

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

**CRL.A. 684 of 2008**

Reserved on: October 9, 2014

Decision on: October 16, 2014

**SURENDER SINGH**

.....Appellant

Through: Mr. Sunil K. Mittal, Mr. Vipin K. Mittal, Mr. Kshitij Mittal and Mr. Anshul Mittal, Advocates

versus

**STATE (NCT OF DELHI)**

..... Respondent

Through: Ms. Isha Khanna, APP

**CORAM: JUSTICE S. MURALIDHAR**

**JUDGMENT**

**16.10.2014**

1. The challenge in this appeal is to the impugned judgment dated 19<sup>th</sup> July 2008 passed by the learned Special Judge, in CC No. 134/06/01 convicting the Appellant for the offences under Section 7 and Section 13 (1) (d) read with Section 13 (2) of the Prevention of Corruption Act, 1988 ('PC Act') and the order on sentence dated 22<sup>nd</sup> July 2008 whereby for the offence under Section 7 PC Act, he was sentenced to undergo rigorous imprisonment ('RI') for one year and to pay a fine of Rs. 2,000 and in default of payment of fine, to undergo simple imprisonment ('SI') for two months and for the offence under Section 13 (1) (d) read with Section 13 (2) PC Act, he was further sentenced to undergo RI for one and half years with fine of Rs. 3,000 and in default, to undergo SI for three months. Both the sentences were directed to run concurrently.

2. The Appellant was employed as *Patwari* with the Delhi Development Authority ('DDA'). The case of the prosecution is that the Complainant,

Tarkeshwar Sharma (PW-5), who was conducting furniture business at 18-C, Bharat Vihar, Kakrola, Delhi, was told by certain employees of the DDA that his house was going to be demolished and that he had been called by the *Patwari*. In his complaint to the Anti-Corruption Branch ('ACB') on 11<sup>th</sup> August 2000 (Ex.PW-5/A), he stated that two or three days after receiving the above message, he met the Appellant in his office when the Appellant demanded a bribe amount of Rs. 5,000 for not demolishing the house. Upon request of PW-5 the amount was reduced to Rs. 4,000 and some time was granted to arrange for the same. PW-5 further stated in his complaint that on 31<sup>st</sup> July 2000 he again met the Appellant and gave him Rs. 1,500 as first the instalment. PW-5 also explained his financial difficulty. He stated that the Appellant called him again on the next day, i.e., 1<sup>st</sup> August 2000 and asked for the balance amount from PW-5. He stated that he would bring it to the office of the Appellant in Subhash Nagar, DDA office between 11 am and 12 noon.

3. Since PW-5 was not willing to pay any further bribe amount he went to the office of the ACB and lodged a complaint. R.S. Yadav (PW-8) who was posted as Inspector in ACB recorded the complaint of PW-5 in the presence of the *panch* witness, Amod Barthwal (PW-7). PW-5 gave two government currency (GC) notes of Rs.500 each to PW-8, who noted down their serial numbers in the pre-raid report (Ex.PW-5/F). Thereafter, PW-8 applied phenolphthalein powder on the GC notes and gave a demonstration as to its effect. The treated GC notes were then handed over to PW-5 to be given to the Appellant. PW-5 kept the GC notes in the pocket of his shirt. PW-7 was directed to remain close with PW-5 so that he could overhear the conversation and give a signal when the bribe money was being handed over to the Appellant.

4. At around 10.30 am, PW-8 along with PW-5, PW-7 and Inspector

N.S. Minhas, Investigating Officer (IO) (PW-9) along with other members of the raiding party left the ACB in a government vehicle for DDA office, Subhash Nagar, Delhi. The raiding party reached there at around 11.55 am. While PW-7 and PW-5 went inside the office of the DDA, PW-8 along with other members of the raiding party took suitable positions outside the office.

5. From the evidence of the *panch* witness (PW-7), it emerged that he and PW-5 went to the room where the Appellant was sitting. Thereafter PWs 5 and 7 along with the Appellant came outside the office and went to a tea stall near the DDA office. The Appellant asked PW-5 whether he had brought the bribe money. PW-5 replied in the affirmative and took out the treated GC notes from the pocket of his shirt and handed over the same in the right hand of the Appellant. Thereafter, the Appellant put the said GC notes in the left pocket of his shirt. At that point PW-7 gave pre-determined signal by hurling his right hand over his head. The raiding party reached there. PW-8 introduced himself and challenged the Appellant regarding accepting the bribe amount. The Appellant became perplexed. On the direction of PW-8, PW-7 took a search of the Appellant and recovered the treated GC notes from the left pocket of the shirt of the Appellant. PW-7 tallied the serial numbers of the recovered GC notes with those noted in the pre-raid report. The hand and shirt washes of the Appellant turned pink. They were stored in separate empty bottles, sealed and labelled.

6. As far as the Complainant (PW-5) was concerned, he turned hostile in the Court. He totally resiled from his statement made by him earlier to the IO of the ACB. He now stated that the person present in the Court was not the *Patwari* to whom the bribe amount had been given. Although he supported the pre-raid proceedings, he now claimed that he

did not know the name of *Patwari* who had demanded money from him and that he was a bald person pointed out by someone from the office staff as his *Alaka Patwari*. He had earlier stated that when he again went to the DDA office at Subhash Nagar and enquired about the *Patwari* “somebody pointed out towards a person in the office claiming him to be *Patwari* of the area who was bald headed in some portion and met him. He was having beard also.” According to him, the said *Patwari* asked him to pay Rs. 4,000. He again met the *Patwari* after 2-3 days and gave him Rs. 1,500. He however admitted his signature on Ex. PW-5/A. He also claimed that he went with the *panch* witness to the office of the DDA and gave treated GC notes “to the *Patwari* who put them after taking with his right hand in the front pocket of his wearing kurta.” He further stated that “the said *Patwari* is not present in Court today.” He also confirmed that hand and shirt/kurta washes of the said *Patwari* did turn pink.

7. In his cross-examination by the learned APP, PW-5 admitted his signature on the complaint, pre-raid report and other exhibits. However he clarified that “I do not know about contents of those documents nor I remember now if police officials had read out the contents of those documents to me while obtaining my signature.”

8. The third important witness was the Raid Officer (RO), R.S. Yadav (PW-8). While confirming the pre-raid proceedings, he stated that at the time of the raid, he received the pre-determined signal from PW-7 and reached the spot and apprehended the Appellant. On his instructions, PW-7 took out the GC notes from the left pocket of the shirt of the Appellant. He spoke about the hand and shirt washes of the Appellant turning pink. In his cross-examination, PW-8 stated that he did not verify the particulars of the complaint (Ex.PW-5/A) before proceeding for the

raid. He did not know whether the house of PW-5 was an unauthorized construction. He further stated that although the DDA office at Subhash Nagar was located in a thickly populated area, he did not associate any public witness. He did not examine any file of the DDA regarding this case. He did not record the statement of the driver of the van in which they proceeded for the raid. He could not obtain any record of the driver regarding his movement of the government vehicle from his office to the spot. Despite stating that all the proceedings were drawn up at the spot and that there were passersby, he did not ask any one of them to join the investigation. PW-8 further stated that "All of us including Complainant, accused and *panch* witness went to AC Branch in the same van along with in which we had come at the spot." This was contradicted by PW-7 who stated that "I was released by the police after completion of the proceedings at the spot and I did not go to their office." PW-8 further denied the suggestion that the raid had in fact failed and the Appellant had been falsely implicated.

9. A strange feature of the cross-examination of PW-8 was that he made statements therein which were contrary to the case of the prosecution and yet not attempt was made by the APP to re-examine PW-8 to seek clarifications or seek correction of the judicial record. The said statements made by PW-8 in his cross-examination read thus:

"It is wrong to suggest that the accused demanded or accepted Rs 1000/- as bribe from the complainant and kept the same in the left pocket of the shirt. It is also wrong to suggest that any such notes were recovered from his possession. It is also wrong to suggest that I took the right hand wash of the accused as stated by me in the examination chief."

10. Apart from the evidence of PWs 5, 7 and 8, the prosecution sought to rely on the report of the Forensic Science Laboratory ("FSL") which confirmed that the hand and shirt washes did in fact test positive for

phenolphthalein powder. The FSL report dated 19<sup>th</sup> September 2000 refers to the letter dated 28<sup>th</sup> August 2000 received from the ACB regarding “two parcel(s) in connection with case FIR No. 41 of 2000 dated 11<sup>th</sup> August 2000 under Section 7/13 POC Act P.S.A.C. Branch duly received in this office on 28<sup>th</sup> August 2000 through Head Constable Om Prakash No. 2539/DAP.” The report also notes that there were two parcels marked as RHW-1 and LSSPW-1 received, sealed and tallied with specimen seal impression forwarded.

11. From the above FSL report it appears that it was Head Constable Om Prakash who took the sample washes to the FSL on 28<sup>th</sup> August 2000. However Head Constable Om Prakash himself was not examined. Constable Mahinder Singh (PW-4) who was posted as an Assistant Malkhana Moharar at PS Civil Lines was examined. He stated that Inspector N.S. Minhas (PW-9) had deposited "two GC notes of Rs. 500 and four bottles RHW-1 and II, LSSPW-1 and II duly sealed with the seal of RS along with sample seal besides the said pulanda and personal search and that I made entry in register No. 19 at Serial NO. 302/2659", a copy of which is Ex. PW-4/A. A perusal of Ex. PW-4/A shows that it was not PW-9 who had brought the samples to the *malkhana*. It was in fact the RO, PW-8, who deposited the samples there. This supports the argument of Mr. Sunil Mittal, learned counsel for the Appellant, that it was PW-8 who continued to deal with the whole case without handing over the case property to the IO, i.e., PW-9.

12. As regards the despatch of the sample washes to the FSL, PW-4 stated as under:

“On 11<sup>th</sup> June 2001 Constable Om Prakash took one set of bottle from me in intact position along with sample seal and FSL form vide RC No. 171/21 for depositing the same to CFSL Laboratory, Malviya Nagar about which I made entry

at the same serial number. Photocopy of the same is Ex.PW4/B.”

13. There are several problems with the above statement. In the first place if the samples were sent on 11<sup>th</sup> June 2001 to the FSL, it was impossible for the FSL to have given a report dated 19<sup>th</sup> September 2000. A perusal of the entries in the *malkhana* register (Ex.PW-4/B) shows that in fact the washes were sent to FSL on 11<sup>th</sup> June 2001. There is an endorsement to that effect against the entry for the sample washes. The entry dated 28<sup>th</sup> August 2000 concerns the return of some of the personal belongings of the Appellant which were seized during the raid. There is yet another entry dated 2<sup>nd</sup> January 2001 on which date a few other personal belongings of the Appellant were returned to him. In other words, the entries in Ex. PW-4/B corroborate the statement by PW-4 that the sample washes were sent to the FSL for the first time on 11<sup>th</sup> June 2001 and not on 28<sup>th</sup> August 2000. No attempt was made by learned APP to seek any clarification from PW-4 in this regard.

14. It was incumbent on the prosecution to show that what was sent to the FSL on 28<sup>th</sup> August 2000 were in fact the sample washes taken at the spot. With the prosecution having failed to do so, the entire evidence regarding the washes requires to be discarded. Consequently it cannot be said that in the present case, as regards the offence under Section 7 of PC Act, Section 20 thereof stood attracted and the burden shifted to the Appellant to show that he did not consciously accept the bribe amount. As a result, the case of the prosecution rests essentially on the evidence of the *panch* witness.

15. In the present case, there were two key elements that were required to be proved by the prosecution. One was the demand of bribe by the Appellant and the other its conscious acceptance by him. The consistent

stand of the Appellant was that he had been falsely implicated. He stated that he had been apprehended from his seat in his office and not at the tea stall where according to the prosecution the raid was supposed to have taken place. With the complainant PW-5 not supporting the prosecution, the demand of bribe prior to the raid cannot be said to have been proved. As regards the demand of bribe at the time of the raid, the evidence of the *panch* witness was critical for the prosecution.

16. A careful perusal of the evidence of PW-7 shows that in his examination in chief he spoke of the conversation that took place on the spot between PW-5 and the Appellant. According to him, the Appellant asked PW-5 whether he had brought the bribe amount, and PW-5 replied in the affirmative and then took out the treated GC notes from the pocket of his shirt and handed over the same in the right hand of the Appellant. However, in his cross-examination PW-7 gave a changed version and stated:

“When we reached near the tea vendors stall the Complainant and the accused were talking in a low voice in fact it was more or less in a whispering tone. **It is correct that as they were talking in a low pitch so I could not hear their talks properly.** As far as I remember the Complainant might have told me the conversation which took place between him and the accused as I could not hear the whole of it because it was not fully audible. **It is correct that I did not state to the police that the accused had asked the Complainant if he had brought the bribe money** (The prosecutor has stated that the witness stated in his statement under Section 161 Cr.PC that on the way the *Patwari* also asked if he had brought money. He has stated that the question of asking money itself has implied reference to bribe money). It is correct that I did not specifically state in my statement to the IO the word “Bribe”. Vol. the word bribe is implied in my statement made to the IO.” (emphasis supplied)

17. The above admission on the crucial aspect of the case by PW-7

makes him an unreliable witness both as regards the demand made at the spot and the subsequent acceptance of the treated GC notes by the Appellant. The trial Court noticed the above change of stand but stated that “this admission alone is not sufficient to give clean chit to the accused.” However, the question is whether the above evidence can be safely relied upon as proving beyond reasonable doubt the guilt of the Appellant. On this crucial aspect, the trial Court appears to have proceeded on the basis that the Appellant is guilty unless proved otherwise.

18. This flawed approach appears to have further persuaded the trial Court to overlook the discrepancies as regards the link evidence concerning the hand washes. The trial Court simply accepted the FSL report without noticing that the prosecution failed to establish the link evidence that would lend assurance that the hand and shirt wash samples were safely preserved. The evidence in this regard, as noticed hereinbefore, raises considerable doubts whether the hand and shirt wash samples sent to the FSL were in fact those purportedly collected at the spot.

19. In ***B. Jayaraj v. State of A.P.* 2014 (4) SCALE 81**, the Supreme Court cautioned that the prosecution has to prove the key ingredients beyond reasonable doubt before the presumption under Section 20 PC Act can stand attracted. In ***Mahavir Singh v. State* 2014 (141) DRJ 149** it was pointed out that in the absence of a proof of demand, the question of raising the presumption under Section 20 PC Act would not arise unless it is shown that there was conscious acceptance of the amount knowing it to be illegal gratification.

20. With the evidence of PW-7 being unclear as to the conversation on

the spot, and with reliable link evidence concerning the samples of the washes being absent, the mere fact that GC notes were recovered from the Appellant and his hand and shirt washes turned pink do not lend sufficient assurance to the Court that the case against the Appellant stands proved beyond reasonable doubt.

21. Before concluding, the Court would like to refer to one more aspect concerning the recording of the statement of the Appellant under Section 313 Cr PC. A perusal of the said statement as found in the trial Court record revealed that (i) the answers to questions 3, 13, 19, 24, 29 and 35 are missing and (ii) questions 4, 9, 13, 19, 20, 30 and 35 are incomplete. Mr. Sunil Mittal, learned counsel for the Appellant, on instructions stated that when the trial Court was approached for a soft copy of the Section 313 Cr PC statement, the counsel was informed that it was not available on the hard disk of the trial Court's computer on which it was typed. As a result, the complete statement under Section 313 Cr PC is unavailable. In every criminal case, this is an important document although in the present case, it does not make much difference since for the other reasons discussed, the appeal deserves to be allowed.

22. The Court therefore considers it appropriate to suggest that directions on the following lines be issued for compliance by subordinate criminal courts where evidence (including evidence recorded through video conference) and statements of parties including those under Section 313 Cr PC are being recorded electronically:

(i) Every page of the evidence or statement typed electronically will have a footer indicating the number of the case in the left hand corner and the page out of the total number of pages of that document in the right hand corner;

(ii) The final corrected (and where applicable, the signed) versions of all evidence and statements recorded electronically shall, where recorded in a text format, be converted into the pdf format and digitally signed by the presiding judicial officer;

(iii) The digitally signed evidence shall be kept in a separate folder for each case and the folder properly labelled with the case number and cause title;

(iv) One back up copy should be taken in a flash drive/cd which should be kept in a secure cover/case which again should be properly labelled and kept with the ahlmad of the Court concerned;

(v) One copy should be uploaded on a central server in the Court complex;

(vi) Every ahlmad should maintain a register of the electronic evidence preserved on the Court's computer and in the back up flash drive/cd;

A copy of this order be placed before the Computer Committee of the High Court to consider issuing appropriate directions on the above lines.

23. For all the aforementioned reasons the Court sets aside the impugned judgment dated 19<sup>th</sup> July 2008 and the order on sentence dated 22<sup>nd</sup> July 2008 of the trial Court and acquits the Appellant of the offences under Section 7 and Section 13 (1) (d) read with Section 13 (2) of the PC Act.

24. The appeal is allowed but in the circumstances with no order as to

costs.

25. The trial Court record be sent back to the learned trial Court forthwith along with a certified copy of this judgment. In terms of Section 437A Cr PC the bail and surety bonds of the Appellant will continue for a period of three months from today.

26. A certified copy of this judgment be sent forthwith to all the Judges-in-charge of the District Courts and to the Chairman of the Computer Committee of the District Courts forthwith for compliance with the directions issued in para 22.

**S. MURALIDHAR, J.**

**OCTOBER 16, 2014**

*Rk*