

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
(APPELLATE SIDE)**

Present:
The Hon'ble Justice Rai Chattopadhyay

C.R.A No. 467 of 2010

**Dulal Chandra Pandey
Vs.
CBI**

For the Appellant : Ms. Minoti Gomes.

For the CBI : Mr. Dipankar Dandapath,
: Ms. Oishani Mukherjee.

Hearing concluded on: 17/01/2023

Judgment on: 05/04/2023

Rai Chattopadhyay, J.

1. Prosecution's case in connection with this appeal appears to be like this:
2. The defacto complainant, who at the relevant point of time was posted as the Commandant, 63 Battalion, of the Border Security Force, at Baishnab Nagar, in district Malda, had received a phone call from the appellant No.1 on October 29, 2001. Said person had introduced himself and wanted to meet the defacto complainant at BSF post, Gulabganj on October 30, 2001, in the afternoon.

3. When the meeting happened on October 30, 2001, at the said place, the appellant proposed for advancing gratification in lieu of extending favours in a particular way, which according to the de facto complainant was not only unethical but illegal and antinational too. Allegedly, the appellant offered him bribe of an amount of Rs. 1,25,000/-on behalf of the syndicate of smugglers, in lieu of allowing the appellant to send Indian goods and cattle to Bangladesh, through the Indo Bangladesh border, illegally. Allegedly the appellant also proposed that the de facto complainant should instruct his subordinates, that is, the officials guarding the BSF outposts at Indo Bangladesh border near Sisani Border Out Post, to illegally allow him free passage on Indian soil, to execute the said activities. Though the de facto complainant had refused such proposal of the appellant, allegedly the appellant strongly insisted the de facto complainant and informed to come to the residence of the de facto complainant at BSF campus Baishnab Nagar, at about 08 hours on November 3, 2001, to pay him the bribe.
4. After this occurrence on October 30, 2001, the de facto complainant immediately wrote his complaint dated October 31, 2001 to the Superintendent of Police, CBI, Anti Corruption Branch, at Kolkata. Thereafter CBI, after confirming as to the genuinity of the complainant and authenticity of the complaint made by him, decided to come to Farakka to conduct a trap operation for apprehending the appellant No.1

red-handed. Directions were issued to the de facto complainant to report to the Superintendent of Police, CBI, at Farakka on November 3, 2001 at 05.45 hours.

5. Prosecution's further case is that, on the stipulated date a total number of eight persons including the CBI officials, officers from NTPC and the de facto complainant formed a team for trapping the appellant. Necessary formalities were done. Pre trap memorandum was prepared, the same was read over and explained to all the other persons, signatures were done and all the team members positioned themselves covertly in and around the place of occurrence, to secretly follow the entire activities. According to the prosecution, appellant being accompanied by the other accused person (now deceased), came to the spot at about 10 hours. There, the said other accused person put out from his possession an amount of ₹ 50,000/-in the denomination of ₹ 500/-and handed the same over to appellant, who had kept the said money on the table, surrounding which the appellant, the other accused person (now deceased) and the de facto complainant were sitting. At that moment all the other person's, that is, the CBI officials and the NTPC officials showed up from their respective hidden places and the said two persons were apprehended. Seizure was made and post trap memorandum was also prepared. After complying with all the necessary formalities, the team went back with both the appellant and other accused person (now deceased), being arrested. Subsequently, prosecution against them was initiated.

6. The said two persons were tried in the Special (CBI) Court, Bichar Bhawan, at Calcutta, in Special (CBI) Case No. 43/2006, under section 120B of the Indian Penal Code and 12 of the Prevention of Corruption Act, 1988. During pendency of the trial, the accused person Subash Singha had died. Hence the trial proceeded against the appellant only. The prosecution has examined in the trial, 9 witnesses and has exhibited 16 documents being marked from Exhibit – 1 to Exhibit – 16. It has also exhibited 3 materials being marked as Mat Exhibit – I to Mat Exhibit – III.
7. The trial Court has delivered the judgment in the case on June 9, 2010, which is impugned in this appeal. The trial Court has found the present appellant as guilty of the offence punishable under section 120 B IPC and also for the offence punishable under section 12 of the Prevention of Corruption Act, 1988. After convicting him for the offences as above, the trial Court has imposed sentence to the appellant to suffer rigorous imprisonment for 2 years and also to pay fine of an amount of ₹ 5000/-in default of which he would suffer simple imprisonment for a further period of 5 months each for the offences under section 12 of the Prevention of Corruption Act, 1988 and under section 120 B of the IPC respectively.
8. Appellant is aggrieved with the said judgment of the trial Court dated June 9, 2010 and challenges the same in this appeal. Ms. Gomes, who is representing the appellant in this case has canvassed various points during her elaborate an exhaustive argument. It may firstly be noted that

the very initial point taken up by the appellant is of absence of any independent witness to have been examined in the trial. It is submitted that all the 9 witnesses of the prosecution, either belong to the CBI or the Border Security Force, by whom or on whose behalf the investigation has proceeded and the complaint against the appellant was lodged. Accordingly serious doubts are raised as to the independence and neutrality of those witnesses, on the basis of whose deposition the Court has ultimately come to the finding of guilt of the present appellant. In a way, the appellant pleads that all the witnesses should be considered to be interested witnesses in this trial. Doubts have been raised regarding authentication of the register to record details of the persons entering into the residential premises of the de facto complainant. According to Ms. Gomes, though the prosecution has claimed that a team of 8 persons to be present at the place of occurrence at the relevant point of time, the entry register would not suggest their entry and consequently not their presence at the said place, at the relevant point of time. Certain discrepancies in the evidence of the de facto complainant have also been pointed out, which according to the appellant are serious enough to effect the decision making process of the Court. It is stated that neither the telephone call, which the de facto complainant claims to have received from the appellant on October 29, 2001 has been proved, nor the place of first meeting with the appellant has been disclosed by the de facto complainant. It is stated that the same nullifies the endeavour of the prosecution to set up a strong

background against this untrue allegations, against the appellant. By referring to the evidence, it has further been pointed out that the de facto complainant had remained silent regarding the role of the other accused person (now deceased). Also that mention of certain “code sign” by the de facto complainant in evidence has not been corroborated by the other vital witnesses like PW1 or PW2. Allegedly all these may render the entire evidence of the de facto complainant as nugatory. Appellant’s further point for challenging the impugned judgment would be that the alleged seizure may also not be considered to be a proper one in absence of the signature of the appellant on the same. Allegedly, absence of signature of the appellant on the seizure list raises strong suspicion as to the authenticity and validity of the same. Ms Gomes has further pointed out that in this case the appellant has already undergone 6 months of incarceration. Regarding the impugned judgment, Ms Gomes has very emphatically submitted that the discrepancies in the evidence would have been considered to be vital lacuna on part of the prosecution for which the Court would not have found the appellant a guilty, in this trial. These are termed to be serious impropriety in the impugned judgment and also shortcomings therein to follow and comply with the settled laws, for which, according to the appellant, the impugned judgment is liable to be set aside.

9. Respondent CBI, has however strongly supported the findings and decisions of the trial Court, in the impugned judgment dated July 9, 2010.

Mr Dipankar Dandapath, who is appearing for the respondent has been eloquent enough to point out to the substantive evidence as well as the corroborative evidence in the trial, which according to him are consistent, coherent and leaves no scope of any doubt regarding proof of guilt of the accused person/appellant. He has controverted the submissions made on behalf of the appellant point -wise, to show that the discrepancies if any in the evidence of the witnesses, would amount to minor discrepancies not to affect the decision of the Court, by any way. According to Mr. Dandapath there would be no reason justifiable enough for this Court to interfere with the finding of the trial Court, in the said impugned judgment.

10. The prosecution has examined nine witnesses in this case, who may be categorised as stated hereinabove:

Witnesses are from	Witness No.
NTPC	P.W 1 & P.W 2
CBI	P.W 3, P.W 5, P.W 6, P.W 7 (Investigation Officer), P.W 9
BSF	P.W 4 (Complainant), P.W 8

11. All the witnesses as above have duly corroborated the prosecution case as narrated above. In support of the substantive evidence of those witnesses, several documents have been exhibited in the Court and also three material exhibits have also been produced, i.e, the currency notes seized during the trap operation.

12. From the reading of the evidence of all these witnesses, one can find, excepting certain minor discrepancies, a consistent, coherent and flawless flow of occurrence to have emerged, resulting into arrest of the present appellant and also seizure of the currency notes, which he allegedly tried to gratify with.
13. The first point of challenge to such evidence of the prosecution is regarding the absence of their independence and unbiasedness as to the cause of the prosecution. As stated earlier, the defence in this appeal has pointed out that all the witnesses being the employee of the entities to which the complainant, the investigating officer as well as the entire trapping team members belong, they would be interested as to the result of such trapping and thus are interested witnesses and not independent witnesses.
14. As to this, one may note in this case that the BSF Commandant of 63 Battalion at Baishnav Nagar, Malda, (P.W 4) has made written complaint dated October 31, 2001 to the CBI, Anti Corruption Branch at Nizam Palace, Kolkata. The CBI took up the matter and sent team to lay trap and expose the offence. In doing so the team members thereof included P.W 1 and 2 from National Thermal Power Corporation to be comprised within the team. All the witnesses/members of the trapping team were present at the place of occurrence though in disguise and in a way can be termed as eye witnesses of the incident. There shall be no doubt in finding that all the steps taken by each of the witnesses were in discharge of their

respective official duties and in compliance with the acceptable procedure to work out any information regarding corrupted practices. Thus, while discharging their official duties they cannot be weened being not independent while deposing in the Court as there would not be any element of interest for those persons excepting discharging their official duties. The other points of connivance and conspiracy amongst the officers of various departments has also been raised. It is however found to be only farfetched as to how the connivance or conspiracy may facilitate mobilization of the entire department. Any connivance and conspiracy would always play within a very small spare between a few numbers of persons. However, in this case it is well evident that on the basis of the complaint from the BSF Commandant (P.W 4), the CBI and its officials of different level have acted appropriately in their official capacity to finally send a tapping team to the spot. P.W 1 and 2 who are the officials of NTPC were requisitioned from outside the complaining or investigating agencies. Thus, the entire team was formed and the trapping operation was conducted. An operation of this level involving official from various departments of different organizations cannot come under the single umbrella excepting in compliance with the settled rules or proceedings. The conspiracy that too, of a volume to such a great extent to cover the entire department or an organisation, is only a fanciful conjecture. Instead, all the witnesses being the responsible officers and the eye

witnesses in the case, are found to be important and independently discharging their duty in a Court of law.

15. The other point of challenge as to the prosecution evidence is regarding certain discrepancies which have allegedly arose during the evidence of the witnesses. Those are like, the seizure list being devoid of signature of the accused person, the place of first meeting of P.W 4/complainant with the appellant having not being disclosed, entry register of the BSF campus having not supported the prosecution case, in so far as that being devoid of signature of the witnesses who allegedly entered the campus on the date of incident. The defence has also put forth the ground that the alleged telephone call made by the appellant to the complainant/P.W 4 on October 29, 2001 is also not proved in this case. It has also submitted that P.W 1 and 2 have not deposed about 'code sign' demonstrated by the complainant/P.W 4 at the time of operation.
16. The discrepancies as above may not impair the prosecution case to any great extent, in view of the fact that the evidence of all the witnesses are mostly and sufficiently consistent and coherent. There is no lack of coherence in the witness's substantive evidence to pose any serious question as to the reliability of the same. Having found the witnesses to be independent witnesses to depose freely and fairly in this case, such consistent and sufficient evidence cannot be negated only on the ground of certain affordable and minor discrepancies.

17. The substantive evidence of the witnesses have been duly corroborated with the documentary evidences to support the plea of the prosecution regarding conduct of a trapping operation, arrest, recovery and seizure in connection with the same. All these evidence unerringly point out to the guilt of the accused person and the same should not be shrouded with any doubt.
18. Under such circumstances appellant's plea regarding the impugned judgment of conviction and sentence of the appellant being not maintainable, does not inspire much confidence in the mind of this Court. So far as proof of the prosecution's case beyond any reasonable doubt, proof of appellant's guilt and his conviction – are concerned, the impugned judgment is found to be just fair and proper.
19. Here comes the question of propriety of the sentencing portion of the impugned judgment. The relevant provision of law may be extracted as hereinbelow at the outset:-
- “12. Punishment for abetment of offences defined in section 7 or 11.—Whoever abets any offence punishable under section 7 or section 11 whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.”***
20. The trial Court has passed sentence directing the appellant to suffer rigorous imprisonment for a period of two years along with fine. As stated earlier, in connection with this case the appellant has already served a

period of six months of incarceration as an under trial prisoner. Thereafter he has been enlarged on bail by the trial Court.

21. Ms. Gomes has further stressed on the point that since after being released on bail the appellant has conducted himself well and has abided by law and the orders of Court. She submits about elapse of considerable period of time from the date of inception of this proceeding till today, during which period according to Ms. Gomes, her client has suffered severe mental agony and learnt his lessons. So far as the sentence part of the impugned judgment is concerned, Ld. Advocate has urged for necessary modification thereto in consideration of facts and circumstances as above.
22. No doubt in this case the trial went for over a considerable period of time. It is also not challenged that the appellant, after being released on bail has conducted himself well. Another factor mitigating to the guilt of the appellant as proved in this trial would be regarding his current age. He is now a fairly aged person. Also it is found that for the rest of his life he has a fair possibility of self-correction, to be a responsible citizen of the country. For the reasons as afore stated, this Court is of the considered view that the sentence granted by the trial Court vide the impugned judgment may be interfered with by modifying the same in the manner that the appellant be directed to suffer rigorous imprisonment for the offence proved against him, for the period as already undergone by him.

23. Under such circumstances it is found justifiable that the sentence awarded by the trial Court may be modified in this appeal to be that the appellant would suffer sentence of imprisonment for a period already undergone by him, in this case. However, the other directions of the trial Court in the said judgment, shall remain as it is.
24. Thus, the appellant succeeds in part. The finding of the trial Court as regards guilt of the appellant and his conviction is upheld. The appellant is directed to suffer a sentence of imprisonment for the period as already undergone and served out by him in correctional home, as an under trial prisoner. The appellant shall pay fine in terms of the impugned judgment.
25. CRA 467 of 2010 is disposed of along with all pending application, if any. Interim order, if any, is vacated.
26. Urgent certified copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

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(Rai Chattopadhyay,J.)