

State Vs. Harbans Lal

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SooperKanoon Citation : sooperkanoon.com/683899

Court : Delhi

Decided On : Sep-27-1968

Reported in : 5(1969)DLT655

Judge : Hardayal Hardy and; V.S. Deshpande, JJ.

Acts : [Prevention of Corruption Act, 1947](#) - Sections 4 and 6; [Indian Penal code, 1860](#) - Sections 161

Appeal No. : Criminal Appeal No. 15 of 1966

Appellant : State

Respondent : Harbans Lal

Advocate for Pet/Ap. : K.C. Pandit,; Prithvi Raj and; K.D. Sood, Advs

Judgement :

V.S. Deshpande, J.

(1) This is an appeal by the State against the judgment of the Special Judge acquitting the respondent Harbans Lal Gupta, of the charge of having accepted illegal gratification of Rs 50/ from the complainant P. W. 1, Sant Ram, on 31st March, 1965, an offence which, if proved, would have been punishable under Section 5(2) of the [Prevention of Corruption Act, 1947](#) (hereniafter called the Act).

(2) The respondent Gupta, was the Sanitary and Food Inspector posted at Arki while P. W. 1 Sant Ram has a shop at Dhundhan, a few miles from Arki. On 23rd March, 1965, Gupta came to the shop of Sant Ram for inspection. Though Tuesday was a closed day for Sant Ram's shop, Gupta ordered him to open it and brought by way of sample 750 grammes of Shakkar, i.e. unrefined sugar, sealed it in three packets and gave one to Sant Ram and took away the other two. It is alleged that Gupta, however, told Sant Ram not to be afraid and asked him to come and see him at his office at Arki. Sant Ram however had no intuition to do so. When Sant Ram met him accidentally on the 28th March, 1965 at the Arki bus-stand, Gupta again told him that he should not be afraid but asked him to arrange to supply him four or five kilos of ghee asking it as a bribe by implication inasmuch as in the circumstances in which the two parties were placed, the accused did not intend to pay the price of it to Sant Ram. Sant Ram did not like the corrupt suggestion made by the accused and on the 30th of March went to Simla to the Office of the Deputy Superintendent of Police. Anti Corruption Unit and made a written report there that if the accused were to demand cash as bribe, he would pay to the extent of Rs. 60.00 to him as bribe. Six ten rupee notes were shown by Sant Ram to the police and their numbers were noted in the report made by Sant Ram. This report is Exhibit P. W. 1/A. The police asked Sant Ram to bring two independent witnesses from his village in the 31st March, 1965 to Arki police station. Accordingly, Sant Ram went there with P. W. 7 Sukh Dev of Dhundhan and P. W. 8 Brij Lal of Lalhyana. The police also called two independent witnesses of Arki, viz., P. W. 2 Balmukand and P. W. 3 Mehar Chand to witness the trap Sant Ram had, is the meanwhile, collected some applications for license from his neighbours and visited the accused to get those applications sanctioned. During his meeting with the accused at the latter's office at Arki, Sant Ram is said to have been told by the accused that since no ghee had been arranged some cash may be paid inasmuch as something out of it would have to be sent to Chandigarh also for obtaining favorable report on the sample seized from Sant Ram's shop. Accordingly, Sant Ram paid Rs. 50.00 to the accused. Thereafter, Deputy Superintendent of Police Shri S. M. Sagar (P. W. 22) and Inspector Bhag Singh (P. W. 23) accompanied by P. W. 2 Balmukand and P. W. 3 Mehar Chand went to the office-cum-residence of the accused and recovered the marked currency notes

of Rs. 50.00 from the almirah in his office.

(3) The defense was that on the 28th March, 1965 when Sant Ram went to the accused at Arki, the latter gave him Rs. 50.00 to buy four or five kilos of ghee. for the accused. However, on the 31st March Sant Ram came to the accused and said that he could not procure the ghee wanted by the accused and returned the sum of Rs. 50.00 which Sant Ram had borrowed from the accused. It is these Rs. 50.00 which were seized by the police from the almirah in the office of the accused. The money was thus not received as illegal gratification, but only as the repayment of the money which had been paid as advance for the price of ghee by the accused to Sant. Ram.

(4) The learned Special Judge discussed the evidence for the prosecution and the evidence adduced by the defense and held that the prosecution case had not been proved. The amount of Rs. 50.00 was, no doubt, paid to the accused by Sant Ram but it was very probable that the accused had already given Rs. 50.00 to Sant Ram for the purchase of ghee and the same amount was returned by Sant Ram to the accused. In acquitting the accused, the learned Special Judge purported to refer to section 4 of the Act and the Supreme Court decision in *Emdon v. State of U. P.*, but observed as follows :-

'If the prosecution has proved that the money was obtained as gratification, then the presumption would arise: but from the facts of the case as discussed above, it has been clearly shown that the accused had paid the amount to Sant Ram for the purchase of ghee which amount was received back by the accused. The gratification as mentioned in Section 4 of the Act has not been proved by the prosecution.'

In the present case, the presumption raised by Section 4 of the Act against the accused was the most fundamental point. The above extract from the judgment of the learned Special Judge shows beyond doubt that, despite his reference to the Supreme Court decisions in *Emden's* case. he did not grasp the ratio of the said decision which was correctly summarised in the headnote of *C.I. Emden v. State of Uttar Pradesh* : [1960]2SCR592 as follows :-

'The presumption under Section 4 arose when it was shown that the accused had received the stated amount and that the said amount was not legal remuneration. The word 'gratification' in Section 4(1) was to be given its literal dictionary meaning of satisfaction of appetite or desire; it could not be construed to mean money paid by way of a bribe. The High Court was justified in raising the presumptions against the appellant as it was admitted that he had received the money from the contractor and the amount received was other than legal remuneration.'

(5) The two really important questions in this case were (1) whether the accused received Rs 50.00 from Public Witness -1 Sant Ram otherwise than by way of legal remuneration and, if so, whether the presumption under Section 4 of the Act arose against him and (2) whether the accused has rebutted the said presumption by proving that the money was received by him as repayment of the advance which had been made by him to Sant Ram for the purchase of ghee. The nature of a case like the present one in which the presumption under Section 4 of the Act is raised differs fundamentally from an ordinary criminal case. In the latter, the general burden of proof is on the prosecution till the end. It may be that under Section 105 of the Evidence Act, the burden to bring his case in one of the general or special exceptions to enable him to escape from punishment may be on the accused. But in that case the ingredients of the offences remained proved against the accused. On the other hand, in a case in which the presumption under Section 4 of the Act is raised against the accused, the burden on the accused is to negative the very existence of such ingredients of the offence with which he is charged so as to bring about a failure of the charge itself. In such a case like the present one, it cannot be said that the general burden to prove the ingredient of the offence with which the accused is charged lies on the prosecution. For, the statutory presumption under Section 4 is raised against the accused and that amounts to the proof of the prosecution case against him. The observations of a Division Bench of the Gujarat High Court in *Pravinchandra Ramnarayan Bhatt v. State of Gujarat* which properly construed the Supreme Court decisions with which we respectfully agree would be found instructive in this connection.

(6) The failure of the learned Special Judge to give effect to the presumption under Section 4 has vitiated the whole of his judgment inasmuch as he discussed the

prosecution and the defense evidence as is done in an ordinary criminal case in which the prosecution case is not proved with the help of the presumption under Section 4 of the Act. If the learned Judge had only properly read the Supreme Court decision in Emden's case to which he purported to refer, he would have found that the Supreme Court discussed the prosecution case only with a view to see if the presumption under Section 4 could properly arise thereby. Once the said presumption was held to arise the Supreme Court had only to consider whether the accused had succeeded in rebutting the said presumption. The same approach in considering the prosecution and the defense evidence would be found in the subsequent decision of the Supreme Court in *V.D. Jhingan v. State of U.P.*

(7) We would be constrained, therefore, to re-examine the prosecution and the defense evidence in this case from this point of view. We would also bear in mind that this is an appeal against acquittal. The powers of the High Court in an appeal against the acquittal, observed the Supreme Court through M. Hidayatullah, C.J. in *Laxman Kalu Nikalje v. The State of Maharashtra* decided on the 5th Day of April, 1968, at page 3, 'are not different from the powers of the same Court in hearing an appeal against a conviction. The High Court in dealing with such an appeal can go into all questions of fact and law and reach its own conclusions on evidence provided it pays due regard to the fact that the matter had been before the Court of Sessions and the Sessions Judge had the chance and opportunity of seeing the witnesses depose to the facts. Further, the High Court in reversing the judgment of the Sessions Judge must pay due regard to all the reasons given by the Sessions Judge for disbelieving a particular witness and must attempt to dispel those reasons effectively before, taking a contrary view of the matter. It may also be pointed out that an accused starts with a presumption of innocence when he is put up for trial and his acquittal in no sense weakens that presumption, and this presumption must also receive adequate consideration from the High Court.' This observation reproduces the well-established view taken in the previous decisions such as *Madan Mohan v. State of U P* and *Shiv Swarup v. Emperor*. After referring to evidence his lordship proceeded

(8) The evidence of Public Witness 1 Sant Ram is not fully satisfactory, but in its essentials his story that the accused made the corrupt suggestion to arrange for

four or five kilos of ghee implying that it should be supplied gratis was apparently true. Even the accused found it difficult to deny that he had asked P. W. 1 Sant Ram for ghee and, therefore, the accused found it advisable to raise the defense that the supply of ghee by P. W. 1 Sant Ram was not to be gratis but on payment of price. P. W. 1 Sant Ram, however, seems to have resented this corrupt suggestion from the accused and decided to trap the accused while accepting the bribe. For this purpose, P. W. 1 Sant Ram, apparently thought that a bribe in the form of marked currency notes could be more easily brought home to the accused than the gratis supply of ghee. The fact that ultimately on the 31st March, 1985, the accused accepted the marked currency notes from P. W. 1 Sant Ram would show that either of the two following things happened. Either as P. W. 1 Sant Ram has explained, the accused was told by Sant Ram that ghee could not be arranged upon which the accused asked for a cash bribe ; or, P. W. 1 Sant Ram himself might have suggested to the accused that a cash bribe could be paid by Sant Ram though not ghee. In case the suggestion to pay the cash bribe had come from Sant Ram himself, the question is whether Sant Ram thereby became an accomplice. If Sant Ram had intended to bribe the accused then Sant Ram would be an accomplice. As the shakkar the sample of which had been taken by the accused was not adulterated, there was really no reason why Sant Ram should have intended himself to pay a bribe to the accused. Further, the very fact that Sant Ram contacted the police and participated in trapping the accused would show that Sant Ram did not intend to pay anything to the accused except with a view to trap him, Sant Ram was, therefore, only a partisan witness interested in the success of the trap. He was not an accomplice. His evidence, therefore, is to be considered with caution but is not, as a matter of law, in need of corroboration. This has been established law since the decision of the Supreme Court in the State of Bihar v Basawan Singh.

(9) The testimony of the witnesses of the trap P. W. 2 Balmukand and P. W. 3 Mehar Chand is also not fully satisfactory. They say that they were not made aware by the police fully as to what exactly they were to witness after the accused was trapped. Secondly, both were shop-keepers of Arki and thus subject to the jurisdiction of the accused. Both, therefore, might have been anxious not to displease the accused. They seem to have been softened in favor of the accused,

in so far as they say that the accused said that the notes seized from him were the notes which he had received, P. W. 3 Mehar Chand goes further and expressly says that the accused while producing the currency notes from the almirah said that the accused had given money for ghee. The witness said, however, that the accused did not disclose the name of the person to whom the money had been given for ghee. But the witness said that the accused said that the amount had been returned only that day. The witness was, therefore, apparently trying to please both the prosecution and the defense. He could not be telling the whole truth while favoring both sides. If the accused had really said that he had given this seized money for ghee, then the accused must have stated that the money had been given to P. W. 1 Sant Ram, for the ghee and that it was returned by Sant Ram, but the witness did not go that far. The question is whether the testimony of these so called independent trap witnesses coupled with the testimony of P. W. 1 Sant Ram and the two police officers who took part in the trap, viz., P. W. 22 S. M. Sagar and P. W. 23 Bhag Singh, is sufficient to show that the amount of Rs. 50.00 was paid by P. W. 1 Sant Ram to the accused in accordance with the plan to trap the accused. There can be no doubt that their testimony fully establishes that the money was paid by Public Witness 1 Sant Ram in pursuance of the trap. The defects- in the testimony of P. W. 2 Balmkand and P. W. 3 Mehar Chand are not such as to destroy the prosecution case on this essential point. In such a case when money is clearly proved to have been paid to the accused, the defects in the testimony of prosecution witnesses do not weigh much with the Court. For instance, in a recent decision of the Supreme Court in *Bhanuprasad Hariprasad Dave and another v. The State of Gujarat* Criminal Appeal No. 155 of 1965, decided on the 19th Day of April, 1968) also the complainant Ramanlal and the two police officers Frulker and Santramji alone stuck to the prosecution case. The Panch witness Dahyabhai and the two other independent witnesses Sanghvi and Sandhalal refused to help the prosecution case fully. The Supreme Court, however observed as follows :-

'The Trial Court as well as the High Court accepted the evidence of Dahyabhu, Sanghvi and Sandhalal to the extent it supported the prosecution case and rejected the rest. It was open for those Courts to do so.'

The Court went on to observed regarding the complainat and the two police officers as follows :-

'It can't be said-it was said-that they were accomplices. Therefore, the law does not require that their evidence should be corroborated before being accepted as sufficient to found a conviction'

The Court then referred to their previous decisions in the State of Bihar v. Basawan Sing, referred to above and explained that the contrary observations in their decision in Major E. G Barsay v. The State of Bombay, to the perfect facts of that were to be confined the decision in Basaw is case' which, was given by a Bench of five Judges was binding on the Bench which decided Major E. G. Barsay's case.

(10) The fact of the currency notes of Rs. 50.00 having been received by the accused from P. W. 1 Sant Ram is thus proved fully by the prosecution evidence. This fact is also admitted by the accused, but it is to be noted that it is not on the admission of the accused but on over-whelming prosecution evidence that the proof of this fact depends. The significance is that the presumption under Section 4 of the Act thereby arose against the accused and the burden of proof to show that the accused had received the money by way of a return of the advance which had been made by him to P. W. 1 Sant Ram, therefore, shifts to the accused. Section 4 requires that the Court 'shall presume' that the money or the valuable thing was accepted by the accused either as a motive or a reward as is mentioned in Section 161, Indian Penal Code, or as being without consideration or for inadequate consideration as mentioned in Section 165, Indian Penal Code Section 4 of the Evidence Act states that 'whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.' It is true that the expression 'shall presume' has not been defined in the Act, But the provisions of Section 4 of the Act are in the nature of law of evidence. therefore, they are in para materia with the provisions of Section 4 of the Evidence Act. They should, therefore, be given the same meaning as they have in the Evidence Act. For the same reason, when Section 4 of the Act requires that the presumption would continue to be raised 'unless the contrary is proved', the

meaning of the word 'proved' would also be the same as its meaning in Section 3 of the Evidence Act, which is as follows :-

'A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case to act upon the supposition that it exists.'

therefore the Supreme Court has laid down in V. D. Jhingan's case cited above that the quantum of proof to be adduced by the accused is the same as is required to be adduced by a party in a civil proceeding and 'just as in civil proceedings. the Court trying an issue makes its decision by adopting the test of probabilities, so must a criminal Court hold that the plea made by the accused is proved if a preponderance of probability is established by the evidence led by him ' (Paragraph) , of V D. Jhingan's case Developing the same idea further, the Division Bench in the Gujarat High Court in Pravinchandra's case referred to above observed as follows in paragraph 11 of A.I.R. 1988 Guj 17 : -

'In other words, it may be said that if the appellant can show that there is enough material on the record to entitle him to a decree for these two amounts, (viz., those paid as gratification to her that legal remuneration) on the basis of these amounts being loans if this were a civil litigation, he is entitled to succeed in the appeal.

(11) Let us examine the evidence both of the prosecution and the defense along with the circumstances of the case to see if the accused had been able to discharge this burden of proof. The most favorable circumstance urged in favor of the accused is the evidence of P. W. 2 Balmukand and P. W. 3 Mehar Chand that the accused handed over the money to the police saying that they were the notes which he had received. This evidence is urged to show that the accused at that very time did not try to deny the receipt of the notes but on the contrary admitted that he had received them. This in itself is non-committal evidence. But the further evidence of P. W. 3 Mehar Chand that the accused said that he had given this money for ghee which he kept in the almirah supports the accused to some extent though not to the full extent inasmuch as Mehar Chand said that the name of the person to whom the amount for ghee was given was not disclosed by

the accused but the accused said that the amount had been returned only that day. In fact, P W. 2 Balmukand expressly denied that the accused at that time said that Sant Ram had returned Rs. 50.00 in notes to him which the accused was producing. The two police officers Public Witness 22 S. M. Sagar and P W. 23 Bhag Singh denied that the accused gave such an Explanation when the notes were seized Assuming that the accused did not try to raise some such defense at the very time the notes were seized the defense was apparently half-hearted The full-blown defense that this money had been returned to the accused by Sant Ram was not raised by the accused at the time of the seizure of the notes. Nor was there any suggestion at that time that this money had been borrowed by the accused from D W. 2 Jai Ram and paid to P. W. 1 Sant Ram for the purchase of ghee and that Sant Ram returned it to the accused in the presence of D. W. 1 Mahender Parakash D. W. 2 Jai Ram is a hotel keeper of Arki who says that the accused was his customer. He says that the accused has been taking his meals at the hotel and then said that the accused seldom used to take meals at his hotel and that also on payment. He says that when the accused asked him for this loan for being given to Sant Ram there were five or six customers taking tea at the hotel In his examination, the accused said one Tulsi Ram was there. But none of those persons has been examined as a witness for defense. D W. 2 Jai Ram being a hotel keeper is also subject to the influence of the accused who was a Food Inspector. He was also apparently on friendly terms with him as a customer taking his meals at his hotel He is not a man of status inasmuch as he says that the net profit of his hotel business was hardly one or two rupees a day. D.W. 1 Mahender Parkash. is the landlord of the accused and of the Government in as much as both the residence and the office of the accused were in his building. He at first said that he was the brother-in law of Sant Ram but later admitted that a cousin-sister of P. W. 1 Sant Ram had been married to him This is a circumstance of which not much can be made in favor of the accused. We have already seen that independent witnesses like P W. 2 Balmukand and P. W.3 Mehar Chand were softened in favor of the accused. D W. 1 Mahender Parkash being a landlord and a close neighbour of the accused would only be inclined even more in favor of the accused. He says that the accused purchased ration from his shop. He even sold sometimes tins of pure ghee. He was examined by the police during the

investigation, but. said that his statement was recorded only with respect to the amount of rent of his house paid by the accused, He does not say that he wanted to tell the police that the accused was innocent and that Rs 50.00 had been returned by Sant Ram to the accused. It would appear, therefore, that the defense of the accused is an after-thought. It was only when the prosecution witnesses P. W 2 Balmukand and P. W. 3 Mahar Chand came to be examined that we see the defense first emerging.

(12) The evidence of D.W. 1 Mahender Parkash and D W.2 Jai Ram and the equivocal statements of P. W. 2 balmukand and P. W. 3 Mehar Chand trying to prove the prosecution case and also the defense at the same time are indicative of a peculiar feature of our criminal trials which has been observed often by the police, magistrates and the judges. When a crime is committed the prosecution is able to secure evidence (though with some difficulty) to bring home the crime to the accused. Then the attempts on the part of the accused to invoke the sense of pity in the prosecution witnesses are made and by the time the recovery of evidence begins the prosecution witnesses are found reluctant to depose the truth fearing that it would inflict hardship on the accused, who would be sent to jail. The defense witnesses influenced by the same sense of misplaced compassion think that they should do a good turn to the accused to escape being sentenced to imprisonment. This appears to be the Explanation why P. W. 2 Balmukand and P. W.3 Mehar Chand should soften down towards the accused and why D.W. 1 Mahender Parkash and D. W. 3 Jai Ram should come forward to depose in favor of the accused. We are constrained to say so because we find that the defense put forward by the accused is in the circumstances of this case inherently improbable.

(13) Here we have the accused who has certain statutory powers over the shopkeepers. What type of a person is he? Public Witness -1 Sant Ram says that the accused and his peon parported to taste shakkar and declared that it contained sand. The later analysis of the Shakkar having proved it to be puri, the accused must be said to be unscrupulous enough to frighten Sant Ram for getting something out of him. The accused is not hardened enough to demand a cash bribe. He just throws a hint that Sant Ram should arrange for four or five kilos of ghee implying that the accused would do him some favor if Sant Ram did so. The accused is a

young man and he and his wife probably constitute his family. They do not need so much ghee for themselves. but it appears that the family of the accused in Ludhiana needs it and this is the temptation for the accused to use his powers to make illegal benefit out of them. He has already taken a tin of ghee from Public Witness 17 Rirku Ram before 13th March, 1984. But he has not been able to pay the price of Rs 138. 85 for the tin till W. ^DV-e-1her, !')65. Here also the accused has got out a tin from Rirku Ram who knew that the accused was not able to pay the price of it. Rirku Ram would not have given the ghee to him if the accused had not been a Fool-Inspector since the chance of getting the price of the ghee tin was not brought

(14) It is this desire to take out ghee from shop keepers that seem to be the temptation to which the accused fell prey. We cannot understand that the accused purchased ghee from Rirku Ram because Rirku Ram was selling ghee. but Public Witness -1 Sant Ram was not selling ghee. We do not understand, therefore, how the accused could think of purchasing ghee from Sant Ram. If Sant Ram did not sell ghee. we see no point in the accused asking him to procure ghee from other ghee sellers by paying the price of it. other ghee sellers including DW-1 Mahender Parkash himself were available to the accused from whom he could directly purchase ghee. Further, what were the relations between the accused and Sant Ram? They appear to be perfect strangers and the only contact between them was that in the course of his official duties, the accused had seized a sample of Shakkar from Sant Ram. This contact if at all was an unfriendly contact, it put Sant Ram in some fear of the accused, but did not create any intimacy between them. The story of the accused that out of all persons he selected Sant Ram to procure ghee for him and even advanced Rs. 59.00 by borrowing the same from DW-2 Jai Ram to Sant Ram is extremely unnatural, In Emden's case referred to above, the accused had taken the plea that the money seized from him had been advanced as a loan to him by the complainant. The Supreme Court observed as follows about this plea at pages 603- 604 :-

'BESIDES, the High Court has also considered whether it would have been probable that Shukla should have advanced money to the appellant. Having regard to the relations between the appellant and Shukla it was held by the High

Court that it was extremely unlikely that Shukia would have offered to advance any loan to the appellant.'

In the present case, the accused was a petty official getting a small salary. He was not in possession of fund? as he could not even pay the price of ghee supplied by Rirku Ram, To purchase ghee he had many other ghee sellers under his influence from whom he could have got the ghee cheaply Sant Ram should have been the last person to whom the accused should have turned for purchasing ghee is Sant Ram did not sell it. Further, the accused had seized Shakkar sample from Sant Ram with a view to prosecute him if it proved to be adulterated. To ask favor from him was improper and would contravene Rules 3 and 13 of the Central Service Conduct Rules, 1964, and even Section 165, Indian Penal Code. When a friend like DW-1 Mahender Parkash, having the shop in the same building as the accused lived, who sold tins of pure ghee sometimes and when ghee could be purchased by the accused from the other ghee sellers direct, it is not believable that the accused advanced Rs. 50.00 to Sant Ram and asked him to procure ghee for him particularly when the accused and Sant Ram are not shown to have been even on talking terms in private life,

(15) On the other hand, the story of the prosecution that the money was paid by Sant Ram to the accused as a bribe is far more probable apart from the fact that it was proved by the presumption raised under Section 4 of the Act. The prosecution story is based on facts which preceded the trap. Even before the accused accepted the money, Public Witness -1 Sant Ram had asked the two police officers who were to tell the two independent witnesses to the trap the fact that the accused had asked for a bribe and was going to accept it from him. Contrasted with this, the story of the accused that money had been advanced by him to Sant Ram had no existence at all when the money was seized from the accused. The defense was an after-thought, the evidence to prove which was apparently got up at the stage of the trial; in assessing the evidence in support of the defense including not only the defense witnesses proper but also the prosecution witnesses so far as they have supported the defense, even if it is assumed that the plea in defense was not an after-thought and that it was raised by the accused at the time of the seizure of the money from him, the mere fact that such an

Explanation was given by title accused at the time of the seizure of the money is in itself not of much importance. The accused Vaidyanatha Iyer in State of Madras v Vaidyanatha Iyer and the accused V.D. Jhingan in V.D. Jhingan v. State of U. P. had both raised the defense pleas immediately when the money was seized from them. Nevertheless, the pleas were disbelieved and they were both convicted. The reason is that the pleas have to be examined on their own merits. The merits of the plea of the accused in this case are very small indeed. Some more factors favoring the defense case may also be considered here. It is somewhat strange that Public Witness -1 Sant Ram was not asked by the police to accompany them and the independent witnesses at the time of the seizure of the marked currency notes from the accused. If Sant Ram had been there, the immediate confrontation of the accused and Sant Ram would have been useful to show which of them reacted in what manner. For instance, Sant Ram could have said that these notes were given by him to the accused or the accused could have said that Sant Ram gave these notes to him as a return of the advance made for ghee. In fact, the accused in answer to a question in his examination under section 342, Code of Criminal Procedure, stated that he requested P W-22 S. M. Sagar to call Sant Ram for the verification of these notes, but the accused did not state that if Sant Ram were called he would immediately admit that the notes were given by way of an advance to him and that he had returned the same to the accused and the truth could immediately be ascertained from Sant Ram. Not only has no prosecution or defense witness stated that the accused desired the presence of Sant Ram there, but even Public Witness -22 was not asked why he did not enquire the presence of Sant Ram at the time of the recovery of the notes. Public Witness Public Witness 22 S. M. Sagar has stated that he did not take Public Witness PW2 Palmukand and Public Witness Public Witness 3 Mehira Chand into confidence because he did not like that the trap may be known generally to others which might defeat its purpose. This does not appear to be the right method of planning a trap. The witnesses to the trap should have been kept fully informed as to what was going to happen. Since there is no other Explanation why Public Witness -1 Sant Ram was not asked by Public Witness -22 to remain present at the time of the recovery of the notes, we can only think that this was due to some similar confused thinking on the part of the police.

(16) Public Witness Public Witness 2 Balmukand and Public Witness -3 Mehar Chand have further stated that at the time of the recovery of the marked currency notes some other money was lying in the almirah from which the notes were seized. The suggestion from the defense is that the almirah in the office of the accused was being used by him to keep not only official things but also his private money. Even if this was so, we do not think that it helps the accused to show that the marked currency notes were received by him by way of return of the advance. We are now in a position to consider whether the accused has disproved the case of the prosecution which has been proved by the presumption raised against the accused under Section 4 of the Act.

(17) The following is the proper way to judge the defense as observed by the Gujarat High Court in paragraph (10) of Pravindhandra's case, referred to above:-

'In view of this, there can be no doubt whatever that in the case where section 4 of the Prevention of Corruption Act applies, the general burden to prove the ingredient of the offence under Section 161 does not lie on the prosecution as there is the specific statutory provision to the contrary. The result of this strain of reasoning is that unless it can be held that the appellant has proved that the two amounts of Rs.10.00 each were accepted by him as the return of loans from Fakir Maganand Shankir Asha, he cannot succeed. It would not be enough for him merely to create a situation where the Court may be put in doubt that his case may be true or may not be true.'

Can we then say that the accused has succeeded in showing that the defense case is more probable than the prosecution case? We have not the least doubt in our minds that the case of the accused is not even plausible much less probable. In no case can it be said that the case of the accused is more probable than the case of the prosecution. Our conclusion is that the case of the prosecution has been proved beyond all reasonable doubt and the accused has not at all been able to discharge the burden placed on him to prove to the contrary or disprove the prosecution case.

(18) It follows, therefore, that the acquittal by the learned Special Judge was wrong and would have to be set aside. A new question, however, arises as to for

what offence should the accused be convicted. The charge framed by the learned Special Judge was peculiar. It was worded in the language of Section 161. Indian Penal Code, and the facts stated therein also fitted it into Section 161. Indian Penal Code. but the charge purported to be under Section 5(2) of the Act. The reason seems to be that the sanction to prosecute was given under Section 6(1)(c) of the Act implying that the prosecution could be for any or all of the Sections mentioned in Section 6 of the Act, viz., Sections 161 and 165 of the Indian Penal Code and Section 5(2) of the Act. It is unfortunate that instead of implying the above, the sanction did not explicitly state that prosecution under any of the above Sections was sanctioned. The validity of the sanction, however, depends on how far the sanctioning authority has applied its mind to the facts constituting the offence. The facts constituting the offence punishable under Section 161 were stated in the letter addressed by the police to the Director of Health Services, which is Exhibit Public Witness -23/F. This letter is dated 5th June, 1965. The Director of Health Services gave the sanction to prosecute in her letter dated 15th July, 1965 stating that she had gone through the record and was granting the permission to prosecute the accused after applying her mind to the facts of the case. The letter is addressed to the Superintendent of Police Anti-Corruption Department, who had sought the sanction to prosecute by his letter of the 5th June, 1965. It may be presumed, therefore, that the facts stated by the Police were considered by the Director of Health Services before granting the sanction. No objection to the validity of the sanction had been raised by the accused either in the trial Court or before us According to the decision in *Gokulchand Dwarkadas Morarka v. The King*.

'A person could not be charged merely with the breach of a particular provision of the Order; he must be charged with the commission of certain acts which constitute a breach, and it is to that prosecution that is, for having done acts which constitute a breach of the Order that the sanction is required.'

According to this criterion, the sanction in the present case is valid in as much as the facts of the case were considered by the sanctioning authority though the offences for which the accused was to be prosecuted were only implied but not stated expressly.

(19) The situation, therefore, is that a valid sanction to prosecute exists for all the three offences, viz. those punishable under Sections 161 and 165, Indian Penal Code, and section 5(2) of the Act. The learned Special Judge should have framed charges under all the three Sections. What he did was to frame the charge in terms of Section 161, Indian Penal Code, but actually mentioning only Section 5 (2) of the Act. He apparently was of the view that Section 5 (1) (d) of the Act was worded very widely. The abusing of his position as a public servant to obtain any valuable thing or pecuniary advantage was all that was to be proved to satisfy Section 5(1)(d) of the Act. Any abuse of his position by the public servant would be covered by it. The commission of offences under Sections 161 and 165 of the Indian Penal Code would be covered inasmuch as they also would amount to abuse of his official position by the accused. The learned Special Judge, therefore, purported to frame the charge under Section 5(2) of the Act as he thought that Sections 161 and 165 of the Indian Penal Code would be automatically included in such a charge.

(20) In doing so, the learned Special Judge unfortunately overlooked the fact that even after the amendment made by the Anticorruption Laws (Amendment) Act, 1964, the presumption raised by Section 4 of the Act against the accused was available only in a trial for an offence punishable under Section 161 or 165, Indian Penal Code, or under Section 5(1)(a) and 5(1)(b) of the Act. Since those clauses of Section 5 of the Act were not applicable to the present case the presumption under Section 4 could be available to the accused only if the charges framed were substantially either under Section 161 or under Section 165, Indian Penal Code, or under both. The question, therefore, arises whether we can convict the accused under Section 161 or 165, Indian Penal Code, or under both on the charge framed by the learned Special Judge. The answer is provided by Section 238 of the Code of Criminal Procedure. Section 5(1)(d) read with Section 5(2) of the Act is an offence consisting of several particulars, a combination of some only of which would constitute the complete minor offences punishable under Sections 161 and 165 of the Indian Penal Code within the meaning of Section 238 (1) of the Code of Criminal Procedure. For, as stated above, the offence of abuse of official position is so wide that various types of such abuse would be covered there under. Sections 161 and 165 referred to specific types of such abuse. It must be said therefore,

that the offences under Sections 161 and 165, Indian Penal Code, were complete minor offences covered by the offence punishable under Section 5(1)(d) read with Section 5(2) of the Act as contemplated by Section 238 of the Code of Criminal Procedure. In *Willie Slaney v. State of Madhya Pradesh* the Supreme Court have stated that Sections 237 and 238 are not part of normal procedure and that they covered every type of case in which conviction can be sustained when there is no charge for that offence provided there is a charge to start with. They more specifically held in *Ramaswamy Nadar v. The State of Madras* that the High Court had the power under Section 423, Code of Criminal Procedure, to convert an order of acquittal into an order of conviction in respect of an offence other than that for which the accused was tried by the trial Court and acquitted by it, by exercising the powers contained in Sections 236, 237 and 238, Code of Criminal Procedure. It is clear, therefore, that we are empowered to convict the accused under Sections 161 and 165, Indian Penal Code.

(21) The facts proved in the present case are, in our opinion, sufficient to establish the commission of both the offences punishable under Sections 161 and 165, Indian Penal Code, by the accused. It may be argued that the accused in the present case was not actually in a position to show favor to Public Witness -1 Sant Ram in as much as after the dispatch of the sample to the Public Analyst, the accused had no power over the result of the case, against Sant Ram. As pointed out by their Lordships of the Supreme Court, however, in *Mahesh Prasad v. The State of U P*, a public servant who receives illegal gratification as a motive for doing or procuring an official act would be guilty under Section 161, Indian Penal Code, whether or not he is capable of doing it or whether or not he intends to do it. The Supreme Court has reiterated this view in the recent case of *Bhanprasad Hariprasad Dave and another v. The State of Gujarat* (Criminal Appeal No. 155 of 1965, decided on the 19th day of April, 1969'. referred to above in the following words:-

'To establish the offence under Section 161 of the Indian Penal Code all that prosecution had to establish was that the appellants were public servants and that they had obtained illegal gratification for showing or for bearing to show, in the exercise of their official functions, favor or disfavor to Ramanlal. The question

whether there was any offence which the first appellant could have investigated or not is irrelevant for that purpose. If he had used his official position to extract illegal gratification the requirements of the law are satisfied. This position is made clear by the decision of this Court in *Mahesh Prasad v. The State of U.P.* and *Dhaneshwar Narain Saxena v. The Delhi Administration.*'

(22) A case on the other side of the border is illustrated by the Supreme Court decision in *Dalpat Singh and another v. The State of Rajasthan* (Criminal Appeal No. 28 of 1965 decided on the 13th day of February, 1968). In that case, the accused had no connection at all with doing any official favor to the complainant. They merely harassed the complainant to get money out of him. Their Lordships of the Supreme Court were, therefore, of the view that the accused were not guilty under Section 161 but guilty under Section 5(1) (d) read with Section 5(2) of the Act. In the present case, however, the connection of the Food Inspector accused with the showing of favor to the shopkeeper complainant is close enough to bring the case within Section 161 Indian Penal Code. Even if it is assumed for the sake of argument that the connection is not close enough, the case squarely falls under Section 165 I. P. C. inasmuch as the accused knew that he had started a case against Sant Ram by seizing the sample of Shakkar, i. e. unrefined sugar and it is clear that the accused obtained a valuable thing from Sant Ram.

(23) Before closing, we may perhaps usefully invite the attention of the authorities concerned to the following : -

(1) The Investigating Officer should have instructed the witnesses to the trap fully as to what was expected to be recovered from the accused according to the allegations made by the complainant. He should also have ensured the presence of the complainant at the time of the recovery of the marked currency notes from the accused. The sanction to prosecute should have been asked not only after stating the facts constituting the offence as has been done, but also after referring to the offences which appeared to have been committed by the accused. (2) The sanctioning authority should have either stated the facts which were considered in giving the sanction to prosecute or should have made a reference in the sanction to the specific request of the police for sanction containing those facts.

The sanctioning authority should also have realised that the sanction was to have been expressly given for all the offences referred to in Section 6, viz.. those punishable under Sections 161 and 165, Indian Penal Code, and under Section 5 (1) (d) read with Section 5 (2) of the Act. (3) The learned Special Judge should have framed separate charges under Sections 161 and 165, Indian Penal Code, and Section 5 (1) (d) read with Section 5 (2) of the Act. The learned Special Judge should also have acquainted himself fully with the provisions of the Act particularly with the precise significance of the presumption under Section 4 thereof. We trust that in future due ntoe would be taken by all concerned nto to repeat lapses as those mentioned above.

(24) The raising of the presumption under Section 4 is primarily a rule of evidence. Such rule of evidence was applicable to the trial for offences under sections 161 and 165, Indian Penal Code. It was nto applicable to the trial of anoffence punishable under section 5 (1) (d) read with section 5 (2) of the Act. As the trial has, in fact, been on the facts which constitute the two offences punishable under the Indian Penal Code, the presumption under section 4 could be raised and have been raised by us against the accused. Even the learned Special Judge was theoretically aware that the presumption had to be raised and the accused too did nto dispute that the presumption could be raised against him. There is ntohing in the Code of Criminal Procedure or in the law of evidence or anywhere else barring the raising of the presumption under section 4 of the Act merely because the charge did nto specify the numbers of the sections of the Indian Penal Code. We have anxiously considered whether any prejudice would be caused to the accused by raising the presumption under section 4. We are unable to sec any reason why any such prejudice should be caused. We having held that the accused can be convicted by us under sections 161 and 165, Indian Penal Code, we cannto prevent the presumption under section 4 raising against him. In Blthe v. The King, it was held that the fact that a special mode of proof is prescribed and the accused is entitled to give evidence on oath with regard to the offence under section 5 (2) of the Act, which does nto apply to a trial for an offence under section 409, Indian Penal Code, does nto render such joint trial illugal. On the same analogy, the trial of the accused under sections 161 and 165, Indian Tenal Code, along with section 5 (2) of the Act is nto illegal.

(25) On considering the evidence and the probabilities of this case, we are of the view that the presumption under section 4 of the Act had to be raised against the accused. As it could be raised only in proof of the offences punishable under sections 161 and 165, Indian Penal Code, we would have to hold that the accused is guilty of those offences. As the said presumption is not raised against the accused in respect of the offence defined in section 5 (1) (d) and punishable under section 5 (2) of the Act, we would have to give the accused the benefit of doubt in respect of the said offence and we would have to acquit him of the same.

(26) For the above reasons, we should have allowed the appeal and convicted the accused-respondent. The case, however, raises several important questions of law. While the answers suggested to them by us are clear, it would perhaps be advisable that these questions should be considered and answered even more authoritatively by a larger Bench. For, the decisions of these questions would affect a large number of pending and future cases and would also serve as guidance to the authorities concerned. We, therefore direct that the case be placed before Hon'ble the Chief Justice for reference to a larger Bench. Case referred to larger bench.