

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

% *Judgment reserved on: 06.01.2014*

Judgment delivered on: 13.01.2014

+ CRL.A. 108/2007

BRIJ MOHAN

..... Appellant

Through Mr. Yudhishter Kahol, Mr. Kunal
Kahol, Mr. Manjeet Godora,
Mr. Archit Arora and Ms. Aarushi
Agarwal, Advs.

versus

CENTRAL BUREAU OF INVESTIGATION Respondent

Through Mr. P.K. Sharma, standing
counsel for the CBI along with
Mr. A.K. Singh, Adv.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order of sentence dated 23.01.2007 and 29.01.2007 respectively wherein the appellant had been convicted for the offence punishable under Section 7 and 13(2) read with Section 13(1)((d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as the 'said Act'); he had been sentenced to undergo rigorous imprisonment for 2 years and to pay a fine of Rs.25,000/- in default of payment of fine to undergo simple

imprisonment for 6 months for the offence punishable under Section 7 of the said Act; he had been further sentenced to undergo rigorous imprisonment for 3 years and to pay a fine of Rs.25,000/- in default of payment of fine to undergo simple imprisonment for 6 months for the offence punishable under Section 13(2) read with Section 13(1)(d) of the said Act.

2 On 07.3.2001, the complainant/Baljit Singh (PW-1) had made a complaint to the Central Bureau of Investigation (CBI) to the effect that Sub-Inspector Brij Mohan (hereinafter referred to as 'the appellant') had called him to police station Adarsh Nagar on 06.3.2001 and demanded a sum of Rs.5000/- for helping him in getting regular bail in proceedings in FIR No.571/2000 which had been registered at the said police station against PW-1 and his family members on the complaint of his wife under Section 498A of the IPC. PW-1 being unwilling to pay the bribe had accordingly filed this complaint.

3 A raiding party was constituted. Apart from PW-1 two independent witnesses who were asked to join the raid were S.P.S.Chauhan (PW-3) who was the shadow witness and Ashok Kumar (PW-6) another independent witness. Inspector Surinder Malik (PW-9)

was the Trap Laying Officer; Sub-Inspector Raja Chatterjee (PW-10) was another member of the raiding party.

4 In the pre-trap proceedings the sum of Rs.5000/- comprising of 10 GC notes of Rs.500/- each were coated with phenolphthalein powder; the reaction of phenolphthalein with Sodium Carbonate was explained to the members of the raiding party; PW-1 was directed to hand over these notes to the appellant on his demand.

5 The CBI team left for police station Adarsh Nagar at 5.45 p.m. PW-1 and PW-3 waited for the appellant; at 6.25 p.m. the appellant reached the police station; on the appointed signal by PW-3 the raiding party rushed to the room of the appellant which was located on the first floor of the police station. PW-9 after disclosing his identity to the appellant challenged the appellant that he had received the bribe amount of Rs.5000/- from the complainant; at the first instance the appellant made a denial; on query he stated that he had flushed the money into the toilet; the toilet was searched but no money was found there. The room of the appellant was searched and from underneath the mattress of the bed the tainted money i.e. Rs.5000/- was recovered.

6 Right hand wash of the appellant as also his left hand wash were

taken; they were sealed into separate containers. The washes from the right pant pocket of the appellant and of the mattress were also taken.

7 The CFSL vide its report Ex. PW-2/A proved through its Senior Scientific Officer K.S.Chhabra (PW-2) after chemical analysis of the washes opined positive test of phenolphthalein on the hand washes as also on the piece of mattress. The wash of the right pant pocket had given a negative reaction.

8 Charge sheet was filed and pursuant thereto charges under Sections 7, 13(2) read with Section 13(1)(d) of the said Act were framed against the appellant. Prosecution examined 10 witnesses. In the statement of the accused recorded under Section 313 Cr. P.C., he pleaded innocence; submission being that he was falsely implicated at the behest of the complainant who had a grudge against him because he had given an adverse report against him in FIR No.571/2000. In defence 1 witness was examined and through him he sought to set up the plea of alibi. His version was to the effect that he had accompanied the appellant to the police station Adarsh Nagar on 06.3.2001 where settlement talks between appellant and his wife were taking place; the appellant had asked them to bring respectable persons from the village

in order that settlement talks could be recorded between PW-1 and his estranged wife.

9 On behalf of the appellant arguments have been addressed in detail by Mr.Kahol, learned counsel for the appellant. It is pointed out that the versions of PW-1, PW-3, PW-6, PW-9 and PW-10 on the manner in which the recovery had been effected from the appellant are all contrary and conflicting; reliance cannot be placed upon such conflicting versions. Attention has been drawn to their testimonies; it is pointed out that different witnesses have given different versions not only on the recovered amount but also the place from where the recovery had been effected. It is pointed out that both PW-3 and PW-6 i.e. the shadow witness and the so-called independent witness had also been declared hostile by the learned public prosecutor as they were not toeing the line of the prosecution; even in their cross-examination by the learned public prosecutor they denied the suggestions which had been put to them. It is pointed out that the handing over memo did not contain the fact that the complainant had brought notes in the denomination of Rs.50/- but he had got them exchanged from PW-9 who had handed over him to 10 notes in the denomination of Rs.500/-;

why this fact was not mentioned in the handing over memo as also the fact that PW-9 in his testimony had denied the factum of a tape recorder being used in the raid which otherwise stands admitted by the other witnesses creates a doubt on the authenticity of the raid. Attention has also been drawn to the various questions which have been put to the appellant in his statement under Section 313 Cr. P.C. with particular reference to question no.4,8, 14 and 37. It is pointed out that these questions were against the versions set up by the prosecution; no motive can be attributed to the appellant for making any demand as admittedly in terms of the order dated 02.3.2001 (in FIR No.571/2000) PW-1 was not to be arrested till 23.3.2001; thus the question of seeking bail did not arise. There is also no explanation as to why the wash from the pant pocket tested negative when as per the version of the prosecution the appellant had put the tainted money in his right pant pocket. It is pointed out that the entire recovery had in fact been planted; electricity had admittedly gone out during the period when the raid was being conducted; it was pitch dark and only one candle was used in the trap proceeding and the investigating officer had used this opportunity to plant the money upon the appellant; the recovery is doubtful. Counsel

for the appellant has placed reliance upon 2007(4) JCC 2715 Ganpathi Sanya Naik Vs. State of Karnataka as also a judgment of this court reported in 2005 III AD (Delhi) 41 Subash Chand Chauhan Ors. Vs. C.B.I to support his submission that where serious doubts arose as to the manner in which bribe was offered and receipt took place, appellant was given benefit of doubt and he had been acquitted. Benefit of doubt on the aforementioned counts must accrue to the appellant as well; he is entitled for a consequent acquittal.

10 Learned public prosecutor has refuted the arguments submitted by the learned counsel for the appellant. It is pointed out that on no count impugned judgment suffers from any infirmity. It is submitted that minor discrepancies in the versions of the witnesses are bound to arise when they had deposed in the court after two years of the incident. The evidence had been appreciated in the correct perspective by the learned trial judge. There is also no answer by the appellant to the hand washes of the appellant and mattress having tested positive for phenolphthalein; this could be for no other reason but the fact that the tainted money had been received by the appellant and had been put under the mattress by him. Learned public prosecutor has placed reliance upon (2009) 6

SCC 462 Subbu Singh Vs. State , (2010) 14 SCC 453 Narayana Vs. State of Karnataka and 1998 CRI L.J. 863 State of U.P. Vs. Zakaullah ; submission being that the evidence of the trap officer even without corroboration can in the given facts be relied upon; where the accused was caught red handed with the tainted money the offence was clearly made out. Further submission being that a hostile witness is not to be ignored in toto and that portion of his testimony pointing out to the guilt of the accused can be accepted.

11 Record has been perused. Submissions of the learned counsel for the parties have also been appreciated.

12 Testimonies of PW-1, PW-3, PW-6, PW-9 and PW-10 apart from PW-2 would be relevant to answer the submissions and the counter submissions of the parties.

13 PW-1 was the complainant. He had filed his complaint (Ex.PW-1/A) before the CBI on 07.3.2001. On oath he stated that a demand of Rs.5000/- had been made by the appellant from him in order to dilute his case i.e. proceedings in FIR No.571/2000; he was ensured that the appellant would not oppose the anticipatory bail which was being pursued by PW-1. Pursuant to his complaint a raiding party had been

constituted. His further testimony is to the effect that on reaching police station Adarsh Nagar the appellant was not available; he reached after about ten minutes. PW-1 was accompanied by PW-3 when they entered the room of the appellant who accepted the money in his both hands and after counting the same he confirmed "PURE PAISE HAI". PW-3 had given the appointed signal; pursuant to which the other members of the raiding party reached the room of the appellant. Further version of PW-1 being that on search from the right side pant pocket of the appellant the tainted money was recovered; some currency notes were also on the bed; his room was searched and thereafter the money was also recovered from underneath the bed. Hand wash as also pant pocket wash and wash of the mattress were taken. In a further part of his testimony PW-1 admitted that he had brought a packet of currency notes of the denomination of Rs.50/- which were deposited with the CBI and they were exchanged for notes of Rs.500/- denomination which had been given to him by PW-9. He reiterated that the appellant had received the trap money in his right hand and after counting it with both hands he put it in the right side pocket of his trouser. He also admitted that when PW-3 was asked to recover the trap money from the right

pocket of the trouser of the appellant no money was recovered and the money was later on recovered underneath the bed. In his cross-examination, he admitted that before the raid was conducted the light had gone out; it was a pitch dark; only one candle was arranged which was fixed on the table to conduct the proceedings; the bath room was also searched but no money was recovered there; the entire money of Rs.5000/- was then recovered from underneath the mattress of the bed. He admitted that a tape recorder had been given to him by PW-9 to record the conversation but he switched on a wrong button. He denied the suggestion that the bribe money had been planted on the appellant in the garb of darkness or that the accused had been falsely implicated because PW-1 was annoyed with him on account of the adverse report which had been filed in the court in the proceedings of FIR No.571/2000.

14 Version of PW-1 is conflicting and contrary on various counts; not only in the manner in which the trap amount had been recovered but also the place from where the recovery had been effected. In one part of his version PW-1 had consciously stated that a part of the tainted money was recovered from the right trouser pocket of the appellant; some

money was lying on the bed and some was recovered underneath the bed. Assuming for the sake of argument that this part of his version that a part of the money was recovered from under the bed and not the mattress was a typographical error but this position has been repeated by him three times over; in a fourth part of the version he had stated that the money was recovered from underneath the mattress. Learned public prosecutor had declared the witness hostile but even then he was unable to elicit from him the version set up by the prosecution which was to the effect that the entire sum of Rs.5000/- was recovered from underneath the mattress of the bed. Even in the cross-examination by the learned public prosecutor PW-1 stated that the money was recovered from underneath the bed and not from under the mattress.

15 From this version it is also clear that PW-1 had initially brought notes in the denomination of Rs.50/- but PW-9 had exchanged them for notes in the denomination of Rs.500/-. This fact did not admittedly find mention in the handing over memo (Ex.PW-1/B). PW-1 in his examination-in-chief also concealed the fact that a tape recorder was used in the raid proceeding. PW-3 and PW-6, however, admitted that a tape recorder was used in the raid proceeding. The tape recorded

conversation was admittedly not brought on record. Submission of the learned counsel for the appellant that an adverse inference for withholding the tape recorded conversation should be drawn against the prosecution in view of the provisions of Section 114 (g) of the Indian Evidence Act is not bereft of force.

16 PW-3 was the shadow witness. He had accompanied PW-1 to the room of the appellant. He categorically stated that when PW-1 offered money to the appellant he refused to accept it; they had hardly walked 5 to 6 steps when the electricity went off. Appellant was thereafter apprehended from his hands i.e. from his shoulder. He was searched. Appellant stated that he had thrown the tainted money in the bath room but no recovery was effected from there. Further version of PW-3 being that some money was recovered from the bed and some from the pocket of the appellant. This witness was also permitted to be cross-examined by the learned public prosecutor. He admitted that the notes which had been brought by PW-1 had been exchanged by PW-9 for a different denomination but he did not remember the details. He denied the suggestion that any demand was made by the appellant in his presence.

He also denied the fact that the trap money had been taken by the

appellant in his presence and put into his right pocket. In another part of his version he admitted that the tainted money was recovered from underneath the mattress.

17 Testimony of this witness also does not help the prosecution. Submission of the learned public prosecutor is that this witness was declared hostile; testimony of the hostile witness cannot be effaced completely and that part of his version which is in conformity with his statement recorded under Section 161 Cr.P.C. can be read.

18 There is no doubt to the proposition that a witness once declared hostile, his testimony is not washed off completely. However, greater care and caution has to be attached while scrutinizing the testimony of such a witness. Even while accepting the submission of the learned public prosecutor and even if the testimony of this witness is ignored or only that part of his version is read which is in conformity with his version under Section 161 Cr.P.C., the question is whether the version of the next independent witness i.e. PW-6 can be reconciled with the conflicting stand taken by PW-1.

19 PW-6 had joined the raid. He deposed that after about five minutes of their reaching the police station PW-3 had given the

appointed signal when the other members of the raiding party reached the first floor i.e. the room of the appellant. While they were just going to mount the stairs the electricity went off; a candle was lit on the instructions of PW-9. PW-9 then apprehended the appellant from his wrists and challenged him that he had taken the bribe. The appellant in the first instance denied this but thereafter admitted that he had thrown the trap money in the toilet. Further version of PW-6 being that four notes of Rs.500/- were recovered from the pocket of the appellant i.e. Rs.2000/- ; six notes of Rs.500/- i.e.Rs.3000/- were recovered from underneath the mattress. This witness was also permitted to be cross-examined by the learned public prosecutor. He denied the suggestion that the entire amount of Rs.5000/- was recovered from underneath the mattress. In his cross-examination, he admitted that the complaint of Baljit Singh was got written by CBI officer from him in their presence. He further reiterated that when the candle was lit he saw PW-9 holding the hands of the appellant. He reiterated that Rs.2000/- was recovered from the pant pocket of the appellant and Rs.3000/- from underneath the mattress. He also admitted that a tape recorder was used in the raid.

version of PW-1 and PW-3. All of them have given different versions. Not only are the shadow witness (PW-3) and the independent witness (PW-6) giving conflicting stands but the testimony of PW-1 (complainant) when examined as a whole also suffers from glaring infirmities. PW-1 is also not sure of his stand.

21 In this background whether the money was recovered from the trouser pocket of the appellant; from the bed; from under the mattress or beneath the bed is not clear. To hold the appellant guilty on these varying stands which are not only natural to go to the root of the issue would not only be unsafe but would amount to a travesty of justice.

22 PW-9 was the trap laying officer. He had prepared the handing over memo (Ex.PW-1/B). Admittedly there was no mention in this document that initially notes of Rs.50/- were brought by PW-1 but had been exchanged for notes in the denomination of Rs.500/-. There was also no mention that a tape recorder was used in the raid. PW-9 had in fact specifically denied that any tape recorder/micro phone was used in the raid whereas all other members of the raiding party i.e. PW-3 and PW-6 including PW-10 (whose testimony shall be discussed later) have admitted this fact. It is also admitted that there was no electricity in the

police station between 6.30 p.m. to 7.30 p.m. i.e. during the period of time when the raid was on. Raid was conducted under light of a single candle.

23 PW-10 also a member of the raiding party but in his cross-examination had given several evasive answers; he also did not remember if there was darkness in the room at the time when the raid was conducted.

24 In terms of Ex.PW-2/A (report of the chemical analyst) the right pant pocket wash of the appellant tested negative. There is little answer of the prosecution on this count. As per the explanation furnished by PW-2 even if the colour fades over a period of time, phenolphthalein powder could be detected if the solution contains 5 micro grams in 100 ml. of sodium carbonate solution; further if the hand wash of the appellant had tested positive, the phenolphthalein coated wad of 10 notes when put in the pant pocket would have had a greater quantity of phenolphthalein coated upon them; the negative report of the pant pocket wash, in this background is highly suspect. It has also come on record in the version of PW-1, PW-3 and PW-6 that the appellant had been apprehended by PW-9 from both his wrists i.e. he was caught hold

of only his hands. Electricity had also gone off; as per PW-1 it was pitch dark and there was only light from one candle in these proceedings. In this background, the submission of the learned counsel for the appellant that the money was planted upon the appellant in this intervening period by the Investigating Officer (PW-9) for the success of his case also cannot be ruled out. The judgments relied upon by the learned public prosecutor are distinct on their own facts. It is also not the case of the prosecution that the tainted money was in the physical possession of the appellant.

25 The aforementioned discussion shows that the prosecution has failed to prove its case to the hilt against the accused. A conviction against the appellant in these circumstances is clearly not sustainable. Impugned judgment is accordingly set aside. Appellant being entitled to a benefit of doubt is granted a consequent acquittal. He is accordingly acquitted of the charges.

26 Appeal is allowed in the above terms.

INDERMEET KAUR, J

JANUARY 13, 2014/ndn