

Vijayendra Kumar Vs. State of Bihar

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Court : Patna

Decided On : Apr-04-2005

Judge : Manohar Lal Visa, J.

Acts : Prevention of Corruption Act - Sections 5(1) and 5(2); [Indian Penal Code \(IPC\), 1860](#) - Sections 120B, 409, 477 and 477A; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal No. 68 of 1989

Appellant : Vijayendra Kumar

Respondent : State of Bihar

Advocate for Def. : Rakesh Kumar, Adv.

Advocate for Pet/Ap. : Ramakant Sharma, Sr. Counsel

Disposition : Appeal allowed

Prior history : Manohar Lal Visa, J. 1. This appeal has been filed by sole appellant Vijayendra Kumar challenging the judgment and order dated 4-2-1989 passed by Special Judge, C.B.I. (South Bihar), Patna in Case No. 11 of 1982 convicting and sentencing him to undergo rigorous imprisonment for one year and to pay a fine of Rs. 10,000/-, in default to undergo rigorous imprisonment for six months under Section 409 of Indian Penal Code (In short 'I.P.C.') and rigorous imprisonment for one year under Section 477

Judgement :

Manohar Lal Visa, J.

1. This appeal has been filed by sole appellant Vijayendra Kumar challenging the judgment and order dated 4-2-1989 passed by Special Judge, C.B.I. (South Bihar), Patna in Case No. 11 of 1982 convicting and sentencing him to undergo rigorous imprisonment for one year and to pay a fine of Rs. 10,000/-, in default to undergo rigorous imprisonment for six months under Section 409 of Indian Penal Code (In short 'I.P.C.') and rigorous imprisonment for one year under Section 477A of I.P.C. Both the substantive sentences have, however, been ordered to run concurrently. Appellant has further been convicted under Sections 5(1)(c) and 5(1)(d) read with Section 5(2) of Prevention of Corruption Act (In short 'P.C. Act') but no separate sentence for this offence has been imposed.

2. The case of prosecution, as disclosed in the first information report recorded by Shri K.N. Gupta, Inspector of Police, S.P.E., C.B.I. Patna, in short, is that information through a Kumar, A G III (Depot), co-accused persons, namely, Shri Arvind Singh A G 111 (Depot), Shri Mahendra Prasad Yadav, Watchman, Shri Lai Bahadur Ram, Watchman and Shri Ramnath Thakur, Watchman, all employees of Food Corporation of India (In short 'F C I') attached to the railway siding (ambulance siding) of F C I at Danapur Station, Eastern Railway during the month of March, 1982 entered into a criminal conspiracy among themselves to obtain undue pecuniary benefits for themselves and for others by abusing their official position as public servants and in furtherance of the said conspiracy, they criminally misappropriated 386 bags of fertilizer worth about Rs. 89,938/- out of the consignment of fertilizer for F C I received at Danapur siding. It was further alleged that appellant, in conspiracy with the other F C I officials named above criminally misappropriated 386 bags of D A P fertilizer and disposed them of dishonestly and with intent to covering up the misappropriation, he brought one truck No. BHQ 2205 on 15-3-1982 with some bundles of empty gunny bags bearing F C I mark to create evidence that shortage occurred in transit handling. He tried to unload the gunny bags which was opposed by other watchmen posted there for patrolling duty and truck driver apprehending some trouble fled away leaving behind the

truck and on getting this information, Shri Mahboob Ali (P.W. 16), the then District Manager along with Shri Bhola Nandan Prasad, Sudama Ram (P.W. 18), D.P. Samayar, Kamta Pandey and T. P. Gaur (P.W. 11) reached the ambulance siding on 15-3-1982 at about 11.30 a.m. and found the truck parked near the fertilizer stock with some bundles of empty gunny bags and on verification, they detected shortage of 386 bags of D A P fertilizer.

3. After investigation, charge-sheet against the appellant and against co-accused Arvind Singh A G III, Shri Mahendra Prasad Yadav, Shri Lal Bahadur Ram and Shri Ramnath Thakur, all Watchmen were submitted under Sections 120B, 409, 477 of I.P.C. and Sections 5(2) read with Sections 5(1)(c) and 5(1)(d) of P.C. Act. Cognizance of the case was taken and charge under Section 120B read with Section 409 of I.P. C. and Section 5(2) read with Section 5(1)(d) of P. C. Act was framed against the appellants and other co-accused persons. Additional charges under Section 409 of I.P.C. and Sections 5(1)(c) and 5(1)(d) of P.C. Act both punishable under Section 5(2) of P.C. Act were framed against the appellant. Appellant and other co-accused persons denied the charges and they were put on trial and after trial, only appellant was found guilty and was convicted and sentenced, as indicated above. Remaining co-accused persons, namely, Arvind Singh, Lal Bahadur Ram, Mahendra Prasad Yadav and Ramnath Thakur were given benefit of doubt and were acquitted.

4. The case of appellant, as it appears from the evidence adduced on his behalf as well as from the trend of cross-examination of prosecution witnesses, is that there was no shortage in the stock and on the basis of wrong accounting of fertilizer bags by P V (Physical Verification) Party, he has been made an accused in this case.

5. Here, it will not be out of place to mention that this appeal was earlier heard and disposed of by the Bench of a Single Judge of this Court confirming the judgment and order of Court below. The appellant preferred criminal appeal No. 1248 of 1999 and the Supreme Court by its order dated 24-11-2004 has been pleased to remit the matter to this Court for fresh hearing by a Judge other than Judge who decided this appeal earlier. In this way, this appeal is before me.

6. In order to prove its case, altogether 31 witnesses have been examined on behalf of prosecution. Kedar Nath Gupta (P.W. 1) is a formal witness who has proved the first information report (Exhibit-1). P.T. Das Gupta (P.W. 2), K. Chandrashekharan (P.W. 3), S. N. Mishra (P.W. 7), Surendra Kumar Ram (P.W. 12) and Rameshwar Jha (P.W. 13) are also formal witnesses in whose presence Investigating Officer had taken the specimen signatures of appellant and co-accused persons, namely, Lal Bahadur Ram, Mahendra Prasad Yadav and Arvind Ram (marked Ex-hibits-2 to 2/51). Gurbachan Rai (P.W. 22) is a tendered witness. Shankar Choudhary (P.W. 4) is also a formal witness who has proved sanction order typed by this witness at the dictation of Mr. A. A. Faridi, the then Senior Regional Manager, F C I with signature of Mr. Faridi on sanction order (Exhibit-3). Mangal Mahto (P.W. 5) and Vijay Kumar (P.W. 6) are also formal witnesses who have proved signature of appellant on M Form dated 10-3-1982 (Exhibit-4), Gate Register (Exhibit-5), Watchmen Duty Register (Exhibit-6), Attendance Register (Exhibit-7) and Empty Gunny Register (Exhibit-8), 2 sheets in the writing and signature of Ravindra Nath (Exhibits-6/1 and 6/2) in Watchmen Register and signature of appellant on charge report (Exhibit-A), signature of Ravindra Nath on two letters (Exhibits-A/1 and A/2) and signature of appellant in Goods Delivery Book (Exhibit-9). Hridayanand Singh (P.W. 8), Ram Bishun Raj (P.W. 14), Ashok Kumar (P.W. 17), Jamuna Singh (P.W. 19), Munna Raj (P.W. 21), Suresh Yadav (P.W. 24) are said to be witnesses who had seen truck No. B H Q 2205 parked at ambulance siding where the fertilizer bags after unloading from wagon used to be stocked. P.W. 8 is a OR P F Constable and has said that on 15-3-1982, he was posted at Danapur and he was at night duty from 2 a.m. to 6 a. m. and at 4 o'clock in the morning, he found truck No. B H Q 2205 parked near ambulance siding and then he and other constables checked the truck and found empty gunny bags with the marks of F C I and on being asked, the driver said that he was to go to Daulatpur but because area was not safe so he parked the truck there and he then told the driver that it was not place for parking the truck and he made complaint to higher officer in his office. He has proved his signature marked Exhibit-10. He has said that in the meantime, truck driver fled away with the truck. Ram Bishun Raj (P.W. 14) has also said that in the month of March, 1982, he was on patrolling duty at F C I railway station ambulance siding and on 15-3-1982 in

the morning, he found truck No. B H Q 2205 parked near the siding and he also found bundles of empty gunny bags in truck which were seen by P.W. 8 also. He has further said that at about 5 o'clock in the morning, appellant came there and from a distance, he gave signal and the truck driver fled away with the truck and on the same day at about 9 a.m., the same truck again came with empty gunny bags loaded on it and appellant who was present there, asked the labourers to unload the gunny bags on which he and others raised objection and sent its information to their Incharge through Ashok Kumar and Incharge informed the D M who came to the siding and enquiry started. He has further said that empty gunny bags were unloaded ;from the truck and on accounting, it was found that number of bags was 509. He has proved the written statement of Ashok Kumar and his signature as well as signature of Ashok Kumar (P.W. 17). This signature is marked Exhibit-10/1. Ashok Kumar (P.W. 17), a Watchman deputed at Danapur Railway ambulance siding of F C I has said that on 15-3-1982 at about 4 a. m., he found truck No. B H Q 2205 coming to the ambulance siding where stock used to be kept and truck stopped at some distance adjacent to platform and he and P. W. 8 went there and enquired from driver who told that he had to go to Daulatpur and they found that some empty gunny bags were loaded in the truck with the mark DAP fertilizer. He has also said that appellant reached there at 5 a. m. and from some distance, he gave signal to the driver for taking away his truck and on the same day at 9 a.m., the same truck again came there and appellant wanted to unload the gunny bags from it but he and his companions raised objection and the driver and Khalasi fled away leaving the truck there and he and his companions reported the matter to the Incharge who in his turn reported the matter to D M who reached the siding and verification started. He has further said that on accounting, 509 bags were found on the truck. He has proved his written report (Exhibit-10/1). Jamuna Singh (P.W. 19), Munna Raj (P.W. 21) and Surendra Yadav (perhaps by error numbered as P. W. 24 because earlier Birendra Kumar Pandey was also numbered as P. W. 24) have also similarly deposed that on 15-3-1982, truck No. B H Q 2205 came to the ambulance siding and early in the morning at the signal of appellant, the truck left the place and again on the same day in the morning it came and appellant wanted to unload the empty gunny bags loaded on the truck but the witnesses raised objection and, thereafter, the matter was reported to the

higher officers and enquiry started and it was found that 509 bag's were loaded on the truck.

7. According to the case of prosecution, the appellant, after misappropriating a number of bags of fertilizer, had brought the empty bags on a truck and made an attempt to unload those bags at the siding in order to cover up the shortage in the number of bags to conceal misappropriation of some bags of fertilizer committed by him. Prosecution has examined Birendra Kumar Pandey (P.W. 24), a transporter who was assigned the duty of transporting fertilizer bags from railway siding to F C I godown and he, in his evidence, has said that he had not engaged truck No. B H Q 2205 on 14/15-3-1982 and he had no knowledge about that truck and the signature purporting to be his signature on truck chit (Ex-hibit-20) and on other two truck chits bearing serial No. 42969 and 42970 were not his signatures.

8. From the side of appellant, Nilmani Singh (D. W. 5) said to be owner of truck No. B H Q 2205 has been examined who has said that this truck is registered in the name of his elder brother who is sick, therefore, he looks after the entire working of this truck. He has said that on 15-3-1982, Birendra Kumar Pandey had requisitioned his aforesaid truck and he had sent the truck to him at 6-6.30 a. m. He has proved signature (Exhibit-19) of Surendra Prasad, driver of his brother on gate pass register (Exhibit-H). Vijay Kumar Singh (D.W. 6) is owner of another truck No. B H K 9505 and has said that in the year 1982, his truck was engaged for transportation of goods by F C I and along with him, trucks of a number of other persons of Bihta were also engaged by F C I including the truck No. B H Q 2205. He has said that on 15-3-1982, his truck and truck No. BHQ 2205 had gone to Khagaul railway station and he along with his vehicle had reached there at about 6/7 o'clock in the morning and in both the trucks, loading was made there and on truck No. BHQ 2205, empty gunny bags were loaded and when further loading started, some personnel of F C I reached there and stopped the loading. He has proved signature of B. K. Pandey (Exhibit-20/1).

9. According to prosecution, the appellant had brought truck No. B H Q 2205 carrying some empty gunny bags which he wanted to unload at the siding so that he may cover up the shortage in bags which were earlier removed by him or he

may remove fertilizer in those bags. So prosecution is not sure about the purpose for which empty gunny bags were brought by appellant but, admittedly, appellant did not succeed in his attempt. The case of appellant is that he had not brought the aforesaid truck No. B H Q 2205 and the workers working on this truck have given in writing before District Manager and other officials of F C I, Patna (Exhibit-A/16) that they had loaded 509 empty gunny bags from the railway siding itself and when they had brought the truck, not a single empty gunny bag was in the truck and at about 9.30 a. m. when they started loading of the full bags of fertilizer, some persons from Depot came and got the loading stopped saying that till the Incharge or District Manager comes, there would be no loading and they also quarrelled with truck driver. They further stated that they had come to siding at about 5.30 a. m. and at that time, six watchmen came from depot who were never seen before at the siding. Further case of the appellant is that earlier on 8-3-1982, he had lodged a written complaint (Exhibit-V) addressed to Mahbood Ali (P.W. 16), District Manager, F C I. Patna against Ashok Kumar (P.W. 17), Munna Raj (P. W. 21), Jamuna Singh (P. W. 19), Ram Bishun Raj (P.W. 14), Suresh Yadav (P. W. 24) and Gurbachan Prasad (P.W. 22) and R P F Constable Hridayanand Singh (P.W. 8) that they, conniving with each other and with the help of four other labourers, were caught by him while taking away ten bags of D A P fertilizer from railway siding (ambulance) and he, with the working labourers, got those bags again put at the siding and informed the matter to Assistant Store Superintendent Shri Narendra Nath but no action was taken and he made a request that he be recalled immediately from railway siding because he was apprehending that he may be put in trouble by those persons. Bharat Bhushan (D.W. 1), an employee of F C I has accepted that appellant had given a letter addressed to District Manager and he received the letter under his signature which he has proved (marked Exhibit-V/2 but in deposition written as Exhibit-V). The Court below has not considered this aspect of the matter only on the ground that D. W. 1 Bharat Bhushan, in his cross-examination, has stated that letters received are entered in receipt register but no such register has been brought on record to show that such complaint was actually filed by appellant, therefore, on the basis of this letter, it cannot be said that watchmen were inimical to the appellant. Court below failed to take note of the fact that receipt register was in possession of prosecution and it

was the duty of prosecution to produce receipt register if it would have denied the receipt of complaint by appellant but when D. W. 1, who is an employee of F C I, himself admitted the receipt of complaint made by appellant against some prosecution witnesses who have stated on the fact of bringing a truck by the appellant at the railway siding on 15-3-1982 and this witness has also proved his signature on the letter which he had given on receipt, the non-production of receipt register by prosecution in no way creates any doubt on the case of appellant that he had lodged a complaint against some persons who were caught by him while committing theft of fertilizer bags. I further find that case of appellant is that truck No. B H Q 2205 was armed with a gate pass but this gate pass has not been taken to be genuine document by the Court below only on the ground that the signature purporting to be of Birendra Kumar Pandey, the transporter on this gate pass was not of Birendra Kumar Pandey because he, in his evidence as well as by Exhibit-11, has denied the same. The Court below, in para-16 of its judgment has referred Exhibit-31 forwarding letter of C.B.I. sent to Government examiner of question document and report of handwriting expert Shanker Singh (P.W. 26) which is marked Exhibits-32 and 32/1. From these exhibits, it appears that specimen writings and signature of appellant which were marked S/1 to S/10 and admitted specimen signature and writings of co-accused Lal Bahadur Ram and Ramnath Thakur marked Exhibits-A/1 to A/9 were sent for comparison of writing in different inks and the original copy of truck chit No. 4291 regarding truck No. B H Q 2205, and writing and signature dated 4-3-1982 in the column of signature of consignee on the Goods Delivery Book of railway regarding receipt of consignment on 25-2-1982 were written by same person. This report does not conclusively fix the responsibility of a particular person as writer of question document which were marked as Q/1 to Q/9 because, as stated above, these documents were compared with the writings of not only of appellant but also with the writings of co-accused Lal Bahadur Ram and Ramnath Thakur. This report of handwriting expert does not show that writing of B. K. Pandey was also compared. The Court below, after considering the argument advanced on behalf of appellant that handwriting expert has not stated that signature purporting to be of B.K. Pandey on gate pass of truck No. B H Q 2205 was forged by appellant has given reason that if the appellant had not forged the signature of B.K. Pandey himself,

he might have got it signed by someone else and he is, therefore, liable for forgery because it was in his custody. Merely because gate pass was shown by appellant to P. W. 16, it cannot be said that forgery was committed by appellant in the gate pass because the gate pass must have been with the truck driver.

10. In this case, appellant has been held guilty for misappropriating 386 bags of fertilizer worth about Rs. 89,938/- as mentioned in the first information report. Charge under Section 120B read with Section 409 of I.P.C. and Section 5(2) read with Section 5(1)(d) of P. C. Act along with other charges was also framed against the appellant and all co-accused persons for criminally misappropriating 386 bags of D A P fertilizer worth about Rs. 89,938/-. About the duty of appellant, Vishnu Prasad Tandon (P. W. 10), in his evidence, has said that in the year, 1982, he was posted at A R D C/F C I, Khagaul as Assistant Grade II and appellant and co-accused Arvind Singh were posted as Assistant Grade III (D) and co-accused Mahendra Prasad Yadav, Lal Bahadur Ram and Ramnath Thakur were posted as watchmen and in the month of March, 1982, appellant and co-accused Arvind Singh were at railway siding, Danapur and the duty of appellant was to unload the goods from wagon, receive the same and get it transported to depot through transporter. T. P. Gond (P.W. 11), in para-3 of his cross-examination, has said that working hours on railway siding are from 6 o'clock in the morning to 6 o'clock in the evening. Ram Bishun Rai (P.W. 14); in para-9 of his cross-examination, has stated that it is the duty of watchmen to see that no theft is committed either from siding or from godown although in this paragraph, he has said that the accounts of goods at siding does not remain with watchman and it remains with siding incharge and after the duty hours of one watchmen, another watchman will come and will start looking after the goods. Mahboob Ali (P.W. 16) who, at the relevant time, was District Manager, F C I, Patna has said that Ravindra Nath was working as Assistant Depot Superintendent and appellant was Incharge of Ambulance Siding, Danapur and co-accused Arvind Singh used to assist him. Ravindra Nath (P.W. 20) has said that in the month of March, 1982, he was posted as Assistant Depot Superintendent of F C I at Khagaul and appellant was Incharge of Railway siding. In para-6 of his evidence, he has said that appellant, Bimlendu Sinha and co-accused Arvind Singh were the officers of same rank and appellant was Incharge and Bimlendu and Arvind Singh were appointed to assist him and V. P.

Tandon was AG II who was senior to appellant and whose duty was at the siding at godown. In para 8 of his evidence, he has said that under the supervision of V. P. Tandon, appellant, who was subordinate to V. P. Tandon, used to work. From all these evidence, it appears that appellant was not in the exclusive charge of the goods which he used to keep at the siding after unloading the same from railway wagon till the goods were transported to godown. Some other persons were there to supervise his duty and to assist him and some watchmen were also posted there. It is nowhere the case of prosecution that for 24 hours, appellant was in custody of goods because the evidence has come that working hours were from 6 o'clock in the morning to 6 o'clock in the evening. Admittedly, in the night time, watchmen used to keep watch on the goods lying at railway siding. The learned counsel appearing on behalf of the appellant has argued that railway siding is an open place where the bags of fertilizer, after unloading from railway wagons, used to be kept and it is not that the bags used to be kept in a close building and from the siding, bags used to be transported to godown by transporter through his trucks. He has further argued that in this case other co-accused persons including watchmen have been acquitted and only appellant has been found guilty by the Court below and has been convicted and sentenced. According to him, case of appellants and of all other co-accused persons, who have been acquitted, stand on same footing and appellant should have also been acquitted in this case. I do not agree with this argument raised on behalf of the appellant that because other co-accused persons have been acquitted and the case of appellant stands on similar footing, therefore, he is also entitled to acquittal. Only point for consideration is whether the charge of misappropriation of 386 bags as claimed by prosecution has been proved or not. If evidence on record shows that it is similar against the appellant and some others who have been acquitted by Court below, the appellant cannot take any advantage of that situation. Now I will take up the evidence on the point of misappropriation of 386 bags by appellant.

11. Case of prosecution is that when on 15-3-1982, it was found that appellant had brought one truck No. B HQ 2205 with some bundles of empty gunny bags bearing F C I marks giving rise to suspicion that he had brought the truck either to cover up the deficiency in number of bags which he had already removed or he wanted to remove some bags and in place of those bags to put empty bags and verification

of stock was made by a party and on verification the shortage of 386 bags of D.A.P. fertilizer worth Rs. 89,938/- was detected. Bhola Nandan Prasad (P.W. 9), T. P. Gond (P.W. 11) Kamta Pandey (P.W. 13), Sudama Rai (P.W. 16) were the members of P. V. Party who, after verification of stock at railway siding of which appellant is said to be Incharge, found that there was shortage of 386 bags. Bhola Nandan Prasad (P.W. 9) has proved P. V. report (Exhibit-12) which was submitted to D, M. after verification. In the P. V. report, it is mentioned that early in the morning of 16- 3-1982 after being satisfied with the left over stock, members of P. V. Party instructed the available staff including the appellant to start loading of the available stock and 2118 bags of fertilizer were transported and on completion of entire operation and after taking into consideration the full unloading operation as per 'D' form No. 5909, bags supplied and consumed bags transported from ambulance siding to A.R.D.C. Khagaul, the shortage came to 386 bags of D. A. P. fertilizer, the details of which is as follows :

(a) Total number of D.A.P. 23,864 bags

bags unloaded from the

wagons from 2-3-1982 to

11-3-1982

(b) New S.S.T. empty gunnies 500 pcs.

sent from A.R.D.C.

Khagaul on indent from

Shri Vijayendra Kumar,

Incharge Ambulance Siding

from 6-3-1982 to 15-

3-1982

(c) Stock transported from 20,130 pcs.

Ambulance Siding to

A.R.D.C. Khagaul upto

14-3-1982

(d) L.J.B. U/S. empty gunnies 275 pcs.

sent to A.R.D.C. Khagaul

by the Siding Incharge,

anapur upto 14-3-1982

after replacement/refilling

in S.B.T. New bags

(e) Balance at the close of the 3,734 bags

operation on 14-3-1982

and handed over to the

watchman as per charge

report and 'D' Form No.

5909

(f) New S.B.T. empty gunny 200 pcs.

supplied from A.R.D.C.

Khagaul on request from

Shri Vijayendra Kumar on

16-3-1982

(g) Stock transported to 3,618 bags

A.R.D.C. Khagaul from

15-3-1982 to 16-3-1982

(h) Empty gunnies sent to 155 pcs.

L.R.D.C.-Khagaul (134 U/

S L.J.B. and 21 New

S.B.T.) (Total 155 pcs.)

(i) Shortage in DAP Fertilizer (--) 386 bags

stocks worked out

It is further mentioned that out of 500 new S.B.T. empty bags sent from depot, 275 bags were replaced and 225 new S.B.T. bags should have been sent at railway siding Danapur but out of 225 S.B.T. bags, only 6 new S.B.T. bags were found.

12. Mr. Rakesh Kumar, learned counsel for C.B.I. has submitted that from 2-3-1982 to 11-3-1982 altogether 23,864 bags were received out of which upto 14-3-1982, 20,130 bags were already transported to godown meaning thereby that balance at the close of operation on 14-3-1982 should have been 3,734 bags out of which when P. V. Party started verification, it transported only 3,618 bags from two depots from 15-3-1982 to 16-3-1982 and in this way, there was shortage of $(3,734-3,618) = 116$ full bags of fertilizer. Besides this, appellant had received 500 new S.B.T. gunny bags from 5-3-1982 to 15-3-1982 out of which he had returned only 275 such bags leaving a balance of 225 empty bags. Again on 16-3-1982, P. V. Party received 200 S.B.T. empty gunny bags and in this way, total balance of empty gunny bags became 425 out of which only 155 empty gunny bags were sent to depot and remaining 270 empty gunny bags were not found. According to him, in this way, there was shortage of 116 full bags and 270 empty bags which comes to 386 bags. The details of bags unloaded, empty gunny bags received, full bags and empty gunny bags sent to depot in P.V. report also shows that while

calculating during verification, empty gunny bags were also taken into account. The Court below also, in para 12 of its judgment, has observed that from the evidence and documents on record, it appears that there was shortage of 116 sound +270 empty bags = 386 bags. This is altogether a new case of prosecution which has developed subsequently because, as stated above, the charge against appellant is that he misappropriated 386 bags of fertilizer worth Rs. 89,938/- but neither in first information report nor in charge, there is any mention that he misappropriated only 116 sound bags and 270 empty bags. The examination of appellant under Section 313 of Criminal Procedure Code also shows that he was questioned for misappropriating 386 D.A.P. fertilizer bags during the period 2-3-1982 to 16-3-1982. Nowhere he has been asked that he misappropriated 116 full bags and 270 empty bags. I find that the trial of ' appellant on this score alone stands vitiated.

13. Dharmendra Prasad Samayar (P.W. 29) was posted as Assistant Manager, F.C.I. Phulwarisharif in the month of March, 1982. He was also one of the members of P. V. Party and he has proved signature of Ravindra Nath on a letter marked Exhibit-V. He has said that during P. V. he did not make any enquiry about the number of bags which were despatched in the consignment which was under consideration of P. V. and he has also said that he did not enquire how many bags of that consignment were transported to depot by the contractor and he did not make any verification of the bags kept in depot. He has further said that he made enquiry in respect of only those bags which were unloaded from 2-3-1982 to 11-3-1982 of the consignment, the bags of which were unloaded from 2-3-1982 to 31-3-1982. He has further said that there was no distinction available at the spot from which it could be gathered that which bags were unloaded on 2-3-1982 or 3-3-1982 or 4-3-1982 or 5-3-1982 or so on.

14. Exhibit-V is the signature of Ravindra Nath who was the then Assistant Depot Manager, Food Storage Depot, Khagaul, Patna on Exhibit-V/3 which is a report giving the details of D. A. P. fertilizer bags despatched from Vishakhapatnam to Khagaul and number of bags unloaded at Danapur railway head with R. R. number and wagon numbers from 3-3-1982 to 31-3-1982 submitted to District Manager, F.C.I., Patna by Assistant Depot Manager by this letter No.

FSO/KG/Allot/81-82 dated 3-4-1982. The appellant is being charged in this case for misappropriating 386 bags which were unloaded from wagons at ambulance siding between 3-3-1982 to 14-3-1982. Exhibit-V/ 3 shows that on 15-3-1982, 579 bags each from two wagons against two railway receipts meaning thereby total, 1,158 bags on 16-3-1982, 1,108 bags, on 20-3-1982, 587 bags and on 31-3-1982, 107 bags were unloaded besides other bags in different quantities unloaded from 3-3-1982 to 14-3-1982. This report shows that as per different R Rs, 28,017 bags were despatched but out of these only 27,784 bags were unloaded and in this way, there was short delivery of 233 bags. If the number of bags which were unloaded on 15-3-1982, 16-3-1982, 20-3-1982 and 31-3-1982 which altogether comes to 3,923 bags is deducted from 27,784 bags, which is the total number of bags unloaded from 3-3-1982 to 31-3-1982, it will come to 23,861 bags meaning thereby that from 3-3-1982 to 14-3-1982, only 23,861 bags were unloaded from figure as 23,864 bags meaning thereby it has included three more bags in the number of bags unloaded from the wagons at ambulance siding from 3-3-1982 to 14-3-1982 and there is no explanation why three more bags were added in the stock. It is further stated in this report that as per despatch documents, standard bag, each bag carrying 50 kgs. of fertilizer had been despatched from Vishakhapatnam but on arrival when a test weighment of 10% of bags was made, it was found that the weight of bags was not of standing character and 100% weighment was not practically possible because of the fact that in the consignment received most of the bags were found old, rotten and torn, mouth having poorly stitched and contents dropping badly from loopholes and mouth and abnormal loss in transit was apprehended. The report further shows that because godown No. 1 remained under seal by C.B.I. from 27-2-1982 anyhow the entire consignment was accommodated in godown No. 2. This document shows that all the bags which were unloaded at railway siding from 3-3-1982 to 31-3-1982 were accommodated in godown No. 2. It does not show that there was any shortage in the number of bags unloaded from wagons at railway siding from 3-3-1982 to 31-3-1982 and the bags which were accommodated to godown. It is the own case of prosecution that after unloading the bags at railway siding, the bags used to be carried to godown by transporter. If all the bags received by different R Rs. from 3-3-1982 to 31-3-1982 were accommodated in depot, the question of shortage of some bags after

unloading and before sending it to depot does not arise otherwise it would not have been mentioned in the report that all the unloaded bags were accommodated in godown. Dharmendra Prasad Samayar (P. W. 29), the then Assistant Manager, F.C.I., in para 1 of his further cross-examination, on recall has said that transport contractor after transporting the bags in depot used to claim the charges by producing handling and transporting bill giving details of how many bags were unloaded and how many bags were transported and on the back of that bill, there used to be details of shortage and damage of bags for which contractor and depot incharge used to put their signatures. Ex-hibit-R/1 is the handling bill submitted by transport agent Birendra Kumar Pandey for the period from 3-3-1982 to 1-4-1982. This . document shows that the contractor stated in this bill that 27,784 bags were unloaded from wagon and were stocked on platform part I and item No. 2 of this bill shows that 27,767 bags were loaded in two trucks. This bill contains the certificate granted by Assistant Depot Superintendent, Food Storage, Khagaul, Patna showing that six bags were received short during transportation on 14-3-1982. Exhibit-R is also bill for transport dated 26-5-1982 for the period from 3-3-1982 to 1-4-1982 showing that the contractor claimed transportation of 27,767 bags but the certificate issued by Assistant Depot Superintendent, Food Storage Depot, Khagaul shows that six bags were received short during transportation on 14-3-1982. As stated above, from Exhibit-V, it appears that from 3-3-1982 to 31-3-1982, altogether 27,784 bags were unloaded and Exhibits-R and R/1 show that the bill of contractor for transporting 27,784 bags from 3-3-1982 to 1-4-1982 was passed with a certificate that six bags were received short and price of those bags were recovered from the contractor as per the certificate on Exhibit-R. In this view of the matter, the question of any shortage does not arise. Apart from it, P.Ws. 13 and 18, in their evidence, have admitted that they found 282 bags cut and open and P.W. 13, in para 5 of his cross-examination, has said that number of cut and open bags was to be deducted from sound bags and be added in the account of empty gunny bags and he further admitted that this number of 282 bags shall be deducted from the closing balance of 14-3-1982 but the report by P.V. Party does not show that any deduction of such type of bags was made.

15. The Court below, in paras 21, 22 and 23 of its judgment has referred Exhibits-R, V and V/3 and also Exhibit-U/1 which is theft/pilferage report for the month of

March, 1982 which does not show any theft of any fertilizer bag from the railway siding of Danapur. It also considered the argument of learned Additional Public Prosecutor that these documents should not be believed because these documents have been produced on behalf of accused. In para 23 of its judgment, it has specifically observed that prosecution has not brought any document to contradict these documents and P.W. 30, the Investigating Officer, in his evidence, has stated that he kept his investigation confined only upto the date of occurrence of unloading and missing of goods and he did not investigate the incident occurred after P. V. The further observation is that in view of admission of P.W. 20 of his signature on Exhibit-U/1 and in absence of any other record contradicting the above documents and also in view of the fact that Investigating Officer did not make any enquiry on the point that as to whether all the stocks under the consignment was received by the department subsequently it was not proper that Exhibit-U/1 should not be disbelieved on the ground that it was produced from the custody of appellant. In last portion of this paragraph, the Court below has observed as follows :

'I hence find that all the stocks minus the shortage delivered by the railway and the shortage made by contractor was received by FSD/FCI.'

After making aforesaid observation, in para 24 of its judgment, the Court below has observed that though from the above evidence, it appears that all the bags received were transported to the depot, it is still an admitted position that there should be a balance of 3,734 bags as the opening balance on 15-3-1982 and evidence of P.W. 29 and P. V. report (Exhibit-12) shows that the entire stocks and empty gunny bags were left at the siding and there was shortage of $116+270=386$ bags and, therefore, it is evident that appellant misappropriated those bags. I fail to understand that after considering the entire documentary as well as oral evidence when Court below came to the conclusion in para 23 of its judgment that all the stocks minus the shortage made by railway and contractor was received by the FSD/FCI how it has held appellant guilty for misappropriating 386 bags of fertilizer.

16. Considering the entire evidence, oral as well as documentary on record, I find that prosecution has not been able to bring on record the manner in which verification of stock was made, how it accounted for the torn and damaged bags of fertilizer found in view of its admission that some bags were found torn and damaged and how it reached to a conclusion of shortage in the bags when the documents of prosecution especially Exhibits-V/3, R and R/1 show that all the bags unloaded from 3-3-1982 to 31-3-1982, except six bags, were transported to godown and for this shortage of six bags, recovery has already been made from the transport contractor.

17. In the result, this appeal is allowed. The judgment and order of Court below is set aside and the appellant is acquitted of the charges.

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18. As the appellant is on bail, he is discharged from the liabilities of bail bonds.

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