BOMBAY HIGH COURT

Indur Dayaldas Advani

Vs.

The State of Bombay

Criminal Appeal No. 855 of 1950

(Bavdekar and Chainani, JJ.)

06.04.1951

JUDGMENT

Bavdekar, J.

1. One Khimji (complainant) had got a shop at Vadgadi Mandvi. On 14th January 1950 Indur Dayaldas Advani (appellant), who was an Inspector in the Sales Tax Department, went to his shop and gave an appointment to the complainant to go to the Sales Tax office on 16th January 1950. On 16th January 1950, when the complainant went to the office, the appellant sent him to one Khoja who called one Udaram Thadani another Inspector in the Sales Tax Department and asked him to look into his books. Thadani examined his books and told him that his transactions came to one lac of rupees and he would have to pay Rs. 8,000 as sales tax and penalty at the rate of Rs. 50 per day. The complainant stated that he was not in a position to do so when Thadani told him that he and the appellant who was at another table would go to his shop at 8 o'clock that night. The complainant was not at his shop at night but his servant told him that two sales tax officers bad been there in his absence. Next day, the complainant went to the Sales Tax office and filled the form to the dictation of Thadani. He was then allowed to go. Thadani telling him that he and the appellant would go to his shop at night. The appellant and Thadani went to his shop at night on 17th January and Thadani then asked him for a bribe. There was higgling, The appellant at one stage agreed to accept along with Thadani Rs. 1,500 but the complainant said that he could not pay the amount when Thadani got into house and he and appellant went away but the appellant came back and said that such a chance would not occur again and asked the complainant to pay. Ultimately the complainant agreed to pay Rs. 100 when the appellant said that he would go at 11 a. m. next day, that is, on 18th January 1950, The appellant did not go to the Complainant's shop on the 18th at 11 A. M. but went there at about 5 p. m. The complainant said that he could not collect the amount. The appellant got angry when the complainant said that he would keep the money ready at 8 a. m. The complainant then went to the Crime Branch and a trap was laid the next day, the complainant having put off the appellant in the meanwhile it was

arranged that there should be two panchas. One should sit at the shop of the complainant and the other should be with the Sub-Inspector. As it happened when the appellant went to the shop of the complainant, he asked the complainant to go out of his shop and took him away. On the way the complainant asked him what would happen about the tax. The appellant said that he would not have to pay much. The appellant then started looking about for a taxi. He could not get it. He then asked the complainant to pay and the complainant paid him Rs. 100. The appellant then made a futile attempt to get hold of a taxi but the driver refused the fare. The appellant then hailed a victoria. Before the victoria could arrive the police caught hold of the appellant. The appellant then started kicking and struggling when he fell on the ground. He then threw down the moneys and when the Police Sub-Inspector and the panchas arrived at a place where be was the moneys were found scattered about on the road.The appellant was charged under Section 161, Indian Penal Code, and Thadani under Sections 161 and 114, Indian Penal Code. The appellant's defense was that even though he had made a report to his superior Mr. Khoja about the case of the complainant he was not in charge of the case after January 14, 1950. Thadani was acquitted by the trying Magistrate. The appellant was convicted of an offence under Section 161 and sentenced to rigorous imprisonment for four months and to pay a fine of Rs. 300 in default to suffer rigorous imprisonment for two months. The appellant appealed to the High Court.

Bavdekar, J.

2. [His Lordship, after considering the facts and holding that the appellant obtained Rs. 100 from the complainant as bribe, proceeded :] The learned counsel who appears on behalf of the appellant says however that in this case even so, the prosecution must fail because the appellant had nothing to do with the case of the complainant after 14th January 1950. Now it is true that Mr Khoja, the superior of the appellant, gave evidence that he had entrusted the case to the appellant but we do not think that that evidence can be accepted. The complainant's case was that it was Thadani who was dealing with this case. The order of Mr. Khoja which was referred to above has an obvious reference as to what was to be done in case the complainant did not appear. There is nothing from which we can come to the conclusion that the appellant had, at the time when the bribe is alleged to have been taken, anything to do with the complainant's case. It may be that subsequently the case may have been referred to the appellant. Thadani had filed a written statement saying as a matter of fact that he had merely got to go into the accounts and that case would have been dealt with later by the latter. Thadani's statement would not be evidence against the appellant and we obviously cannot use it against him. Even if we are entitled to use it, we find each one would obviously have something to gain by throwing the blame on the other. No reliance could be placed on Thadani's statement. In that case, we must accept that it is not proved that the appellant had anything to do with the case of the complainant. He had indeed, as it was his duty, to enquire into the question as to whether the complainant had paid the sales tax. Upon having found that he had not paid the sales tax, he has made a report to the superior officer and thereafter it would appear that he had nothing to do with the appellant's case.

2. But in our view, that does not absolve the appellant from the charge under Section 161, Penal Code. The learned counsel who appears on behalf of the appellant urged that before the appellant could be convicted of an offence under Section 161, Penal Code, in the first instance it must be shown that it was within the power of the appellant to show any favor to the complainant, and he says that if it was not within his power to do so, the appellant could not be held guilty of an offence under Section 161, merely because he took Rs. 100 from the complainant.

3. Now, the offence under Section 161, if we confine ourselves to the relevant portion of the definition, consists of obtaining any gratification other than legal remuneration "as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show in the exercise of his official function favor or disfavor to any person." The section does not say anything about the official act being within the power of the public servant concerned. Nor does it say anything about it being within the power of the public servant concerned to show favor or disfavor to any person in the exercise of his official function. It is true that the section does not penalize the public servant in obtaining any gratification other than legal remuneration in all cases. The section would have application only when gratification is taken as a motive or reward for doing the things mentioned above. But even though this would exclude the case in which money is accepted, for example, in a private Capacity or for doing something which is entirely unconnected with the official duties of the taker, we do not think that there is anything in the section which requires the State to prove that the act which was committed was within the power of the public servant concerned. The words "as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show in the exercise of his official function" may constitute the ingredient which English lawyers call mens rea. But these words in the first instance do not postulate a state of mind in the public servant that he was going to do the promised official act or he was going to show the promised official favor. That is quite clear from the last explanation to the section which says about the words "a motive or reward for doing" that "a person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words." It would appear therefore that a state of mind in the public servant that he was not going to do anything for the giver of the bribe would not render his act innocuous. These words must, therefore, in our view, be interpreted to mean upon a representation that a particular desired official act will be done or forborne and favor or disfavor will be shown. That impliedly at any rate would include a representation that the act was within the power of the public servant or that it was within the power of the public servant to show favor or disfavor. But if both these representations are there, the only other thing which it is necessary is that gratification should have been taken in order to do an official act as distinguished from a private act or to show favor or disfavor in the discharge of an official function as apart from functions which can be said to be entirely non official. For example, there was the case of a village watchman who found a widow at the shop of goldsmith at night, and the goldsmith gave him a reward to hold his tongue to prevent them from being disgraced. Similarly, where a Sub-Inspector helped a candidate for the Legislative Council upon getting what was called a silver tonic, it was held by the Patna High Court that that did not amount to a charge of bribery as canvassing for votes at a Council election was not an official

act. But these oases obviously are not authorities for the proposition that where a public servant obtains a bribe for himself or for another upon a representation that favor would be shown to the giver in the discharge of his official functions the public servant is still not guilty, because it is not within his power to show favor. In our view, it makes no difference whether it was not within his power to show any favor because the act falls within the authority of another servant holding a similar office in the same establishment or because the public servant has become functus officio.

4. It is true that a view sometimes has been taken and especially in Madras that before an offence under Section 161 could be committed, it must be within the power of the public servant to do the official act concerned or to show favor in the discharge of his official functions. The first of these cases was the case of In *re Pulipati Venkiah*[1], That was a case in which a Karnam was sentenced for having accepted a bribe of Rs. 20 from a villager giving him to understand that he would get him some land on darkhast. It was observed that granting a darkhast was not an official act of a Karnam, and even though, he may have cheated the villager into believing that he was the official to grant the darkhast, that did not come out from the evidence and view of the Sessions Judge that only his recommendation was paid for was the correct view. There was then an opinion expressed that even if the charge had run that he had accepted a bribe of Rs. 20 for recommending the darkhast in his capacity as a Karnam, that still would not be an official act. We fail with respect to understand that it would not be an official act unless an application for the grant of darkhast land would not even go to a Karnam for report and recommendation. Bat the fact remains that the decision of the case proceeded not upon the view that it was not an official act for the Karnam to recommend the darkhast but on the ground that the charge which was framed was that he took bribe as a reward for doing an official act, viz. granting the darkhast, and that proposition Could not stand because it was not within the power of the Karnam to grant the darkhast. The authority undoubtedly is in favor of the appellant. and as a matter of fact, the Madras High Court has taken a similar view in the case of *Venkatarama v. Emperor*[2], In that case the accused was anxious to be a policeman and his application by the orders of the District Superintendent of Police was referred to the Reserve Inspector who found that be was below the minimum height and rejected his application. The complainant thereupon tendered a five rupee note to the officer in the hope that the officer would reconsider his decision and make a report to the District Superintendent of Police to that effect. The officer had the man charged. The Madras High Court took the view that the accused had committed no offence, but it seems to have proceeded not upon any fresh ground. The only fresh ground which we find mentioned is that it seems absurd to say that a man abetted an offence which not only is not committed but with the whole transaction in relation to which he indignantly refused to have anything to do. But in India abetment is defined as instigation to commit an offence, and inasmuch as both in India and in England there is 'a penal offence called criminal conspiracy which punishes conspiracy to commit an offence if certain conditions are satisfied, there is nothing illogical in making it penal to instigate an offence. The next case of the Madras High Court merely says that the law which has been laid down in *Venkatarama v. Emperor*[3], has stood for a long time, and if it was desired

to obtain any change in it, the Legislature would obviously have to be moved to enact legislation on the lines of the Fry's Act. The only other High Court in which it is said that a similar view has been taken is the Calcutta High Court. Bat we are not satisfied that as a matter of fact in that case any such view has been taken. The case is the case reported in *Shamsul Huq v. Emperor*[4], That was a case against the giver of a bribe and the bribe was supposed to have been offered to a sergeant after the case against the accused person had already been dismissed. It was held that the accused had not committed any offence, but the reasoning upon which this conclusion was reached was as follows (p. 344) :

> "Now, on the 21st June it was not within the powers of the Sergeant to show any favor to the petitioner who had already been discharged by the Magistrate and no money could have been paid to him as a motive or reward for doing anything for the petitioner."

[1] AIR 1924 Mad 851 [3](AIR 1929 Mad 756)
[2] AIR 1929 Mad 156 [4] AIR 1921 Cal 344

The ratio of the case appears, therefore, to be that assuming even that money was paid inasmuch as the offerer was aware that the case against him had been dismissed even if the money had been offered, it could not have been offered as a motive or reward for doing anything for the petitioner. On the other hand, taking up the case of an offerer or giver of a bribe, the Allahabad and the Lahore High Courts have taken the view that in case the bribe is given to a public servant for showing favor to the giver in the discharge of his official function, it does not make any difference whether a public servant to whom bribe is offered could or could not show any favor to the giver. These Cases are *Kishan Lal v. Emperor*[5], *Emperor v. Ajudhia Prasad*[6], *Emperor v. Ram Sewak*[7], and *Emperor v. Phul Singh*[8], The Nagpur High Court took a similar view with regard to the taker in *Gopeshwar Mandal v. Emperor*[9],

5. It is true that with the exception of the last case of *Gopeshwar Mandal v. Emperor*[10], all the cases are cases in which an offence under Section 161 read with Section 116 was to be considered. and so far as that offence is concerned inasmuch as the gist of the offence is any offer to a public servant of gratification other than legal remuneration with a motive that that public servant should show favor in the discharge of his official function, it is argued that the cases can be distinguished from the case in which the person charged is a taker of a bribe. So far as the offerer of the bribe is concerned, the mens rea necessarily consists in an intention in the giver of the bribe that the bribe should induce the taker to show favor and this state of mind has obviously nothing to do with the question as to whether the taker has or has not power to show any favor. But we think that the same consideration applies to the case of a bribe also if we consider that Section 161 is aimed at prevention of corruption in public servants and the gist of the offence from the point of view of the taker of the bribe consists in making a representation that if the bribe is paid, favor would be shown and impliedly that power to show favor exists. It is undoubtedly true that one can conceive of a case in which a public servant may obtain a sum of money other than legal remuneration, such sum of money may be obtained as a motive or reward

for showing favor in the exercise of a function which is an official futction and yet some times it may not amount to an offence under Section 161, Penal Code, because the function in the exercise of which favor is to be shown is not the official function of the public servant concerned. I think that it is from that point of view that in the case of the word "his" in the phrase "of his official functions" has been emphasized. If this distinction is borne in mind, no difficulty would be created in dealing with a case in which a public servant misrepresents that he has an official capacity which he does not possess and obtains gratification other than legal remuneration for showing favor in the capacity misrepresented, To give an example, if a constable wore the uniform of a ticket collector and after having obtained access to a railway train took a bribe from a person travelling without a ticket, the bribe would undoubtedly be taken by a public servant and it would be also taken as a motive or reward for showing favor in the discharge of an official function. But even so, the act may not amount to an offence on the ground that the bribe was taken for showing favor in the discharge of a function which even though it was an official function was not the official function of the public servant concerned.

[5]1 All L Jour 207 [7] ILR 1947 All 444 [9] ILR 1947 Nag 611
[6]51 All 467 [8]23 Lah 402 [10](ILR (1947) Nag 611

6. The learned counsel who appears on behalf of the appellant says that even though that is our view, there is nothing in this case to show that the appellant had made a representation that it was within his power to show favor and that he would show favor to the complainant. But we do not think that this contention can be accepted. In the first instance, it has got to be remembered that the appellant was the first person who drew the attention of Mr. Khoja to the case of the complainant who appears to have escaped assessment of sales tax. At any rate he had not been assessed till then. In the second instance, the complainant said that when on 16.1.1950, he went to the Sales Tax Office, accused 2 told him that he would have to pay and at that time the appellant was at another table. He said next that on 17th Thadani told him that he and the appellant would go to his shop that night and he and the appellant both went to his shop on that night. The complainant said next that after considerable higgling, Tha-dani said that if Rs. 1,500 were paid to him and the appellant, they would see that he would have to pay as little as possible to the Government as sales tax. The appellant was standing by and this would obviously mean a representation by the appellant that he would also see that if Rs. 1,500 were paid the complainant will have to pay as little as possible to the Government as sales tax. The complainant then said that subsequently the appellant said that he and Thadani would charge Rs. 1 000. We have got to take into consideration these facts along with the fact that it was the appellant who had reported the complainant's case to Mr. Khoja and the complainant would not have any means of knowing what was the internal arrangement in the Sales Tax Office. In our view, in these circumstances there was a representation by the appellant that it was within his power to show favor and that he would show favor in case the payment was made.

7. In this view of the case, the appellant was rightly convicted. The sentence passed upon the accused is not excessive. So we dismiss his appeal. The accused should surrender to his bail.

8. Chainani, J. - I agree. I wish to add a few words with regard to the question whether a public

servant, who receives a bribe as a motive or reward for doing an act, which it is not in his power to perform, thereby commits an offence under Section 161, Penal Code. The first part of this section makes it an offence for a public servant to accept or obtain, or agree to accept, or attempt to obtain, any gratification whatever other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favor or disfavor to any person. The section requires that the gratification must be received by a public servant as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show favor or disfavor in the exercise of his official functions. It does not require that the public servant must himself have the power or must himself be in a position to perform the act or show favor or disfavor, for doing or showing which the bribe has been paid to him. One of the explanations to Section 161 provides that a person who receives a gratification as a motive for doing what he does not intend to do or as a reward for doing what he has not done, comes within the words "a motive or reward for doing" used in the section. Illustration (c) to the section is as follows :

> "A, a public servant induces Z erroneously to believe that A's influence with the Government has obtained a title for Z, and thus induces Z to give A money as a reward for this service. A has committed the offence defined in this section."

It is, therefore, not necessary in order to constitute an offence under Section 161 that the act for doing which the bribe is given should actually be performed. It is sufficient if a representation is made that it has been or that it will be performed and a public servant, who obtains a bribe by making such representation, will be guilty of the offence punishable under this section, even if he had or has no intention to perform and has not performed or does not actually perform that act. A representation by a person that he has done or that he will do an act impliedly includes a representation that it was or is within his power to do that act. As therefore the obtaining of a bribe by making a representation that an official act has been or will be performed is sufficient to constitute an offence under the section and as for this purpose it is not necessary that the act should actually be performed, it is immaterial whether the act which is the consideration for the bribe, is or is not within the power of the public servant receiving the bribe to perform. In the ill. (c) referred to above, the representation by A to z may be false, either because A had no influence with Government or because even though he had such influence, he had not actually used it. In either case, he is guilty of the offence defined in Section 161, because he obtained an illegal gratification by making a false representation. The essence of the offence therefore consists in making a representation that an official act has been or would be performed or that a favor or disfavor has been or would be shown and not in actually performing that act or actually showing favor or disfavor. If relying on or trusting the representation made to him that an official act has been or would be performed or that a favor or disfavor has been or would be shown, a person gives a bribe the public servant receiving it can, in my opinion, be said to have received it "as a motive or reward for doing" that act or showing that favor or disfavor, within the meaning of these words as used in the section.

9. The act in respect of which the bribe is paid must, however, be an official act and the favor or disfavor must be shown in the exercise of official functions. The official "act" or official "functions" referred to in the section obviously mean an act or functions which a public servant can perform in his official capacity and not in the capacity of a private citizen. The act, for doing which the bribe is received or paid, must therefore, have some connection with the office which the public servant receiving the bribe is holding or must be one in regard to which the person giving the bribe can reasonably believe that it could be performed by the public servant receiving the bribe. Thus if a clerk in the District Magistrate's office receives illegal gratification from a person, who has applied to the District Magistrate for an arm's license and who wants a favorable note to be put up on his application by the District Magistrate's office by wrongly representing to that person that he was dealing with his application and would recommend it to the District Magistrate, even though such applications were actually being handled by another clerk in the District Magistrate's office, he would, in my opinion be guilty of the offence punishable under Section 161, Penal Code. He has received the bribe by making the applicant believe that an official act will be performed in his favor, viz. that a favorable note will be made on his application. The act, which is the consideration for the bribe, is connected with his office, for it can be performed by another person holding the same office in the same establishment. The applicant is also not likely to know which particular clerk in the District Magistrate's office deals with such applications. The clerk receiving the bribe can therefore be said to have received it as a motive for doing an official act even though he was not actually in a position to do that act.

10. I do not think it is necessary for me to refer to the various oases which have been cited at the bar. These have all been discussed in the judgment of my learned brother and with respect, I agree with the view taken by the Allahabad, Lahore and Nagpur High Courts on this point in *Kishan Lal v. King-Emperor*[11], *Emperor v. Ajudhia Prasad*[12], *Emperor v. Phul Singh*[13], and *Gopeshwar Mandal v. Emperor*[14],

11. In this case, the appellant had originally inquired into the complainant's case. Thereafter another Inspector was asked to look into the complainant's books. The complainant has stated that the appellant went to him subsequently and demanded a bribe. He has also stated that the appellant told him that he would see that the complainant did not have to pay much amount as sales tax. A representation was therefore made to the complainant that a favor would be shown to him in assessing the amount of tax to be paid by him As the appellant was also an Inspector in the Sales Tax Department and as he had previously inquired into the complainant's case, the complainant had a reasonable ground for believing that the appellant might be in a position to show him some favor or to do something for him. It is, therefore, immaterial whether the appellant was or was not actually in a position so assist the complainant at the time when he received the bribe. In accepting the bribe from the complainant, he has, therefore, committed an offence under Section 161, Penal Code.

12. I, therefore, agree that the appeal should be dismissed.

Appeal dismissed.

[11]1 All L Jour 207
[12]51 All 467
[13]23 Lah 402
[14] ILR 1947 Nag 611