HIGH COURT OF JAMMU AND KASHMIR

AT SRIMAGAR

Cr.Acq. Appeal no.15/2014 Date of decision: 11.12.2014

State through P/S VOK v. Sajad Ali Bhat.

Hon'ble Mr. Justice Ali Mohammad Magrey, Judge

Appearing counsel:

For Appellant: Mr. N. H. Shah, Dy. AG.

For Respondent: Mr. M. Moomin Khan, Advocate.

1. Corruption is a menace, eating out the society within and a stumbling block in the path of development. Its elimination and prevention in public services and to punish the guilty in accordance with law is of paramount importance, but, at the same time, a duty is cast on the Courts to ensure that no innocent is fastened into the dragnet of prosecution. This is a case where the trial court, learned Special Judge Anti-corruption, Kashmir, Srinagar, has elaborately and minutely threshed the chaff from the corn.

2. This criminal acquittal appeal by the prosecution arises from the judgment dated 31.12.2012 rendered by the learned Special Judge, Anti-corruption, Kashmir, Srinagar, in File no.131/B. Before stating the grounds of appeal, a brief and bare resume of the prosecution case is given hereunder:

3. On 29.06.2005, the complainant, Tasaduq Hussain Bhat, proprietor of Rehbar Stone Crusher, Lasjan, lodged a written complaint before the Vigilance Organization alleging that Sajad Ali Bhat, the then Assistant Environmental Engineer, Pollution Control Board, Rajbagh, Srinagar, had been demanding an amount of Rs.80,000/- as bribe from him for issuance of

consent certificate. However, after negotiation, he had agreed to accept Rs.20,000/- for doing the needful. As the complainant was reluctant to pay the bribe, he demanded legal action against the accused. On receipt of the complaint, a case was registered at Police Station, VOK and a trap team was constituted. Director, Social Welfare Department, Kashmir, was requested to provide two officials to associate in the trap proceedings as independent witnesses. The Director, Social Welfare Department, deputed two of his officials, namely, Mehraj-ud-Din Rather, Computer Assistant, and Gulzar Ahmad Raja, Junior Assistant, for the purpose.

4. After completing the pre-trap proceedings, the trap team accompanied by the complainant and the two independent witnesses proceeded to the office of Regional Director, Pollution Control Board, Srinagar. Mehraj-ud-Din Rather, Computer Assistant, was designated as shadow witness. The complainant accompanied by the shadow witness, Mehraj-ud-Din Rather, entered the room of the accused where the accused, as per the prosecution story, discussed the material, including bribe money with the complainant, but then the accused asked the shadow witness to move out of his office room. The shadow witness, however, kept watching the activities at the door and as soon as the accused demanded and accepted the bribe money from the complainant, the shadow witness flashed a prefixed signal to other members of the trap team who rushed to the spot. It was alleged that the bribe money was recovered from the left drawer of office table of the accused in presence of independent witnesses who identified the currency notes as they were signed by them during pre-tap proceedings. It was alleged that hand wash of the accused proved positive. The file pertaining to Rehbar Stone Crusher was also recovered from the office room of the accused. It was further alleged that during investigation perusal of the seized file revealed that the file was unnecessarily retained by the accused when, in terms of the last note paragraph recorded therein, it was supposed to be with the Junior Assistant for necessary action.

5. Challan against the accused was presented in the trial court and he was charge sheeted for the commission of offences punishable under Sections 5(1)(d) read with Section 5(2) of Prevention of Corruption Act read with Section 161 RPC.

6. At the trial, the prosecution in an attempt to prove its case, examined all the twelve listed witnesses, including the two independent witnesses,

7. In order to prove the allegations of demand and acceptance of the bribe money, prosecution relied upon the depositions of PWs 1 and 2, namely, the complainant and the shadow witness. However, the trial court came to the conclusion that no cogent, trustworthy, reliable and clinching evidence was produced to prove the demand and acceptance of the bribe by the accused. Relying on various judgments cited before it, the learned trial court held that it was necessary for the prosecution to prove that there was demand of money and the same was voluntarily accepted by the accused for doing a favour as a public servant in discharge of his official duty, which is *sine qua non* to the conviction of accused.

8. As to the recovery of bribe money, on the basis of the evidence produced by the prosecution and the law governing the field, the trial court has come to the conclusion that the prosecution has not lead cogent and clinching evidence to prove the recovery of bribe money from the accused and that the legal presumption as envisaged in Section 4 of the Prevention of Corruption Act cannot be drawn in regard to acceptance of gratification by the accused.

9. The trial court has also come to a definite finding that the handwash of the accused was suspicious and not satisfactorily proved. Consequently, the trial court, by its impugned judgment dated 31.12.2012 acquitted the accused of all the charges levelled against him.

10 I heard learned counsel for the parties, minutely perused the record, including the evidence tendered by the prosecution before the trial court, and considered the matter.

11. Mr. Shah, learned Dy. AG, appearing for the prosecution raised only three arguments. He submitted that the trial court has based its judgment only on the testimony of prosecution witnesses 1, 2 and 3 and has not appreciated the evidence of other nine witnesses produced by the prosecution. His second argument is that the trial court has overlooked the legal presumption available against the accused under Section 4 of the Prevention of Corruption Act. Learned counsel also submitted that the learned trial court has failed to appreciate that the accused had not accounted for the amount recovered from him, and on that count also the judgment deserves to be set aside.

12. On the other hand, learned counsel for the accused-respondent argued that the prosecution has not been able to prove beyond reasonable doubt the major ingredients of Section 5(1) of the Prevention of Corruption Act, namely, demand, payment, acceptance and recovery of the bribe money, therefore, the accused was entitled to be, and has rightly been, acquitted. In this connection, the learned counsel drew the attention of this Court to the statements of prosecution witnesses, PWs 2 and 3, said to be the independent witnesses by the prosecution, one of them, PW2 was also designated as shadow witness. To buttress his argument, the learned counsel relied on the judgments of this Court in ***Mohammad Hussain v. State of J&K***, 2008 (II) SLJ 741, and ***Mohammad Afzal Bat v State of J&K***, 2009(I) SLJ 130. Further, the learned counsel submitted that the presumption under Section 4(1) of the Prevention of Corruption Act can only be drawn against the accused if the prosecution has in the first place discharged its burden of proving the major ingredients of demand, payment, acceptance and recovery. According to him, since the prosecution had failed in that regard, the presumption was not available. In this behalf, the learned counsel cited and

relied upon a judgment of the Supreme Court in ***Trilok Chand Jain v. State of Delhi***, 1977 Cri. L. J. 254 (1), and a judgment of the Calcutta High Court in ***M. C. Mitra v. The State***, AIR 1951 Calcutta 524.

13. It is to be borne in mind that evidence of the shadow witness and the independent witness are of higher credibility, as it is their duty to observe the whole incident and depose to the same effect. In ***Smt. Meena Balwant Hemke v. State of Maharashtra***, AIR, 2000 SC 3377, the Supreme Court held that law always favours the presence and importance of a shadow witness in the trap party not only to facilitate such witness to see but also overhear what happens and how it happens.

14. In the instant case, it is not denied that the shadow witness, namely, Mehraj-ud-Din Rather, and the other independent witness, namely, Gulzar Ahgmad Raja, solicited from the Directorate of Social Welfare Department by the VOK, in their main examination have not supported the prosecution case. They have not been declared as hostile witnesses. Except the deposition of the complainant, there is no evidence on record to prove demand and acceptance of the bribe money. Even the money has not been recovered from the personal search of the accused. It was recovered from the left side drawer of the office table of the accused at the instance of the complainant. The PWs 2 and 3, i.e., the shadow witness and the other independent witness, in their depositions have clearly stated that the VOK team asked the accused to take out the tainted money from the drawer and count the same. When he refused, he was slapped. On this, the accused took out the money from the drawer and counted the notes. It was thereafter that the handwash test of the accused was conducted.

15. In ***Mukut Bihari v. State of Rajasthan***, (2012) 11 SCC 642, the Supreme Court has held that the complainant is an interested and partisan witness concerned with the success of the trap and his evidence must be tested in the same way as that of any other interested witness and in a proper

case the court may look for independent corroboration before convicting the accused person. In this connection, the Supreme Court relied on its earlier decisions in Ram Prakash Arora v. The State of Punjab, AIR 1973 SC 498; Panalal Damodar Rathi v. State of Maharashtra, AIR 1979 SC 1191; Suraj Mal v. The State (Delhi Admn.), AIR 1979 SC 1408; Smt. Meena Balwant Hemke v. State of Maharashtra, AIR 2000 SC 3377; T. Subramanian v. The State of T.N., AIR 2006 SC 836; A. Subair v. State of Kerela, (2009) 6 SCC 587; State of Maharashtra v. Dnyaneshwar Laxman Rao Wankhede, (2009) 15 SCC 200; C.M. Girish Babu v. CBI, Cochin, High Court of Kerala, AIR 2009 SC 2022; and State of Kerala and Anr. v. C.P. Rao, (2011) 6 SCC 450). As said above there is no independent corroboration of the complainant's deposition in the instant case about the demand and acceptance of the bribe money by the accused.

16. Coming to the argument of Mr. Shah that the trial court has overlooked the presumption available against the accused under Section 4 of the Act, it is settled law that while invoking the provisions of Section 4 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt. However, before the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. Reference in this connection may be made to ***Mukut Bihari v. State of Rajasthan*** (supra). In the instant case the amount has not been recovered from the person of the accused. In fact, from the statements of PWs 2 and 3 – the shadow witness and the independent witness – it is established that the accused had not received the money, because the handwash test was conducted only after he was made to take out the money from the drawer and count the notes. The presumption available under

Section 4 of the Act would come into play only when the bribe money had been recovered from his possession.

17. In ***Banarsi Dass v. State of Haryana***, 2010 (4) SCC 450, in somewhat similar facts it has been held as under:-

> "24. In the case of M. K. Harshan v. State of Kerala, 1996 (11) SCC 720, this Court in somewhat similar circumstances, where the tainted money was kept in the drawer of the accused who denied the same and said that it was put in the drawer without his knowledge, held as under:
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> > '8....It is in this context the courts have cautioned that as a rule of prudence, some corroboration is necessary. In all such type of cases of bribery, two aspects are important. Firstly, there must be a demand and secondly there must be acceptance in the sense that the accused has obtained the illegal gratification. Mere demand by itself is not sufficient to establish the offence. Therefore, the other aspect, namely, acceptance is very important and when the accused has come forward with a plea that the currency notes were put in the drawer without his knowledge, then there must be clinching evidence to show that it was with the tacit approval of the accused that the money had been put in the drawer as an illegal gratification. Unfortunately, on this aspect in the present case we have no other evidence except that of PW-1. Since PW-1's evidence suffers from infirmities, we sought to find some corroboration but in vain. There is no other witness or any other circumstance which supports the evidence of PW-1 that this tainted money as a bribe was put in the drawer, as directed by the accused. Unless we are satisfied on this aspect, it is difficult to hold that the accused tacitly accepted the illegal gratification or obtained the same within the meaning of Section 5(1)(d) of the Act, particularly when the version of the accused appears to be probable.'
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> 25. Reliance on behalf of the appellant was placed upon the judgment of this Court in the case of C. M. Girish Babu (supra) where in the facts of the case the Court took the view that mere recovery of money from the accused by itself is not enough in absence of substantive evidence for demand and acceptance. The Court held that there was no voluntary acceptance of the money

knowing it to be a bribe and giving advantage to the accused of the evidence on record, the Court in para 18 and 20 of the judgment held as under:

> ‘18. In Suraj Mal v. State (Delhi Admn.) 1979 (4) SCC 725 this Court took the view that mere recovery of tainted money divorced 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. The 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.
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> …
> 20. A three-Judge Bench in M. Narsinga Rao v. State of A.P. 2001 (1) SCC 691 : SCC (Cri) 258 while dealing with the contention that it is not enough that some currency notes were handed over to the public servant to make it acceptance of gratification and prosecution has a further duty to prove that what was paid amounted to gratification, observed: (SCC p. 700, para 24)
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> > ‘24. ...we think it is not necessary to deal with the matter in detail because in a recent decision rendered by us the said aspect has been dealt with at length. (Vide Madhukar Bhaskarrao Joshi v. State of Maharashtra 2000 (8) SCC 571).The following statement made by us in the said decision would be the answer to the aforesaid contention raised by the learned Counsel: (Madhukar case, SCC p. 577, para 12)
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> > > `12. The premise to be established on the facts for drawing the presumption is that there was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted "as motive or reward" for doing or forbearing to do any official act. So the word "gratification" need not be stretched to mean reward because reward is the

> outcome of the presumption which the court has to draw on the factual premise that there was payment of gratification. This will again be fortified by looking at the collocation of two expressions adjacent to each other like "gratification or any valuable thing". If acceptance of any valuable thing can help to draw the presumption that it was accepted as motive or reward for doing or forbearing to do an official act, the word "gratification" must be treated in the context to mean any payment for giving satisfaction to the public servant who received it.'

In fact, the above principle is no way derivative but is a reiteration of the principle enunciated by this Court in Suraj Mal case (supra), where the Court had held that mere recovery by itself cannot prove the charge of 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. Reference can also be made to the judgment of this Court in Sita Ram v. State of Rajasthan 1975 (2) SCC 227, where similar view was taken.

26. C.M. Girish Babu (supra) was registered under the Prevention of Corruption Act, 1988, Section 7of which is in pari materia with Section 5 of the Prevention of Corruption Act, 1947. Section 20 of the 1988 Act raises a rebuttable presumption where the public servant accepts gratification other than legal remuneration, which presumption is absent in the 1947 Act. Despite this, the Court followed the principle that mere recovery of tainted money divorced from the circumstances under which it is paid would not be sufficient to convict the accused despite presumption and, in fact, acquitted the accused in that case."

18. The law on the subject is thus clear 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. The premise to be established on the facts for drawing the presumption under Section 4 of the Act is that there

was payment or acceptance of gratification. Once the said premise is established the inference to be drawn is that the said gratification was accepted ‘as motive or reward’ for doing or forbearing to do any official act. In the instant case, as said above, there is no evidence on record to establish that the accused had demanded or voluntarily accepted the money. The circumstances in which it was recovered is quote suspicious.

19. In light of the above, I am convinced that the trial court has considered the facts properly, appreciated the evidence in correct perspective and then reached the conclusion that the prosecution had failed to prove the charges against the accused.

20. As regards the argument put forth by Mr. Shah that the accused has failed to account for the money recovered from the drawer, it needs to be mentioned that the accused in his statement recorded under Section 342 Cr. P. C. had stated that the bribe money had been kept in the drawer without his knowledge and in his absence. The bribe money was not recovered from his personal search. The question of accounting for the money would only arise had it been recovered from his possession.

21. In light of the above, the judgment rendered by the learned trial court does not warrant any interference. This appeal is, accordingly, dismissed as being without any merit.

(Ali Mohammad Magrey)
Judge

Srinagar,
11 .12.2014
Syed Ayaz, Secretary.