

A STATE OF KERALA AND ANR.
v.
C.P. RAO
(Criminal Appeal No. 1098 of 2006)

B MAY 16, 2011

[ASOK KUMAR GANGULY AND DEEPAK VERMA, JJ.]

C *Prevention of Corruption Act, 1988 – ss.7 and 13(2) r/w*
s.13(1)(d) – Bribery case – Non-examination of complainant
– Effect of – Allegation that respondent demanded illegal
gratification from complainant CW1 for allotting pass marks
to D-Pharma students in practical examination – Conviction
of respondent by trial court – High Court acquitted the
respondent on the ground that the complainant was not
examined – Justification of – Held: Justified – In view of the
examination system prevailing, respondent alone was not in
a position to allot higher marks – Besides, it is the case of
the respondent that when CW 1 met him in a hotel room, the
respondent shouted that some currency notes had been thrust
into his pocket by CW 1 – Such shouts were heard by PW-1
and PW 2 – Their evidence could not be, in any way, shaken
by manner of cross-examination – Further, PW 3 gave
evidence of the previous animosity between the college
authorities and the respondent – In the background of these
F facts, the non-examination of CW 1 was very crucial – The
case was not proved beyond reasonable doubt.

G *Appeal – Against order of acquittal – Scope of*
interference – Discussed.

The prosecution case was that the respondent demanded illegal gratification of Rs. 5000/- from the complainant CW 1 for allotting pass marks to D-Pharma

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students in practical examination. The respondent was convicted under Sections 7 and 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988. On appeal, the High Court acquitted the respondent on the ground that CW 1 was not examined and the only explanation given was that he was not available in the country but no details were given as to where the complainant was. Hence the present appeal.

Dismissing the appeal, the Court

HEDL:1. It is an admitted case that the accused-respondent alone cannot give such marks. In view of the examination system prevailing such marks have to be approved by others. The respondent alone, therefore, is admittedly not in a position to allot higher marks. Apart from that, it is the case of the respondent that when CW 1 met him in a hotel room, the respondent shouted that some currency notes had been thrust into his pocket by CW 1. Such shouts of the respondent were heard by PW 1 and PW 2. The evidence of PW 1 and PW 2 were recorded by the Trial Court. The evidence of PW 1 and PW 2 could not be, in any way, shaken by manner of cross-examination. PW 3 has also given evidence of the previous animosity between the college authorities and the respondent who had an occasion to file reports with the college authorities on the basis of some inspection. In the background of these facts, especially the non-examination of CW 1, was very crucial. When there was no corroboration of testimony of the complainant regarding the demand of bribe by the accused, it has to be accepted that the version of the complainant is not corroborated and, therefore, the evidence of the complainant cannot be relied on. [Paras 5 and 6] [868-G-H; 869-A-E]

A *Panalal Damodar Rathi v. State of Maharashtra* 1979(4)
SCC 526 – relied on.

B 2. Mere recovery of tainted money, divorced from the
circumstances under which it is paid, is not sufficient to
convict the accused when the substantive evidence in
the case is not reliable. The presence of the complainant
in a bribery case is necessary. The prosecution has to
prove the charge beyond reasonable doubt like any other
criminal offence and the accused should be considered
C innocent till it is proved to the contrary by proper proof
of demand and acceptance of illegal gratification, which
is the vital ingredient to secure the conviction in a bribery
case. [Para 10, 11, 12] [870-B-D; 871-A-B]

D *C.M. Girish Babu v. CBI, Cochin, High Court of Kerala*
2009(3)SCC779; *A. Subair v. State of Kerala* 2009(6) SCC
587 – relied on.

E *Suraj Mal v. State (Delhi Admn.)* 1979(4) SCC 725 –
referred to.

F 3. Further, it is a well settled principle that when the
court has to exercise its discretion in an appeal arising
against an order of acquittal, the Court must remember
that the innocence of the accused is further re-established
by the judgment of acquittal rendered by the High Court.
Against such decision of the High Court, the scope of
interference by this Court in order of acquittal has been
very succinctly laid down by a Three-Judge bench of this
Court in the case of *Sanwat Singh* as follows:- (1) An
G appellate court has full power to review the evidence
upon which the order of acquittal is founded; (2) the
principles laid down in Sheo Swarup's case 1934 L.R. 61
I.A. 398 afford a correct guide for the appellate court's
approach to a case in disposing of such an appeal; and
H (3) the different phraseology used in the judgments of

this Court, such as (i) “substantial and compelling reasons”, (ii) “good and sufficiently cogent reasons”, and (iii) “strong reasons” are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified. This Court is in respectful agreement with the aforesaid salutary principles settled by this Court and is constrained to hold that this appeal has no merit and is accordingly dismissed. [Paras 14, 15] [871-C-H; 872-A-C]

Sanwat Singh & others v. State of Rajasthan 1961(3) SCR 120 – relied on.

Case Law Reference:

1979 (4) SCC 526	relied on	Para 6, 7, 8
2009(3)SCC 779	relied on	Para 10
1979(4) SCC 725	referred to	Para 10
2009(6) SCC 587	relied on	Para 11, 12
1961(3) SCR 120	relied on	Para 14

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1098 of 2006.

From the Judgment & Order dated 19.1.2005 of the High Court of Kerala at Ernakulam in Crl. A.No. 180 of 1998.

G. Praksh, Ramesh Babu M.R. for the Appellant

A P.P. Rao, Guntur Prabhakar for the Respondent.

The Judgment of the Court was delivered by

GANGULY, J. 1. Heard learned counsel for the parties.

B 2. This is an appeal against the judgment and order of
acquittal dated 19th January, 2005 rendered by the High Court.
The respondent facing a trial, was convicted under Sections 7
and 13(2) read with Section 13(1)(d) of Prevention of Corruption
Act, 1988 by the Special Judge, Thiruvananthapuram, in
C Criminal Case No. 9 of 1996 and the respondent was
sentenced to undergo rigorous imprisonment for 20 months
and pay a fine of Rs. 2500/- under the former charge and
rigorous imprisonment for two years and a fine of Rs. 2500/-
under the second charge. Default stipulations were also there.

D 3. The facts relating to that case have been summed up
in the judgment of the High Court and we are not repeating the
same here once again.

E 4. In passing the order of acquittal, the High Court
examined and analysed in detail the evidence of the case. The
High Court found that the complainant CW 1 was not examined
and the only explanation given was that he was not available
in the country but no details were given as to where the
complainant was. The defence of the respondent in this case
F has also been noted by the High Court in some detail.

5. The prosecution case is that the demand of illegal
gratification of Rs. 5000/- was made by the respondent from
CW 1 on 19.10.1994 for the purpose of giving pass marks to
G all the students who appeared in the practical examination of
pharmaceutical-II in D-Pharma final examination in the year
1994. It is an admitted case that the respondent alone cannot
give such marks. In view of the examination system prevailing
such marks have to be approved by others. The respondent
H alone, therefore, is admittedly not in a position to allot higher

marks. Apart from that, it is the case of the respondent that when CW 1 met him in a hotel room, the respondent shouted that some currency notes had been thrust into his pocket by CW 1. Such shouts of the respondent were heard by PW 1 and PW 2. The evidence of PW 1 and PW 2 were recorded by the Trial Court. The evidence of PW 1 and PW 2 could not be, in any way, shaken by manner of cross-examination. PW 3 has also given evidence of the previous animosity between the college authorities and the respondent who had an occasion to file reports with the college authorities on the basis of some inspection.

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6. In the background of these facts, especially the non-examination of CW 1, was found very crucial by the High Court. The High Court has referred to the decision of this Court in *Panalal Damodar Rathi Vs. State of Maharashtra* 1979(4) SCC 526 wherein a Three-Judge Bench of this Court held that when there was no corroboration of testimony of the complainant regarding the demand of bribe by the accused, it has to be accepted that the version of the complainant is not corroborated and, therefore, the evidence of the complainant cannot be relied on.

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7. In the aforesaid circumstances, the Three-Judge Bench in *Pannalal Damodar Rathi case*(supra) held that there is grave suspicion about the appellant's complicity and the case has not been proved beyond reasonable doubt. (see para 11)

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8. This Court finds that the appreciation of the ratio in *Panalal Damodar Rathi case*(supra) by the High Court was correctly made in the facts and circumstances of the case.

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9. Apart from that, Mr. P.P. Rao, learned counsel for the respondent has drawn attention of this Court to some other pronouncements of this Court on the relevant question.

10. In *C.M. Girish Babu Vs. CBI, Cochin, High Court of*

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- A *Kerala* reported in 2009(3)SCC 779, this Court while dealing with the case under the Prevention of Corruption Act 1988, by referring to its previous decision in the case of *Suraj Mal Vs. State (Delhi Admn.)* reported in 1979(4) SCC 725 held that mere recovery of tainted money, divorced from the
- B circumstances under which it is paid, is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused. In the absence of any
- C evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe conviction cannot be sustained. (See para 18)

11. In a subsequent decision of this Court also under the Prevention of Corruption Act, in the case of *A. Subair Vs. State of Kerala* 2009(6) SCC 587, this Court made certain pertinent observations about the necessity of the presence of the complainant in a bribery case. The relevant observations have been made in paragraph 18 and 19 which are quoted below:-

- E 18. The High Court held that since the Special Judge made attempts to secure the presence of the complainant and those attempts failed because he was not available in India, there was justification for non-examination of the complainant.
- F 19. We find it difficult to countenance the approach of the High Court. In the absence of semblance of explanation by the investigating officer for the non-examination of the complainant, it was not open to the courts below to find out their own reason for not tendering the complainant in
- G evidence. It has, therefore, to be held that the best evidence to prove the demand was not made available before the court.

12. Those observations quoted above are clearly

H applicable in this case. In the context of those observations,

this Court in paragraph 28 of *A. Subair* (supra) made it clear that the prosecution has to prove the charge beyond reasonable doubt like any other criminal offence and the accused should be considered innocent till it is proved to the contrary by proper proof of demand and acceptance of illegal gratification, which is the vital ingredient to secure the conviction in a bribery case.

13. In view of the aforesaid settled principles of law, we find it difficult to take a view different from the one taken by the High Court.

14. In coming to its conclusion, we are reminded of the well settled principle that when the court has to exercise its discretion in an appeal arising against an order of acquittal, the Court must remember that the innocence of the accused is further re-established by the judgment of acquittal rendered by the High Court. Against such decision of the High Court, the scope of interference by this Court in order of acquittal has been very succinctly laid down by a Three-Judge bench of this Court in the case of *Sanwat Singh & others Vs. State of Rajasthan* 1961(3) SCR 120. At page 129, Justice Subba Rao(as His Lordship then was) culled out the principles as follows:-

“The foregoing discussion yields the following results: (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup’s case 1934 L.R. 61 I.A. 398 afford a correct guide for the appellate court’s approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court, such as (i) “substantial and compelling reasons”, (ii) “good and sufficiently cogent reasons”, and (iii) “strong reasons” are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every

- A matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified.”
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We are in respectful agreement with the aforesaid salutary principles settled by this Court and we are constrained to hold that this appeal has no merit and is accordingly dismissed.

- C B.B.B. Appeal dismissed.