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r.k. Pathak vs.state (Cbi)

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Court : Delhi

Decided On : Apr-26-2019

Appellant : r.k. Pathak

Respondent : State (Cbi)

Advocate for Pet/Ap. : Mr. Sunil K. Mittal, Mr. Vipin K. Mittal, Mr. Anshul Mittal, Ms. Aanchal Mittal, Mr. Sushant Bali, Mr. Nikhil Goel, Mr. Ashutosh Ghade, Mr. Dushyant Sarna

Judgement :

$~36 & 37 IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL. A5672000 Decided on:

26. h April, 2019 R.K. PATHAK STATE (CBI) + CRL. A5682000 ..... Appellant Through: Mr. Sunil K. Mittal, Mr. Vipin K. Mittal, Mr. Anshul Mittal, Ms. Aanchal Mittal and Mr. Sushant Bali, Advocates versus Through: Mr. Nikhil Goel, SPP with Mr. Ashutosh Ghade and Mr. Dushyant Sarna, Advocates ..... Respondent PRADEEP SHARMA ..... Appellant Through: Mr. Sunil K. Mittal, Mr. Vipin K. Mittal, Mr. Anshul Mittal, Ms. Aanchal Mittal and Mr. Sushant Bali, Advocates STATE (CBI) versus Through: Mr. Nikhil Goel, SPP with Mr. Ashutosh Ghade and Mr. Dushyant Sarna, Advocates ..... Respondent CORAM: HON'BLE MR. JUSTICE R.K.GAUBA JUDGMENT (ORAL) 1. The appellants in these connected appeals were brought before the Special Judge (Prevention of Corruption Act) in criminal case (CC no.86/99) on the basis of report (charge-sheet) under Section 173 of the

Crl. A567568/2000 Page 1 of 17 Code of Criminal Procedure, 1973 (Cr.PC), upon conclusion of investigation into first information report (FIR) vide RC no.54(A)/92-DLI of Central Bureau of Investigation (CBI), put on trial on charge for offences punishable under Section 120B of Indian Penal Code, 1860 read with Section 13(2) of Prevention of Corruption Act, 1988 (P.C. Act), besides substantive offences under Section 7 and 13(1)(d) read with Section 13 (2) of P.C. Act. By judgment dated 30.08.2000, they were held guilty and convicted, as charged. By order dated 31.08.2000, the trial court awarded rigorous imprisonment for two years with fine of Rs.5,000/-, and in default to further undergo rigorous imprisonment for six months, for the offence of criminal conspiracy under Section 120 B IPC read with Section 7 & 13(1)(d) punishable u/s 13(2) PC Act to appellant Pradeep Sharma (A1). Similarly, the appellant R.K. Pathak (A2) was sentenced to undergo rigorous imprisonment of two years and three years respectively on the charge for offences under Sections 7 and 13(2) of P.C. Act, 1988 with fine of Rs.5,000/- each, on both counts, the substantive sentences having been directed to run concurrently.

2. These appeals were presented in September 2000 bringing challenge to the correctness, legality and propriety of the said judgment and order on sentence. The sentences were suspended and the appellants were enlarged on bail pending hearing on the appeals which was admitted and directed to come up in due course. The appellant Pradeep Sharma (A1), however, died on 15.02.2016. On her application (Crl. M.A. 7480/2016), his wife, Mrs. Narinder Sharma, has been permitted, by order dated 06.05.2016, to prosecute the appeal. Crl. A567568/2000 Page 2 of 17 3. Certain indisputable facts which emerge from the evidence on record, and the submissions of both sides, may be taken note of at the outset.

4. Both the appellants were members of Delhi Police holding the rank of Sub Inspector (SI), they being posted at the relevant point of time in Crime Branch, their office being located at Police Headquarters near ITO, New Delhi, Inspector Mahinder Kumar Sharma (PW7) being their immediate superior. Kishore Kumar (PW1), the complainant of the case at hand would run the business of recruiting agency in the name and style of K.M. Enterprises, his office being in Flat no.203, at the second floor level of property no.A-31-34, Jaina House Extension, Dr.

Mukherjee Nagar Commercial Complex, Delhi. It may be mentioned here that he at that time (PW-1) was a resident of property no.E-10, Vijay Nagar, Delhi.

5. PW-1 had advertised his business and concededly had been approached by a person named C. Rajan, a resident of Kerala, for assistance to get employment in Gulf countries, he having remitted to PW1, a demand draft of Rs.2,000/- as advance payment pursuant to letter dated 07.04.1992 of PW-1. It appears that services, as assured, were not provided and C. Rajan felt cheated. On 05.08.1992, he sent a communication from his native place in Kerala to Secretary, Ministry of Labour, Government of India, New Delhi lodging complaint expressing strong suspicion that the said firm of PW-1 had cheated him and possibly other unemployed persons. Crl. A567568/2000 Page 3 of 17 6. A copy of the aforesaid complaint dated 05.08.1992 (Ex. PW7/A) was also endorsed to the Commissioner of Police, New Delhi, it reaching the said office on 10.08.1992. The said complaint was marked by the office of the Commissioner of Police downwards, it eventually reaching the Crime Branch on 14.08.1992 and having been endorsed for inquiry and report to A-1 by PW-7. The action on the complaint of C. Rajan was closed with approval of the Deputy Commissioner of Police (DCP), Crime and Railways, on 14.08.1992 itself on the basis of report (Ex. PW7/B) of PW-7, the said report, inter alia, stating that the matter had been inquired into through A-1, it having been revealed that the concerned agency had already remitted an amount of Rs.2,000/- to the complainant by money order, this fact being supported by copy of a money order receipt showing such remittance to C. Rajan on 13.08.1992 as per document (D-9 at page

569) on the trial court record. Though the document in question was not formally proved at the trial, it being a document presented by the investigating / prosecution agency itself, it can be looked into to examine the defence plea that has been raised.

7. On 07.09.1992, PW-1 approached the Superintendent of Police (SP), CBI by a formal complaint (Ex. PW1/A) which was marked to Inspector Javed Siraj (PW-6) for necessary action including registration of FIR. On the basis of further action taken, FIR (Ex. PW6/A) was registered on the same date.

8. As per the allegations in the FIR (Ex. PW6/A), based on the complaint (Ex. PW1/A), both the appellants had approached PW-1 at Crl. A567568/2000 Page 4 of 17 his residence at about 6.00 p.m. on 12.08.1992 and had informed him about the complaint of C. Rajan of Kerala, which was indicated to be pending. PW-1 reported that the appellants had threatened him that a case would be registered unless he paid a bribe of Rs.50,000/- to them. The complaint stated further that upon he (PW-1) indicating his inability to afford such a big amount, the demand was reduced to Rs.10,000/-. He further stated that after the said demand (made on 12.08.1992), the appellants had been threatening him with implication in the matter. He informed the SP, CBI in the complaint that he did not want to pay the bribe and had been able to arrange only Rs.5,000/-, seeking legal action stating that the appellants would be visiting his office at 4.00 p.m. on 07.09.1992.

9. As per the case of the CBI, a trap was arranged, and for such purposes, two government officials namely Bal Kishan Chanana (PW-

3) and Ashok Tanwar (PW-4), both employees of Airport Authority of India, International Division, were called and joined as independent witnesses. The trap proceedings were drawn (Ex. PW1/C), the arrangements made thereby including the details of the currency notes (13 of the denomination of Rs.100 and 74 of the denomination of Rs.50/-) which had been brought by the complainant (PW-1) being noted down (vide Ex. PW1/B). It has been the case of CBI that the said currency notes (Ex. P1 to P87) were treated with phenolphthalein powder, the use of the said power explained and demonstrated for the benefit of the complainant and the independent witnesses. It has also been the case of CBI that a micro-cassette recorder was arranged, the pre-trap conversation was recorded therein and the apparatus handed Crl. A567568/2000 Page 5 of 17 over to the complainant (PW-1) for being kept in his wearing apparel, it to be switched on at the time of arrival of the appellants in his office so that the conversation (which was exchanged) could be recorded for corroboration. PW-3 was statedly deputed as the shadow witness, he was instructed to remain with PW-1 in his office and to be introduced as a cousin who was employed at the airport, he purportedly having come to the said place on some personal work. PW-4, on the other hand, was deputed to remain outside with other members of the raiding party, his services to

be availed as recovery witness after the pre- determined signal had been given once the trap money had been handed over to the suspects. The trap party was led by trap laying officer (PW-6) and also included at least five other officers of CBI, they including Inspectors (S.K. Peshin, Ved Prakash and R.K. Chadha) besides two Sub Inspectors (Sanjay Sharma and A.K. Mishra).

10. It is the case of CBI that trap party had reached the area in question where the office of PW-1 was located and while PW-1 and PW-3 went inside his office, the other members of the trap party including the recovery witness (PW-4) were deployed outside. It is alleged that sometime between 4.30 to 4.35 p.m. on 07.09.1992, the two appellants had come to the office of PW-1 wherein they initially engaged each other in some general conversation. It is admitted case of CBI that midway the said conversation, at the instance of PW-1, the shadow witness (PW-3) left his cabin and moved to an adjoining cabin. It is alleged that after PW-1 had moved to the adjoining cabin, the demand was reiterated, the complainant (PW-1) thereupon placing the trap money on his office table, the same having been picked by A2. Crl. A567568/2000 Page 6 of 17 It is claimed that conversation confirming the demand, tender of half of the money (which had been demanded) with assurance that the rest would be arranged in near future and insistence of the appellants in such regard was duly recorded in the audio cassette. It is stated that upon pre-determined signal being given, the other members of the trap party had entered the cabin of PW-1, where both the appellants were confronted, search of A2 having resulted in recovery of the trap money from the right side pocket of his trousers. The wash of the right hand of A2, and of the right side pocket of his trousers (Ex. P92), were taken, the report (Ex. PW2/A) of Central Forensic Science Laboratory (CFSL) eventually giving positive tests in their regard for the presence of phenolphthalein powder.

11. The investigative steps which were taken in the wake of the aforementioned trap proceedings were reduced into writing in a document which is described as recovery memo (Ex. PW1/D), it being followed by preparation of a site plan (Ex. PW3/A). The probe that continued included the preparation of the transcript (Ex. PW3/G) of the contents of micro audio cassette (Ex P-93), memorandum (Ex. PW3/F) in this regard having been prepared on 20.10.1992 by Inspector K.S.

Joshi (PW-8), it being attested by PW-3 and PW-4.

12. The prosecution sought to prove its case by examining eight witnesses at the trial, they including Kishore Kumar (PW-1), the complainant; Dr. N.K. Parshad of CFSL (PW-2); Bal Kishan Chanana, shadow witness (PW-3); Ashok Tanwar (PW-4), the other witness to trap; Neeraj Kumar, who was DCP (Crime & Railways) (PW-5), who Crl. A567568/2000 Page 7 of 17 had granted sanction for prosecution under Section 19 of the P.C. Act; Inspector Javed Siraj (PW-6); Mahinder Kumar Sharma (PW-7); and Inspector K.S. Joshi (PW-8), Dy. S.P., the investigating officer.

13. The appellants when examined under Section 313 Cr. PC, denied as incorrect the evidence about demand of illegal gratification. They took the position that they had no reason to visit the office of the complainant prior to 14.08.1992, since that was the day on which the complaint of C. Rajan had been made over to A1 by PW-7. They denied having made any such contact with the complainant for giving threats to implicate him in any such case or to demand illegal gratification.

14. A1 explained that on 12.08.1992, the date of alleged demand, he was pre-occupied in connection with a criminal case vide FIR no.504/1992 of police station Connaught Place and had dispatched the rukka from office of the Crime Branch near ITO at 6.15 p.m. and had no occasion to be at the residence of PW-1 in Vijay Nagar. PW-1, in the course of his deposition, in the court had also referred to a visit of 03.09.1992. A1, however, sought to explain in his statement under Section 313 Cr. PC that he was pre-occupied elsewhere with PW-7 for investigation of FIR no.480/1992 of police station Trilok Puri, he having left the Crime Branch office for such purposes in the morning at about 9.05 a.m. returning as late as 9.25 p.m.

15. On similar lines, A2 in his statement under Section 313 Cr. PC referred to his pre-occupation on 07.09.1992, another date of alleged Crl. A567568/2000 Page 8 of 17 visit, he being pre-occupied in connection with investigation of FIR nos.240/1992 and 241/1992 of police station Kotla Mubarakpur.

16. The last two said FIRs statedly involved one P.N. Aggarwal who had been declared a proclaimed offender, the officials of Crime Branch being on the look-out

for him. A1 in his statement under Section 313 Cr. PC referred to another FIR no.212/1992, also of police station Kotla Mubarakpur, again involving the said P.N. Aggarwal, who was an absconder. Both A1 and A2 referred to the said cases against P.N. Aggarwal and stated that they had information that he could be located in the commercial office complex where PW-1 had his office, justifying their visit and presence at the said place in such context on 07.09.1992.

17. Both the appellants led evidence in defence, they having examined H.C. Rattan Lal (DW-1), who proved certain records relating to FIR no.212/1992 and 241/1992 of police station Kotla Mubarakpur involving P.N. Aggarwal; Constable Vikram Singh (DW-2) who proved records relating to FIR nos.251, 212, 240 and 131 of 1992 of police station Kotla Mubarakpur; HC Uday Sigh (DW-3), who brought record relating to FIR no.480/1992 of police station Trilok Puri; SI Kanwaljit Singh (DW-4), whose evidence relates to the objections taken about the validity of the sanction for prosecution; Constable Jas Ram Singh (DW-5), who produced records relating to FIR no.504/1992 of police station Connaught Place; Constable Avdesh Narain (DW-6), who spoke about the rukka given to him by A-1 in the evening of 12.08.1992, it having resulted in registration of FIR Crl. A567568/2000 Page 9 of 17 no.504/1992 in police station Connaught Place; HC Kirpa Shankar (DW-7), who also deposed on the basis of record of investigation into FIR no.504/1992 of police station Connaught Place; Constable Kanwar Kumar (DW-8) who produced records relating to FIR no.480/1992 of police station Ganesh Nagar; and Inspector Suresh Chandra (DW-9), who produced the record of investigation relating to FIR nos.212/1992 and 241/1992 of police station Kotla Mubarakpur in which P.N Aggarwal was wanted but was an absconder at the relevant point of time, the former being under investigation with A1 and the latter with A2.

18. As is clear from the above narration, the Special Judge was not impressed with the defence plea. He accepted the evidence of the prosecution to return finding of guilty, convicting the appellants and meting out the punishment as indicated earlier.

19. Having heard both sides at length and having gone through the record, this court is of the view that the evidence led by the prosecution lacks credibility and, therefore, could not have been the basis of returning findings of guilty. The reasons may be set out hereinafter.

20. The complainant (PW-1) is a person with a criminal record. He admitted that he had been accused in cases of forgery and murder. Though he would claim that he had been acquitted in the said cases, it is also on record that he had earlier lodged certain complaints against the local police with CBI, he not sharing with the court as to the background of such earlier complaints or the results thereof. With this Crl. A567568/2000 Page 10 of 17 admission, however, the defence plea that PW-1 was inimically placed against officials of Delhi Police cannot be lightly brushed aside.

21. Be that as it may, having regard to the allegations in the complaint (Ex. PW1/A) lodged by PW-1 with SP, CBI on 07.09.1992, it is clear that he had come across the appellants for the first time at about 6.00 p.m. on 12.08.1992. According to his version, the appellants had visited him at his residence with the information about the complaint of C. Rajan. In the said complaint, leading to the registration of FIR, there was no reference whatsoever of any telephonic calls or any other visits of the appellants on any specific dates. The demand indicated was of Rs.50,000/- which had been reduced to Rs.10,000/-. All that he was aware at the time of lodging the complaint with CBI was that the matter was pending on complaint of C. Rajan.

22. Having regard to the complaint (Ex. PW7/A) of C. Rajan and the action taken thereupon, vide noting (Ex. PW7/B) of PW-7 on 14.08.1992, it is clear that neither A1 nor A2 had any reasons to visit the complainant on such subject on 12.08.1992. The complaint of C. Rajan itself had not reached the Crime Branch till 14.08.1992. It was marked to A1 on 14.08.1992 only. It is inconceivable that A1 and A2 could be privy to such complaint on 12.08.1992. There is no explanation as to why PW1 had not lodged a complaint with any authority immediately on such illegal gratification being demanded on or about 12.08.1992. Crl. A567568/2000 Page 11 of 17 23. PW-1 made a lot of improvement with regard to the first demand

while deposing in the court rendering his word incredible. He spoke about the demand being Rs.1,00,000/- which had been reduced later to Rs.10,000/-. He was well aware that the dispute with C. Rajan concerned Rs.2,000/- only. The evidence clearly shows that he had remitted Rs.2,000/- to C. Rajan on 13.08.1992. If so, PW-1 had no cause for worry. He had taken only such amount of money from C. Rajan as had been duly returned on 13.08.1992. It is not palatable that he would be apprehensive about demand of Rs.1,00,000/- against a matter that involved the amount of Rs.2,000/- only which was no longer outstanding.

24. The visit of the appellants to the residence of PW-1 at 6.00 p.m. on 12.08.1992 is highly doubtful for several reasons that includes not only the fact that the complaint of C. Rajan had not surfaced for their purposes till 14.08.1992. The defence evidence led through DW-6 clearly shows that A1 was pre-occupied in the context of FIR no.504/1992 of police station Connaught Place till 6.30 p.m. at the place from where rukka was sent. He continued to be available in Crime Branch office till 8.00 p.m. or 8.15 p.m. when the copy of the FIR was handed over to him by DW-6.

25. The only document available to A-1 was the copy of complaint of C. Rajan. The said complaint did not indicate the place of his residence. PW-1 is on record to state that his landline numbers had not been functional during those days. There was conceivably no way for the appellants to reach out to him at his residence that too around Crl. A567568/2000 Page 12 of 17 6.00 p.m. on 12.08.1992. The version of PW-1 about the demand of Rs.1,00,000/- to be given as illegal gratification is a major improvement for which there was no explanation offered. Seen against the light of his own complaint leading to registration of FIR, his word in this regard is rendered highly suspect.

26. The prosecution relied heavily on audio cassette recording (Ex. P93). Its transcript (Ex. PW3/G) had been statedly prepared on 20.10.1992. But then, the said piece of evidence concededly is not wholesome, not the least what had been gathered at the time of investigation on 23.08.1994. At the time of compliance with Section 207 Cr. PC, it had been reported by the prosecutor and the investigating officer that certain portion of the recording in the original cassette had got erased.

This was duly noted in the proceedings of 23.08.1994. This was re-confirmed during the course of evidence when the cassette (Ex. P94) was found to contain conversation which could not have been part of the recording either in the pre-trap preparation proceedings or during the conversation at the time of alleged visit of the appellants to the office of PW-1 for alleged collection of illegal gratification. Reference in this regard may be made to the deposition of PW-1 recorded on 19.05.2000. Concededly, samples of the voice of the persons concerned were not gathered. Concededly again, the audio recording was not sent for voice matching. PW-3 and PW-4 were not acquainted with either the complainant, or with the appellants, prior to 07.09.1992. It is difficult to accept their testimony about identification of the voices only on the basis of their one meeting with the persons concerned. Above all, it is Crl. A567568/2000 Page 13 of 17 not safe to act upon selective part of the conversation as may have been recorded, certain portion thereof having been deleted, exposing the material to the possibility of the portion retained being construed out of context.

27. PW-1, PW-3 and PW-4 were most crucial witnesses to the prosecution case. PW-1 and PW-4, however, were declared hostile and subjected to cross-examination by the public prosecutor. PW-4 did not confirm the prosecution case in all material particulars, he having pleaded loss of memory almost throughout the deposition, his testimony not being of much use or avail. PW-1 did confirm the relevant facts supportive of the prosecution case on material particulars specifically with regard to steps that had been taken and the events which had happened after the pre-trap proceedings had been put in position. His testimony, however, turns out to be one which is based on leading questions having been put, the procedure adopted being improper and contrary to the rule of evidence.

28. Practice almost similar to the one discussed here adopted by a public prosecutor of CBI was noticed by this court in Crl. A1262000, Om Parkash Chhikara Vs. State, decided on 15.11.2018. In that case, this court had observed thus :-

"The manner in which recovery witness (PW-5) 13. was examined by the prosecution has left much to be desired. He was questioned, during examination-

in- chief, with regard to the sequence of events till the stage of preparation by the CBI officials for laying the trap. During that part of the testimony, he pleaded lack of memory with regard to some facts including as to the Crl. A567568/2000 Page 14 of 17 names of the complainant or the other witnesses joined in the trap and the denomination of the currency notes that had been arranged. It is on that basis that the prosecutor declared him hostile submitting to the trial judge that the witness was suppressing the truth and resiling from the previous statement. The request of the prosecution for permission for cross-examination of its own witness was granted. In the considered view of this court, the stage had not yet been reached for such request to be made by the prosecution or to be granted by the trial court. The entire subsequent sequence of events - post taking of steps for the trap to be laid - has consequentially came on record on being spoon fed on leading questions being put during the cross- examination by the public prosecutor. The deposition recorded reflects that all the facts were suggested to and put in the mouth of the witness who would simply concede the same to be correct. This procedure was not only impermissible but also most unfair and cannot be the basis for such evidence to be accepted. 29. The above observations in the case of Om Parkash Chhikara applies squarely to the case at hand. This court disapproves the approach of the public prosecutor. The case of CBI largely hinges on the word of PW-1 as supported by PW-3 and PW-6. PW-6, the trap laying officer was outside the premises, he having entered only after the pre-determined signal had been given. His word, therefore, cannot confirm the demand or acceptance of illegal gratification. PW-3 was a crucial witness, he having been joined by CBI for the purpose of trap. PW-1 and PW-3 are on record to state that midway the conversation, the latter (PW-3) had been sent out of the cabin by PW-1 to an adjoining cabin. It appears PW-3 was made to sit in the adjoining cabin, which had a glass partition through which he might possibly Crl. A567568/2000 Page 15 of 17 have some view of what was going on in the cabin of PW-1. But then, he is on record to state that he was facing the back of PW-1, his view of the table in front of PW-1 thus not being complete. Be that as it may, the reiteration of the demand was not heard by PW-3. In this view, the effort of the prosecution to confirm the conversation through the mouth piece of PW-3 by leading questions was most unfair. The fact that PW-3 was also too anxious to

confirm the facts which could not possibly have happened in his presence shows his credibility in poor light. This may be illustrated by his insistence that even while he was sitting in cabin of PW-1, there was (implied) talk of part of the money having been arranged, the balance being yet to be organized. That such conversion had not happened in his presence is shown by the testimony of PW-1 who disclosed that reference to the purpose of the visit came up only after PW-3 had left the cabin.

30. PW-1 has deposed about A2 having given him telephone calls two or four days after the alleged visit of 12.08.1992 and then again two or three times to enquire about the arrangement of money. At the same time, he conceded under cross-examination that his land-line phones were not functional during those days. The two versions cannot be reconciled. He spoke about the visit of the appellants to his office in the evening of 07.09.1992. By their defence evidence, the appellants had brought some material on record to show that they had justification for such a visit to the area. They were responsible for investigation of the cases of police station Kotla Mubarakpur wherein P.N. Aggarwal was wanted but absconding. The copies of the case diaries of 07.09.1992 of FIR no.212/1992, 241/1992 (Ex.DW-1/A and Crl. A567568/2000 Page 16 of 17 B) provide sufficient corroboration to this plea. The said case diaries had been recorded by the appellants in regular course of their official duties. Such records were produced by official witnesses summoned at their instance. Such evidence has been unfairly short-shrifted and glossed over by the trial court.

31. In the above facts and circumstances, serious doubts persist as to the credibility of the word of PW-1, PW-3 and PW-6. There were other witnesses, who were part of the raiding team. None of them have been examined by the prosecution, no explanation having been offered for such omission. This gives rise to adverse inference against the prosecution case adding to the reasons why the impugned judgment of the trial court ought not be upheld.

32. In the result, the impugned judgment and the order on sentence are set aside. Both the appellants are acquitted. The fine amount, if deposited, shall be refunded.

33. The appeals stand disposed of in above terms. R.K.GAUBA, J.

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