

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

+ **CRL.A. 453/2003**

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Reserved on: 7th March, 2013

Decided on: 23rd May, 2013

I.P.S. AHLUWALIA

..... Appellant

Through Mr. Ashok Bhasin, Sr. Adv. with Mr.
Sunklan Porwal, Mr. Arav Kapoor,
Mr. Anubhav Bhasin, Adv.

versus

C.B.I.

..... Respondent

Through Mr. P.K. Sharma, Standing Counsel
with Mr. Anil Kr. Singh, Adv.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal the Appellant assails the judgment dated 7th July, 2003 convicting the Appellant for offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (in short the PC Act) and the order on sentence dated 8th July, 2003 directing the Appellant to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs. 5000/- and in default of payment of fine to further undergo rigorous imprisonment for six months on each count.

2. Learned counsel for the Appellant submits that statements of the complainant, his wife PW4 and PW9 are not corroborated either by the shadow witness or the recovery witness. Further even as per the

complainant himself the order on the valuation of the Assistant Commissioner had already been passed by the Deputy Commissioner which was in the knowledge of the complainant and thus the Appellant had no role in allegedly showing favour by under-valuing. The complainant stated that the alleged incident took place on 2nd January, 1996 which has been ignored by the learned Trial Court as a minor discrepancy. The Appellant was not the adjudicating authority nor the valuing authority and thus had no role to play and could not have thus demanded the bribe. As per the case of the prosecution, the Appellant is alleged to have given his name and phone number to contact him which was seized, however the same was never sent to CFSL nor produced in evidence to show that the same was written by the Appellant. Further there is no material on record to show that the telephone number written on the chit or on the one on which alleged call was made belonged to the Appellant. Facts that have not been proved have been asked in the statement under Section 313 Cr.P.C. thus causing serious prejudice to the Appellant. The voice samples of the Appellant were not taken and the alleged tape-recorded version was never sent to the CFSL. All the three independent witnesses i.e. PW3 Sangeeta Madan, PW6 P.L Bains and PW7 V.K. Sharma, the witnesses of alleged recovery have turned hostile. PW4 the complainant was not competent to have recognized and proved the voice of the Appellant as even as per the case of the prosecution, he met the Appellant only once. As per PW4 himself he was a regular visitor to foreign countries as he was doing musical programmes, hence he was duly aware of the intricacies at the airport and thus he was not required to ask the same from anybody. Both PW4 and PW9 admit having deposited the fine of Rs. 1000/- each and hence no cause for demanding bribe from the PW4 arose.

PW8 S.K. Peshin, Trap Laying Officer (TLO) admits that he was outside when the alleged transaction took place and thus he was neither a witness to the demand nor acceptance. Two Police witnesses i.e. S.I. Shobha Dutta and DSP Ramnish, who were inside have not been examined. Further PW8 stated that the money was taken in the right hand and kept in the left pocket whereas PW4 and PW9 stated that the same was kept in the right hand side pocket. Copies of the transcript were neither sealed nor deposited in malkhana. As per PW9 the pocket wash was not pink in colour. Reliance is placed on *Nilesh Dinkar Paradkar (2011) 4 SCC 143*; *Ram Singh & Ors. Vs. Col. Ram Singh AIR 1986 SC 3*; *Asraf Ali Vs. State of Assam (2008) 16 SCC 328*; *Meena Vs. State of Maharashtra (2000) 5 SCC 21* and *Dev Raj Arora Vs. State (Thr. CBI) 2012 (2) JCC 1045*.

3. Learned counsel for the CBI on the other hand contends that part testimony of hostile witnesses can also be looked into which corroborate the prosecution case. The prosecution case stands proved by PW4, the complainant and PW9 his companion. Part testimonies of PW3, PW6 and PW7 also corroborate the version of the complainant that the Appellant demanded bribe and accepted the same. PW4 and PW9 have categorically stated that the money after receiving was kept in the right hand side pocket and the same was washed which gave pink colour. PW6 supports the case of the prosecution to the extent that the currency notes were seized and on comparison the numbers were tallied. Further in view of the fact that in the statement under Section 313 Cr.P.C., the Appellant has given incorrect answers to question numbers 27 to 30 by giving a complete denial, the same is required to be used against him. During the course of arguments learned

counsel for the CBI admitted that in view of the fact that the tape-recorded conversation was neither sealed nor the voice sample was identified by a person acquainted nor sent to the CFSL, the said evidence cannot be looked into. In view of the fact that the demand and acceptance has been proved, presumption under Section 20 of the PC Act is duly raised against the Appellant, who has not discharged the burden that shifted on him by giving cogent explanation in the statement under Section 313 Cr.P.C. Reliance is placed on *Krishna Ram Vs. State of Rajasthan* (2009) 11 SCC 708; *State represented by CBI, Hyderabad Vs. G. Prem Raj* (2010) 1 SCC 398; *Subbu Singh Vs. State by Prosecutor* (2009) 6 SCC 462.

4. I have heard learned counsel for the parties and perused the record. Briefly the facts giving rise to the filing of the present appeal are that PW4 and PW9 travelled from Bangkok to New Delhi on 31st December, 1995. At the airport, custom officials found certain articles on which custom duty was required to be levied, thus detention receipts were given to both of them and they were asked to come on 2nd January, 1996 to the customs warehouse. On 2nd when PW4 reached the customs warehouse, the Appellant asked him to come on the next day. The valuation of the goods was carried out and duty was calculated to be Rs. 20,000/- besides the penalty of Rs. 5000/- each. In this regard order was passed by PW5, however the Appellant allegedly retained the receipt and adjudication order. He demanded Rs. 10,000/- and a girl for showing favour by undervaluing the goods and returning the receipts. As PW4 was not carrying extra money, he sought time from the Appellant to make arrangements and to contact him on the telephone which phone number was written by the Appellant on a chit. Thus, PW4 lodged the

complainant with the CBI. Thereafter a phone call was made to the Appellant which was recorded in the presence of independent witnesses. The meeting was fixed at a restaurant and Rs. 10,000/- was handed over by PW4 as trap money. After the Appellant accepted the money at restaurant New Minar he was apprehended and necessary post-trap proceedings conducted.

5. PW4, the complainant in his testimony before the Court reiterated his complaint and stated that when he along with his partner PW9 was going out through green channel exit, some custom officials sent them to the custom counter for examination of the luggage. The luggage was opened and the custom Superintendent manning that counter demanded illegal gratification of Rs. 50,000/- from him for clearing his luggage. He told that he was carrying duty payable articles and aforesaid duty on calculation shall be of heavy amount. On this he had an argument with the aforesaid custom officer and the Assistant Collector of Customs arrived at the counter and asked him “Aap Kaya Chahte Hoo”. He told that he was not interested in getting the luggage assessed to custom duty during his shift because they were charging excessive custom duty. On this, his luggage was sent to arrival warehouse without any valuation for the custom duty. A receipt of the same was given to him and he was allowed to go. Two days later he and Prati Sethi again went to the airport in the morning where they met the Appellant. He opened his and Prati Sethi’s luggage in their presence and they were later separately called by the Assistant Collector, Customs Shri Ashok Mehta in his cabin. When he came out of the cabin of the Assistant Collector, the Appellant suggested that he would assess their luggage at a very less valuation and for

the aforesaid favour he demanded a gratification of Rs. 10,000/- by saying “Iske Badle Aapko Dus Bazaar Rupye Dene Pareng”. He told the Appellant that he was not carrying the money with him and after that the Appellant folded the paper on which he had done the valuation of the luggage for custom duty and kept in his pocket. On that valuation the Assistant Collector had already appended his signatures. Thereafter they came back from the IGI Airport and talked to a friend who advised them to report the matter to the Anti-corruption branch of CBI. He clarified that he was not aware whether the valuation report was prepared on 2nd January, 1996 or on some other date. At the CBI office he met the Trap Laying Officer PW8 S.K. Peshin and a S.P. who enquired from the complainant his problem. The complainant informed his problem and also stated that the Appellant had given him his phone number at the time of demand with directions that after arranging the money he should call on that phone number at around 8.30/ 8.45 PM. PW8 asked the complainant to ring the Appellant on the phone that the money was not arranged to which he responded by saying “Kal Agar Ho Jayega to Mujhe Inform Kar Dena”. The slip of the paper containing the telephone number and the name of the Appellant was exhibited as Ex.PW4/A and the complaint as Ex.PW4/C. The witness further clarified that when the accused made the demand of Rs. 10,000/- he also told him to bring some lady for him in a hotel. Then on 5th January, 1996 entire recording arrangement was made in the CBI office and the complainant called up the Appellant on the phone number given, however nobody picked up. Finally at about 8.30 PM on 5th January, 1996 one lady picked up the telephone on the other end and called the Appellant. The complainant informed him that he had arranged the money and a girl for

his entertainment to which the Appellant asked him to call him again on Sunday 7th January, 1996 at about 10.00 AM. The said audio cassette was taken out and seized vide Ex. Memo PW4/D. The complainant again went to the CBI office on Sunday at 9.00 AM and in the presence of panch witnesses, again the tape-recording was conducted on a fresh blank cassette. During the conversation the time of around 2.30 PM was fixed at M-Block Market, Greater Kailash, Part-I at New Minar Restaurant. This audio cassette was also seen and seized vide Ex.PW4/A. All the pre-raided proceedings were conducted and at the appointed time he along with Prati Sethi and Sangeeta Narula went inside New Minar Restaurant and occupied the table. Inspector Shobha Dutta and one other male CBI officer also occupied a table in the hotel. After some time the complainant went to receive the Appellant near the shop of M/s Rama Jewellers who had come in a blue Maruti car. The Appellant enquired as to where they were going and he told that they were going to New Minar Restaurant. The complainant, Appellant and his companion occupied the same table where Sangeeta Narula and Prati Sethi were sitting. They had the refreshments and the Appellant stated to Prati Sethi that whenever they come back they should arrange “that the baggage is sent in next flight which automatically comes to the warehouse on which his duty was fixed”. On this Prati Sethi asked as to how much they take for one suitcase. The Appellant quoted Rs. 20,000/- or whatever be the item. Thereafter, the complainant stated as to whether he had the order passed in respect of his case in his pocket and stated that “ Aap Paisa Mujhse Le Lo Aur Order Mujhe De Do”. To this the Appellant replied” Orders to Mere Paas Nahin Hain Shayad Office Mein Honge”, “Aap Kal Aa Jao”. On this the complainant said that he could not come the next

day and the Appellant replied that he should give the authority to the Prati Sethi to come and collect it. Thereafter the Appellant stated that he would not take money from the lady and he should give the same here itself. The complainant took out Rs. 10,000/- from his pocket and gave to the Appellant who accepted the same with his right hand and kept in the right side pocket of his pant. The pre-appointed signal was given and Inspector Shobha Dutta apprehended the Appellant from his right wrist. The money recovered was counted and his right hand and the right side pocket of the pant were dipped and the solution turned pink.

6. Though the transcript was played in presence of PW4 and he identified the voice, however as fairly conceded by the learned Spl. PP for the CBI, this cannot be looked into in evidence for the reason that neither the voice has been proved to be that of the Appellant nor the prosecution has proved that there was no tampering with the tape-recorded version. Thus, this Court is left with the testimony of PW4 and PW9 his companion who also corroborated the version of the complainant on all material aspects.

7. It may be noted that the independent witnesses PW3, PW6 and PW7 have turned hostile and learned counsel for the Appellant lays a great stress thereon to state that in view of the fact that public witnesses have turned hostile, no credence can be placed on the testimony of the two interested witnesses PW4 and PW9 who according to PW4 are husband and wife. Even otherwise they are the partners. PW3 Ms. Sangeeta Madan Shadow witness has supported the prosecution case with regard to pre-raided formalities. Though this witness support to the extent that I.P.S. Ahluwalia along with his cousin came to the spot at the restaurant, however she stated

that she does not remember the conversation that took place between the complainant and the accused. However, in the cross-examination by the learned PP, she admitted that the Appellant demanded money and stated “Achcha Lao Das Hazaar Rupye”. In the cross-examination she further accepted that the right hand of the Appellant was dipped in the solution and the same turned pink. She has stated that she cannot reproduce the conversation verbatim as it took place. Rightly so as it is generally difficult for any witness to remember the conversation verbatim after a period of more than 5 and a half years as the Appellant was apprehended on 7th January, 1996 and this witness was examined on 22nd August, 2001. PW6 Shri P.L. Bains the other witness to recovery has also turned hostile and has been cross-examined by the learned prosecutor. However, this witness was not a witness to demand and acceptance. Further PW7 Shri Vijay Kishan Sharma has also not supported the prosecution case.

8. It is thus evident that the prosecution has left with the part testimony of PW3, PW4 and PW9. The version of PW4 has been fully corroborated by PW9 who is stated to be the companion of PW4. Despite PW3, PW6 and PW9 turning hostile, the conviction can safely be based on testimony of PW4 which is duly corroborated by PW9 and PW8 the Trap Laying Officer in case the same is reliable.

9. According to the learned counsel for the Appellant, the Appellant was not the competent authority to assess the goods and to adjudicate thereupon. He had only prepared the list of goods under the supervision of Superintendent. From the evidence on record it is evident that even though Appellant may not be an adjudicatory officer, however he was nonetheless a

part of the system and was required to prepare the list based upon which duty was to be calculated. No doubt PW5 in his statement has clearly illustrated the system as per which the Appellant was not enjoined with any power of adjudication, however as stated above on the basis of list of goods prepared by the Appellant, the duty was calculated and thus he was an essential part of the chain, de-hors the fact that he had no jurisdiction to reduce custody duty/valuation.

10. Learned counsel for the Appellant has urged that the slip whereby the Appellant had written his telephone number was not sent to the CFSL for expert examination. No doubt this corroborative piece of evidence has not been adduced by the prosecution, however the same does not belie the otherwise credible testimony of PW4 who has clearly proved the demand and acceptance. Testimony of this witness has been duly corroborated by PW3 an independent witness and PW8 the Trap Laying Officer. Further in view of the demand and acceptance being proved, presumption under Section 20 of the PC Act is raised qua Section 7 PC Act which has not been rebutted by the Appellant. De-hors the fact that the prosecution has not been able to prove the tape-recorded conversation as per the law laid down, there is sufficient material on record in the form of testimony of PW4, PW9 and PW8 the Trap Laying Officer which has proved the case of the prosecution beyond reasonable doubt.

11. It may be noted that in *Dev Raj Arora* (supra) relied upon by the learned counsel for the Appellant this Court held that the initial burden is to be discharged by the prosecution to prove demand and thereafter presumption under Section 20 is applicable. In the present case the

prosecution has proved the initial demand through the evidence of witnesses as stated above. As regards the contention of learned counsel for the Appellant that Appellant was examined under Section 313 Cr.P.C. on the basis of facts which were not even proved, it may be noted that no question has been pointed which has not been proved from the testimony of witnesses as stated above. Merely because there is no corroboration to certain facts from independent witnesses, the same cannot be said to be not proved. Thus, the decisions as relied upon are not applicable to the facts of the present case.

12. Appeal is accordingly dismissed. Bail bond and surety bond are cancelled.

(MUKTA GUPTA)

MAY 23, 2013
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