IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 143 of 2010

Sunil Jagannath Tibe .. Appellant
Versus
The State of Maharashtra .. Respondents

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Mr. Priyal G. Sarda i/b Mr.Vaibhav G. Bagade for the appellant.
Mr.Suraj S. Hulke, Spl.P.P for CBI.
Mr.Y.Y. Dabake, APP for the State.

CORAM: BHARATI DANGRE, J.
RESERVED : 6th APRIL, 2021.
PRONOUNCED: 5th MAY, 2021.

JUDGMENT :-

1 The appellant is aggrieved by the judgment in Special Case No.117 of 2004 delivered by the Special Judge for CBI on 18th February 2010, thereby convicting him for offence punishable under Section 461 of the IPC and sentencing him to suffer RI for one year and to pay fine of Rs.1000/-, and in default of payment of fine, undergo SI for 30 days. By the very same judgment, the appellant has been convicted of the offence punishable under section 13(1)(d)(ii) read with section 13(2) of the Prevention of Corruption Act (for short 'P.C. Act") and sentenced to suffer RI for one year and to pay fine of Rs.1000/-

in default, undergo SI for 30 days. Substantive sentences being directed to run concurrently. On the judgment being pronounced, the appellant was directed to be taken into custody.

2 On the appeal being filed and registered, on 12th March 2010, it is admitted. The order imposing sentence, being suspended, the appellant came to be released on bail on furnishing fresh bond. Resultantly, when the Appeal is heard, the appellant is on bail.

3 The appellant working as Police Constable came to be charged along with three accused persons on 8th September 2006, he being arraigned as accused no.2 in the C.R. registered on a complaint being filed by one Mrs. Jyotsna Rasam, API attached to the DCB CID, the complaint allege that she was investigating an R.C.No. 1-B/2003 which involved the accused no.3 Mr.Pravin Bharatan and in connection with the said case under investigation, she had obtained some documents from the officials of the Bank and some incriminating documents were seized from the house of accused no.3, with regard to the loan facility availed by him from Canara Bank. Mrs.Rasam (PW 9) asserted that she had received documents from the official of Canara Bank under receipt memo and all the documents collected on various dates were put by her in a cupboard in her office situated at Kitab Mahal, 3rd floor, D.N. Road, Mumbai. The cupboard was located

in the room known as Inspectors room and the key of the cupboard which was a steel almirah was retained by her. On 5.11.2003, she had taken out the documents from the cupboard for preparation of a final report and she had put the documents back in the cupboard, locked the cupboard and retained the keys with her. On the following day i.e. 6th November 2003, she was in the premises of her office during 10.30 am to 15.00 hours and opened the cupboard on two occasions and locked the same on its use. After taking out papers with regard to other matter at 15.00 hours, when she opened the cupboard for locating the document regards to the case of accused no.3, they were missing from the cupboard and though the entire office was searched, the documents were not traceable.

4 Consequentially, on 8th November 2003, when information was received from reliable source that accused no.1 who was working as clerk and the accused no.2 (present applicant) working as constable with the CBI office were on night duty on 5th November 2003 and that they had prepared duplicate keys of the cupboard and stolen the documents with regard to R.C.No.1-E/2003. Complaint was filed and an FIR was registered. Complaint alleged that she gathered information from reliable sources and prepared list of the documents which were stolen, the documents stolen being 465 in number.

It is in the backdrop of this complaint lodged by PW 9, the appellant was arraigned as accused no.2 along with one clerk working in the office of CBI, Shreejeev. Further, Pravin Bharatan who was an accused in RC No.1-E of 2003 along with his accomplice one Mr.Hiten Ashwin Abiani were also arraigned as accused persons and charge-sheeted.

5 The Special Judge, framed the charge against the accused persons. The accused nos.1 and 2 were charged for committing offence punishable under 461 read with Section 34 of IPC, since in furtherance of the common intention of all the accused persons during the night of 5th November 2003, they engaged services of a locksmith (key maker) and by bringing him in the office premises of CBI located at 3rd floor, Kitab Mahal, Fort Mumbai, unauthorizedly and dishonestly, prepared a duplicate key of the steel cupboard in-charge of Smt.Rasam, and intentionally broke open the Almirah for committing theft and destruction of certain documents concerning RC No.1E/2003. The accused nos.1 and 2 were also charged under Section 381 read with 34 of IPC as in their capacity as clerk and constable respectively of the CBI, EOW Branch, since they had committed theft of 465 original documents from the file of RC No.1E-2003 from the steel cupboard in possession of Smt.Rasam, PI, CBI with an intention to destroy them. As far as accused nos.3 and 4 are concerned, they were charged under section 201 read with section

34 of IPC, as they got the original documents, 465 in number to be stolen from the cupboard of Smt.Rasam, from the accused nos.1 and 2 and cause destruction of the said documents on 6th November 2993 at village Chankala, District Trichur, Kerala. Further, the accused nos.1 and 2, were also charged for committed criminal misconduct punishable under section 13(1)(d) (ii) of PC Act read with Section 13(2), being public servants, by abusing their position as such, by illegal means causing removal and destruction of 465 original documents from the possession of Smt.Rasam, for and on behalf of accused nos.3 and 4.

6 All the accused, including the accused no.2 (appellant), pleaded not guilty and came to be tried before the Special Court and chose to be tried by the Special Judge. The prosecution in order to establish the guilt of the accused persons, and laid its case before the Special Court by examining twenty one (21) witnesses. On appreciation of the evidence placed before it, the Special Court determined the points formulated and concluded that the prosecution had proved that the accused no.1 in furtherance of the common intention, engaged the services of the locksmith and unauthorizedly and dishonestly prepared the duplicate key of the steel almirah in-charge of Smt.Rasam, PI, CBI with an intention to break open the same for committing theft and destruction of the documents concerning case no. RC No.1E-2003. As far as charge under Section 381 of IPC is

concerned, the accused nos.1 and 2 came to be acquitted. As an outcome of the trial, accused nos.3 and 4 came to be acquitted of the charge levelled against them under section 201 read with section 34 of IPC. However, it is only accused no.2 (appellant) who had been held guilty of criminal misconduct punishable under the relevant provisions of the P.C Act and the accused no.1 was granted an acquittal of the said charge. It is this impugned judgment which convict the appellant and impose sentence on him, the appeal has been preferred.

7 I have heard the learned counsel Mr.Priyal Sarda for the appellant and Mr.Suraj Hulke for the CBI. Mr.Sarda would submit that the prosecution has failed to prove the charges against the appellant and he would submit that the case of the prosecution is that the accused nos.1 and 2 had stolen the documents for benefiting the accused no.3 who was arraigned as an accused in a case being investigated by the CBI, which was an offence under Section 420, but since accused no.3 has been acquitted of the charge u/s.201 read with Section 34 IPC, Mr.Sarda would pose a question as to how the appellant can be convicted. He would submit that the original papers as alleged were stolen for the benefit of accused no.3, and as per the say of accused no.3, in order to shelter the offenders in the case registered by EOW against accused no.3. But when the Special Court has held that the said charge cannot be proved against

accused no.3, how can the appellant (accused no.2) be convicted with the aid of Section 34. In absence of any positive evidence led by the prosecution to establish that the almirah which was opened with the aid of PW 5 and at the instructions of PW 6, who arrived in the office, as per the say and request made by the present appellant, but there is nothing on record to show that it is this almirah which stored the documents pertaining to the case involving accused no.3, was opened by preparing a duplicate key. Mr.Sarda would also urge that the sanction order to prosecute the appellant, which has been granted by PW 12 do not accord sanction to prosecute him for the offenc punishable under Section 461, and therefore, in absence of sanction to prosecute under the said relevant provision, the appellant is entitled for acquittal on account of non-application of mind by the sanctioning authority. The submission of Mr.Sarda is that the prosecution has failed to prove the criminal misconduct as alleged and specifically the charge under Section 13(1)(d) (ii), which pertain to abuse of the position as a public servant, for obtaining for himself or any other person any valuable thing or pecuniary advantage. Mr.Sarda would submit that in the ultimatum, accused no.3 has been acquitted of the charge under Section 201 read with Section 34, and the Special Court has held that the prosecution has failed to prove that the documents were handed over by the accused nos.1 and 2 to the accused no.3, the prosecution has failed to bring home the guilt of the appellant for the charge of criminal misconduct. Resultantly, since prosecution case created more doubts than the assertions established by evidence placed on record, he urge that the impugned judgment deserve to be set aside qua the appellant.

Per contra, learned counsel Mr.Hulke support the impugned judgment and state that the fact of acquittal of other accused persons do not render any good qua the present appellant who has been held guilty of the charge leveled against him under Section 461 of IPC as he has dishonestly broken the almirah which contained the original documents and this would clearly attract section 461 of IPC, under which the appellant has been convicted and sentenced. Further, relying upon clause (ii) of Section 13(1)(d) of the PC. Act, Mr.Hulke submit that the said provision is attracted if the public servant abuses his position as a public servant and obtain for himself for any other person any valuable thing or pecuniary advantage and in the present case, the valuable thing being original documents in the custody of the CBI, EOW in relation to an offence in which accused no.3 was indicted. According to the learned APP, the prosecution has clearly brought about the said charge of criminal misconduct against the present accused though the other accused persons are acquitted of the charges levelled against them. His submission is that the judgment assailed in the appeal be upheld.

8 The appellant who is arraigned as accused no.2 was working as police constable, who joined the Mumbai police on 1.1.1997 and was sent on deputation to the CBI, EOW on 5.7.2000. He was attached to the office of CBI and was posted on duty at 3rd floor, Kitab Mahal, Fort, Mumbai where the office of CBI EOW Mumbai and the office of CBI, SU, Mumbai is located.

At this stage, it would be necessary to refer to the relevance of the original documents which are alleged to have been stolen from the almirah in the office of CBI. Mrs.Jyotsna Rasam was investigating R.C.No.1-E-2003 dated 27th January 2003 registered under Section 420 read with Section 120B of IPC along with Section 13(2) read with Section 13(1)(d) of the P.C. Act, on the complaint of Mr.M.A. Pai, Dy.General Manager, Canara Bank. In the said case, the accused no.3 in the present case, Mr.Pravin Bharatan along with one another private person and the then Branch Manager of Canara Bank, Chunabhatti were inculpated for cheating the Bank to the tune of Rs.164 lakhs approximately. PW 7 and PW 8 are the two Officers of Canara Bank who have been examined by the prosecution in the present case. PW 7 deposed that during the tenure of Mr.Mahalikam, in the year 2001-2002, Chunabhatti Branch of Canara Bank, loan was sanctioned to Mr.Pravin Bharatan (accused no.3) but the repayments were irregular and as such, his accounts were classified as NPA and the Bank filed Suits against him and the matter was also referred to CBI. PW 7 further deposed that he was called by Mrs.Rasam, PI for CBI and on 2nd June 2003, he handed over original papers to Mrs.Rasam, receipt memo of which is produced by him. The said witness in cross examination has admitted that the originals of the documents which was handed over to Mrs.Rasam was available in the branch office of Canara Bank. PW 8 is the Manager of the Bank and has also deposed about the loans being advanced to Mr.Pravin Bharatan which were misused by him and the loan amounts were not repaid, constraining the senior Manager of Canara Bank to file complaint with the CBI, EOW Branch. As per him, when the Investigating Officer, PW 9 Mrs.Rasam asked the documents to be handed over to her, he made over the necessary papers to the Investigating Officer after obtaining receipt memos on various dates. The receipt memos came to be exhibited at the hands of this witness who deposed that before handing over the original documents to CBI, xerox copies of the documents were prepared by the Bank and after the documents were stolen, certified copies of the original documents were handed over to CBI office.

9 It is in connection with these documents which were made over to the Investigating Officer, Mrs.Rasam who was investigating the offence registered against accused no.3, the appellant is alleged to be involved. In order to establish the

charge levelled against the present applicant that he dishonestly opened the almirah over which Mrs.Rasam exercised control and remove the documents for benefit of accused no.3, the prosecution has relied upon the evidence of the following five witnesses:-

PW 1, working as Head Clerk of EO Wing of CBI, at Kitab Mahal bldg, Fort Mumbai deposed that he was in charge of the staff and the administration of the said office. He depose that the accused no.2 was working as constable under the Duty Officer and on perusal of the Muster Roll, he has stated that the present appellant attended the duty on 1^{st}, 2^{nd}, 3^{rd}, 5^{th}, 7^{th} and 8^{th} of November 2003. Prosecution Witness No.2 Shri Pradeep Shinde is examined as the accused no.2 used to work under him. As per the said witness, on 5^{th} November 2003, accused no.2 took over charge of general diary from him at 8.15 pm and he was on night duty. It is PW 2 who had assigned work to accused no.2 who remained on duty till 9.30 am on 6^{th} November 2003. Thereafter, the charge of the general diary was taken over by him by PW 2. In the cross-examination, the witness has deposed that Mumbai police had provided guards round the clock for protecting the office of CBI and during night time, usually, there are three police guards on duty. On the relevant day i.e. on 5^{th} November 2003. One Mr.Mulani was the guard and he is not aware of the names of the other 2 guards. He has deposed that when he left at 8.15 p.m, another guard was present and he did not inquire about his name. Shri Mulani is examined as PW 4 by the prosecution who was on guard duty on the night of 5.11.2003. He referred to PW 2 and the accused no.2 being present in the CBI office and at 8.15 p.m, according to PW 4, PW 2 left and the accused no.2 remained on night duty. At 8.30 p.m, two persons came to the office of CBI and they were asking for accused no.2. On being asked the purpose of their visit, they responded to PW 4 by stating that they had come to prepare duplicate key for a steel cupboard, and at that time, accused no.2 arrived at the spot and ushered the two persons in the CBI office and they went in the room of the officers where PI Smt.Rasam used to sit. After 20 minutes, the two persons came out and accused no.2 handed over Rs.150/- to them. On being asked why are they being paid, accused no.2 responded by stating that they had worked hard on making duplicate keys and on being asked why he required duplicate keys, it is deposed by PW 4, that accused no.2 told him that the keys were prepared at the request of accused no.1 Shreejeev, Assistant in the CBI Office, who used to sit in the office late and used to occupy the computer room. The accused no.2 also informed PW 4 that the cupboard was required to be opened by accused no.1 as some important documents were to be sent to Delhi urgently.

Further, prosecution has relied upon evidence of PW 5, Vinay Jadhav, who was sent by PW 6, Prakash Shah to the CBI office on 5.11.2002 at about 8.30 pm. PW 5 deposed that 4 to 5 persons being present on the spot, when he reached there and they were guided to accused no.2. He further deposed that he was taken in a room and a steel cupboard was shown and he was asked to prepare duplicate key of the said cupboard. The cupboard was opened by the duplicate key and it was also closed by means of the same key. PW 5 has deposed that accused no.2 gave him Rs.150 for the work. PW 6 is Sanjay Shah who is engaged in the business of preparing duplicate key s and has sent PW 5 to the CBI office at the request of accused no.2 for opening of a steel cupboard, for which an amount of Rs.150 was charged.

10 Another witness examined by the prosecution for establishing presence of accused no.2 in the office of CBI on the relevant night is PW 10, Uday Shetty working in the canteen at Kitab Mahal, D.N Road as waiter. This witness has established that on 5.11.2003, at about 10.30 pm, he brought meal for accused no.2 for which he paid Rs.100/-. It is deposed by the said witness that accused no.2 was in the EOW room which was the room for working of Mrs.Rasam and he deposed that accused no.1 Shreejeev was also there in the office of EOW and they together were opening Godrej Almirah.

11 The evidence of the aforesaid witness will have to be read with the evidence of PW 9 Mrs.Rasam (PW 9). PW 9 is the complainant who deposed that she had received documents from

the Canara Bank and some incriminating documents came to be seized from the house of Mr.Pravin Bharatan, an accused in Crime No. 1/E/2003 being investigated by CBI, EOW. She deposed that the documents were put by her in the cupboard in her office situated in Kitab Mahal, 3rd floor and the cupboard was in the Inspectors room. On 5.11.2003, he has taken the documents out and put the documents back in the cupboard at 18.45 hours after she locked the cupboard and retained the key with her. It is on the following day that on 6.11.2003, she went to the office and she operated the cupboard two times for taking out some papers. At 15.00 hours, she came to know that the documents with regard to Pravin Bharatan's case were missing, complaint about the documents being stolen was lodged on 8.11.2003 when information was received from reliable sources that it was accused no.1, who were on night duty on 5.11.2003 and they had prepared duplicate keys and removed the documents from her cupboard. Total 465 documents were reported to be stolen.

The charge levelled against the accused nos.1 and 2 is that they conspired with accused no.3 for supplying him the incriminating documents to help him out against the accusation faced by him. When the accused persons together came to be tried, the guilt of all the accused persons barring the present appellant, was held to be not established since the evidence, according to the Special Judge, did not establish the same.

Accepted the prosecution case that the accused no.2 was present in the office of CBI, in the intervening night of 5.11.2003 and 6.11.2003, the learned Special Judge held that this established the allegations against him. This has been assumed on the basis of evidence of PW 4, Mr.Mulani who was told by accused no.2 that the accused no.1 required the key for opening of a cupboard in which important documents were kept and they were to be sent to Delhi. The said statement however was not relied upon against accused no.1, since according to the trial Court, it did not amount to confession did not partake by way of confession qua the accused no.1 and hence the said testimony was discarded. By the same logic, it cannot be held admissible against accused no.2 but was accepted against him. If in light of evidence of PW 4, the statement do not indict accused no.1, it cannot indict accused no.2 also. Though the set of witnesses, i.e. PW 1, PW 2, PW 4 and PW 10 establish the presence of the accused no.2 in the office of CBI and which was natural, since he was on night duty in the office, the prosecution has failed to establish that the duplicate keys were made for opening a particular cupboard in which the documents were stored by PW 9. None of the witnesses was present inside the office of the CBI and none has spoken about which cupboard was opened by use of duplicate keys. PW 4 was standing outside and therefore, throw no light to which cupboard was opened by a duplicate key. Nor PW 5 who actually opened the cupboard by preparing duplicate keys on the say of accused no.2, has reflected as to which cupboard in which room of the office of CBI was opened by means of a duplicate key. It can very well be imagined that the office of CBI which was functional on 3rd floor would have comprised of many rooms and many almirahs, which could have been put to use for storage. Since the prosecution has failed to establish that the keys were made to open an almirah where the documents pertaining to accused no.3 were kept, in absence of a positive evidence brought on record by the prosecution to establish that the keys were prepared of the same almirah, where the documents were stored by PW 9, the case of the prosecution becomes doubtful. The Special Judge have ignored the testimony of PW 10, who arranged for meal of accused no.2 at around 10.30 p.m, who has specifically referred to the presence of accused no.1 in the office of CBI in the intervening night of 5th November and 6th November 2003. The presence of the accused no.2 in the office of CBI has been established as he was posted on night duty and from evidence of PW 4 and PW 5, it is also established that the keys were prepared for opening of some almirah and for this purpose, accused no.2 gave a sum of Rs.150/- for the task done. However, when PW 4 specifically deposed that accused no.2 has disclosed to him that accused no.1, who was working as a clerk in the office of CBI, had instructed him to obtain a duplicate key, in absence of any evidence on record to show that it was the same almirah from which the documents were found to be stolen, post lunch session on the next day i.e. 6.11.2003 and particularly when PW 9 has deposed that she herself had opened the Almirah on two occasions but she did not find a document missing, makes the prosecution case dither, the benefit of which must go to the accused.

12 The charge levelled against the accused nos.1 and 2 under Section 461 and also Section 381 of IPC. Section 461 would get attracted if it is established that the accused dishonestly or with intention to commit mischief, breaks open or unfastens any close receptable which contain or which he believe to contain property; it does require dishonest opening or unfastening of a close receptative. In absence of the prosecution establishing by positive evidence that the accused no.2 opened the very same cupboard in which Mrs.Rasam had stored her documents, which were found to be missing on the next day, it cannot be said to have attracted Section 461 unless the prosecution positively establish that the key was made by accused no.2 for opening of the very said cupboard where Mrs.Rasam had stored the document. The witnesses examined by the prosecution were present outside the office of CBI and have deposed about two persons being summoned by accused no.2 for opening of a cupboard and for the work done, they were paid by him. PW 5 actually opened the almirah, by preparing a duplicate key as per the say of the accused no.2, also do not speak about the identity

of the almirah except that it was a steel cupboard nor does any witness speak of some documents being removed from it. The Special Judge, has therefore, erred in rendering a finding that it was within the knowledge of accused no.2 that in a cupboard files were stacked which contained valuable documents and as soon as the cupboard was open with the help of duplicate key, section 461 stand established.

13 Offence under Section 461 is committed when a person dishonestly or with intent to commit mischief, breaks open any closed receptacle which contains or he believes to contain property. The dishonest intention or intention to commit mischief and the knowledge. That it contains the valuables in form of documents is not established by the prosecution. None of the witnesses has attributed any knowledge to the accused no.2, about the documents beneficial to accused no.3 being stored in the almirah by PW 9.

14 Another important aspect of the matter is that the prosecution case is that the accused no.3 , being beneficiary, so making of a duplicate key and removal of document is presumed to have been done at his instance. However, there is absolutely no iota as evidence brought on record by the prosecution regarding prior meeting of mind between accused nos. 1 and 2 at one end and accused no.3 at the other end. This premise is

accepted by the learned Special Judge when he record to the following effect :

> "There is absolutely no evidence to show that the accused no.3 was acquainted or was having friendly relation with accused nos. 1 and 2. In the cross-examination of Mrs.Rasam, it is considered that she has stated that Mr.Mahalikam Mahesh Nagrajan, accused no.3 and others were accused in RC No.1E-2003. Therefore, in absence of evidence regarding prior meeting of mind between them and previous acquaintance between them, merely because accused no.3 was one of the accused in RC 1-E/2003, it cannot be held that accused no.2 has opened the cupboard with duplicate key at its instance. There is no iota of evidence to show delivery of documents to accused no.3".

The case of the prosecution has been accepted by the Special Judge to the extent that the accused no.2 opened the cupboard but the Special Judge has recorded that there is no evidence to show that accused no.2 has taken away the documents out of the cupboard and/or that he has taken those away out of the office and delivered it to accused no.3 or accused no.4, but the suspicious circumstances that he is present through out the night, in the office of CBI, EOW has weighed against him. As per Section 381 is concerned, in absence of any linking evidence, the accused no.2 has been acquitted.

15 In the aforesaid circumstance, since prosecution has failed to prove that the document of the case involving accused no.3 were removed by the accused no.2, or the documents were handed over to accused nos.3 and 4, who were unsuccessfully charged with destruction of the same documents, the accused no.2 cannot be held guilty under Section 461 and for the same reason, the charge under Section 13(1)(d)(ii) read with Section 13(2) must also fail. It has not been proved that the alleged documents have been removed from the almirah over which PW 9 exercised control. I fail to understand how clause (ii) of 13(1)(d) gets attracted where a public servant abuses his position for obtaining gain for himself or for someone else. Once it has been held by the Special Judge that the prosecution has failed to prove that the documents were transmitted to accused 3 and 4 and when the accused no.1 is also acquitted of the charge levelled against him, then it is not understood on what basis the appellant has been convicted for preparing duplicate keys for opening of the cupboard and removing the documents for benefitting the accused nos.3 and 4. The common intention as attributed to the appellant ought to have been shared by him with other accused persons but when all other accused persons are discharged, the charging of the applicant with the aid of Section 34 of the IPC must necessarily fail. For the same analogy, the conviction of the appellant under Section 13(1)(d)(ii) and Section 13(2) also

cannot be sustained. Resultantly, the conviction on the aforesaid counts of the appellant vide the impugned judgment is liable to be set aside by allowing the present Appeal. Hence, the Appeal is allowed.

16 Judgment dated 18th February 2010 in Special Case No. 117 of 2004 is set aside.

17 Bail bonds furnished by the appellant at the time when he was released on bail, pending the Appeal, stands cancelled.

SMT. BHARATI DANGRE, J

Tilak