

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. No. 740 of 2008

Reserved on: 14th October 2014

Decision on: 28th October 2014

SHIV SHANKAR PRASAD

..... Appellant

Through: Ms. Nitya Ramakrishnan with
Mr. Sarim Naved and Ms. Soumya Jha,
Advocates.

versus

STATE

..... Respondent

Through: Ms. Isha Khanna, APP.

CORAM: JUSTICE S. MURALIDHAR

JUDGMENT

28.10.2014

1. This appeal is directed against the judgment dated 19th August 2008 passed by the learned Special Judge in CC No. 53 of 2006 convicting the Appellant for the offences under Sections 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 22nd August 2008 whereby for the offence under Section 7 the Appellant was sentenced to rigorous imprisonment ('RI') for 1 year with fine of Rs.2,000 and in default to undergo simple imprisonment ('SI') for 2 months and for the offence under Section 13 (1) (d) read with Section 13 (2) of the PC Act, he was further sentenced to two years RI with fine of Rs.4,000 and in default to undergo SI for 4 months. Both sentences were directed to run concurrently.

2. The Appellant was at the relevant time a Sub Inspector ('SI') attached to Police Station ('PS') Welcome. The police booth at Janta Colony, Welcome, was functioning as part of the said PS. The complainant Bashir (PW-5) was working as a Tailor. An FIR No. 348 of 2008 had been registered against PW-5 under Sections 341/343 IPC at PS Welcome in which he was granted anticipatory bail. According to PW-5 he had met the Appellant to furnish his bail bond and the surety bond of Shamim Bano (PW-7). In his complaint to the Anti Corruption Branch ('ACB') (Ex. PW-5/A) dated 22nd March 2001 he stated that he had been called by the Appellant to the police booth at Welcome on 22nd March 2001 at 6 pm with his surety for filling up of the bail bond. PW-5 stated that he had been asked by the Appellant to come with Rs.1,000 as bribe amount.

3. Since PW-5 was not willing to give the bribe he went to the ACB at around 4 pm and got his complaint (Ex. PW-5/A) recorded by Ms. Sudesh Kumari, Raiding Officer ('RO') (PW-9) who was at the relevant time an Inspector in the ACB and in the presence of the *panch* witness Mr. Abhay Sharma (PW-6) who at that time was an LDC in the Employment Exchange, Kasturba Gandhi Marg and was on duty at the ACB. PW-5 is stated to have produced two government currency ('GC') notes of Rs.500 each. PW-9 noted their numbers in the pre-raid report, treated them with phenolphthalein powder and gave a demonstration of its effect. The treated GC notes were given back to PW-5 to be handed over to the Appellant. PW-6 was instructed to remain close to PW-5 and to see and overhear the transaction and to give a signal once the transaction is completed. The pre-raid proceeding (Ex.PW-5/B) was

signed by both PWs-5 and 6.

4. PW-6 the *panch* witness in his examination-in-chief confirmed the entire pre-raid proceeding. He stated that at around 5/5.30 pm he along with PW-5 and the raiding party comprising PW-9, Inspector O.P. Arora, the Investigating Officer ('IO') (PW-8) and certain others including Sub Inspector Sanjeev and Constable Birju left for the spot in a government vehicle. They parked near the police booth at Janta Colony, Welcome where they reached within about half an hour. They waited for some time outside the booth since the Appellant was not present there. PW-5 made a telephone call and informed the raiding party that the Appellant would soon be coming to the police booth. After about 5 to 6 minutes the Appellant, whom PW-6 correctly identified in the Court, came there. PWs-5 and 6 went inside the police booth. The Appellant asked for the bail papers but PW-5 was not carrying them. PW-6 stated that thereafter he accompanied PW-5 to the latter's house and returned to the police booth with the bail papers. Thereafter some paper work was done by the Appellant. PW-6 stated: "Thereafter accused asked the Complainant to give what was earlier settled between them. The Complainant replied that he had brought but he wanted the amount reduced. Thereafter Complainant took out those GC notes from his pocket and gave to the accused and the accused took it with his left hand and hand kept the same in his right shirt pocket of office police uniform."

5. PW-6 then came out of the police booth and gave pre-determined signal to the raiding party. The raiding party entered the police booth.

PW-9 disclosed her identity to the Appellant who then became perplexed. It was dark in the police booth. PW-9 asked all of them to move towards the government vehicle for conducting the remaining proceedings. PW-6 then stated: "One police person name Sanjay along with another police official taking (*sic* took) the accused towards the vehicle. Thereafter I heard a noise of '*pakro pakro*' and I came to know that accused had run away. The police persons followed him but he could not be apprehended. The money could not be recovered at the spot because the accused had run away along with the money. The raid officer had drawn post raid proceedings Ex.PW-5/C which bears my signature at point P. I had seen the accused at the spot for about at least 30 minutes."

6. In his statement under Section 313 Cr PC when confronted with the above evidence, the Appellant stated "it is wrong to state that I ran away from the spot along with the bribe money.. It is also wrong to say that I ever accepted any bribe from Bashir so there was no question of running with the bribe money". He maintained that PW-9 "manipulated the endorsement Ex.PW-9/A in order to save her skin as the raid was not successful." However, the Appellant did not deny that he surrendered only after 15 days. This is evident from Question 35 in the Section 313 statement and the answer given which read as under:

"Q.35. It is in evidence against you that after about 15 days of the incident you surrendered in the Court and were formally arrested. Your personal search was conducted vide personal search memo Ex.PW-8/B. Arrest memo Ex.PW-8/C was prepared. What have you to say?

A: A false case was registered against me. I had to surrender before the Court in order to prove my innocence

and the Court was pleased to release me on bail.”

7. The second factor which requires to be noticed is that the Appellant did not deny that PW-5 came to him along with PW-7 with the bail papers and that he in fact completed the paper work sitting in the police booth. This is evident from answers to Questions 17, 18 and 21 which read as under:

“Q.17. It is in evidence against you that after 5/6 minutes at about 6.55 p.m. you came there by a motorcycle. Complainant and panch witness went inside the police booth. What have you to say?

A: I came to the police booth as per my duties. I cannot say about the time regarding 5/6 minutes as mentioned in the question. Complainant alone came inside the police booth.

Q.18. It is in evidence against you that you asked for the papers for bail from the Complainant. The Complainant by that time was not having the documents regarding bail order. Complainant was asked to bring the documents and the bail order and Complainant along with panch witness came at the Complainant's house for obtaining the same. What have you to say?

A: I asked the Complainant to bring the bail order. I have no knowledge about the method which was adopted by the Complainant for bringing the bail order from his house so the presence of panch witness with the Complainant is incorrect.”

Q.21. It is in evidence against you that thereafter some paper work was done by you. What have you to say?

A: I did the paper work which was to be done by me in the discharge of my duties and Smt. Shamim Bani stood surety for the accused.”

8. PW-6 was subjected to extensive cross-examination. Although it was sought to be suggested by Ms. Nitya Ramakrishnan, learned counsel appearing for the Appellant, that he was a stock witness, the answer in this regard that is elicited was that "I had gone to the AC Branch Office for more than once for duty as a witness." He further stated that he could not recollect how many times he was deputed as a *panch* witness but that he had been deputed each time as an official *panch* witness. These answers by themselves do not suggest that PW-6 was a stock witness and that his evidence was unreliable on that score. PW-6 did state that he found a Constable sitting outside the police booth however he did not have any conversation with that Constable. He stated that he returned to the ACB at around 11 pm. He stated that there was no light in and around the police booth. Neither he nor the RO chased the Appellant. He stated that PW-5 had not given any complaint in his presence at the ACB. He denied the suggestion that the Appellant had not accepted the money from PW-5 or that the raid did not succeed and, therefore, the RO made a false story regarding the Appellant having been escaped. He, however, stated that no search of the police booth was taken to recover the money.

9. Both PWs-5 and 7 turned hostile. Interestingly, however, PW-5 did identify his signature on Ex.PW-5/A but claimed that the document was not read over to him. He claimed that he went along with a friend Ajab Singh Bagri and that he signed papers at the ACB which were written by the ACB "on the pretext of getting me released on bail." He, however, stated that "police team along with myself went to police booth Welcome in order to get me released on bail." He further stated

“On reaching police post Welcome my bail papers were filled and I was discharged thereafter. SI Shiv Shankar was not present there.” He denied that the Appellant ever demanded any bribe or that he paid any bribe to the Appellant.

10. In his cross-examination by the APP PW-5 claimed that first the bail papers were filled up and the signatures of PW-7 also were obtained. He also identified his signature on Ex. PW-5/E and Ex. PW-5/F. In his cross-examination by the counsel for the accused he claimed that he had signed on blank papers.

11. Interestingly, even according to Ms. Ramakrishnan, PW-5 is an unreliable and untrustworthy witness. He even contradicted the Appellant, who as already noticed, admitted to having processed the bail papers of PW-5 on the relevant day. In any event, the presence of PW-5 at the spot is also confirmed by PW-5 himself. It is unbelievable that PW-5 did not meet the Appellant on the said date. Looking at Ex. PW-5/A and all other connected pre-raids proceedings, the claim of PW-5 that he signed blank papers appears to be unbelievable.

12. A principal submission of Ms. Ramakrishnan concerned the deposition of one Head Constable (‘HC’) Vijender which was recorded in the trial of the connected case arising out of the same incident in regard to the Appellant having run away from the spot. The said deposition was marked as Ex.D-1 during recording of the statement of the Appellant under Section 313 Cr PC in response to Question 45

which reads as under:

“Q.45. Do you want to say anything else?

A. I am innocent. I hereby produce the certificate copy of the statement EX.D-1 of HC Vijender Singh, No. 662 PCR, East Zone, recorded in the case FIR No. 103/01, U/s. 353/332/225-B IPC, PS-Welcome, by the Ld. MM on 19th May 2004. This case was got registered by PW-9 Smt. Sudesh Kumari, raid officer of the present case, against me in order to save her skin as the raid was not successful.”

13. However, the said HC was neither summoned as witness nor was any application filed by the Appellant for that purpose. Further since Ex.D-1 was produced at the end of the Section 313 Cr PC statement, the IO, PW-10, was not confronted with the said statement.

14. The said statement of HC Vijender Singh reads as under:

“PW-1. Statement of HC Vijender Singh No. 662 PCR, East Zone.

On S.A.

On 22.3.2001, I was posted at P.S. Welcome, on that day I was present at picket duty at Janta colony police booth along with one Home Guard Megh Chand from 8 am to 8 pm. On that day at about 5.35 pm one person came to me along with one lady and asked me about SI Shiv Shankar, I replied that he might be present in the P.S., and it was his briefing time. He told me that SI Shiv Shankar given time to meet him and I allowed him to sit there. After 10/15 minutes SI Shiv Shankar came there and he along with aforesaid person went inside the police booth and I along with Home Guard Ct. Megh Singh were sitting outside the booth. After some time said persons came out along with

SI Shiv Shankar and they were talking with each other in friendly way. After 10/15 minutes said persons left the police booth. From the left side of the police booth I heard noise of CHOR CHOR PAKRO PAKRO. Thereafter one lady along with two persons came there and they introduced themselves as Officers from Anti Corruption branch. They took wireless set and motorcycle of SI Shiv Shankar from police booth.

After 2/3 days I was called from Anti Corruption branch and they recorded my statement.

XXXXX by defence counsel.

It is correct that one another wireless set was also installed in the police booth by the police of P.S. Welcome. It is also correct that on 22.3.2001 said set was available there in working condition. This set we used for furnishing information with regard to any incident and for receiving message from the P.S. On 22.3.2001 I had not given any information to P.S. Welcome regarding any incident as no incident took place in my presence from 8 am to 8 pm.”

15. Although it was initially submitted by Ms. Ramakrishnan that the above deposition was a relevant piece of evidence for the purpose of Section 33 of the Evidence Act, 1872 (‘EA’) and could not have been ignored by the trial Court, she later modified the submission by stating that although the requirements of Section 33 EA may not be entirely satisfied, the trial Court could not have afforded to overlook the above deposition, which according to her contradicted the case of the prosecution.

16. Since HC Vijender Singh had in the above deposition stated that he was called at the ACB and “they recorded my statement”, the Court

requested the APP to verify if his statement had in fact been recorded in the present case under Section 161 Cr PC. Learned APP produced the police file and confirmed that no such statement had been recorded. This explains why he was not cited as a prosecution witness in the present case.

17. Relying on the decisions in *Habeeb Mohammad v. State of Hyderabad AIR 1954 SC 51*, *State of U.P. v. Jaggo AIR 1971 SC 1586*, *Rabindra Kumar Dey v. State of Orissa AIR 1977 SC 170*, *Hem Raj v. State of Haryana (2005) 10 SCC 614*, *Gopal Krishnaji Ketkar v. Mohammed Haji Latif AIR 1968 SC 1413*, Ms. Ramakrishnan submitted that an adverse inference ought to be drawn against the prosecution in the present case for failing to examine HC Vijender Singh who was sitting outside the police booth between 8 am and 8 pm as a witness. According to her SI Sanjeev and Constable Birju from whose clutches the Appellant escaped also ought to have been examined. Ms. Ramakrishnan submitted that withholding of the said witness casts a serious reflection on the fairness of the trial and this considerably prejudiced the Appellant in the defence of his case.

18. Ms. Isha Khanna, learned APP for the State, on the other hand submitted that the above deposition of Vijender Singh was recorded in the trial arising out of FIR No. 103 of 2001 dated 19th May 2004 whereas the prosecution witnesses in the present case were examined nearly three years thereafter. It was not expected in 2004 that PW-5 would turn hostile in the present case. In the understanding of the prosecution, the three witnesses PWs-5, 6 and 9 were sufficient to bring

home the guilt of the Appellant. It was entirely up to the prosecution to decide as to how many witnesses it wished to examine.

19. A perusal of the decision in ***Habeeb Mohammad*** (supra) reveals that in the said case a witness shown in the list of prosecution witnesses was not examined and in those circumstances the Supreme Court observed that an adverse inference could be drawn against the prosecution. In ***Jaggo*** (supra), the Court stressed the salutary principle of the prosecution having to examine all the witnesses essential to the “unfolding of the narrative”. This, however, will have to depend on the facts and circumstances of every case. It is difficult to state as a definite proposition that in every case if all possible eye-witnesses are not examined, the case of the prosecution should fail only on that score.

20. Ms. Ramakrishnan laid emphasis on the decision in ***Rabindra Kumar Dey*** (supra) and submitted hold that onus entirely lays on the prosecution to prove its case beyond reasonable doubt and that onus never shifts. According to her, on the facts of the present case when HC Vijender Singh was very much present and he did not mention about the raiding party entering the police booth at all, clearly his evidence contradicted the prosecution case and could not have been overlooked by the trial Court in the present case when his deposition has been placed on judicial record and marked as an exhibit. On the other hand, Ms. Khanna, learned APP, maintained that if the Appellant sought to rely on the said document then he should have summoned HC Vijender Singh. The mere marking of the deposition as an exhibit in the present proceedings would not be sufficient. She further pointed out that in that

event the prosecution would have had an opportunity of cross-examining such witness to elicit the complete details.

21. The Court would first like to observe that HC Vijender Singh was examined as PW-1 in the case arising out of FIR No. 103/01. The other depositions in the said case are not before the Court. It would not be safe for the Court to read the evidence of one witness in isolation as regards what transpired outside the police booth on the date of the raid. Even in the said trial arising out of FIR 103/01, the possibility of recall of HC Vijender Singh under Section 311 Cr PC and his further cross-examination can hardly be ruled out. The safest course for the Appellant to have adopted would have been to file an application in the present case for summoning HC Vijender Singh as a witness. For some reason, the Appellant did not consider it appropriate to do so. As a result, the version of HC Vijender Singh could not be tested in the present case. As rightly pointed out by the learned APP, the prosecution also did not get a chance to counter the said evidence.

22. The decisions in *Hem Raj* (supra), *Gopal Krishnaji Ketkar* (supra) and *Sunil Kumar Sharma* (supra) appear to have turned on their peculiar facts. To what extent the omission to examine a particular witness by the prosecution would be fatal to the case of the prosecution obviously depends on the facts of that case. A careful perusal of the statement of HC Vijender Singh shows that he does confirm the presence of the Appellant and PW-5 and their going into the police booth with PW 7. While he does not specifically state about the raiding party entering the police booth, he confirms that he heard the noise

‘Chor Chor Pakro Pakro’. It is difficult to say that he completely contradicts the prosecution case without his having been actually examined in the present case and questions being put to him both by the prosecution and the counsel for the Appellant which would have brought out the full facts as to what he actually saw at the relevant time. Consequently, the Court is unable to agree with the submission of Ms. Ramakrishnan that the non-examination of HC Vijender Singh is fatal to the prosecution case.

23. A circumstance which has not been explained at all by the Appellant is why in the first place did he leave the police booth and surrender only after 15 days if he was not guilty of having committed any offence especially since he was an SI who must have been fully aware of the consequence of such conduct. Secondly, there was no explanation how he left behind the bail papers of PW-5 that he had processed in the police booth itself and never returned. This conduct of the Appellant is, for the purpose of Section 8 EA, relevant and has been rightly noticed by the trial Court in para 36 of the impugned judgment in the following terms:

“36. The subsequent conduct of the accused soon after the incident also is relevant to infer his guilt. Accused did not explain in the statement recorded u/s 313 Cr PC as to when he left the police booth after accepting the bail bonds furnished by Complainant Bashir. Accused also did not explain as to where he returned for duty after accepting the bail bonds of the Complainant Bashir. It has rather come on record with the accused remained absconded for number of days and surrendered before the Court only on 9th April 2001 after his application for anticipatory bail was rejected. Accused failed to explain as to where he remained present during this period. Accused

did not explain that he reported for the duty during this period. Accused did not explain why he remained absconding for such a long duration. Accused did not adduce any evidence in defence to justify his absence from his duty soon after the incident of raid. Had the accused been not the guilty conscious, he would not have absconded from the spot. Adverse inference is to be drawn against the accused for absconding from the spot.”

24. Relying on the decision in *Sunil Kumar Sharma v. State* 139 (2007) DLT 407 Ms. Ramakrishnan urged that the mere fact that the accused had run away on seeing the raiding party cannot by itself lead to the inference of the guilt of the Appellant. A perusal of the said decision shows that in the said case the very presence of some of the police officers and some other public witnesses at the spot was shown to be in doubt. In the present case, however, from what has been discussed hereinbefore, the presence of PWs-5, 6 and 7, the presence of the Appellant himself and the presence of PW-8 and 9 are not in doubt at all. No satisfactory explanation has been forthcoming from the Appellant for his conduct. For a police officer to abscond for 15 days and to surrender to the Court thereafter is a very serious issue and if he is unable to explain the same, an appropriate adverse inference would have to be drawn.

25. In the considered view of the Court, the evidence of PW-6, corroborated in the material particulars by PW-9, is sufficient to prove beyond reasonable doubt the guilt of the Appellant of having demanded and consciously accepted the bribe amount.

26. The Court is unable to find any legal infirmity in the conclusion drawn by the trial Court concerning the guilt of the Appellant for the offence under Section 7 and Section 13 (1) (d) read with Section 13 (2) of the PC Act.

27. The appeal is accordingly dismissed. The bail bond of the Appellant is cancelled. He is directed to surrender forthwith to serve out the remainder sentence.

28. The trial Court record along with a certified copy of this order be sent to the learned trial Court forthwith.

S. MURALIDHAR, J.

OCTOBER 28, 2014
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