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Crl.A.No. 325 OF 1995
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ITEM No.101 Court No.1 SECTION II
Part-Heard

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

CRIMINAL APPEAL NO.325 OF 1995@@
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M. Abbas Appellant (s)

VERSUS

State of Kerala Respondent (s)

Date : 23/01/2001 This petition was called on for hearing
today.

CORAM :

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE R.C. LAHOTI
HON'BLE MR. JUSTICE DORAISWAMY RAJU

For Appellant (s) Mr. U.R. Lalit, Sr. adv.
Mrs. Beena Prakash, adv.
Mr. Jyothish A.P., adv.
Mr. G. Prakash, adv.

For Respondent (s) Mr. K.M.K. Nair, adv.

UPON hearing counsel the Court made the following
O R D E R

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.SP2

The appeal is allowed in terms of the signed order.
The conviction and sentence of the appellant is set aside.
The appellant is on bail. His bail bonds shall stand
discharged.

.SP1

(Neena Verma)
Court Master

(Prem Prakash)
Court Master

Signed order is placed on the file.

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IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.325 OF 1995@@
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M. Abbas

... Appellant

versus

State of Kerala

... Respondent

O R D E R@@
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The appellant, at the relevant time, was serving as an Overseer with Nedumangad Municipality. PW-2 Sasidharan Nair was a Contractor with that Municipality. According to the prosecution case, the appellant demanded a sum of Rs.200/- as bribe from PW-2 for refunding earnest money and security deposit amounting to Rs.500/-, which had been deposited at the time of submission of tender for maintenance work of Poovathoor road, which work was completed by the Contractor, PW-2 by 12.7.1984. PW-2 submitted a bill for Rs.10,000/-. He was, however, paid Rs.8706.12 only after measurements were taken. On 28th August, 1984, PW-2 applied for release of earnest money and security deposit. His application was referred to the appellant for report. It is at that point of time on 18th October, 1984 that, it is alleged, appellant demanded Rs.200/- as bribe from PW-2 for processing his refund application. It is further alleged by the prosecution that on 19th October, 1984, PW-2 paid Rs.50/- to the appellant and left after promising to pay the balance amount of Rs.150/-. PW-2, then, made a complaint (Exh. P-6) at the headquarter of Vigilance Wing. The complaint was recorded by Dy.S.P., A. Thankappan Pillai, PW-5. A trap was thereafter organized for 21st November, 1984. PW-1, Sivadasan, working in the Local Fund Accounts Office was joined as a panch witness. PW-2, Contractor was given instructions regarding giving of signal after appellant received the bribe. The three currency notes of the denomination of Rs.50/- each were produced by PW-2. Those notes were treated with phenolphthalein powder and after recording their particulars were handed back to PW-2, who was instructed to give a pre-arranged signal in case bribe was demanded/accepted by the appellant.

On 21st November, 1984, the raiding party went to the office of the appellant. PW-2 went ahead and in the verandah of his office, he handed over the tainted currency notes to the appellant who received the same and put them in his shirt pocket. On receipt of a pre-arranged signal, the raiding party rushed to the Municipal Office compound. The Dy.S.P., PW-5 disclosed his identity to the appellant and searched him. The tainted amount was recovered from the pocket of the shirt of the appellant. The appellant was asked to dip his hands in a solution of sodium bicarbonate. The solution turned pink. After tallying the numbers of the currency notes recovered from the shirt pocket of the appellant, the same were seized and the seizure memo was prepared at the spot. The appellant was taken into custody and after completion of investigation was sent up for trial for offences under Section 5(2) read with 5(1)(d) of the Prevention of Corruption Act, 1947 and Section 161 IPC.

The prosecution led evidence, after appreciation of which, the Trial Court convicted the appellant and sentenced him to undergo simple imprisonment for one year for the offence under Section 5(1)(d) read with 5(2) of the Prevention of Corruption Act, 1947. No separate sentence was awarded while convicting the appellant for the offence under Section 161 IPC. Aggrieved by his conviction and sentence, the appellant filed an appeal in the High Court, which was dismissed vide order dated 22nd December, 1994. His conviction and sentence were sustained. By special leave, the appellant is before us.

From a careful perusal of the evidence on record, we are satisfied that the three currency notes of the denomination of Rs.50/- each were recovered from the shirt pocket of the appellant and those currency notes were the same which PW-2 had presented before the Investigating Officer, PW-5 on the previous day and had been treated with phenolphthalein powder. The appellant also, in his statement, recorded under Section 313 Cr.P.C. has admitted that the seized currency notes had been received by him and had also been recovered from his possession. The explanation of the appellant, however, was that the amount of Rs.150/- had not been received by him as bribe but for the purpose of giving the same to another Contractor - Kamalasanan, who had completed the work of removing the bump from the road, which otherwise was required to be removed by the Contractor, PW-2.

From a perusal of the evidence of Contractor, PW-2, it transpires that after he had completed maintenance work and had received payment of Rs.8,706.12 against his bill of Rs.10,000/-, he asked for refund of his earnest money and security deposit of Rs.500/-. That request was not acceded to for the reason that while completing maintenance work of the road, PW-2 had failed to remove bump from that road which was later on got removed through Kamalasanan, another Contractor. Thus, it is prosecution's own case that the bump which was to be removed by PW-2 was got removed through Kamalasanan. The only question which, therefore, requires our consideration is whether the amount of Rs.150/- in the form of three currency notes of Rs.50/- each was given to the appellant towards balance amount to be paid to Kamalasanan to whom Rs.50/- had allegedly been paid by the complainant himself earlier as claimed by the appellant or was the amount given as a bribe to the appellant.

While in his examination in chief, the complainant - PW-2, Sasidharan Nair deposed that he had given the money to the appellant on his demand as bribe for releasing earnest money and security deposit and not for being paid to the other Contractor who removed the bump from the road, during his cross-examination, he conceded in the cross-examination that he had paid Rs.50/- earlier to Mr. Kamalasanan and had agreed to pay him the balance amount of Rs.150/- within a week for removal of the bump and that the amount of Rs.150/- was given by him to the appellant to be handed over to Kamalasanan, Contractor, who had been engaged to remove the bump towards the balance payment. PW-2 was subjected to re-examination wherein he specifically asserted that the appellant had been paid the money not as bribe for releasing earnest money and security deposit but for getting the bump from the road removed. PW-2 was got declared hostile at this stage and cross-examined. During his cross-examination by the Public Prosecutor, PW-2 reiterated that the amount of Rs.150/- had been paid by him to the appellant for payment to Kamalasanan to whom he had earlier paid Rs.50/- out of the total agreed amount of Rs.200/- for removal of bump.

This statement supports the explanation given by the appellant.

The prosecution, having itself come up with the case that the bump was removed by Kamalasanan and that without removal of the bump, refund of earnest money and security deposit could not have been made, neither examined Kamalasanan as a witness nor even the Executive Engineer of the Municipality for reasons best known to it. Admittedly, the bump from the road was got removed from Kamalasanan. He would not have done that work free. There is nothing on the record to show that the Municipality paid Kamalasanan any amount for removal of the bump. He would not have done the work free either. This probablises the version of the appellant that the amount of Rs.150/- given to him was in fact the balance of Rs.200/- agreed to be given to Kamalasanan for removal of the bump.

The panch witness who could have testified to the demand of Rs.150/- being made by the appellant, as illegal gratification, did not follow PW-2 when he approached the appellant in the verandha and did not, therefore, depose about any alleged demand having been made by the appellant as alleged by the prosecution. According to PW-4, Ramakrishnan, who was the Municipal Commissioner at Nedumangad during November 1984, the execution of maintenance work of road required the bump to be removed by the Contractor himself and till that was done, he could not have been paid back the earnest money and the security deposit. This tallies with the explanation of the appellant.

The appellant had been charged for offences under Section 5(1)(d) read with 5(2) of the Prevention of Corruption Act, 1947 and Section 161 IPC. As already noticed, the factum of recovery of the amount of Rs.150/- from the person of the appellant, is not in doubt. Is, the presumption under Section 4(1) of the Prevention of Corruption Act, 1947 attracted to the facts of this case? From a bare reading of Section 4(1) it is seen that presumption arising under Section 4 is a rebuttable presumption and is not available to the prosecution for proving a charge under Section 5(2) read with Section 5(1)(d) of the Act. That presumption arises only in regard to cases falling under Section 161 IPC or to an offence referred to in Clauses (a) or (b) of Section 5(1) of the Prevention of Corruption Act, 1947. Since, the presumption under Section 4(1) is not attracted to an offence under Section 5(1)(d) read with 5(2) of the Prevention of Corruption Act, it cannot be raised against the appellant for the said offence. Whether presumption can be raised in The facts and circumstances of this case with regard to the offence under Section 161 IPC is the next issue?

The presumption under Section 4(1) in reference to an offence under Section 161 IPC is, as already noticed, a rebuttable presumption. The only evidence led in this case to establish charge under Section 161 IPC, of appellant having received gratification other than legal reward, as a motive or reward for doing or forbearing to do any official act in the exercise of his official functions to favour the prime mover is the statement of the Contractor, PW-2. As already noticed, the Contractor has given different versions of the occurrence in his statement before the vigilance wing and in the Court. At the trial, he has not supported the prosecution case fully. On the other hand, the explanation given by the appellant both during the cross examination of prosecution witnesses and in his own statement, recorded under Section 313 Cr.P.C. is quite plausible. Where an

accused sets up a defence or offers an explanation, it is well settled that he is not required to prove his defence beyond a reasonable doubt but only by preponderance of probabilities. On prosecution's own showing, in this case, that onus can be said to have been duly discharged by the appellant, more particularly, when the prosecution did not lead any evidence to show as to who made the payment to Kamalasanan who had removed the bump from the road, which bump was otherwise required to be removed by PW-2 for getting refund of his earnest money and security. Maybe, the allegation that the appellant accepted the amount as bribe to process his refund application is true but the court cannot convict an accused only on such probability or suspicion, howsoever strong it may be. 'Between may be true and must be true, there is a long distance to travel' and in this case the prosecution has failed to travel that distance through any unimpeachable evidence. The case of the prosecution has not been established beyond a reasonable doubt.

Thus, for what we have said above, we are of the opinion that both the Trial Court and the High Court fell in error in convicting the appellant. This appeal succeeds and is, therefore, allowed. The conviction and sentence of the appellant is set aside. The appellant is on bail. His bail bonds shall stand discharged.

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.....CJI.

.....J.
(R.C. LAHOTI)

.....J.
(DORAISWAMY RAJU)

New Delhi;
January 23, 2001.