

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: March 25, 2014

Decision on: April 4, 2014

CRL.A. No. 124 of 2008

ASHISH KUMAR DUBEY

..... Appellant

Through: Mr. Dayan Krishnan, Senior
Advocate with Mr. Pramod Kumar
Dubey, Ms. Smriti Sinha, Mohd.
Faraz, Ms. Swati Goswami, Mr. Shiv
Pande, Ms. Vasundhara Nagrath and
Mr. Nishank Mattoo, Advocates

versus

STATE THR. C.B.I.

..... Respondent

Through: Mr. Manoj Ohri, Special
Public Prosecutor.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

04.04.2014

1. This appeal is directed against the judgment dated 25th January 2008 passed by the learned Special Judge (CBI) in CC No. 07/03 convicting the Appellant under Section 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 28th January 2008 sentencing him to two years rigorous imprisonment ('RI') with a fine of Rs. 10,000, and in default, to undergo simple imprisonment for fifteen days for the offence under Section 7 of the PC Act and RI for two and a half years with a fine of Rs. 15,000, and in default, to

undergo SI for fifteen days for the offence under Section 13(2) read with 13 (1) (d) of the PC Act. Both the sentences were directed to run concurrently.

2. By an order dated 26th February 2008, this Court suspended the sentence awarded to the Appellant during the pendency of the appeal, subject to terms.

The case of the prosecution

3. The case of the prosecution was that one Ms. Sabina, the maid servant of Mr. Qayum Qureshi (PW5) and his wife Smt. Zeenat Qureshi (PW6) went missing on 18th March 2002. A report to that effect was lodged by Smt. Khushnudh Begum, the mother-in-law of PW5. Daily Diary ('DD') Entry 29A was made in that regard. Assistant Sub-Inspector ('ASI') Ram Darsh, Police Station ('PS') Shalimar Bagh, Delhi was directed to inquire into the matter. On 18th June 2002, the Appellant SI A.K. Dubey joined duty as Divisional Head of PS Shalimar Bagh, Delhi. He was briefed about all the pending matters, including the missing report of Ms. Sabina by ASI Ram Darsh.

4. According to prosecution, on 19th June 2002, the Appellant along with ASI Ram Darsh and some constables conducted a search at the residence of PW5 and brought him to the PS, where he was threatened by the Appellant. According to PW5, when he was brought to the PS, Ms. Sabina was already there and he was forced to sign on DD. He alleged that neither was Ms. Sabina sent along with him nor was he allowed to talk to her.

5. However, there is a DD 35/B (Ex.PW7/C) dated 19th June 2002, which records the statement of PW5 that Sabina, on her own, came back to his house and that he had no further complaint about her going missing and does not wish to initiate any legal proceedings in that regard. It further records that he wishes to take her back with him. The DD entry records that the girl has been sent back to the custody of PW5.

6. It may be noted at this stage that Inspector B.R. Mann (PW7), who was posted at the relevant time as Station House Officer ('SHO') in PS Shalimar Bagh, had confirmed both the DD entries 29A and 35B. He stated that the Appellant was the Divisional Officer and in-charge of the area, from where the missing report was received and "at no point of time, he was entrusted with investigation of the above DDs." PW7 further stated that "the missing girl was handed over to the Complainant, i.e., Qayoom Qureshi on the same day, i.e., 19.6.2002 and an entry to this effect was made in the DD by the duty officer."

7. According to PW5, the Appellant asked him to come to the PS and demanded a bribe of Rs. 8,000 and threatened him that if the bribe amount was not paid, the Appellant would register a case of kidnapping against PW5. PW5 also alleged that he was slapped by the Appellant. PW5 stated that he then returned home and disclosed to his wife Zeenat Qureshi (PW6) that the Appellant had demanded a bribe. PW6 is then stated to have said that they should not pay the bribe. PW5 left for his work, and in his absence, the Appellant made a telephone call to his house, which was

attended by PW6. The Appellant is stated to have spoken to PW6 regarding the bribe amount.

8. In his cross-examination, PW5 stated that he had a micro cassette recorder ('MCR') at his residence and also had an ID caller installed at his residential telephone. According to PW5, PW6 recorded the telephonic conversation between herself and the Appellant using the said MCR. In her examination-in-chief, PW6 stated that the cassette containing the telephonic conversation between herself and the Appellant was handed over to the Central Bureau of Investigation ('CBI') along with the complaint (Ex. PW5/A). This cassette was marked as Q3 in the trial. When the cassette was played in the Court, PW6 identified her voice and the voice of the Appellant. She also identified the points in the transcript (Ex. PW6/A). In her cross-examination, PW-6 confirmed that she had recorded the telephonic conversation on 19th August 2002 in the evening, by which time only she and her infant child were present. She stated that the cassette was also lying at her house.

Pre-raid proceedings

9. According to PW5, on the next day, i.e. 20th August 2002, he and PW6 went to the CBI office and lodged their complaint (Ex. PW5/A) and also handed over the cassette containing the conversation between PW 6 and the Appellant that took place the previous evening to the CBI officer S. Balasubramony (PW11). PW-11 stated that the complaint was marked to him by the then Superintendent of Police ('SP'), Mr. Kamal Pant. PW11 verified the contents of the complaint, and on that basis, first information

report ('FIR') [PW11/A] was registered. According to PW11, the cassette containing the conversation between the Appellant and PW6 revealed that the Appellant was demanding bribe amount of Rs. 8,000. The cassette was taken into possession under seizure memo (Ex. PW1/H).

10. PW11 stated that PW5 produced 16 government currency ('GC') notes of Rs. 500 denomination each and their numbers were noted down in the handing over memo (Ex.PW1/F). Thereafter, phenolphthalein powder was applied to the GC notes and a practical demonstration was given by Inspector A.K. Singh. On this aspect, it must be noted that in his cross-examination PW5 stated that "I borrowed money from Kailash Kumar for giving to the accused."

11. At this stage, it requires to be noticed that, according to PW11, one Mr. Kailash Kumar (PW4) from the Ministry of Health ('MOH') was directed to act as shadow witness. One other person, Mr. Hub Lal (PW1), was the other independent witness from the MOH who formed part of the trap team.

12. In the handing over memo of the tape recorder, which was drawn up in the office of the CBI, it was recorded that in the presence of the signatories to the memo including PWs 1 and 4, PW 5 was handed over a Kinetic Cassette Recorder ('KCR')-360 with transmitter, a Sanyo MCR and two sealed TDK D-60 blank cassettes. The voice of both PWs 1 and 4 were recorded on one cassette after ensuring that the cassette was blank by playing it on both the sides in the presence of the said witnesses. The transmitter of the KCR and the Sanyo MCR were handed over to PW5 with

the direction to switch on the same while making contact with the accused for the purpose of recording of the conversation that might take place between the Appellant and PW5.

13. In the handing over memo of the tainted GC notes (Ex. PW1/F), it was recorded that PW5 produced a sum of Rs. 8,000 in the form of 500 GC notes and their numbers were noted down in the said memo. PW4 was directed to act as shadow witness and remain as close as possible to PW5 to hear the conversation that might take place between the Appellant and the PW5 and also to see the passing of the bribe amount. PW4 was directed to give a signal after completion of the transaction by scratching his head with both his hands.

The trap proceedings

14. In the detailed recovery-cum-seizure memo (Ex.PW1/A), drawn-up by PW11 and signed by PW5, PW1, Inspector A.K. Singh, Inspector Surender Malik and SI Prem Nath, it is recorded that PW4 went to the house of PW5 and the rest of the team positioned themselves around the house of PW5. A telephone call was made from the residence of PW5 to PS: Shalimar Bagh, Delhi when it was found that the Appellant had left for Court work. At around 5:30 pm., a telephone call made by the Appellant from PS: Shalimar Bagh, Delhi to PW5 and the call was identified through the caller ID installed at the residential telephone of PW5. The Appellant directed PW5 to come to the ICICI Bank ATM, Everbake market, Shalimar Bagh, Delhi within ten minutes. The said conversation between the Appellant and the PW5 was recorded in the MCR and the same was rewound and listened. It

is stated that PW5 identified his voice as well as the voice of the Appellant. The cassette was not sealed as it was to be used for further proceedings.

15. The recovery-cum-seizure memo (Ex.PW1/A) stated that at around 5:40 pm, the trap team reached the spot and at about 6 pm the Appellant reached the spot. The Appellant along with PWs 4 and 5 went to the ATM of HDFC Bank situated near the ICICI Bank. After about ten minutes, PW4 came out of the ATM and flashed the pre-arranged signal to the trap team members. In the meanwhile, the Appellant, followed by PW5, came out of the ATM counter of HDFC Bank. At the same time, PW11 along with trap team, including the witnesses rushed towards the Appellant. On seeing the team members rushing towards him, the Appellant took out the bunch of currency notes from the left pocket of his shirt and threw it on the ground and tried to escape. After chasing him for a few yards, the Appellant was caught by PW11 and Inspector Surender Malik by the left and right wrist respectively. Inspector A.K. Singh and PW1 guarded the money thrown out by the Appellant on the ground. PW11 disclosed his identity as well as the identity of the other team members to the Appellant. In the meanwhile, the crowd which had gathered was told the purpose of the operation and they were invited to be witnesses to the proceedings. However, they declined and left the spot. The Appellant denied having accepted any bribe amount from PW5. PW1 was then directed to recover the GC notes thrown by the Appellant on the ground. After counting the GC notes, PW1 reported that these were 16 notes. Since all this took place in an open place, the remaining proceedings were carried out in the office of Mr. Dharampal, proprietor of Keshav Properties, adjacent to the HDFC Bank ATM counter,

after taking due permission of Mr. Dharampal “on the condition that he will not be a witness to the proceedings.”

16. PW4, on being asked, informed PW11 that the Appellant had some formal talk and PW4 informed the Appellant that he would give him some valuable information. Thereafter, the Appellant, by making gesture with his right hand, demanded the bribe amount from PW5. Thereafter, PW5 took out the treated GC notes from his left pocket with his right hand which was accepted by the Appellant by extending his right hand and kept it in the left side shirt pocket by touching the notes with his left hand. PW11 stated in the recovery-cum-seizure memo (PW1/A) that “The whole proceedings was visible from the outside as there was a glass door in the HDFC ATM counter.” The colourless solution of sodium carbonate was prepared in a neat and clean glass tumbler. The Appellant was directed to dip his right hand first. On his doing so, the colourless solution turned pink. This was collected in a neat and clean glass bottle, then sealed and labelled. The same was done with the left hand, the wash of which also turned pink. The samples were sealed in a neat and clean bottle and labelled. A third sample of the pocket of the shirt of the Appellant, when dipped in the sodium carbonate solution, also turned pink. This was also collected in a bottle and labelled. It is stated that the shirt was given back to the Appellant till the alternative arrangements were made, keeping in view the decency of the Appellant.

17. The recovery memo stated that the MCR was taken back from PW5 and was listened to. The KCR was also listened to. Both the recorders

established the conversation of PWs 4 and 5. The MCR was marked as 'Q1' and the audio cassette recorder was marked as 'Q2'. The Appellant was arrested at 7:45 pm.

18. A rough site plan of the place showing where the trap transactions took place was drawn-up (Ex.PW1/B). The personal search arrest memo (PW1/C) of the Appellant was also taken. During investigation, the subsequent voice of the Appellant was taken (PW1/D) on 21st August 2002.

The CFSL reports

19. On 3rd October 2002, the Central Forensic Science Laboratory ('CFSL') gave its report concerning the right hand wash, left hand wash and the left shirt pocket wash of the Appellant and confirmed that all the three gave positive tests for sodium carbonate and phenolphthalein powder.

20. As regards the tape recorded conversation, the CFSL gave its report dated 31st December 2002. The report referred to three parcels Q1, Q2 and Q3. Q1 was the parcel containing the MCR of make Sony MC 60 which had a total duration of recorded conversation of 2 minutes and 31 seconds. This was the conversation between PW5 and the Appellant when the Appellant called PW5 at his residence in the evening of 20th August 2004.

21. Q2 was the parcel containing the audio cassette of make TDK D 60 having a total recorded conversation of three minutes and 36 seconds. This was the conversation recorded at the spot.

22. Q3 was stated to be containing a “normal audio cassette of make TDK D60”, purportedly of a total duration of 1 minute and 32 seconds which was of the conversation of PW6 and the Appellant on 19th August 2002. It stated that the common sentences with respect to the specimen voice of the Appellant (S1) had been selected from Q3 for voice spectrographic analysis.

23. Parcel S1 was described as containing a normal audio cassette of make T-series HF90 containing the specimen voice of the Appellant.

24. The result of the examination was that the specimen voice, marked S1 (A), was similar to the male voice in Q1 (A) and Q2 (A) in respect of linguistic and phonetic features. Further, no common sentences could be detected in Q1 (A) and Q2 (A) and, therefore, the questioned voice in Q1 (A) and Q2 (A) could not be compared with the specimen questioned voice S1 A1. However, the auditioning and voice spectrographic examination of the voice samples in Q3 was similar to the specimen voice sample in S1. It was accordingly concluded that “the voice marked exhibit Q3 (A) is the voice of the same person whose specimen voice marked exhibit S1 (A) [Shri Ashish Kumar] beyond reasonable doubt.” The report was signed by Dr. Rajinder Singh (PW-3), Senior Scientific Officer, Grade-I. The transcripts of the conversations recorded in the KCR (Q2) were marked as Exhibit PW5/B. The transcripts of the conversation recorded in the MCR at the house and the spot was marked as Exhibit PW5/C. The transcripts of the conversation between PW6 and the Appellant recorded on 19th August 2002 were exhibited as Ex. PW6/A.

25. A chargesheet was filed on 30th January 2003. Charges were framed against the Appellant on 15th January 2004 for the offences under Section 7 and 13 (2) read with Section 13 (1) (d) of the PC Act.

The Appellant's statement under S. 313 Cr PC

26. The prosecution examined 12 witnesses. In his statement under Section 313 Cr PC, the Appellant stated that he was made a Divisional Officer in PS Shalimar Bagh, Delhi on 18th June 2002 and the girl Ms. Sabina was recovered on 19th June 2002 and he was never entrusted with the missing report. He denied having ever gone to the house of PW5 or demanding a bribe from him and that the entire story had been concocted by PW5 with a view to falsely implicate him and to put pressure on him and the local police as PW5 was indulging in the flesh trade. As regards the conversation which purportedly took place between him and PW6, he stated that he was made to read over the transcript of the said conversation in the office of the CBI.

27. The Appellant denied that he had directed PW5 to come to Everbake market, Shalimar Bagh, Delhi. He denied demanding a bribe at the spot in the ATM. He stated that “the complainant tried to catch hold of me from behind and thrust the money forcibly into my pocket. When I resisted, there was a scuffle and no money was recovered from me.” The Appellant denied having been challenged by PW11 for accepting the bribe. He, however, did not deny that his right and left hand as well as left side pocket wash, when dipped in sodium carbonate, turned pink. As regards the audio cassette, the translation of which was exhibit PW5/B, he stated that it could not be

played in the Court on 24th and 25th November 2004 or 24th March 2005 and 6th April 2005.

28. When the Appellant was asked whether he had anything else to state, he stated as under:

“Since the complainant was indulging in flash trade, he offered his services, since he initially wanted to oblige me and when I refused he implicated me by way of introducing one informer having information in respect of some robbers and prostitution racket and the shadow witness was introduced to me as an informer and for the said services I even offered him financial assistance. Thus, I have been falsely implicated in the present case.”

The finding of the trial Court

29. Before the trial Court, the validity of the Sanction Order was questioned. That point was decided against the Appellant. The said finding has not been challenged in this Court during the course of arguments by learned counsel for the Appellant.

30. On the merits of the case, the learned trial Court held that voice spectrographic analysis, which confirmed that the questioned voice of Q3 was that of the Appellant, was admissible in evidence and that the transcript Ex.PW6/A “clearly shows that accused was demanding 8,000 from the complainant (PW5).” As regards the plea of learned counsel for the Plaintiff that the scientific expert (PW3) had not given any opinion on whether the cassette had been tampered or edited in terms of the legal requirements spelt out by the Supreme Court in ***Ram Singh v. Col. Ram Singh 1985 Supp SCC 611***, the learned trial Court referred to the fact that the cassette was

sealed as per the production-cum-seizure memo (Ex.PW1/H) with CBI seal and was sent to the CFSL where the parcel was found to be sealed with the seal of CBI and the seal was tallied with the specimen seal and found intact. The report of CFSL (Ex.PW3/A) was sent with the said cassette, resealed with their seal which was opened in the Court during the cross-examination of PW1. Accordingly, the learned trial Court concluded that “there was no question of tampering with the contents of conversation recorded in the cassette.”

Demand of bribe

31. The case of the prosecution was that there was a demand for a bribe already made by the Appellant from PW5 by calling him over to the PS and that the above conversation with PW6 was simply a follow-up on that issue. It is stated that it is in the above context that the transcript of the conversation between PW6 and the Appellant has to be understood.

32. In the first place, it must be noticed that in Ex.PW5/A, the complaint dated 20th August 2002, it was stated that the Appellant was ‘harassing’ PWs 5 and 6 regarding the case of their maid servant going missing. He is alleged to have demanded Rs. 8,000 for not implicating from them in the said case. The learned trial Court appears to have overlooked one important aspect here. The maid servant in question was shown in DD 35/B (Ex.PW7/C) to have already returned. The statement to that effect was recorded on 19th June 2002. This was confirmed by PW7, Inspector Mann, who was SHO PS Shalimar Bagh at the relevant point in time. Mr. Mann was never cross-examined by the learned APP that the said statement was

wrong or that the official record was false. DD entry 35B was marked as an exhibit through the said witness as an official record. This falsified the plea of PW5 that he was forced to sign DD 35B and that Ms. Sabina was never sent back with him.

33. The learned trial Court has gone by the fact that since PW5 was “just 5th class pass”, he “does not know the legal implications” and the Appellant “must be well qualified and intelligent.” The above conclusions of the learned trial Court are based on surmises. It is difficult to believe that PW5 did not understand the implications of DD 35B which clearly stated that Ms. Sabina had already returned on her own on 19th June 2002 itself. There was no motive for the Appellant, two months later, to demand a bribe for not registering a case against PWs 5 and 6 alleging that they had kidnapped Ms. Sabina. The so-called demand of bribe was for not registering a case which in any event did not survive as on the date of the demand of a bribe. The prosecution story in this regard appears not logical at all.

34. Interestingly, in his examination-in-chief, PW5 is vague about when the Appellant actually demanded the bribe. His statement reads as under:

“One day A.K. Dubey, accused came to my house and conducted search of my house and took me to the police station and demanded bribe from me threatening that if the bribe was not paid, he would register a case of kidnapping against me. He demanded Rs. 8000 from me. He also slapped me.”

35. It will be seen, therefore, that no date or time is mentioned about the search conducted by the Appellant. The prosecution has also not produced any log book or diary entries to show that the Appellant had left PS

Shalimar Bagh, Delhi to conduct a raid in the house of PW5. If indeed he came to conduct a search with other police officials, there is no evidence by any of the police witnesses which spoke of raid conducted by the Appellant in the house of PW5.

36. Another important aspect is the recording of the conversation that allegedly took place between PW6 and the Appellant, which was done by PW6 with the help of an MCR which PW5 had apparently given to her. If indeed it was a micro cassette, then it was for the prosecution to explain how the parcel Q3 given to the CFSL contained a regular TDK D-60 cassette and not a micro cassette. It is not clear when the contents of the micro cassette were transferred to a larger cassette for being given to the CFSL. Also, it appears that the MCR given by PW5 to PW6 on 19th August 2002 was different from the MCR given to him by PW11 during the pre-raid proceedings for which the handing over memo Ex. PW1/G was drawn up.

The conversation on 19th August 2002

37. The next aspect of the matter as regards the conversation between PW6 and the Appellant which purportedly took place on 19th August 2002 is that the device by which the conversation was recorded was not itself examined. This was important since a specific question was put to the scientific expert (PW3) whether the device was tampered or not. In his cross-examination, PW3 stated: “As I was not asked to give opinion whether the cassette was tampered or edited, I have not expressed any opinion on this aspect.”

38. At this stage, it is important to recall the requirements of law, as spelt out in ***Ram Singh v. Col. Ram Singh*** which read 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.”

39. The above statement of PW3 was in the context of the third test which required ruling out “every possibility of tampering with or erasure of a part of a tape recorded statement.” What the learned trial Court in the instant case has done is examined the 5th requirement that “the recorded cassette must be carefully sealed and kept in safe or official custody.” The learned trial Court has failed to notice that the third requirement spelt out in ***Ram Singh v. Col. Ram Singh*** was not satisfied in view of the above answer of

PW3. The official safety of the parcel contained in the cassette is not the same thing as ruling out the possibility of tampering with a tape recorded statement.

40. In *Nilesh Dinkar Paradkar v. State of Maharashtra* (2011) 4 SCC 143, the Supreme Court referred to the judgment in *R. V. Robson* (1972) 2 All ER 699 where it was observed as under:

“....The determination of the question is rendered the more difficult because tape recordings may be altered by the transposition, excision and insertion of words or phrases and such alterations may escape detection and even elude it on examination by technical experts.”

41. Both in *Ram Singh v. Col. Ram Singh* and *Nilesh Dinkar Paradkar v. State of Maharashtra* reference was made to **Archbold Criminal Pleading, Evidence and Practice** (Chapter 14) which lays down that the factors that would be relevant for the purpose of correct identification of voice. One of this is “quality of the recording of the disputed voice.” Reference was also made to **American Jurisprudence 2d** (Vol.29) according to which for admissibility of a sound recording it had to be shown *inter alia* that “the recording device was capable to taking and testimony”; that the recording was authentic and correct and “the manner of the preservations of the recording” was also shown. This is apart from the fact that tape recorded evidence can only be used as a corroboration evidence.

42. The MCR used in the present case by PW6 to record the conversation was not submitted to CFSL. Without the device being examined and

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without the cassette itself being examined for ruling out the possibility of tampering, one of the important requirements spelt out in ***Ram Singh v. Col. Ram Singh*** was not satisfied in the present case. This rendered the Q3 cassette an inadmissible piece of evidence.

43. In the present case as already noticed although the voice may have been identified by PW-6 to be that of Appellant, the third test in ***Ram Singh's case*** that the tape recorded conversation must be shown to be not tampered or capable of being tampered, has not been satisfied.

44. PW6 herself was not a witness to the demand by the Appellant or bribe from PW5. She had only purportedly heard of the demand of bribe from PW5. The only time she could have heard of the demand was during her conversation with the Appellant on 19th August 2002. The Court finds that the transcript of the conversation between her and the Appellant does not clearly spell out the demand by the Appellant of the bribe amount of Rs. 8,000. The transcript of the conversation, and in particular, the relevant portions have been marked 'A-A' to 'E-E' and have been set out in detail in the judgment of the learned trial Court. In appreciating the above conversation, it must be remembered that the shadow witness (PW 4) was pretending to be an informer and PW5 was supposed to introduce PW4 in that capacity to the Appellant. He was perhaps to be paid for passing on information. One portion of the transcript contains a reference to the sum of eight thousand. However, when the entire transcript is read as a whole it is not clear whether it refers to the demand of bribe by the Appellant.

The two 'independent' witnesses

45. The prosecution case is that when PW5 and PW6 went to the CBI office in the morning of 20th August 2002 and filed a written complaint (PW5/A) about the demand of bribe by the Appellant, the two independent witnesses were already present. Interestingly, four days earlier a letter dated 16th August 2002, which forms part of the trial Court record, was purportedly written by the Additional Director, Central Government Health Scheme ('CGHS'), Nirman Bhawan, Delhi to the Anti Corruption Branch of CBI as under:

“Sub: Nomination for confidential duties – regarding of.

Sir,

Kindly refer to your letter No. NIL dated 16.8.2002 on the subject mentioned above. The following Lower Division Clerks are nominated and directed to report to you on 19.8.2002 at 10:00 A.M.

1. Sh. Hube Lal LDC
2. Sh. Kailash Kumar LDC”

46. The letter was signed with the date of 16th August 2002. Clearly, the CBI had written a letter on that very date to the CGHS asking them to nominate two officers for “confidential duties” It is inexplicable that this could have been in anticipation of a complaint which was to be made to the ACB, CBI four days later. It is not clear what was written by the CBI in its letter to the CGHS since that letter has not been produced before the Court. However, what is clear is that PWs 1 and 4, the two witnesses, seem to have already been assigned for duties with the CBI on 16th August 2002 itself, at least four days prior to the complaint filed by PWs 5 and 6.

47. Strangely, the learned trial Court appears to have brushed aside this unexplained discrepancy in the prosecution case by observing in para 42 as under:

“It is a fact that CBI is a very big Investigation Agency of the country and is heavily burdened with thousands of cases. It requires services of independent witnesses not only in trap cases but also in various searches, preparation of memos, transcriptions, specimen’s voice, specimen’s signatures and handwriting on many a week days. These witnesses have produced the copy of letter Ext. PW1/E issued by Head of their Departments addressed to SP, CBI Ext. PW1/E dated 16.8.02 to the effect that PW-1 Sh. Hub Lal and PW-4 Sh. Kailash Kumar have been nominated to report in their office on 19.8.02 and obviously the name of the case is not mentioned in the letter for maintaining secrecy.”

48. The above observations of the learned trial Court would seem to imply that there are “stock independent witnesses” who are at the service of the CBI. This seriously undermines the so-called independence of these witnesses. This was too serious a matter for the learned trial Court to be basing its views on surmises and conjectures as to how these two witnesses could already be present in the office of the CBI even before the Complainant reached there with his written complaint.

49. PWs 1 and 4 stated that they visited the office of the CBI on 19th August 2002 itself and again were asked to come on 20th August 2002. This again is overlooked by the learned trial Court when it stated as under:

“These witnesses might have visited the office of CBI on 19.8.02 but not in the present case as the complaint was lodged on 20.8.02 and these witnesses might have been asked to come to CBI office next day on 20th August 2002 when their services were utilized by the CBI officer in the present case.”

50. There can be no doubt that again the learned trial Court is basing its opinion on surmises that the witnesses did not come to the office of the CBI on 19th August 2002 when clearly these witnesses say so. It was impermissible for the learned trial Court to substitute its own opinion on facts overlooking the evidence on record.

51. It is a matter of fact that neither PW1 nor PW4 has supported the case of the prosecution as regards what transpired during the pre-raid proceedings and the trap proceedings. The learned trial Court simply held that both these witnesses were won over by the accused. There was no basis for the said conclusion either.

Demand during the trap proceedings

52. The case of the prosecution is that prior to the raid there were two instances of demand of bribe purportedly made by the Appellant. The first, as noted in the charge framed against the Appellant, was that “while you were posted as Sub-Inspector at the PS Shalimar Bagh demanded Rs. 8,000/- on 19.8.2002 from the Complainant Mohd. Qayyum Qureshi for a motive or reward of not involving and arresting him in a case regarding kidnapping of his maid servant Sabina.” The second was during the conversation with PW 6. As far as the above charge is concerned, for the reasons discussed, the Court is of the view that the prosecution has not been able to prove it beyond reasonable doubt.

53. The further case of the prosecution is that the Appellant made a further demand which is indicated in the second part of the charge which reads

thus: “and in furtherance of your demand you demanded and accepted the bribe of Rs. 8,000 from the complainant on 20.8.2002 near ICICI Bank, Everbake market, Shalimar Bagh, Delhi and thereby you committed an offence punishable u/s 7 of the P.C. Act and within the cognizance of this Court.”

54. As regards the demand allegedly made by the Appellant from PW-5 on 20th August 2002 at the ATM near ICICI Bank, Mr. Manoj Ohri, learned Special Public Prosecutor (SPP) has relied on the evidence of PW-5 as corroborated by PW-11. The case of the prosecution is that the Appellant telephoned PW-5 at his residence for fixing of the spot and for introduction of PW-4, the supposed informer. The transcript of this conversation as recorded in the audio tape was also read out in the court. All this does is to confirm that the purpose of the meeting between the Appellant and PW-5 for introduction of PW-4 as informer. There is no reference to any bribe in this conversation.

55. PW-5 in his examination-in-chief has stated that the Appellant demanded the bribe money by a hand gesture and when it was taken out by PW-5 and handed over to the Appellant, it was accepted by the Appellant with his right hand. The only other person present at that time was PW-4 and he has not supported the prosecution on this aspect. In his cross-examination by the Senior Public Prosecutor for the CBI, PW-4 agreed that he and PW-5 went to the ATM. However, he denied the suggestion that the Appellant demanded Rs. 8,000 from PW-5 by gesture and that PW-5 gave

the treated GC notes to the Appellant which the Appellant accepted with his right hand.

56. The parameters for testing the authenticity of the taped conversations on the tapes Q 1 and Q 2 would be the same as was applied to test the conversation recorded on Q 3. Neither Q 1 nor Q 2 was tested for tampering by PW-3. Notwithstanding this, the transcript of the conversation between PW-5 and the Appellant at the house prior to the trap team leaving to the site does not *per se* establish any demand of bribe by the Appellant for not registering a case concerning the Ms. Sabina going missing. The conversation is about the introduction of the informer to the Appellant. Admittedly, even the recording of the conversation at the spot on the KCR does not reveal any demand of bribe which is perhaps why it is sought to be stated by PW-5 that the demand was made by gesture.

Evidence of PW-5

57. Given the conduct of PW-5 in the present case, he does not appear to be a trustworthy witness. He is the only person speaking of the demand of a bribe by the Appellant at the police station, for which there is no evidence, and later at the spot which again is not corroborated by PW-4. It would be unsafe only to rely on the evidence of PW-5 to conclude that there was a demand of bribe of Rs. 8,000 either prior to the trap proceedings or at the spot.

58. In the impugned judgment of the trial Court, the discussion has turned essentially on the hand washes turning pink. It was concluded that this one

aspect was sufficient by itself to prove that there was demand and acceptance by the Appellant of the bribe amount. The Court is unable to draw any such conclusion in the absence of other reliable evidence.

Acceptance of bribe

59. On the question of acceptance of the bribe, the prosecution has relied on the fact that PW-5 as well as PW-11 have spoken of the Appellant throwing the treated GC notes on the ground from his shirt pocket and of both his left and right hands turning pink. It must be recalled that the defence of the Appellant as stated in his answer under Section 313 CrPC is that he was caught from behind and that there was a scuffle and that the money was thrust into his pocket.

60. Neither PW-1 nor PW-4 supported the prosecution in this regard. PW-1 states that when he received the signal and went towards the ATM, he found the treated GC notes scattered on the ground and in a mutilated condition. PW-1 was directed by PW-11 to pick up the treated GC notes. He, however, does say that the right and left hand wash as well as the wash of the shirt pocket of the Appellant turned pink. Since he was not supporting the prosecution, PW-1 was examined by the SPP. He resiled from his statement that he had seen the Appellant throwing the money on seeing the raiding party. PW-4, the other independent witness, also did not support the prosecution. He denied the suggestion that he had flashed the pre-arranged signal after the alleged transaction of bribe was completed and that the trap team thereupon rushed towards the spot and the Appellant on seeing the trap team took out the treated GC notes and threw them on the

ground. PW-4 agreed that the recovered GC notes tallied with those notes noted down in the handing over memo.

61. In the above circumstances, the mere fact that the hand washes turned pink cannot be said to conclusively prove that the Appellant had accepted the bribe money. In the first place, it is not clear whether the accused in fact accepted the money with his right hand as spoken of by PW-5 since that was not supported by any of the independent witnesses. Nothing in their examination-in-chief can be said to support PW-5 on this aspect. As far as PW-11 is concerned, he entered the scene only after the pre-arranged signal was given by PW-4. PW-11 did not actually see the Appellant accepting the bribe money with his right hand as alleged by PW-5. PW-11 only says that the accused threw the money on the ground.

62. If as stated by the Appellant that he was caught from behind and there was a scuffle, then it is possible that in the struggle, the treated GC notes were flung on the ground. Interestingly PW-4 in his examination-in-chief states as under:

“We left for the market from the residence of Qureshi. At about 7.30 p.m. the Inspector came along with two constables in the market and he was on the other side of the road. Qureshi called the Inspector by gesture. Both of them shook their hands and Qureshi took him to ATM Booth. I was standing outside the ATM booth. They talked about 2/3 minutes and thereafter Qureshi called me by gesticulating inside the ATM. I was introduced to the Inspector as informer. Inspector asked me about the information and I told him that in Shalimar Bagh some prostitution racket was operating by four girls and four boys. Inspector insisted me to reveal the information then and there. I told the Inspector to come at Real Juice at 8 p.m. Qureshi made me to go outside the booth. Thereafter, I heard a noise

of quarrel. When I saw by turning myself towards the Booth I saw Qureshi holding the Inspector from his back and they were grappling with each other. I saw the currency notes lying on the ground. The said currency notes were picked up by CBI officials and caught the said Inspector. That Inspector is the accused present in court (correctly identified).”

63. It was at the above stage that the SPP sought to cross-examine PW-4. What PW-4 stated in his examination-in-chief probablises the defence of the Appellant regarding the grappling. The Court is, therefore, unable to agree with the conclusion reached by the trial Court that the prosecution has been able to prove beyond reasonable doubt that there was an acceptance of the treated GC notes by the Appellant and that while accepting that he knew it to be illegal gratification.

64. There is also a discrepancy in the version of PW-5 on this critical aspect. In his examination-in-chief, he stated that the Appellant tried to run away from the spot “after dropping the money when the CBI people rushed towards the spot”. In his cross-examination, he stated out that a *chowkidar* was sitting outside the ATM. Incidentally this *chowkidar* was not examined. PW-5 then stated that “the money did not fell down as after accepting the money and counting the same, the accused kept the same in his pocket. The accused while coming out was apprehended by CBI and on that he took out the money from his pocket and was in the process of throwing down when caught hold by CBI.”

65. It appears that PW-5 was unclear from where the money was recovered. He was, therefore, again examined by the SPP. He now stated:

“It is correct that when the accused was about to be apprehended, he threw the money on the ground”.

Therefore, even PW-5 cannot be said to be a reliable witness on what exactly transpired at the spot and during the trial proceedings.

66. Mr. Ohri explained the failure to examine the property dealer in whose office the proceedings were completed by pointing out that the seizure memo itself states that the property dealer permitted the prosecution to use his office on the condition that he would not be examined as a witness. Nevertheless even according to PW-5 there was a *chowkidar* sitting outside the ATM. There is no reasonable explanation as to why the prosecution failed to examine the *chowkidar*. PW-5 being an unreliable witness cannot be said to have supported the case of the prosecution as regards the acceptance of the bribe amount by the Appellant.

67. As regards the wash of the shirt pocket turning pink, it has been rightly pointed out that after the initial wash, the shirt was in fact handed back to the Appellant. Therefore, the sanctity of the shirt being preserved for forensic examination was compromised. In that view of the matter, the court does not consider it necessary to examine the question that has been elaborately examined by the trial Court regarding the two different dates on the signatures on the shirt. The Court is of the view that if the Appellant was caught from behind as he alleges by PW-5 and in any event touched the tainted GC notes at that time, the mere fact that the shirt pocket wash turned pink, may itself not be sufficient to hold that the Appellant consciously

accepted the bribe amount and kept it in his left shirt pocket. Consequently, the fact that the shirt pocket turned pink does not by itself help the prosecution in the present case.

68. With the prosecution failing to prove the demand or acceptance of the bribe by the Appellant, the question of applicability of the presumption Section 20 of the PC Act does not arise.

Evidence of PW-11

69. Mr. Ohri sought to place reliance on the decisions in *Hazari Lal v. State (1980) 2 SCC 390* and *State of U.P. v. Zakaullah (1998) 1 SCC 557* and *State of U.P. v. Dr. G.K. Ghosh 1984 (1) SCC 254* to urge that even if the independent witnesses turned hostile, the evidence of the official witnesses can be relied upon even without corroboration.

70. Had the complainant (PW-5) fully supported the case of prosecution on the aspect of the demand of a bribe by the Appellant, it would still be possible to consider whether the evidence of PW-11 could be held to be sufficient proof of the acceptance of the bribe amount by the Appellant as regards what transpired at the spot. However, as already noticed, PW-5 was an unreliable witness. Interestingly, some of the members of the pre-trap proceedings, Inspector AK Singh and Inspector Surender Malik, do not appear to have been examined. We have only evidence of PW-11 who arrived at the spot after the pre-arranged signal of PW-4. PW-11 was himself not a witness to the acceptance of the bribe amount by the Appellant. If there was a struggle as spoken of by PW-4, then the mere fact

that the GC notes were flung on the ground by itself would not prove the acceptance of the bribe amount by the Appellant. On the critical aspects of the case therefore, the uncorroborated evidence of PW-11 cannot help prove the case of the prosecution beyond reasonable doubt.

Conclusion

71. The Court is thus of the view that the evidence brought on record by the prosecution was insufficient to return a finding of guilt against the Appellant beyond all reasonable doubt. The offence under Section 13(2) read with Section 13(1) (d) of the PC Act is not made out against the Appellant.

72. For the aforementioned reasons, the impugned judgment 25th January 2008 and the order on sentence dated 28th January 2008 passed by the trial Court are set aside and the Appellant is acquitted of the offences with which he has been charged.

73. The appeal is allowed in the above terms but, in the circumstances, with no order as to costs. The trial Court record be sent back forthwith.

S. MURALIDHAR, J.

APRIL 4, 2014

tp/akg