

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

(I)

CRM-M-47288-2019 (O&M)

State of Haryana

.....Petitioner

Versus

Mahender Singh

.....Respondent

(II)

CRR-881-2021 (O&M)

State of Haryana

.....Petitioner

Versus

Mahender Singh

.....Respondent

Date of Decision: 19.01.2023

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present: Mr. Gurmeet Singh, AAG, Haryana.

Mr. Rakesh Nehra, Senior Advocate, with
M/s Ankit Yadav, Chirag Kundu, Anil K. Sokal & Abhaysher Singh,
Advocates, for the respondent.

GURVINDER SINGH GILL, J.

1. This order shall dispose off the aforesaid two petitions i.e. CRM-M-47288-2019 and CRR-881-2021 filed on behalf of the State of Haryana, wherein the following two orders passed by learned Judge, Special Court, Jhajjar, during the course of proceedings of trial arising out of FIR No.30 dated 04.08.2016, registered at Police Station: State Vigilance Bureau, Rohtak, under Sections 7, 13 & 13(1) of the Prevention of Corruption Act 1988, have been challenged:

- (i) Order dated 22.04.2019 (impugned in CRR-881-2019), whereby an application filed by the State seeking a direction to be issued to the accused to furnish voice sample has been declined; and
 - (ii) Order dated 24.07.2019 (impugned in CRM-M-47288-2019), whereby an application under Section 311 Cr.P.C. filed on behalf of the State seeking recalling and re-examination of PW-8 ASI Suresh Kumar alongwith Register No.19 indicating deposit of mobile phones has been declined.
2. Both the aforesaid matters are being taken up together, as both relate to the same issue i.e. as to whether prosecution should be permitted to lead evidence pertaining to audio recording of telephonic conversation between the accused and PW-10 Jai Prakash Kadian.
3. The FIR in question was lodged at the instance of Krishan Kumar, who was working as a Manager in M/s Dudhi Gypsum Industries, owned by Sh. Jai Prakash Kadian. The allegations, in nutshell, are that the accused Mahender was posted as JE in the office of DTP, Jhajjar. The complainant Krishan Kumar had met the accused several times in connection with issuance of 'No Objection Certificate', with respect to the land owned by the company i.e. M/s Dudhi Gypsum Industries, for installation of an industry. However, the accused (respondent herein) had demanded bribe from the complainant's employer Jai Prakash Kadian for the purpose of issuing NOC. It is alleged that conversation made between accused and Jai Prakash Kadian regarding the demand of bribe had also been recorded. A trap was accordingly laid by the police and the accused Mahender, JE was caught red-handed while accepting a bribe of Rs.4 lakhs on 04.08.2016.

4. The matter was investigated by the police and upon conclusion of investigation, challan was presented against said Mahender, JE. After framing of charges, the prosecution proceeded to examine prosecution witnesses and during the course of which the prosecution examined PW-8 ASI Suresh Kumar, who had been working as Malkhana Incharge in Police Station SVB, Rohtak, at the time of occurrence. The examination-in-chief of ASI Suresh Kumar was recorded by way of tendering his affidavit dated 11.12.2017 (Annexure P-2 in CRM-M-47288-2019), wherein he deposed to the following effect:

“2. That the case property of above mentioned case (1) One number parcel paper envelope containing currency note; (2) one number parcel quarter Hand Wash, accused; (3) One number-parcel quarter Hand Wash, complainant; sealed SVB(H) with Sample Seal dated 04.08.2016 was deposited with me at Malkhana through Constable Rajpal, SVB, RTK.”

5. The aforesaid witness was duly cross-examined. Subsequently, the prosecution moved an application seeking issuance of direction to furnish voice sample of the accused, which came to be dismissed by the Judge, Special Court, Jhajjar vide order dated 22.04.2019, which has been impugned in CRR-881-2021. Thereafter, the prosecution moved another application dated 07.05.2019 (Annexure P-5 in CRM-M-47288-2019) under Section 311 Cr.P.C. seeking recalling and re-examination of PW-8 ASI Suresh Kumar alongwith Register No.19, which was also dismissed by the Judge, Special Court, Jhajjar vide order dated 24.07.2019 (Annexure P-7), which has been impugned in CRM-M-47288-2019.
6. Learned State counsel while challenging both the orders dated 22.07.2019 and 24.07.2019 has submitted that the trial Court fell in error in dismissing

both the applications filed on behalf of State inasmuch as the audio recording, which is available with the police, would have furnished concrete evidence as regards the demand raised by the accused and since the mobile phones of PW-10 Jai Prakash Kadian and also of accused Mahender Singh had been duly taken into possession, the prosecution ought to have been granted permission for leading the evidence in respect of the same and to get the conversation examined from the FSL.

7. Opposing the petitions, learned Senior counsel representing the accused/respondent submitted that no ground is made out for permitting the prosecution either to re-examine PW-8 ASI Suresh Kumar or to direct the accused to furnish voice sample at fag end of the trial particularly when the mobile phones were always in possession of the police and no effort whatsoever was taken to get the audio recording examined and nor any explanation is forthcoming as to why the same were not examined at appropriate stage of investigation. Learned Senior counsel has further submitted that the applications have been filed simply in order to fill up the lacuna in the case of the prosecution inasmuch as complainant Krishan Kumar as well as Jai Prakash Kadian have not supported the case of the prosecution, when they were examined during the proceedings of trial and that PW-10 Jai Prakash Kadian specifically denied during his cross-examination as regards having any conversation with the accused Mahender from his mobile phone. It has thus been submitted that the prosecution cannot be permitted to lead additional evidence as of right and that the impugned orders do not suffer from any infirmity.

8. This Court has considered rival submissions and has perused the impugned orders and also the documents annexed with the petitions. This Court is however unable to agree with the contentions raised on behalf of the petitioner/State for the following reasons:

- (i) Though the prosecution intends to examine PW-8 for the reason that he did not state anything as regards deposit of phone when he stepped into the witness box on 11.12.2017 (Annexure P-2 & P-3 in CRM-M 47288-2019), but as a matter of fact he had not even uttered a word as regards deposit of any mobile phone when his statement was recorded in terms of Section 161 Cr.P.C. as is evident upon perusal of said statement dated 16.8.2016 (Annexure R-1 in CRM-M 47288-2019). Permitting prosecution to lead such evidence would amount to permitting improvements to be made in case of prosecution.
- (ii) The prosecution had taken a conscious decision not to go in for voice comparison at initial stage as is evident upon perusal of letter written by investigating officer, while removing objections raised by superior officers. The relevant extract from said letter dated 08.12.2016 (Annexure R-2 in CRM-M 47288-2019) reads as under:

“Point no.6: A sum of Rs.4 lacs which was demanded from the complainant has already been recovered from Mahender Singh F.I. Therefore it will not be justified to take voice sample of the accused and get it matched because if, due to a technical reason, the voice does not match, then it will directly give benefit to the accused and can affect the prosecution case. The recovery of bribe money is sufficient to get the accused convicted.”

Thus, it is not a case where some evidence has inadvertently not been brought forth but is a case where, after having mulled the matter, the prosecution chose not to go in for voice sampling and matching. As such, the prosecution being fully aware of the said evidence and having taken a conscious decision not to produce the

same, cannot be allowed to recall witnesses or go in for voice sampling at this stage to the prejudice of accused.

- (iii) Permitting Voice sampling and matching at this belated stage would virtually amount to conducting 'further investigation', which cannot be allowed as of right when the said facts were very much in knowledge of prosecution right from day one.
- (iv) It is the specific case of the prosecution that there had been a telephonic conversation between accused (from his mobile phone 9416438174) and PW-10 Jai Prakash Kadian (from his mobile phone 9311315461) and that there is recording of the accused making a demand. However, when PW-10 Jai Prakash Kadian stepped into witness box, he denied having made any conversation with accused from his phone. On the other hand, the complainant i.e. PW-3 Krishan Kumar admitted having conversed with accused from his mobile phone No.9311315461 and that his phone had been taken into possession by the police. However, as per the entry no.539 in Register No.19, apart from the phone of accused, it is only one other phone (brand Samsung) of Jai Prakash which has been taken into possession. There is no mention of any phone of the complainant Krishan Kumar. Said facts would shatter the piece of evidence now sought to be led as such there is no room to permit prosecution to collect and lead evidence at this stage.
- (v) The prosecution seeks to re-examine PW-8 ASI Suresh Kumar as regards entries in Malkhana Register No.19 (Annexure P-4 in CRM-M 47288-2019) pertaining to deposit of mobile phones of accused and of PW-10 Jai Prakash Kadian, but a perusal of relevant extracts from Register No.19 (Annexure P-4) shows that the relevant entries are not free from doubt as has been noticed by Sessions Judge and also by Inspector General, State Vigilance Bureau (Haryana). A perusal of entry recorded at serial no.539 in vernacular copy of Malkhana Register (Annexure P-4) would show that there is some over-writing and upon noticing the same, when said register was produced before Sessions Judge on

09.07.2019, the learned Sessions Judge encircled the same and affixed his signatures. A reference to said fact is there in the impugned order as well. Still further, one finds that the I.G (S.V.P) has checked and affixed his stamp and signatures on 29.04.2019 on all entries recorded from serial no.523 onwards upto 530 except on entry at serial no.539 in the said Register No.19. Said conspicuous omission shows that even I.G. also noticed something wrong in the said entry. Placing reliance upon such an entry would certainly be unsafe.

9. The prosecution having failed to show as to why the evidence now sought to be led, which was very much available and was in the knowledge of the investigating agency, was not led at appropriate stage, cannot be allowed to fill in lacuna at this belated stage particularly when even statement of PW-8 ASI Suresh Kumar, recorded under Section 161 Cr.P.C, is silent regarding deposit of phones and even the relevant entry no.539 in Register No.19 (Annexure P-4 in CRM-M 47288-2019) pertaining to deposit of phones is not free from doubt. This Court does not find any infirmity in either of the orders and the same are hereby upheld. Both the petitions, as such, are dismissed.
10. A photocopy of this order be placed on the connected file.

19.01.2023

Vimal

**(GURVINDER SINGH GILL)
JUDGE**

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No