been referred to by the trial Court as this was a statement made before the commencement of investigation. For this purpose he has relied on a decision of the Gujarat High Court in Valibhai Omarji v. State . It has been held therein that in a case falling under Section 161, I. P. C. or Section 5 (1) (d) of the prevention of Corruption Act the offence thereunder is complete when illegal gratification is accepted by an accused person. Proceeding on this hypothesis it was held that the panchanamas which were conducted earlier would not fall under Section 162 of the Code of Criminal Procedure and any statement made to the Police Officer prior to the offence would not hit by Section 162, Cr. P.C. With respect to the learned Judges we do not agree with this view as, in our opinion, the offence under S.161, I. P. C. is made out even when there is an attempt to obtain any gratification other

than legal remuneration. Further, as observed by the learned Judges, the question when actually the investigation commenced is obviously a question of fact.

In the instant case, the explanation if any, was said to have been offered after the amount has been accepted by the accused. Therefore, even if the ruling is accepted as laying down correct law the explanation was hit by Section 162, Cr. P.C. The position has been succinctly, laid down in *Issuf Mahomed v. Emperor*[2], It was a case in which the accused were charged with the offence of rape and convicted thereunder. There a police Head Constable and Sub-Inspector of Police had recorded the statements of the accused at the time of their arrest. In the course of their cross-examination certain questions were put to them in respect of the statements of the accused. Their reply was in the negative. The learned Judge held that no such questions were admissible. It was observed that:-

> "If a police witness is asked, "Did the accused say so and so." and he answers 'yes' he is clearly using the statement if he answers 'No' he is still using the statement to show that it omitted something material. Section 162 was intended to prevent the user of statements made by the accused to the police, and questions designed to show, by process of elimination that matters subsequently mentioned by the accused were omitted from such statements are within the mischief aimed at by the section."

12. Without referring to any other cases cited across the bar which more or less reiterate the same position, we are in respectful agreement with the views that have been expressed in the case of AIR 1931 Bom 311. In other words, the Trial Judge should not have allowed any questions in regard to the furnishing or non-furnishing of explanation by the accused to the police at the time of trial. much less adverted to it for the purpose of arriving at an inference adverse to the accused.

13. The next question is whether the conduct of the accused as distinct from his giving an explanation or failing to do so at the time of commission of the offence in the presence of the Police Officer can be taken into consideration for arriving at a conclusion against or in favour of an accused. The learned counsel for the appellant has contended that the statement included conduct as well, and attempted to substantiate his contention by citing certain decisions. We find, however, that the question does not directly arise out of the facts in the instant case. The trial Judge has not adverted to any particular 'reaction' of the accused at the time he was surprised and asked to return the tainted money nor drawn any inference against him with reference to such reaction. The only adverse inference drawn against the accused is his failure to give an explanation which he later put forth in his statement under Section 342, Cr. P. C. Therefore, we do not think it necessary to express our opinion on that aspect. However, if in the instant case reference to the conduct of the accused is to the making or not making a statement, offering or

not offering an explanation, the considerations mentioned in the preceding paras will certainly be applicable.

14. The last question that requires consideration is whether prosecution under a special law (as in the instant case, Prevention of Corruption Act) called for a different approach to the interpretation of Section 162, Cr. P.C. with reference to the special provisions contained therein. It has been urged that under Section 4 of the Prevention of Corruption Act (Act II of 1947) there is presumption in cases where public servants accept gratification other than legal remuneration. The presumption under Sections 161, 165 or 165-A of the Indian Penal Code and is provided to relieve the prosecution of the burden of proving the motive in accepting the said gratification. The presumption raised therein is rebuttable. It has nothing to do and cannot be invoked at any stage of investigation. Therefore, it cannot be urged that the provisions of Sections 162, Cr. P.C. demand a different interpretation with reference to the provisions of the said Act.

15. As a result of foregoing discussion, we hold that the trial Judge was not justified in drawing an inference against the accused with reference to his failure to offer an explanation to the investigating officer. But, to what extent the conclusion is coloured by this inference and whether the other material on record is not sufficient to sustain the conviction is not within the scope of the reference. We therefore, refrain from commenting on that aspect as it is a matter pertaining to appreciation of evidence. With these observations the case may go back to the learned Judge who is dealing with the appeal.

M. Mirza, J.

16. The appellant was the Superintendent of the Railway station, Vijaywada at the relevant period. He has been found guilty by the learned Special Judge for S. P. E. Cases, Secunderabad of offences under S. 161, I. P. C. and 5(1) (d) read with S.5 (2) of the Prevention of Corruption Act (hereinafter referred to as the Act), and sentenced to undergo rigorous imprisonment for one year, and also to pay a fine of Rs. 200 and in default to further undergo rigorous imprisonment for six months under the first count, and to undergo rigorous imprisonment for a period of one year under the second count. But, both these sentences are directed to run concurrently.

17. This case was heard by me previously, and after the conclusion of the arguments, I felt that the leaned trial Judge had taken into account in convicting the appellant, the conduct of the appellant in the presence of the Police. I was not satisfied that the learned Judge had acted correctly and legally. Therefore, I referred not only the question of law, but also the case to the Bench. The learned Judges constituting the Bench, did not choose to dispose of the case, after deciding the point referred to the Bench that the trial Judge should not have allowed any questions with regard to furnishing or non-furnishing of an explanation of the accused to the

Police at the time of trial, and much less, adverted to it for the purposes of arriving at an inference adverse to the accused. and again sent back the case for disposal.

18. The short facts may be stated. The appellant, it is alleged, on 21-6-1964, demanded and accepted a sum or Rs. 100 from V. Krupadanam, P. W. 1, a Senior Assistant Parcel Clerk at the said railway station as a gratification other than legal remuneration as a motive or reward of having posted the said P. W. 1 to the Outward Parcel Office, and for also retaining him in the seat, and not harassing him. As is usual in these cases, a trap was laid and the tainted money was offered to the appellant, and was recovered from the trouser pocked of the appellant. It is necessary to re-count the facts leading to the recovery, because it has been admitted by the appellant that he received a sum of Rs. 100 from P. W. 1, but not as a bribe or gratification other than legal remuneration. But his case has been that there were number of instances of pilferage of parcels, and tampering of record in the parcel Office at Vijayawada Railway Station, and the D. C. S. Office had instructed him to exercise close check over the activities of the staff of the parcel office, and to put an end to the racket. One Seshagiri Rao and Govindarajulu, Senior Assistant Parcel Clerks were not having their way because the appellant was keeping a strict control over them, and, therefore they instigated P. W. 1 to get him (the appellant) trapped perhaps in the belief that he would not kept P. W. 1 long in the seat.

19. As to the actual occurrences the appellant has stated that when P. W. 1. entered his room, he asked him (p. w. 1) what he enacted, and then P. W. 1 offered a sum of Rs. 100 towards the value of ten shares of Railway Employees' Co-Operative Stores of which he was the founder President. P. W. 1 told him that the Secretary of the stores was out of station and that the Assistant Secretary could not be found. Therefore, the appellant told him to give the money the next day, and he further told him that Rs 5 more have to be paid as admission fee. The P. W. 1 requested the appellant to keep the money with him and promised to come the next day with the relevant papers and the balance or S. 5. In good faith he believed the statement of P. W. 1 and took the money, and kept it in the right pocket of his trousers. In view of this plea, it will be seen, that the decision of the case lies in a short compass.

20. In a case reported in V. D. Jhingan v. State of Uttar Pradesh, , it has been observed that the mere receipt of money is sufficient to raise the presumption under Section 4 (1) of the Act. In the same decision, it has also been held that where burden of proof lies on an accused, he is not required to discharge the burden by leading the evidence to prove his case beyond a resoluble doubt. In support of his plea, the appellant has examined five witnesses, and, therefore, first of all, it will have to be considered, how far he has discharged that burden by preponderance of probability. The learned counsel for the appellant has referred me to a recent judgment of the Supreme Court reported in K. P. Raghavan v. M. H. Abbas, . The same principle has been

reiterated that the Court has to see the probabilities of the case, and to see whether the preponderance of probabilities lies with defence version or with the prosecution version irrespective of the presumption which is sought to be rebutted by the accused person. Obviously this observation of the Supreme Court reemphasises the salutary principles of Criminal Law that the burden of proving a criminal case still lies on the prosecution. Circumstances have been brought on record to show that the Parcel Office of the Vijayawada Railway station was in a mess. There was theft of parcels, booked parcels were found missing, and there was pilferage, and even the office records were tampered with. This is evident from Ex. D-4, a letter from the office of the Divisional Superintendent Vijayawada, to the Station Master, Vijayawada. Under Ex. D-5, the D. C. S. has again suggested to the Station Superintendent methods to prevent the missing of the booked parcels, Again, under Ex D-6, the D. C. S has suggested to the Station Superintendent, Vijayawada that clerks in the parcel Office should not be allowed to work for a considerable period and they should be rotated It is quite clear from a perusal of these documents that the affairs of the Parcel Office of the Vijayawada, Railway Station, were in a confusion, and the Station Superintendent was expected to keep a strict clerk to control the affairs. It appears that there were complaints against the parcel clerks, and in this connection, it was directed by the D. C. S. under Ed. D-1 that Seshagiri Rao, who was the Senior Assistant Parcel Clerk should at once be transferred to the Booking Office , and it is in his vacancy, that P. W. 1 was appointed by the Station Superintendent, the appellant. There is no dispute about the fact that it is within the discretion of the appellant to make the postings of the clerks. P. W. 1 has stated that it was a 'fetching seat' and he has very naively described the words" 'fetching seat' to mean that the merchants booking parcels would pay the person in that seat, in excess of the freight. Perhaps in more direct words, it was a seat to which if a person was posted, would make illegal gains. Any way, the case of the prosecution is that after P. W. 1 was appointed to that post on 20-5-1964 he was asked by the appellant to pay him Rs. 50 the very next day, as he was posted to a "fetching seat" and accordingly on the 22nd of May 1964, he paid the appellant the amount of Rs. 50. Thereafter, P. W. 1 was being harassed by the appellant to pay him more money, and as he (P. W. 1) was getting tired of the insistent demands made by the appellant , he approached the Anti-corruption Police, and laid the complaint. It is in this context that the plea of the appellant has to be examined.

21-26. (After discussing the evidence, his Lordship proceeded). The evidence of the prosecution with respect to the giving of the bribe, in my view, is neither satisfactory, nor convincing. When the prosecution case itself rests on infirm grounds, the defence evidence, which cannot be characterised, as false or untrue, has to be preferred, with the result that there appears to be some truth in the plea taken by the appellant. The weakness of the prosecution case itself enhances the value of the defence evidence.

27. Therefore, in view of the above discussion, I allow the appeal, set aside the conviction an sentence, and acquit the appellant. Fine, if paid will be refunded.

SSG/D.V.C.

28. Appeal allowed.

Cases Referred.

1AIR 1926 Rang 116 (FB)
2AIR 1931 Bom 311