

* **THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment reserved on: 25.08.2009

Judgment delivered on: 23.12.2009

Crl.A.No. 454/2009

SANJEEV KUMAR

..... Appellant

vs.

STATE (THROUGH CBI)

....Respondent

Advocates who appeared in the case:

For the Appellant : Ms Rebecca M John with Mr Vishal Gosain, Advocates

For the Respondent : Mr Ashish Kumar, Advocate

CORAM :-

HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment ? No
2. To be referred to Reporters or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

RAJIV SHAKDHER, J

1. The instant appeal is directed against the judgment and sentence of even date i.e., 30.05.2009 passed by the Special Judge-IV, (PC ACT) CBI, Delhi. By the impugned judgment, the appellant has been convicted in respect of offence of criminal misconduct under Sections 7, 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to in short as the 'PC Act'). In respect of conviction under Section 7 of the PC Act, the appellant is required to undergo rigorous imprisonment for a period of three years with a fine of Rs 10,000/-. In default, the appellant is required to undergo a further simple imprisonment for a period of one month. For an offence under Section 13(1)(d) for which punishment under Section 13(2) of the PC Act, is prescribed, the appellant is similarly required to undergo rigorous imprisonment for a period of three years with a fine of Rs 10,000/-. In default of payment of fine, the appellant is required to undergo simple imprisonment for a further period of one month. The sentences are to run concurrently.

2. The prosecution's version of the case is as follows:-

3. One Rupesh Jain (PW2), who was the Director and promoter, at the relevant point in time, of two companies by the name of M/s Flexo Foam Pvt Ltd (hereinafter referred to as 'FFPL') and Pelican Crafts Private Limited (hereinafter referred to as 'PCPL') was being harassed by the appellant, who admittedly is an employee of the Central Excise Department (hereinafter referred to as the 'Excise Department'). The apparent reason for harassment of PW2 was the pendency of issues pertaining to the aforementioned two companies promoted by PW2, which in the course of their business had to deal with the Excise Department. It is alleged that the appellant demanded a bribe from PW2. In this connection, the appellant had been interacting with PW2 since February, 2002. On 17.05.2002, the appellant had asked PW2 to visit his house. Thereafter the appellant had once again asked PW2 to visit his house on 24.05.2002. It is in this background, PW2 approached the Central Bureau of Investigation (CBI)/Anti Corruption Bureau (ACB). A complaint (Ex PW2/A) was filed by PW2 with the CBI/ACB. On receipt of complaint, the contents of the same were verified and consequent thereto, a FIR bearing No.RC.No. DA1-2002-A-0030 dated 24.05.2002 was registered.

4. In order to ascertain the truthfulness of the allegations made in the complaint, a decision was taken to lay a trap for the appellant. One Mr A K Pandey, Inspector (PW12) was assigned the task of laying the trap. For this purpose, two shadow witnesses i.e., one Mr Suresh Chand (PW4) and Mr Ishwar (PW5), who were the employees with the Northern Railways, were requested to join the trap laying team.

5. The pre-trap proceedings were conducted by PW12. In the pre-trap proceedings PW2 alongwith shadow witnesses PW4 and PW5 were given a demonstration as to how the trap would progress in the instant case. They were familiarized with the procedure whereby, money which, in the instant case was a sum of Rs 25,000/- comprising of thousand and five hundred rupees notes would be coated with phenolphthalein powder; and at a point in time when the money would change hands, the one receiving the tainted

money would have powder transferred on to his hands. The fact that the bribe taker had handled the tainted money would get reinforced once his hands, which would have traces of phenolphthalein powder on being dipped in a solution of sodium carbonate would result in the solution turning colour. The mixture of the phenolphthalein powder with a solution of sodium carbonate would catalyze a change in the colour of the sodium carbonate solution to pink. This procedure was explained by physically having PW5 handle powder treated notes with his right hand, and thereafter having his hand dipped in a solution of sodium carbonate. Immediately, on contact the colour of sodium carbonate turned pink. After this demonstration the said solution was discarded. Having explained the aforementioned procedure, powder treated currency notes brought by PW2 were kept in the right side pocket of the trouser worn by PW2. PW 2 was instructed to hand over the tainted notes only on a specific demand by the appellant. A kit bag comprising of clean tumblers and sodium carbonate powder etc. was prepared for being carried by the traps laying team.

5.1 Thereafter PW5 and other members of the trap laying team washed their hands with soap and water and the remaining phenolphthalein powder was returned to the store room of ACB vide memo Ex PW2/D. It was ensured that PW2 did not carry with him any other incriminating documents. During pre-trap proceedings the trap laying team also arranged a digital SVR 240 Samsung digital recorder (in short 'Samsung Recorder') and KCR 360 with a transmitter and two TDK-60 audio cassettes. Care was taken that the cassettes did not contain any pre-recorded voice. Thereafter, voice samples of both shadow witnesses i.e., PW4 and PW5 were recorded in the Samsung recorder, as well as, in the cassettes through KCR 360. The two recorders were carried to the spot for recording the conversation between the appellant and PW2. PW4 was asked to accompany PW2 upto the point it was possible, in order to overhear the conversation between the appellant and PW2. On the appellant demanding and thereafter accepting the bribe both PW4 and PW2 were instructed to signal the completion of the transaction to the trap laying team positioned outside the house of the appellant, by restoring pre-

arranged signs. While PW4 was required to scratch his head with both hands; PW2 was asked to send a signal of completion of transaction from his mobile no. 9810076446 to a pre-fed mobile no. 9810636241. PW5 was instructed to remain with the trap laying team. The proceedings with respect to the pre-trap procedures were recorded in the handing over memo being Ex PW2/D. At about 8.15-8.30 pm the trap laying team alongwith shadow witnesses reached the residence of the appellant situate at AG-1, 65-B, 1st Floor, Vikas Puri, A-Block (hereinafter referred to as the 'house'). The Government vehicles, in which the team members and shadow witnesses alongwith PW2 reached the spot, were parked at a safe distance. On PW2 informing the others that the appellant was a person having a suspicious deposition, it was decided that PW4 would remain outside, in case there was any such disinclination shown by the appellant, in permitting his entry into the house.

5.2 Finally, PW2 entered the house of the appellant. After some time the trap laying team received a signal from PW2 on the pre-fed mobile number. Within no time the trap laying members rushed to the house of the appellant. The door bell was answered by a person who, on being asked as to whether the appellant was available replied by saying "Sanjeev Kumar Nahi Hai" (Sanjeev Kumar is not available). Simultaneously, PW2 on hearing the commotion outside the house shouted that the person answering the call bell was none other than the appellant himself. Consequently, PW2 forcibly opened the door of the house from inside. The members of the trap laying team, on entering the house of the appellant, identified themselves and disclosed the purpose of their visit. The appellant was asked whether he had demanded and accepted a bribe of Rs 25,000/- from PW2. At first, the appellant denied the charge but later on decided to keep quite. At this point, PW2 informed the other members of the trap team that the appellant had accepted the money, and had kept the same in the magazine titled "Mera Bachpan" which was lying on the lower shelf of the central table of the room where evidently the transaction got concluded. Immediately thereupon, the kit bag carried by the trap laying team was opened and a sodium carbonate solution was prepared. The right hand of the

appellant was dipped in the solution to ascertain whether the appellant had handled the tainted money or not. On the appellant's right hand being dipped in the solution, it turned pink. In the meanwhile, PW5 recovered the money from the magazine and the numbers of the currency notes were tallied with those noted in the handing over memo (Ex PW2/D). A left hand wash was also taken but it did not change colour. Similarly, a wash of the magazine in which the tainted money had been kept was also taken; the solution turned pink. The three washes i.e., right hand wash, left hand wash and the FPBW (magazine wash) were kept in separate tumblers and labeled as RHW, LHW and FPBW respectively. The recovery memo Ex PW2/B was prepared; as also the audio cassette, was sealed vide memo Ex PW4/A, after a recording was prepared from Samsung recorder. The site plan of the premises Ex PW4/C was also prepared. On a search of the house of the appellant vide Search Memo Ex PW4/D, two pieces of paper (marked DX) were recovered which were seized vide Ex PW4/DX. Thereafter, the statement of PW2 and the two shadow witnesses i.e., PW4 and PW5 was recorded.

6. In the background of the aforesaid circumstances, the then Investigating Officer PW13 to whom the case had been transferred from PW12, recorded supplementary statements of PW2, PW4 and PW5 and as also of other witnesses. He also prepared a transcript (Ex PW2/E) of the conversation recorded between the appellant and PW2 in the presence of witnesses. The I.O. also recorded the specimen voices of PW2 and the appellant. This was also done in the presence of witnesses. Documents were also summoned and received from the office of the Excise Department. Furthermore, cell phone records were also obtained from Bharti Cellular Limited (ExPW2/DA) vide letter dated Ex PW11/A. The hand washes, magazine wash and the cassette containing the conversation between the appellant and PW2 were sent for expert opinion to the Central Forensic Science Laboratory (CFSL). On obtaining the report of PW3 who, at the relevant time was SSO-II at the CFSL, CBI; and the order sanctioning the prosecution of the appellant passed by PW1 i.e., the Joint Commissioner, Central Excise, Delhi; a chargesheet was filed in the Court.

7. By an order dated 18.03.2004, the following charge was framed against the appellant. Since submissions have been made on behalf of the appellant pertaining to the issue that the charge as framed was defective, it would be relevant to extract the charge, which reads as follows:-

“Firstly, that in the last week of February, 2002 you visited the factory M/s Flexo Foam Pvt. Ltd. and mentioned about a complaint against that factory and thereafter you started demanding money from the complainant Rupesh Jain on phone. On seeing that complainant was not taking your calls seriously and did not pay any money to you, on 17.5.2002 while you were posted as Inspector, Central Excise, Gurgaon demanded Rs 2 lacs from the complainant Sh. Rupesh Jain, Director of M/s Flexo Foam Pvt. Ltd. for a motive or reward and also threatened him that if above demand is not met, his factory would be raided and booked in some case and in furtherance of your demand you accepted the bribe of Rs. 25,000/- from the complainant on 24.5.2002 at your house No. AG-1/65-B, Vikas Puri, New Delhi and thereby you committed an offence punishable u/s 7 of the P.C. Act and within the cognizance of this Court.

Secondly, that you being a public servant while working as Inspector, Central Excise, Gurgaon by abusing your official position or otherwise by corrupt or illegal means obtained pecuniary advantage for yourself to the tune of Rs.25,000/- from the complainant and thereby you committed an offence punishable u/s 13(2) r/w 13(1)(d) of the P.C. Act and within the cognizance of this Court.

And I hereby direct you that you be tried by this Court for the said charges.”

8. Continuing with the narration, it would be relevant to mention that the appellant had challenged the framing of the charge by way of Criminal Revision Petition being; Crl.Rev.No. 375/2004. A single Judge of this Court dismissed the Criminal Revision petition vide order dated 01.02.2005.

9. As a matter of fact, the appellant had also filed an application under Section 464 of the Code of Criminal Procedure, 1973 (in short the ‘Cr.P.C’) in the Court of Shri Vinod Goel, Special Judge, CBI, Delhi for acquittal on the ground that prosecution had failed to prove the charges framed against the appellant vide order dated 18.03.2004. By an order dated 05.02.2008, the appellant’s application under Section 464 of the Cr.P.C was dismissed. The appellant escalated the matter further by preferring a Criminal Miscellaneous being Crl.M.C.No 607/2008 in this Court. A single Judge of this Court vide order dated 10.09.2008 dismissed the petition.

10. The prosecution in order to prove its case has cited 14 witnesses. The defence has cited three witnesses. In addition, the appellant's statement under Section 313 Cr.P.C was also recorded by the trial court. The sum and substance of statement recorded by the trial court under Section 313 of the Cr.P.C was that PW2 bore an animus against the Excise Department in view of his ongoing litigation with them, and in order to get even with the Excise Department, the appellant had been falsely implicated in a bribery case so as to pressurize the Excise Department to withdraw the case against him.

11. In the background of the aforesaid circumstances, the learned counsel for the appellant assailed the judgment of the trial court on the following grounds:-

(i) the charge framed vide order dated 18.03.2004 is defective in as much as that it refers to the fact that at the relevant point in time i.e., 17.05.2002 a sum of Rs 2 lacs was demanded as bribe and in furtherance of the demand, on 24.05.2002 the appellant accepted a bribe of Rs 25,000/- while he was posted as an Inspector, in the Excise Department, at Gurgaon. It was submitted that the appellant had, as a matter of fact, already moved to the technical branch of the excise department located at Delhi w.e.f. 01.05.2009. Apropos to the aforesaid submission, it was contended that the appellant was thus in no position to either benefit or harm the interest of PW2. Therefore, the charge as framed was bad in law and hence, the impugned judgment should be set aside on this short ground alone;

(ii) the testimony of PW2 has to be analysed and appreciated in the background of the fact that the Excise Department way back in March, 2001 had initiated proceedings against PW2 and hence, the entire case built on the complaint of PW2, that the appellant was threatening to inveigle PW2 in a false case is clearly without basis;

(iii) there are several discrepancies in the testimony of PW2. For this purpose, a comparison was made with the assertions in the complaint (Ex PW2/A) to the CBI and PW2's testimony in Court. On a comparison it was submitted that several aspects were referred to in the complaint in respect of which there was no mention in the testimony in Court. These being: the appellant had called PW2 to his office in February, 2002; since

then the appellant had been consistently calling PW2 on his phone for the purposes of payment of bribe; because PW2 was not taking the appellant's calls seriously, and had not paid him the money; on 17.05.2002 the appellant called PW2 to his house and demanded Rs 2 lacs as bribe, failing which, he threatened that his factory would be raided and PW2 be booked in some case or the other; PW2 was informed that since the appellant was travelling out of Delhi, he should visit the appellant's house on 24.05.2002 for paying a bribe. The discrepancies were elaborated upon by adverting to the following:

(iii) (a) the visitor's register (Ex PW6/B) maintained in appellant's office had no mention of PW2's visits to the Office in February, 2002;

(iii)(b) furthermore, the mobile phone records of March-April, 2002 of PW2 would show that between March-April, 2002, eleven (11) calls were made by PW2 to the appellant, while in April, 2002 two short calls were made by the appellant to PW2;

(iii) (c) in the complaint, it is stated that the appellant had called PW2 to his office on 17.05.2002, while in the cross-examination, PW2 had stated that the appellant had called him on phone on 17.05.2002. There is no record of phone calls made or received as between PW2 and the appellant on 17.05.2002. For this purpose, reliance was placed on Ex PW2/DA.

(iv) In respect of the prosecution's version as regards the events which preceded and followed the laying of trap, the following discrepancies were pointed:-

(a) both the shadow witnesses i.e., PW4 and PW5 were employees of the railways. PW2 through his companies FFPL and PCPL also dealt with the railways. PW2, as a matter of fact, was in the business of supplying seats and berths to the railways. The fact that the shadow witnesses who accompanied the trap laying team were requisitioned from railways, in the facts and circumstances of the instant case, had to be viewed with suspicion. It was, as a matter of fact, suggested that even the trap laying officer PW12 was at some point in time working with the railways;

(b) it has come through in the testimony of the prosecution witnesses that, PW2 was handed over the Samsung recorder which contains a chip, for the purposes of recording conversations between PW2 and the appellant, on 24.05.2002. Both, the Samsung recorder, as well as, the chip were not produced by the prosecution;

(c) the audio cassette sealing memo (Ex PW4/A) which records that an audio cassette used for recording conversation in the trap proceedings was taken out from the KCR 360 recorder in the presence of independent witnesses; lends credence to the stand of the defence that there is no contemporaneous record of the purported conversation between the appellant and PW 2 held on 24.05.2002 at the time the tainted money exchanged hands between them. Since firstly, what was carried inside the house of the appellant by PW 2 was a Samsung Digital recorder; and secondly, KCR-360 is a listening device and not a recorder; and

(d) lastly, there was no recovery of tainted money from the appellant. Even according to the prosecution, the tainted money was recovered from a magazine “Mera Bachpan”. Curiously, the magazine was not produced by the prosecution.

(v) as per the complaint of PW2, Ex PW2/A the appellant had demanded a sum of Rs 2 lacs. The prosecution has failed to explain the circumstances in which the amount demanded as bribe was reduced to Rs.25,000/-;

(vi) it is come through in the evidence of the prosecution that GC notes (Ex P1/1 to Ex P1/26) which were eventually handed over by PW2 to the appellant, comprised of four notes of a denomination of rupees thousand and the balance twenty one notes of denomination of rupees five hundred. If the bribe amount was a sum of Rs 25,000/-, this would mathematically not add up to the said sum.

(vii) for the appellant to be convicted under Section 7 and Section 13(1)(d) of the PC Act, there has to be a demand of money by the appellant. The transcript of the conversation which has been placed on record (Ex PW2/E) does not reveal that there was a demand of money by the appellant. Mere acceptance of money cannot lead to the conclusion that the appellant has committed an offence with which he has been charged;

(vii) the CFSL report (Ex.PW7/A) clearly indicates that no spectrographic examination of critical portions of the conversation alleged to be held between the plaintiff and PW2 could be conducted in view of disturbance in the background. Merely because the CFSL report opined that there is a similarity in 'linguistic' and 'phonetic' features would not necessarily lead to the conclusion that the voices in the tape were that of the appellant and PW2.

(viii) the CFSL report, on the hand washes opined, that left hand wash (LHW) gave a positive result for phenolphthalein and sodium carbonate, while the right hand wash (RHW) and the magazine wash (FPBW) gave positive result only for sodium carbonate. This was in contradiction to the testimony of PW12 wherein he stated that the right hand wash (RHW) and the magazine wash (FPBW) turned pink. There is, therefore, no conclusive proof of the fact that the appellant had actually accepted the tainted money.

12. To sum up, the learned counsel for the plaintiff says that there is a clear case of animus which has been set up by the defence if due regard is had to the fact that the complainant was engaged in litigation with the Excise Department. In this regard reference was made to the following documents filed by the defence pertaining to the period March, 2001: the KCR 360 recorder was not carried into the house of the appellant, what was taken in was the Samsung recorder, which was not produced by the prosecution; the number of GC notes which were taken in were 26 which did not add up to the bribe amount of Rs 25,000/- whereas the GC notes which ought to have been taken in and handed over to the appellant, given the denomination of notes adverted to by the prosecution, should have been 46 in number; the CFSL report of both with respect to hand washes as well as conversation which purportedly was held between the appellant and PW2 does not incriminate the appellant; the magazine in which the money was kept was not produced by the prosecution.

12.1 The aforesaid, according to the learned counsel, briefly encapsulate the probable defence of the appellant and the standard of proof in respect of the same is preponderance of probability.

12.2 The learned counsel for the appellant also submitted that presumption drawn by the trial court based on Section 20 of the PC Act was erroneous; there can be no question convicting the appellant for an offence under the PC Act unless there is a demand, and consequent acceptance of the bribe by the appellant. In support of her submissions, the learned counsel relied upon the following judgments:-

Pannalal Damodar Rathi vs State of Rajasthan (1979) 4 SCC 526 paras 8 & 11 at pages 528-529; Anand Prakash & Anr vs State of Haryana 2008 (4) Crimes 365 (P&H) paras 11, 13 & 18 at pages 368-370; State (Delhi Admn.) vs Satish Chand Sharma 1987 CriLJ 1205 paras 9 & 13, 17, 18 & 19 at pages 1208-1212; C.M. Girish babu vs CBI, Cochin, High Court of Kerala (2009) 2 SCC (CrL.) 1 para 14 at page 5; Sita Ram vs State of Rajasthan: AIR 1975 SC 1432 paras 9 & 10 at pages 1435-1436; and lastly, M Abbas vs State of Kerala : JT 2001 (4) SC 92 para 10 at page 96.

12.3 The learned counsel for the appellant concluded by submitting that the testimony of the appellant who is the complainant in the present case, can be no better than that an accomplice; therefore, while weighing the evidentiary value of the testimony of the appellant this fact would have to be kept in mind.

13. As against this, Mr Ashish Kumar, learned counsel for the CBI largely relied upon the impugned judgment. In particular, he laid stress on the observations made by the trial court in paragraphs 28, 50, 59 to 68. It was the learned counsel's submission that the only aspect which required to be proved was whether the appellant had accepted or agreed to accept the bribe. The learned counsel laid stress on the fact that the testimony of PW2 clearly demonstrated that there was a demand. He further submitted that this is borne out from the transcript of the conversations, and the cassette, the contents of which were proved. It was his submission that the Samsung recorder and the chip were not produced since the contents of the chip were recorded on to a cassette. The fact that a conversation was recorded on a cassette TDK-D-60 has been alluded to by Mr A K Pandey (PW12) in his testimony before the Court, there has been no cross-

examination of PW12 on this aspect of the matter. This aspect has also been touched upon by the trial court in paragraph 50 of its judgment. The learned counsel for CBI also referred to the testimony of PW12 to demonstrate that a KCR 360 transmitter was kept for transferring the conversation from the digital Samsung recorder to the KCR.

13.1 In the alternative, it was submitted that it was not required in law for the prosecution to prove that there had been a 'demand' of bribe by the appellant. As regards the apparent contradiction in the CFSL report and the testimony of PW12, with regard to hand washes and magazine washes, the learned counsel has relied upon the judgment of the Supreme Court in *State of U.P. vs Zakaullah (1998) 1 SCC 577 at page 562*, to buttress his point that the entire process of subjecting the appellant to hand wash test is really to establish independently that the public servant had handled the tainted money. The contradiction, if any, in the CFSL report and the testimony PW 12 could not by itself dilute the weight of the testimony of PW2 and PW12, if otherwise it is found trustworthy. There is no statutory requirement for such a procedure to be adopted. Based on the aforesaid submissions, the learned counsel for CBI sought dismissal of the appeal.

14. I have heard the learned counsels for the parties. Even though the learned counsel for the appellant has assailed the impugned judgment on several grounds, in my view, the most important and material issue which the prosecution is required to prove is whether on 24.05.2002, after PW2 had gained entry to the house of the appellant, was there an acceptance by the appellant of the tainted money. This, according to me, is a material fact around which other ancillary issues revolve. In order to ascertain as to whether the prosecution has been able to prove this material fact the testimony of PW2, PW4, PW5 and PW12 would in my view be crucial.

14.1 PW2, in the first instance, had lodged a complaint (Ex. PW2/A) with the CBI on 24.05.2002. In the complaint PW2 has stated as follows: He is the director of FFPL; during the last week of February, 2002 the appellant, who is an inspector with the Excise Department, had called him to his office where he is said to have informed him that he

had received some complaints about his factory. Since then the appellant had been calling him on the phone in the hope of receiving money from him; on 17.05.2002, he called him to his house and demanded Rs 2.00 lacs in bribe; and also threatened him, that in case he did not pay the money he would get raids conducted on his factory and get him involved in other cases. The appellant evidently also informed him that since he is travelling out of Delhi, he should pay him the bribe on 24.05.2002 at his residence.

14.2 In the examination-in-chief in Court, PW2 deposed that he had lodged a complaint against the appellant with the CBI for demanding bribe from him, and that the bribe was being demanded on the ground that if he did not pay the money to him, proceedings would be initiated against his company for excise violation. This complaint has been proved by PW2 being Exhibit PW2/A. There is a reference in the testimony to the effect that the appellant had demanded a sum of Rs 2.00 lacs out of which PW2 had agreed to pay only Rs 25,000/-. He, however, stated that he did not remember the exact date of payment. He also alluded to the fact that he made a call to the appellant that he wanted to visit to his house, and for confirming the time at which he would be available. He further deposed that two independent witnesses were requisitioned by the CBI and GC notes with chemical coating were kept in his pocket to be handed over to the appellant. He also deposed to the effect that, in his conversation with the appellant, in his house, he had handed over the sum of Rs 25,000/- carried by him, after he informed the appellant that he was unable to arrange the entire sum of Rs 2.00 lacs; whereupon the appellant kept the tainted money inside the magazine lying on the table. Immediately, thereafter the appellant sent a signal to the trap laying team by dialing the pre-fed number from his mobile phone. He further stated that on receiving the signal the trap laying team entered the house of the appellant, and recovered the GC notes kept in the magazine, and also searched the house of the appellant. He identified the appellant who was present in court. He, however, stated that he did not remember as to whether the recovery memo (Ex. PW2/B) was prepared at the site; though he deposed that the

signature on the recovery memo (Ex. PW2/B) at point 'A' was his, and that he may have read the memo.

14.3 It is to be noted that since PW2 has resiled from his earlier statement made to the CBI, the public prosecutor was allowed to cross-examine PW2. In his cross-examination by the public prosecutor, PW2 stated that he did not remember as to whether the bribe amount was duly paid on 24.05.2002; he also stated that he did not remember the names of the shadow witnesses; he also stated that he did not remember as to whether the sum of Rs 25,000/- consisted of notes of Rs 1000 and Rs 500 denomination though he did say that notes were of high value denominations. PW2 categorically stated that he was told to hand over the powder coated notes to the appellant only on a specific demand by the appellant. PW2 further deposed that he did not remember whether specimen voice of both witnesses were recorded in a digital recorder and in a cassette of KCR-360. PW2 also stated that even though one witness was to accompany him to the house of the appellant since the appellant did not let the witness enter the house; therefore, PW2 entered the house of the appellant alone. He also denied recollection of the fact that CBI officer had challenged the appellant of having demanded and accepted Rs 25,000/- by him. PW2 further deposed that he did not remember as to whether PW5 had recovered the tainted money from the magazine. PW2, however, confirmed that GC notes were tallied and hand washes of the appellant were taken, but he could not say as to whether both hands of the appellant were washed. PW2 categorically adverted to the fact that the hand wash turned pink and also the fact that the wash of the magazine also turned pink. PW2 accepted the fact that he had a tape recorder when he entered the house of the appellant, which he played during the trap proceedings, and the fact that, the conversation between him and the accused was audible. PW2 further deposed that the handing over memo (Ex.PW2/D) was prepared in the CBI Office before leaving for the residence of the appellant. PW2 also accepted the fact that on 19.07.2002 he visited the CBI Office and, in his presence specimen voice of the appellant was recorded, at which point in time, the witnesses were also present.

He accepted the fact that the cassette was played and, he had identified both his voice and that of the appellant. He further stated that while, he did not remember how transcript (Ex. PW2/E) was prepared but it did bear his signatures at point 'A' on all the pages of the transcript. He also stated that the specimen voice recording (Ex. PW2/F) bore his signatures on all pages. He adverted to the fact that he had seen and tallied the number of GC notes and found them to be correct, which were the same GC notes, which were given by him to the appellant, i.e, Exs. PW1/1to46. As regards the contents of the cassette which was taken out of sealed envelope and played in Court, PW2 deposed as follows:

“After hearing the cassette, the witness states that the cassette initially contains the specimen voice of the witnesses and thereafter myself and accused are discussing about the weather. The same is mentioned at point –A to A of transcript Ex. PW2/E. Again cassette is played and witness states that he is being offered tea, cold drink etc. by the accused. The fact of tea and cold drink is mentioned at point B to B of the transcript. The cassette is further played and the witness identifies one dialogue by Saneev Kumar “KYA DECIDE KIYA AAPNE’ which is mentioned at point – C to C in the transcript. The cassette is again played and the witness identifies his voice in which he was saying “IKATTHA NAHI HO PAYEGA” which is mentioned at point D to D in the transcript. The other conversation he is unable to understand. The cassette is further played and the witness identifies the dialogue in which the accused asked about his (complainant) residing saying ‘Old or New’ and reference of ‘Old’ and ‘new’ is coming at point E to E in the transcript. The cassettes is again played and the witness states that he identifies his voice and voice of accused in which he himself said “ISSE RAKH LO” on which accused asked “KITNE HAIN” and I said ‘PACCHIS” which is mentioned at point –F to F. The cassette is further played and the witness identifies his voice in which he is saying that he had arranged fifty but he had received a phone on the way. The cassette is again played and witness states that the other conversation is formal.”

14.4 In the cross-examination by the defence counsel it appears that apart from admitting the fact that PW2 had received summons from the Excise Department in

respect of his company FFPL, he also adverted to the effect that the appellant had contacted him on 17.05.2002, albeit on phone. PW2 stated that he did not remember that whether he had been contacted on mobile or the landline. PW2 stated that he also did not remember whether he was contacted at his residence or his office. PW2 specifically denied the suggestion that there was no demand by the appellant. PW2 denied the suggestion that he had himself put the money in the magazine which was placed in the lower shelf of the table. PW2 also denied the suggestion that he had not given a signal from his mobile phone. PW2 specifically denied the suggestion that no writing work was done at the spot in his presence, and that he had signed subsequently on a latter date in the office of the CBI. PW2 denied the suggestion that he had made a false complaint to the CBI to weaken his company's case under investigation by the Excise Department. PW2 further also denied the suggestion that the entire transcript did not contain any conversation recording the demand and acceptance of money by the appellant or that he had voluntarily given the money to the appellant in the hope that he would weaken his case, initiated by the Excise Department. PW2 also denied that the appellant has not signed the recovery memo because he and the CBI officials forcibly put the money. PW2 denied the suggestion that he had not met the appellant at any point in time prior to 24.05.2002 or that he had entered the house of the appellant as a stranger and sought his help in respect of a pending central excise matter. He further denied the suggestion that the appellant had entertained him as a good human being to help in the formation of an advice by understanding his problem. PW2 denied that Exhibit PW12/DX were short notes prepared by the appellant on 24.05.2002 to understand his problem with the Excise Department. He further denied the suggestion that the appellant had not dealt with the tainted money at any point in time or that he had planted the tainted money in the house of the appellant. He accepted the fact that the appellant was neither part of the search team nor the team that had investigated the matter pertaining to his company pending before the Excise Department. PW2

emphatically denied the suggestion that he had got the appellant trapped in order to overawe the officials of the Excise Department.

15. PW4 and PW5 confirmed the prosecution case. PW4 deposed with respect to the pre-trap proceeding. PW4 specifically referred to the fact that he and PW2 were shown the sum of Rs 25,000/- consisting of 4 GC notes of Rs 1000 each and remaining notes of Rs 500 denomination. PW4 also adverted to the fact that notes were chemically treated. PW4 further adverted to the fact that the specimen of his voice and that of PW5 were recorded. PW4 also adverted to the fact that the numbers on the GC notes were noted in the computer and a print out was taken. PW4 also stated that the GC notes were handed over to the complainant after they had been treated alongwith one digital tape recorder. PW4 proved his signatures on the handing over memo (Ex. PW2/D) at point 'B'. PW4 further stated that on reaching the house of the appellant PW2 insisted that he would like to enter the house of the appellant alone. Accordingly, PW2 was instructed to give a signal, after the transaction is complete, on the mobile phone. PW4 adverted to the effect that after receiving the signal they rushed to the house of the appellant; at which point the person who answered call bell replied by saying "**YAHAN SANJEEV NAHI HAIN**" (Sanjeev is not available). PW4 then stated that PW2, who was inside the house, informed the trap laying team that the person who was at the door was the appellant and he had apprehended him. PW4 further deposed that thereupon they gained entry into the appellant's house; on the appellant being asked, he denied that he had taken any money. PW4 further stated that it was PW2 who pointed out to them as to where the money had been kept and PW2 had stated that he had given the money to the appellant which he had kept under the table at the place pointed out by PW2. PW4 further stated that PW5 recovered the money, and that thereafter, the recovered notes were tallied by PW5 and found to be correct. He also stated that thereupon washes were taken and the right hand wash of the appellant turned pink, whereas left hand wash did not turn pink. He also stated that the wash of the magazine was also taken; which turned pink. He adverted to the effect that washes were kept in separate bottles and sealed in

his presence with labels put on them. He proved his signatures at point 'A' on the labels. He also identified the cloth wrapper in which the cassette was sealed, i.e., Ex. P5 and his signatures at point 'A', as also the cassette (Ex. P6) and its cover (Ex. P7). He identified his signatures on Ex. P6 and Ex. P7 at point 'A'. He proved the pre-trap proceedings which were recorded in the memo being Ex. PW2/B which bore his signatures at point 'B'; the cassette (Ex PW4/A) which bore his signature at point A; the personal search memo (Ex. PW4/B) which bore his signature at point 'A'; site plan (Ex. PW4/C) which bore his signature at point 'A' and memo evidencing house search of the appellant being Ex. PW4/D bearing his signatures at point 'A'. He also stated that on 19.07.2002 he was called to the CBI office, and on that day a transcript was prepared after playing the cassette which is Ex. PW2/E. He proved his signatures at point 'B' on the other exhibits. He further deposed that at that point in time PW2 and other witnesses were also present and a memo being Ex. PW4/E was prepared which bears his signatures at point 'A'. He also deposed to the effect that a sample voice was recorded vide Ex. PW2/F which bears his signatures at point 'B'. In his cross-examination, he did not deviate from his deposition made in examination-in-chief.

16. Similarly, PW5 broadly confirmed what was stated by PW4, both with regard to pre-trap proceeding and the proceeding which were conducted inside the house of the appellant, as also with regard to the preparation of the transcript from the conversation recorded between the plaintiff and PW2 which was also held inside the house of the appellant. What is important is that in his cross-examination, PW5 stated that GC notes Ex. P1/1to46 comprising of 4 GC notes of Rs 1000 denomination and remaining in denomination of Rs 500. He specifically alluded to the fact that GC notes shown to him in court were the same which he had recovered from the spot. He, however, stated that the solutions in all the three bottles were whitish in colour.

17. PW12, on the other hand, in detail deposed with regard to the pre-trap proceedings and the events which followed after they had gained entry into the house of the appellant. PW12 stated that on 24.05.2002 the complaint (Ex. PW2/A) was marked

to him; on the basis of the complaint a FIR (Ex. PW12/A) was registered under the signatures of the then S.P. Sh. R.S. Dhankar. PW12 proved the signatures of Sh. R.S. Dhankar at point 'A' of the FIR (Ex. PW12/A) as he had seen him writing and signing in the past. He adverted to the effect that two witnesses, i.e., PW4 and PW5 were requisitioned from the Railway Department. PW12 also testified that a demonstration was given to PW2, PW4 & PW5 with regard to how notes were chemically treated with phenolphthalein powder; thereafter the manner in which the powder treated notes were required to be handled; and the fact that the sodium carbonate solution would turn pink if person, who had handled the powder treated notes, was to dip his hands in the sodium carbonate solution. He also testified that this demonstration had taken place in the presence of PW2, PW4 and PW5. He further deposed that PW2 had produced a sum of Rs 25,000/- in the denomination of Rs 1000 and 500 GC notes which were treated with phenolphthalein powder in the presence of PW4 and PW5. He also testified that after the process was explained the tainted money was kept in the pocket of PW2 with a direction that it should be handed over to the appellant on his specific demand. PW12 further deposed that thereafter PW2, PW5 and other members of the trap team washed their hands, and the remaining phenolphthalein powder was returned to the malkhana. PW12 proved his signatures on the handing over memo (Ex. PW2/D) at point 'D'. PW12 testified that a samsung recorder was arranged and specimen voices of the witnesses were recorded after satisfying oneself that it did not contain any pre-recorded voices. He deposed that the Samsung recorder was handed over to PW2 with the instruction that it should be switched on once he reached the site. PW12 confirmed that on reaching the spot PW2 informed that the appellant was a person of suspicious nature and hence, may not allow entry of any other person. At this point PW4 was instructed that if he was not permitted inside the house by the appellant he should not insist on gaining entry; PW2 was told to signal the trap team, waiting outside the appellant's house, once the transaction was complete on a pre-arranged cell phone number fed in the mobile of PW2. PW12 stated that they found that once PW2 and PW4 had reached the

door of the appellant PW4 remained ,outside while PW2 went inside; upon receiving a signal from PW2 they rushed to the house; the door bell was answered by a person, who, on being asked, as to whether the appellant was available, replied “YAHAN SANJEEV NAHI HAIN” (Sanjeev is not available); in the meanwhile, PW2 informed that the person at the door was the appellant himself; PW2 then opened the door forcibly from inside; thereupon the trap team gained entry into the house of the appellant. PW12 stated that when the appellant was challenged, he, in the first instance, denied the charge but thereafter kept quite. PW12 also stated that it was PW2, who informed them that appellant had kept the money in the magazine titled “MERA BACHPAN” which is lying on the lower shelf of the central table of the room in which they were present. PW12 further stated that the kit bag in which they carried the sodium carbonate solution was summoned from the vehicle, and the appellant’s right hand was dipped in the said solution, which turned pink. The left hand wash, however, did not turn colour. The wash of the magazine, however, resulted in the sodium solution turning pink in colour. PW12 adverted that the solutions were kept in separate bottles and sealed thereafter. The right hand wash, the left hand wash and the magazine wash were labeled and marked as RHW, LHW and FPBW respectively. PW12 further deposed that the witnesses present put their signatures on them. He proved his signatures at point ‘D’ on the recovery memo (Ex. PW2/B). PW12 also testified that audio cassette was sealed vide Ex. PW4/A after the cassette was prepared from the digital recorder. PW12 proved his signatures on the audio cassette at point ‘D’. PW12 also proved his signatures on the personal search memo (Ex. PW1/B) at point ‘D’; his signatures on the site plan (Ex.PW4/C) at point ‘C’; his signatures on the house search memo (Ex. PW4/D) at point ‘C’. He also proved the recovery of two papers marked DX recovered and seized vide memo (Ex.PW4/D). PW12 testified that he recorded the statement of PW2 as also that of the panch witnesses without any addition or deletion.

17.1 In the cross-examination, PW12 denied the suggestion that PW2 and the panch witnesses were known to him prior to his interaction with them while laying the trap for

the appellant. Though PW12 accepted the fact that he came to know that the complainant was a supplier to railways during investigation. PW12 specifically stated that on coming to know that PW2 was a railway-goods supplier and the witnesses were from the railway department; he enquired whether they knew each other and, he found that they did not know each other; though he accepted that this fact is not mentioned in the pre-trap proceedings.

18. A reading of the testimony of PW2, PW4, PW5 and PW12 clearly demonstrate the following: That the entry of PW2 in the house of the appellant was not that of a stranger. The appellant obviously knew PW2. The stand taken by the defence that the appellant entertained PW2 as a good human being and was discussing his problem with regard to excise is unnatural. This is apart from the fact that there was no denial even by the appellant that the cell phone records revealed that at least on two occasions calls emanated from the cell phone of the appellant to PW2 in the month of April, 2002.

19. The next issue which confronts me is that: was there a demand for money by the appellant. Upon a perusal of the testimony of PW2 what can be gleaned, even though PW2 turned hostile, is that the appellant did demand the money. This is quite evident from the following extracts of the testimony:

“I went inside the house of Sanjeev Kumar (appellant) where I had some conversation with him and told him that I could not arrange the entire amount of Rs 2.00 lacs. I took out the amount of Rs 25,000/- and handed over the same to Sanjeev Kumar which he kept inside the magazine lying on the table.....”

19.1 When this is juxtaposed with the earlier part of PW2’s testimony that he had made a call to the appellant to inform him that he wanted to visit him and also the fact that appellant had been harassing him to pay a bribe in order to keep the department at bay – the purpose of PW2’s visit could not have been for anything else but to handover the illegal gratification to the appellant. Furthermore, in the latter part of the testimony, where PW2 identified not only the tainted money, which was handed over to the

appellant, but also his own voice as well as that of the appellant on the cassette which was played leaves no doubt in my mind that there was a specific demand for bribe.

19.2 The learned counsel for the appellant, however, assailed this part of the testimony on the ground that what was taken in by PW2 was a Samsung digital recorder; both the digital recorder and the chip inside the Samsung digital recorder were not produced and that the KCR-360 was a listening device and not a recorder. In my view, this submission of the learned counsel for the appellant, is clearly untenable. The reason being, none of these aspects were put to PW2 in the cross-examination. As a matter of fact the transcript of conversation was also not put in issue. The only suggestion made was that the transcript did not reveal demand and acceptance of the tainted money by the appellant. This is evident from the following extract of PW2's deposition in cross-examination:

“Vol...I was called by the accused. I do not know about the transfer of the accused. It is incorrect to suggest that the entire transcript does not contain any conversation regarding demand and acceptance of money by the accused. It is incorrect that I voluntarily gave the money to the accused in the hop that my case would be weakened by him.....”

20. Similarly, no suggestion was made to PW2 that the Samsung digital recorder was not carried into the house of the appellant by PW2. There was no suggestion made to PW2 that the conversation from the digital recorder had not been transferred to a cassette. As a matter of fact PW2 was not confronted that the transcript alluded to a conversation, which never took place. The defence did not confront PW2 as to how, and in what manner the transfer of conversation took place from the digital recorder on to the cassette. In these circumstances, I am not persuaded to accept the appellant's submission and nor can it be concluded from this that the version given by the prosecution is false and fabricated; in as much as PW2 never carried a digital recorder inside the appellant's house and hence, there was no record made of the conversations which took place between PW2 and the appellant. The defence has not examined any

expert to demonstrate that KCR-360 is a listening device. As a matter of fact Ex PW4/A which has been proved suggests that it also functions as a recorder. Since defence chose not to confront the prosecution witnesses as to how the transfer of the conversation on to the cassette took place, which was recorded on the Samsung recorder in the first instance; the prosecution's version that transfer did take place has to be accepted. The prosecution had no opportunity to explain the methodology used to transfer the conversation on to the cassette. In this context PW12 stated as follows: ***"The audio cassette was also sealed vide memo Ex PW4/A after the cassette was prepared from the digital recorder"***. From the point of view of the defence, the relevance of this aspect is only to cast a doubt that the Samsung recorded was not taken inside the appellant's house — a fact which is clearly proved by the prosecution witnesses.

21. The submission of the learned counsel for the appellant that the testimony of PW2 is not reliable for various reasons, which I have already noted in the earlier part of my judgment, I am of the opinion that the discrepancies were minor and that the core aspects of the testimony of PW2 remain undiluted. This is borne out on a perusal of the contents of the complaint (Ex. PW2/A) alongside the testimony of PW2 in court. The fact that there is a reference to the appellant harassing the PW2 since February, 2002, which is not referred to in the testimony in court, would not help the defence. The defence made no suggestion with respect to this aspect of the matter to PW2 in his cross-examination. Therefore, there was no occasion for PW2 to explain as to why there was no entry in the Excise Department's visitors' book.

21.1 Further discrepancies such as whether the appellant called PW2 to his house on 17.05.2002 or contacted him on the phone are to my mind discrepancies which do not lead to a conclusion that the events of 24.05.2002 did not happen in the manner in which they were described by PW2, that is, there was demand for bribe by the appellant which was gratified. The learned counsel for the appellant also sought to cast doubts on the testimony of PW2 by building a case of animus which PW2 purportedly had against the

Excise Department. In my view, there is no merit in this submission. It seems quite improbable and unnatural that if, as contended by learned counsel for the appellant, PW2 had an animus against the Excise Department he would pick the appellant to wreck vengeance on the Excise Department when admittedly he was not part of the team which raided PW2's company FFPL. The other submission that the appellant was not in a position to benefit or harm the interest of PW2 since the proceedings against PW2 by the Excise Department had concluded in March 2001, is in my view also without merit for the following reasons: Firstly, it is quite natural that a person when he is put in situation such as the one in which PW2 was put to clutches at straws. Secondly, PW2's dealings with the Excise Department were obviously a continuous process. If PW2 was in trouble with the Excise Department a suggestion by the appellant that PW2 could get into further trouble would have him look for help or seek to protect himself. As stated above, these are not core issues.

21.2 The submission that there was no recovery of tainted money from the appellant is completely belied by the testimony of PW2 that it was the appellant who had kept the money in the magazine 'Mera Bachpan'. The shadow witnesses corroborated the retrieval of the tainted money from the magazine.

21.3 The fact that bribe given was only Rs 25,000/- as against a demand of Rs 2.00 lacs is fully explained if regard is had to the transcript of conversation (Ex. PW2/E) held between PW2 and the appellant on 24.05.2002 when the transaction took place. There is nothing which would have me believe that the transaction was doctored.

21.4 The submission that GC notes used were only 26 in number with four notes of Rs 1000 denomination and remaining of Rs 500 denomination is an aspect alluded to either inadvertently or by design. Either way this part of the testimony should be excluded, since PW2 testified that: the number on GC notes recovered were tallied; he proved his signatures on the recovery memo (Ex. PW2/B) at point 'A'; and that the handing over memo (Ex. PW2/D) was prepared before he along with the trap laying team left the office of the CBI. Furthermore, the handing over memo (Ex. PW/D) has

also been proved by PW12. PW5 has, in his testimony, specifically alluded to the fact that the GC notes involved were 46 in number. The fact that PW2 turned hostile cannot axiomatically result in his testimony being effaced to the extent it is dependable, it can be relied upon; though on a careful scrutiny. [see *Khuji @ Surendra Tiwari vs State of M.P. (1991) 3 SCC 627 at page 635 paragraph 6*].

22. The submission of the learned counsel for the appellant which was that the charge framed on 18.03.2004 by the trial court was defective, in as much as, the appellant was not posted as inspector in Gurgaon on 24.05.2002 but was posted to the technical branch of the excise department as far back as on 01.05.2002 is of no consequence for the following reasons:

- (i) that the charge in sum and substance put the appellant to notice that he was accused of having demanded and accepted a bribe in his capacity as the public servant from PW2 on 24.05.2002 by making PW2 believe that he was in a position to extend a favour to him. Whether the appellant was posted at Gurgaon or Delhi was not the material to the charge; and
- (ii) since the core of the accusation was known to the appellant, in my view, there was no failure of justice. The appellant was given a fair opportunity to defend the charge.

23. The other discrepancies pointed out by the learned counsel for the appellant that there was no record of conversation held on 17.05.2002 between the appellant and PW2; or that PW4 and PW5 are the employees of the railways, would not help the defence. The reason being, as indicated above, that whether or not the appellant asked PW2 to visit his house or that, as stated by PW2, he spoke to him on his phone is not a material aspect of the case. This is more so because in his statement under Section 313 of the Cr.P.C. the appellant has accepted the fact that PW2 gained entry into his house on 24.05.2002 albeit for reasons un-connected with appellant's acceptance of bribe. Therefore, the event of 17.05.2002 is not relevant in my view. As regards the fact that PW4 and PW5 were employees of railways is also not relevant for the reason that PW12

in his testimony categorically stated that he had ascertained that PW2 was not known to PW4 and PW5. PW12 also clarified that he was not posted at Railways. Furthermore, there is nothing to suggest that PW4 and PW5 had an animus against the appellant and hence, their testimony ought to be rejected. Therefore, in my view, if the testimony of PW2 is accepted with respect to the material fact that there was a demand for money, which was accepted by the appellant on 24.05.2002, other issues get relegated to the background. Therefore, the submission of the learned counsel for the appellant with regard to the contradiction in the testimony of PW12 and the CFSL report with regard to the hand washes and the magazine wash also does not attain much significance. The Supreme Court in the judgment of *Zakaullah (supra)* has observed: there is no requirement of law which mandates that in laying the trap, the money, which is to exchange hands, should be coated with phenolphthalein powder. This process, it seems, is followed in practice by the investigators for the purposes of their own satisfaction. As far as the courts are concerned, if they are otherwise satisfied; then a mere discrepancy in the hand washes would not by itself cast doubt on the version placed before the court by the prosecution. As is evident from the testimony of PW12 as well as that of PW4 the right hand wash (RHW) of the appellant as well as magazine wash (FPBW) turned pink; whereas CFSL report opined that it was the left hand wash (LHW) of the appellant which turned pink, and there was no reaction in so far as the magazine wash (FPBW) was concerned. It is quite possible that PW12, who deposed in court after nearly two years of the occurrence of the incident, did not recollect as to which of the two hand washes had turned pink in colour. It often happens that people while pointing out a person's right or left hand indicate the same by referring to their right and left hand, whereas it is the other way round when a reference is made to a third person. Be that as it may, as indicated above, this discrepancy by itself would not persuade me to believe that there was no demand of bribe and its acceptance by the appellant. Therefore, looked at from this point of view, the non-production of magazine was not insignificant.

25. In these circumstances, the judgments cited by the learned counsel for the appellant that in order to convict the appellant under the PC Act a demand was a necessary ingredient need not be discussed by me. Similarly, it is not relevant for me to discuss the judgments cited by the learned counsel for the State that mere acceptance of bribe is good enough to convict the appellant under the PC Act.

26. Accordingly, I am of the opinion that no fault can be found with the judgment of the trial court. The judgment of the trial court deserves to be sustained. The appeal is dismissed.

DECEMBER 23, 2009
mb/kk

RAJIV SHAKDHER, J