

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

(THROUGH VIRTUAL MODE)

Pronounced on : 10.12.2024

Case No: **CRA No. 07/2015**

Mohammad Subhan Shah, aged 65 years,
S/o Late Ghulam Mohammad Shah,
R/o Lar Ganderbal (the then Accounts
Officer), Electric Commercial Division
PDD, Basant Bagh, Srinagar through his
son namely Sajad Ahmad Shah

...Appellant(s)..

Through :- Mr. M.Y.Bhat, Sr. Advocate with
Mr. Sajid Ahmad Bhat, Advocate.

Vs

State of J&K through
Vigilance Organization Kashmir.

....Respondent(s)..

Through :- Mr. Mohsin Qadiri, Sr. AAG.

Coram: HON'BLE MR. JUSTICE PUNEET GUPTA, JUDGE

JUDGMENT

1. The appellant has been held guilty, convicted and sentenced to undergo simple imprisonment for one year and a fine of Rs.5000/- for offence under Section 5 (2) (d) P.C. Act and also to undergo imprisonment for six months for offence under Section 161 RPC. Both the sentences are to run concurrently. In default of payment of fine, the appellant was further directed to undergo simple imprisonment for three months, by the Court of learned Special Judge (Anti-Corruption), Kashmir. It is submitted in the appeal that the trial court has passed the judgment which is not as per the facts and the law on the subject. The appellant seeks setting aside of the conviction recorded by the trial court.
2. The respondent-State stands represented by Mr. Mohsin Qadiri, Sr.AAG.
3. The original record of the trial court is also before this Court. The appellant shall be referred to as 'accused' in the judgment for the purposes of discussion.
4. The written complaint filed by PW-Mohd. Amin Misgar with Police Station, VOK on 19.04.2005 alleging therein that the accused who was then Accounts Officer, Electric Commercial Division, PDD was demanding bribe of Rs.1000/- for forwarding his Inspection Report to

higher authorities. This complaint resulted into registration of the FIR No. 10/2005 for offences under Sections 5 (1) (d) read with Section 5 (2) P.C.Act. A trap team was constituted and PW-Mushtaq Ahmed Wani, Senior Assistant of the health department was associated as shadow witness. After completion of pre-trap proceedings, the team proceeded to the office of the accused. The complainant and shadow witness went inside the office whereas other members of the trap team stayed outside the office of the accused. The complainant along with the accused came out of the office after 10/15 minutes and proceeded towards main gate of the office. The shadow witness followed them and after sometime gave signal to the other trap team members though the shadow witness did not hear the conversation between the complainant and the accused. The trap team is stated to have caught hold of the accused red-handed with bribe money which was recovered from the left pocket of the coat of the accused. The investigation resulted into presentation of challan against the accused under Section 5 (1) (d)/5 (2) P.C.Act and 161 RPC. The sanction was also obtained before presentation of the challan. The charges were framed against the accused under Sections 5 (1) (d)/5 (2) P.C.Act and 161 RPC. The accused denied charges and claimed trial.

5. The prosecution examined witnesses cited in the challan. The statements of the witnesses are reproduced as under:-
6. **PW-1 Mohd. Amin Misgar**, complainant, has deposed that he had examined the accounts of Sub-Division, Charari sharief and submitted the test report to the accused about four months prior to the occurrence. The accused demanded Rs.1000/- from him when he asked the accused to forward his report to the higher authorities. The accused did not forward the report to the Superintending Engineer as he used to demand money from him. The witness has also stated that the accused told him that he will not release his T.E. unless he was paid the money. The witness has identified his complaint which is exhibited as EXPW-MAM. It is also deposed by him that the shadow witness remained at the door when he went inside the office of the complainant. The accused suggested to him that he should go out of the office when told that he had arranged the

money. The accused told him that the witness should accompany him as other persons were also present in the room. When both of them moved few steps ahead of main gate, he handed over the currency notes of Rs.500/- to the accused which was accepted by the accused and kept it in the left pocket of his coat. The independent witness had followed them and gave signal to the vigilance team who caught hold of the accused and searched him. The witness has deposed of the other proceedings which took place in the matter including turning pink of the pocket wash of the coat. The witness has identified the memos prepared which are duly exhibited. In cross-examination, the witness has deposed that he was not shown any order which shows that he was deputed as member of audit party which was headed by Ghulam Rasool Bhat. He prepared the report and also signed the same. The witness acknowledges that he did not shake hands with the accused. He did not know whether Mr. Najar was present on spot. Further, he was not told by the accused that as Mr. Najar was in the office and, therefore, he will not accept the money in presence of Mr. Najar. As per the witness, the accused got the complainant transferred to another place few days earlier and that it was wrong that because of this factor he had got the accused implicated in the case. The witness was not on talking terms with the accused for the last six months.

7. **PW-2 Mushtaq Ahmed Wani** is the shadow witness and had deposed of pre-trap proceedings which took place in the office of Vigilance. The witness claims to have accompanied the complainant to the office of the accused but he was told to stay in the corridor whereas the complainant went inside the office. The witness followed the complainant and the accused up to the market place after the accused returned with the complainant after being in office for about ten minutes. The witness has further stated that he had observed some movement and passing of money by the complainant to the accused and then he signalled the team members who recovered the money from the left pocket of the coat of the accused. The witness is also witness to the documents prepared thereafter including the seizure memo exhibited MAW/1 pertaining to superdnama of seal used during proceedings. In cross-examination, the witness has

stated that he was associated as shadow witness in three other cases. The witness was not shown the seizure memo with respect to the court.

8. **PW-3 Abdul Rashid Lone** was Junior Assistant in PDD Commercial Division at the relevant time and is witness to the seizure memo exhibited of the audit report of Charari Sharief and the seizure memo of the file is exhibited as AR. The file recovered is marked as MAM/4. The file was taken from him by the accused fifteen days prior to occurrence. He used to type the audit report. The file was taken out by the Vigilance Party from his trunk. The letter with the file was typed by him and signed by the accused.
9. **PW-4 Ghulam Mohd. Najar**, Accounts Officer in revenue cell of PDD, has deposed that he and the complainant had conducted the audit of Charari Sharief and the report was filed with the Accounts Officer. The witness does not remember if he was present in the office on 30.04.2005. It is rightly recorded under Section 161 Cr.P.C that the complainant and the accused were not having good relations and also not on talking terms 10/15 days prior to occurrence. The accused had issued transfer order of the complainant before occurrence took place.
10. **PW-5 Shakeel Ahmed Wani**, Constable VOK, is member of the trap team and after being witness in the pre-trap proceedings proceeded to the office of the accused along with other trap team members. As per the witness, the complainant and the shadow witness went inside the office as many persons were present in the office room the accused signalled the complaint to move out of the room and thereafter the complainant and the accused proceeded towards the road. As the independent witness gave the signal, the trap team members caught the accused on the road. The witness has then stated of the recovery of the currency notes from the left pocket of the coat from the accused and other proceedings which took place thereafter. In cross-examination, he has stated that there was no identification mark on the coat which may show that it belong to the accused. The witness has denied the suggestion that the complainant had caught hold of the accused from his hands. Some of the documents were

prepared by him and so was the statement of complainant which is in his handwriting.

11. **PW-6 Abdul Rashid Khan**, SGCT, is also one of the members of the trap team constituted by SSP VOK. He is also witness to the pre-trap proceedings. He also states that complainant and the shadow witness went inside the office of the accused whereas the other members of the team remained outside the office. The independent witness followed the complainant and the accused who came out of the office after 10/15 minutes and passed the gate of the office. The accused was caught hold of from wrist after the independent witness gave signal. The witness also speaks of recovery of money from the pocket of the coat of the accused, turning of the solution pink when the fingers of the accused were washed in the solution and also the memos prepared. He is witness to the memo of superdnama. In cross-examination, the witness has stated that he did not go inside the office of the accused. He has also stated that he did not see the accused taking bribe nor could hear the conversation between the complainant and the accused. Seizure memo of the coat was not shown to him.
12. **PW-7 Inspector Meharaj-Ud-Din** is also witness to the pre-trap and the trap proceedings. As per the witness the accused along with the complainant came out of the office room of the accused and the complainant handed over the bribe money to the accused who kept it in the left pocket of his coat. He is also witness to other proceedings which took place post-recovery of bribe money. In cross-examination, the witness has deposed that he was about 10 yards behind when the accused was handed over the bribe money by the complainant and he saw the same.
13. **PW-8 Inspector Altaf Hussain Shah** is also member of the trap team and has not seen the complainant giving bribe money to the accused though he has stated that the shadow witness passed the signal when the complainant and the accused were conversing near the bridge. Like other witnesses, he has also deposed of the bribe money recovered from the pocket of the coat of the accused and being witness to the documents

prepared in connection with the trap proceedings. As per the witness, the T.E. Bill prepared by the accused is not part of the file marked as MAM/4. It is not mentioned in the statement under Section 161 Cr.P.C that he saw the shadow witness passing the signal.

14. **PW-9 Abdul Rashid Paul**, Dy.S.P is the investigating officer. He is also witness to the pre-trap proceedings. As per the witness, the trap team party went to the office of the accused where the complainant went inside the office whereas he was standing at the door. After 5/10 minutes the complainant along with the accused came out of the office and the shadow witness followed both of them. The accused obtained the bribe amount from the complainant on reaching Basant Bagh on the main road near temporary bridge. The complainant put the money in the left pocket of his blue jacket. The money was recovered from the pocket of the coat of the accused and the other proceedings that took place on spot are also stated by the witness. In cross-examination, he has stated that except for exhibit P10 other documents are not in his handwriting but written on his dictation. The documents, however, do not mention that they were written on the dictation of the witness. It is true that bribe was accepted in the public place which was frequented by public. Passers-by were not associated with the trap proceedings as the independent witness was in the trap team.
15. **PW-10 Farhat Jeelani** succeeded PW-Abdul Rashid Paul as Investigating Officer. He prepared the site plan EXP-P10 and also recorded the statement of the complainant under Section 161 Cr.P.C. In cross-examination he has stated that he might have summoned the complaint for re-examination. The demand was made by the accused in respect of T.E.Bill and for inspection note and not for cancellation of transfer order of the complaint. The witness has further deposed that from the record it became evident that accused had demanded bribe for modification of transfer order though there is no mention of the demand being made for cancellation of the transfer order of the complainant in the charge sheet. The site plan was prepared on 26.09.2005 though the

investigation was handed over to him on 25.04.2005 and the occurrence had taken place on 19.04. 2005.

16. **PW-11 Ghulam Hassan Bhat**, SSP (then SHO P/S VOK), is witness to FIR No. 10/2005 marked as exhibit P-11.
17. The documents prepared in respect of pre-trap proceedings and post-trap proceedings are exhibited and include EXT-P11 (FIR), EXPW-MAM (complaint), EXPW-MD (production of currency notes by the complainant), EXPW-MD1 (currency notes with phenolphthalein), EXPW-MD2 , EXPW-MD3 (recovery of currency notes from pocket of the coat of the accused), EXPW-MD4 (phenolphthalein test carried on PW-Mushtaq Ahmed Wani), EXPW-MD5 (phenolphthalein test regarding pocket of the blue coat of accused), EXPW-MD6 (personal search of accused), EXT-P5, EXP-MAW1 (superdnama of seal in favour of PW-Mushtaq Ahmed Wani), EXPW-MD7 (seizure of file regarding report of sub-division Charari Sharief), EXPW-AR (seizure of transfer order of complainant) and EXT-P10 (site plan).
18. After the closure of the prosecution evidence, the statement of the accused under Section 342 Cr.P.C was recorded. The accused denied the prosecution evidence that came on record against him.
19. The accused has produced one witness, namely, Ghulam Rasool Bhat, who speaks of the hostile relationship between the complainant and the accused and that on the day of trap the complainant was not in his office and the accused was with the witness up to 1 PM when he along with the accused left for the office of Chief Engineer. He and the accused met their colleague late Mohd. Jamal-Ud-Din. When they were passing through Basant Bagh Barrage, the accused was encircled there by some persons and the complainant tried to force something into the hands of the accused. The accused protested and the complainant signalled the witness to leave the place. In cross-examination, he has stated that the relation between the accused and the complainant were not cordial and the complainant was got transferred by the accused. He could not say if the accused was absent on the day of occurrence. The witness failed to

disclose the date and time of occurrence as he has deposed that he did not stay on spot.

20. Heard learned counsel for the parties and perused the record. The written arguments also stand filed by both the sides.
21. Mr. M.Y.Bhat, learned Sr. Advocate appearing for the accused has argued that the trial court has passed the judgment against the accused though the evidence on record was not sufficient to hold the accused guilty of the offences for which he has been convicted. Neither the demand nor the voluntary acceptance of bribe was proved by the prosecution. The statement of the complainant itself does not inspire confidence. The accused is required to be acquitted of the charges.
22. Mr. Mohsin Qadiri, learned Sr. AAG appearing on behalf of the respondents has vehemently argued that the trial court has appreciated the prosecution evidence that has come on record in its right perspective and held the accused guilty of the offence and this finding of the trial court does not require any interference in appeal. The statements of the prosecution witnesses fully support the prosecution case. The prosecution case stands proved. The appeal is required to be dismissed.
23. The written complaint filed by the complainant PW-Mohd. Amin Misgar against the accused to the effect that the accused had demanded bribe of Rs.1000/- so that the inspection report of the complainant is forwarded to higher authorities led to the registration of FIR by the Vigilance Organisation and the investigation that were carried out in the matter resulted in the filing of charge sheet against the accused under Section 5(1) (d) read with 5 (2) P.C.Act and 161 RPC. The trap team constituted by VOK was successful in operation of the trap for which it was constituted is the crux of the case set up against the accused. The statements of the complainant and PW-2 Mushtaq Ahmed Wani, shadow witness, are key to the case of the prosecution. The accused used to demand Rs.1000/- as bribe from the complainant so that the report prepared by the complainant is forwarded to the higher authorities by the accused is what is deposed by the complainant in his statement recorded before the court during trial. So far as the aspect of demand of money

made by the accused to the complainant is concerned there is no other evidence on record except the statement of the complainant. The so called demand made by the accused as per his statement is for two reasons; one is for the report of which mention is made above and other is for release of T.E. bills of the complainant. Admittedly, there is no mention of the accused having demanded bribe from the complainant on account of release of T.E. bills in the written complaint EXPW-MAM filed by the complainant before VOK. The learned trial court has not given weightage to the fact that there was no mention in the complaint of the demand being raised by the accused on account of the T.E. bills which were purportedly pending with the complainant. The Senior counsel appearing for the accused has sought to lay emphasis on the absence of this demand raised by the accused but not finding its mention in the complaint. The government counsel, on the other hand, has submitted that demand made by the accused for this reason is not core one in the case as the demand was also made by the accused for forwarding of the report to the higher authorities. The court is of the considered view that the trial court could not brush aside this important factor of non-revelation in the written complaint of the alleged bribe demanded by the accused regarding the passing of T.E. bills of the complainant. It is not just that the complainant has tried to rope in the accused in his statement for seeking bribe on two counts-forwarding of inspection report and release of T.E.-but this smacks of the hell-bent inclination of the complainant to find means to implicate the accused by multiplying accusation against him which was not in written complaint. What made the complainant to omit the allegation in the complaint regarding T.E. bills though recorded in the court is not made known to the court. The allegation of bribe is a serious allegation which has of course very serious consequences if proved in the court of law. The absence of the allegation regarding T.E. bill in the written complaint by the complainant raises a doubt in the mind of the court if the complaint itself was genuine one. The so called demand made by the accused prior to lodging of report with vigilance department is not supported by any other witness.

24. The court is required to analyse the evidence produced by the prosecution in order to hold if the statements of the witnesses do prove the case against the accused. PW-Mohd. Amin Misgar, complainant, has deposed that after the pre-trap proceedings took place in the office of VOK he along with other members of the trap team reached the office of the accused and went inside the room of the accused where four/five persons were present and the accused suggested to the complainant that they should go out after the complainant informed the accused that he possessed the money. The complainant and the accused came out of the main gate of the office and just ahead of main gate the transaction took place and the accused kept the money in the left pocket of his coat after accepting the money. As per the witness, the shadow witness had given signal whereupon the money was recovered from the accused and further proceedings took place in the matter. PW-2 Mushtaq Ahmed Wani who was the shadow witness in the case and accompanied the trap team to the office of the accused has deposed that he stayed in the corridor of the office of the accused whereas the complainant went inside the office. He further states that after ten minutes both of them came out and he followed them up to the market and there he observed some movement and passing of money by the complainant to the accused whereupon he signalled to the other trap team members. The shadow witness has not stated in his statement that he heard the accused demanding any bribe from the complainant outside the office of the accused. The witness has also not stated in his deposition that he heard any sort of conversation between the complainant and the accused after the complainant entered the office of the accused and rightly so because the witness himself states that he remained stationed in the corridor and did not enter the room of the accused. He has not even stated that four/five persons were present in the room of the accused when the complainant entered it. In fact, the shadow witness had no inner view of the room nor could possibly notice what happened in the room. The trial court has not appreciated the statement of the shadow witness PW-Mohd. Mushtaq Ahmed Wani in a apt manner as the court has not concluded that the shadow witness did

hear the accused demanding any bribe amount from the complainant. Infact, the shadow witness has not even mentioned in his statement that he presumed because of a certain act that the accused demanded bribe from the complainant and the complainant was made to hand over the currency notes to the accused. The shadow witness has only stated that he observed some movement and passing of money by the complainant to the accused. The trial court has presumed happening of a vital act of the accused demanding money from the accused and further voluntary accepting of the amount from the complainant when both were not there in the statement of the shadow witness. Merely because the complainant and the accused came out of office together and the shadow witness noticed some movement outside the office does not prove that the accused demanded bribe from the complainant. No such demand and acceptance of bribe can be presumed in the facts of the case. As the prosecution failed to prove the vital and inescapable feature required for commission of offence, the case of the prosecution gets knocked out on that score alone.

25. The trial court while holding the accused guilty has relied upon the evidence regarding the recovery of currency notes from the coat of the accused and the phenolphthalein test carried on the spot. There can be no dispute that the recovery of currency notes from the accused or the hand wash test even if positive will not prove the accused guilty unless the basic ingredients of demand and voluntary acceptance of bribe are proved by the prosecution. The initial burden unless discharged by the prosecution to prove its case against the accused, the burden does not shift upon the accused to prove his innocence in a case of present nature. PW-Inspector Mehraj-Ud-Din is the other witness from the trap team who has deposed that after the pre-trap proceedings the team reached the office of the accused where the complainant and the shadow witness went to the office room of the accused and after few minutes complainant and the accused came out of the room and the complainant handed over the bribe money to the accused and the same was kept by the accused in the left pocket of his coat. The witness though speaks of handing over the money

by the complainant to the accused yet the prosecution cannot take any mileage of the statement of this witness as his statement does not speak of the accused seeking any bribe from the complainant or the accused consequently accepting the amount from the complainant. No other witness has either deposed that he saw the accused demanding money from the complainant and consequent to it obtaining currency notes from the complainant. If the shadow witness fails to depose of the demand from the accused there is no question of other prosecution witnesses deposing of the demand factor. The witnesses have indeed deposed that the team reached the spot after signal was received from shadow witness and on search of the accused they recovered the money from the left side pocket of the coat of the accused. Mere recovery of money or hand wash test is not sufficient to hold the accused guilty.

26. The complainant had grievance against the accused, as per the complaint, that the accused had been demanding bribe of Rs.1000/- from the complainant for forwarding his inspection report to higher authorities. The court does not find a whisper in the statement of the complainant the reason which the accused may have in retaining the inspection report if any made by the complainant and not forwarding the same to the higher authorities. It may be noted herein that the complainant was not the head of the inspection team who should be normally interested in sending of the report by the accused to the higher authorities. It is also not proved by the prosecution that the accused was responsible for forwarding that inspection note to higher authorities or the retention of the report in the office of the accused would have made the complainant accountable for which the accused would demand bribe from the complainant. The court has noted above that introduction of non-clearance of T.E. bills by the accused being one of the two reasons for demanding bribe by the accused though the same is not mentioned in the written complaint filed makes the prosecution case doubtful. It is suffice to mention herein that the charge sheet filed against the accused also does not mention that the accused demanded the bribe from the accused also on account of release of T.E. bills. There is no evidence either on record otherwise that it was the

accused who was required to or was competent authority to clear the T.E. bills of the complainant even if they are said to have been submitted by the complainant to the accused. No adverse inference can be drawn against the accused on aforesaid aspect of the issue.

27. PW-3 Abdul Rashid Lone is the Junior Assistant in the office of the accused and has deposed of seizure of file marked as MAM/4 pertaining to audit report of Charari sharief. The statement of this witness though from the office of the accused does not in any manner help the prosecution in establishing the case against the accused. He is more or less witness to the recovery of the file.
28. The counsel for the accused has argued that the place of occurrence that is where the bribe is alleged to have been accepted by the accused is not proved by the prosecution as the different version have come on record. It is also submitted that the site plan and the statements of the witnesses do not corroborate with each other and further the site plan has been prepared after five months of the occurrence. The other side has contended that the place where the occurrence has taken place is outside the office of the accused and any minor discrepancy in the statements does not affect the case of the prosecution. From the evidence on record, the place where the alleged bribe is taken by the accused is not clearly made out from the statements of the witnesses. Whereas the complainant states that the occurrence took place just outside the main gate of the office, PW-2 shadow witness, on the other hand, states that he saw the complainant giving the amount to the accused in the market. Other set of evidence reveals that the occurrence took place on the bridge. It may be noted that the site plan was prepared on 26.09.2005 though the occurrence took place on 19.04.2005 and the same was prepared by PW-Farhat Jeelani, then Investigating Officer. There is no reason as to why the I.O took five long months to prepare the site plan. The only inference that can be drawn is that the site plan was prepared after five months only with a view to validate the investigation.
29. It is also important to take note of the fact that in the challan non-forwarding of the report by the accused is the cause for demand of bribe

by the accused from the complainant whereas the complainant, as mentioned above, has deposed of the T.E. bills which were not cleared by the accused and that was also the reason for demand of bribe by the accused from the complainant. It only shows that the complaint of the complainant could be for extraneous reason. The court says so also for the reason that it has also come on record that the complainant and the accused were not on speaking terms and the complainant had also grieve against the accused that he was got transferred by the accused sometime before the complaint was filed.

30. The statements of the Investigating Officers do not in any way advance the case of the prosecution. Infact the challan produced confines the bribe aspect qua the report of the complainant and not the T.E. bills which was also projected by the complainant in his statement recorded before the trial court.
31. The trial court has also laid much reliance on the statement of the accused recorded under Section 342 Cr.P.C and the statement of the defence witness. The court is of the view that the statement of DW-Ghulam Rasool Bhat could not be the reason to raise any presumption of the guilt against the accused. The prosecution is to stand on its own legs and cannot shift the burden of proving its case upon the accused. The court is more than convinced that the statement of the complainant is itself not reliable and trustworthy. The statement of other important prosecution witness PW-2 Mushtaq Ahmed Wani does not rescue the case of the prosecution as his statement does not prove that the demand of bribe was made and accepted by the accused voluntarily. The trial court has presumed the demand of bribe on the basis of the statements of the witnesses but this Court is of the opinion that the facts do not raise such presumption and, thus, the presumption drawn by the trial court is misplaced.
32. Both the sides have cited number of judgments in support of their respective contentions. The sum and substance of the judgments cited by the counsels make out that the demand of bribe and its voluntarily acceptance is required to be proved, consideration for demand of money

must be there and further the recovery of money is also required to be proved, in the absence of the demand of bribe the accused cannot be held guilty of the offence for which he has been charged, the presence of shadow witness in the trap party is not must but if he is there his statement is of vital importance for the prosecution and the prosecution has to discharge the initial burden of proving its case against the accused. Of course, the facts and circumstances of the case finally determine if the prosecution has been able to prove its case against the accused. The Court, in the present case, has no hesitation to hold that the prosecution has failed to prove its case against the accused for which charges have been framed against him.

33. The sanction which was necessarily required to be proved in order to launch the prosecution, to say the least, has not been proved by the prosecution. This only shows the manner in which the prosecution has taken care of its case.
34. The Court, in the facts and circumstances of the case, is of the view that the judgment of the trial court cannot be upheld and is required to be set aside. Accordingly, the appeal is allowed and the judgment impugned is set aside. The accused is acquitted of the charges in which he has been convicted. The accused is discharged of the bail obligations. The record of the trial court be sent back.

(PUNEET GUPTA)
JUDGE

Jammu:
10.12.2024
Pawan Chopra

Whether the Judgment is speaking? Yes
Whether the Judgment is reportable? Yes