

Vijay Dan Vs. the State of Rajasthan

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Court : Rajasthan

Decided On : Nov-28-1983

Reported in : 1983WLN564

Judge : S.S. Vyas, J.

Appeal No. : S.B. Criminal Appeal No. 227/80

Appellant : Vijay Dan

Respondent : The State of Rajasthan

Disposition : Appeal allowed

Judgement :

S.S. Vyas, J.

1. Accused Vijay Dan was convicted under Section 161, IPC and sentenced to nine months rigorous imprisonment by the learned Special Judge, Anti-Corruption Cases, Jodhpur by his judgment dated 30.4.80. The accused has come up in appeal to challenge his conviction and sentence.

2. Put briefly, the prosecution case is that the accused was posted as Head Constable at Police Outpost Utamber, PS Shergarh district Jodhpur in May, 1975. In that capacity he was conducting investigation in police Case No. 8/75 against PW 5 Om Prakash, PW6 Pukhraj and others for offences under Section 452, 148

etc of the Penal Code, it was alleged in that case that the miscreants went in a three-wheeler Auto-Rikshaw No. RJQ 8653 to commit the offences. On 8.5.75, the accused arrested PW 5 Om Prakash and PW 6 Pukhraj at Jodhpur and also seized the aforesaid vehicle. He took them to Police Station, Mahamandir and lodged them in the police Lock-up. PW 1 Chhagan Lal, who is father of Pukhraj (PW 6) approached the accused to get his son released as the betrothal ceremony of his daughter's marriage was going to be solemnized in that very evening. The accused refused to oblige and advised him to move the Court concerned for bail. Next day, on 9.5.75, Chhagan Lal again approached the accused. There were morning hours for the Courts in those days. The accused brought the arrested persons to the Court & lodged them in the prisoner's room situate nearby. The accused demanded a sum of Rs. 100/- from Chhagan Lal to get his son released on bail. He also told Chhagan Lal that in case the money was not paid to him, he would apply for police custody remand of the arrested persons. Chhagan Lal pretended to have no ready money with him at that time and left the place assuring the accused to soon return with money. Chhagan Lal immediately approached Shri Rameshwar Lal (PW 11), Additional Superintendent Anti corruption Police, Jodhpur and apprised him of the situation. He expressed his desire to get the accused arrested and caught red-handed in a trap. He submitted written report Ex. P1 for this purpose. The Additional Superintendent decided to lay the trap against the accused and called PW 2 Vijay Singh and PW3 Raddhey Shyam as Motbirs. He took currency notes of Rs 110/-, one being of Rs 20/- and the others being of Rs. 10/- from Chhagan Lal, sprinkled phenolphthalein powder over them in the presence of Chhagan Lal and the motbirs and made a demonstration before them as to how the water of the powder would become red. He noted down all that he did on Ex. P1. Thereafter he and the party proceeded to the Court premises, Chhagan Lal went to the Guards-room and gave the currency notes to the accused. The accused put the currency notes in the pocket of his pant. As planned, he thereafter gave a signal to the police party by rubbing his hand over the head. The Additional Superintendent, on getting the signal immediately came there, arrested the accused and recovered the currency notes from him. Memo Ex. P4 was prepared then and there on the spot of this trap showing therein how the accused was found in possession of the currency notes.

His hands were washed and the wash was filled in a bottle. The bottle was sealed. The case was registered against the accused under Section 161, IPC and 5 of the Prevention of Corruption Act, 1947 (hereinafter called 'the Act'). The usual investigation ensued. The bottle was sent for chemical examination. The contents of the bottle were found to contain phenolphthalein and sodium carbonate. The report of the Chemical Examiner is Ex. P14. Sanction to prosecute the accused was obtained from the Deputy Inspector General of Police, Jodhpur. On the completion of investigation, the police submitted a challan against the accused. The learned Special Judge framed charges under Sections 161, IPC and 5(1)(d) read with 5(2) of the Act against the accused. The accused pleaded not guilty and demanded the trial. The defence put forward by him was that DW1 Girdhari the nephew of PW 1 Chhagan Lal owed a sum of Rs. 100/- to him. Chhagan Lal came to him with letter Ex D2 from Girdhari and gave Rs. 100/- to him. He wrote receipt of receiving the money on the back of Ex. D2 and returned it to Chhagan Lal. Hence he did not oblige Chhagan Lal and refused to release his son Pukhraj, Chhagan Lal developed an animus against him. It resulted in his false trap. During trial, the prosecution examined 12 witnesses and filed some documents. In defence, the accused examined two witnesses and also filed some documents. On the conclusion of trial, the learned Special Judge drew a presumption under Section 4(1) of the Act and disbelieved the defence version put by the accused. He, however, held that no case under Section 5 of the Act was made out. The accused was consequently acquitted of the charge under Section 5 of the Act but was convicted under Section 161, IPC and sentenced as mentioned at the very outset. Aggrieved against his conviction and sentence, the accused has taken this appeal.

3. Launching a blistering attack on the judgment of the Court below, the learned Counsel for the accused vehemently contended that the whole approach of the learned Special Judge was erroneous and unsustainable in law. It was argued that the accused was not required to prove his defence to the hilt. No doubt, under Section 4(1) of the Act, the accused is required to rebut the presumption and show that he had received the gratification not as a bribe or rewards required under Section 161, IPC but innocently. The accused, in the instant case, had satisfactorily discharged this burden by showing a preponderance of probability in his favour.

He was not required to lead that much formidable evidence which is required from the prosecution to prove the guilt. It was urged that even the prosecution witnesses, including the star witnesses Chhagan Lal (PW 1) and his son Pukhraj (PW 6) had tacitly admitted the defence version put forward by the accused. In these circumstances, the conviction was wholly unwarranted and erroneous. Reliance in support of the contention was placed on (1) V.D. Jhingar v. State of : [1966]3SCR736 . (2) M.P. Gupta v. State of Rajasthan A.I.R. 1974 S.C. 773 of UP (3) T.C. Jain v. The State of Delhi Administration A.I.R. 1977 S.C. 66. (4) A.P. Trivedi v. State of Rajasthan 1979 Cr.L.J. 484. (5) the State v. Abhey Singh and Tej Singh v. The State of Rajasthan 1979 R.L.W. 37.

4. In reply, the learned Public Prosecutor supported the judgment of the Court below and submitted that the approach of the learned Special Judge was perfectly legal and justified, it was the duty of the accused to rebut the presumption arising against him under Section 4(1) of the Act. The accused had utterly failed to discharge that burden. The trial Court had advanced a number of convincing reasons as to why the defence version could not be accepted as true. Reliance in support of the contention was placed on the words 'unless the contrary is proved' occurring in Section 4(1) of the Act and certain observations made in Dhanwantri v. the State of Moharashtra : 1964 CriLJ437 and (2) Chatal Das v. the State Gujarat : 1976 CriLJ1180 . I have taken the rival contentions into consideration.

5. Section 4(1) of the Act, around which arguments were built-up by both the parties, reads as under:

(1) where in any trial of an offence punishable under Section 161 or Section 165 of the Indian Penal Code (or of an offence referred to in Clause (a) or Clause (b) of Sub-Section (1) of Section 5 of the Act punishable under Sub-section (2) thereof), 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 the said Section 161, or, as

the case may be, without consideration or for a consideration which knows to be inadequate.

6. A plain reading of this sub-section makes it amply clear that when the accused has accepted the gratification, the presumption that he accepted it as a motive or reward such as mentioned in Section 161, IPC, at once comes in to play. The presumption is inevitable and the Court has no choice in the matter. This presumption is, of course, not conclusive but rebuttable. The accused can rebut this presumption by showing that the gratification received or accepted by him was not as motive or reward as is alleged against him by the prosecution. He is at liberty to show that he accepted or received the gratification innocently.

7. Here, in the instant case, the accused has admitted that he had accepted Rs. 100/- from PW 1 Chhagan Lal and the same money was recovered from his possession. Now, as soon as it is proved or admitted that the accused had received the money, the presumption under Section 4(1) of the Act springs up against him. It was for him to rebut this presumption and to show that he did not accept it as a motive or reward. How & in what manner this burden, resting on the accused, can be discharged, has been laid down by their Lordships of the Supreme Court and this Court from time to time in the authorities cited before me.

8. In V.D. Jhingan's case, it was observed:

The burden of proof lying upon the accused under Section 4(1) of the Prevention of Corruption Act will be satisfied if he establishes his case by a preponderance of probability as is done by a party in civil proceedings. It is not necessary that he should establish his case by the test of proof beyond reasonable doubt.

9. It was observed in M.P. Gupta's case that the accused can establish his case by preponderance of probability that is to say, he need not prove his case beyond reasonable doubt.

10. In T.C. Jais's case, their Lordships observed as under:

The degree and the character of the burden of proof which Section 4(1) casts on an accused person to rebut the presumption raised thereunder, cannot be equated

with the degree and character of proof, which under Section 101, Evidence Act rests on the prosecution. While the mere plausibility of an explanation given by the accused in his examination under Section 342, Cr.P.C. may not be enough, the burden on him to negative the presumption may stand discharged if the effect of the material brought on the record in its totality, renders the existence of the fact presumed, improbable. In other words, the accused may rebut the presumption by showing a mere preponderance of probability in his favour, it is not necessary for him to establish his case beyond a reasonable doubt.

11. This Court observed in Abhey Singh's case that:

Even assuming that such a presumption can be raised against the accused until he shows the contrary he can discharge the burden by evidence which show the probability of his claim. He would not be called upon to discharge the burden in the manner in which the prosecution would be called upon to prove its case beyond reasonable doubt.

12. In R.P. Trivedi's case, this Court observed:

The burden of proof lying upon the accused under Section 4(1) will be satisfied if he establishes his case by preponderance of probabilities as is done by a party in civil proceedings. It is not necessary that he should establish his case by the test of proof beyond reasonable doubt.

One must not ignore the fact that the burden of proof lying on the accused is not so heavy in the sense as to require him to prove his defence conclusive.

13. In Tej Singh's case, it was observed:..even where such a preponderance is drawn, the accused can rebut it by showing that there is a plausible explanation and on the basis of preponderance of probability of other theory the accused is not required to rebut this presumption by leading evidence beyond reasonable doubt. But all that is required to show is to establish preponderance of probability in his favour.

14. In Dhanwantari's case, the Court observed:

Of course, it is open to that person to show that though that money was not due to him as legal remuneration it was legally due to him in some other manner or that he had received it under a transaction or an arrangement which was lawful. The burden resting on the accused person in such a case would not be as light as it is where a presumption is raised under Section 114 of the Evidence Act and cannot be held to be discharged merely by reason of the fact that the explanation offered by the accused is reasonable and probable. It must further be shown that the explanation is a true one. The words 'unless the contrary is proved' which occur in this provision make it clear that the presumption has to be rebutted by proof and not by a bare explanation which is merely possible. A fact is said to be proved when its existence is directly established or when upon the material before it the Court finds its existence to be so probable that a reasonable man would act on the supposition that it exists. Unless, therefore, the explanation is supported by proof, the presumption treated by the provision cannot be said to be rebutted.

15. In Chhatur Das's case, it was observed:

It is true that the burden which rests on an accused to displace this presumption is not as onerous as that cast on the prosecution to prove its case. Nevertheless, this burden on the accused is to be discharged by bringing on record evidence circumstantial or direct which establishes with reasonable probability, that the money was accepted by the accused, other than as a motive or reward such as is referred to in Section 16.

16. As a result of the law laid down by the Supreme Court and this Court, the position boils down to this that Section 4(d) of the Act introduces an exception to the general rule as to burden of proof in criminal case and shifts the onus on the accused who has to prove that it was not as a motive or reward that the gratification was received by him. If it is shown that the accused had received the tainted gratification, the prosecution is relieved of the burden to prove the incriminating character of the gratification that it was as a motive or reward, such as is mentioned in Section 161, IPC. The presumption would be that it was paid as a motive or reward. It is then for the accused to rebut this statutory presumption. He can discharge this burden in various ways, i.e. by leading evidence in defence

or by pointing out material in the prosecution evidence itself as a result of cross-examination or otherwise and so on and so forth. He is not required to prove his defence to the hilt. The standard of evidence required to rebut the presumption arising under Section 4(1) is not to be equated with the standard of evidence required to prove the charge. The presumption would stand rebutted if the accused shows a preponderance of probabilities in his favour.

17. The defence taken by the accused is that DW 1 Girdhari Lal, who is the real nephew of PW 1 Chhagan Lal, owed a sum of Rs. 100/- to him. PW 1 Chhagan Lal came to him with letter Ex. D2 from Girdhari Lal and gave the currency notes of Rs 100/-. He took the money, wrote the receipt on the back of Ex. D2 and returned it to PW1 Chhagan LaL. He, thus, innocently received the money order the impression that it was sent by Girdhari Lal, who owed the money to him. In support of his defence, the accused not only led evidence but also relied upon certain admissions made by some of the prosecution witnesses.

18. Dw 1 Girdhari Lal is the nephew of PW 1 Chhagan Lal. He deposed that he had borrowed a sum of Rs. 100/- from the accused in March 1975. On 8 5-75, he gave currency notes of Rs. 100/-to his uncle Chhagan Lal (PW 1) with letter Ex. D 2 and asked him to give that money to the accused and obtain his receipt. Chhagan Lal came to him next day and returned letter Ex D 2 with the receipt of the accused written on the back of it. DW 2 Shri Mool Singh is an advocate of long standing at the bar. His presence at the time of passing of the money to the accused has been admitted by PW 1 Chhagan Lal, PW3 Radhey Shyam and even by the Additional Superintendent of Police PW 11 Shri Rameshwer Lal He deposed that on 9-5-75, when he was in the prisoners rood situate in the Court premises and was having a talk with the accused in connection with the submission of a challan in an opium case, PW 1 Chhagan Lal came there and gave the currency notes of Rs. 100/- to the accused. Chhagan Lal also gave a letter to the accused at that time and told that the money was sent by Shri Girdhari Lal. He also asked the accused for the receipt of money. The accused took the money and wrote receipt on the bock of Ex. D2. He then gave it to Chhagan Lal. Thereafter the currency notes were recovered from the accused by the anti-corruption police. Both these witnesses have been cross-examined by the

prosecution but their evidence could not be shattered or shaken. There are no convincing reasons to discard the testimony of these two witnesses, specially when the presence of Shri Mool Singh DW2 is not open to any doubt and has been admitted even by the Additional Superintendent of Police Shri Rameshwar Lal (PW 11).

19. Coming to the prosecution side, PW2 Vijay Singh who is a Motbir witness of the trap admitted the defence version in toto. He deposed that the accused took the money, wrote the receipt of it on a letter and handed over it to PW 1 Chhagan Lal. Though he was declared hostile by the prosecution, but that cannot be treated as sound reason to discard what he deposed. His testimony must be judged on merits keeping the fact of his hostility to prosecution in mind.

20. PW 1 Chhagan Lal, who was pointedly cross-examined with reference to the defence version, could not dare to deny it. He deposed that he could not recollect whether his nephew Girdhari Lal gave him Rs. 100/- and asked him to give it to the accused. He also failed to recollect whether the same money, which Girdhari Lal gave to him, was given by him to the accused and obtained the receipt from him. The attitude adopted by this witness is strange and speaks heavily against the prosecution. It is not a case of the genuine loss of memory. Here the loss of memory appears to be deliberate and intentional. He pretended to forget the matter to avoid the issue. PW 3 Radhey Sham, who is also a Motbir witness of the trap, admitted in cross-examination that when the money was recovered from the accused, the accused told the Additional Superintendent of Police that it was sent to him by Gridhari Lal. Sub Inspector Panney Singh (PW 7), who was with the Additional Superintendent of Police in the trap, could not deny the defence version put Co him in cross-examination. He deposed that he could not recollect whether the accused told the Additional Superintendent of Police when the money was recovered from him that it was sent to him by Girdhan Lal.

21. In view of what has been discussed above, it can be safely Said that the accused has been successful to satisfactorily rebut the presumption arising against him under Section 4(1) of the Act. After all, he is only required to show the preponderance of probabilities in his favour and nothing more, it cannot be said

that the version put by him in defence is totally false or unfounded.

22. Over and above all this, there is yet another striking feature which cannot be lightly brushed aside in assessing the guilt of the accused. The striking feature is whether in the given circumstances of the case the accused would accept the illegal gratification. PW 1 Chhagan Lal, PW3 Radhey Sham and PW6 Pukh Raj admitted in cross-examination that they approached the accused on 8.5.75 with a request not to arrest Pukhraj (PW6) as the betrothal ceremony of his sister was to be solemnised in the evening of that very day. They also offered money to the accused to oblige them. But the accused refused to show any favour and declined to accept the gratification. These witnesses further admitted that they approached Shri Madan Joshi; the then Additional Superintendent of Police, Jodhpur to use his good-office to prevail over the accused not to arrest Pukhraj on that day, but the accused even then did not yield and arrested Pukhraj. In these circumstances When the matter had come to the knowledge of high-ups, it is difficult to readily believe that the accused would accept the illegal gratification.

23. Naturally enough, PW 1 Chhagan Lal got highly annoyed when the accused did not relent and arrested his son Pukbraj (PW6) despite all his efforts. He, therefore, developed the words hatred and animus against the accused. PW 1 Chhagan Lal and Motbii witness Radhey Shyam (PW3) have admitted in cross-examination that they wanted to teach a lesson to the accused because the arrest of Pukhraj (PW6) had badly damaged their prestige in the social circles. There is, therefore, no wonder that PW 1 Chhagan Lal got the trap arranged to give a vent to his annoyance and hatred feelings. Viewed in this perspective, the defence version appears to be quite plausible, reasonable and logical that the accused accepted money under the impression that it was sent to him by Girdhari Lal (DWI) who owed a debt to him. His defence is not an after thought as held by the learned trial Judge.

24. In order to seek conviction, the prosecution case 'must be true' but to rebut the presumption what is required is that defence version 'may be true'. The learned trial Judge obviously failed to notice this distinction between 'Must' and 'May' & applied the uniform test of 'must' while examining the defence version.

25. For reasons discussed above, the conviction of the accused is bad and cannot be maintained. On a careful appraisal of the evidence of the parties, the irresistible impression is that the accused was more sinned than the sinner.

26. In the result, the appeal of accused Vijay Dan is allowed. His conviction, and sentence under Section 161, IPC are set-aside and he is acquitted. He is already on bail and need not surrender. His bail bonds shall stand cancelled.

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