SMT JUSTICE T. RAJANI

CRIMINAL APPEAL No.676 of 2007

ORDER:

This appeal is preferred, by the appellant, who is A1, aggrieved by the Judgment, dated 22.05.2007, passed in C.C.No.108 of 2000 by the Court of III Additional District & Sessions Judge cum Special Judge for ACB Cases, Visakhapatnam, by virtue of which the trial court convicted A1 for the offence punishable under Section 7 and 13(1)(d) r/w 13(2) of the Prevention of Corruption Act, 1988 (for short, "P.C.Act") and he was sentenced to undergo Rigorous Imprisonment for six months and to pay a fine of Rs.500/- in default simple imprisonment for one month for the offence punishable under Section 7 of P.C.Act and further sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.1,000/- in default simple imprisonment for two months for the offence under Section 13(1)(d) r/w 13(2) of P.C.Act.

2. The facts of the case, briefly, are as follows:

A1 was working as Special Assistant Commercial Tax Officer (Intelligence) in the Commercial Tax Department at Narsipatnam and A2 was working as attender in the same department in the said office, by the date of trap proceedings, which took place on 09.12.1998. They are public servants within the meaning of clause (c) of Section 2 of P.C.Act. PW1 is the resident of Ayyapalem Village, Chodavaram Mandal, Visakhapatnam District, who was carrying tea dust and coffee powder business at Chodavaram, under the name and style of Himalaya Tea Traders. He used to purchase the tea and coffee material from A.Lokamanyee & Company, Calcutta by placing purchase orders. PW1 placed the order for 20 tea dust bags and received bill, dated 10.11.1998, along with way bill dated 10.11.1998. The material was transported to Vizianagaram through East Coast Roadways, Vizianagaram. On 18.11.1998, the complainant went to Vizianagaram and took the delivery of 20bags of tea dust powder from the transport company, under the way bill. He engaged a taxi to transport the material, but he was able to load 15 bags only and the pending five bags were book in Muralikrishna Transport Private Limited for transportation from Vizianagaram to Choadavaram. He carried 15 bags in his Taxi, to Chodavaram. Subsequently, on 19.11.1998 he received a copy of detention order through Muralikrishna Transport and came to know that 5 bags of tea dust material is detained by the CTO Narsipatnam and enquired about the detention order and showed him the purchase bill and way bill. The CTO directed him to approach A1, as he is the competent person to release the material. Thereupon, the complainant showed the way bill for 20 bags and informed that he already transported 15 bags out of 20 bags, through Taxi. Then A1 demanded the complainant to pay Rs.3,000/- towards bribe amount, for release of the material. The complainant informed that he is unable to pay the demanded amount, then A1 called A2 and instructed A2 to convince PW1. A2 took the complainant out of the office of A1 and suggested to pay the amount and otherwise the material will be confiscated. The complainant informed to A2 that he possessed only Rs.1,270/- and he has agreed to pay Rs.1,200/- keeping Rs.70/- for his transportation charges. In turn, A2 went into the office room of A1 and returned and informed that A1 is not agreeing for less than Rs.3,000/- and advised the complainant to get Rs.3,000/-. Thereupon, the complainant returned from the ACTO Office. Subsequently, on 05.12.1998 at about 12:00 Noon, the complainant telephoned to the office of A1 and came to know that A1 was not available and A2 advised him to come on 08.12.1998, with money. Accordingly, on 8.12.1998, the complainant went to the office of ACTO Office, Narsipatnam and met A1 and A2 and requested to release the goods. A1 and A2 questioned PW1 about the bribe amount of Rs.3,000/-, for which PW1 replied that he is unable to pay that much of amount and requested to reduce the amount. A1 informed to the complainant that the amount is to be apportioned among the other employees in the office and advised to bring an amount of Rs.3,000/-, along with way bill and the original purchase bill. A2 suggested the complainant to pay the demanded amount. The complainant is not willing to pay the bribe amount, as such he approached the then Deputy Superintendent of police, ACB, Visakhapatnam Range and filed written complaint. Basing on the said complaint, the Deputy Superintendent of Police registered a case in Crime No.19/RC-WLR/98 for the offence under Sections 7, 11 and 13(1)(d) r/w 13(2) of P.C.Act and took up investigation.

During the course of investigation, the DSP collected the mediators, got prepared pre trap proceedings and Rs.3,000/- produced by the complainant was tainted with Phenapthelene Powder and the same amount was given to the complainant to give the same to A1 and A2, whenever they demanded. Accordingly, on 09.12.1998 at 09:10 AM the de facto complainant and the trap party went to the office of A1 and A2, where PW1 paid the tainted amount of Rs.3,000/- to A1 on demand. On receiving the amount, A1 issued release order of 5 bags of tea dust, meanwhile ACB Officials trapped A1 and recovered the tainted amount of Rs.3,000/- and conducted chemical test. The chemical test was positive. The amount of Rs.2,800/- was recovered from the shirt pocket and Rs.200/- was recovered from the pant pocket. After due investigation, charge sheet was laid for the same offences.

3. The trial court, on appearance of the accused, framed charges for the offences under Sections 7, 13(1)(d) r/w 13(2) and Section 120(b) of IPC and read over the same to the accused. The accused pleaded not guilty and claimed to be tried.

4. During trial, on behalf of the prosecution, PWs.1 to 4 were examined and Exs.P1 to P30 and MOs.1 to 10 were marked. The incriminating circumstances in the evidence of the prosecution witnesses were put to the accused when he was examined under Section 313 Cr.P.C. and he denied the truth of the evidence and reported no evidence.

5. The trial court, after evaluating the evidence and the material on record, passed the impugned judgment. Questioning the said judgment, the present appeal is preferred on the grounds that the court below erred in convicting the appellant for the alleged offences. The court below ought to have seen that the ingredients to constitute the said offences are not proved by any legal and reliable evidence. It failed to give any importance to the entire evidence of the *de facto* complainant, to admit that the appellant made calculations on a paper and asked him to pay Rs.3,000/- towards tax and compounding fee. It failed to see that PW1 also deposed that he first approached the then CTO who also stated that he has to pay Rs.5,000/- towards tax and compounding fee and asked him to meet the appellant, when he first approached. It failed to give any importance to the evidence of PW1, who had categorically stated that on the date of alleged trap, the appellant asked him to wait outside to give a receipt and some more documents have to be prepared and that he went out and gave pre-arranged signal, without waiting. The trial court erred in giving importance to release order and came to a wrong conclusion that nothing has been mentioned in the said release order about Rs.3,000/-. The trial court ought to have given the benefit of doubt to the appellant.

6. Heard the counsel for the appellant and the Public prosecutor appearing for the respondent.

7. The counsel for the appellant relies on the relevant parts of the evidence of PW1, in support of his contention that Rs.3,000/-

which was demanded by A1, is only towards the tax and the compounding fee. Initially, even according to PW1, who is the complainant, the demand was Rs.5,000/-. The said demand was based on the discretion, which A1 had with regard to the levying the compounding fee. He draws the attention of this court to Section 29(6A) of Sales Tax Act, to convince the court that A1 had discretion with regard to the levying of the compounding fee. The said provision runs as under:

> "29(6A) Where goods are carried without paying tax, if any, payable under this Act, or goods are carried without being properly accounted for in the documents referred to in clause (b) of sub-section (2), the said officer shall collect the tax payable on the goods so carried and in addition levy a penalty not exceeding five times the amount of tax pauyable on such goods are giving a reasonable opportunity to the person likely to be affected, against the proposed penalty."

Learned counsel contends that based on the plea of PW1, A1 used his discretion given under the above provision and reduced the amount to Rs.3,000/- and asked him to bring the said amount, but it is not towards any bribe.

8. With the above contentions in mind, it would be beneficial to peruse the evidence of PW1.

9. PW1 states that on 18.11.1988 he proceeded to Vizianagaram to take delivery of tea powder upon receipt of way bill, dated 10.11.1998. He took delivery of 20 bags of tea dust from East Coast Road ways, Vizianagaram and engaged a taxi to transport the same to Chodavaram and he loaded 15 bags of tea dust into the taxi and he booked the rest of five bags of tea dust

with Murali Krishna Transport Authority Pvt. Ltd., for being transported to Chodavaram. He returned back to Chodavaram with the load of 15 bags of tea dust powder, by taxi. On the following day i.e., on 19.11.1998, he received copy of detention order from Murali Krishna Transport Authority Pvt. Ltd., to the effect that the Commercial Tax Officer detained the stock of tea dust (five bags). On 23.11.1998, PW1 proceeded to CTO's office, Narsipatnam, and met CTO in the office and requested him to release his five bags of tea dust powder, which includes compounding fee.

10. So from the above evidence, it can be understood that the demand was made for Rs.5,000/-, which includes compounding fee. As to whether, apart from the compounding fee there is need for any other taxable amount, has to be further seen. PW1 continues to say that CTO instructed him to meet ACTO by name Venkata Rao, who is A1 in this case. He met A1 who also reiterated that he has to pay tax as well as compounding fee, for a sum of Rs.5,000/-. So from the above it can be understood that Rs.5,000/- is towards the compounding fee and the tax. PW1 expressed his inability to pay the amount and requested to reduce the amount. On that, A1 reduced the sum to Rs.3,000/-. PW1 states that he believed that the said sum of Rs.3,000/- is to be paid towards the bribe amount. He again expressed his inability to pay the said amount and requested for further reduction. He met the attender i.e., A2 and requested him to see that the amount is further reduced. A2 told him that he would talk to A1 in that regard and he asked him to wait for

some time. PW1 further informed A2 that he could pay only Rs.1,200/- since he was having only Rs.1,270/- and he required Rs.70/- to meet his fare expenses. As such, A2 went into the office and returned stating that A1 is not agreeing for reducing the amount and then he returned back to his place, Chodavaram. On 05.12.1998, he rang up A2 and talked to him and informed that he would come to the office on 08.12.1998. On 08.12.1998, in the morning hours, he went to the CTOs office and met A1 and asked A1 about the detained stock. He reiterated the earlier version and demanded Rs.3,000/-. He also talked to A2. He also reiterated the earlier version and added to that, that if a sum of Rs.3,000/- is not paid, the stock would be confiscated to the State. A2 also stated to PW1 to bring Rs.3,000/- to the office along with way bill, purchase bill and letter head. Since PW1 thought the sum of Rs.3,000/-, as demanded by A1, and A2 is towards bribe for both of them and he was not to willing to pay the said amount to them, he went to the office of ACB, Visakhapatnam and met the DSP and reported the matter and drafted the report. He went to the office of ACB along with purchase bill, way bill, letter head and the proposed bribe amount. The Deputy Superintendent introduced him, his staff members and mediators. The mediators took charge of the proposed bribe amount of Rs.3,000/- from him and noted down the serial numbers in the pre trap proceedings. The amount was of two, five hundred rupee notes and twenty, one hundred rupee notes. Thereafter, he was asked to wait outside the office. Fifteen minutes thereafter, he was called inside the office. At that time, he was in the custody of bill, way bill, letter head paper and personal cash of Rs.550/- and hand kerchief. He was allowed to keep them in his pant pocket. The constable kept wad of currency in his shirt pocket and the Deputy Superintendent of Police instructed him not to touch the wad of currency notes until and unless it was demanded by A1 and A2 and in case the amount is paid, to come out and give the signal, by wiping his face with his hand kerchief. The constable rinsed his hand fingers in the sodium carbonate solution, and on doing so, the solution turned to pink colour and he prepared another carbonate solution and all of them rinsed their hand fingers in it and the solution remained colourless. PW1 further stated that they all left the office of ACB, Visakhapatnam at 06:00 AM. He went into the office and noticed that A1 was present in the office. On seeing him, A1 asked him whether the demanded amount was brought or not. On that, he took out the amount from his shirt pocket and paid it to A1 and he received it with his right hand and kept it in his shirt pocket. A1 instructed him to bring the Xerox copies of purchase bill at Calcutta. He proceeded to the office and got the above documents Xeroxed and produced his documents before A1. He requested A1 to issue the release order. He instructed him to address a letter to him in the office, under Ex.P7 and A1 issued a release order in Ex.P8. Thereafter he came out and gave a signal.

11. In the cross-examination, it was elicited that when PW1 went to him, A1 made some calculations on a rough paper and stated to him that a sum of Rs.3,000/- has to be paid towards

the tax and compounding fee. He replied that he was not in a position to pay so much amount. In the second instance, he met CTO and complained to him that A1 was demanding him to pay Rs.3,000/- and on hearing that, CTO called A1 and directed A1 to calculate and to arrive at correct figure and to issue release order and he would endorse the matter later. On that, he came to A1 and he stated that a sum not less than Rs.3,000/- was to be paid in that matter and the same cannot be reduced and the power to reduce the same is not in his hands. It was further elicited that he did not ask either CTO or A1 or A2 whether the amount demanded was towards tax or bribe. As he was under the impression that the demanded amount, as was demanded by A1 and A2, was towards bribe, he proceeded to the office of DSP, ACB, Vizakhapatnam. It was further elicited that when he requested A1 to issue the release order as he was in a hurry to open his shop, A1 stated to him that CTO will come to the office and asked him to wait for some time. When he requested A1 to issue release order, he issued the release order to him, saying that he would obtain the endorsement by the CTO later. A1 also stated to him to wait outside for some time, as he has to prepare receipt and to issue some other documents. He came out side the office and gave the pre arranged signal, without waiting outside the office.

12. The above evidence would show that it was only on the basis of the understanding of PW1, that the amount was demanded as bribe, he went and reported the matter to the DSP, ACB. In Ex.P1, which is the report given by PW1,

the version of PW1 is that the ACTO called the attender and asked him to talk to him and the attender A2 took him to a room and asked him to pay for himself and ACTO. From the said fact, it can be understood that it was demanded as a bribe. In the concluding part of Ex.P1, it is stated that ACTO i.e., A1 asked him to bring along with Rs.3,000/- along with Bill, Way Bill, and Letter head paper on 09.12.1998 stating that Rs.3,000/- is not for himself only and same would be given to the remaining staff and therefore, the said amount cannot be reduced, failing which he would confiscate the gods.

13. From the above, a clear demand for bribe can be made out. But while deposing before the court, PW1 did not stick to the said version, in spite of which the prosecution did not declare him as hostile and cross-examine him on the contents of Ex.P1. Hence, Ex.P1 is not substantial evidence. The evidence of PW1, taken as it is, would not reveal anything, which would imply that the amount was demanded towards bribe. PW2, who is a mediator, however, is a person, who acted as a mediator at the request of the DSP, believing the version of PW1, which is that the amount was demanded as a bribe. But since PW1 has not reiterated the version given in Ex.P1 while deposing before the court, the evidence of the other witnesses, who were only participants in the trap proceedings, does not come of any avail to the prosecution.

14. The counsel for the appellant relies on a ruling of the apex court reported in *T.Subramanian v. State of T.N.*[1]*,* wherein it was held that mere proof of receipt of money by accused, in absence of proof of demand and acceptance of money as illegal gratification, is not sufficient to establish that guilt of the accused. It was further held that if the accused offers reasonable and probable explanation, based on the evidence that the money was accepted by him, other than as an illegal gratification, accused would be entitled to acquittal.

15. The facts of this case would also call for application of the said ruling, since there is no proof of demand in this case. The evidence of PW1 is shaky, as regards the demand. The facts mentioned in the recovery proceedings, as stated by PW2, mediator, and PW4, investigating officer, also do not inspire confidence. When the case is that Rs.3,000/- was demanded towards bribe, recovery of Rs.2,800/- from pant pocket and Rs.200/- from shirt pocket, does not probablise the story of receiving the amount of Rs.3,000/- towards bribe. There is no need for the accused to segregate the amount. Had the case been that Rs.3,000/- includes the tax amount and the bribe, then perhaps, a segregation would be needed. The above, would support the evidence of PW1 that he was only under an impression that Rs.3,000/- was demanded towards bribe and had initiated the proceedings of trap, only because of such inspection of PW1.

[1] (2006) 1 SCC 401

16. In view of the above, this court opines that the judgment of the court below needs to be allowed.

17. Accordingly, the Criminal Appeal is allowed and the conviction and sentence recorded against the appellant for the offence punishable under Section 7 and 13(1)(d) r/w 13(2) of the Prevention of Corruption Act, 1988 (for short, "P.C.Act"), in C.C.No.108 of 2000, dated 22.05.2007, by the Court of III Additional District & Sessions Judge cum Special Judge for ACB Cases, Visakhapatnam, are hereby set aside and consequently, the appellant is acquitted of the charges leveled against him. The appellant/A1 shall be set at liberty forthwith, if not required in any other crime. The fine amount, if any, paid by the appellant/A1 shall be refunded to them.

As a sequel, the miscellaneous applications pending, if any, shall stand closed.

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T. RAJANI, J

September 11, 2018
LMV