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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: 28.09.2022***
Pronounced on: 08.12.2022

\+ **CRL.A. 629/2009**

SUDESH KAUSHIK ..... Petitioner

Through: Ms. Rajdipa Behura, Mr. Philomon Kani, Mr. Ashray Behura, Ms. Hansika Sahu, Ms. Neha Lingwal and Mr. Swayantosh Rath, Advocates.

versus

CBI ..... Respondent

Through: Mr. Rajesh Kumar, SPP for CBI

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The present appeal under Section 374 of the Code of Criminal Procedure, 1973 ("Cr.P.C.") has been filed by the appellant for setting aside the impugned judgment dated 28.07.2009, and the order on point of sentence dated 30.07.2009 passed by learned Special Judge, CBI, Patiala House Courts, New Delhi in CC No. 26/04, whereby the appellant was convicted for offences punishable under Sections 7 and 13(2) read with Section 13(1)(d) of Prevention of Corruption Act, 1988, (*hereinafter as "P.C. Act, 1988"*). The relevant portion of order of sentence is reproduced as under:

> *"7. Considering the totality of the facts and circumstances of the case as well as the submissions made by the learned Defence Counsel, particularly the fact that convict is a woman, I am inclined to take extremely lenient view and sentence her to Rigorous Imprisonment for one year alongwith a fine of Rs. 1,000/- in default of which to Rigorous Imprisonment for two months under Section 7 of the Act.*
>
> *8. I also sentence her to Rigorous Imprisonment for one year alongwith a fine of Rs. 1,000/- in default of which to Rigorous Imprisonment for two months under Section 13 (2) r/w Section 13 (1)(d) of the Act.*
>
> *9. Both the sentences shall run concurrently."*

2. By virtue of order dated 31.08.2009, the present appeal was admitted and the sentence of the appellant was suspended.

FACTUAL MATRIX

3. The case of the prosecution has been recorded by the learned Trial Court. The details of the same are that one Sh. Gagan Hoon, the complainant in present case, was called in P.S. Vasant Vihar by appellant on 09.04.2004 in reference to a complaint given by Ms. Elizabeth against him and his mother. The concerned SHO asked the complainant to join the inquiry and cooperate with the appellant. The appellant, after having a close meeting with the SHO for a few minutes, then informed the complainant that he should pay Rs. 12,000/- to her if he wanted to finish the case and the same would be paid to the SHO. Since the complainant was not having any money, so on his request, the appellant agreed to accept the bribe amount in installments, first being of Rs. 2,000/- in the coming week. However, since the complainant was not willing to pay any bribe to the appellant, he approached the office of Superintendent of Police, ACB/CBI CGO complex, New Delhi on 15.04.2004 and on the basis of his complaint, a case was registered against the appellant and entrusted to Mr. A.K. Pandey, Inspector for laying a trap on the same day.

4. Sh. A.K. Pandey, Inspector procured the presence of two independent witnesses namely Sh. Suraj Bhan and Sh. Chandra Deo Sharma, and pre-trap formalities were conducted. The bribe amount of Rs. 2,000/- duly treated with phenolphthalein powder was kept in the left hand side shirt pocket of the complainant and he was directed to hand over this amount to appellant on her specific demand and not otherwise. Sh. Suraj Bhan was asked to act as a shadow witness and remain close to the complainant to overhear the conversation which

may take place between appellant and the complainant and watch the transaction, if possible. He was also directed to give a signal by scratching his head with both of his hands after the transaction of bribe was over to the other members of trap party.

5. A Digital Samsung recorder (SVR-240) was arranged by the Trap Laying Officer (TLO). Complainant contacted the appellant on his mobile phone and this conversation confirmed the demand of bribe by the petitioner. This conversation from digital recorder was transferred to a brand new blank audio cassette make Sony ZX 60 by SI Prem Nath and was sealed in the presence of independent witnesses. Another copy of the said audio cassette was prepared and kept for the purpose of investigation. The Samsung digital recorder was handed over to the complainant for recording the conversation between him and appellant that may ensue at the spot. The other witness Chandra Deo Sharma was directed to remain with the trap party.

6. After completion of pre-trap proceedings, the trap team left the CBI and reached the IIT Gate where complainant contacted the appellant who instructed the him to reach Anupam Restaurant Munirka. The appellant then instructed the complainant to meet her at bus stand near Vasant Vihar Bus depot. All the members of the trap team including the complainant and the independent witnesses reached at the designated place, i.e., Vasant Vihar Bus Depot. ten minutes into it, the appellant reached there and met the complainant, and thereafter both the complainant and appellant reached Coffee Home, R. K. Puram, Sector-13, in complainant's Maruti Car. Appellant got the signature of complainant appended on the letter/ complaint of Ms. Elizabeth at

Coffee Home R. K. Puram in back date, that is, 09.04.04, and kept the said letter in her purse/handbag. Thereafter, appellant demanded the bribe by way of hand gesture and as per pre-appointed signal of shadow witness Sh. Suraj Bhan, the appellant was caught red handed while accepting bribe of Rs. 2,000/- from the complainant. The independent witness Sh. Chandra Deo Sharma recovered the bribe amount of Rs. 2,000/- from the possession of appellant and tallied the currency notes numbers with the numbers mentioned in the handing over memo. Both the hands of the accused were dipped in the separate colourless solutions of sodium carbonate which turned pink in colour immediately and in her hand bag colourless solution of sodium carbonate was poured which was collected in a separate clean glass bottle which also turned visibly pink. Samsung digital recorder which was given to the complainant was also taken back in presence of the witnesses and was played in their presence. The conversation recorded in the said cassette confirmed the demand of the bribe by appellant from the complainant with regard to the complaint pending with her. The letter/complaint of Ms. Elizabeth which was got signed by appellant from the complainant was also taken into police possession and the perusal of the same revealed that the said letter was written by Ms. Elizabeth addressed to SHO.

7. Further, hand washes and hand bag pocket wash were sent to CFSL for chemical analysis. The CFSL had confirmed the presence of phenolphthalein powder and sodium carbonate in RHW, LHW and HBPW. The cassette in which recorded conversation was transferred was sent to CFSL for voice analysis spectragraph of appellant with her

specimen voice which confirmed that the voice in the said cassette was of appellant. The mobile number used by the appellant was in the name of one Sh. Santosh Kumar Dubey and the said mobile phone was invariably used by the appellant. The statement of Sh. Santosh Kumar Dubey was also recorded by the Investigating Officer.

8. Prosecution sanction against the appellant was accorded by the competent authority.

9. The appellant appeared before the Trial Court and copies under Section 207 Cr.P.C were supplied to appellant, to her satisfaction. Thereafter, the appellant was charged for offences punishable under Sections 7 & 13(2) read with Section 13(1)(d) of PC Act, 1988. Appellant pleaded not guilty to the aforementioned charges and claimed trial.

10. Thereafter, following prosecution witnesses were examined:

i. PW-1 Sh. Dipender Pathak, DCP, Security, Delhi Police (sanctioning authority).

ii. PW-2 Ms. Elizabeth, who had lodged complaint against PW4.

iii. PW-3 Dr. Rajinder Singh, Principal Scientific Officer, CFSL, New Delhi.

iv. PW-4 Sh. Gagan Hoon, complainant in the present case.

v. PW-5 Sh. Chander Deo Sharma, LDC of Sales Tax Department (independent witness).

vi. PW-6 Sh. C.L. Bansal, Senior Scientific Officer, CFSL, New Delhi.

vii. PW-7 Sh. Stanley, father of PW-2 Ms. Elizabeth.

viii. PW-8 Sh. Gulshan Arora, Nodal Officer, Vodafone.

ix. PW-9 Inspector A.K. Pandey, Trap Laying Officer (TLO)

x. PW-10 Inspector Mridula Shukla, Investigating Officer.

11. Defence evidence was led by the appellant. A written statement, in addition to her statement under Section 313 Cr.P.C, was filed wherein she had denied the entire allegations against her and claimed that she had been falsely implicated in the present case by complainant Mr. Gagan Hoon in connivance with CBI officials. In her defence, the appellant had examined the following witnesses:

i. DW-1 Assistant Sub Inspector Ram Nath, Duty Officer.

ii. DW-2 Assistant Sub Inspector Bhoop Singh.

iii. DW-3 Sh. Surender, Dispatch cum Crime Clerk, CBI.

12. By way of impugned judgment dated 28.07.2009, the learned Trial Court after considering the evidence and material available on record held the appellant guilty of offences punishable under Sections 7 and 13(2) read with Section 13(1)(d) of P.C. Act, 1988. The concluding part of the impugned judgment dated 28.07.2009 reads as under:

> *"59. The prosecution case is that Sudesh Kaushik had demanded Rs. 2,000/- from the complainant Gagan Hoon on 09.04.04 at police station Vasant Vihar in reference to complaint of Ms Elizabeth against him and to settle the said complaint, she agreed to accept Rs. 2,000/- as first installment, which was accepted/ obtained by Sudesh Kaushik on 15.04.04 at Coffee House, where she was caught red handed. The prosecution has been successful in proving its case on the basis of evidence placed on record, that she had, in fact, demanded Rs. 12,000/- on 09.04.04 from Gagan Hoon in order to settle the complaint of Ms Elizabeth against complainant Gagan Hoon and she agreed to accept Rs. 2,000/- as first installment on 15.04.04 and was caught red-handed while accepting it. Prosecution has been successful in proving beyond reasonable*

doubt that while working as a public servant, i.e., Assistant Sub-Inspector in Delhi Police, she obtained illegal gratification other than legal remuneration as a motive or reward to settle a complaint against Gagan Hoon and while doing so she, by corrupt or illegal means, or by otherwise abusing her position as such public servant, demanded Rs. 12,000/- from complainant Gagan Hoon on 09.04.04 and accepted first installment of Rs. 2,000 on 15.04.04. The oral evidence, transcription as well as phenolphthalein powder test, unmistakably point to the guilt of the accused.

60. I, therefore, hold Sudesh Kaushik guilty for the offences punishable under Section 7 and 13(2) rw Section 13 (1)(d) of the Act and convict her accordingly."

SUBMISSIONS ON BEHALF OF APPELLANT

13. Learned counsel for appellant submits that in the present case there was no independent witness and that PW-5 and shadow witness had gone to witness the trap proceedings on the instructions of their senior officer and not voluntarily. It is further submitted that even though all the tests after the trap were conducted in the room of the Manager of Coffee House, neither the Manager nor any member present at the Coffee House was made witness in the present case.

14. Learned counsel argued that the sanction order was given without application of mind and is bad in law as the entire material evidence was not placed before the Sanctioning Authority, as the date on which the sanction letter was forwarded by the CBI, the investigations were still underway and that the CFSL report and the transcript were also not prepared. The counsel further argued that the Sanctioning Authority had merely copied the draft sanction order that was received along with forwarding letter from Superintendent of Police, CBI. In this regard,

reliance has been placed on the judgments in cases titled as ***Mohd. Iqbal Ahmed v. State of Andhra Pradesh (1979) 4 SCC 172, State of T.N. v. M.M. Rajendran (1998) 9 SCC 268*** and ***Central Bureau of Investigation v. Ashok Kumar Aggarwal (2014) 14 SCC 295***.

15. Learned counsel also contends that the original recording device that was used to record the trap proceedings was not produced before the learned Trial Court. Further, the copies of the Call Detail Record (CDR) pertaining to the telephone number allegedly seized from the appellant was neither certified/authenticated by the authorized personnel of cellular service provider nor proved as per the requirement of section 65B of Indian Evidence Act, 1872.

16. Learned counsel for appellant further submits that the shadow witness in the present case was not examined before the Court. He has also pointed out material contradictions among the statements of complainant (PW-4), trap officer (PW-9) and the shadow witness (Section 161 Cr.P.C statement).

17. Learned counsel submits that the prosecution has failed to establish demand of bribe by the petitioner, which is a sine qua non for prosecution under Section 7 and 13(d) of P.C. Act, 1988. In this regard, reliance has been placed on the judgments in cases titled as ***P. Satyaanarayana Murthy v. District Inspector of Police, State of Andhra Pradesh and another (2015) 10 SCC 152*** and ***K. Shanthamma v. State of Telangana (2022) 4 SCC 574***.

SUBMISSIONS ON BEHALF OF RESPONDENT

18. Learned Special Public Prosecutor for the CBI submits that there

is no infirmity in the judgment passed by the learned Trial Court as the learned Trial Court has adequately and sufficiently dealt with every contention raised before this Court.

19. It is submitted that any discrepancies in the statement of witnesses which does not shake the edifice of the case of prosecution cannot form the basis of acquittal of the accused. He states that discrepancies pointed out by the learned counsel for the appellant are minor discrepancies which are bound to occur due to lapse of time.

20. The learned counsel also states that the witnesses were independent since nothing could be brought on record despite extensive cross-examination that they had anything against the accused to have deposed against her. It is also argued that the motive for demanding and accepting the bribe was already writ large as mentioned in the judgment impugned before this Court that the appellant was dealing with a complaint lodged against the complainant and she had promised to get him out of the same.

21. It is also argued that since recovery of the bribe amount has been affected from the purse of the accused, the burden to prove otherwise shifts to the accused as per Section 20 of the P.C. Act, 1988.

22. Learned SPP for CBI further relies on Section 19(3)(a) of P.C. Act, 1988, which provides:

> "*no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby*".

In this case, the appellant could not show that there was failure of justice due to non-production of transcript or anything before the sanctioning authority. There was nothing in favour of appellant which could show that she was innocent.

ANALYSIS AND FINDINGS

23. The relevant provisions of Prevention of Corruption Act, 1988 (as they stood before the Amendment Act, 2018) are reproduced herein under:

Section 7 of P.C. Act, 1988 provides:

"7. Public servant taking gratification other than legal remuneration in respect of an official act.—Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in clause (c) of section 2, or with any public servant, whether named or otherwise, shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine."

Section 13 of P.C. Act, 1988 provides:

13. Criminal misconduct by a public servant.—
(1) A public servant is said to commit the offence of

criminal misconduct……..
…(d) if he,—
(i) by corrupt or illegal means, obtains for himself or for any other person any valuable thing or pecuniary advantage; or
(ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or
(iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest……
(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine.

Section 20 of P.C. Act, 1988 provides:

20. Presumption where public servant accepts gratification other than legal remuneration.—
(1) Where, in any trial of an offence punishable under section 7 or section 11 or clause (a) or clause (b) of sub-section (1) of section 13 it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain for himself, or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed, unless the contrary is proved, that he accepted or obtained or agreed to accept or attempted to obtain that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7 or, as the case may be, without consideration or for a consideration which he knows to be inadequate.
(2) Where in any trial of an offence punishable under section 12 or under clause (b) of section 14, it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or

> *offered to be given or attempted to be given by an accused person, it shall be presumed, unless the contrary is proved, that he gave or offered to give or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 7, or as the case may be, without consideration or for a consideration which he knows to be inadequate.*
> *(3) Notwithstanding anything contained in sub-sections (1) and (2), the court may decline to draw the presumption referred to in either of the said sub-sections, if the gratification or thing aforesaid is, in its opinion, so trivial that no interference of corruption may fairly be drawn.*

(i) Irregularity in Sanction

24. The first issue before this Court is whether the sanction for prosecution accorded against the appellant is valid in law or not. In the present case, after the trap and arrest of appellant, the request letter seeking sanction for prosecution of the appellant was forwarded by C.B.I. to DCP Dependra Pathak (PW-1) on 14.10.2004. PW-1 in his testimony deposed that the request letter of the C.B.I. for grant of sanction consisted of FIR, complaint, various statements recorded under Section 161 Cr.P.C., transcript of the tape-recorded version, CFSL report of voice as well as washes and other related documents. Further, PW-1 admitted in the cross-examination that he had also received a draft sanction order along with the request letter on 14.10.2004. Pursuant thereof, sanction was granted and the same was supplied to C.B.I. on 16.11.2004. A perusal of the copy of sanction order, in light of the testimony of DW-2 ASI Bhoop Singh, shows that

the office copy of the said sanction order was prepared on 20.10.2004.

25. In this regard, it is argued by the learned counsel for appellant that the CFSL report of voice comparison which was received by sanctioning authority on 14.10.2004, was in-fact prepared on 15.10.2004 by Dr. Rajinder Singh (PW-3). The same was collected by IO Mridula Shukla (PW-10) on 02.11.2004, much after the sanction order came into existence (i.e., 20.10.2004). Further, even the number of the CFSL Report (CFSL-2004/P-0338), which was prepared on 15.10.2004 and was collected on 02.11.2004, was mentioned on the draft sanction order which was forwarded to sanctioning authority on 14.10.2004, which is earlier than the date of the report.

26. It is further argued that the transcriptions of conversation marked as Ex. PW 4/E and Ex. PW 4/F were prepared on 16.11.2014 by IO Mridula Shukla (PW-10) as deposed by her in her cross-examination, and were thereafter shown to Complainant Gagan Hoon (PW-4) for verification of its contents. However as deposed by PW-1, the same were forwarded to him by C.B.I. on 14.10.2004 along with the request letter, more than one month prior to its coming into existence.

27. Learned counsel for appellant has relied upon the judgment of ***Mohd. Iqbal Ahmed v. State of Andhra Pradesh (supra)***, wherein the Hon'ble Supreme Court has held as under:

> *3…. It is incumbent on the prosecution to prove that a valid sanction has been granted by the Sanctioning Authority after it was satisfied that a case for sanction has been made out constituting the offence. This should be done in two ways: either (1) by producing the original sanction which itself contains the facts constituting the offence and the grounds of satisfaction, or (2) by adducing evidence aliunde to show that the facts were*

placed before the Sanctioning Authority and the satisfaction arrived at by it. Any case instituted without a proper sanction must fail because this being a manifest difficulty in the prosecution, the entire proceedings are rendered void ab initio."

28. Reliance is also placed upon the judgment of Hon'ble Supreme Court in the case of ***CBI v. Ashok Kumar Aggarwal (supra)*** has held as under:

"16. In view of the above, the legal propositions can be summarised as under:
16.1 The prosecution must send the entire relevant record to the sanctioning authority including the FIR, disclosure statements, statements of witnesses, recovery memos, draft charge sheet and all other relevant material. The record so sent should also contain the material/document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction.
16.2 The authority itself has to do complete and conscious scrutiny of the whole record so produced by the prosecution independently applying its mind and taking into consideration all the relevant facts before grant of sanction while discharging its duty to give or withhold the sanction.
16.3 The power to grant sanction is to be exercised strictly keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.
16.4 The order of sanction should make it evident that the authority had been aware of all relevant facts/materials and had applied its mind to all the relevant material.
16.5 In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law."

29. Learned SPP for CBI, in response, contended that the learned Trial Court in the impugned judgment had rightly presumed that the

sanctioning authority must have come to know, through other sources, regarding the existence and contents of the transcript of conversations and CFSL report on voice comparison on the day when the sanction was accorded. The observation of the learned Trial Court in this respect is as under:

> *"38. ...In view of this, it is quite probable that report was ready on 14.10.04 and the opinion and its dispatch number was obtained by the Investigating Officer telephonically. As such, it cannot be said that the report of voice expert was not in existence on 14.10.04. The same might have been dispatched on 15.10.04, but its existence on 14.10.04 cannot be disputed..."*

30. This Court is unable to agree to and accept the arguments advanced by the learned SPP for CBI and observations made by learned Trial Court. These arguments and observations are meritless since in a criminal trial, nothing can be left on presumptions if the documents placed on record speak and reveal otherwise. In the facts at hand, there is nothing on record in the form of evidence, documentary or oral, to suggest that the sanctioning authority (PW-1) was informed regarding existence of CFSL report of voice comparison or the transcripts when the sanction was accorded. The transcripts had, in fact, not been prepared on the date when sanction was accorded.

31. However, before any further observation, it will be pertinent to refer to Section 19(3)(a) of the P.C. Act, 1988, which is as under:

> *"Notwithstanding anything contained in the Code of Criminal Procedure, 1973 —*
> *(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1),*

unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;"

Further, Section 19(4) of the Act provides as under:

"In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings."

32. In ***Prakash Singh Badal and Anr. v. State of Punjab and Ors. (2007) 1 SCC 1***, the Apex Court, while interpreting Sections 19(3) and 19(4) of P.C. Act, 1988, observed as under:

"29. ...The effect of sub-sections (3) and (4) of Section 19 of the Act are of considerable significance. In Sub-Section (3) the stress is on "failure of justice" and that too "in the opinion of the Court". In sub-section (4), the stress is on raising the plea at the appropriate time. Significantly, the "failure of justice" is relatable to error, omission or irregularity in the sanction. Therefore, mere error, omission or irregularity in sanction is considered fatal unless it has resulted in failure of justice or has been occasioned thereby. Section 19(1) is a matter of procedure and does not go to root of jurisdiction..."

However, the Apex Court in ***State of Karnataka v. Ameerjan (2007) 11 SCC 273*** has observed as under:

"17. Prakash Singh Badal, therefore is not an authority for the proposition that even when an order of sanction is held to be wholly invalid inter alia on the premise that the order is a nullity having been suffering from the vice of total non-application of mind..."

33. Therefore, despite such an irregularity in the sanction, this Court shall not make this as sole criteria for acquittal. The evidence on record

and the impugned judgment passed in light of the statement of the witnesses of the case will have to be anaylsed.

(ii) Witnesses: Non-Examination and Discrepancies

34. It is the case of the appellant that there are material contradictions among the testimonies of witnesses which create doubts about the story of the prosecution.

35. It is argued by the counsel for appellant that there are material contradictions in the testimonies/statements of the complainant/PW-4, trap officer/PW-9 and shadow witness, with regard to presence of shadow witness in complainant's car, and the post-trap proceedings.

36. It was also pointed out to the Court that the complainant/PW-4 had stated in his testimony that he was called by appellant on 08.04.2004 asking him to take back his articles which were deposited by PW-2 Elizabeth. However, PW-2 had approached the appellant only on 09.04.2004 to give back the articles, and thus, the said statement of complainant is totally false.

37. A perusal of record shows that the Trap Laying Officer (PW-9) had deposed that the shadow witness had gone to the coffee house along with the complainant and appellant in complainant's Maruti Car. On the contrary, complainant (PW-4) in his testimony deposed that only he along with the appellant went to the coffee house in his Maruti Car and rest of the team had followed them. Same was stated by the shadow witness in his statement under Section 161 Cr.P.C. but he expired before he could be examined in the present case.

38. A shadow witness, in any given case, must be in a position to

depose not only about the passing of money but also about the conversation which takes place between a complainant and an accused so as to find out the basis for the exchange of money/bribe. As expressed by Hon'ble Supreme Court in ***Meena v. State of Maharashtra (2000) 5 SCC 21***, law always favours the presence and importance of a shadow witness in the trap party, who is supposed to be there not only to see but to overhear what happens and how it happens also.

39. Shadow witness in the present case, was supposed to be with the complainant when he was travelling in the car with the appellant. But the perusal of testimonies on record show that the shadow witness was not travelling with the complainant in the car. Thus, shadow witness was not privy to the entire conversation that took place between the appellant and the complainant while travelling in the car.

40. Further, the complainant/PW-4 stated that after the appellant had accepted bribe and was caught hold by the CBI team, she was taken to the office of the manager of coffee house for post-trap proceedings, including wash tests, recovery of bribe, transfer of audio, etc. The independent witness/PW-5 had also testified that the appellant was taken inside some office in the garden for further proceedings. On the contrary, the Trap Laying Officer (PW-9) stated in his cross-examination that the appellant was not taken inside any room in the coffee house and that she was searched in open hall by SI Sandeepni Garg.

41. It is pertinent to note that neither the manager of the Coffee House, in whose room the entire trap tests and proceedings were

conducted after the recovery was made from the appellant, nor any other member of public present at the coffee house has been examined as a witness in the present case. This contention was also raised before the learned Trial Court but the same was disregarded. The relevant portion of the impugned judgment in this respect is as under:

> *"53. ...learned Defence Counsel has not been able to point out the reasons as to how the non-examination of these witnesses has rendered the prosecution case unreliable. It is a settled proposition of law that every person present on the spot need not be examined as a witness, otherwise the process of examination would become endless and repetitive. As many number of witnesses are required to be examined as are necessary for proving the case as per the law. If, there was any witness who could have deposed contrary to the prosecution version, accused was at liberty to summon him in her defence..."*

42. This Court, however, is unable to agree with the aforesaid observation. This should have arisen suspicion in the mind of the learned Trial Court as the manager was one of the crucial witnesses to the entire proceedings of recovery as well as washes of hand and transfer of conversation to another device. Not examining the manager, in a situation where there exists contradictions among the testimonies available on record in respect of conduct of post-trap proceedings at the coffee house, raises further doubts and suspicion regarding the story of prosecution.

43. Admittedly, as per case of the prosecution, the demand was made by the appellant on behalf of the SHO of P.S. Vasant Vihar to let off the complainant. However, even the statement of SHO has not been recorded for reasons best known to the prosecution.

(iii) Demand of bribe

44. The offence under Section 7 of the P.C. Act 1988 relating to public servants taking bribe requires a demand of illegal gratification and the acceptance thereof. The proof of demand of bribe by a public servant and its acceptance by him is *sine qua non* for establishing the offence under Section 7 of the Act.

45. In the case of ***A. Subair v. State of Kerala (2009) 6 SCC 587***, it was held by the Hon'ble Supreme Court as under:

> *"15. ...In other words, in the absence of proof of demand or request from the public servant for a valuable thing or pecuniary advantage, the offence under Section 13(1)(d) cannot be held to be established...*
>
> ***
>
> *30. ...Mere recovery of currency notes (Rs. 20/- and Rs.5/-) denomination, in the facts of the present case, by itself cannot be held to be proper or sufficient proof of the demand and acceptance of bribe.*
>
> *31. When the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence. It is true that the judgments of the courts below are rendered concurrently but having considered the matter thoughtfully, we find that the High Court as well as the Special Judge committed manifest errors on account of unwarranted inferences. The evidence on record in this case is not sufficient to bring home the guilt of the appellant. The appellant is entitled to the benefit of doubt."*

46. The Hon'ble Apex Court in ***Rakesh Kapoor v. State of Himachal Pradesh 2012 13 SCC 552***, has held as under:

> *"20. Coming to the next argument that there was absolutely no demand for bribe and in the absence of such claim by the accused duly established by the prosecution, the conviction*

cannot be sustained. In support of the above claim, learned counsel for the appellant relied on the decision of this Court in Banarsi Dass vs. State of Haryana, (2010) 4 SCC 450. It was an appeal under Article 136 of the Constitution of India filed against the judgment and order of conviction dated 20.11.2002 passed by the learned single Judge of the High Court of Punjab and Haryana at Chandigarh. In that case, it was contended before this Court that there is no evidence to prove demand and voluntary acceptance of the alleged bribe so as to attract the offence under Section 5(2) of the Prevention of Corruption Act, 1947. The other contentions were also raised regarding merits with which we are not concerned. The accused was charged for the offence punishable under Section 5(2) of the 1947 Act as well as Section 161 (since repealed) of the IPC. In para 23, this Court held that:

> *"23.* ***To constitute an offence under Section 161 IPC, it is necessary for the prosecution to prove that there was demand of money and the same was voluntarily accepted by the accused".***

It was further held that

> *"23. ...Similarly in terms of Section 5(1)(d) of the Act,* ***the demand and acceptance of the money for doing a favour in discharge of his official duties is sine qua non to the conviction of the accused****".*

21. In para 25, this Court quoted the decision rendered in C.M. Girish Babu vs. CBI, (2009) 3 SCC 779 and held that:

> *"25. ...****Mere recovery of money from the accused by itself is not enough in the absence of substantive evidence of demand and acceptance****."*

In the sama para, a reference was also made to Suraj Mal vs. State (Delhi Admn.) (1979) 4 SCC 725 wherein this Court took the view that ***mere recovery of tainted money from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable.*** *This Court further held that mere recovery by itself*

cannot prove the charge of the prosecution against the accused in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe. After underlying the above principles, and noting that 2 prosecution witnesses turned hostile, while giving the benefit of doubt on technical ground to the accused, this Court, set aside the judgment of the High Court and acquitted the accused of both the charges i.e. under Section 161 IPC and under Section 5(2) of the 1947 Act..."

(Emphasis supplied)

47. In the case of ***P. Satyanarayana Murthy v. District Inspector of Police, State of Andhra Pradesh and anr. (2015) 10 SCC 152***, the Apex Court has summarised the well-settled law on the subject which reads thus:

"23. The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1)(d)(i) and (ii) of the Act and in absence thereof, unmistakably the charge therefor, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act. As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under Section 7 or 13 of the Act would not entail his conviction thereunder."

48. In the present case, there are certain important facts to be considered for the purposes of ascertaining as to whether a demand for bribe was made or could have been made by the appellant as per the case of prosecution.

49. As per the prosecution story, the appellant had demanded Rs. 12,000/- from the complainant on the pretext that the same was to be

paid to SHO, P.S. Vasant Vihar to let off the complainant. As observed in preceding paras, the statement of SHO was not recorded in the present case. In any case, the appellant was merely a duty officer and could not have helped the complainant/PW-4 in withdrawing the complaint filed against him by PW-2.

50. It is pertinent to note that the complainant/PW-4 was granted anticipatory bail by this Court in connection with FIR No. 57/2003 dated 27.02.2003 under sections 452/342/506/323/34 IPC and the complainant was directed to not visit the jurisdiction of P.S. Vasant Vihar, New Delhi. The same has been admitted by complainant in his cross examination. It was argued by the counsel for appellant that the complainant disobeyed the order of this Court and entered the jurisdiction of P.S. Vasant Vihar only with the sole intention of falsely implicating the appellant herein as he had grudges against the appellant on the account of SHO P.S. Vasant Vihar scolding the complainant before his mother.

51. When the relief had already been granted to the complainant by this Court, there was no occasion for the appellant to have done anything in connection with the present case and the complaint of PW-2 was of practically of no use for the complainant. Therefore, having agreed to pay any amount of getting that piece of paper will also make the Court to look with suspicion regarding the demand made for the purpose as suggested by the prosecution, more so when the articles belonging to the complainant, which were submitted by PW-2 vide complaint dated 09.04.2004 at P.S. Vasant Vihar, were already returned to him on 09.04.2004 at P.S. Vasant Vihar. Also, as per the record of

P.S. Vasant Vihar, there was no complaint pending against the complainant/PW-4. Thus, there appears to be no occasion for letting the complainant off in a case since no case was pending against him.

52. Even to invoke the presumption under Section 20 of P.C. Act, 1988, it is essential that the demand of bribe must have been established. In ***B. Jayaraj v. State of Andhra Pradesh (2014) 13 SCC 55***, the Apex Court has held as under:

> *"9...In so far as the presumption permissible to be drawn under Section 20 of the Act is concerned, such presumption can only be in respect of the offence under Section 7 and not the offences under Section 13(1)(d)(i)(ii) of the Act. In any event, it is only on proof of acceptance of illegal gratification that presumption can be drawn under Section 20 of the Act that such gratification was received for doing or forbearing to do any official act. Proof of acceptance of illegal gratification can follow only if there is proof of demand. As the same is lacking in the present case the primary facts on the basis of which the legal presumption under Section 20 can be drawn are wholly absent."*

53. In ***Mahavir Singh v. State 2014 SCC OnLine Del 290***, it was highlighted by this Court that:

> *"18. ...For the purposes of Sections 7, 13(2) read with 13(1) (d) of the PC Act require the trial Court to be satisfied that there was a demand of a bribe by the accused and it was accepted by the accused. The presumption under Section 20 of the PC Act presupposes the prosecution establishing beyond reasonable doubt that there was demand and acceptance of illegal gratification. In K.S. Panduranga v. State of Karnataka (2013) 3 SCC 721, the Supreme Court explained "It is well settled in law that demand and acceptance of the amount as illegal gratification is sine qua non for constitution of an offence under the Act and it is obligatory on the part of the prosecution to establish that there was an illegal offer of bribe and acceptance thereof"..."*

54. It is argued by the learned counsel for appellant that the document/complaint on which the signature of Gagan Hoon was taken at the coffee house was not in possession of the appellant. The appellant had signed the complaint on 09.04.2004 as she was duty officer on that day and after which the complaint was forwarded to SI Ram Nath, investigating officer. A perusal of record shows that no witness has been examined in the present case to prove the recovery of the document (i.e., complaint of Elizabeth/PW-2) which was allegedly got signed by the appellant at the place of alleged occurrence. Merely handing over of the copy of complaint of PW-2 to the complainant and taking his signatures on the same, the recovery of which has not been proved and the independent witnesses of recovery being completely silent on the same, arises suspicion about the case of the prosecution.

55. There is no explanation to say that burden of proof regarding non-recovery of this document also lay on the shoulders of the appellant under Section 20 of P.C. Act, 1988 and it will be misplaced say so since it was for the prosecution to prove recovery of this crucial piece of evidence on the basis of which the demand of Rs. 2,000/- was allegedly made.

(iv) Electronic Records

56. The present case also involves repeated transfers of data from one device to another. It was argued by the counsel for appellant that the original recording device, Samsung Recorder (VR 240), which was used to record the trap proceedings was not produced before the Trial Court, and that it is a settled rule that if the primary original evidence is

available and could be produced before the Court, the secondary evidence should not be relied upon. The copies of the Call Detail Record (CDR) pertaining to the telephone number allegedly seized from the appellant was neither certified/authenticated by the authorized personnel of cellular service provider nor proved as per the requirement of Section 65B of Indian Evidence Act, 1872.

57. A perusal of record shows that no certificate under Section 65B was produced by the prosecution in respect of any of the electronic evidence. It is also not explained at any point of time as to how the several audio recordings were transferred from one device to another. The original audio devices were also not produced before the Trial Court.

58. The law regarding admissibility of electronic evidence, as introduced in the Indian Evidence Act, 1872 by way of an amendment in the year 2000, was elaborated by the Hon'ble Supreme Court in ***Anvar P.V. v. P.K. Basheer, (2014) 10 SCC 473*** as under:

> *"16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.*
>
> *17. Only if the electronic record is duly produced in terms of*

Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.

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22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

23. The appellant admittedly has not produced any certificate in terms of Section 65B in respect of the CDs, Exhibits-P4, P8, P9, P10, P12, P13, P15, P20 and P22. Therefore, the same cannot be admitted in evidence. Thus, the whole case set up regarding the corrupt practice using songs, announcements and speeches fall to the ground..."

59. The decision of ***Anvar P.V. (supra)*** was affirmed, though with a few clarifications, by the Hon'ble Apex Court in ***Arjun Panditrao***

Khotkar v. Kailash Kushanrao Gorantyal & Ors. (2020) 7 SCC 1 holding that Section 65A and Section 65B of Indian Evidence Act fully govern the admissibility of electronic evidence under the Act, to the exclusion of the regular procedures provided in other parts of the Act. It was held that certificate under Section 65B(4) is a condition precedent to the admissibility of secondary evidence by way of electronic record, but the said certificate is unnecessary if the original document itself is produced and this can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the device concerned, on which the original information is first stored, is owned and/or operated by him.

60. However, it will also be relevant to note that the aforesaid judicial decisions, dealing comprehensively with the issue of admissibility of electronic records and requirement of certificate under Section 65B of Indian Evidence Act, were rendered much later than the decision in the present case. In the year 2009, the Court at most could have relied upon the decision of ***State (NCT of Delhi) v. Navjot Sandhu (2005) 11 SCC 600*** wherein the Hon'ble Apex, considering the the constraints of producing information contained electronic records stored in huge servers, held that secondary evidence under Sections 63 and 65 of the Evidence Act could be produced for proving the contents of an electronic record, and that a certificate under Section 65B(4) was held to not be mandatory for producing electronic evidence. This view was subsequently overruled by the Apex Court in ***Anvar P.V. (supra),*** which has been further upheld in ***Arjun Panditrao Khotkar (supra).*** However, a perusal of impugned judgment reveals that the learned Trial

Court has not dealt with the issue of admissibility of electronic evidence at all, though the statutory law regarding the same had already been in existence at the time of passing of impugned judgment.

61. Thus, in view of the aforesaid, it is difficult for this Court to completely rely upon the transcripts which were prepared from several recorders and cassettes, especially in light of the fact that there is no mention in depositions of the witnesses as to how the data/recordings were transferred from one device to another and how these transcripts were prepared by the investigating agency.

CONCLUSION

62. Thus, considering the irregularities in the sanction obtained for prosecution, contradictions among the testimonies of the witnesses as well as non-examination of material witnesses, coupled with unreliable electronic evidence and failure to prove demand of bribe beyond reasonable doubt, the evidence produced by the prosecution is insufficient and inconsistent to establish the guilt of the appellant beyond reasonable doubt.

63. In view thereof, the impugned judgment dated 28.07.2009, and the order on point of sentence dated 30.07.2009 passed by learned Trial Court are set aside. The appellant is acquitted of the offences.

64. The appeal is allowed accordingly, with no order as to costs.

SWARANA KANTA SHARMA, J

DECEMBER 8, 2022/kss