

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: March 10, 2014

Decision on: March 26, 2014

CRL.A. No. 359 of 2009 and Crl.M.A.No. 8682 of 2013

DEVINDER SINGH

..... Appellant

Through: Ms. Nitya Ramakrishnan with
Mr. Sarin Naved, Ms. Ria Singh Sawhney
and Mr. Snehashish Mukherjee, Advocates.

versus

CENTRAL BUREAU OF INVESTIGATION Respondent

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

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

26.03.2014

1. This appeal is directed against the judgment dated 24th April 2009 passed by the learned Special Judge, (CBI) in CC No. 221 of 2007 holding the Appellant guilty of the offence under Sections 7 and 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 ('PC Act') and the order on sentence dated 28th April 2009 sentencing him to rigorous imprisonment ('RI') for one year with fine of Rs.5,000 and in default to undergo simple imprisonment ('SI') for 5 months for the offence under Section 7 of the PC Act and to undergo RI for two years with fine of Rs.10,000 and in default to undergo SI for ten months for the

offence under Section 13 (2) read with Section 13 (1) (d) of the PC Act with both sentences being directed to run concurrently.

The complaint to the CBI

2. The case of the prosecution is that Mr. Yogender Prasad Gupta lodged a complaint (Ex.PW-6/A) with the Central Bureau of Investigation ('CBI') on 25th January 2003 stating that he was a Consultant and that on 23rd January 2003, at about 10.30 am, two police officials from the MIG Flats, Police Post Titarpur, Police Station Rajouri Garden came to his office at Shop No. 10, First Floor, Gurudwara Singh Sabha, Subhash Nagar and informed him that the Chowki Incharge, Sub Inspector Devinder Singh (Appellant) had called him immediately at the police post. Mr. Gupta is stated to have told the police officials that he had some urgent work and that he would appear before the Appellant in the evening. Mr. Gupta in his complaint stated that when he reached the police post at 4 pm, the Duty Officer asked him to wait. At around 6 pm, the Appellant arrived and called him to his office. The Appellant informed Mr. Gupta that a complaint had been lodged against Mr. Gupta by one Ms. Sheetal Sharma accusing him of cheating and that the Appellant would have to register a case against Mr. Gupta on the basis of the said complaint. Mr. Gupta in his complaint further disclosed that the Appellant told him that if he wanted to avoid registration of the case, Mr. Gupta should bring Rs.5,000. The Appellant further asked Mr. Gupta to inform the Appellant on his mobile as to when and where the money would be paid. The Appellant gave Mr. Gupta his mobile number on a slip which was brought by Mr. Gupta to the CBI office. Mr. Gupta in his

complaint further stated that he received a call in his office at around 4 pm on 24th January 2003 for not calling the Appellant on his phone and was threatened that if the money did not reach the Appellant by the next date, Mr. Gupta would be arrested. Mr. Gupta is stated to have informed the Appellant that he could arrange only Rs.3,000. Since Mr. Gupta did not wish to pay the bribe amount, he approached the CBI with a written complaint.

Pre-raid proceedings

3. At the CBI office, Mr. Gupta met Mr. Anil Kumar Minocha of the Anti Corruption Branch ('ACB'). Mr. Minocha, for the purposes of verification, arranged two independent witnesses, Mr. Shyam Lal (PW-1) and Mr. Rajiv Kumar Sharma (PW-5), both Ticket Collectors at the New Delhi Railway Station. In the presence of PWs 1 and 5, Mr. Gupta was asked by Mr. Minocha to call the Appellant from Mr. Gupta's mobile phone on the Appellant's mobile phone. The conversation, which was recorded, is stated to have established the demand of bribe by the Appellant.

4. On the basis of the written complaint, an FIR (Ex. PW-6/B) was registered. Mr. Gupta produced six government currency ('GC') notes of Rs.500 each and their numbers were noted down by Mr. Minocha in the handing over memo (Ex.PW-1/B). A memo was also drawn up regarding the telephone conversation (Ex.PW-1/C). The GC notes provided by Mr. Gupta were treated with phenolphthalein powder and a demonstration was given showing its reaction to sodium carbonate solution. The treated

GC notes were kept in the left side shirt pocket of Mr. Gupta and he was directed to hand over the money to the Appellant on his specific demand or on his direction to some other person and not otherwise. PW 5 was directed to act as a shadow witness and to give signal by scratching his head by both his hands after the giving of bribe was completed. A micro cassette recorder (MCR) was given to Mr. Gupta for the purpose of recording his conversation with the Appellant at the spot.

The raid proceedings

5. The trap team comprising of Mr. Minocha, Mr. Gupta and PWs 1 and 5 reached Tis Hazari Courts where the Appellant was stated to have been attending a case in Court No. 35. The case of the prosecution as set out in recovery memo (Ex.PW-1/D) is that PWs 1 and 5 were seen entering Court No. 35 at Tis Hazari Courts at around 1.50 pm along with Mr. Gupta. In the recovery memo drawn up by Mr. Minocha, it is stated that when he visited Court No. 35 he saw that Mr. Gupta was talking with the Appellant.

6. At around 2.15 pm, PW 5, Mr. Gupta and the Appellant came out of the Court and went into the corridor. After about 10 minutes, PW 5 gave the pre- determined signal. Mr. Minocha then rushed towards Appellant and, after disclosing his identity and the identities of other trap team members, challenged whether he has demanded and accepted bribe from Mr. Gupta. The Appellant was stated to have gotten perplexed. The left hand and right hand wrists of the Appellant were caught by Inspector R.K. Rishi (PW-10) and Inspector A.K.Pandey respectively. On being

asked, PW-5 informed that the Appellant had demanded the bribe amount by gesturing with his right hand and on his demand, Mr. Gupta took out the treated GC notes from his left side shirt pocket with his right hand and handed it over to the Appellant who accepted the bribe amount with his left hand. He counted the same with both his hands and, thereafter, using both hands, kept the notes in his left side pant pocket with his left hand.

7. In the recovery memo Ex.PW-1/D, it was recorded that PW-5 had informed Mr. Minocha that the Appellant had asked Mr. Gupta "*Kitne Hain*" to which Mr. Gupta is stated to have replied "*Teen Hain*". The Appellant is stated to have then asked "*Baki Kab Doge*" to which Mr. Gupta replied "*Char Din Mein De Dun Ga*" and the Appellant is stated to have retorted "*Theek Hai*". The recovery memo further stated that the right hand of the Appellant when dipped in the colourless solution of the sodium carbonate turned pink and this was transferred to a glass bottle which was sealed and wrapped with a cloth wrapper. The left hand wash of the Appellant also turned pink which was again transferred to a clean bottle and sealed and wrapped.

8. The Appellant was asked to change his pant and he informed that he had another pant in his scooter dickey. The key of the scooter was taken from him and the search of scooter was carried out in the presence of PWs 1 and 5 and the spare pant taken from it. After the Appellant changed his pant, the inner liner of left side pant pocket was washed in a colourless solution of sodium carbonate which turned pink. This was

transferred to a separate clean bottle and sealed and labelled. The numbers of the GC notes were tallied with the numbers mentioned in the pre-raid proceedings. The MCR was taken back from Mr.Gupta.

9. In the meanwhile, since there was huge public gathering at the place of occurrence i.e. corridor of Tis Hazari Court No.35 and there was apprehension of injury to the Appellant and the case property, it was decided to shift to the CBI office, CGO Complex, Lodhi Road at around 3.30 pm. It is stated that at the CBI office at the CGO Complex, the MCR was played and copy of the conversation was transferred to a new blank cassette and the MCR was then sealed with the signatures of PWs 1 and 5. A rough site plan (Ex.PW-1/E) was also prepared at the spot at Tis Hazari Courts.

Arrest of the accused and trial

10. The Appellant was arrested and a charge sheet filed. By an order dated 17th May 2005, the trial Court framed charges against the Appellant for the offences under Sections 7 and 13 (1) (d) punishable under Section 13 (2) of the PC Act. The Appellant pleaded not guilty and claimed trial.

11. The prosecution examined 11 witnesses and the Appellant examined one Mr. Chander Kant (DW-1). In his statement under Section 313 CrPC, the Appellant denied demanding and accepting any illegal gratification from Mr. Gupta. He claimed that he had been falsely implicated in the case. He further stated that during the course of the trial he learnt that Mr. Gupta had also implicated several other police officials in similar other

cases and one such case was *CBI v. Manuel Massey*. He also learnt that Mr. Gupta and his associates while operating in the jurisdiction of Police Station Naraina falsely implicated the then SHO and the case was *CBI v. Pawan Kumar*. He denied meeting Mr. Gupta at any time or that his pant was removed at the spot.

12. During the trial, Mr. Minocha expired. From the side of the police Mr. R.K. Rishi (PW-10) was examined to prove the pre-raid and recovery proceedings. The prosecution failed to produce the complainant Mr. Gupta as a witness. The reason given by it to the trial Court was that he was unable to be traced. The two independent witnesses examined by the prosecution to prove the pre-raid and raid proceedings were PWs 1 and 5.

Evidence of PW 1

13. In his examination-in-chief on 1st March 2007, PW-1 stated that in his presence the notes given by Mr. Gupta to Mr. Minocha were treated with phenolphthalein powder and a demonstration was given. He then stated that the notes were kept by Mr. Minocha. He added that he was unable to recollect whether Mr. Minocha kept the notes with him or handed them over to somebody else or to Mr. Gupta. In the further examination-in-chief on 25th February 2008, PW-1 turned hostile. He now stated that he did not know the details of any complaint against the Appellant or whether any tape recorder instrument was used in the pre-trap proceedings. He stated that he could not remember whether any attempt was made by Mr. Gupta to contact the Appellant from the CBI office.

The Special Public Prosecutor ('SPP') for the CBI was then permitted to cross-examine PW-1.

14. In his cross-examination by the SPP, PW-1 maintained that he could not recollect whether Mr. Gupta had called the Appellant from his mobile from the CBI office and whether said conversation was recorded and later the cassette was played in the presence of PWs 1 and 5. He admitted as correct that the numbers of the GC notes for Rs.3,000 recorded in Ex.PW-1/B which had his signatures at point A on both the pages. He also admitted that he had signed Ex.PW-1/C but he could not recollect that the said memo concerned the recording of the taped conversation between Mr. Gupta and the Appellant. Although he agreed that his statement under Section 161 CrPC (Ex.PW-1/A) was recorded by the Investigating Officer ('IO'), PW-1 resiled from the said statement. He now denied having told the IO that after the demonstration, the treated GC notes were kept in the left side shirt pocket of Mr. Gupta. PW-1 resiled from certain other statements but admitted that he and other team members put the signatures on the handing over memo Ex.PW-1/B.

15. PW-1 admitted that the trap team, including himself reached Tis Hazari Courts at about 1.40 pm. He denied that Mr. Gupta and PW-5 were directed to proceed inside Court No.35 and contact the Appellant. PW-1 stated:

"I can only say that I was made to sit in a gallery all alone whereas other members went somewhere else which I do not know. I cannot say for what purpose I was made a member of the trap team. It is incorrect to suggest that I was made a member of the

trap team. It is incorrect to suggest that I was made an independent witness to see the proceeding so that I am in a position to depose whether the trap proceedings are correct or not.”

16. Thereafter PW-1 proceeded to deny the entire raid proceedings and resiled from his previous statement in that regard. He, however, stated:

“I had seen that accused Devinder Singh present in the Court (correctly identified) was arrested by CBI at Tis Hazari Court on second floor on the day of the trap and I had seen him for the first time on that day i.e., 25.1.2003. I had seen this while I was sitting in the gallery (Ground Floor). It is correct that the hands of accused were washed in freshly prepared colourless solution of Sodium Carbonate but I cannot say whether each hand was washed separately or not. When the wash of the hands was taken in this manner, the colourless solution was turned slightly pink. The respective pink solutions were transferred in two separate clean glass bottles and were sealed with seal of CBI. CBI conducted some proceedings which I do not recollect. CBI did some writing work and I find that paper which is Ex.PW-1/D and bears my signatures at point A on all pages. I do not recollect if some labels were put on these sealed bottles containing the washes. I did not tell the IO that on the direction of Inspector A.K. Manocha, I recovered the tainted amount of Rs.3000 from the left side pant pocket of the accused. (Confronted with portion G to G of Ex.PW-1/A, where it is so recorded). Some CBI officer had recovered the notes which I could not see due to crowd. These GC notes were recovered from the possession of the accused present in the Court. It is correct that I had tallied the numbers these recovered GC notes with the numbers recorded in the memo Ex.PW-1/B and these numbers were found to be the same. I do not remember whether the wash of the inner lining of the left side pant pocket of the accused was taken in freshly prepared colourless solution of sodium carbonate and the solution turned pink; which was

preserved in clean glass water and sealed with CBI seal. The site plan was prepared in my presence on which I wrote my name in Hindi. The site plan is Ex.PW-1/E. Similarly, the personal search cum memo of the accused Ex.PW-1/F which I signed. The specimen voice memo was not prepared in my presence but it is correct that the same bears my signatures at point A.”

17. PW-1 identified the glass bottles containing the washes and the cloth wrappers used to seal the glass bottles and his signatures on the pant. He also identified his signatures on the MCR and the cover used for sealing the micro cassette.

18. In his cross-examination by learned counsel for the Appellant, PW-1 maintained that he had not seen the recovery of the GC notes from the possession of the Appellant. The CBI officials had handed over some GC notes to him and that they had been recovered from the Appellant and he was asked to tally the numbers of those notes with a paper slip. He claimed that he could not read or write English and he always signed in Hindi and that in the CBI office he was made to sign certain documents which he signed on their asking. He added that while sitting in the gallery of the ground floor at Tis Hazari Courts, he was taken to the Second Floor office of the CBI where he was asked to sign documents.

Evidence of PW 5

19. The other independent witness was PW-5. He stated that in his presence Mr. Gupta made a complaint regarding demand of bribe “by some police officials whose name I do not recollect at present”. PW-5

claimed that he did not know what proceedings were conducted by the CBI officials and that he put his signatures on those proceedings. He could not recall if any conversation took place between Mr. Gupta and the Appellant in his presence. He agreed that the GC notes were treated and a demonstration was given and that serial numbers were noted in the pre-raid proceedings.

20. PW-5 further agreed that “in CBI office, in one blank cassette my introductory voice was got recorded. The introductory voice of PW Shyam Lal was also got recorded in the same cassette. The said cassette was played to check our voice recorded therein. The said cassette was probably handed over thereafter to Mr. Gupta. I do not remember if any conversation was recorded in the said cassette in my presence between the complainant and suspect.” PW-5 agreed that he was asked to give the pre-assigned signal to the CBI by scratching with both his hands. He admitted his signatures on the handing over memo Ex. PW-1/B.

21. PW 5 spoke of the raiding team reaching Tis Hazari Courts and that after the vehicle was parked the CBI officials took their positions in the gallery. PW-5 stated that Mr. Gupta was with him and both of them went to see a Sikh gentleman who had demanded the bribe and thereafter Mr. Gupta and the said Sikh gentleman started going out. PW-5 stated:

“There were many persons present in the gallery. The conversation took place between the complainant and said Sikh man and I could not hear as to what conversation took place between them. Meanwhile, CBI official rushed there and went on the second

floor. A large people gathered there. No bribe was demanded and accepted in my presence.”

22. The SPP was then permitted to cross-examine PW-5 as he was resiling from his previous statement. PW-5 stated that he signed all the documents on the directions of the senior officers of the CBI. He denied that he had signed Ex.PW-1/B (the pre-trap proceedings) after reading and understanding its contents. He also denied reading the memo of the tape recorded conversation (Ex.PW-1/C) although he admitted his signatures thereon. When asked to identify the Appellant, PW-5 stated that “perhaps the accused present before the Court today was the said person to whom complainant had met”. He denied that the Appellant had asked Mr. Gupta “*Kitne Hain*” or that he had gestured his hand or that Mr. Gupta had said “*Teen Hain*” and taken out the bribe money and handed over to the Appellant. He was resiling from his previous statement Ex.PW-5/A on the above particulars and was, therefore, confronted with it.

23. PW-5 further stated in his cross-examination by the SPP:

“The accused now present before the Court today was apprehended by the CBI officials at Tis Hazari Court on the said day. It is correct that accused was caught hold by his right and left hands by the CBI team. I do not remember whether the CBI team challenged the accused telling him that he had accepted the bribe amount. It is correct that CBI team had apprehended the accused for accepting the bribe amount. I do not know if any amount was accepted by the accused. I cannot say if the accused had accepted the GC notes on which Phenolphthalein powder was applied by the CBI officials. It is incorrect to suggest that the accused had accepted in my

presence before the CBI officials that he had accepted the bribe amount from the complainant. (Confronted with portion B to B of statement Ex.PW-5/A where this fact finds mention). It is correct that the hand wash of the accused was taken by the CBI team and there was change of colour but I do not remember if the colour of that solution had turned pink. I do not remember whether the right hand wash and left hand wash were preserved in bottles RHW and LHW.”

24. PW-5 stated that he did not remember whether the GC notes were recovered from the left side pant pocket of the accused or that it was recovered by PW-1 Shyam Lal. He stated that the left side pant pocket wash changed colour but he could not remember if it turned pink. He did not remember whether the MCR was taken back from Mr. Gupta or was played before the CBI team or that it confirmed the demand and acceptance of bribe by the accused. He admitted as correct that the pant of the accused was removed. Although he remembered the pant being searched he stated “I did not know whether the tainted notes were actually recovered from that pant or not”.

Submissions of counsel on question of demand of bribe

25. Focussing first on the aspect of demand of bribe, Ms. Nitya Ramakrishnan, learned counsel for the Appellant, submitted that with the complainant not being examined, and with both independent witnesses turning hostile, and with the tape recorded conversation not being proved in accordance with law, there was no credible evidence to prove the demand of bribe by the Appellant.

26. Mr. Narender Mann, learned SPP for the CBI, in reply relied on the decision in *Mahesh Prasad Gupta v. State of Rajasthan (1974) 3 SCC 591* and submitted that conscious acceptance of any illegal gratification would be sufficient to attract Section 7 of the PC Act. In such an event, the demand per se does not have to be proved. He relied on the deposition of PW-6 Inspector Ajit Singh who prepared the transcript of the telephone conversation which was tape recorded and for which the memo (Ex.PW-1/C) was drawn. The specimen voice was taken under memo Ex. PW5/E. According to Mr. Mann, the proof of demand was evident from the transcript itself. He also relied on the evidence of PW-2 Dr. Rajinder of the CFSL who identified the voice in question on the cassette as being the specimen voice of the accused which was taken under Ex.PW-5/E.

27. Mr. Mann further submitted that the entire evidence of the two hostile witnesses PWs 1 and 5 need not be rejected. The statements made by them during the examination-in-chief to the extent corroborated by the evidence of PW-10 were admissible. The fact that the hand turned pink was sufficient. He pointed out that the accused did not demand that the tape recorded conversation should be played in Court. Mr. Mann referred to the handwritten slip with the mobile number of the accused being given to the Complainant and the report of the hand writing expert which proved that it was the writing of the Appellant.

Demand of bribe

28. The Court would first like to deal with the issue as to whether there was a demand of bribe. Much reliance has been placed by the prosecution

on the tape recording of the conversation between the accused and the Complainant when a call was made to the accused from the office of the CBI. The prerequisites of proving a tape recorded conversation have been spelt out by the Supreme Court in ***Ram Singh v. Col. Ram Singh 1985 Supp SCC 611*** 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.”

29. The above legal position has been reiterated by the Supreme Court in *Nilesh Dinkar Paradkar v. State of Maharashtra (2011) 4 SCC 143*. In the present case, the maker of the tape recording is the Complainant. For some reason he was not examined. In the impugned judgment, the trial Court notes that despite efforts by the prosecution, the Complainant could not be located.

30. The Appellant has been able to show before this Court that the Complainant was in fact appearing in another Court in the same Court Complex where the CBI was prosecuting him in another corruption case. This Court permitted the Appellant, during the pendency of present appeal, to produce the record of that case before this Court. Learned SPP has not disputed the correctness of the said record. It cannot, therefore, be said that despite diligent efforts the prosecution was unable to locate the Complainant. The evidence in the present case was recorded up to April 2009 and around the same time the Complainant was appearing in the said case. The learned SPP could not offer any satisfactory explanation for the above lapse on the part of the prosecution except saying that there was lack of coordination within the CBI itself.

31. In the present case, the maker of the tape recorded conversation was the Complainant himself. He was the only person who could have correctly identified the voice of the accused. Neither of the independent

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witnesses who purportedly heard the conversation had met the accused in person earlier. Consequently, the failure to examine the Complainant meant that one of the essential pre-requisites for proving the tape recorded conversation in terms of the law laid down in ***Ram Singh*** is not satisfied. The attempt at trying to prove the transcript of the conversation through the evidence of PW-6 will not help the prosecution if the voice of the accused on the tape is not identified by its maker. Comparison of the specimen voice of the Appellant with the voice on the tape by the FSL expert (PW-2) presupposes that the voice on the tape has been correctly identified as that of the Appellant in terms of the law explained in ***Ram Singh***.

32. The other major prerequisite in terms of the decision in ***Ram Singh*** is that the prosecution must show that the tape and the device on which it was recorded were not tampered. The evidence of PW-2 merely talks of comparing the voice in question with the specimen voice. It does not indicate that the device was examined and that the expert formed an opinion that it was not capable of being tampered. Therefore, the test of purity of the sample and reliability of the device on which the voice has been recorded has not been established.

33. In the absence of above two requisites spelt out by the Supreme Court in ***Ram Singh***, no reliance can be placed on the tape recorded conversation. It was for the prosecution to have insisted on playing the tape recorded conversation in the Court and to prove the said conversation in accordance with the law explained in ***Ram Singh***. The

trial Court has completely failed to note the above requirement of the law and has come to the erroneous conclusion that the mere comparison of the questioned voice with the specimen voice by PW-2 was sufficient to prove the demand of bribe by the Appellant.

34. In the absence of the tape recorded conversation, the only person who could have proved that there was a demand of the bribe amount was the Complainant. As already noticed, the Complainant was not examined in the present case. Before the trial Court and before this Court, records have been produced to show that Mr. Gupta, the Complainant, had even earlier filed complaints against police officials falsely accusing them of indulging in corrupt practices. Ex. DW-1/B is the judgment passed by another Court in *CBI v. Manuel Massey* acquitting the police officer accused in that case. In the impugned judgment in the present case, the trial Court has held that merely because there was an acquittal in the case of Manuel Massey, it did not mean that the complaint was motivated. However, when the above factors are viewed in the context of the Complainant not being produced as a witness, the contention of the Appellant that the motives of the Complainant were not bonafide cannot be said to be without merit. The Court is, therefore, unable to agree with the conclusion of the trial Court on this aspect.

Discrepancies in the prosecution case

35. There are serious discrepancies as regards recovery of the bribe amount from the accused at the place where the trap was executed. In the first place, the detailed recovery memo prepared in the case in the

handwriting of Mr. Minocha categorically states that the trap including the apprehension of the accused was executed in the corridor of the Tis Hazari courts outside Court No.35. However, from the evidence of PWs-1 and 5 it appears that the arrest of the accused took place in the parking lot outside the Court. This discrepancy has not been satisfactorily explained by the prosecution. Secondly, there is a doubt whether the treated GC notes were recovered from the person of the accused. The independent witnesses forming part of the trap team have turned hostile. No part of their evidence can be stated to substantiate the case of the prosecution on this aspect.

36. As regards the police witnesses, Mr. Minocha, the trap laying officer, expired during the pendency of the trial and was not examined. Mr. Rajiv Kumar Rishi (PW-10), whose previous statement during investigation had not been recorded, stated in his examination-in-chief in Court as under:

“I alongwith Sh. Minocha, other team members and recovery witness Sh. Shyam Lal waited outside the Court No. 35. After sometime Sh. Minocha went in the Court No.35 and came back. He told that Sh. Gupta was talking with a Sikh gentleman (objected to be hearsay). After sometime I had seen Sh. Gupta alongwith that Sikh gentleman coming out of the court room. Later on the Sikh gentleman was identified as accused Devinder Singh present in the Court today (who is correctly identified by the witness). I had seen both walking in the corridor. They then came out and were seen standing opposite to the parking. We including panch witness and Sh. Minocha were also following them at some distance.

Thereafter I saw that Sh. Gupta taking out the bribe money with his right hand from his left side upper chest pocket and extending the same towards Sh. Devinder Singh who accepted the same with his right hand, counted the same with both of his hands and kept the same in his pant pocket. Immediately shadow witness Sh. Sharma gave a pre-determined signal by scratching his head with both hands and I saw Sh. Minocha rushing towards Sh. Devinder Singh. We including panch witness also followed him. Sh. Minocha disclosed the identity of the team members including himself and witnesses. Thereafter on the direction Sh. Minocha, I and Sh. A.K. Pandey, Inspector caught hold of Sh. Devinder Singh from his wrist.”

37. PW-10 stated that the left and right hand washes of the Appellant turned pink when taken at the spot. He stated that on being asked by Mr. Minocha, the Appellant told him that he was having an extra pant in the dickey of his two-wheeler. Thereafter, the Appellant handed over the keys of his two-wheeler and the extra pant was retrieved from the dickey. PW-10 was speaking for the first time in Court on 8th December 2008 i.e. more than five years after the incident. He stated that Mr. Minocha was finding it difficult to conduct further proceedings in the Tis Hazari premises and at around 3.30 pm the trap team shifted to Block No.4, CGO Complex, Delhi.

38. There are several difficulties with the above narration of the events by PW-10. In the first place, as regards the acceptance of the bribe money by the Appellant with his right hand, the FSL report indicates that “the

exhibit mark RHW does not show the presence of sodium carbonate”. In other words, there is no explanation as to why the right hand wash turned pink at the spot if it showed no presence of sodium carbonate when tested in the FSL. This raises a doubt whether the accused accepted the treated GC notes with his right hand. This also contradicts what has been stated in the recovery memo drawn up by Mr. Minocha. There it was stated that the accused accepted the bribe amount with the help of his left hand and counted the money with both his hands. Further, it lends credence to the submission of the Appellant that with the link evidence missing, there was no assurance that the sanctity of the hand washes was preserved till the time they were sent to the FSL for testing.

39. PWs 1 and 5 have not supported this version at all. PW-5 stated: “I do not know if any amount was accepted by the accused. I cannot say if accused has accepted the GC notes on which phenolphthalein powder was applied by the CBI officials.” PWs 1 and 5 both said that they were made to sign documents on the asking of the CBI officials. PW-1, in his cross-examination by learned counsel for the accused, stated that he was sitting in the gallery in the ground floor of the Tis Hazari Courts and taken to the second floor office of the CBI where he signed the documents. Likewise, PW-5 stated that after the conversation between the Complainant and the Appellant, which he could not hear, the CBI officers rushed there and went on to the second floor. Neither PW-1 nor PW-5 stated that they went to the office of the CBI at CGO Complex. The Court in the circumstances finds it unsafe to rely on the sole testimony of PW-10.

40. Mr. Mann relied on the decision in *State of UP v. Zakaullah AIR 1998 SC 1474* and submitted that the evidence of the trap laying officer could be relied upon even without corroboration. However, in the present case the trap laying officer, Mr. Minocha, could not be examined. Further, the decision in *Zakaullah* refers to the decision in *Hazari Lal v. State (Delhi Administration) (1980) 2 SCC 390* which held as under:

“9. We do wish to say that there is no rule of prudence which has crystallized into a rule of law, nor indeed any rule or prudence, which requires that the evidence of such officers should be treated on the same footing as evidence of accomplices and there should be insistence on corroboration. In the facts and circumstances of a particular case a court may be disinclined to act upon the evidence of such an officer without corroboration, but, equally, in the facts and circumstances of another case the court may unhesitatingly accept the evidence of such an officer. It is all a matter of appreciation of evidence and on such matters there can be no hard and fast rule, nor can there be any precedential guidance.”

41. The key element is, therefore, the reliability of the evidence of the police officers. The Court must be satisfied that it is entirely trustworthy. As already pointed out there is no previous statement of PW-10. He was deposing in the Court five years after the incident. If indeed the GC notes were accepted by the accused with his right hand as stated by this witness, there is no explanation why there was no presence of sodium carbonate in the right hand wash when tested by the FSL. PW-10 has also not been able to explain what happened to the seals purportedly used by the CBI and whether they were deposited with the *malkhana*. According

to the detailed memo drawn upon by Mr. Minocha, the trap proceedings and the arrest of the Appellant took place in the corridor. However, the site plan showed that it took place in the parking lot. PW-10 confirms that the site plan (Ex.PW-1/E) was prepared at the spot and that he had seen it prior to appending his signatures to the recovery memo. The above glaring discrepancy as regards the place of trap proceedings remains unexplained by PW-10.

42. The trial Court appears to have gone by the fact that the facts asserted by PW-10 in his examination in the Court remained unshattered in his cross-examination. Further, it was held that no motive could be imputed to PW-10 to falsely claim his presence in the trap team. The said conclusion overlooks the discrepancies discussed hereinbefore. The Court accordingly holds that it is not safe to rely on the sole testimony of PW-10 to come to the conclusion that the accused was seen accepting the bribe amount during the trap proceedings.

Summary of the findings

43. To summarise the discussion thus far, the aspects of the case which show that the prosecution has been unable to prove the case against the accused beyond all reasonable doubts are as under:

(i) The failure to produce the Complainant as a witness was fatal to the case of the prosecution. Considering that it is not disputed that he was an accused in another case being prosecuted by the CBI and was being produced as such in another court in the Tis Hazari Courts complex

around the same time as the present case was being tried, the explanation of his non-production as a witness is not satisfactory.

(ii) The tape recorded conversation has not been proved according to the tests laid down by the Supreme Court in ***Ram Singh***. The maker of the record i.e. the Complainant was not examined. The Complainant was party to the alleged conversation in which the accused purportedly demanded the bribe. Having met the Appellant earlier, he was the only person who could have identified the voice of the Appellant on the tape.

(iii) The sanctity and purity of the tape recorded conversation was not proved. The evidence to show that the tape and the device on which it was used could not be tampered with was missing. The tape recorded conversation was also not played in the Court. Consequently, it was not proved in accordance with law.

(iv) The independent witnesses, PWs 1 and 5, did not support the case of the prosecution on material aspects. There is no part of their respective examinations-in-chief which could be said to help the case of the prosecution and which could be salvaged for corroboration by other independent evidence.

(v) The link evidence to show that the purity of the hand washes taken at the spot was maintained was missing.

(vi) The evidence of PW-10, the sole police witness, was unsafe to be relied upon on account of inherent contradictions and inconsistencies.

Conclusion

44. For all of the above reasons, the Court is of the view that the impugned judgment of the trial Court cannot be sustained in law and that the benefit of doubt should be granted to the accused.

45. The judgment dated 24th April 2009 and order on sentence dated 28th April 2009 passed by the learned Special Judge is accordingly set aside and the accused is acquitted of the offences under Section 7 and Section 13 (2) read with Section 13 (1) (d) of the PC Act. The appeal is accordingly allowed but, in the circumstances, with no order as to costs. The application is disposed of. The trial Court record be returned forthwith.

MARCH 26, 2014
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S. MURALIDHAR, J.