

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: March 3, 2014

Decision on: March 25, 2014

CRL.A. 89 of 2009

RAJESH GUPTA

..... Appellant

Through: Mr. Arvind K. Nigam, Senior
Advocate with Mr. Subhiksh Vasudev,
Mr. Abhishek Singh, Mr. Atul T.N., Advocates.

versus

**STATE THROUGH
CENTRAL BUREAU OF INVESTIGATION**

..... Respondent

Through: Mr. Narender Mann, Special Public
Prosecutor with Mr. Manoj Pant and
Ms. Utkarsha Kohli, Advocates.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT
25.03.2014

1. This appeal is directed against the judgment dated 24th January 2009 passed by the Special Judge, Central District-02, Delhi in CC No. 195/01 convicting the Appellant for the offences under Sections 7 and 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 ('PC Act') and the order on sentence dated 27th January 2009 whereby for the offence under Section 7 of the PC Act, the Appellant was sentenced to two years rigorous imprisonment ('RI') with a fine of Rs. 15,000 and in default of payment of fine, further simple imprisonment ('SI') for 30 days and for the offence under Section 13 (2) read with

Section 13 (1) (d) of the PC Act, to RI for 2½ years and fine of Rs.15,000 and in default to undergo SI for 30 days. Both sentences were directed to run concurrently. By an order dated 4th February 2009 while admitting the appeal, the sentence awarded to the Appellant was suspended.

The case of the prosecution

2. The case of the prosecution is that Mrs. Madhu Bala, the Complainant (PW-3) was running a business of packing, shipping and a travel agency under the name and style of M/s. Duro Pack at C-4/67, SDA, New Delhi and was filing her income tax returns ('ITRs') regularly. The ITR filed by her for the assessment year 1997-98 was under scrutiny with the Appellant who was the Assistant Commissioner of Income Tax ('ACIT'), Circle 20 (1). The office of the Appellant was at Room No. 163, C.R. Building, ITO Delhi. On 7th March 2000, PW-3 met the Appellant for ascertaining whether any further information was required for the ITR filed by her. According to PW-3, the Appellant demanded a bribe of Rs.75,000 from her to clear her case. On her repeated request, the bribe amount was reduced to Rs.50,000 and the Appellant informed her that he would let her know finally in a day or two. PW-3 is then supposed to have sought some time to make payment as it was a large sum. However, PW-3 did not want to pay any bribe and thus lodged a complaint with the Central Bureau of Investigation ('CBI'), Anti Corruption Branch ('ACB') on 9th March 2000.

3. The further case of the prosecution is that at around 10.30 am, PW-3 gave an oral complaint to the Superintendent of Police ('SP'), CBI, ACB

about the alleged demand of a bribe by the Appellant. The SP directed Inspector Azad Singh (PW-12) to verify the genuineness of the complaint. After arranging an audio cassette and ensuring that it was blank PW-12 in the presence of two independent witnesses i.e. Mr. V.S. Chauhan, Eviction Inspector (PW-5) and Mr. Virendra Prasad, Superintendent (PW-4) both from the Directorate of Estates, New Delhi recorded a conversation made by PW-3 to the Appellant on telephone No. 3316392 (of the ITO) from telephone No. 4362460. According to the prosecution, the conversation revealed that PW-3 had repeatedly requested the Appellant to reduce the bribe amount and the Appellant had asked her to come at around 4 pm to pay whatever amount she had collected by that time. The original cassette was sealed. A memo (Ex.PW-3/A) of the telephone conversation was prepared. The conversation is stated to have commenced at 11:30 am and concluded at 11:45 am.

4. It was thereafter decided to lay a trap for the Appellant. PW-3 then submitted a written complaint (Ex.PW-3/B) on the basis of which a case was registered by the CBI and entrusted to PW-12 for laying a trap. A trap team of CBI officers along with PW-3 and PWs-4 and 5 was constituted. PW-3 produced Rs.15,000 in the form of a hundred government currency ('GC') notes of Rs.100 each and a hundred GC notes of Rs.50 each. The serial numbers of the notes were noted down in an annexure to the handing over memo (Ex. PW-3/C and 3/C-1). The GC notes were treated with phenolphthalein powder by PW-12 and a practical demonstration through PW-4 was given.

5. The tainted GC notes were kept in the hand bag of PW-3. The instructions to PW-3 were that she had to hand over the tainted GC notes to the Appellant only on specific demand; she had to take PW-5 along with her so that PW-5 could see and overhear the conversation between PW-3 and the Appellant while the bribe transaction was being completed. She was further instructed to switch on the micro cassette recorder (MCR) before entering the room of the Appellant. PWs-3 and 5 were directed to give a signal to the trap team by scratching their heads when the transaction was completed. This apart, an automatic transmitter-cum-recorder (TCR) was given to PW-5 to record the conversation which was likely to be held between Appellant and PW-3. Thereafter the trap team left for the spot.

6. On reaching the spot, PW-3 sent a chit to the Appellant through his peon Mr. Biharilal (PW-13). However, the Appellant permitted only PW-3 to enter the office. As a result, PW-5 remained waiting at the door. At around 4:40 pm, PW-3 came out of the room of the Appellant and gave the pre-appointed signal to the trap team. Thereupon PW-12 with the other team members including PW-4, PW-5 and PW-3 rushed into the Appellant's room. They found two other persons besides the Appellant. Their identities were disclosed as Mr. T. Kipgen, ACIT (PW-10) and Mr. N.C. Swain, DCIT (PW-6). The Appellant's room was separated by a wooden partition which ended with the visitors chairs. PW-12 challenged the Appellant to disclose whether he had demanded and accepted a bribe of Rs.15,000 from PW-3. The Appellant denied it. Meanwhile, Mr. Vivek

Dhir, Inspector and PW-12 caught hold of the right and left wrist of the Appellant.

7. PW-3 informed PW-12 that during discussions she informed the Appellant that she could arrange only Rs.15,000 of the bribe amount. Thereupon, according to PW-3, the Appellant tore a note sheet paper from a pad lying on his incliner and kept the same on the left side of the incliner in front of PW-3 on her right side. The Appellant is stated to have directed PW-3 by gesture through his eyes and by nodding his head to place the bribe amount on the torn note sheet paper. Acting according to the said directions, PW-3 is stated to have taken out the bribe amount from her bag and kept it on the note sheet. Thereupon the Appellant immediately folded the torn note sheet and covered it by the blue coloured *dak* folder with both his hands. PW-3 further disclosed that the Appellant had directed her to pay the balance amount as early as possible either by herself or through someone else.

8. The trap team apparently could not locate the bribe amount stated to have been paid by PW-3 to the Appellant. PW-3 pointed out where the bribe amount was kept i.e. on the table under the *dak* folder. Acting on the directions of PW-12, PW-5 is stated to have lifted the *dak* folder and the treated GC notes were seen in the partially folded note sheet. A request for the finger print expert and photographer from CFSL was made from the spot after securing the scene of the crime.

9. A colourless solution of sodium carbonate was prepared in a neat and

clean glass tumbler. The Appellant washed his left hand fingers in the colourless solution but the colour of the solution remained unchanged. The wash was transferred to a clean glass tumbler and sealed and marked as LHW. It was signed by both PWs-4 and 5. Likewise, the right hand wash (RHW) was also obtained. This wash also did not turn pink. The TCR provided to PW-4 was taken back. The cassette which contained the alleged conversation between Appellant and PW-3 was rewound and heard. The cassette was then sealed with a seal of the CBI.

10. At around 6 pm, Mr. S.K. Chadha, SSO-II, finger print expert and Mr. Rajesh Bist, SSA, Photograph Division of CFSL, reached the spot. Mr. S.K. Chadha is stated to have picked up the tainted GC notes and handed them over to PW-5. PWs-4 and 5 then compared the numbers of the said GC notes with the numbers mentioned in the handing over memo (Ex.PW-3/C) and found them to be tallying. The note sheet paper in which the GC notes were wrapped was washed in a sodium carbonate solution which then turned pink and was sealed and marked as NSPW. Similarly, with the help of a piece of cotton the wash of the *dak* pad was also obtained. The sodium carbonate solution remained unchanged. The wash was transferred to another glass tumbler, sealed and marked as FW. The cotton piece used for washing was sealed in an envelope. The torn piece of paper used for wrapping the tainted money along with the note sheet and dark pad was kept in an envelope and sealed.

11. The search of the office of the Appellant, the file pertaining to the ITR of PW-3 was recovered from the office cupboard. A rough site plan

of the scene of the crime was prepared. The CBI seal used for sealing was handed over to PW-4 and all case properties were taken into possession.

12. There were three test reports of the CFSL. The report of the chemical division (Ex. PW-2/A) dated 2nd May 2000 certified that the right hand wash, the left hand wash, the finger wash ('FW') and the note sheet paper wash gave a positive test for Phenolphthalein and sodium carbonate. The wash of the piece of cotton ('PC') gave a positive test only for Phenolphthalein. The detailed work sheet of the chemical report of the CFSL enclosed the analysis of all four washes.

13. The report of the physical division of the CFSL (EX.PW-8/A) was regarding the finger prints on the torn piece of white note sheet paper (Ex. 1/A) and whether it matched with the remaining sheet of paper (Ex.1/B). The report confirmed that it did and that both parts were parts of "one and the same paper". The CFSL expert Mr. C.K. Jain (PW-8) in his report dated 25th May 2000 opined that the note sheet, with one corner in torn condition, physically matched with the other part of the paper.

14. The report of the finger print division of the CFSL (Ex.PW-11/DA) had prints marked as Q-1 to Q-12 containing two prints Q-1 and Q-2 of the torn note sheet containing the bribe amount. The report was that the prints marked as Q-2 was different from the specimen finger prints of the Appellant which were marked S-1 to S-5. However a third note sheet lying on the table incliner was found to contain the finger prints of the Appellant.

15. The Under Secretary in the Department of Revenue passed an order dated 24th September 2001 (Ex. PW-1/A) according sanction under Section 19 (1) (c) of the PC Act for prosecuting the Appellant for the offences under Section 7 and 13 (2) read with Section 13 (1) (d) of the PC Act. The charge sheet was accordingly filed. The order framing charges was passed on 2nd January 2003 and the trial commenced.

The statement of the Appellant under Section 313 Cr PC

16. The prosecution examined 13 witnesses. In his statement under Section 313 Cr PC, the Appellant admitted that while working as ACIT during March 2000, the scrutiny of the income tax assessment case of PW-3 was pending with him. He also did not deny that on 9th March 2000 PW-3 had sent a chit to him through one peon by writing her name on that chit and that he called her inside his chamber. He accepted as correct that when PW-3 entered his office, she found another person sitting on the other side of the partition from where he was sitting. He further stated that while he was not aware about PW-3 giving any signal, two-three persons came inside the chamber and disclosed that they were CBI officers. He also admitted that Inspector A.K. Singh and Vivek Dhir caught hold of him and that the TLO Azad Singh (PW-12) challenged the Appellant as having demanded and accepted Rs.15,000 from PW-3. He, however, denied that the independent shadow witness V.S. Chauhan (PW-5) had on the directions of PW-12 removed the *dak* pad and found two bundles of GC notes of Rs.100 and Rs.50 denomination wrapped in a note sheet. He agreed that the hand washes were taken but stated that he

did not know what happened thereafter as the transfer of washes and sealing was not done in his presence.

17. The Appellant denied that he had refused to give his specimen voice but stated that since the written matter which was given to him to read was objectionable and could be manipulated against him, he had only requested the learned MM that if a changed matter could have been given to him he would have given a specimen voice. He claimed that the case was false and motivated. He denied demanding or accepting any money from PW-3. When asked why the PWs had deposed against him, the Appellant stated as under:

“The Complainant is an accomplice in the eyes of law. The two *panch* witnesses have deposed out of fear of departmental action, moreover one of them Sh. V.S. Chauhan is a stock witness and a witness of choice of CBI. The CFSL report of the hand washes is biased and is not admissible in law. The other witnesses are either CBI's own persons or they are formal in nature.”

The judgment of the trial Court

18. On the issue of the validity of the sanction order (Ex.PW-1/A), the trial Court held that merely because PW-1 took help from the draft sanction order, did not ipso facto make it illegal. It was apparent that PW-1 had applied his mind to the materials produced before him.

19. The trial Court analysed the pre-trap proceedings as spoken of by PW-3 the Complainant, PW-5 the shadow witness, PW-4 the recovery

witness and PW-12 the trap laying officer. The trial Court concluded that in the complaint, PW-3 did mention about the demand of a bribe by the Appellant from her on 7th March 2000 as well as on 9th March 2000 when the call was made by her from the office of the CBI. It was held that PW-3 was not required to mention all the minute details in the complaint. PW-3 had proved the pre-trial proceedings, i.e., lodging of the oral complaint, verification thereof, lodging of the written complaint, production of Rs.15,000 in the CBI office, the treating of the GC notes with phenolphthalein powder as recorded in the handing over memo EX. PW-3/C. This was corroborated by PW-5. He had also proved the telephonic conversation memo Ex.PW-3/A as well as the treating of the GC notes. PW-4 confirmed that PW-3 had come to the CBI office with a complaint about demand and bribe by the Appellant, her using the GC notes in denominations of Rs.100 and Rs.50 for the sum of Rs.15,000; the notes being treated with phenolphthalein; the practical demonstration being given; PW-3 being made to contact Appellant on telephone from the CBI Office and fixing of the time of meeting at 3 or 4 pm. The trap proceedings were also corroborated by PW-12.

20. As regards the demand, acceptance and recovery of the bribe amount, the trial Court analysed the evidence of PW-3. It was PW-3 who had suggested that the lady Constable Babita Kapoor and *panch* witnesses should not accompany her inside the room of the Appellant. PW-3 stated that the MCR she was carrying could not be operated by her. However, since TCR was on, the conversation could be recorded outside but this was not audible. PW-3 confirmed that the treated notes were not

recovered from the person of the Appellant but from the table on her pointing out the spot. She denied the suggestion that she had cleverly concealed the treated notes beneath the file and that the Appellant had neither demanded nor accepted the bribe. She also denied the suggestion that she had falsely implicated the Appellant through her acquaintance in the CBI to get rid of the penal provisions of the Income Tax Act in her scrutiny case.

21. PW-5 confirmed that PW-3 gave her visiting card to the peon outside the room of the Appellant. Before PW-5 could have entered, the peon stopped him and he along with one CBI official sat on the chair outside the office of the Appellant. After PW-3 came out after some time and gave a signal, all members of the trap team gathered at one place and rushed inside the room. He confirmed that on the pointing out of the PW-3 the treated notes were recovered from underneath a *dak* pad in a note sheet. PW-5 confirmed that the notes were the same as recorded in the pre-raid proceedings. He confirmed that the hands of the Appellant were washed in the separate solution but the colour did not change and the solutions were transferred in the bottles and labelled. He confirmed the drawing up of the recovery memo (Ex.PW-3/E) on the spot with his signatures thereon.

22. PW-4 more or less corroborated all of the above statements. He too was not able to be shaken in the cross-examination. The evidence of PW-12 fully corroborated the raid proceedings as spoken to by PWs-3, 4 and 5. In his cross-examination he maintained that the scene of occurrence

was not disturbed for the purposes of recovery till the CFSL experts arrived.

23. As regards the argument of the defence counsel that since the right hand wash of the Appellant did not turn pink at the spot it could not, on a chemical analysis show the presence of phenolphthalein, the trial Court referred to the Thin Layer Chromatography ('TLC') Test which was reliable when chemicals are used in small amounts. The trial Court concluded that the TLC Test corroborated the case of the prosecution that the Appellant had come into contact with the treated GC notes while accepting them from PW-3 in the manner stated by her. It was concluded that it was unlikely that PW-3 could have kept the money on a note sheet paper on the Appellant's table without being asked by the Appellant to do so. There was no reason for PW-3 to implicate the Appellant falsely in such a serious matter.

24. In the facts and circumstances, the trial Court by the impugned judgment dated 24th January 2009 concluded that the deposition of PW-3 on the demand and acceptance of bribe by the Appellant was truthful and inspired confidence and proved the guilt of the Appellant beyond all reasonable doubt. A separate order on sentence was passed by the trial Court on 27th January 2009 sentencing the Appellant and imposing fines as noticed in the first para of this judgment.

Submissions of counsel

25. Mr. Arvind Nigam, learned Senior counsel for the Appellant, submitted that there were several inconsistencies in the testimonies of the PWs. Referring to the charge, he pointed out that it was alleged that on 7th March 2000, the Appellant demanded as Rs.75,000 as illegal gratification for clearing the income tax returns of PW-3. The said amount was then reduced to Rs.50,000 and finally on 9th March 2000, the Appellant demanded and accepted Rs.15,000 from PW-3. In her cross-examination PW-3 disclosed that she had visited the Appellant's office in February 2000 along with a Chartered Accountant (CA) Mr. Rajesh Jain and again visited him on 7th March 2000 with her employee Mr. Krishan Kumar. The CA purportedly told PW-3 that since she had met the Appellant by herself, she would have to pay Rs.1 lakh. Mr. Nigam submitted that apart from the fact that all the above facts were not disclosed in the complaint, the CA and Mr. Krishan Kumar were not examined as witnesses. Therefore, according to him, the entire chain of foundational facts was not proved.

26. Further elaborating on the lack of evidence regarding demand of bribe by the Appellant, Mr. Nigam submitted that both PWs 4 and 5 stated that during the telephonic conversation between the PW-3 and the Appellant on 9th March 2000 there was no demand of bribe by the Appellant. PW- 3 too admitted that the Appellant had not uttered any word about any sum of money. On each occasion during their telephonic conversation it was PW-3 who mentioned different amounts. This was also corroborated by PW-12. Mr. Nigam relied on the decisions in ***Sohan***

v. State of Haryana (2001) 3 SCC 620 and Narain v. State of Punjab AIR 1959 SC 484.

27. As regards the tape recording, Mr. Nigam submitted that since it was not played in the Court, the transcript of the telephonic conversation between PW-3 and Appellant recorded on 9th March 2000 could not be relied upon. The MCR containing voice of PWs-4 and 5 (Ex.PW-3/D) as seen from the tape recording memo Ex. PW-3/D was found blank when it was played in the trial Court. The second device, the TCR along with a hearing cord which was with PW-4 during pre-raid proceedings was not in fact with PW-4 or PW-5. Further although there were two audio cassettes mentioned in the list of articles supplied with the charge sheet, it appeared that there were six audio cassettes prepared by the prosecution. Three of the said cassettes were never produced.

28. Mr. Nigam doubted the safe custody of the case property. He submitted that there was no link evidence to show such safe custody. He pointed out that the chain of safe custody has not been established by the prosecution. Referring to the decisions in ***Niranjan Singh v. CBI (2013) 203 DLT 635*** and ***Nilesh Dinkar Paradkar v. State of Maharashtra (2011) 4 SCC 143***, Mr. Nigam submitted that the said tape recorded conversation was, therefore, not reliable at all.

29. Mr. Narender Mann, learned Special Public Prosecutor ('SPP') for the CBI on the other hand submitted that the evidence of PW-3 sufficiently proved the pre-raid telephonic conversation. He referred to

the deposition of PW-3 in which she submitted that after entering the room she informed the Appellant that he should take whatever she had brought and thereupon the Appellant tore a sheet of paper lying with him and by way of gesture directed her to keep the amount in it. He submitted that the evidence of PW-3 was corroborated by the police witnesses and other independent evidence and that it was not necessary that every detail of her statement required to be corroborated. Mr. Mann, relied on the decisions in *State of UP v. Zakaullah 1998 SCC (Crl.) 456*, *State of UP v. Dr. G.K. Ghosh (1984) 1 SCC 254* and *Parkash Chand v. State 1979 (3) SCC 90*. He also submitted that while appreciating the evidence of witnesses, it must be seen whether it had a ring of truth. Reliance was placed on the decision of *State of UP v. M.K. Anthony (1995) 1 SCC 505*.

30. Mr. Mann, submitted that the cassette containing the recording of the telephonic conversation of 9th March 2000 (Ex. P 2) was played in the Court and PW-3 proved the same by pointing out the portions A to A, B to B and C to C therein. This was not objected to by the Appellant and, therefore, was admissible under Section 142 of the Evidence Act, 1872 ('EA'). According to Mr. Mann, Ex. P-2 was clear and audible and PW-3 in fact stated during her examination-in-chief that "the tape recorded conversation which was done previously was very clear..."

31. Mr. Mann further submitted that the Appellant himself used the transcript Ex.PW-11/DB to cross-examine PWs-3, 11 and 12. He also referred to the cross-examination of PW-11 where he confirmed that the

transcript bears his signature at points A and C. This transcript was prepared on 11th June 2001 after procuring the cassette from the *malkhana*. He also referred to the cross-examination of PW-12 during which learned counsel for the Appellant asked whether PW-12 had seen the transcript. According to Mr. Mann, by the aforementioned question the Appellant had not only admitted the correctness of the transcript but also admitted his voice in the cassette. He submitted that transcripts so admitted and proved were relevant and admissible under Sections 157, 159 and 160 of EA.

32. Mr. Mann clarified that the recording at the spot on the TCR was in the cassette Ex. P-1 and the one in the MCR was Ex.P-3. Therefore only three cassettes were seized. Copies of Ex. P-2 and Ex. P-1 were kept for the purposes of investigation and this was reflected in both the seizure memos. All the original cassettes i.e. Ex. P-1, P-2 and P-3, were produced before the Court. The remaining three cassettes were only for the purposes of investigation.

Demand of bribe

33. On reading of the entire evidence of PW-3 it appears that there are two stages of the demand as spoken to by her. PW-3 states that when met the Appellant on 7th March 2000 in respect of the scrutiny of her income tax returns, the Appellant had demanded Rs.75,000 for a favourable scrutiny and that after negotiations the amount was settled at Rs.50,000. While it is true that in her complaint she did not mention about the role of the CA and Mr. Krishan Kumar the essential fact of Appellant

demanding Rs.75,000 and reducing it later to Rs.50,000 has been mentioned by her in the complaint.

34. As regards the second stage of the demand i.e. on 9th March 2000, the conversation between PW-3 and Appellant on telephone which was recorded in the cassette marked as Ex. P-2. In her examination-in-chief she confirmed the pre-raid proceedings and the handing over memo (Ex. PW-3/C). She also confirmed the annexures to the handing over memo (Ex. PW-3/C-1) containing the numbers of the GC notes. She proved Ex. PW-3/A, the telephone conversation-cum- recording memo. PW-3 also identified her signatures thereon. A perusal of this memo shows that it contains the signatures of PWs-4 and 5 and Inspector Vivek Dhir. It records that specimen voices of both PWs-4 and 5 were recorded with the help of a credit card type transmitter. A bug was installed in the telephone line of telephone no. 4362460 and PW-3 was directed to contact the Appellant on telephone no. 3316392. The TCR was handed over to PW-5 for the purposes of overhearing the conversation with the help of the cord. The memo records that PW-3 dialled the number given to her and talked to the Appellant. The conversation was simultaneously recorded in the presence of PW-5 and the other signatories to the memo. After the conclusion of the conversation, the cassette was rewound and replayed and the conversation confirmed the demand of bribe by the Appellant from PW3. It recorded that PW-3 identified the voice of the Appellant. PW-5 also confirmed the conversation which he had heard simultaneously recorded in the device. The cassette Ex. P 2 was then taken out of the recorder and both witnesses signed on the paper slip

pasted on the cassette. A copy of the cassette was prepared and the original was kept in its cover and sealed with the CBI seal and seal was handed over to PW-4 for safe custody. The proceedings are said to have commenced at 11:30 am and concluded at 11:45 am.

35. In her examination-in-chief, PW-3 stated that when the conversation contained in the cassette Ex. P 2 was played in her presence it “was very much clear and audible and I identified my voice as well as the voice of Rajesh Gupta”. Although Ex P-2 when played in Court was not clear, PW-3 identified from the transcript that the conversation at points A to A, B to B and C to C in her voice and that of the Appellant.

36. As regards Ex. P 1, the cassette containing the recording of the TCR, PW-3 stated that “...now she recollect the names of independent witnesses Mr. Chauhan and Mr. Prasad. After hearing the conversation, the witness states that this cassette Ex. P1 is the same which was recorded at the spot and she states that she is talking with Rajesh Gupta but is unable to tell what conversation is going on between her and Rajesh Gupta because there is noise and Rajesh Gupta is speaking very low tone and as such, the conversation is not audible.”

37. When PW-4 was examined he resiled from his statement that on hearing the telephonic conversation it was confirmed that the demand of bribe of Rs.75,000 was reduced to Rs.50,000 by the accused. He also denied that the Appellant had called PW-3 to his office with the bribe amount which had been arranged by her as revealed in the conversation

recorded in the cassette. However, he admitted that the voices himself (PW-4) and PW-5 were recorded both in the MCR as well as the in the regular cassette. In his cross-examination by the learned counsel for the accused, PW-4 stated that a telephonic conversation took place in the CBI office by attaching the instrument with the telephone. He did not know the Appellant at that that time so he could not identify his voice.

38. PW-5 confirmed that telephonic conversation memo Ex. PW-3/A was prepared in the CBI Office and contained his signatures at point C. He too confirmed the handing over memo Ex. PW-3/C. He stated that “when complainant was talking with the accused in CBI office before trap, she was talking about one CA Rajeev Jain. During the telephonic conversation between complainant and the accused I also heard about the talk of Rs.50,000/- by the complainant but there was no positive response showing demand from the other side who was saying “*Aa Jayiye, Dekh Lenge*”.

39. At that stage, the SPP requested to examine the witness as he was resiling from his earlier statement. PW-5 confirmed that his previous statement Ex. PW-5/A at portions A to A was correctly recorded. The said portion reads “Tape recorded conversation confirmed the demand of bribe of Rs.75,000 and thereafter reduced to Rs.50,000 by Sh. Rajesh Gupta, Assistant Commissioner from Smt. Madhu Bala”. In other words, it was clarified from this witness that the demand was reduced to Rs.50,000. In his cross-examination he stated that “from the conversation with the Complainant it was revealed that the money was being

demanded by the suspect from Mr. Rajiv Jain, CA.” He then stated “From the telephonic conversation which I heard with earphone I can state that there was no demand of money from the other side i.e. accused Rajesh Gupta”.

40. PW-11 was Inspector Surinder Malik. In his cross-examination he was asked about Ex. PW-11/DB and gave the following answers:

“I do not recollect if I had sent the cassette to CFSL for preparing transcript. I do not want to look into the case diary to refresh my memory. It is wrong to suggest that I am deliberately avoiding to answer this question. It is wrong to suggest that the cassette, on play, was not audible. The transcription was got typed while playing the cassette intermittently as per version of complainant and witness. **The transcription Ex. PW-11/DB does not bear the signature either of the complainant or of any witness but it bears my signature at point-A on the last page. The transcription was prepared on 11.6.2001 after procuring the cassette from the Malkhana. The permission for desealing the cassette was obtained from the Court on 26.9.2000. At the time of opening of the cassette and during proceedings, both the panch witnesses were present. It is wrong to suggest that the cassette in question was tampered with during investigation.**” (emphasis supplied)

41. PW-12 also spoke of the telephonic conversation and Ex.PW-3/A being drawn up. In his cross-examination, he was asked about the transcript Ex.PW-11/DB. His specific answers were as under:

“I have seen the transcript Ex. PW-11/DB. There are no specific words uttered by Rajesh mentioning the amount of Rs.50,000, Rs.75,0000, Rs.1 lacs or Rs.1.5 lac. Vol. This inference can be drawn from portion X to X1 of the transcript. Specimen voice of the complainant was not recorded by me. **It is wrong to suggest that the cassette allegedly containing conversations were distorted and fabricated.**”
(emphasis supplied)

42. A perusal of the transcript Ex. PW-11/DB shows that it was prepared on 11th June 2001. It was submitted by Mr. Nigam that when an application was made before the trial Court by the Appellant, subsequent to the above date, seeking a copy of the cassette, the prosecution took the stand that as on that date no transcript had been prepared and, therefore, the copy could not be provided. Mr. Nigam submitted that it was inexplicable how the fact of the transcript having already been prepared on 11th June 2001 was not disclosed to the trial Court.

43. The above submission is to no avail since Ex. PW-11/DB was used by learned counsel for the Appellant confronting both PWs-11 and 12. They were asked whether the transcript was accurate and they answered in the affirmative. When PW-3 stated that Ex. P 2 was audible and clear when it was played in the office of CBI but when played in Court the voice of the Appellant was low, her attention was drawn to the transcript and she identified portions of the transcript. The first three pages of the transcript referred to Ex. P 2 containing the conversation recorded on 7th March 2000. There is merit in the contention of the learned SPP that

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having accepted the said transcript as admissible piece of evidence and confronting PWs 11 and 12 with it would preclude the Appellant from challenging the admissibility of the said transcript at this stage.

44. Although PWs-4 and 5 appear to be vacillating on whether they heard Appellant making any demand, it is clear from the identified portions of the transcript that when PW-3 stated “*Sir To Ab Pachas To Ho Jayenge Na Sir Pachas, Sir Please Sir Wo To Mai Phir Le Ke Aa Sakti Hu*” the Appellant answered “*Chaliye Aap Aaiye*”. She then asked him when she should come to which he says she should come around 3 pm. When she asked whether she could come by 4 pm, the Appellant agreed. Although the Appellant may himself have not specified the amount and it was the PW-3 who was suggesting the amount, it is clear that the Appellant was referring to the demand already made and was implicitly agreeing to a reduction of the amount to Rs.50,000.

The tape recording of the conversation

45. As regards the evidentiary value of the tape recording of the conversation on 9th March 2000, in ***Nilesh Dinkar Paradkar v. State of Maharashtra (2011) 4 SCC 143***, the Supreme Court referred to its earlier decision in ***Ram Singh v. Col. Ram Singh 1985 Supp. SCC 611*** where it was held as under:

“(1) The voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the

admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence-direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of the Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.”

46. Reference was also made by the Supreme Court in the above case to Chapter 14 of **Archbold Criminal Pleadings, Evidence and Practice** (2010 Edn.) as regards the factors to be considered for voice identification:

“(a) the quality of the recording of the disputed voice,

(b) the gap in time between the listener hearing the known voice and his attempt to recognise the disputed voice;

(c) the ability of the individual to identify voices in general (research showing that this varies from person to person),

(d) the nature and duration of the speech which is sought to be identified, and

(e) the familiarity of the listener with the known voice; and even a confident recognition of a familiar voice by a way listener may nevertheless be wrong.”

47. A tape recorded conversation can only be corroborative and not substantive evidence. In ***Mahabir Prasad Verma v. Dr. Surinder Kaur*** (1982) 2 SCC 258 it was explained by the Supreme Court:

“22. ...Tape-recorded conversation can only be relied upon as corroborative evidence of conversation deposed by any of the parties to the conversation and in the absence of evidence of any such conversation, the tape-recorded conversation is indeed no proper evidence and cannot be relied upon.”

48. In the present case the voice of the Appellant could be identified either by the maker of the record or by others who recognised his voice. The voices of both the PW-3 and the Appellant have been duly identified by PW-3. She was familiar with the Appellant’s voice having met him earlier. Next as regards the accuracy of the tape recorded conversation,

when Ex. P 2 was played in the office of the CBI it was clear and audible. PW-3 was unable to be shaken in her cross-examination on that aspect. Although the tape was inaudible when played in the Court, PW-3 was able to identify the conversation from the transcript. In response to a specific suggestion put to both PWs 11 and 12 in cross-examination, both denied that Ex P 2 had been tampered.

49. Even if PW-4 turned hostile, it is clear from the examination of PW-5 on the point of Ex.PW-3/A that he did confirm about the demand amount being reduced from Rs.75,000 to Rs.50,0000. Consequently, the statements in the cross-examination of PWs-4 and 5 when reconciled with the statements in their respective examinations-in-chief lead to the conclusion that there is corroboration of the portion of their depositions which fully supports the case of the prosecution.

50. In ***Gura Singh v. State of Rajasthan 2001 Cri. LJ 487*** it was held:

“11. There appears to be misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. This Court in *Bhagwan Singh v. State of Haryana 1976 Cri LJ 203* held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness.

In *Rabindra Kumar Dey v. State of Orissa* 1977CriLJ173 it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy.”

51. The Court is, therefore, not persuaded by the submission of the Appellant that it was not proved beyond reasonable doubt by the prosecution that there was a demand by the Appellant of illegal gratification from PW-3 and that the demand was reduced from Rs.75,000 to Rs.50,000. The fact that the prosecution may not have examined the CA or Mr. Krishan Kumar loses significance in light of the actual tape recorded conversation of 9th March 2000 being reduced to a transcript which has been used by the accused to confront PWs-11 and 12.

Acceptance of bribe

52. Once the demand of bribe stands proved it was incumbent on the prosecution to prove the acceptance of Rs.15,000 by the Appellant. Here again the evidence of PW-3 is significant. When she entered his room PW-3 informed the Appellant that she had brought Rs.15,000 upon which he tore out a sheet of paper and by way of gesture asked her to place the notes in it. As regards the conversation that took place between the two, the cassette Ex P 1 played in the Court was inaudible. The prosecution's case, therefore, hinged on the other evidence.

53. The main thrust of the argument of the Appellant has been that the chain of custody of the case property, viz., the cassettes and hand washes have not been established as there is no link evidence. As regards the safe custody of Ex P 2 containing the telephonic conversation of 9th March 2000 both PWs 11 and 12 denied that it was tampered. As regards the MCR which was suggested to be used at the time of the meeting between the Appellant and PW-3, it was clear that PW-3 forgot to activate it. As regards the automatic TCR, the conversation was admittedly inaudible with there being too much noise.

54. While it is true that the hand washes of the Appellant did not turn pink, the CFSL Report Chemical Division does indicate that the TLC Test showed the presence of phenolphthalein in the sodium carbonate solution. There are several unanswered questions as regards the cotton piece not containing any sodium carbonate although it was supposed to have been dipped into it. These discrepancies do not by themselves shake

the credibility of the prosecution case. The version of PW-3 that she was asked to place Rs.15,000 in a torn sheet of paper without the Appellant touching it is in fact consistent with his hand washes not turning pink when taken at the spot. This is spoken to by not only PW-3 but also PWs-4, 5 and 12.

55. There was no need for PW-3 to take Rs.15,000 with her to falsely implicate the Appellant. The truthfulness of the deposition of PW-3 is also evidenced from the fact that when the trap team entered the room it was she who pointed out where the treated notes were. Her version appears to be both natural and probable and does have the ring of truth. As explained in *State of UP v. M.K. Anthony (1995) 1 SCC 505*:

“While appreciating the evidence of witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigation officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole...”

56. Consequently, notwithstanding that the CFSL reports, the hand washes and the finger prints may not appear to support the case of the prosecution, the evidence of PW-3 is both cogent and reliable and can be safely accepted as proving the fact of acceptance of the bribe amount by the Appellant.

Presumption under Section 20 PC Act

57. Once the demand and acceptance of bribe is proved then the prosecution under Section 20 PC Act would be attracted. Section 20 PC Act has been elaborately discussed by the Supreme Court in ***M. Narsinga Rao v. State of Andhra Pradesh (2001) SCC 691*** and in that context it has been observed as under:

“17. Presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the court is only applying a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. Presumption in Law of Evidence is a rule indicating the stage of shifting the burden of proof. From a certain fact or facts the court can draw an inference and that would remain until such inference is either disproved or dispelled.”

58. It was of course open to the Appellant to rebut the presumption on a preponderance of probabilities. In the considered view of the Court, the Appellant has been unable to rebut the statutory presumption under
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Section 20 PC Act. The ingredients of Section 20 stand satisfied that in the present case. There has been a demand and an acceptance of the bribe amount by the Appellant.

Questions to the Appellant under Section 313 Cr PC

59. While on this aspect the Court is required to deal with one more submission regarding the Appellant not being put all the incriminating evidence against him when being examined under Section 313 Cr PC. Reliance in this regard was placed on the decisions in ***Sujit Biswas v. State of Assam (2013) 3 JCC 1887*** and ***Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116***. It was submitted by Mr. Nigam that the fact that the CA of PW-3 met the Appellant or the fact of her coming with her employee Mr. Krishan Kumar to meet the Appellant were not put to him under Section 313 Cr PC and, therefore, the entire evidence of PW-3 has to be excluded.

60. As already noticed even if the above statements of PW-3 are not taken into account, the fact is that on 9th March 2000 during the telephonic conversation, the offer by PW-3 to bring a reduced bribe amount being accepted by the Appellant has been satisfactorily proved by the prosecution. Therefore, the failure to put to the Appellant the above aspects of the evidence of PW-3 cannot be said to have caused any prejudice whatsoever to the Appellant. The case appearing against the Appellant and in particular the circumstances concerning the telephonic conversation of 9th March 2000 have been put to him. It is another matter that he has denied the said conversation.

Validity of the sanction order

61. Lastly on the aspect of granting sanction it was argued that mentioning of Section 19 (1) (c) of PC Act instead of Section 19 (1) (a) PC Act in the order granting sanction showed the non-application of mind by the sanctioning authority. Further according to the sanctioning authority, the Appellant was caught red-handed which was not even the case of the prosecution. Lastly, it was submitted that the draft sanction order was prepared by the Vigilance Department and merely copied by the sanctioning authority.

62. It is true that PW-1 in his evidence admits that most of the language of the sanction order was in terms of the proforma sanction order given by the Vigilance Department. However, that by itself cannot lead to the inference that there was non-application of mind by PW-1. The words 'red-handed' was perhaps in the context of the fact that a trap was laid as a result of which the Appellant was apprehended and arrested. As regards the non-mentioning of the correct provisions of PC Act, the settled law is that mere failure to mention correct provisions cannot lead to invalidity of the order (*C.S. Krishnamurthy v. State of Karnataka (2005) 4 SCC 81*). In any event, Section 19 (3)(a) read with 19(4) of PC Act states that no finding of guilt would be reversed only on the ground of any error or irregularity in the sanction order unless the Court is of the view that there was a failure of justice. The Court is not persuaded to hold that the mention of Section 19 (1) (c) PC Act in the sanction order instead of Section 19 (1) (a) has resulted in any failure of justice qua the Appellant.

63. The Court is unable to find any legal infirmity either in the impugned judgment or in the order on sentence passed by the trial Court. The appeal is accordingly dismissed. The Appellant will now surrender forthwith to serve out the remainder sentence.

S. MURALIDHAR, J.

MARCH 25, 2014
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