PETITIONER:
S.K. KALE

Vs.

RESPONDENT:
STATE OF MAHARASHTRA

DATE OF JUDGMENT17/12/1976

BENCH:
FAZALALI, SYED MURTAZA
BENCH:
FAZALALI, SYED MURTAZA
BHAGWATI, P.N.

CITATION:
1977 AIR 822 1977 SCR (2) 533
1977 SCC (2) 394
CITATOR INFO :
R 1979 SC 826 (20,21)

ACT:
Prevention of Corruption Act, 1947, s. 5(1)(d), onus probandi, whether to be discharged by the accused.
Constitution of India, Article 136, Re-appraisal of evidence under, when called for.

HEADNOTE:
The appellant was posted as the Local Purchase Officer at the Army Ordnance Depot in Poona district. In connection with the purchase of some engineering tools, charges were brought against him under s. 5(1)(d) read with s. 5(2) of the Prevention of Corruption Act, for having procured pecuniary benefit for a certain contractor by corrupt means, thereby causing wrongful loss to the army department. The Trial Court convicted the appellant, and in appeal the High Court confirmed the conviction. The Supreme Court granted him Special Leave to appeal under Art. 136 of the Constitution, and allowing the appeal,
HELD: 1. Both the courts below had proceeded on the footing that it was for the accused to prove the ingredients of s. 5(1)(d) of the Act. This approach was wrong. It was for the prosecution to prove affirmatively that the appellant by corrupt or illegal means or by abusing his position obtained any pecuniary advantage for some other person. [536 C-D]
2. Normally this Court in special leave against a concurrent judgment of the High Court and the trial Court does not re-appraise the evidence, but here we find that both the courts below have drawn wrong inferences from proved facts and have made a completely wrong approach to the whole case by misplacing the onus of proof which lay on the prosecution on the accused and presuming that the accused had a dishonest intention. [536 B-C, H]
Narayanan Nambiar v. State of Kerala [1963] Supp. 2 SCR 724; 730-731, referred to.

JUDGMENT:
CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.

301 of 1971.

(Appeal by Special Leave from the Judgment and Order dated the 15th/l6th June 1971 of the Bombay High Court in Criminal Appeal No. 1405 of 1969).

P.H. Parekh and Miss Manju Jatley, for the appellant..

H.R. Khanna and M.N. Shroff, for respondent.

The Judgment of the Court was delivered by

FAZAL ALI, J.---Corruption and nepotism is so rampant in our society of to-day, and more particularly in the services, that the Indian Penal Code was not considered sufficient to meet this menace, and the Prevention of Corruption Act, .1947 (Act II of 1947)--hereinafter referred to as 'the Act'--had to be enacted and amended from time to time to stamp out this evil. This is an appeal by special leave

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directed against the judgment of the Bombay High Court affirming the conviction of the appellant under s. 5(1)(d) read with s. 5(2) of the Act and the sentence of six months rigorous imprisonment passed by the Special Judge, Bombay.

The facts of the present case are more or less undisputed and are the least complicated and, therefore, they fall within a very narrow compass, and by and large we have to examine whether or not the inferences drawn by the High Court from the proved facts are legally correct and lead to only one hypothesis, namely, that the accused is guilty.

It may. be necessary to give a resume of the prosecution case before indicating the evidence and the circumstances relied upon by the courts below in convicting the appellant. The appellant was a senior officer in the Army, holding the rank of a Major, and was at the material time the local Purchase Officer, hereinafter to be referred to as LPO, at Ordnance Depot at Talegaon Dabhade, District Poona. Following the Chinese attack in 1962 an Emergency was declared and the Army required certain engineering tools to be supplied immediately. The Ordnance Depot, Jabalpur, sent a requisition of engineering tools to the Ordnance Depot at Talegaon Dabhade, Poona. In this connection the Control Officer of the Ordnance Depot wrote a letter to the Group Officer requesting him to despatch the stores immediately. The Group Officer consequently wrote a letter to the appellant who was the LPO at the relevant time to arrange the supply of stores immediately. The appellant was directed to purchase the stores locally and to deliver them to the Group Officer. The Group Officer also indicated in his letter that the stores requisitioned by him were not available at the Depot at Talegaon. The detailed list of the tools, while is at Ext. 9, was received by the appellant on March 27, 1963. On the same day the Chief Ordance Officer passed an order enabling the LPO to immediately purchase the tools on cash purchase basis.

We might pause for a little while in order to explain the nature of the order passed by the Chief Ordnance Officer. It appears that the normal procedure in the Department was that the LPO had to draw cash and then go to the market and purchase the goods against cash. But in view of the Emergency and the immediate necessity of the tools this procedure was waived and the appellant was permitted to buy the tools on covering purchase order basis; in other words, the appellant could himself purchase the tools without obtaining the previous sanction of the Chief Ordnance Officer, and on receiving the bills from the supplier and processing the same could get them sanctioned by the Chief Ordnance Officer and then make the payment to the supplier. According to the prosecution the appellant, a day after he received the list,

Ext. 9, placed orders with Jayantilal Himatlal Shah, P.W. 2, for supply of the tools. It is not disputed that P.W. 2 was one of the contractors on the approved list of the Department, and still continues to be so. P.W. 2 further assured the appellant that he would make the supply as early as possible, and that .he would do so at moderate rates. P.W. 2 accordingly procured .the articles from Bombay and delivered the same in the Depot by April 6, 1963 along with his bills after which
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the bills were placed before. the Chief Ordnance Officer and after sanction by him the payment was made to P.W. 2. Apart from engineering tools there was another requisition for the supply of 900 dessert spoons. The appellant first wanted to place this order also with P.W. 2, but he found that his rate was a little higher than the rate which was tendered to the Department sometime before, and, therefore, placed orders with another firm of M/s Devichand Lalchand Gandhi, P.W. 11, and received 900 dessert spoons of stainless steel from them.

Sometime in 1964, P.W. 18, an Inspector of Police in the Office of Special Police Establishment, Bombay, received some information regarding the appellant having committed an offence punishable under the Act on the basis of which he recorded the First Information Report on January 25, 1964. Thereafter he obtained the permission of the Special Judicial Magistrate for investigating the case and eventually submitted a chargesheet against the appellant before the Special Judge, Bombay, on April 28, 1966 as a result of which the appellant was tried, convicted and sentenced by the Special Judge, and his appeal against the said conviction and sentence before the High Court failed.

The gravamen of the allegation against the appellant is that although the supplies were to be made as quickly as possible the appellant made a deliberate departure from the normal procedure which was adopted in the Department, in that he followed the procedure of covering purchase order basis and placed orders with P.W. 2 a,lone without making any enquiries from the local market whether the tools were available there. It was also alleged that by placing orders with P.W. 2 the appellant caused P.W. 2 to earn a profit of 45% and thereby caused wrongful loss to the Army Department. It was further alleged that a number of firms in Poona were prepared to supply the goods required at a much lesser profit of 10 to 15 % and the appellant made no enquiries whatsoever from these firms although some of them were also on the approved list of the Department. On the basis of these circumstances only the prosecution sought the conviction of the appellant. The appellant pleaded innocence and denied that he had any intention to cause pecuniary benefit to P.W. 2. The appellant submitted that the articles were very urgently required and as no time was left he had to act quickly and take immediate decisions. It was for this purpose that the normal procedure was waived and the Chief Ordnance Officer permitted him to adopt the covering purchase order system. As regards the enquiries from the local market, the definite case of the appellant in his statement under s. 342 of the Code of Criminal Procedure was that he had in fact made enquiries from a few firms and his enquiries revealed that either the firms did not possess the goods themselves or that they were not dealers in all the goods. He further expressed his ignorance that P.W. 2 made a profit of 45% and pleaded, on the other hand, that he was given to understand by P.W. 2 that the articles would be supplied at moderate rates. The appellant seemed to suggest

that as all the articles required were not available in the local market he thought it a prudent act to place orders with a person who was in a position to supply all the tools required at one stretch instead of running from one dealer to another for purchasing goods piecemeal, and as P.W. 2 was prepared to supply all the goods himself and he was also on the 18--1546 SCI/76
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approved list of dealers the appellant decided to place orders with him. He made no secret of the fact because all the higher officers, including the Chief Ordnance Officer, sanctioned the bills sent by P.W. 2. The Trial Court, after consideration of the evidence and circumstances, found that the appellant had by corrupt means procured pecuniary benefit for P.W. 2 and caused wrongful loss. The High Court in appeal confirmed the finding of the Trial Court.

Normally this Court in special leave against a concurrent judgment of the High Court and the Trial Court does not re-appraise the evidence, but unfortunately in this case we find that both the courts below have drawn wrong inferences from proved facts and have made a completely wrong approach to the whole case by misplacing the onus of proof which lay on the prosecution on the accused. Both the courts below had proceeded on the footing that it was for the accused and not for the prosecution to prove that the accused made enquiries from the local market or that he knew about the rates, etc. This approach was obviously and manifestly wrong. It is plain that it was for the prosecution to prove the ingredients of s. 5(1) (d), which runs thus:

> "5(1) A public servant is said to commit the offence of criminal misconduced.
> (a)....
> (b)....
> (c)....
> (d) if lie, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other persons any valuable thing or pecuniary advantage .... "

In other words it was for the prosecution to prove affirmatively that the appellant by corrupt or illegal means or by abusing his position obtained any pecuniary advantage for some other person. In view of the clear defence taken by the appellant it is obvious that it was for the prosecution to prove that the accused made no enquiries, that the accused made a departure from the normal procedure with oblique motive, and that the accused knew that P.W. 2 would make a profit of 45 % whereas others would be satisfied with a profit of 10-15%. The High Court, to begin with, started with the presumption that the accused led no evidence to show that he made any enquiries. We might state at the .risk of repetition that it was not for the accused to prove the prosecution case but it was for the prosecution to disprove what the accused said, namely, that he had made enquiries. The prosecution could prove this fact only by producing satisfactory and convincing evidence to show that the accused in fact made no such enquiries and he knew about the margin of profit which other dealers would have made. We shall immediately show that there is no legal evidence to prove this fact. What the courts below have done is to disbelieve the case of the appellant because he led no evidence to show that he made any enquiries regarding the availability of goods or the rates, and therefore the courts presumed that the accused had a dishonest intention.
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In the case of Narayanan Nambiar v. State of Kerala(1) this Court had the occasion to consider the import and interpretation of the words "corrupt or illegal means" and the word "abuse", as mentioned in s. 5 (1) (d). Tiffs Court observed thus:

> "Let us look at the clause "by otherwise abusing the position of a public servant", for the argument mainly turns upon the said clause. The phraseology is very comprehensive. It covers acts done "otherwise" than by corrupt or illegal means by an officer abusing his position. The gist of the offence under this clause is that a public officer abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage. "Abuse" means mis-use i.e. using his position for something for which it is not intended. That abuse may be by corrupt or illegal means or otherwise than those means. The word 'otherwise' has wide connotation and if no limitation is placed on it, the words "corrupt', 'illegal' and 'otherwise' mentioned in the clause become surplusage, for on that construction every abuse of position is gathered by the clause. So some limitation will have to be put on that word and that limitation is that it takes colour from the preceding words along with which it appears in the clause, that is to say something savouring of dishonest act on his part ..... The juxtaposition of the word 'otherwise' with the words "corrupt or illegal means" and the dishonesty implicit in the word "abuse" indicate the necessity for a dishonest intention on his part to bring him within the meaning of the clause?'

We are satisfied that the judgment of the High Court runs counter to the principles laid down by this Court in the case cited above, and the High Court does not appear to have applied that principle in deciding the truth of the case presented by the prosecution against the appellant. In the instant case it is not alleged that the accused had used any corrupt or illegal means. It has not been shown that the accused himself accepted any illegal gratification or pecuniary benefit nor has it been shown that he violated any statutory rule or order. Thus, even on the prosecution allegation the case of the appellant falls only within the second part of s. 5 (1) (d), namely, abusing his position as public servant. The abuse of position, as held by this Court, must necessarily be dishonest so that it may be proved that the appellant caused deliberately wrongful loss to the Army by obtaining pecuniary benefit for P.W. 2.

After having gone through the evidence referred to by the courts below we think the prosecution has miserably failed to prove this fact. To begin with, the first circumstance relied upon by the High Court is that the accused made a deliberate departure from the usual procedure of purchasing against cash. According to the prosecution, the procedure was that the officer should have drawn cash from the office and then he should have gone to the market 'and purchased the articles and

(1) [1963] supp. 2 S.C.R. 724, 730-731.

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after having made the purchases he would obtain the sanction of the Chief Commanding Officer. This procedure is known as

"cash purchase basis". The accused, however, adopted the procedure known as "covering purchase order", i.e., he made the purchases and got the bills sanctioned by the Chief Ordnance Officer. It is not disputed that in the present case, in view of the emergent circumstances the Chief. Ordnance Officer himself had allowed the appellant to make the purchases on the basis of cash purchase and had himself sanctioned the bills tendered by the supplier, P.W. 2. All the bills were paid to P.W. 2 by cheque. It was contended by the State that in the instant' ease the appellant had purchased these articles against cash and later on obtained the necessary covering purchase orders. This is not correct because the appellant had merely placed orders with P.W. 2 for supply of goods and it was only after all the goods had been supplied, verified and found correct that the bills were forwarded to the Chief Commanding Officer for sanction. The High Court itself found that Lt. Col. Pun had passed an order directing the appellant as LPO to purchase all the articles against cash immediately. In this connection the High Court observed as follows:

> "Similarly, it is not in dispute that regarding the mode of purchase, Lt. Col. Purl had already passed an order directing the appellant as Local Purchase Officer to purchase all the articles against cash immediately."

Even assuming that the appellant purchased the articles against cash he was doing so in compliance with the orders of the Chief Ordnance officer and there was absolutely no reason for the High Court or the Special Judge to have drawn inferences against the appellant for violation of the procedure when the highest officer of the Depot had sanctioned the procedure which was adopted by the appellant and had in fact authorised him to do so in view of the Emergency. It may be necessary to refer to the evidence of P.W. 2, Lt. Col. Des Raj (P.W. 10) who stated that a covering purchase order is sanctioned only when the Chief Ordnance Officer is satisfied that there are special circumstances which necessitate the sanction of the purchase order after the stores are purchased. It is not disputed that the Chief Ordnance Officer had issued a covering purchase order in this case. In these circumstances the best person who would have thrown a flood of light on the subject and whose evidence would have clinched the issue whether or not the accused was authorised to depart from the normal procedure was Col. Anand, the Chief Ordnance Officer, who though examined by the Police during investigations was not produced before the Court. In the absence of his evidence there was no legal justification for the court to hold that the accused had departed, from the normal procedure without the authority of the Chief Ordnance Officer, particularly when it is admitted that a covering purchase order was passed by the said Officer and the bill was also finally sanctioned by him. In these circumstances, therefore, the entire fabric of the reasoning of the High Court as also that of the Special Judge falls to the ground.

Another circumstance on the basis of which the appellant was convicted was the fact that he made no enquiries from the local suppliers, nor did he ascertain the rates. On this question also the High Court, as well as the Special Judge, have misplaced the onus on the accused.

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To begin with, the accused has categorically stated in his statement under s. 342, Cr.P.C., that he had in fact made enquiries and had sent the Supply Clerk and one Deshmukh for

getting the rates and find out whether the stores were available. The prosecution could succeed only in the statement of the accused could be falsified and this could not only be done if the prosecution had examined the Supply Clerk who was sent by the appellant or Deshmukh, both of whom were employees in the Army and in possession and control of the prosecution, and yet none of these persons were examined to falsify the statement of the accused. The High Court, on the Other hand, was in error when it observed that the accused did not produce either the clerk or Deshmukh forgetting that it was not for the accused but for the prosecution to prove that what the appellant had said was false. Furthermore, reliance was placed by the High Court and the Special Judge on the evidence of P.W.s 14, 15 and 16. P.W. 14 does state that his firm was dealing in engineering tools and other articles and that he was on the list of approved contractors of ,Ordnance Depot. He, however, admitted that out of the articles required only 80 to 90 percent wet available with the firm. In cross-examination, when asked about a particular type of engineering tool the witness was unable to state for what purpose it was used. The witness admitted that he did not maintain any stock register at the shop and the fact that the articles were available was being deposed by him merely on the basis of his memory. Finally, the witness admitted thus:

> "I had not gone to Talegaon Ordnance Depot to enquire whether any engineering tools were required in the depot."

The High Court seems to think that as this witness's firm was merely a retailor, therefore there was not necessity to keep a stock register, The witness has nowhere stated that he was a retailer and not a whole saler and, therefore, there was absolutely no basis for the High Court to have conjectured or speculated on this point in order to raise an inference against the appellant. On the other hand, in the absence of any document, register or inventory to show the nature of goods the firm of P.W. 14 was dealing in, it is difficult to accept the ipsi dixit of the witness consisting of his bare statement based on pure memory that the engineering tools were available six years before the date he was deposing. Such evidence, in our opinion, is absolutely worthless. In fact P.W. 18, the Inspector, has deposed that in the course of his investigations he had seized the accounts and documents of the local firms, and yet no document was produced by the prosecution to show that P.W. 14 in fact had in his possession engineering goods at the relevant time. Furthermore, the witness positively states that he never went to Talegaon Ordnance Depot to enquire whether any tools were required. It was also not put to the witness whether the appellant personally or through one of his employees had approached him regarding the supply of the goods. In these circumstances, therefore, how possibly can an inference be drawn from his evidence that the accused made no enquiries whatsoever when the accused had positively stated that he did. Finally, on the question of rates or margin of profit also, the witness makes

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only a verbal statement that he would have charged 10-15% which cannot be accepted in the absence of documentary proof of the fact that the firm had sold these articles during the relevant time to various persons and made 10-15% profit only. It is manifest that if the firm was carrying on such a huge business then everything must have been written in the account books which were in possession of the Inspector and yet not produced. In these circumstances,

therefore, we are satisfied that the High Court misread the evidence of P.W.14.

Reliance was then placed on the evidence of P.W. 15, Mahendrakumar, who is a partner of the firm known as 'C. Ambalal & Co.' To begin with, he clearly admits that his firm was dealing in hardware, paints, sanitaryware and only files amongst the engineering tools. The witness further states that Out of the articles mentioned in the list, Ex. 9, only files, being items Nos. 75 to 94 and 96 to 99 were available with him and could be supplied by him. He does not say that he was in a position to supply the other engineering goods also. Again, the witness makes only a verbal statement without any documentary proof that he would have charged 10-12% of profit on the amount spent. It may be pertinent to note here that the appellant in his statement under s. 342, has positively asserted that he did make enquiries from the firm of Ambalal. Ambalal was examined by the police but not produced in court and the explanation given was that he was ill. That by itself is not a convincing explanation because the prosecution could have asked for adjournment from the court to enable Ambalal to be examined as a witness for he alone could have falsified the statement of the accused whether or not any enquiry was made from him. Finally, this witness himself states:

> "I do not remember whether I was present when the list, Ex. 9, was shown to Ambalal when his statement was recorded."

The evidence of this witness, therefore, does not exclude the possibility of the accused having made enquiries from Ambalal and the accused has in fact explained in his statement that no orders could have been placed with this firm because he was only in a position to supply files which formed a very small component of the engineering goods required. In these circumstances, therefore, the evidence, of P.W. 15 does not falsify the statement of the accused that he made enquiries from this firm but, on the other hand, goes to support it. The High Court has observed that if the appellant had made enquiries from P.W. 15, then he would have undoubtedly remembered this fact. This process of reasoning appears to us to be absolutely perverse. When the witness himself does not remember whether the appellant had made any enquiries in his presence then the natural inference would be that he does not exclude the possibility of the appellant having made an enquiry, and in the absence of the examination of Ambalal it cannot be said that the statement of the accused was false.

The next evidence on which reliance was placed was of P.W. 16, Taharbhai. This witness clearly admits that he had no engineering goods in his stock and if an order had been placed he could have

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supplied them by procuring them from somebody else. In these circumstances he was in the same position as P.W. 2. This witness further admits that out of the list, Ex.9, only files and drills were available, but the stock of these articles was scanty. He again orally says that he would have charged a profit of 15%. This witness admits that he does not remember whether the appellant had come to his shop on March 27, 1963 to enquire about the availability of the goods and the rates of engineering tools. It was suggested to him that enquiries were made from him by the appellant and he said, that the tools were not available with his firm. The evidence of this witness also suffers from the same infirmities as are to be found in the evidence of P.Ws. 14 and 15. He has not produced the stock register

nor any document or accounts or inventories to show that he had all the goods required. His statement further does not exclude the possibility of the accused having made enquires from him, or at any rate does not falsify the statement of the accused. As regards the margin of profit, that is also ipsi dixit without any basis and is not supported by his account books.

It seems to us that before a presumption against the accused could be raised that he knew that other firms would have charged a much lesser profit than P.W.2, it should have been proved by the production of account books of the firms concerned and their dealings during the relevant time that they had sold similar of identical goods and made only a profit of 10-15%. The verbal statement of the witnesses regarding the margin of profit which they would have made had orders been placed six years back can carry no weight.

This is all the evidence on the basis of which inferences against the appellant have been drawn. After having gone through the evidence we are satisfied that the prosecution has not produced any reliable or conclusive material to prove that the appellant had any dishonest intention in causing pecuniary benefit to P.W. 2. Even assuming that the accused departed from the normal procedure in view of the urgent necessity of the articles it cannot be said that this was done with a corrupt or oblique motive. The appellant had been asked. by the Jabalpur Depot to supply these articles immediately. The appellant, therefore, had t6 take a quick decision and he was authorised to do so by his Chief. Since P.W. 2 was prepared to supply all the goods in bulk at one stretch the appellant may have thought it better to place the orders with him. May be, that this was an error of judgment or an act of indiscretion, but from that alone an inference of dishonest intention cannot be drawn. Moreover, P.W l0 has clearly stated thus:

> "I had no reason to doubt the honesty or sincerity of the accused during the period he was serving under me."

This would show that the appellant was really an honest and sincere officer and his antecedents were good. Against this background we should have expected much better and superior evidence to justify inference of the accused having been animated by a dishonest intention in placing orders with P.W. 2.

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There is yet one more intrinsic circumstance which negatives the guilt of the accused. Although the appellant had given orders with respect to all the articles to P.W. 2, yet when he found that P.W. 2 was charging higher rate for the dessert spoons he did not place orders for the same with him but placed the orders with P.W. 11, who supplied at the rate of Re. 1/- per spoon which was less than the rate at which P.W. 2 was ready to supply. This shows that the appellant did take due care and caution and did not act blindly. There is absolutely no legal evidence on the record to show as to what was the nature of the margin of profit which the firms of P.Ws. 14, 15 and 16 had made if the orders had been placed with them, and in the absence of such an evidence the court would not be justified in holding that the accused abused his position in causing pecuniary benefit to P.W. 2. The appellant had admitted that if he had known that P.W. 2 would have charged such a high profit he would have been more careful.

On the other hand, what appears to us to be most surprising is that although P.W. 2 was the sole beneficiary of the whole transaction and had, according to the prosecution,

made profit of 45% and was, therefore, in the nature of an accomplice, yet he continues to be on the approved list of the departmental suppliers even on the date when he was giving evidence. Such a conduct on the part of the department can only be consistent with the innocence rather than the. guilt of the accused. If the prosecution allegation was true that P.W. 2 through his business influence obtained the order in his favour, then before the prosecution was started against the appellant, P.W. 2 should have been blacklisted. But this was not done. The High Court appears to have been led away by the impression that the appellant had personal relations with P.W. 2. There is, however, no such evidence on record and P.W. 2 himself has categorically stated that his relations with the appellant were purely business relations as he used to visit the office in connection with the supplies off and on. In these circumstances, therefore, if P.W. 2 was not suspected by the prosecution for having received huge pecuniary benefit much less could the blame lie on the appellant.

In these circumstances, even if there was some amount of carelessness or negligence on the part of the appellant it is impossible to doubt his bona fides. He acted as a prodent person and tried to get the supplies as quickly as possible with the result that all the gods required by Jabalpur Depot were supplied within two weeks.

A careful analysis of the evidence and the circumstances would, therefore, show that the approach of the High Court was clearly

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wrong and that the inferences drawn by the High Court were not at all warranted by the circumstances and facts proved in the case. The entire charge against the appellant rested on circumstantial evidence and the prosecution has failed to prove that the circumstances were such as could be explained only on one hypothesis, namely, that the accused was guilty.

For these reasons, therefore, the appeal is allowed, judgment of the High Court set aside and conviction and sentence imposed on the appellant are hereby quashed, and he is acquitted of the charge framed against him.

M.R. Appeal allowed.

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