

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: March 19, 2014

Decision on: March 21, 2014

CRL.A. No. 48 of 2008

HARI SHANKAR SHARMA

..... Appellant

Through: Mr. Sachin Chopra, Mr. Kamal

Bansal and Mr. Sidhant, Advocates.

versus

CENTRAL BUREAU OF INVESTIGATION Respondent

Through: Mr. Manoj Ohri, Special
Public Prosecutor.

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

21.03.2014

1. This appeal is directed against the judgment dated 1st November 2007 passed by the Special Judge in CC No. 59/02 convicting the Appellant for the offences under Section 7 and 13(2) read with 13(1)(d) of the Prevention of Corruption Act, 1988 ('PC Act') and the order on sentence dated 6th November 2007 sentencing the Appellant to undergo rigorous imprisonment ('RI') for two years and to pay a fine of Rs. 25,000 and in default, to undergo simple imprisonment ('SI') for six months for the offence under Section 7 of the PC Act and to undergo RI for four years and to pay a fine of Rs. 50,000 and in default, to undergo SI for six months for the offence under Section 13(2) read with 13(1)(d) of the PC Act.

2. The case of the prosecution is that the Appellant was working as a Junior Engineer ('JE') in the Commercial Land Department of the Delhi Development Authority ('DDA') in the year 1998. The Complainant, Mahinder Pal Singh (PW4) is stated to have been running a public call office ('PCO') in an open space outside AB-11, Safdarjung Enclave, New Delhi in the handicapped category allotted by the Mahanagar Telephone Nigam Limited ('MTNL') in 1984. PW4 is stated to have started a photo studio in the name of Shilpi Studio in 1997. He then started operating the PCO booth at another place in the same block.

3. In the complaint lodged by PW4 with the Superintendent of Police ('SP'), Anti Corruption Branch ('ACB') of the Central Bureau of Investigation ('CBI') on 10th August, 1998, he alleged that, on 6th August 1998, the Appellant had come to his studio and informed him that the studio was an unauthorised encroachment, which was not approved by the DDA. The Appellant is stated to have further informed PW4 that if he did not wish the construction to be demolished, he should pay a bribe of Rs. 5,000 to the Appellant.

4. In his complaint lodged on 10th August 1998, PW4 further alleged that the Appellant had visited his PCO on 10th August 1998 at 1 pm when PW4 was not present there. The Appellant is then alleged to have called PW4 on his mobile phone from the telephone located in the PCO booth and asked him to get the bribe amount ready and that he would come in the evening to collect it around 5 pm. PW4 is alleged to

have informed the Appellant that he would not be able to pay that amount, but the Appellant, however, told him that the matter would be sorted out in the evening.

5. On receipt of the written complaint of PW4, Inspector K. Babu (PW10) was directed by the SP, CBI to verify the complaint, after registering the case. Two independent witnesses, Jagdish Prasad Meena (PW6) and Raj Kumar (PW8) were arranged. PW4 is stated to have produced Rs. 3,000 in the form of 3 government currency ('GC') notes of Rs. 500 each and 15 GC notes of Rs. 100 each. Their numbers were noted down by PW10 in the handing over memo (Ex.PW4/B). The GC notes were treated with Phenolphthalein powder and a demonstration was arranged by Inspector Surender Malik on the directions of Inspector K. Babu (PW10) in the presence of PWs 6 and 8. PW6 was asked to act as a shadow witness and to remain as close as possible to PW4 to hear the conversation between him and the Appellant and to give a signal on the payment of the bribe amount. A remote mic-cum-transmitter and another micro cassette recorder ('MCR') were given to PW4 with the direction to switch it on before contacting the Appellant.

6. The trap team reached the DDA Local Shopping Centre at Safdarjung Enclave at about 4:50 pm. PWs 4 and 6 were directed to proceed to the PCO and the other members of the raiding team took suitable positions outside the booth. At around 5:50 pm, the Appellant parked his two-wheeler scooter near the PCO and entered the booth.

There was a brief conversation between PW4 and the Appellant. PW4 is stated to have informed the Appellant that he could arrange only Rs. 3,000 and the Appellant agreed to accept the same.

7. PW4 then took out the treated GC notes from the left side pocket of his shirt and handed it over to the Appellant. The Appellant accepted the amount by his right hand and touched the same with his left hand and thereafter kept it in the right pocket of his pant. As the Appellant left the PCO, PW6 gave the pre-determined signal whereupon the trap team rushed towards the Appellant.

8. The Appellant was secured by both of his wrists by Inspector Surender Malik and the Sub-Inspector T.K. Roy. PW10 challenged the accused about whether he had accepted the bribe amount. The Appellant is stated to have kept silent. The Appellant was then escorted to the PCO booth of PW4. The right and left hand washes of the Appellant, taken one after the other, turned pink. These were sealed and labelled in separate bottles. PW8 is stated to have recovered the bribe amount from the right side pant pocket of the Appellant. The number on the said notes tallied with those noted in the handing over memo. The wash of the inner lining of the right pocket was also taken and that also turned pink.

9. The conversation recorded on the MCR was played and the copies of the conversation from the audio cassette were prepared. A site plan was prepared and the Appellant was arrested.

10. The investigation of the case was handed over to the Investigating Officer ('IO'), Mr. Virender Thakran (PW11). After obtaining the sanction from Mr. P.K.Hota, the then Vice-Chairman of the DDA, a chargesheet was filed in the Court.

11. The learned trial Court framed the charges against the Appellant under Section 7 and 13(2) read with 13(1)(d) of the PC Act. The prosecution examined 11 witnesses.

12. In his statement under Section 313 Cr.P.C., the Appellant stated that he had been apprehended by the CBI around 7:30 pm outside the PCO booth and that he had been implicated in a false case. In response to a question as to why the case has been instituted against him, the Appellant stated as under:

“Complainant M.P. Singh is in league with the officials of the CBI. He has filed some false complaints against public servants on earlier occasion also which I have come to know from the news reports. The matter of unauthorised construction or encroachment on public land was not within my ambit as the area was in the jurisdiction of MCD. He implicated me in this case falsely so that the violation of the conditions of lease committed by the allottees may not be checked by me.”

13. The Appellant examined Mr. Ramesh Chandra, Assistant Land & Building Department, Government of National Capital Territory of Delhi ('GNCTD') as DW1. This witness proved that the commercial

land in the area between block A and B, Safdarjung Enclave, has been transferred from DDA to the Municipal Corporation of Delhi ('MCD') with effect from 1st August 1989. The Appellant next examined Mr. Om Prakash Rohilla, an Upper Division Clerk ('UDC') of the Commercial Land Department of the DDA as DW2. DW2 proved that the allottee of the plot AB-11, Safdarjung Enclave had deposited the requisite ground rent and interest on 10th September 1990 but was in arrears of lease rent as on 14th July 1996. Mr. Rajinder was examined as DW3. He was running a tea stall in AB block, Safdarjung Enclave. DW3 stated that one Mr. Sudhir Gupta had approached PW4 in 1998 for getting his case solved with the DDA, stating that he was being harassed by the DDA. DW3 claimed that PW4 had told him that he would involve the DDA officials on the pretext of payment of the lease rent and accordingly framed a case against the DDA official in 1998. He further stated that PW4 was a Special Police Officer ('SPO'). DW3 stated that police officials and one CBI Inspector, Mr. Singh used to visit PW4. In his cross-examination, DW3 stated that he was supplying milk in Sector-19, Faridabad, Haryana since 2000. He had no personal knowledge of the case. DW3 claimed that he had no friendly terms with PW4, who used to come to his shop for taking tea. Mr. Ajay Mishra, UDC in the Department of Urban Development, GNCTD was examined as DW4. He stated that the Notification dated 31st May 1989 was not available since the record was more than 17 years old.

14. Before the learned trial Court, it was submitted on behalf of the Appellant, that the sanction order (Ex. PW1/A) passed by PW1 was

illegal. It was submitted that it was vitiated by non application of mind, by PW1, to the relevant material. It was argued before the learned trial Court, and it has been reiterated before this Court by Mr. Sachin Chopra, learned counsel for the Appellant, that the cross-examination of PW1 revealed that he had not examined the relevant materials in the case. In particular, it was submitted that the sanction order did not mention that PW1 had gone through the statements of witnesses and the material collected by the IO, including the tape recording in the cassette.

15. The learned trial Court rejected the above plea by holding that Ex.PW1/A did show that PW1 had gone through the records of the case. Since the recovery memo (Ex. PW4/D) mentioned that copies of the audio cassette were made from the music shop in the shopping complex at Safdarjung Enclave, it could not be said that the audio cassette had not been sent to PW1. Mr. Chopra assailed the above finding as being contrary to the record.

16. This Court has examined the sanction order as well as the deposition of PW1. The only question asked of PW1 concerned the draft sanction order prepared by the CBI. PW1 stated that he had not given the details of the witnesses of the documents perused by him before granting of the sanction. He could not recollect if the cassette was sealed or not. In response to another question, he stated that the letter of request (Ex. PW-1/C) received from the SP contained only one enclosure, i.e., the draft sanction order. He denied the suggestion

that he had not heard the cassette. In response to another question, he stated “It is wrong to suggest that CBI had sent only a report of the SP and calendar of evidence prepared by the SP.” There was nothing in the cross-examination to indicate that PW1 had in fact not seen the entire record of the case. It is, therefore, not possible to accept the submission of Mr. Chopra that PW1 mechanically granted sanction without applying his mind to the relevant material.

17. Also, merely because the order granting sanction repeats the text of the draft sanction order cannot, *ipso facto*, mean that it is vitiated by non-application of mind. In ***Indu Bhusan Chatterjee v. State of West Bengal AIR 1958 SC 1482***, the Supreme Court held that if the competent authority, after perusing the material, signed a draft sanction order, it could not be said to be suffering from non-application of mind. Further, in ***State of Bihar v. P.P. Sharma AIR 1991 SC 1260***, the Supreme Court held that the order of sanction need not contain the detailed reasons in support thereof. This Court is, therefore, unable to agree with the submission of Mr. Chopra that the sanction order stood vitiated on account of non-application of mind by PW1 to the relevant materials.

18. Mr. Chopra then proceeded to deal with the evidence of PWs 4, 6, 8 and 9. According to him, PW4 was an unreliable witness. He pointed out that PW4 admitted that he did not know English and that he had written down the complaint in English on the dictation of the CBI officials. In his complaint, he stated that the Appellant had come to his

studio on 6th August 1998, whereas, in his deposition in Court, in his examination-in-chief itself, he contradicted his version by stating that one Mr. R.P. Gautam (examined as PW3) came along with the Appellant. Further, PW4 did not support the prosecution on the aspect of taping of the conversation inside the PCO on 10th August 1998. He also did not support the prosecution as to the manner in which the bribe amount was accepted by the Appellant. The case of the prosecution was that the Appellant had accepted the bribe amount with his right hand and kept in the right side pant pocket. PW4 stated that he had in fact taken out the money and kept it on the table. The Appellant then took out the money with his left hand and kept it in the left side pant pocket. As a result of the above contradictions, the learned Special Public Prosecutor ('SPP'), CBI was permitted to cross-examine PW4. Mr. Chopra submitted that as regards the demand by the Appellant of the bribe amount, the only evidence with the prosecution was that of PW4. Since PW4 was himself an unreliable witness, and was not corroborated by any other independent evidence, there was no reliable evidence as regards the demand of the bribe by the Appellant.

19. Mr. Chopra further submitted that although Mr. R.P. Gautam was himself examined as PW-3, the burden was on the prosecution to find out why there was no mention by the PW-4 when he first gave his statement to the police. Mr. Chopra placed reliance on the decisions in ***Rakesh Kapoor v. State of Himachal Pradesh 2013 (1) Crimes 92 (SC)***, ***State of Punjab v. Madan Mohan Lal Verma AIR 2013 SC***

3368, State of Maharashtra v. Dnyaneshwar Laxman Rao Wankhede (2009) 15 SCC 200, Mukut Bihari v. State of Rajasthan (2012) 11 SCC 642 and T. Subramanian v. The State of Tamil Nadu AIR 2006 SC 836. As regards PW-6 Mr. Chopra submitted that he admitted to being pressurised by the CBI to depose in favour of the prosecution. Further he too did not support the prosecution on the alleged manner of receipt of the bribe amount by the accused.

20. In the instant case there were two public witnesses who constituted the trap team. While PW-6 was the shadow witness, PW-8 along with the trap team arrived at the spot after the pre-determined signal was given by PW-6 who accompanied PW-4 when the latter was met by the Appellant. The evidence of PW-4 is consistent as regards the demand of the Appellant for the bribe money on 6th August 1998 and at the spot on 10th August 1998. While it is true that only he and the Appellant are parties to the transactions during which the demand was made, this has to be seen in the context of the other evidence. PW-6 also talks of the bribe money being paid to the Complainant. In his examination-in-chief recorded on 7th February 2006, PW-6 clearly stated “Hari Shankar came and demanded money from the Complainant Mahender Pal who gave the bribe amount of Rs.3,000 to him.” This witness correctly identified the Appellant in the Court. He further stated that the Appellant “took the money with his right hand, touched them with left hand and kept the same in the right side pant pocket.” He also spoke of the hand washes turning pink. The cross-examination by the PP was only on the question whether the hand

washes were taken simultaneously or one after the other. PW-6 clarified that they were taken separately. As regards the cross-examination of PW-6 on 24th August 2006 nearly six months later, he stated that his back was towards the accused and “I did not hear the talks of the accused Hari Shankar and the Complainant Mahender Pal.” This did not mean that there was no talk at all between PW-4 and the Appellant. It cannot, therefore, be said that this evidence completely contradicts the evidence of PW-4 who also consistently stated that “Hari Shankar asked me whether money had been arranged.” On the above aspect even in the cross-examination of PW-4 nothing has been elicited by the defence which can throw doubt on the fact that when the Appellant came to the PCO he did make a demand for the bribe money. This Court is, therefore, not persuaded to hold that there is no reliable evidence as regards the demand of bribe money by the Appellant on 10th August 1998.

21. Although Mr. Chopra sought to suggest that PWs-4, 6 and 8 turned hostile, that would not mean that their entire evidence shall be rejected. As pointed out by the Supreme Court in *Haradhan Das v. State of West Bengal (2013) 2 SCC 197* “it is a settled principle of law that the statement of a witness which has been declared hostile by the prosecution is neither admissible nor is it of no value in its entirety. The statement particularly the examination-in-chief insofar as it supports the case of the prosecution is admissible and can be relied upon by the Court.” Although Mr. Manoj Ohri, learned SPP drew the attention of the Court to the decision in *Khujji v. State of Madhya*

Pradesh (1991) 3 SCC 626 to urge that the fact that a public witness turns hostile during cross-examination which took place more than a month after his examination-in-chief need not be viewed as completely destroying the prosecution case, the Court finds that in the present case the answers given by the above witnesses as regards the demand and acceptance of bribe by the Appellant are consistent. In *State of UP v. Zakaullah AIR (1998) 1 SCC 557* the reasons for not accepting the evidence was because “nobody overheard the demand made by the Respondent for bribe and that the amount was found not in the right pocket but only on the left pocket.” This was termed by the Supreme Court as “flippant grounds which should never have merited consideration”. In the present case, the cross-examination of PWs-4, 6 and 8 was essentially on the aspect whether the accused accepted the bribe with his right hand or left hand. The cross-examination on behalf of the accused did not suggest that the accused never accepted the bribe amount.

22. The Court finds that in his answers under Section 313 CrPC, the accused had not denied that he was present at the spot. He has further not offered any explanation whatsoever as to why he was at a PCO booth in Safdarjung Enclave in the evening hours of 10th August 1998.

23. The trial court has itself not placed reliance on the tape recorded conversation as it was inaudible. Even the link evidence in that regard was not proved. Even the hand washes turning pink have not been relied upon by the trial Court. In that view of the matter, the

inconsistent answers of the public witnesses as regards the tape recorded conversation do not have to be considered.

24. The law regarding the presumption under Section 20 of PC Act has been explained in several decisions by the Supreme Court, some of which were referred to by the learned counsel for the Appellant. The law has been succinctly summarised in *Mukut Bihari v. State of Rajasthan* as under:

“11. The law on the issue is well settled that demand of illegal gratification is sine qua non for constituting an offence under the 1988 Act. Mere recovery of tainted money is not sufficient to convict the accused, when the substantive evidence in the case is not reliable, unless there is evidence to prove payment of bribe or to show that the money was taken voluntarily as bribe. Mere receipt of amount by the accused is not sufficient to fasten the guilt, in the absence of any evidence with regard to demand and acceptance of the amount as illegal gratification, but the burden rests on the accused to displace the statutory presumption raised Under Section 20 of the 1988 Act, by bringing on record evidence, either direct or circumstantial, to establish with reasonable probability, that the money was accepted by him, other than as a motive or reward as referred to in Section 7 of the Act, 1988. While invoking the provisions of Section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. The complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the

same way as that of any other interested witness and in a proper case the court may look for independent corroboration before convicting the accused person.”

25. In light of the above law when the evidence in the present case is analysed, it is seen that the demand and acceptance of illegal gratification has been proved beyond all reasonable doubt. Further the Appellant has not been able to displace the presumption under Section 20 of the PC Act by the evidence adduced by him. The Court is satisfied that the evidence of PW-4 in the instant case cannot be termed as interested and that there is sufficient corroboration of the evidence by the other witnesses including the testimonies of the police officials.

26. Turning to the question of sentence, Mr. Chopra pointed out that the Appellant had undergone about eight months of judicial custody during the pendency of the trial. The incident was of August 1998 nearly sixteen years ago, and the Appellant was nearly 60 years old. Accordingly, without prejudice to his submissions on merits, Mr. Chopra pleaded that a more lenient view may be taken of the sentence.

27. Keeping in view the above factors and the submissions of Mr. Chopra, this Court while not being inclined to interfere with the conviction of the Appellant is inclined to take a more lenient view as regards the sentence.

28. For the aforementioned reasons, this Court declines to interfere with the judgment dated 1st November 2007 passed by the Special

Judge convicting the Appellant for the offences under Section 7 and Section 13(2) read with Section 13(1)(d) PC Act. However, the order dated 6th November 2007 on sentence passed by the Special Judge is modified by sentencing the Appellant to undergo one year's RI and to pay a fine of Rs.25,000 and in default to undergo SI for six months for the offence under Section 7 of PC Act and sentencing him to RI for one year and to pay a fine of Rs.50,000 and in default to undergo SI for six months for the offence under Section 13(2) read with Section 13(1)(d) PC Act. It is directed that both sentences shall run concurrently.

29. The Appellant shall be taken into custody forthwith to serve out the remainder of his sentence. His bail bonds and surety bonds are accordingly cancelled.

30. The appeal is disposed of in the above terms. A copy of the judgment be given *dasti* to learned counsel for the parties under signature of the Court Master.

S. MURALIDHAR, J.

MARCH 21, 2014

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