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Court : Rajasthan

Decided On : Apr-20-1987

Reported in : 1987(2)WLN33

Judge : Vinod Shanker Dave and; Inder Sen Israni, JJ.

Appeal No. : S.B. Criminal Appeal No. 165 of 1977

Appellant : Mohan Singh

Respondent : State of Rajasthan

Disposition : Appeal allowed

Judgement :

1. This appeal is directed against the judgment of Special Judge, ACD cases Jaipur, dated 25th March, 1977. The accused-appellant has been convicted for offences under Section 161 IPC and 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act and has been sentenced to one year's rigorous imprisonment and a fine of Rs. 200/- and in default of payment of fine to further undergo two month's rigorous imprisonment on each count. Both the sentences have been made to run concurrently.

2. The accused-appellant preferred an appeal to this Court which has come up before the Division Bench on being referred to it by our brother Hon'ble G.M. Lodha. Hon'ble Single Judge while hearing the appeal felt that an important

question of law is involved in the case which required adjudication and consideration by a larger bench. His Lordship also observed in the order of reference that since it is an old criminal appeal, he is referring the entire case to larger bench and treating the appeal as disposed of by the Single bench. We, therefore, have heard the appeal not only on the question framed but also on merits.

3. The question framed by the learned Single Judge is as below:

Whether, in a case of trap by the Anti Corruption Department non-preparation of seizure memo or recovery memo of the amount recovered from the accused is fatal to the prosecution?

4. Before we address ourselves on the aforesaid question we deem it proper to first mention the facts giving rise to filing of this appeal.

5. At 10.00 a.m. on 12-9-1974 decoy Chandrakant Choudhary filed a written application Ex. P. 3 before Addl. I.G.P. Anti Corruption Department, Jaipur to the effect that he is resident of Tehvildaron-ka-Rasta, Chand Pole Bazar, Jaipur and is appearing in the examination of 1st year. He had applied for receiving training in Home Guards in June, 1974 and Home Guards Office wanted verification certificate about his character. Shri Mukesh Singh Incharge of Police out-post Silawatan gave a report to him which he took to Police Station, Kotwali on 11-9-1974. The constable incharge police station maintaining the records, after seeing the report, found no adverse report and gave it to the constable whose duty is to get the seal of SHO affixed and despatch. That constable demanded a sum of Rs. 5/- for affixing the seal which money he did not possess. Since he does not want to give bribe, he is presenting the note of Rs. 5/-.

6. This application bears an endorsement at E to F by Dy. S.P. Radhey Shyam PW 7 where in it is mentioned that application was presented before Addl. I.G.P. who has verbally ordered him to do the needful.

7. Shri Radhey Shyam after taking the note from Chandra Kant initialled it and asked Literate Constable Mahaveer Singh to sprinkle Phenophthlene powder on it.

He took down the number of this note and after preparing memo Ex. P. 4, handed it over to Chandra Kant in presence of Motbirs Poonam Chand aged 17 years and Mahesh Kumar aged 18 years. He instructed literate constable Mahaveer Singh to be near the decoy and also instructed the motbirs to see the accused taking bribe. He thereafter at 3.45 p m. along with trap party left for Kotwali Police Station. At 4.00 p. m. along with other members of trap party and witness Mahesh Kumar came to the crossing of Choti Chopar and stood near water hut (PYAU) and asked Chandra Kant and witness Poonam Chand to go inside Kotwali. After sometime witness Poonam Chand came from the side of Kotwali.

8. Poonam Chand gave him the signal on which he along with police party went towards Kotwali but they met Chandra Kant near the gate of the Kotwali who told him that he has passed over that note to a literate constable who sits in the room of Head Moharir who is putting on white bush-shirt and white pant. It was further told that he has handed over the duly attested character certificate. He later on told him that the literate constable has gone towards Kishanpole. He was then followed to a restaurant Bhagat Mishthan Bhandar. The Dy. S.P. asked him to produce the note which he had accepted as bribe to which he denied. It was, thereafter, that Kanhaiyalal was asked to take the search but, the accused himself brought out the note from his pant's right hand side pocket The number of note was tallied with the memo in presence of motbirs. Hands of accused were got washed in Sodium Carbonate water on which the colour became pink. Similarly his pants pocket was got washed and it's colour also became pink. Both the washes were taken in bottles and sealed. Search of the accused was also taken Rs. 5/- were recovered from his pocket. One was five rupees denomination note and another one rupee note. A memo of this arrest and search was made and thereafter First Information Report Ex. P. 11 was taken down. Report of Chemical Examiner and Public Analyst was taken and sanction for prosecution obtained. Thereafter, accused appellant was charge sheeted in the court of Special Judge, ACD (cases) Jaipur.

9. Learned Special Judge framed charges for offences under Section 161 IPC and 5(1)(d) read with Section 5(2) Prevention of Corruption Act to which accused denied and claimed to be tried. Prosecution examined seven witnesses in support

of its case. Accused stated in his statement that papers of accused came on 9-9-1974 and he wanted immediate report. He was told that he will be given certificate on 12-9-1974 when the report comes from Laxman Singh. The decoy got annoyed and challenged him and lodged the false report. He was given papers on 12-9-1974 when he came. He stated, he has not accepted any bribe. He examined one witness in defence. The learned Special Judge accepted the prosecution evidence and convicted and sentenced the accused appellant as mentioned above. Accused appellant preferred an appeal. When it was being heard the learned Counsel for appellant argued that neither the seizure memo nor recovery memo in respect of recovered currency notes have been prepared which is fatal to the prosecution. He relied on certain decisions. The learned Judge considered it to be an important question and referred this case to larger bench. This is how this appeal has come up before us.

10. Learned Counsel for the appellant submitted that preparation of seizure memo and recovery memo in a trap case is a condition precedent for prosecuting the accused and if that is not done the prosecution case must fail on this count alone. It is submitted that when the so called tainted note was recovered from the accused in pursuance of his own production or search being taken then a memo should have been prepared that the number of the note has been tallied with the number of note mentioned in the memo of the handing over the notes to decoy. If no memo is prepared then there is no guarantee that it was the same. It is submitted that oral evidence is not enough to prove recovery/seizure of the tainted note. Learned Counsel drew our attention to Section 100(7) Cr. PC and submitted that a separate list should be prepared for the articles seized and copy of the memo should be delivered to the accused. Learned Counsel placed reliance on : 1976 CriLJ713 and : 1956 CriLJ1254 . Learned Counsel for the appellant then started addressing us on merits of the case. At this stage the learned Public Prosecutor submitted that arguments should only be heard on the question referred to. It is submitted that this bench cannot decide the appeal on merits. It is submitted that larger bench has limited jurisdiction of answering the question referred to in such cases. This court, therefore, it is submitted only on answer this question referred to and remit the same to learned Single Judge for deciding appeal in light of question answered. Regarding the question referred the learned

Public Prosecutor submits that non-preparation of the memos is only an irregularity on which alone the case cannot be decided. Learned Public Prosecutor has placed reliance on *State of Assam v. Muhim Barkat Ali* and another report in : 1987 CriLJ152 and *Kishan Chand Mangal v. State of Rajasthan* reported in : [1983]1SCR569 . It is submitted that if there is oral evidence about the recovery of tainted notes and it is borne out from other documents then also non-preparation of documents cannot be treated as fatal. In the instant case it is submitted that there are couple of documents to corroborate the ocular evidence.

11. We have given our thoughtful considerations to the rival contentions on the question referred and have persued the cases cited by learned Counsel for the parties. Case cited by the Public Prosecutor have no application in the facts of the present case. In *State of Assam v. Muhim Barkat Ali and Ors.* reported in : 1987 CriLJ152 , their Lordships held that-'evidence of the Police Officer-Cannot be under estimated, merely because he is a Police Officer.' This was a murder case where the evidence of Shri Pradeep Jyoti Sharma who was called as a court witness and was a Police Officer was considered to be an officer of sterling worth and sufficient reasons had been also given for a summoning him as court witness. He testified to the dying declaration and it was accepted by their Lordships. The facts of this case have no semblance with the facts of the present case. In the instant case it is borne out that the investigation itself was not fair. Hence this case has no application.

12. In *Kishan Chand Mangal v. State of Rajasthan* reported in : [1983]1SCR569 , their Lordship while considering a trap case held that:

Merely because witnesses relating to trap in a bribery case are petty clerks, there evidence cannot be rejected as wholly unreliable more so when they do satisfy the test of witness independent of police influence. In a country where renunciation is worshipped and the grandeur and wild display of wealth frowned upon, it would be the travesty of truth if persons coming from humble origin and belonging to officewise, wealthwise lower strata of society are to be disbelieved or rejected as unworthy of belief solely on the ground of their humble position in society. The converse unfortunately appears to be true.

13. This case also has no application as on the count mentioned in the aforesaid case, the evidence has not been discarded in the instant case.

14. In Bhagwan Singh v. The State of Rajasthan reported in : 1976 CriLJ713 , referred to learned Counsel for appellant Hon'ble Supreme Court held:

Search memo signed only by police men accompanying the Head Constable and not by any independent witnesses though present-Matter not free from doubt.

15. In State of U.P. v. Sukhbasi and Ors. reported in 1985 Supreme Court Cases (Supp.) 79, their Lordships quoting from High Court judgment have held as under:

We feel it would be better to set out in extenso the portions of the judgment dealing with the various circumstances appearing from the prosecution evidence which make the alleged recoveries not free from suspicion.

In the first instance, there is evidence to show that valuable ornaments were found spread out inside and outside the main living room but we have been left guessing as to what happened to these. Rameshwar, Bharat Singh and Chandra Prakash (PWs 7, 8 and 28) have admitted that ornaments were found scattered inside or outside the room. Chandra Prakash has approximated the value thereof at Rs. 12,000/-. The Investigating Officer, Ganga Prasad Tripathi, PW 31 has also admitted the existence of these ornaments. He has not said a word as to how he dealt with these. No recovery memo was prepared in respect of these valuables; or at any rate, he does not say so. He does not even say as to how he dealt with these ornaments that is to say, did he take them into custody or handed them over to someone, and if so, to whom. The witnesses aforesaid are also silent about it. The suggestion made by the learned Counsel for the appellants is that these ornaments were subsequently utilized for the purpose of being shown as recovered ornaments. It is quite true that the appellants have been unsuccessful in providing it to be so but the matter is not free from suspicion. It was the duty of the prosecution to have explained what happened to these ornaments and it is unfortunate that we have been made to guess about it. We agree with these observations made by the High Court

16. In *Bhagwan Singh v. The State of Rajasthan* reported in 1976 Supreme Court Cases 15 a case of offering the bribe, investigation was conducted by Head Constable in a matter in which he himself was the complainant. The entire case rested solely on the testimony of head constable, Ram Singh and four other Police Constables. There was not a single independent witness to depose to the offer of the bribe by appellant, even about the seizure memo Ex. P. 1 of the currency notes, the only signatory was head constable and the sub-ordinate police constable. In these circumstances their Lordships held that important, independent and respectable witnesses had not been so cited in the case and the seizure memo is not of any avail. It was held that the whole episode seems to be shrouded in secrecy and there is evidence of police constable to support it. Their Lordships therefore, did not rely on the prosecution evidence. In *State v. Har Prasad Sharma* reported in : AIR 1958 All 334 it was alleged that the accused put one currency note of the value of Rs. 5/- into his mouth and produced only Rs. 32/- Sub-Inspector forcibly took out the currency note from mouth of the accused by putting his fingers, but no mention of this course of conduct was made in the recovery list nor it found place in either the police statement or the statement recorded under Section 164 Cr. P.C. and in these circumstances their Lordships held that the recovery of the currency note from the person of the accused is an important link, in proving the case in the prosecution for offence Under Section 161, IPC and Sections 5(1)(d) & (2) of the Prevention of Corruption Act. It further held that if the recovery becomes doubtful no conviction can be maintained. In AIR 1956 Supreme Court 643 it was the police officer who supplied the money for getting the accused trapped, and the investigation from beginning to end was biased. In these circumstances their Lordships of the Supreme Court held as under:

Whatever the criminal tendencies of a man may be, he has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law, and more particularly by those who are guardians and keepers of the law. However, regrettable the necessity of employing agents provocateurs may be (and this is unfortunately often inevitable if corruption is to be detected and bribery stamped out), it is one thing to tempt a suspected offender to overt action when he is doing all he can to commit a crime and has every intention to carrying through his nefarious purpose from start to finish, and quite another to

egg him on to do that which it has been finally and firmly decided shall not be done. The very best of men have moments of weakness and temptation, and even the worst, times when they repent of an evil thought and are given an inner strength to set Satan behind them; and if they do, whether it is because of caution, or because of their better instincts, or because some other has shown them either the futility or the wickedness of wrong doing, it behoves society and the State to protect them and help them in their good resolve; not to place further temptation in their way and start afresh a train of criminal thought which had been finally set aside.

Held, that this was not a case of laying a trap in the usual way, for a man who was demanding a bribe but of deliberately tempting a man to his own undoing after his suggestion about breaking the law had been finally and conclusively rejected with considerable emphasis and decisions.

17. From a careful study of the aforesaid cases it is borne out that emphasis has been given on fairness of the investigation. It must be such which inspires the confidence and to judge the same. The evidence has to be scanned and weighed thoroughly and in doing so the documents prepared on the spot play an important part and all such documents must be placed before the Court. If no documents are prepared the cogent and convincing explanation must be furnished.

18. It is, therefore, essential that prosecution so long as possible must produce documentary evidence to substantiate the recovery of tainted notes. The full and complete procedure must be followed that is when the numbers of notes are taken down and initials done before the notes are handed over to the decoy for passing the same over to the accused and then the recovery is made after the trap. It is bounden duty of Investigating Officer to tally the numbers and check his initials thereafter he must prepare a memo in this respect and seal the notes recovered. This memo as prepared should contain the numbers of the notes recovered and fact about their sealing and the impressions of the seals. The purpose of this all is to ensure fair investigation and is a check for subsequent mischief. Similarly, hand wash should be sealed, its memo prepared with seal impression. In all the cases it is, therefore, essential to prepare the recovery/seizure memos and if such memos

are not available that prosecution story normally be not accepted on the face value unless prosecution has offered an explanation which is cogent, convincing and plausible. The explanation has to contain reasons which may be for example, where documents are prepared but they are snatched and torn off by the miscreants to favour accused, there may be cases after filing the same, they are removed from the record, there may be cases that inadvertently some part of it is left to be written etc. In absence of documentary evidence there must be unimpeachable oral evidence to substantiate prosecution case then alone the evidence must be accepted. In fact we do not consider it to be such a questions of law which can be answered on a reference to larger bench. Each case has to be decided on the evidence tendered. No hard and fast rule can be laid down while considering the quality of evidence. Due weight has to be given to all the surrounding circumstances and preparation of documents is one of the circumstances to corroborate the oral testimony. It can not be held that in all circumstances the accused is entitled to be acquitted if memos are not prepared. We have set out some of general principle and do not think that the question requires to be answered one way or the other.

19. Before coming to merits we will dispose of objection of learned Public Prosecutor about hearing of merits. It is true that their Lordships of the Supreme Court have held that the Division Bench should send the case back to the referring for decision and should not decide the case by themselves. But this decision of their Lordships is not applicable to the facts of the case. In instant case the learned Single Judge has not referred the question but the whole case. Learned Single Judge himself has mentioned in order of reference that he is referring the whole case and that appeal from Single Judge be taken to be decided. Thus, we are seized of the whole case and thus over rule the objection. We are fortified in our view by a decision of this court reported in *Umrao Singh Dhabaria v. Yashwant Singh Nahar and Ors.* .

20. Coming to the merits of the case lesser we say about the conduct of investigation better it is. The investigation in trap cases must be such which does not admit of several loopholes to entertain doubts and criticism. It must be fair, In the instant case, the case of the prosecution is that report about demand was

presented before Addl. I.G.P. (ACD) but there is no endorsement by him. There is no indication on the document to substantiate that it was even placed before the Addl. I.G.P. except the oral statement of Radhey Shyam that the complaint was given to him by Addl. I.G.P. who had orally asked him to investigate. Radhey Shyam received this report at 10.00 a. m. according to endorsement. This fact, was normally of not much significance, but in this case it assumes importance because statement of Chandra Kant decoy is oscillating. He has mentioned in Ex. P. 3 that he had gone to Kotwali on 11-9-1974 along with papers to obtain the report and it was on that day the demand was made. The date, time and place for acceptance is also not mentioned in it but he in statement in court stated that he went to Kotwali on 9-9-1974 and it was on this date that he was asked by a constable that if he has money he can take the certificate else he should come next day, i. e. on 10-9-1974. There is no mention of going to Kotwali on 11-9-1974 in examination-in-Chief. The witness then stated that he had met the Addl. I.G.P. on 11-9-1974 and he had asked him to come on 12-9-1974. He stated that he does not know about the application he handed over to the Addl. I.G.P. It appears from the statement of decoy that demand was made on 9-9-1974 and he lodged the complaint to Addl. I.G.P. on 11-9-1974 but both these facts are neither mentioned nor are borne out from Ex. P. 3 and it is for this reason that to reconcile the two stands taken by decoy it was necessary that there ought to have been endorsement of the Addl. I.G.P. on application Ex. P. 3 or that he should have been examined to prove that decoy met him on 11-9-1974 but without an application.

21. Secondly there is no corroboration to the story of demand. Chandra Shekhar PW 2 in his statement submits that demand was made on 9-9-1974 and the money was to be given next day but according to his written complaint dated 12-9-1974 Ex. P. 3 demand was made on 11-9-1974. This discrepancy remains to be explained.

22. PW 3 Poonam Chand and PW 4 Mahesh Kumar are the two motbirs in this case. According to Ex. P. 4. QnZ lqiqnZxh uksV age of Poonam, Chand is 17 years. He is resident of Khejaron Ka Rasta, Mahesh Kumar is 18 years old residing in same colony i. e. near the place of decoy and Poonam Chand, who

brought these two motbirs to the Anti Corruption Office remains a mystery in the case. According to decoy Chandra Kant, who too was a young boy having appeared for 1st year examination, both these motbirs were already in the office of Dy. S.P. when Ex. P. 4 was prepared. According to Poonam Chand PW 3 he had gone to the office of Employment Exchange, from where he was called through one man, in the office of (S.P.) Superintendent Police when he reached there three person were already standing there and one of them was Chandra Kant.

23. PW 5 Mahesh Kumar stated that he had gone to Chopar to meet his brother-in-law from where one man called him and took him to Jalebi Chowk He was taken to police officer who told him that he shall have to become a witness. According to him Poonam Chand was already in office of A.C.D. when he reached there. Mahaveer Singh PW 6 Literate Constable, who had sprinkled the powder does not know from where the Motbirs came. He saw them in office of Anti Corruption Department when he was sprinkling powder. Radhey Shyam PW 7 Dy. S.P. who arranged the trap also stand that when memo Ex. P. 4 was being prepared motbirs Poonam Chand and Mahesh Kumar were already there. In cross examination he is unable to say from where the motbirs were called. Thus, on the point as to who brought the motbirs and from where they appeared prosecution has no explanation. In the trap cases choice and selection of motbirs is one of the important things. The motbirs must be so chosen who can inspire confidence of the court. Merely, the toeing with the prosecution is not enough. It is not essential that they must belong to a particular strata. They may be rich or poor. Government servant or private persons, young or old but they must be plain speaking, truthful and honest and if possible from the locality where the offence is committed. Here the police has chosen two young boys from a far off locality. Both of them are from one locality one of them is even a minor and other is just 18 years, who do not want to disclose how they reached there rather according to both of them they are chance witnesses Both the police officers have no explanation to offer from where they came and decoy poses that he does not know them and they were already in office of the Dy. S P. when he reached there, which fact is belied by motbirs. How they could be called unless decoy had first met the Dy. S.P. Then as per Mahesh Kumar, Poonam Chand was already there when he went and as per Poonam Chand when he arrived in office of the Dy. S.P. Mahesh Kumar was already there.

We are unable to appreciate the conduct of Investigating Officer in selecting the motbirs one of whom according to his own document is not even major. It behaved the Investigating Officer to have taken trouble in calling some independent matured persons as motbirs.

24. Regarding the trap part of the prosecution case it is surprising when the Dy. S.P. did not catch hold of the accused in the Kotwali itself and permitted him to go upto a restaurant is difficult to understand. Poonam Chand as per prosecution story had seen the passing of notes. He came out and gave a signal. Thereafter prosecution case as per Mahaveer Singh is that some secret talk took place between decoy and the Dy. S.P. and thereafter they went to the Restaurant. It is thereafter that the Dy. S.P. in the restaurant asked accused to note. It is admitted by all the witnesses that accused denied to have taken the bribe from decoy. Thereafter in the prosecution story there are contradictions and there is no unanimity in prosecution case. According to Chandra Kant decoy PW 2 when the accused refused to have accepted the bribe Mahaveer Singh was asked by the Dy. S.P. to take the search. Mahaveer Singh according to this witness, had already caught the accused as seen as they reached the restaurant. Mahaveer Singh thereafter took the search and brought out the tainted note Article I which was wrapped along with other notes. Poonam Chand PW 3 has stated that on being pressed by the Dy. S.P. accused himself brought out the note. This witness does not speak of recovery of another notes from the pocket of accused when admittedly, they have been found as per arrest and seizure memos PW 4 Mahesh Kumar stated that accused produced one Note Article 1 and does not speak of any search. Mahaveer Singh PW 6 has different story to tell. He states that when accused denied to have taken bribe, the Dy. S.P. asked Kanhaiya Lal constable to take the search and at that time accused himself produced the note Article 1. Even after his production he stated that Kanhaiya Lal took the search, brought out two more notes, one of five rupees denominations and another of rupee one. Radhey Shyam Sharma PW 7 has stated similar to what Mahaveer Singh stated. Thus, the witnesses have given different versions on the point of production of notes.

25. Now comes the most important lapse on the part of the Dy. S.P. There is no memo of recovery of Article 1 prepared to corroborate the prosecution case.

Neither any such memo is on record nor is there any mention in any of the documents prepared. There is nothing to show on record that recovered note had the same number which was on the note mentioned in memo of handing over the note. Only one line has been mentioned in dk;Zokgh iqfyl These could be sufficient had there been some other memo regarding sealing of the note in presence of motbirs. There is nothing on record to suggest that any seizure/recovery memo indicating the number on notes and in trials of Dy. S.P. on the note was prepared and that it was got signed by motbirs Not only this even some about sealing the hand wash was also not prepared. It is most astonishing to note that Dy. S.P. had prepared a memo regarding the recovery of two notes which are not tainted and part of bribe money but he did not prepare one about the initialled note. He did not get the other documents also signed by decoy and simply stated that he did not consider it necessary. He did not even get the bottles signed after sealing and kept the bottles and seal with himself. We have no hesitation in holding that in facts and circumstances of this case when there are so many infirmities, the non-preparation of recovery/seizure memo is fatal to the prosecution. When even the investigation itself is neither free from doubt nor fair and proper then it would be futile for us to go into other points particularly when there are several other discrepancies also in the statement of witnesses. The accused appellant in these circumstances is entitled to benefit of doubt.

26. The result is that appeal is allowed. Judgment of Special Judge, Anti-Corruption Department Cases, dated 25th March, 1977 is reversed Conviction and sentence of accused is set-aside. He is acquitted of all the charges. He is on bail and need not surrender his bail bonds.