

Ram Avtar Vs. State

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Court : Delhi

Decided On : Oct-08-1993

Reported in : 1993IVAD(Delhi)289; 1994CriLJ323; 52(1993)DLT508

Judge : R.L. Gupta, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 161; [Prevention of Corruption Act, 1947](#) - Sections 5(2)

Appeal No. : Criminal Appeal No. 312 of 1976

Appellant : Ram Avtar

Respondent : State

Advocate for Pet/Ap. : Usha Kumari and; S. Lal, Advs

Judgement :

R.L. Gupta, J.

(1) This criminal Appeal is directed against the

JUDGMENT / ORDER

dated 19-8-76/20-8-76 of the learned Special Judge, Delhi by which he convicted the appellant under Section 161 of the Indian Penal Code and under Section 5(2)

read with Section 5(l)(d) Prevention of Corruption. Act, 1947 (hereinafter called the Act, and sentenced him to Rigorous Imprisonment (RI) for one year under first count and a similar sentence with finis of Rs. 100 or in default to suffer further RI for one month under the second count. The substantive sentences of imprisonment were made to run concurrently.

(2) The prosecution case is based upon a complaint made by Rajesh PW7 to the Superintendent of Police, Cbi, Kota House, New Delhi. He stated in the complaint as follows: 'I am running my philately business for the last about 3 years. On 22nd July, 1974 my house No. A-45, East of Kailash, New Delhi-24 was searched by Shri Ram Saran Malik, Dsp Economic Offences Wing, Jam Nagar House, New Delhi. After the search I was arrested and was bailed out on 25th July, 1974 by the court. The Dsp had come to my house in a jeep which was driven by Shri Ram Avtar, driver (appellant in this appeal). After 10 15 days of the search of my house I was called in Jam Nagar House by Shri Ram Saran Malik DSP. I reached there at 10.00 A.M. and remained there till 4.30 P.M. Shri Ram Saran Malik Dsp did not record my statement and at 4.30 P.M. only asked, me to again come to his office next day at 4.00 P.M. When I came out of the office, the said driver of the jeep approached me and told that nothing would happen against me. Next day i again went there at about 4.00 P.M. but Shri Ram Saran Malik Dsp was not present in his office. The driver informed me that Dsp was not present and directed me to come again to the office next day with some money and he would give me some information of my interest. I again went to the said office next day at about 3.30 P.M- Shri Ram Saran Malik asked me that he does not requite me at present. The driver was present who asked me to go to India Gate where he would also be coming. Accordingly I went there and the driver also arrived within 5-10 minutes. He told me that there was nothing in the case and I should not worry at all. Thereafter he demanded a sum of Rs. 150 and further told that he would supply me useful information about my case. I put him off by saying that I have no money at present and would certainly please him. I was again called by, Shri Ram Saran Malik Dsp on 23rd August, 1974 at 11.00 A.M. He was present in his office but asked me to wait for sometime as he was busy with some other important work. I told him that I was not feeling well and after his permission I returned to my house. As soon as I came out of his office the driver approached me arid again demanded

a sum of Rs. 150 and told that he would supply me very useful information pertaining to my case. I pat him off on the pretext that I have no money with me at the moment. Thereupon he told me that he would come to my residence on 25 August, 1974 at about 6.00 P.M. and would collect the money to which I consented. I am not in favor of giving bribes. Necessary action may kindly be taken. Yours faithfully, Dated 24-8-74 sd/- Rajesh Kumar A-45, East of Kailash, Delhi-24.' 1725 HCD/94 19.

(3) Rajesh submitted this complaint to Dig Mr Mukherjee on the same day, who called Dsp Chander Bhan of the Cbi in the presence of Rajesh. Mr. Mukherjee handed over the complaint bx. PW5/A of Rajesh to Chander Bhan and asked him to investigate. formal Fir Ex. PW5/B was recorded. The Dsp directed Rajesh to see him on the following day in Cbi office, Safdarjung Enclave at about 3.30 P.M. and bring along the bribe money amounting to Rs. 150. He also gave direction to Inspector Joshi and Hc Harbans Lal to see him at Cbi office on the following day at about 11.00 A.M. On the next day, he proceeded to police post Sector 8, R. K. Puram in a staff car at about 11.45 A.M. with Inspector Joshi and Hc Harbans Lal from his Safdarjung Enclave office. There he directed Hc Harbans Lal to procure two independent witnesses from that locality. Accordingly, R. D. Pathak PW2 came in the first instance followed by Asa Ram Pwi who accompanied Hc Harbans Lal. Mr. Chander Bhan joined both these persons as independent witnesses. They then reached Safdarjung Enclave Cbi office at about 3.00 P.M. Inspector Mukherjee was also joined there in the raiding party.

(4) At about 3.30 P.M. Rajesh arrived and he was introduced to the independent witnesses and other members of the raiding party. Rajesh also narrated his grievance to the members of the raiding party and produced 15 ten rupee currency notes before the DSP. He tendered the number of those notes Ex. P1 to P15 in Memo Ex. PW1/A he Dsp then handed back the currency notes to Rajesh with instructions to give the same to Ram Avtar, appellant as and when demanded by him. He further instructed him to cough loudly by way of signal on the passing on of currency notes to the appellant. Asa Ram was directed to accompany Rajesh and hear and observe what transpired. Then they proceeded to the house of Rajesh in East Kailash at about 5.00 P.M., led by Rajesh on his scooter while the

other members of the raiding party went in the staff car They reached the place at about 5.30 P.M. The staff car was parked at some distance from the house of Rajesh. On examination of the house of Rajesh it was decided that Rajesh should take up his position the drawing room where there was a sofa and sofa chairs while hers members of the raiding party should take up potion in the joining bed room which opened into the drawing room. These two rooms were connected with an intervening door. At about 7.00 P.M. the appellant came, entered the drawing room and sat on a sofa near Rajesh. After conversation the appellant demanded the bribe and Rajesh gave him the currency notes of Rs. 150. After counting the notes, the appellant is alleged to have kept the aforesaid bribe money in the right side pocket of his pant. Rajesh gave the appointed signal hereupon the bribe money of Rs. 150 was recovered from the right pocket of the pant of the appellant in the presence of both the witnesses, namely, Asa Ram and R. D. Pathak by Dsp chander bhan and taken into police possession vide recovery memo Ex. pw1//b. It is then further the case of the prosecution that the passing of money was seen and conversation between the appellant and Rajesh was over heard by independent witness Asa Ram and Chander Bhan, Dsp Appellant is alleged to have gone to the house of Rajesh in Government jeep No. DLJ-1720 which was found parked outside the house. It was brought back to Kota House. The appellant was arrested and released on bail. In the aforesaid circumstances the appellant was alleged to have committed offence under Section 161 Indian Penal Code and Section 5(2) read with 5(l)(d) of the Act. After obtaining sanction, the challan was filed and the appellant convicted and sentenced as stated above.

(5) I have heard arguments addressed by learned counsel for the parties. Learned counsel for the appellant drew my attention to certain discrepancies in the statements of witnesses and infirmities inherent in the prosecution case and evidence Or account of which she urged, the appellant was entitled to be acquitted. On the other Land, learned counsel for Cbi described such discrepancies as in material and the so-called infirmities either as non-existent or having no bearing on the merit of the case. Some case law has also been cited. 6. According to allegations in complaint Ex. PW5/A Rajesh visited the office of Dsp Ram Saran 5 times in all, but in his statement in Court he says he visited his office 6 times. Now according, to Rajesh. raid was conducted at his house on 22 July.

He was released on bail on 24 July and he was called by Dsp Ram Saran to his office for the first time 10 -15 days thereafter. But according to Dsp Ram Saran. he called Rajesh for the first time on 25 July, that is after 3 days only, and that Rajesh visited him only 3 times in all, that is, on 25 July.

(6) August and 23 August. PW4 Constable Prithvi Chand who claims to have accompanied Dsp Ram Saran on 22 July at the time of raid on the house of Rajesh, deposed that after 15/16 days of the raid he had again accompanied Dsp Ram Saran to the house of Rajesh and when Rajesh was not found, he was directed by the Dsp to serve a notice for appearance on Rajesh, and he served such notice on the next day. Strangely enough, there is no mention of any such second visit of the Dsp to the house of Rajesh by the DSP. In fact, the whole emphasis in the statements of the Dsp and Rajesh is on the 1 visits of Rajesh to the office of the Dsp whenever he was called. It is also not understood what for the Dsp visited the house of Rajesh for the second time. Rajesh also says in cross-examination that he was not called for appearance by the Dsp through a written notice. Then according to Rajesh, he was called by Ram Saran to his office on 23 August at about 10.30 A.M. for the last time and when Rani Saran. asked him to wait outside, he told him that he was not feeling well and he was allowed to go. Rajesh does not talk of any further visit to the office of Ram Saran and straight comes to the story that when he came out of the office of Ram Saran, appellant met him and when he told the appellant that he was not carrying Rs. 150, the appellant told him that he would come to his house to collect the money at 6 P.M. on 25 August. As against this, according to Ram Saran Dsp when Rajesh said that he was not well, he asked him to come at 3 P.M. but he did not come and rather sent his brother at 3 P.M. to inform that Rajesh would now be coming only on 26 August. But Rajesh neither says that he was called by Dsp Ram Saran on that very day, that is, 23 August at 3 P.M. nor that he sent his brother at that time to inform that he would now come on 26 August only.

(7) Then according to Rajesh, the. members of the raiding party got down from the vehicle near his house and the driver thereafter took away the vehicle. But according to Pwi Asa Ram the vehicle was parked outside at some distance and then all the members of the raiding party walked to the house of Rajesh. PW1

does not know if any tape recorder was carried by Dsp Chander Bhan along with him for laying the trap. Same is the reply of PW2, but he is sure he did not hear any sound which had been tape recorded, being played in the bed room. His answer is non committal in this respect. In the first sentence he is not sure of tape recording while in the next sentence tape recording was done out he did not hear the sound of its being played. Dsp Chander Bhan gave varying versions on this point. First he said that their special unit was provided with tape recorders and .his own office also had a tape recorder.

(8) Then he said that he did not take tape recorder for recording conversation. Strangely, he then said that he took the tape recorder from the special unit. Then he again changed and said that in fact the tape recorder was taken by Inspector Mukerjee and after reaching the residence of Rajesh and inspection of the positions which were to be taken up, it was considered expedient to see and hear the conversation themselves and not to make use of the tape recorder. In fact, the statement of Chander Bhan in respect of the carrying the tape recorder and taking a decision at the spot regarding its user makes the presence of PWs 1 and 2 in the said party doubtful. They were bound to observe such major events if they were actually member of the raid party. It was a Sunday. Normally it is presumed that offices remain closed on Sundays, and so if the special unit was closed why tape recorder was procured from that unit when it was also available in the office of the Dsp himself? So the possibility of the tape-recording of the entire occurrence, as suggested on behalf of the appellant and nothing incriminating being found and its consequent destruction cannot be ruled out and this circumstance cause another dent in the prosecution case.

(9) Then Rajesh PW7 in examination-in-chief says that when 10 15 days after the raid, that is, first or second week of August. he went to the office of Dsp Ram Saran, he was asked to wait outside up to 4 or 4.30 P.M. and his statement was not recorded. In fact, on none of his visits to the office of the Dsp, his statement was recorded. As against this in cross-examination, he says that he was interrogated for 3-4 hours by the Dsp in the first week of August. So it will be seen that Rajesh has made a very discrepant statement in his deposition on the same day. We also cannot lose sight of the fact that his own house was raided by Dsp

Ram Saran in which suspected stolen postal stamps worth Rs. 4 to 5 thousand were recovered. According to his own admission the recovery also included unused Service Stamps of the value of Rupees 2 to 3 thousand. Dsp Ram Saran made his statement in Court after 1 year and 10 months and till then he didn't know if the charge sheet against Rajesh had been put up or not. It is obvious prima facie that Rajesh is being utilized by Dsp Ram Saran through Dsp Chander Bhan against the appellant with whom he had no love lost because he admitted in cross-examination that he had made a complaint against him on account of his misbehavior and the appellant was given warning by the SP. The appellant admittedly worked over time with Ram Saran in his raids and the appellant suggested in his cross-examination that Ram Saran neither gave any money to him nor recommended his name for rewards, which is the usual practice in successful raids. Another infirmity in the prosecution case is that if the appellant had actually demanded money from Rajesh, Rajesh was bound to bring this fact to the notice of Dsp Ram Saran first because the appellant was constable driver of Ram Saran. He was not connected in any way with any other DSP. Rajesh was likely to act in this manner according to common course of human conduct. The complaint of Rajesh is addressed to SP. CBT. But Rajesh says in his statement that he presented it to Dig Mukherjee. This fact also suggests that there was some moving spirit behind Rajesh. Otherwise, how could he come and meet the Dig on 24 August when he had conveyed to Ram Saran that he will be coming on 26 August only. It is quite possible that the movements of Rajesh were being guided by Ram Saran.

(10) There is then another circumstance. The appellant was not in a position to supply any useful information to Rajesh because he was only a constable driver and was at no point of time entrusted with the investigation file. The gravamen of the charge under section 161 Indian Penal Code seems to be that the public servant accepts or obtains or agrees to accept or attempts to obtain any illegal gratification, as a motive or reward for doing or forbearing to do any official act in the exercise of his official functions, favor or disfavor to any person with any Govt., local authority etc. or with any public servant. Section 161 Indian Penal Code has since been omitted by Section 31 of Prevention of Corruption Act, 1988. But since the present occurrence pertains to a period when that section was in force, and

the appellant was specifically charged under that Section and Section 5(1)(d) of the Act. this case is being discussed from that angle. The first two illustrations under that section clearly indicate the obtaining of gratification by a munsif or the Consul because they were in a position to deal directly with the matter/matters for which gratification was obtained. The third illustration pertains to the erroneous induction of a belief by a public servant in the mind of the other that that person had obtained the title by the exercise of influence with the Govt. by the public servant. therefore, these illustrations seem to suggest, us is so apparent from the language of Section 161 Indian Penal Code , that the accused servant who accepts gratification, does so as a motive or reward for doing or forbearing to do any official act in the exercise of his official functions. therefore, unless the prosecution is also able to show that some favor could be shown by the accused in the exercise his official functions, to the person from whom he accepts illegal gratification. he may not be capable of being found guilty under section 161 Indian Penal Code . According to Section 5(l)(d) of the Act, a public servant is guilty of criminal misconduct if he abuses his position as a public servant for obtaining any pecuniary advantage. This definition is akin to the language of Section 161 Indian Penal Code in which also the public servant should be in a position to show favor in exercise of his official functions. The appellant is alleged to have told Rajesh time and again that he will supply him useful information and he should not worry. Rajesh cannot be considered to be such an-intelligent person that he would not ask him as to what useful information could be supplied by him for which he was demanding money from him. Rajesh also knew that the appellant was only a constable driver and as such could not have anything to do with the investigation and. therefore, not in a position to do any thing with his case file in the exercise of his official functions. The type of situation in the case in hand arose in Raghbir Singh Vs . State of Punjab : 1976 CriLJ172 . The Supreme Court held, 'Where the accused who was alleged to have demanded and accepted the bribe for granting exemption from goods tax was in fact not dealing with such application. a serious infirmity was introduced in the prosecution case" The appellant Raghbir Singh was a Passenger and Goods Tax Clerk li in the office of Excise and Taxation Officer. Amritsar. But it was Harmohan Singh, Passenger and Goods Tax Clerk I who was concerned with the processing of applications for exemption from payment of

passenger or goods tax. The appellant was not handing those applications but undoubtedly one of the duties entrusted to him was the detection and recovery of passenger and goods tax. Since the decoy Jagdish Raj was interested at that time only in obtaining a certificate relating to exemption from payment of goods tax, which was not to be dealt with by the appellant, it was held to be a circumstance to weaken the foundation on which the edifice of the prosecution story rested and introduce an element of infirmity in it. It was also observed, 'It would be desirable if in cases of this kind where a trap is laid for a public servant, the marked currency notes, which are used for the purpose of trap, are treated with phenolphthalein powder so that the handing of such marked currency notes by the public servants can be detected by Chemical process and the court does not have to depend on oral evidence which is sometimes of a dubious character for the purpose of deciding the fate of the public servant. It is but meet that science-oriented detection of crime is made a massive programme of police, for in our technological age nothing more primitive can be conceived of than denying the discoveries of the science as aids to crime Suppression and nothing cruder can retard forensic efficiency than swearing by traditional oral evidence only, thereby discouraging liberal use of scientific research to prove guilt'.

(11) In *Bhajan Siagh Vs . State of Punjab* : 1977 CriLJ439 there were contradictions in the statements of prosecution witness which remained unexplained and also there was no evidence that any scientific test was applied to prove that the accused bandied the currency notes in question. The contradictions also suggested that the defense version might be correct. In the background of the aforesaid circumstances it was held that, 'there were infirmities in the prosecution case casting legitimate doubt on truth of the prosecution story and so the conviction could not be sustained.'

(12) In the present case also, the investigating officer did not treat the currency notes with phenolphthalein powder, though he had made up his mind to lay a trap on the earlier day. He had sufficient time to procure the powder. This circumstance also, therefore, weakens the fabric of the prosecution case.

(13) There is another important aspect of this case. When the appellant is stated to have met him on 23 August below the office of Ram Saran, Dsp, the appellant demanded from him Rs. 150. When the appellant put him off by saying that he did not have money, he told him that he would come to the residence of Rajesh on 25 August at about 6.00 P.M. to collect money and to which he consented. This is so stated in the complaint Ex. PW5/A. However, in respect of that incident Rajesh deposed in court that when the appellant told him that he will come to collect money on 25 August to his residence at 6.00 P.M., he kept quiet. It clearly means that Rajesh gave no hint to the appellant that he could come to his residence to collect money. Since Rajesh made no positive promise to the appellant encouraging him to come to his house, it seems highly improbable that the appellant would visit the house of Rajesh on 25 August. The appellant is actually alleged to have come to the house of Rajesh at about 7.00 P.M. by all the witnesses. Since neither Rajesh consented to the visit of the appellant to his house at 6.00 P.M. nor the appellant came to his house at 6.00 P.M., it defies common sense as to how and why the raiding party would keep waiting for the arrival of appellant at about 7.00 P.M. If the raiding party had actually collected at the house of Rajesh, as is the case of the prosecution, then when the appellant had not turned up for about an hour after the time given by him had passed, it does not stand to reason why the raiding party would have kept waiting for his arrival. Even if somehow we persuade ourselves to believe that the appellant did visit the house of Rajesh on 25 August, the statement of Asa Ram PW1 in respect of hearing and watching the actual occurrence between Rajesh and the appellant does not inspire confidence. He stated in cross-examination that he saw the full face of the appellant while peeping by the side of the curtain. He and Dsp Chander Bhan, he further says, were peeping from same side of the curtain. One has just to visualise the situation of these two rooms. If actually these two persons had watched the occurrence by peeping by the side of the curtain, both at a time, it is very probable that the appellant whose full face was visible to them at that point of time would have also been able to see both of them and immediately he would have become conscious of the laying of the trap and would have been the last person to accept any illegal gratification from Rajesh. In *Tej Bahadur Singh v. The State of U.P.* 1990 (1) Cri (3), the appellant was a Sub-Inspector in the local

Intelligence unit at Allahabad. He was alleged to have gone to the house of the decoy on 21-12-75 at about 7.30 P.M. There were a drawing room and second room separated by a curtain in that case also as in the present The decoy similarly took position in the drawing room while remaining members of the raiding party took position in the other room. On the handing over of a sum of Rs. 500 to the appellant, and his keeping them in right pocket of his coat, the raiding party led the Dsp entered the drawing room and arrested the appellant. The supreme Court noticed some infirmities in the case of the prosecution. first was that after having made a promise to come on a particular Jay, it could well be that the appellant might not have turned up and his coming to the house of the decoy was a speculative act. In this circumstance the straightaway taking steps of arranging the trap by the complainant was stated to be a circumstance which did set a doubt in the mind of the Court. The second circumstance was that it was inconceivable that the appellant, who was himself a Vigilance Sub-Inspector, when scheduling his visit to the house of the complainant, would himself be non-vigilant about the surroundings in which he was walking into and placing himself. The third circumstance of significance was about the happening of the incident in the house of the complainant himself about which the Court observed, 'Now when the appellant has entered the house an hour earlier before his scheduled visit, it cannot be expected that the members of trap party which were said to be sitting in the adjoining back room had become instantly stone-still so as to conceal their presence from the appellant.

(14) The dimension of those two rooms 8 ft. X 8 ft. and 8 ft. X 12 ft. separated merely by a window and a door on which curtains were hanging are suggestive of the fact that if the happenings in one room could be known to the inmates of the other, the converse would also be true. Relatively, if the members of the trap party could see and hear what was happening in the drawing room through the curtains, the inmates of the drawing room could also see the presence of others in the connecting room, huddled as they were in that small space. The appellant in these circumstances could not be expected to throw caution to winds and either ignore or become indifferent of the presence of the inmates of the adjoining room especially when both rooms were lit by electric tube-lights and there was just a curtain intervening. Additionally, in such a situation there awakes the sixth sense

in every human being so as to detect the presence of another in such close surroundings. The appellant could not have been so foolhardy to accept bribe in circumstances which were obviously suspicious, and that too in house of the complainant, running the risk of being entrapped'. In the background of the aforesaid circumstances it was held that, 'it was not safe to sustain the conviction on the framed charges'. The facts of the present case are almost akin to the afore-

(15) In *Darshan Lal Vs . The Delhi Administration* : 1974 CriLJ307 , the appellant as a constable had investigated certain complaint against Niranjan Lal at whose instance the trap was laid against the appellant. Niranjan Lal was held to be a partisan witness.

(16) In the present case, it has been pointed out earlier that Rajesh complainant himself was an accused in a serious case and Dsp Ram Saran has not even filed a challan against him. Obviously Rajesh 1725 HCD/94 20. was under his influence, and to save his own skin he could be made to do anything by Ram Saran, who had no love lost with the appellant against whom he had even made a complaint to the Sp and who had given a warning to him. It is not possible to believe Dsp Chander Bhan when he said that he did not enquire from Rajesh in what connection his house was searched and by whom and what was the nature of the case against him. As a prudent police officer, he was bound to investigate these facts and when he says he did not make enquiries about those facts, prima facie he seems to be making that statement just to conceal his connection with Dsp Ram Saran. thereforee, the possibility of the appellant being framed up in this case at die instance if Dsp Ram Saran cannot be ruled out. In fact, the appellant was not useful to Rajesh otherwise also in supplying any information as he had nothing to do with his case. He was only a driver constable. when the appellant is alleged to have told Ra)esh that he will come to his house on 25 August to collect money, Ra)esh simply kept quiet. is highly improbable that the appellant would go to his house even without his consent for collecting money. The defense version that the appellant had gone to convey to Rajesh the message of Ram Saran Sp for Coming to his office next day is, thereforee, more plausible.

(17) In the light of above discussion, it will be seen that there are material contradictions and inherent infirmities in the case of the prosecution. Rajesh, complainant is in the nature of a partisan witness. Asa Ram PW1 is not worth believing with his statement in cross-examination that both he and the Dsp Chander Bhan were peep- from the side of the curtain when the actual conversation including the act of gratification being passed was going on because in that situation both of them were likely to be observed by the appellant also Use of phenolphthalein powder was also not made. Taking the totality of circumstances into circumstances, it will not be safe to situation the conviction of the appellant. I would, therefore, like to him the benefit of doubt. The appeal is, therefore, allowed and the appellant acquitted. His bail bonds are discharged.

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