

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

+ **Crl. A. No. 135/2001**

% Reserved on: 22nd November, 2010

Decided on: 7th January, 2011

ROOP CHAND

..... Petitioner

Through: Mr. V.K.Ohri and Mr. Vivek Singh
Bishnoi, Advocates

versus

STATE(CBI)

..... Respondents

Through: Mr. Vikas Pahwa, S.C. for CBI with
Ms. Suchiti Chandra, Advocates

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Not necessary |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MUKTA GUPTA, J.

1. By the present appeal, the Appellant lays a challenge to the judgment passed by the Ld. Special Judge, convicting him for offence punishable under Section 12 of the Prevention of Corruption Act, 1988(in short 'P.C. Act') and

sentence of Rigorous Imprisonment for a period of two years and fine of ₹30,000/-, in default of payment of fine, to further undergo Rigorous Imprisonment for a period of six months.

2. Briefly, the prosecution case is that the Appellant Roop Singh offered to the Complainant Lt. Col. B.K. Singh, a public servant who was posted as Dy. Independent Recruitment Officer with IRO, Delhi Cantt. an illegal gratification of ₹.10,000/- per candidate for recruitment of certain candidates in the Indian Army. The Complainant refused the offer. However, the Appellant threatened him and went away saying that he would come back after a few days and he should reconsider his proposal. On 15th January, 1990, the Appellant gave a telephonic call to the Complainant and stated that he would visit him on the 17th January, 1990 with a list of candidates to be inducted in the Army. On the Complainant disconnecting the phone, the Appellant visited the residence of the Complainant in the evening and again persuaded him to agree to his request and gave a chit Ex.PW6/A detailing the names of the candidates to be inducted in the Indian Army and threatened him to accede to his request. He also said that the Complainant can be given more gratification per candidate. The Complainant reported the matter to his commanding officer and thereafter a written complaint Ex.PW1/A was given in the office of the Superintendent of Police, CBI, Anti-Corruption Branch,

New Delhi. As the Appellant proposed to visit the Complainant on 2nd February, 1990 at around 7:30 p.m. along with the bribe amount, PW 6 D.C. Sorari, DSP, CBI organized a raid by joining Inspector S.C. Yadav and Inspector S.K. Saxena from CBI and two panch witnesses namely Sh. M.M. Bhatia and Sh. Tajender Singh Walia requisitioned from the Oriental Bank of Commerce, Jhandewalan Extension, New Delhi. During the pre-raid formalities which were conducted in the afternoon of 1st February, 1990, a micro-cassette recorder alongwith one micro-cassette was arranged. The audio cassette was checked by the witnesses and found to be blank. After loading the recorder with the blank audio cassette, the same was given to the Complainant and he was directed to record the said conversation which might take place between him and the Appellant. On 2nd February, 1990, all members of the trap party reached the residence of the Complainant at around 5:30 am. Both the panch witnesses were asked to conceal themselves behind the curtain between the drawing-room and the lobby and the other members of the trap party concealed themselves in the bedroom of the children. The Appellant arrived at around 8:10 a.m. He was taken to the drawing-room by the Complainant and they had a conversation. The Appellant offered the bribe by saying “SAHEB PAISE LE AAYA HOON LEKIN KAM HAIN BAKI KAAM HONE PAR DE DONGA KYONKI CALL LETTER ABHI TAK

NAHI PAHUNCHE HAI”. The Appellant took out the money and offered the same to the Complainant. When the accused started counting the same, the pre-arranged signal was raised. On hearing the signal, the members of the trap party rushed into the drawing-room and apprehended the accused along with the bribe amount of ₹11,950. Thus, on the aforesaid allegations, a case FIR was registered under Section 12 of the P.C. Act and after completion of the investigation, charge-sheet was filed against the Appellant. During the trial, the Complainant Lt. Col. B.K. Singh and panch witness M.M. Bhatia, expired and thus, the two material witnesses on whose testimony the entire prosecution case hinges are PW 1 T.S. Ahuwalia, the panch witness and PW 6 D.S. Sorari, the Investigating Officer. PW 4 M.C. Joshi, DSP to whom subsequent investigation was transferred is also a relevant witness.

3. Learned counsel for the Appellant challenging the conviction contends that the complaint dated 1st February, 1990 against the Appellant has not been proved as the prosecution failed to examine the Complainant and thus there is no evidence to establish the allegation of the initial offer which led to filing of the complaint. The entire prosecution case is based on the sole testimony of one panch witness who was not ever present when the alleged complaint was filed before CBI. Moreover, out of the 25 prosecution witness cited, only six have been examined during trial and thus an adverse inference as per Section

114(g), Evidence Act should be drawn against the prosecution. There are material contradictions in the testimony of PW 1 T.S. Walia and PW 6 D.C. Sorari as PW 1 in his testimony has deposed that ₹12,000/- were recovered whereas PW6 states that ₹11,950/- were lying on the table. According to PW1, on entering the drawing room PW 6 caught hold of the accused with the money in his hand, however, as per PW 6, the said money was lying on the table. Also as per PW1, the said cassette recorder was kept in a flower pot whereas PW6 Sh. D.C. Sorari stated that the said cassette recorder was kept in the pocket of the Complainant for recording the conversation between him and the accused. Though chance prints were recovered from the spot, however they were not produced during trial. Thus an adverse inference should be drawn. PW 2 C.P. Pandey has not supported the prosecution case as he has not identified the Appellant in the court as the person who had approached him with a proposal for the recruitment of his candidates. PW 3 Satish Kumar is the person who had allegedly given his papers to the Appellant for recruitment in Army. This witness in his testimony had deposed that “it is incorrect to suggest that on 17th January, 1990 I along with my brother visited the residence of Roop Chand in Gurgaon. It is incorrect to suggest that we gave our application form along with other particulars to Roop Chand for submitting the same at the relevant counter”. Hence this

witness has also not supported the prosecution case. Learned Trial Court has disbelieved the defence version on the ground that no witness in the defence has been examined. However, it is well-settled that the prosecution must stand on its own legs and it cannot take advantage of the weakness of the defence, nor can the Court on its own make out a new case for the prosecution and convict the accused on that basis. Reliance is placed on *Bhagirath vs. State of Madhya Pradesh AIR 1976 SC 975*. It is thus prayed that the Appellant be acquitted of the charges framed. In the alternative it is also prayed that since the Appellant is an old man of 88 years of age, he be released on the period of imprisonment already undergone.

4. Learned counsel for the Respondent on the other hand contends that under Section 12 of the P.C. Act, the Appellant is liable to be punished for abetment of the offences punishable under Section 7 and 11 of the P.C. Act even if the offence is not committed as abetment in itself is an offence. The incident is dated 2nd February, 1990. The Complainant Lt. Col. B.K. Singh and the panch witness M.M. Bhatia expired on 2nd July, 1991 and 5th January, 1998 respectively before they could be examined in the trial court and thus the prosecution could not examine them. Therefore, no adverse inference can be drawn under Section 114(g) of the Evidence Act. The testimony of T.S. Walia, PW1 is duly corroborated by the testimony of D.C. Sorari, PW6.

Coupled with the tape-recorded conversation between the Complainant and the Appellant, there is sufficient evidence to bring home the charge for offence punishable under Section 12 of the P.C. Act against the Appellant. The contradictions as referred to by the learned counsel for the Appellant are minor in nature and are bound to occur in view of the passage of time. During appreciation of the evidence, these minor contradictions should be ignored. Once a prima-facie case is proved by the prosecution then in terms of Section 20 of the P.C. Act, a mandatory presumption is required to be raised and the onus thereafter shifts to the accused to rebut the said presumption.

5. I have heard the learned counsel for the parties and perused the record. There is no doubt that PW1 T.S. Walia, the panch witness has fully supported the prosecution case. According to him, he not only met the Complainant on 1st February, 1990 when the Complainant came to the office of CBI but he also fully satisfied himself about the contents of the complaint. Moreover, on 2nd February, 1990 when the trap was laid, PW1 was hiding himself behind the curtain. He witnessed and heard the entire conversation between the Appellant and the Complainant and was thus a witness to every transaction on the date of incident. He is an eye-witness to the occurrence and in the absence of any motive to falsely implicate the Appellant, his testimony cannot be brushed aside lightly. This witness has proved the complaint of the

Complainant Ex. PW1/A. He has also deposed that he heard the Appellant telling Lt. Col. B.K. Singh, the Complainant “SAHEB PAISE LE AAYA HOON LEKIN KAM HAIN BAKI KAAM HONE PAR DE DONGA KYONKI CALL LETTER ABHI TAK NAHI PAHUNCHE HAI”. It is thereafter on a signal being raised by the Complainant that the Appellant was apprehended and money was recovered from his hand. The fact that the money was ₹50/- short of ₹12,000/- would not make a material difference so as to cast a serious doubt on the prosecution case. The testimony of this witness stands duly corroborated by the testimony of PW6, Sh. D.C. Sorari, Dy. S.P., CBI, the trap officer. This witness has also corroborated the version of the Complainant, the pre-trap evidence and he is the one who apprehended the Appellant in the drawing-room of the Complainant. The fact that the Appellant was sitting with the Complainant in his drawing-room and some currency notes along with some papers were lying on the table has also been proved by the testimony of this witness. The articles from the spot were seized which have been duly exhibited, which also include a list of candidates and some application forms etc. I find no merit in the contention raised by the learned counsel for the Appellant that there are material contradictions in the testimonies of PW1 and PW6 with regard to the placement of tape-recorder or that the bribe money was recovered from the hand or from the table, as with

the passage of time, minor variations in the testimony of the witnesses are bound to occur and such minor discrepancies cannot throw out the entire prosecution case. The evidence of these two witnesses is sufficient to prove the charge for offence under Section 12 of the P.C. Act against the Appellant.

6. The Hon'ble Supreme Court in *M. Narsingha Rao vs. State of Andhra Pradesh* 2001(1) SCC 691 while dealing with the presumption under Section 20(1) of the P.C. Act held:

“14. When the sub-section deals with legal presumption it is to be understood as in terrarium i.e. in tone of a command that it has to be presumed that the accused accepted the gratification as a motive or reward for doing or forbearing to do any official act etc., if the condition envisaged in the former part of the section is satisfied. The only condition for drawing such a legal presumption under Section [20](#) is that during trial it should be proved that the accused has accepted or agreed to accept any gratification. The section does not say that the said condition should be satisfied through direct evidence. Its only requirement is that it must be proved that the accused has accepted or agreed to accept gratification. Direct evidence is one of the modes through which a fact can be proved. But that is not the only mode envisaged in the Evidence Act”.

Sub-Section (2) of Section 20 is similar to Sub-Section (1). In terms of Sub-Section (2) of Section 20, once an offer or attempt to give is proved, the Court is duty bound to presume the motive or reward as mentioned in Section 7 and thereafter the onus shifts to the accused to disprove the said fact. Thus, I find no merit in the contention of the learned counsel for the Appellant that

the learned trial court erred in arriving at the conclusion that the Appellant did not produce any evidence to prove this defence. The Appellant has taken the defence in his statement under Section 313 Cr. P.C., that on the date of incident he had gone to take earnest money from the Complainant for the plot he desired to purchase. However, neither any defence to this extent has been produced nor anything has been elicited from the testimony of prosecution witnesses in this regard.

7. Coming to the evidence of tape-recorded conversation. The law in this regard is well-settled as held by the Hon'ble Supreme Court in *R.M. Malkani vs. State of Maharashtra* 1973 (1) SCC 471:

“23. Tape recorded conversation is admissible provided first the conversation is relevant to the matters in issue; secondly, there is identification of the voice; and, thirdly, the accuracy of the tape recorded conversation is proved by eliminating the possibility of erasing the tape record. A contemporaneous tape record of a relevant conversation is a relevant fact and is admissible Under Section 8 of the Evidence Act. It is res gestae. It is also comparable to a photograph of a relevant incident. The tape recorded conversation is therefore a relevant fact and is admissible Under Section 7 of the Evidence Act. The conversation between Dr. Motwani and the Appellant in the present case is relevant to the matter in issue. There is no dispute about the identification of the voices. There is no controversy about any portion of the conversation being erased or mutilated. The Appellant was given full opportunity to test the genuineness of the tape recorded conversation. The tape recorded conversation is admissible in evidence.”

Applying the test as laid down by the Hon'ble Supreme Court in this case, though the witnesses have stated that the cassette was blank and was duly sealed after the recording and PW1 has also identified the voice of the Appellant, however, the link evidence that the said cassette was not tampered with is missing. Therefore, the same cannot be relied upon as the mandate for admissibility of the tape-recorded conversation is that the said cassette should be duly sealed, voices in the conversation should be recognized by the witness and the factum of non-tampering of the same should be proved by the prosecution. In the present case, the chain of link evidence proving that the cassette was kept intact in sealed condition is incomplete and hence the evidence in the form of tape-recorded conversation cannot be relied upon.

8. In view of the testimony of PW1 and PW 6 and the statutory presumption under Section 20(2) of the P.C. Act, the conviction of the Appellant for the offence punishable under Section 12 of the P.C. Act is upheld. The Appellant has undergone a sentence of imprisonment for 10 days and deposited the fine amount. The minimum sentence prescribed for an offence punishable under Section 12 of the P.C. Act is imprisonment for a period of six months which may extend up to five years. Since the Appellant is now 88 years old, the sentence of the Appellant is modified to the period of Rigorous Imprisonment for six months.

9. The appeal is accordingly, disposed of. The bail bond and surety bond of the Appellant are cancelled. The Appellant be taken into custody to undergo the remaining sentence.

(MUKTA GUPTA)
JUDGE

JANUARY 7th, 2011/dk