

IN THE GAUHATI HIGH COURT
THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA, MANIPUR,
TRIPURA, MIZORAM AND ARUNACHAL PRADESH
SHILLONG BENCH

Criminal Appeal No. 2(SH) of 2005

Shri Manoj Diwakar
Permanent resident of Ashok Puri Colony
Mauryapath, PO BV College
Patna-14, Bihar : Petitioner

-vs-

CBI represented by its SP CBI
Dispur, Guwahati
Assam : Respondents

BEFORE
THE HON'BLE MR JUSTICE T VAIPHEI

For the Petitioner : Mr SP Mahanta
Mr AK Agarwal
Mr H Abraham, Advs.

For the Respondents : Mr VK Jindal, Sr Adv

Date of hearing : 25.08.2011

Date of Judgment & Order : 22-11-2011.

JUDGMENT AND ORDER

This criminal appeal under Section 374(2) of the Code of Criminal Procedure, 1973 is directed against the judgment dated 16-6-2005 passed by the learned Special Judge, Shillong in Special Case No. 11 of 2002 convicting the appellant under Sections 7 and 13(2) of the Prevention of Corruption Act, 1988 ("PC Act" for short) and sentencing him to undergo rigorous imprisonment for two years with a fine of ` 5,000/- and, in default thereof, to undergo another six months of imprisonment for each of the offences: the sentences were to run concurrently.

2. Before proceeding further, the facts leading to the filing of the appeal may be briefly noted. The case of the prosecution is that on 16-1-2002, one Tikaram Lama lodged a complaint with the CBI, Guwahati stating that on 8-1-2002, when he went to meet the accused/appellant to process the pending bill amounting to ` 3,80,000/- for execution of the work undertaken by him at Bagli, Meghalaya, he (appellant) demanded ` 55,000/- as illegal gratification for processing the same and warned him that unless the same was paid, his bill would not be processed and instructed him to bring the money at his residence on 17-1-2002. As the complainant was not willing to pay the bribe, the complaint was lodged by him. On receipt of the complaint, the CBI planned for laying a trap on the appellant on 16-1-2002 and accordingly left for Tura along with witnesses on the same evening. On reaching Tura, the CBI team, complainant and the witnesses assembled at the Guest House of Police Officers, Tura to verify the genuineness of the complaint lodged by the complainant. One of the witnesses, namely, Shri J.C. Sharmah was asked to accompany the complainant posing as his relative to the house of the appellant to hear their conversation: the complainant and the said witness were provided with a tape recorder to record such conversation. On his return, the said J.C. Sharmah confirmed to the CBI team that there was a demand of bribe by the appellant.

3. It is the further case of the prosecution that the trap team, the said witness and the complainant were then given briefing and demonstration of the use of Phenolphthalein Powder and Sodium Carbonate, and the complainant, on being asked, produced `50,000/-, and a number of GC Notes were then recorded in the Panchanama and were treated with Phenolphthalein Powder, which were then returned to the complainant

with proper briefing that he should hand over the G.C. Notes to the appellant only he made the demand and not otherwise. The said witness was also asked to accompany the complainant so that he could witness the transaction and hear the conversation between the complainant and the appellant while other members of the team and the other witness, namely, Shri Motiram Das were asked to take position at different places so that they could see the signal given by the said J.C. Sharmah (witness) as soon as the transaction was over. Finally, the complainant and the said J.C.Sharmah reached the house of the appellant at about 2.30 PM and took their respective positions as per plan. The complainant and the said JC Sharmah thereafter entered the room of the appellant and discussed about the payment of money as demanded by the appellant: the appellant agreed to accept `50,000/- after making adjustment of `5,000/- which he had taken as loan from the complainant. As agreed to by them, the complainant handed over the treated notes of `50,000/- who accepted it and after counting the number of bundles kept in the study table. Immediately thereafter, the said JC Sharmah emerged out of the room and gave signal to the trap laying team who immediately rushed to the room and challenged the appellant for demanding and accepting the bribe from the complainant. The appellant was shocked by this and kept on begging for excuse. The treated money of `50,000/- was recovered by the other witness (Moti Ram Das) from the study table. The left and right hand of the appellant was then washed in sodium carbonate solution which turned pink and the said solution was preserved in two separate bottles. A panchanama was then prepared for the proceeding of the trap, which was signed by all concerned, which was followed by the search of the house of the appellant: measurement book No. 133 was recovered from his home in

which the work done by the complainant was found in which work was recorded by the appellant to have been completed as per schedule and the last entry being made on 22-9-2001. It was also found that the work was carried out by the complainant for and on behalf of his wife, Smt. Thailind Ch. Marak, who had duly authorised her husband.

4. The statements of the witnesses were then recorded and, after the investigation, a prima facie case under Section 7 read with Section 13(1)(d) of the PC Act was established against the appellant, who was accordingly forwarded by the CBI to the Special Court for trial. The trial court then framed the charges against the appellant under Section 7 and 13(1)(d) of the PC Act on 4-10-2002 to which he pleaded not guilty to the charges and claimed to be tried. The trial court then proceeded with the trial. In the course of trial, the prosecution examined as many as nine witnesses and exhibited some documentary evidence to bring home the charges against the appellant. After examination of the prosecution witnesses, the appellant was examined under Section 313 CrPC. As desired by the appellant, he was allowed to adduce defence witnesses: three DWs were accordingly examined. At the conclusion of the trial, the trial court passed the impugned judgment of conviction and sentence.

5. Assailing the impugned judgment, Mr. SP Mahanta, the learned counsel for the appellant, contends that though the complainant, who was examined as PW 2, in his complaint had stated that he met the appellant on 8-1-2002 when he demanded `55,000/- as bribe, he, however, in his evidence, deposed that the appellant demanded only `50,000/- as he had already received `5,000/- as loan from him: no evidence was, however, adduced by the prosecution to corroborate his later version in Court.

According to the learned counsel, this is a device introduced for the first time in Court without corroboration. He also submits that from the evidence of PW 3 and PW 4, the appellant was with them on 8-1-2002 and stayed at linger(?) Bazaar thereby ruling out the demand of bribe by him from the complainant does not arise: no conviction can be sustained on the basis of such unreliable witnesses. He also strongly urges this Court not to believe the case of the prosecution when they have miserably failed to prove the acceptance of money by the appellant without proof of its recovery from his physical possession. He also points out that the prosecution did not examine the most vital witness, namely, the said Moti Ram Das, who was alleged to have accompanied the appellant and witnessed the entire episode of the recovery drama: this creates serious doubts on the entire prosecution story and also entitles this Court adverse inference against the prosecution for withholding such material witness. He, therefore, submits that the finding of guilt recorded by the trial court on the basis of such sketchy evidence is liable to be interfered with to prevent gross miscarriage of justice. Per contra, Mr. V.K. Jindal, the learned senior counsel for CBI, supports the impugned judgment, which is an open and shut for the CBI and is based on solid evidence and, therefore, contends that the appeal, which is bereft of merit, is liable to be dismissed.

6. I have given my anxious consideration to the submissions advanced by the learned counsel appearing for the parties. I have also carefully gone through the impugned judgment together with the evidence adduced by both the parties to substantiate their respective cases. It is obvious that the trial court has heavily relied on the evidence of PWs 2, 6 and 8 in

convicting the appellant. The findings of the trial court are found mainly at page 62 and 69 of the certified copy of the judgment, which read thus:

“On receiving the complaint, CBI [personnel decided to verify the matter and called two witnesses namely Sri JC Sharma (PW 6) and one Mr. MR Das and introduced the complainant with them where the complainant disclosed in front of the said witnesses with regard to demand of bribe of Rs. 55,000/- by the accused for processing his ill for a sum of Rs. 3,00,000/- and accordingly, a panchanama was drawn to the effect of disclosure of bribe money as exhibit 4. Thereafter, CBI personnel along with complainant and witnesses left for Tura on 16-1-2002 and reached Tura on 17-1-2002 and stayed at Police Officer Beat House Fancy Valley. And before laying trap further try to verify about the genuinity of the demand and asked the complainant and PW No. 6 to go to the accused’s residence along with a mini tape recorder to record the conversation on bribe money between the complainant and accused and also drawn another panchanama as exhibit-5.

“From the evidence of PW No. 2 and 6, it appears to me they went to the residence of the accused on the morning of 17-1-2002 and there accused enquired about the bribe money and fixed the time for payment at between 2 to 2.30 PM of the same day. From the evidence of DW No. 1 it supports that complainant and another person met the accused at his residence on 17-1-2002.

“From the evidence of PW 2 and 6 as well as PW No. 8, it appears that on return from the residence of accused when complainant and witness (PW 6) confirmed the demand of bribe money, they reduced another pachanama as exhibit 6 and thereafter, trap was laid down and GC Notes of `50,000/- of 100 denomination was treated with phenolphthalein powder and number of GC notes were noted down which found mentioned in Annexure A-6 and given to complainant with a direction to give to the accused on his demand and trap team reached residence of accused Manoj Diwakar at about 2.30 PM and was waiting outside at the first floor, and complainant and independent witness PW 6 entered the room of the accused who was present at that relevant point of time in his room. PW No. 6 make it categorically clear in his chief as well as in cross examination. The accused received the bribe of `50,000/- in his presence from the complainant (PW 2) and after receiving the same he counted the money and PW 6 gave signal to the CBI personnels and CBI personnels arrived immediately and recovered the bribe money from the table of the accused and checked the number of GC notes with the number recorded in exhibit-6 and found it to be correct and tallied and also washed the hand of the accused in a solution of sodium carbonate which turned pink and they prepared another panchanama as exhibit-13.

“From the evidence of PW 2 and 6 and exhibit 6 and 13, it is ample clear to me that there was a demand for bribe money by the

accused and the bribe was given and the same was accepted and I did not find any discrepancies in the evidence of PW 2 and 6 except some minor discrepancies which in my view is not at all sufficient to discredit the evidence of prosecution witnesses.”

Disbelieving the evidence of DWs examined, the trial court held further:

“Accused though examined 3(three) witnesses who could not throw any light to the effect that accused did not demand or accept the bribe money, rather they have stated that they have no knowledge about the actual occurrence. Moreover, from the defence witnesses it appears that the official time is from 10-30 to 5 PM, but here it is an admitted fact from the evidence of DWs that accused left office at 3.30 PM which remained unexplained. As such, I am of the view that defence witnesses failed to demolish the prosecution evidence.”

7. To verify the correctness the aforesaid findings of the trial court, I have read and re-read the depositions of PW 2, PW 6 and PW 8. It is interesting to note that though the cross-examination of PW 2 (the complainant) ran into 8 full pages, no substantial questions were asked with respect to the giving of the bribe money by this witness and the receipt thereof by the appellant. PW 2 in his evidence has described this incident with graphic details, but the cross-examination conveniently skipped this vital issue and preferred to indulge in secondary issues, which did not help the case of the appellant. In my judgment, the reason is simple. Cross-examination is a double-edged weapon. The defence counsel rightly wished to ignore this issue for fear of extracting more incriminating evidence against his client. Therefore, nothing tangible was brought out in the cross-examination to discredit the testimony of PW 2. PW 6 was roped in by the CBI as a trap witness and fully corroborated the statement of PW 2. Once again, the cross-examination of this witness ran into 8 pages, but they do not in any manner shaken the testimony of PW 6. Some minor variations are likely to occur here and there in such lengthy cross-examination, but they do not otherwise affect the credibility of this witness, which remained credit worthy and mostly consistent throughout. Similarly,

PW 8 was the CBI official who led the CBI team to lay a trap on the appellant and actually carried out by the plan. His cross-examination does not reveal any substantial point to weaken the case of the prosecution. Cross-examination for the sake of cross-examination cannot otherwise make out a case for the defence: searching questions on the relevant points mentioned in the examination-in-chief are more likely to help the defence. Such approach is conspicuously absent in the cross-examinations of PW 2, PW 6 and PW 8. In my opinion, when the three witnesses have convincingly substantiated the case of the prosecution on the relevant points, non-examination of the other witness, namely, Moti Ram Das has paled into insignificance. The law is well-settled that it is open to the prosecution not to examine all the witnesses and to make selection of witnesses: it is the quality of evidence and not merely the quantity that really matters. The prosecution is also not required to meet any and every doubt put forward by the defence. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based on reason and common sense. In my judgment, the oral evidence of the PW 2, PW 6 and PW 8 together with the exhibits 6 and 13 clichingly established the commission of crime, the manner in which it was committed and the place where it was committed. The trial court does not commit any infirmity which calls for the interference of this Court. The trial court has also rightly discarded the evidence of defence witnesses for reasons recorded by it. In so far as the quantum of sentence is concerned, it is stated at the bar that following this incident, he had been ousted from service. In my opinion, this itself is a punishment, but not enough in a case of this nature: white collar crimes are on the rise. Today, the appetites of public servants to make more money, despite the manifold increase in their salaries and allowances, are not abating and, in fact, are growing day by

day. Therefore, the trial court rightly sentenced him to imprisonment. However, considering the fact that the appellant has already been out of service, the ends of justice will be met if the sentences imposed upon him by the trial court is reduced to one year and three months each for both the offences without disturbing the fines so imposed: both the sentences will, however, run concurrently.

8. The result of the foregoing discussion is that the impugned judgment of conviction is affirmed. The sentences imposed by the learned Special Judge, PC Act, Shillong, however, shall stand reduced to a period of one year and six months of rigorous imprisonment each for both the offences of Section 7 and Section 13(2) of the Prevention of Corruption Act, 1988 with the fines already imposed, but both the sentences are to run concurrently. The impugned judgment is modified in the manner and to the extent indicated above. The appellant shall surrender to the learned Special Judge, PC Act, Shillong within a period of one month from today to serve the sentences so imposed. The appeal is, therefore, partly allowed. Transmit the L.C. record forthwith.

JUDGE

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