

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRIMINAL APPEAL No. 190 of 2009

Reserved on: May 28, 2014

Decision on: July 8, 2014

RAJ KUMAR VARUN

..... Appellant

Through: Mr. N. Hariharan,
Senior Advocate with
Mr. Gurpreet Singh and
Mr. Bakul Jain,
Advocates

versus

CENTRAL BUREAU OF INVESTIGATION Respondent

Through: Mr. Narender Mann, Spl.
PP with Mr. Manoj Pant
and Ms. Uttkarsha Kohli,
Advocates

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

08.07.2014

1. This appeal is directed against the judgment dated 27th February 2009 passed by the learned Special Judge in CC No. 89/04 convicting the Appellant under Section 7 and 13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988 ('PC Act') and the order on sentence dated 28th February 2009 whereby the Appellant was sentenced to rigorous imprisonment ('RI') for two years with a fine of Rs. 10,000, and in default, to undergo simple imprisonment ('SI') for seven days for the offence under Section 7 of the PC Act and RI for

three 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. It may be mentioned at the outset that by the same impugned judgment dated 27th February 2009, the learned trial Court directed that the Complainant, Mr. Mukesh Gupta, be tried summarily for giving false evidence and directed him to show cause as to why he should not be punished for such offence.

3. While admitting this appeal on 17th March 2009, this Court suspended the sentence awarded to the Appellant.

The complaint

4. The case of the prosecution is that Mr. Mukesh Gupta (PW6) was the owner of two flats, namely, 84-A and 85-A, Pocket-VI, Mayur Vihar, Phase-III, Delhi, which he had given on lease to the Office of the General Manager ('GM'), Mahanagar Telephone Nigam Limited ('MTNL'), Delhi at a monthly rent of Rs. 5,750 and Rs. 7,600 respectively. Two separate lease deeds were executed. In respect of the flat at 85A, Pocket-VI, Mayur Vihar, Phase-III, the lease was executed on 4th November 2000 (Ex.PW6/DA), whereby the said premises was given on rent for a period of three years commencing from 11th September 2000 on a monthly rent of Rs. 7,600. However, the possession letter (Ex.PW8/C) in respect of the said flat was executed on 11th September 2000. As regards the flat at 84A, Pocket-

VI, Mayur Vihar, Phase-III, Delhi, by a lease deed (Ex.PW6/DB) was executed on 6th November 2000 the said flat was given on lease to MTNL for a period of three years commencing from 4th November 2000 on a monthly rent of Rs. 5,750. The possession of the said flat was given on 4th November 2000, as evidenced by the possession letter (Ex.PW8/G).

5. The above two flats were jointly owned by PW6 and his wife. According to PW 6, the Appellant Mr. Raj Kumar Varun, DGM (Maintenance), MTNL and the co-accused, Mr. S.R. Bali, DGM (Administration), were dealing with the payment of rent for the said flats. On 16th November 2000, PW6 gave a handwritten complaint (Ex.PW6/A) to the Superintendent of Police ('SP') of the Central Bureau of Investigation ('CBI') at the Anti -Corruption Branch ('ACB') at the CGO Complex, New Delhi stating that "the rent for the said premises has not been paid to us for the last two months." In the said complaint, he further stated that "Yesterday, when I inquired about the payment of rent from Shri S.R. Bali, DGM (A), MTNL Delhi, he demanded two months' rent as bribe for timely payment of rent, failing which he threatened to cancel the lease deed of both the premises." PW6 further stated in the said complaint that when he informed Mr. Bali that he could not afford to pay such a huge amount as bribe, Mr. Bali told him that "he has to share this amount with Sh. R.K. Varun, DGM (MTC) and I may talk to Shri Varun also in this regard." Thereafter, when PW6 visited the Appellant's office and requested for the release of the rent the Appellant is alleged to have

told him to first pay the Appellant's share of the bribe equal to one month's rent. When PW6 requested the Appellant to reduce the amount, the Appellant told him to pay the same in two or three instalments. PW6 stated in his complaint that he did not wish to pay a bribe; that he had brought Rs. 5,000 with him and requested the SP to take action against the said officers.

Pre-trap proceedings

6. Mr. Man Chand (PW5), the Section Officer in Doordarshan and Mr. Biplob Patra (PW7), a Lower Division Clerk with All India Radio were both at the CBI office on the morning of 16th November 2000 when PW6 came there with his complaint. Inspector Alok Kumar (PW9), the Trap Laying Officer ('TLO'), introduced PWs5 and 7 to PW6. Both PWs 5 and 7 read the complaint given by PW6 and witnessed PW6 producing Rs. 5,000 by way of ten government currency ('GC') notes of Rs. 500 each. PW9 noted down the distinct numbers of the GC notes. On the directions of PW9, Mr. C.K. Sharma, Inspector, treated the GC notes with phenolphthalein powder and gave a practical demonstration regarding the chemical reaction when the notes were touched. PW6 was then handed over the treated GC notes. He kept them in his leather purse which he then kept in his right rear pocket. PW6 was directed to handover the bribe amount to the Appellant on a specific demand. PW5 was asked to act as a shadow witness and remain close to PW6 to hear the conversation that might take place between the Appellant and PW6 and watch the transaction if possible. PW7 was asked to remain with the trap party.

PW6, who was carrying a cell phone, was asked to give a signal to the CBI on the CBI cell phone after completion of the transaction of the bribe. The handing over memo (Ex. PW5/A) was signed by PWs 5, 6 and 7, Mr. C.K. Sharma and PW9.

7. The tape recording memo (Ex. PW5/E) recorded that a micro cassette recorder ('MCR') along with the blank micro cassette of a Sony make was first played in the office of the CBI and given to PW 6 and the micro-cum-transmitter-cum-recorder ('transmitter') was given to PW7. The specimen voices of PWs 5 and 7 were recorded on the blank micro cassette as well as on the blank cassette of the transmitter. A long range transmitter was kept in the shirt pocket of PW6 and PW7 was directed to hear the conversation. The MCR was handed over to PW6 with a direction to switch it on after reaching the spot. The telephonic conversation and the tape recording memo drawn up on that date is Ex. PW5/K. According to this memo, prior to the trap team leaving the office, when PW6 called the office of the Appellant, his lady P.A. told PW6 that the Appellant had just left for the field. Thereafter, PW6 called up Mr. Bali and the recorded conversation confirmed the demand of the bribe by Mr. Bali. Mark 'A' was given to the said cassette.

The trap proceedings

8. At around 4:50 pm on 16th November 2000, the trap team reached the office of the DGM (Maintenance), MTNL at Patparganj, Delhi. PW6 and PW7 also reached the said premises in the car of PW6. PW9

directed PW6 to proceed towards the office of the Appellant along with PW5. The other trap team members, including PW7, took suitable positions nearby. The recovery memo (Ex.PW4/B) drawn up on that date recorded that after about ten minutes, PWs 6, 5 along with two other persons, were seen proceeding towards the car of PW6. It was noted that PW6 sat at the driver's seat. The Appellant sat beside PW6 in the front seat. Mr. Arun Kohle (PW4), a common friend of the Appellant and PW6, sat in the rear seat. PW5 remained outside the car. The recovery memo noted that as the windows were down, the activities going on in the car were visible to the trap team.

9. The memo further recorded that at around 5:10 pm, on receiving the cell phone signal from PW6 and simultaneously knowing that PW6 had handed over some cash to the Appellant, who accepted it in his right hand, counted the same with both his hands and kept the same in his left side shirt pocket, the TLO along with other trap team members rushed towards the car. PW9, the TLO, disclosed his identity to the Appellant and challenged him as to whether he had demanded and accepted Rs. 5,000 as bribe from PW6. The Appellant is stated to have got perplexed and kept mum. The Appellant was asked to step out of the car. Inspectors C.K. Sharma and H.K. Lal, caught hold of the right and left wrists of the Appellant. PW6 is stated to have confirmed the identity of the Appellant and the fact that he had demanded and accepted the bribe amount, and further that after counting it with his hands, kept it in his left side shirt pocket. PW5 also confirmed the demand.

10. The recovery memo further noted that on the direction of PW9, PW5 took out the bribe amount from the left side shirt pocket of the Appellant. The GC notes were tallied with the numbers noted down in the handing over memo. PW6 is also stated to have confirmed the identity of PW4, who was sitting in the rear of the car. A crowd is stated to have gathered near the car, but despite requests, none came forward to join the proceedings. It was then decided to carry out the further proceedings in the Office of the DGM (Maintenance) at the first floor of the building.

11. Both the right and left hand washes of the Appellant turned pink and were preserved in separate bottles, which were appropriately sealed and labeled. The Appellant was asked to remove his shirt. The inner lining of the left side shirt pocket was dipped in separately prepared colourless sodium carbonate solution, which turned pink. This was also preserved in a bottle and appropriately labeled. The recovery memo notes that “the shirt of the accused was given back to him for obvious reasons till further arrangement.”

12. The recovery memo noted that the MCR was taken back from PW6 and the transmitter from PW7 and both of the MCR and the transmitter were heard after rewinding. The cassettes were then wrapped in a cloth wrapper and sealed with the CBI seal. A rough site plan was prepared by Inspector C.K. Sharma. The Appellant was arrested. The recovery memo was signed by the trap team members, including PWs 5, 6, 7, 9 and the Appellant.

13. The personal search memo (Ex.PW5/D) of the Appellant revealed inter alia a brown colour leather purse containing Rs. 4,331 in cash, a Maruti car key, a driving license and an identity card. The co-accused, Mr. Bali, was arrested on the same date and his personal search-cum-arrest memo was drawn up (Ex.PW 9/B).

14. When the MCR was played, the conversation recorded therein confirmed the demand of a bribe by the Appellant. The micro cassette was labeled as mark 'B'.

Post-trap proceedings

15. On 17th November 2000, the specimen voices of the Appellant and Mr. Bali were taken and the memos were drawn up (PW5/G & H).

16. On 20th November 2000, Mr. R.P. Aggarwal, SP, sent the hand wash and shirt wash to Central Forensic Science Laboratory (CFSL), CGO Complex, Lodhi Road, New Delhi. The letter itself noted that "As the glass bottle marked 'LHW' is found having internal crack near base portion though there is no apparent leakage found. So the contents of bottle marked 'LHW' may be transferred to some other bottle and the glass bottle marked 'LHW' may be preserved." On the said letter, there is a handwritten noting of the Case Assistant, CFSL, which reads thus: "Received three sealed bottles along with specimen seal in Chemistry Divn." The report of the CFSL dated 19th December 2000 (Ex.PW1/A) confirmed that the three washes gave a positive test of phenolphthalein and sodium carbonate. The note at the end of the

report stated that the remnants of the exhibits are returned with the seal impression of CFSL; one sealed envelope containing seal impressions along with wrappers was also returned with the seal impression and it was further noted by hand that “The contents of the bottle marked ‘LHW’ were transferred to another bottle as the original bottle had a crack at the bottom.”

17. The questioned voices and the samples of the audio cassette were also sent by the SP to the CFSL under covering letter dated 18th December 2000. The report dated 14th June 2001 of the CFSL (Ex.PW2/A) stated that the voice samples in Exs. B1, B2, D1, D2 were probable voices of the Appellant and that Ex.B3, B4, F1 and F2 were the probable voices of the co-accused. The transcript of conversation on the MCR between PW6 and the co-accused (PW10/D1) was also exhibited.

Charges

18. A chargesheet was filed and thereafter the charges were framed on 7th April 2004 against the Appellant and the co-accused, S.R. Bali. The first charge was under Section 120-B of the Indian Penal Code (‘IPC’), 1860 read with Section 13(1)(d) of the PC Act. The second charge was that in pursuance of the conspiracy between two of them, both of them demanded illegal gratification equivalent to two months’ rent on 15th November 2000 and that on 16th November 2000, a sum of Rs. 5,000 was obtained “as illegal gratification” from PW6 by the Appellant at about 5:10 pm at his office in Patparganj “for yourself and on behalf of

the co-accused, S.R. Bali” and thereby both of them committed the offence under Section 7 of the PC Act.

19. The third charge was that on 16th November 2000, pursuant to the conspiracy between two of them, illegal gratification of Rs. 5,000 was obtained from PW6 by the Appellant for himself and on behalf of Mr. Bali “as pecuniary advantage by corrupt or illegal means or otherwise by abusing the position as public servants”, thus committing the offence under Section 13(1)(d) read with Section 13(2) of the PC Act.

20. The prosecution examined ten witnesses.

Statement under Section 313 Cr PC

21. In his statement under Section 313 of the Code of Criminal Procedure, 1973 (‘Cr PC’), the Appellant admitted that he was working as DGM (Maintenance).

22. In response to question No.18 regarding his sitting on the front seat of the car along with PW6, who sat on the driver seat, with PW4 sitting on the rear seat and PW5 standing outside, near the door of the driver’s seat, the Appellant stated as under:

“I came downstairs from my office along with Arun Kohle (PW4) who was common friend of mine as well as Mukesh Gupta in order to go to the office of General Manager, MTNL, Preet Vihar, New Delhi. I occupied the side seat of the front side in the car. Mukesh Gupta was on the driving seat and Arun Kohle sat on the rear seat. We were going to Preet Vihar Office

for solving the rent problem of Mukesh Gupta to meet General Manager. I had no role to play in the matter.”

23. In response to question No.24 regarding the hand washes turning pink, the Appellant stated as under:

“I was taken to office of Divisional Engineer (Telecom), DDA Shopping Complex, Madhu Vihar and not to my office. My washes were taken in the office of DET and same turned pink in colour. I was forced to pick up the money from the dashboard of the car where it was placed by Mukesh Gupta saying that I should keep the money and discuss the matter with the GM. When I refused to accept the money, he placed the same on the dash board of the car from where CBI Inspector and others forced me to pick up the currency notes.”

24. In reply to question No.26, the Appellant stated that his shirt was taken in possession by CBI officers in the CBI office. He denied that any cassette was played on the spot or sealed. He admitted that he was given a copy of the recovery memo in the CBI Office and that it contained his signatures. He admitted that his specimen voice was taken in the CBI office. In response to question No.38 that Mr. O.P. Sachdeva (PW8) had deposed that the Appellant processed the matter concerning the payment of rent for Flats 84A and 85A, the Appellant answered as under:

“It is correct that the matter pertaining to above said two flats was processed in MTNL office by me. I dealt with the matter. I was member of Fair Rent Assessment Committee. The recommendations made by the Committee were conveyed by me to the General Manager MTNL. Thereafter I had no role to play.”

25. When asked to explain why the case was registered against him, the Appellant stated that “I was member of the Committee. Therefore, I have been implicated.” He claimed that the prosecution witnesses had deposed against him since “they have been influenced by the CBI.” In response to question No.42 whether he wanted to state anything, the Appellant stated as under:

“When I was asked by CBI officers to come out from the car threatened me to slap me. Then he slapped me and many people gathered there. Thereafter Alok Kumar forced me to pick up the money from the dash board of the car and take it to the office situated upstairs. Alok Kumar did not make any public person a witness.”

The defence evidence

26. Mr. Raj Kumar Dadu, working in the canteen in Green Field Public School, Dilshad Garden, a resident of Madhu Vihar, was examined as DW1. He stated that in front of the office of MTNL in the DDA Market in Madhu Vihar, DW1 has his own office. He had given that room on rent to MTNL in December 1999 and November 2000. He claimed that on 12-13th November 2000 in the evening around 4:30-5:00 pm, when he had gone to fetch milk from the mother dairy situated in the same market, he saw 3-4 persons compelling the Appellant to lift some money lying on the dash board of the car and the Appellant was refusing to do so. He further claimed that one of the 3-4 persons slapped the Appellant once and when he wanted to intervene, the said 3-4 persons stopped him stating that they were from CBI. He claimed that the Appellant lifted the GC notes when he was slapped. In cross-examination, he could not tell the exact

date of the incident or the day of the week or also the time of the incident. He claimed that in the Maruti Zen car, besides the Appellant, only a person on the driver seat was sitting. He denied as incorrect that three persons were sitting in the car. He did not remember the number of the car and the denomination of the GC notes lying on its dash board.

27. Bhagwati Prasad, posted as Divisional Engineer (Telecom), with MTNL, was examined as DW2. He stated that on 16th November 2000, at about 5-5:15 pm, four or five persons came into the office room. They were holding one hand of the Appellant and the Appellant was holding some currency notes. They brought him into the room by pushing him. They disclosed that they were from the CBI and asked him to go out. He claimed that no proceedings were conducted in his presence. In cross-examination, he denied that he was on leave on that date, although he could not produce any document to show his presence on that date. When it was suggested to him that the post trap proceedings were conducted in the office of the DGM (Maintenance), DW2 stated that when he came out of his room, he saw the room of the DGM (Maintenance) to be vacant. He admitted that he was a junior to the Appellant and working under him.

28. Mr. Joginder Gupta was examined as DW3. He was running a shop in the DDA market, I.P. Extension, Delhi. He stated that on 14-15th November 2000, he went to a urinal situated in the market, and when he came out, he saw a crowd gathered. He saw two persons in

the front seat of the car and noted that four or five persons were pushing the Appellant inside the car. They were pushing him to pick up the notes on the dash board of the car and when he did not do so, one person slapped him. He was compelled to pick up the notes and immediately took him to the first floor. In his cross-examination, he denied having any contract for the supply of electrical parts to MTNL.

Judgment of the trial Court

29. In its impugned judgment dated 27th February 2009, the learned trial Court first held that the Sanction Order (Ex.PW3/A) was given after a proper examination of the material placed before Mr. D.P. Saini (PW3), the Sanctioning Authority. Despite PWs 5 and 6 turning hostile, each of them had admitted to the handwritten complaint (Ex.PW6/A) and the handing over memo (Ex.PW5/A). PW6 also admitted to having contacted Mr. Bali over telephone and the said conversation having been recorded. This was also admitted by PW5. PW7 corroborated the statements of PWs 5 and 6 about the pre-trap proceedings. PW7 also proved the handing over memo (Ex. PW5/A). The above evidence was corroborated by PW9, the TLO. The learned trial Court held that the evidence of PW8, Mr. O.P. Sachdeva, showed that the main matter of rent in relation to the both the flats was dealt with by both the accused and, as on 16th November 2000, two months' rent in respect of Flat No.85A, was in fact due. Further, the Appellant had admitted that he and PW4 along with PW6 were going to meet the GM at the Preet Vihar Office for solving the rent problem of PW6.

The evidence of PWs 5, 6, 7 and 9 also proved the demand and acceptance of bribe by the Appellant.

30. As regards the absence of the link evidence regarding the hand wash samples, the learned trial Court observed that PW1, Dr. K.S. Chhabra, had categorically stated that when the three sealed bottles were received in the office of the CBI on 20th November 2000, they were intact and tallied with the specimen seal. The record showed that the copy of the First Information Report ('FIR') was received by the learned trial Court on 17th November 2000 at around 3:05 pm and the FIR had been registered at 11:00 am on the previous date. Even if the FIR was not proved, it could not be a ground for acquittal. The evidence of PW7, corroborated by the evidence of PW9, was consistent with the guilt of the Appellant and not consistent with his innocence. Since there was a conclusive proof with regard to the tainted money recovered from the pocket of the Appellant, the deficiency evidence of corroboration with regard to the negotiation of the Appellant with PW6 "paled into insignificance, more so when no material prejudice resulted to the accused." Therefore, Section 20 of the PC Act was attracted. The statements made by the defence witnesses were not put to the prosecution witnesses in their cross-examination. The trial Court held that the defence of the Appellant that he was slapped by a CBI officer and forced to pick the GC notes was an after-thought.

31. However, the learned trial Court noted that the prosecution had failed to adduce any substantive evidence as regards the involvement of Mr. Bali or his involvement in the conspiracy with the Appellant. Therefore, Mr. Bali was given the benefit of doubt and acquitted. As has already been noted, the learned trial Court directed perjury proceedings to be initiated against PW6 for resiling from the statement made by him before the CBI and turning hostile during the trial.

Submissions of Senior counsel for the Appellant

32. Mr. Hariharan, learned Senior counsel for the Appellant, first submitted that each of the charges against the Appellant stemmed from the alleged conspiracy between him and the co-accused, Mr. Bali for which they were charged under Section 120-B IPC. Relying on the decision dated 3rd March 2014 of this Court in ***Kanti Prasad Tyagi v. State of Delhi Crl. A. No. 151 of 2008***, once the charge under Section 120-B IPC failed, the entire case against the Appellant had to fail. The judgment of acquittal, as far as Mr. Bali was concerned, was not appealed against by the MTNL and will have to become final. Therefore, the conviction of the Appellant was not sustainable in law.

33. Secondly, it was submitted that there was absolutely no evidence of conscious demand or conscious acceptance of the bribe amount since the Complainant (PW6) and the shadow witness (PW5) had both turned hostile. There was no occasion for the Appellant to demand any such bribe. Mere recovery of the treated GC notes from the

Appellant was not sufficient to prove the conscious demand or conscious acceptance of the bribe amount and in such circumstances, Section 20 would not be attracted. He placed reliance on the decisions in *Banarsi Dass v. State of Haryana AIR 2010 SC 1589*, *Suraj Mal v. State (Delhi Administration) (1979) 4 SCC 725* and *N.M. Rajendran v. The State 1995 Cri. L.J. 4195*.

34. Relying on the decision of this Court in *Ashish Kumar Dubey v. State Thru CBI 2014 (142) DRJ 396*, Mr. Hariharan submitted that the availability of PWs 5 and 7 in the office of the CBI by coincidence on the date, with the Complainant PW6 arriving there, had not been explained and, therefore was not believable. He relied on the decision in *B. Jayaraj v. State of A.P. 2014(4) SCALE 81* and submitted that not only did DW1 support the demand and acceptance of bribe but DWs 1 and 3 categorically deposed about the Appellant being compelled by the CBI officers to pick up the treated GC notes from the dash board of the car. This aspect of the case has not been discussed by the learned trial Court. DWs 1 and 3 were not shaken in their cross-examination and, therefore, the Appellant had been able to prove his defence that he had not, either consciously demanded or consciously accepted, any bribe amount.

Submissions of the Special PP

35. In reply, Mr. Narender Mann, learned Special Public Prosecutor, pointed out that the evidence on record did prove that the Appellant was in-charge of dealing with the complaints regarding non-payment

of rent and that, as on 16th November 2000, two months' rent for Flat No. 85A was due.

36. Mr. Mann also pointed out that there were portions of the depositions of PW 5 and 6 which supported the case of the prosecution in some material aspects despite them turning hostile regarding the trap proceedings. He referred to the fact that PW6 admitted that in the pre-trap proceedings his conversation with Mr. Bali was recorded. The transcript prepared of the said conversation was also not denied. Referring to Section 61 of the Indian Evidence Act, 1872, Mr. Mann submitted that the cassette itself established the primary evidence and it had been duly exhibited. With PW6 denying the version of the cassette in his cross-examination, it was required to be proved by scientific evidence. The giving of the complaint was proved by the evidence of PWs 5, 7 and 9. The presence of PW4 at the spot was also proved. There was no suggestion put to PW5 that the Appellant had been forced to pick up the GC notes. The other independent witness, PW7, fully supported the case of the prosecution.

37. Mr. Mann placed reliance on the decision of the Supreme Court in ***Willie (William) Slaney v. State of M.P. AIR 1956 SC 116(1)*** and urged that the mere fact that there was a defect in the charge as prayed, could not render the trial invalid. If the charge under Section 120-B IPC failed, then the prosecution was to prove that it was individually committed by the accused, which it had been able to do

in the present case. As regards the voice samples evidence, it was not sufficient for the Appellant to deny them but to make good that denial by cross-examining either PW1 or other leading expert witness. As regards the absence of link evidence, Mr. Mann pointed out that no questions were put to PW1 about the tampering of the seals.

Offence under Section 120-B IPC

38. The first issue that the Court proposes to deal with is the one arising in the context of the charge under Section 120-B IPC. The charge, when carefully perused, reveals three distinct elements. The first is that there was a conspiracy between the two accused for extracting illegal money from PW6 for realization of the payment of rent for two flats in time and thereby establishing that both of them had committed an offence under Section 120-B IPC read with Section 7 and Section 13 (1) (d) of the PC Act. This charge, undoubtedly, has not been proved by the prosecution. The learned trial Court has acquitted the co-accused, Mr. Bali. The question, therefore, of the Appellant being in conspiracy with Mr. Bali does not arise.

39. However, the matter does not end there and this is also why the present case is different from the facts in ***Kanti Prasad Tyagi v. State of Delhi*** which will be discussed soon hereafter. The second charge is that pursuant to the conspiracy, both the Appellant and Mr. Bali demanded illegal gratification. The second part of the second charge is specific that “on 16-11-2000 a sum of Rs. 5,000/- was obtained as illegal gratification from the complainant Mukesh Gupta by you

accused Raj Kumar Varun at about 5.10 pm at your office in Patparganj, Delhi for yourself and on behalf of your co-accused Shiv Raj Bali, thereby both of you committed an offence punishable under Section 7 of the PC Act”. The third charge also is specific to the Appellant obtaining the illegal gratification from PW6 on 16th November 2000. The Court agrees with the submission of Mr. Mann that in light of the wording of second and third charge, even if the charge under Section 120-B IPC is held not to be proved, the learned trial Court is still required to examine the acts attributable to the Appellant for the said two charges. The wording of the two charges categorically records the offences attributable to the Appellant even without the aid of Section 120-B IPC.

40. It is possible that charges 2 and 3 may have been better worded, in the sense that in both the charges the prefix is ‘in pursuance of the aforesaid conspiracy’, indicating as if they are inseparable chain of the same transaction. However, the mere improper wording of a charge need not come in the way of prosecution being able to prove that the Appellant is guilty of the individual act of demanding and accepting illegal gratification, as has been spoken of in the second and third charge. In *Willie (William) Slaney v. State of M.P.*, the Supreme Court was considering the effect of an irregularity in the framing of charges under the Cr PC 1898. At the outset, it must be noted that Sections 535 and 537 of the Cr PC correspond to Sections 464 and 465 of Cr PC 1973. There, the Court was dealing with the omission to file a charge in respect of the offence for which the Appellant was

found guilty. It was opined that the provision relating to charge ought not to be read disjunctively. It was further held that the provision concerning the irregularity in the framing of charge covering Sections 535 and 537 Cr PC 1898 are comprehensive and cover every case where there is a departure from the rule set out in the Chapter. The Supreme Court observed:

“In our opinion, they between them (including sections 535 and 537) cover every possible case that relates to the charge and they place ‘all’ failures to observe the rules about the charge in the category of curable irregularities. Chapter XIX deals comprehensively with charges and sections 535 and 537 cover every case in which there is a departure from the rules set out in that Chapter. Such departures range from errors, omissions and irregularities in charges that are framed, down to charges that might have been framed and were not and include a total omission to frame a charge at all at any stage of the trial. In all these cases the only question is about prejudice. We say this because the Code repeatedly says so in express and emphatic terms and because that is the foundation of which rules of procedure are based.”

41. The Court further observed as under:

“We see no reason for straining at the meaning of these plain and emphatic provisions unless ritual and form are to be regarded as of the essence in criminal trials. We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues or escape for the guilty and afford no protection to the innocent.

We agree that a man must know what offence he is being tried for and that he must be told in clear and unambiguous terms and that it must all be “explained to him” so that he really understands (section 271(1) in sessions trials, section 255(1) in warrant cases) but to say that a technical jargon of words whose

significance no man not trained to the law can grasp of follow affords him greater protection or assistance than the informing and the explaining that are the substance of the matter, is to base on fanciful theory wholly divorced from practical reality; and the same applies to the vast bulk of jurors who attend our courts.

They are none the wiser because of a formal charge except in a vague and general way that is of no practical account. The essence of the matter is not a technical formula of words but the reality. Was he told? Was it explained to him? Did he understand? Was it done in a fair way?"

42. Reverting to the present case, the Court finds that from the second and third charge against the Appellant, it is sufficiently clear as to the individual acts with which he has been charged and, therefore, even *de hors* the charge of conspiracy under Section 120-B IPC, he could have been validly tried for the individual acts constituting the offences under Section 13(1) (d) of the PC Act.

Demand and acceptance of bribe

43. Next, the Court would like to deal with the issue of conscious demand and conscious acceptance of illegal gratification by the Appellant. In this case, it is necessary for the Court to discuss the evidence of the Complainant (PW6), the shadow witness (PW5), the recovery witness (PW7) and the TLO (PW9).

44. PW6, no doubt, turned hostile since in his examination-in-chief, he stated that when he contacted the Appellant on the phone, he had

suggested that PW6 “should contact GM as he was the competent person to give relief and that he could not do anything in the matter.” However, there are statements made by PW6 prior to the above statement which corroborates some material aspects of the case of the prosecution. These are the admissions by PW6 that he waited for payment of rent till November 2000 and that despite meeting the Appellant, Mr. Bali and GM, he was unable to get the rent. Next he stated that “I was informed by account official that unless I pay the money to somebody, may be G.M., DGM or any other person, R.K. Varun and Mr. Bali I will not get the rent.” The third is that although in his examination-in-chief, he stated “I have seen the complaint mark PW6/A. I have not made this complaint”, in his cross-examination by the learned PP, he admitted as under:

“It is correct that powder treated notes were given to me with the direction to hand over the same to the person demanding, on his specific demand.”

45. The further admission in his cross-examination by the learned PP is as under:

“It is correct that flat No.84-A and 85-A, Pocket-VI, Mayur Vihar-III were let out to MTNL in September, 2000 and Mr. R.K. Varun, DGM, MTNL and Mr. S.R. Bali, DGM (Admn.) were dealing with the case of letting out of my flats and I used to meet these two officials in this connection as mention in portion A to A and B to B. It is incorrect that on 15.11.2000 when I met S.R. Bali, he demanded amount equal to two months' rent as bribe for releasing of rent and that this amount is to be shared by him with R.K. Varun and directed me to contract to R.K. Varun and also threatened to cancel the lease agreement in case of non-payment of bribe (Confid. with portion

C to C where it is so recorded). It is incorrect that when I contacted R.K. Varun, he demanded the amount equal to one month rent as bribe and asked me to pay in two or three instalments. (Confid. with portion D to D where it is so recorded). It is correct that as I did not want to pay the bribe I went to SP, CBI with a written complaint. It is correct that on the basis of my complaint Insp. C.K. Sharma was asked to take action.”

46. From the above answers, it does appear that the Complainant’s denial in the earlier portion about his having given the complaint itself under threat by the CBI is clearly an after-thought.

47. The further admission by PW6 is that he did contact the Appellant on telephone and when he was not available, on the direction of the CBI, he contacted Mr. Bali and the conversation between them was recorded. He was not sure if during the conversation, Mr. Bali had demanded a bribe, but he clearly says as under:

“It is also correct that the cassette was sealed after being signed by the witnesses. It is correct that I was given small tape recorder before leaving the CBI office. I cannot say if transmitter was given to the witness. It is incorrect that Mr. Varun asked me not to give more than Rs. 1000/- to Rs.2000/- to S.R. Bali as his share. It is correct that I was again said to contract S.R. Bali on telephone and I contacted him on phone and that conversation was recorded. But I cannot say whether it contained demand of bribe and threat to cancel the lease deed. I cannot say whether that cassette was sealed and marked as ‘B’. Tape recording memo Ex. PW5/E and K also bear my signature at point B.”

48. PW6 also admits to the presence of PW4, Arun Kohle and to the

fact that PW4 was a common friend of PW6 and the Appellant. He further states as under:

“It is correct that myself, Mr. Varun and Mr. Kohli sat in the car but shadow witness was not with us so he was not standing near the car window. It is incorrect that shadow witness remained outside the car near the window. It is incorrect that in the car I gave Rs.5000/- to R.K. Varun who accepted the same and after counting, kept the same in his left pocket of his shirt. I do not remember whether then I gave the signal through my mobile. It is correct that the CBI team reached there and challenged R.K. Varun and asked him about demand and acceptance of Rs.5000/-. I do not know whether he remained silent or gave any answer. It is correct that I introduced Arun Kohli with CBI and accused Varun was asked to come out of the car. It is incorrect that I was asked about the details of transaction and the payment made which I narrated. Vol. The money was lying at the desk board and not given to the accused Varun. It is incorrect that B. Patra was asked to recover the amount who recovered the same from the left side shirt pocket of the accused or that numbers If the recovered GC notes were tallied with the numbers already noted down and found to be correct. It is incorrect that when the crowd gathered at the spot then we were brought to MTNL office. Vol. We were immediately brought to MTNL office and no proceedings were done near the car. As I was sitting in another room I cannot say about the proceedings regarding taking of washes and seizure conducted by CBI.”

49. From the above answers, in the cross-examination, it is clear that PW7 was asked to recover the amount and that money was lying on the dash board of the car. What is significant is that PW6 does not say anything about the Appellant being beaten and being compelled to pick up the GC notes. It is also significant that PW6 confirms that “I have seen the GC notes Ex.PW1/1 to 10 and after tallying their numbers I can say that these are the same GC notes which were given

by me to CBI as trap money but it is incorrect that all these were recovered from accused Varun as the same were lying on the dash board of my car.”

50. The cassette (mark ‘A’) was played in Court. PW6 claimed that he could not recognize the voice on the cassette. Likewise, he declined to identify the voices on cassettes B, C and E.

51. A significant aspect of the deposition of PW6 is that he admits to having taken the sum of Rs. 5,000 from the office of the CBI; admits to the fact that the numbers of the GC notes were noted in the pre trap proceedings; that the numbers tallied with those seized during the trap proceedings. He also admits to the presence of himself, the Appellant and PW4 in the car. He is unable to deny whether he gave a signal through his mobile. He admits to having been given the MCR, although he claimed that he was unable to identify the voices.

52. A reading of the entire evidence of PW6 gives the distinct impression that he does support the case of the prosecution in some material particulars discussed hereinbefore. His evidence cannot be discarded in its entirety. No doubt, he has tried to help the Appellant by denying in the Court that he gave any bribe. But, at the same time, he does not say that the Appellant was forced by the CBI to pick up the GC notes. To this extent, PW6, though having turned hostile, does not help the case of the Appellant that he was somehow forced to pick up the GC notes by the officials of the CBI.

53. Turning to the shadow witness (PW5), it is seen that he too admits that the talk regarding “*paisa ka len den*” was recorded at the pre-trap stage. He confirmed that PW6 produced GC notes of Rs. 500 denomination which were then treated. He correctly identified the Appellant. He further stated that “in the MTNL office, in my presence, CBI officers took out the GC notes from the front pocket of the shirt of accused No.2.” This is significant because although this witness states that he saw PW6 and the Appellant in the car, and is witness to everything that happened thereafter, he does not anywhere states that the Appellant was forced or beaten by any CBI officer and made to pick up the GC notes in the dash board of the car. In fact, he categorically states that the CBI officers took out the GC notes from the front pocket of the shirt of the Appellant.

54. PW-5 witness also confirms that “washes of hands of accused No.2 as well as the wash of his shirt pocket was taken and the colour became red.” In his cross-examination by the learned PP, PW5 confirmed that the complaint of PW6 was shown to me and both he and PW7 were satisfied about its genuineness. He virtually proved the entire pre-trap proceedings. He also confirmed that the specimen voices of PW7 and himself (PW5) were recorded in the blank cassette and thereafter PW6 was asked to talk to the Appellant. He virtually confirmed the conversation between the Appellant and Mr. Bali. The giving of the MCR to PW6 and the preparation of Ex.PW5/E has also been proved to be correct by this witness. He stated as under:

“It is correct that I was standing close to the car when complainant along with Mr. Kohle and accused No.2 was sitting in the car and windows of the car were opened. I did not state that in my presence the complainant took out the money and handed over to accused No.2 who kept the same in his shirt pocket as this transaction was going on in the car. It is correct that I was able to see the transaction from outside. It is correct that when I was about to give the signal, I saw that CBI team had already arrived. It is also correct that the CBI team asked all the occupants to come out of the car. It is correct that the CBI team asked from me and the complainant about the transaction and I stated that the money has been given. It is correct that in the office of DGM, my colleague Mr. V. Patra was directed to recover the money and he recovered the money from the shirt pocket of accused No.2. It is correct that washes were transferred and sealed in bottles. It is correct that the recorded which was given to the complainant was taken from him and played which was found containing the entire conversation. It is also correct that the cassette was also sealed at the spot and I signed the same. It is correct that the site plan Ex.PW5/C was also prepared at the spot. It is correct that all the post trap proceedings were done at the spot. It is correct that on the next day I was called again to the CBI office and specimen voice of both the accused persons were recorded in my presence vide memo Ex.PW5/G and H bearing my signature at point-A. Specimen of the seal was taken on a paper which is Ex.PW5/J bearing my signature at point-A. Conversation recording memo Ex.PW5/K bearing my signature at point-A. I have seen the GC notes Ex.P1/1 to 10 and after tallying their numbers, I can say that these are the same GC notes which were used as trap money and recovered from the spot.”

55. From the above detailed answers of PW-5, it is clear that he has virtually proved the arrest of the Appellant from the spot; the recovery of the treated GC notes from the shirt pocket of the Appellant by PW7; the fact that the cassette was played at the spot and contained the entire conversation; that the entire post trap proceedings was done

at the spot and that the numbers of the seized GC notes tallied with those noted in the pre-trap proceedings.

56. This Court is of the view that PW5, although apparently hostile as regards the demand and acceptance of bribe by the Appellant, has in fact proved beyond a shadow of doubt that the recovery of the tainted GC notes was made from the shirt pocket of the Appellant. The defence of the Appellant that he was forced to pick up the GC notes by the CBI officers from the dash board of the car is not spoken to either by PW5 or PW6. If, indeed, the tainted GC notes, as stated by PW6, were recovered from the shirt pocket of the Appellant, then the burden certainly shifts to the Appellant under Section 20 of the PC Act to prove how it landed there, without his conscious acceptance of the bribe amount.

57. It may be noted at this stage that PW7 has fully supported the case of the prosecution. He has proved the recorded conversation between the Appellant, PW6 and Mr. Bali. He clearly stated as under:

“This telephonic conversation was recorded in a cassette which was played and I heard the conversation while playing the cassette and there was demand of bribe money of Rs.5000/- by the accused R.K.Varun from the complainant. As per conversation recorded the accused R.K. Varun was telling complainant that the complainant will not pay more than Rs.1000/- or Rs.2000/- to the other accused S.R. Bali. Thereafter complainant talked over telephone with S.R. Bali and this conversation was also recorded. After hearing recorded conversation it was revealed that accused S.R. Bali was saying that if bribe amount was not paid to him he would cause hurdle in the work of the complainant. The micro cassette in which the

conversation was recorded was got signed by me and other witness Man Chand on the paper slip pasted on it and the said cassette was sealed in a cloth wrapper.”

58. The above evidence has to be read along with the corroborative evidence of the report of CFSL of the telephonic conversation (Ex.PW2/A), which confirms the voices of PW6 and Mr. Bali. The transcript of the said conversation (PW10/D1) has been proved in the evidence of PW10. What is required to be noted at this stage is that there has been no suggestion, even remotely made to either PW7 or PW10, that the above conversation was not correctly recorded or that the transcript contained an inaccurate statement. The Court is of the view that the above scientific evidence, read with the transcript of the tape, fully corroborates the evidence of PW7 that there were telephonic conversations between PW6 and Mr. Bali.

59. Even if one completely discards the evidence by way of the cassette recorder containing the conversation between PW6 and Mr. Bali and its transcript, as has been done by the learned trial Court, the evidence of PWs 5 and 6, to the extent as noted hereinbefore, and the fully corroborative evidence of PW7, is sufficient to prove the conscious demand and acceptance of the illegal gratification by the Appellant.

60. The decisions cited by Mr. Hariharan are distinguishable on facts. In *Banarsi Dass v. State of Haryana*, as noted in para 16 of that judgment, both the Complainant and the *panch* witness turned hostile.

It was observed that only because of that the accused was held entitled to acquittal “on technical ground.” In the present case, it cannot be said that PWs 5 and 6 have turned completely hostile. As already noted, there are portions of their testimonies which support the case of the prosecution. Importantly, the other independent witness, PW7, has not turned hostile. He has fully supported the case of the prosecution and his evidence has remained unshaken in cross-examination. In ***Kanti Prasad Tyagi v. State of Delhi***, the charges framed were all in relation to conspiracy between the two accused and it was not possible to isolate any separate individual act of demand and acceptance by the Appellant in that case. However, in the present case, charges 2 and 3, talk of an individual act of demand and acceptance by the Appellant. Therefore, the decision in ***Kanti Prasad Tyagi v. State of Delhi*** is not helpful to the Appellant. In ***Suraj Mal v. State (Delhi Administration)***, no doubt the Court held that mere recovery by itself cannot prove the case of the prosecution, but this was because in that case there was “absence of any evidence to prove payment of bribe or to show that the Appellant voluntarily accepted the money.” In the present case, however, there is sufficient evidence to prove beyond reasonable doubt that the illegal gratification was demanded and accepted by the Appellant. Likewise, in ***B. Jayaraj v. State of A.P.***, there was no proof of voluntary acceptance of the bribe amount by the Appellant in that case. In the present case, since there is clear proof of conscious acceptance of bribe amount by the Appellant, the presumption under Section 20 of the PC Act was attracted. The decision in ***N.M. Rajendran v. The State*** holds that if indeed the TLO

himself was able to witness the acceptance of bribe amount by the Appellant, there was no need to have two other independent witnesses for that purpose. It only requires to be noted that the TLO could not have anticipated that at the crucial moment, the windows of the car would be down, thus enabling even the TLO to witness the acceptance of bribe by the Appellant. Therefore, the decision in the said case is not helpful to the Appellant.

Link evidence

61. Mr. Hariharan dwelt at length on the fact that there was no link evidence to show that the seals were preserved properly; deposited in the *malkhana*; or that the samples and the hand washes were kept in a tamper proof environment; that they were sent in an intact condition from *malkhana* to the CFSL and received back thereafter at *malkhana*.

62. As already noticed, even at the stage of sending the samples to CFSL, the SP at the ACB noted that the bottle of left hand wash had a crack at the bottom and he advised the CFSL to transfer it to another bottle. It cannot, therefore, be said that the CBI was unaware of the crack at the bottom of the bottle containing the left hand wash. The covering letter under which the samples were sent bears the endorsement of the CFSL of having received the samples on 20th November 2000 along with the specimen seal. The report clearly states “received three parcel sealed with the seal intact CBI ACB ND 22/99 as per official specimen enclosed.” This report (Ex.PW1/A) was proved by PW1. No suggestion was put to him during his cross-

examination that the seals were not intact and they were found in a tampered condition. Even in the handwritten note in the report regarding transfer of the left hand wash to a separate bottle remained unchallenged in cross-examination. The only question was regarding the change of colour with the passage of time and about no other aspect. In the absence of questions being put to the witness from CFSL that the samples may have been tampered with, it is not possible to entertain the submission at this stage that there was no link evidence to establish that the samples were kept in a tamper proof environment.

63. As regards the absence of production of relevant registers to prove the deposit of the seals and samples in the *malkhana*, the Court finds that nothing has been elicited in the cross-examination of TLO (PW9) in this regard. This argument cannot be developed for the first time at the stage of appeal when the opportunity to confront the concerned witness with such a line of defence was not availed of at the appropriate stage.

Presumption under Section 20 PC Act

64. Mr. Hariharan urged that unless the foundational facts were laid and proved by the prosecution beyond reasonable doubt, the presumption under Section 20 of the PC Act would not be attracted. He further submitted that the burden on the defence was only to prove its case on a preponderance of probabilities and this having been

sufficiently discharged by the Appellant herein through the evidence of DWs 1 and 3.

65. On a careful examination of the evidence of DWs 1 and 3, the Court is inclined to agree with the learned trial Court, which has, in fact, analyzed it in great detail. In para 55 of the impugned judgment it has been rightly held that DW1 appears to be an interested witness. The inability of DW2 to recollect the exact date of the incident and the statements made by DW3 that it was around 14th or 15th November 2000 and his inability to state that three persons were in the car, when the Appellant himself stated that there were three persons, rendered their evidence untrustworthy. The Court is unable to accept this submission that the foundational facts have not been proved by the CBI beyond all reasonable doubt in the present case.

66. For all the aforementioned reasons, the Court finds no error in the impugned judgment dated 27th February 2005 passed by the learned trial Court convicting the Appellant of the offences under Section 7 and 13 (1) (d) read with Section 13 (2) of the PC Act.

Sentence

67. Now coming to the question of sentence, the Court finds that the incident is of 2000 and the trial went on for nearly nine years. The appeal has been pending in this Court for over five years. In the circumstances, the Court reduces the sentence awarded to the Appellant to 18 months' RI for both the offences under Section 7 and

13 (1) (d) read with Section 13 (2) of the PC Act with the fine imposed being unaltered and both the sentences to run concurrently.

68. The bail bond and the surety bond of the Appellant are cancelled. He is directed to surrender forthwith to serve out the remaining sentence.

69. The appeal is disposed of in the above terms, but with no order as to costs.

70. A certified copy of this order along with the trial Court record be delivered by Special Messenger to the trial Court concerned forthwith.

July 8, 2014
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S. MURALIDHAR, J.

