A. SUBAIR

v.

STATE OF KERALA

(Criminal Appeal No. 639 of 2004)

MAY 26, 2009

[V.S. SIRPURKAR AND R.M. LODHA, JJ.]

Prevention of Corruption Act, 1988 – ss.7, 13(1)(d) r/w 13(2) and 20 – Public servant allegedly took gratification other than legal remuneration in respect of official act – Conviction by Trial Court – Affirmed by High Court – Propriety of – Held: On facts, not proper –Complainant was not tendered in evidence by prosecution – No explanation was given therefor – In absence of examination of complainant, there was no substantive evidence to prove the factum of demand – Besides, prosecution neither relied upon evidence of witnesses present at the time of raid nor evidence of panch witnesses – Evidence of only remaining witness, on which the Courts below heavily relied upon, was highly doubtful – Also, inference of corruption could not be fairly drawn as the alleged demand of Rs.25/- was too trivial – Mere recovery of currency notes, in denominations of Rs.20/- and Rs.5/-, by itself, could not be held to be proper or sufficient proof of demand and acceptance of bribe – Evidence produced by prosecution had neither quality nor credibility and was not sufficient to bring home the guilt of accused – Accused-appellant entitled to benefit of doubt.

The complainant had applied for driving licence which was issued but not in the book form as required. According to the prosecution, for delivery of driving licence in book form, appellant, a Lower Division Clerk in Sub-Regional Transport Office, demanded and received an amount of Rs.25/- from the complainant. The Courts below convicted the appellant under Sections 7

and 13(1)(d) r/w Section 13(2) of the Prevention of the Corruption Act, 1988.

In appeal to this Court, the question which arose for consideration was whether there was sufficient legal evidence on record to convict the appellant under sections 7 and 13(1)(d) r/w s.13(2) of the Prevention of Corruption Act, 1988.

Allowing the appeal, the Court

HELD: 1.1. The essential ingredients of Section 7 of the Prevention of Corruption Act, 1988 are:(i) that the person accepting the gratification should be a public servant and (ii) that he should accept the gratification for himself and the gratification should be 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, favour or disfavour to any person. [Para 7] [1067-C-D]

1.2. Insofar as section 13(1)(d) of the Act is concerned, its essential ingredients are:(i) that he should have been a public servant; (ii) that he should have used corrupt or illegal means or otherwise abused his position as such public servant and (iii) that he should have obtained a valuable thing or pecuniary advantage for himself or for any other person. The primary requisite of an offence under Section 13(1)(d) of the Act is proof of a demand or request of a valuable thing or pecuniary advantage from the public servant. In the absence of proof of demand or request from the public servant for a valuable thing or pecuniary advantage, the offence under Section 13(1) (d) cannot be held to be established. [Paras 8 and 10] [1067-D-E; 1068-C-D]

C.K. Damodaran Nair v. Government of India **(1997) 9 SCC 477, referred to**

A 2. In the present case, the complainant has not been tendered in evidence by the prosecution. PW-12 (IO) in his entire deposition has not stated a word as to why the complainant was not examined or why it was not possible to tender him in evidence. In the absence of examination B of the complainant, there is no substantive evidence to prove the factum of demand. 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 C justification of non-examination of the complainant. It is 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 D out their own reason for not tendering the complaint in evidence. It has, therefore, to be held that the best evidence to prove the demand was not made available before the Court. [Para 12] [1060-F-H; 1061-A-B]

3.1. The prosecution neither relied upon the evidence E of PW-3 to PW-8, who were present in the office at the time of raid nor the evidence of panch witnesses (PW 1 and PW 2) to prove the demand. The investigating officer (PW 12) also does not state anything about the demand. The only evidence now remains is that of PW 10. F However, the evidence of PW-10 hardly establishes the demand allegedly made by the accused. The factum of demand, thus remains not proved. Moreover, the evidence lacks in quality and reliability to record verdict of guilt against the appellant. PW1 was initially declared G hostile and public prosecutor sought permission to cross examine him. In cross examination conducted by public prosecutor, he partially supported the prosecution case. Having considered his evidence minutely, it is difficult to give much credence to his evidence. [Paras 13 and 14] H [1069-B-F]

3.2. Insofar as PW 2 is concerned, he did not fully support the case of prosecution. He deposed that he had an ear attack two months before recording of his deposition and due to the illness and the treatment, he could not recollect the details of the incident. He also stated that he was suffering from depressive psychosis. His evidence does not help the case of the prosecution at all. Thus, the evidence of two independent witnesses does not advance the prosecution case. [Para 15] [1069-G-H; 1070-A]

3.3. As a matter of fact, the Special Judge as well as the High Court heavily relied upon the deposition of PW-10 in support of the prosecution case. The evidence of PW-10 however suffers from serious infirmities. The Special Judge as well as the High Court were not even clear about the place where PW-10 has positioned himself. He was not within the hearing range that he could hear the conversation that is said to have taken place between the complainant and the appellant. The defence of the appellant was that the complainant attempted to thrust the currency notes into his pocket. PW-10 stated that the currency notes (MO 1 series) were handed over by the complainant and accepted by the appellant through the counter/window but admittedly the complainant was found inside the office room when PW 12 reached. If the amount had already been handed over by the complainant to the appellant through the counter/window, where was an occasion for the complainant to be inside the office room where the appellant was said to be sitting. This casts serious doubt about the prosecution case and, more particularly, the evidence of PW-10 that the amount was handed over by the complainant from outside the window and accepted by the appellant while sitting inside the room. Strangely, the High Court made out a new case in favour of prosecution although it was not stated by PW-10 nor anyone that the

A complainant entered the room, after handing over money to the accused, to sign the acknowledgement on the register. As a matter of fact the presence of the complainant inside the room renders the evidence of PW-10 highly doubtful. With such interested evidence of PW-
B 10, who is a police constable and subordinate to PW-12, it would be not only unsafe but dangerous to rest conviction upon his testimony. [Paras 16, 17 and 18] [1070-A-E, G-H; 1071-A-B]

C 4. 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 established otherwise by proper proof of demand and acceptance of the illegal gratification, the vital ingredient, necessary to be established to procure a conviction for
D the offences under consideration. [Para 19] [1071-B-C]

5. In the present case, the High Court drew presumption under Section 20 of the Act for charge under Section 7. Based on that, it was held that the prosecution
E has proved the offence punishable under Section 7 of the Act. Sub-Section (3) of section 20 is a "non obstante clause" and provides that where the gratification is trivial and the Court is of opinion that no inference of corruption may fairly be drawn, it may decline to draw the
F presumption as referred to in sub-sections (1) and (2). Thus, the Court is not bound to draw a presumption under section 20 where the alleged gratification is too trivial. In a case such as this, an inference of corruption may not be fairly drawn as the alleged demand was of
G Rs.25/- only. The High Court was not justified in drawing the presumption under Section 20 and holding that offence punishable under Section 7 of the Act was proved. [Paras 20, 22] [1071-D; 1072-D-G]

6. Mere recovery of currency notes (Rs.20/- and Rs.5/
H -) denomination, in the facts of the present case, by itself

cannot be held to be proper or sufficient proof of the demand and acceptance of bribe. When the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence. It is true that the judgments of the Courts below are rendered concurrently but having considered the matter, it is found that the High Court as well as the Special Judge committed manifest error on account of unwarranted inferences. The evidence on record in this case is not sufficient to bring home the guilt of the appellant. The appellant is entitled to the benefit of doubt. [Para 23] [1072-G-H; 1073-A-B]

Case Law Reference:

(1997) 9 SCC 477 referred to Para 9

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 639 of 2004.

From the Judgment & Order dated 03.12.2003 of the High Court of Kerala at Ernakulam in Criminal Appeal No. 97 of 1994.

C.N. Sreekumar, P.R. Nayak, Dushyant Parashar and V.K. Sidharthan for the Appellants.

Kunwar Yuvraj Singh and Ramesh Babu M.R. for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The appellant, A. Subair, in this appeal by special leave, suffered conviction under Sections 7 and 13(1)(d) read with Section 13(2) of Prevention of Corruption Act, 1988 ('the Act') by the court of Special Judge, Thiruvanathapuram. The Special Judge sentenced him to undergo rigorous imprisonment for a period of six months and to pay fine of Rs. 100/- with default stipulation under Section 7

A and rigorous imprisonment for a period of one year and to pay fine of Rs. 250/- with default stipulation for the offence under Section 13(1)(d) read with Section 13(2) of the Act, 1988. His conviction and sentence has not been interfered with by the High Court of Kerala.

B

2. The case of the prosecution was that the appellant was working as a Lower Division Clerk in L-2 Section at the Sub-Regional Transport Office, Attingal. One Manaf had applied for a driving licence which was issued to him but since that was not issued in book form, he made an application to get it C converted into book form. Despite several visits made by Manaf, the appellant did not deliver him the driving licence in book form and he was asked to come time and again. On April 24, 1989, when Manaf visited the office, the appellant informed him that the driving licence in book form was ready. The appellant D demanded an amount of Rs. 25/- for delivery of the driving licence in book form. Manaf was not prepared to pay the money and he made oral complaint to K. Krishna Pillai (PW-12), Deputy Superintendent working in the Vigilance Unit, Thiruvanathapuram. The oral complaint made by Manaf was E reduced in writing (Ext. P-20). PW-12 sent a requisition to the Director, State Institute of Education seeking assistance of two persons to act as independent witnesses. K. Krishnan Kutty (PW-1) and A.S. Abdul Rahim (PW-2) were deputed accordingly. A pre-trap Mahazar (Exh.P-1) was drawn after F explaining the details of the trap and the characteristics of phenolphthalein powder as well as its use in the trap. Phenolphthalein powder was applied on currency notes of Rs. 20/- and Rs. 5/- denomination (M.O.1 series). PW-12 also asked the constable R.Vaman (PW-10) to accompany him. G PW-12, PW-1, PW-2, PW-10 and Manaf then proceeded to Sub-Regional Transport Office at Attingal, at about 12.30P.M. on April 25, 1989 where the appellant was working. PW-10 at the directions of PW-12 positioned himself to such a vantage point that no sooner the money (M.O.1 series) was accepted H by the appellant and the signal was given, he was able to

collect that signal and give further signal to PW-12. As soon as Manaf made the signal for the trap party, PW-12 rushed into the office room where appellant was working and in the presence of PW-1 and PW-2, he recovered money (M.O.1 series) from the shirt pocket of the appellant. The appellant also had his own currency notes (M.O.2 series) in the shirt pocket. P. Thankappan (PW-3), N. Thankamony (PW-4), R. Rajan (PW-5), P. Viswanathan (PW-6), K. Jayadevan (PW-7) and A. Sahadevan (PW-8) were also present in the office at that time. A post trap Mahazar (Ext.P-2) was prepared in the presence of PW-1 and PW-2. A solution of sodium carbonate was prepared in a glass tumbler. The appellant's left hand was dipped into solution of sodium carbonate which turned pink. M.O.1 series currency notes as well as one of the M.O.2 series currency notes which was already in the pocket of the appellant answered the phenolphthalein test positively. The left side pocket of shirt also turned pink when sodium carbonate water was applied. Sodium Carbonate bottles after conducting the tests were sealed.

3. The appellant was arrested and later on released on bail.

4. PW-12 carried on the investigation; got the site plan prepared by the Village Officer (PW-11) and on completion of investigation sent the investigation papers through Director of Vigilance to W.Joseph Devson (PW-9), Joint Transport Commissioner, Thiruvanathapuram for sanction. PW-9 granted sanction to prosecute the appellant for the offence under Section 7 and Section 13(1)(d) read with Section 13(2) of the Act, 1988 which ultimately resulted in laying of the charge against the appellant.

5. Section 7 of the Act is as follows -

"7. Public servant taking gratification other than legal remuneration in respect of an official act. – Whoever, being, or expecting to be a public servant,

A accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, 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 B exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or C government company referred to in clause © of Section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine."

D 6. Section 13 (1)(d) and (2) reads –

"13. Criminal misconduct by a public servant. ; (1) A public servant is said to commit the offence of criminal misconduct, -

E (a) .....

(b) .....

(c) .....

F (d) if, he, -

(i) by corrupt or illegal means, obtains for himself or for any other person any valuation thing or pecuniary advantage; or

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(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or

(iii) while holding office as a public servant, obtains

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for any person any valuable thing or pecuniary advantage without any public interest; or

(e) .....

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extent to seven years and shall also be liable to fine."

7. The essential ingredients of Section 7 are: (i) that the person accepting the gratification should be a public servant; (ii) that he should accept the gratification for himself and the gratification should be 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, favour or disfavour to any person.

8. Insofar as Section 13 (1)(d) of the Act is concerned, its essential ingredients are: (i) that he should have been a public servant; (ii) that he should have used corrupt or illegal means or otherwise abused his position as such public servant and (iii) that he should have obtained a valuable thing or pecuniary advantage for himself or for any other person.

9. In the case of *C.K. Damodaran Nair v. Government of India*[1], this Court had an occasion to consider the word "obtained" used in Section 5(1)(d) of the Prevention of Corruption Act, 1947 (now Section 13(1)(d) of Act, 1988), and it was held:

> **"12.** The position will, however, be different so far as an offence under Section 5(1)(d) read with Section 5(2) of the Act is concerned. For such an offence prosecution has to prove that the accused "obtained" the valuable thing or pecuniary advantage by corrupt or illegal means or by

1. (1997) 9 SCC 477

A otherwise abusing his position as a public servant and that too without the aid of the statutory presumption under Section 4(1) of the Act as it is available only in respect of offences under Section 5(1)(a) and (b) — and not under Section 5(1)(c), (d) or (e) of the Act. "Obtain" means to
B secure or gain (something) as the result of request or effort (Shorter Oxford Dictionary). In case of obtainment the initiative vests in the person who receives and in that context a demand or request from him will be a primary requisite for an offence under Section 5(1)(d) of the Act
C unlike an offence under Section 161 IPC, which, as noticed above, can be, established by proof of either "acceptance" or "obtainment"."

10. The legal position is no more *res integra* that primary requisite of an offence under Section 13(1)(d) of the Act is proof
D of a demand or request of a valuable thing or pecuniary advantage from the public servant. In other words, in the absence of proof of demand or request from the public servant for a valuable thing or pecuniary advantage, the offence under Section 13(1)(d) cannot be held to be established.

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11. The core question that must be answered by us in this appeal is: whether there is sufficient legal evidence on record to bring home the guilt of the appellant for the offence under Sections 7 and 13(1)(d) read with 13(2)?

F 12. Pertinently, Manaf (complainant) has not been tendered in evidence by the prosecution. PW-12 (IO) in his entire deposition has not stated a word as to why Manaf was not examined or why it was not possible to tender him in evidence. In the absence of examination of the complainant, there is no
G substantive evidence to prove the factum of demand. 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 of non-examination of the complainant. We find it

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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 evidence. It has, therefore, to be held that the best evidence to prove the demand was not made available before the Court.

13. We shall now examine whether the evidence of other witnesses sufficiently proves the demand? Suffice it to say that prosecution has neither relied upon the evidence of PW-3 to PW-8, who were present in the office at the time of raid nor the evidence of panch witnesses (PW-1 and PW-2) to prove the demand. The investigating officer (PW-12) also does not state anything about the demand. The only evidence now remains is that of PW-10. He stated, "I felt that he (complainant) was talking something to the person who was sitting inside near the window (the accused). Immediately complainant took out the money from the left pocket of his shirt and offered it through the window." We are afraid, the evidence of PW-10 hardly establishes the demand allegedly made by the accused. The factum of demand, thus, remains not proved.

14. Moreover, we find that the evidence lacks in quality and reliability to record verdict of guilt against the appellant. PW-1 was initially declared hostile and public prosecutor sought permission to cross examine him. In cross examination conducted by public prosecutor, he partially supported the prosecution case. Having considered his evidence minutely, we find it difficult to give much credence to his evidence.

15. Insofar as PW-2 is concerned, he did not fully support the case of prosecution. He deposed that he had an ear attack two months before recording of his deposition and due to the illness and the treatment, he could not recollect the details of the incident. He also stated that he was suffering from depressive psychosis. His evidence does not help the case of

A the prosecution at all. Thus, the evidence of two independent witnesses does not advance the prosecution case.

16. As a matter of fact, the Special Judge as well as the High Court heavily relied upon the deposition of PW-10 in B support of the prosecution case. We were taken through the evidence of PW-10 and, in our considered view, his evidence suffers from serious infirmities. The Special Judge as well as the High court were not even clear about the place where PW-10 has positioned himself. He was not within the hearing range that he could hear the conversation that is said to have taken C place between the complainant and the appellant. The defence of the appellant was that the complainant attempted to thrust the currency notes into his pocket. PW-10 stated that the currency notes (M.O. 1 series) were handed over by the complainant and accepted by the appellant through the counter/ D window but admittedly the complainant was found inside the office room when PW-12 reached. If the amount had already been handed over by the complainant to the appellant through the counter/window, where was an occasion for the complainant to be inside the office room where the appellant was said to E be sitting. This casts serious doubt about the prosecution case and, more particularly, the evidence of PW-10 that the amount was handed over by the complainant from outside the window and accepted by the appellant while sitting inside the room.

F 17. The High Court noticed: "But why was CW-1 (complainant) found inside the office room? Though such a specific version has not at all been given by the prosecution, probabilities unmistakably suggest that the presence of complainant inside the room obviously must have been G necessarily to sign the acknowledgment on Ext. P-23(a). Specific evidence, I repeat is not available on the point." Strangely, the High Court made out a new case in favour of prosecution although it was not stated by PW-10 nor anyone that the complainant entered the room, after handing over money to the accused, to sign the acknowledgement on the H

register [Ext. P-23(a)]. As a matter of fact the presence of the complainant inside the room renders the evidence of PW-10 highly doubtful.

18. In our view, with such interested evidence of PW-10, who is a police constable and subordinate to PW-12, it would be not only unsafe but dangerous to rest conviction upon his testimony.

19. It needs no emphasis 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 established otherwise by proper proof of demand and acceptance of the illegal gratification, the vital ingredient, necessary to be established to procure a conviction for the offences under consideration.

20. The High Court drew presumption under Section 20 of the Act for charge under Section 7. Based on that, it was held that the prosecution has proved the offence punishable under Section 7 of the Act.

21. Section 20 of the Act, 1988 reads thus:-

"20. Presumption where public servant accepts gratification other than legal remuneration. –

(1) Where, in any trial of an offence punishable under Section 7 or Section 11 or clause (a) or clause (b) of sub-section (1) of Section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in Section 7 or, as the case

A may be, without consideration or for a consideration which he knows to be inadequate.

(2) Where in any trial of an offence punishable under Section 12 or under clause (b) of Section 14, it is proved that any gratification (other than legal remuneration) or any B valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward C such as is mentioned in Section 7, or as the case may be, without consideration or for a consideration which he knows to be inadequate.

(3) Notwithstanding anything contained in sub-sections (1) D and (2), the court may decline to draw the presumption referred to in either of the said sub–sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn."

22. Sub-Section (3) is a "non-obstante clause". It provides E that where the gratification is trivial and the Court is of opinion that no inference of corruption may fairly be drawn, it may decline to draw the presumption as referred to in sub-Sections (1) and (2). In other words, the Court is not bound to draw a presumption under Section 20 where the alleged gratification F is too trivial. In a case such as this an inference of corruption may not be fairly drawn as the alleged demand was of Rs. 25/ - only. In our view, the High Court was not justified in drawing the presumption under Section 20 and holding that offence punishable under Section 7 of the Act was proved.

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23. Mere recovery of currency notes (Rs. 20/- and Rs.5/-) denomination, in the facts of the present case, by itself cannot be held to be proper or sufficient proof of the demand and acceptance of bribe. When the evidence produced by the

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prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence. It is true that the judgments of the courts below are rendered concurrently but having considered the matter thoughtfully, we find that the High Court as well as the Special Judge committed manifest errors on account of unwarranted inferences. The evidence on record in this case is not sufficient to bring home the guilt of the appellant. The appellant is entitled to the benefit of doubt.

24. Consequently, the appeal is allowed. The conviction and sentence of the appellant is set aside and the fine if paid, shall be refunded to the appellant. The bail bonds are cancelled.

B.B.B. Appeal allowed.