

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1839 OF 2012
(Arising out of SLP (Crl.) No. 23 of 2012)

Rakesh Kapoor

.... Appellant(s)

Versus

State of Himachal Pradesh

.... Respondent(s)

J U D G M E N T

P. Sathasivam, J.

- 1) Leave granted.
- 2) This appeal is directed against the final judgment and order dated 08.09.2011 passed by the High Court of Himachal Pradesh at Shimla in Criminal Appeal No. 713 of 2008 whereby the High Court while partly allowing the appeal filed by the appellant herein set aside the conviction under Section 7 of the Prevention of Corruption Act, 1988 (for short 'the P.C. Act') and upheld the conviction and sentence awarded by the trial Court under Section 13(2) of the P.C. Act.

3) **Brief facts:**

(a) In January, 2003, the appellant had been posted as Divisional Tourism Development Officer, Dharamshala, H.P. His duty includes issuing permits for running of buildings as guest houses/hotels, by registering them as such and fixing the tariff for different types of rooms/accommodation in the said buildings.

(b) One Nirwan Singh is having a Tea Orchard and a house in Cheelgari in Dharamshala. He executed a general power of attorney in favour of the complainant - Sukhjit Singh Sidhu for managing his aforesaid properties. He renovated the said house and converted and converted it into a hotel and sought permission for registration and for fixing of tariff for the same from the appellant herein.

(c) On 28.04.2003, the appellant officially inspected the site of the hotel. After inspection, the appellant found everything in order and asked the complainant to go ahead with the running of the hotel. The complainant also requested him to give official permission to run the same. On 02.05.2003, the appellant recorded a note for registration

of the same fixing tariff for different rooms. However, formal letter of registration and order of fixation of tariff had not been issued.

(d) It is the case of the prosecution that on 04.05.2003, the complainant received a telephonic call from the appellant at about 4.00 p.m. informing him that his case for registration of hotel and fixation of tariff had been cleared and that he could collect the registration certificate on the next day by paying him Rs. 10,000/-.

(e) The complainant being an Ex-serviceman not inclined to give bribe and therefore, he shared this conversation with his friend Ashwani Bhatia (PW-3) and on 05.05.2003, both of them went to the Police Station, A.C. Zone, Dharamshala and lodged a complaint. They carried with them ten currency notes of the denomination of Rs.1,000/- each and produced the same before the police. The currency notes of Rs. 1,000/- each amounting to Rs.10,000/- were treated by the Vigilance Police with phenolphthalein powder and their numbers were noted down and handed over to the complainant asking him to give the same to the accused on demand with a direction to not to tamper with the same in

any manner. The police asked Ashwani Bhatia (PW-3) to act as a shadow witness and requested him to go to the office of the appellant with the complainant and give signal to them as and when the bribe money stood paid.

(f) Thereafter, the members of the raiding party (Vigilance Police) took shelter near the office of the accused. At about 6.55 p.m., after receiving signal from the shadow witness, the raiding party caught hold of the appellant. The appellant was asked to produce the currency notes taken by him as bribe and the same had been taken out from the right pocket of his pant. The number of the currency notes were got tallied as the same which were shown to the police earlier. The appellant was arrested and grounds of arrest intimated to him. The case was committed to the Court of Special Judge, Kangra at Dharamshala.

(g) Vide judgment dated 16.10.2008, the Special Judge, on perusal of the record, held the appellant guilty and convicted him for the offences punishable under Sections 7 and 13(2) of the P.C. Act. Vide order dated 03.11.2008, the Special Judge sentenced the appellant to undergo Rigorous Imprisonment (RI) for two years and to pay a fine of

Rs.10,000/-, in default, to further undergo simple imprisonment for 6 months.

(h) Being aggrieved, the appellant preferred an appeal being Criminal Appeal No. 713 of 2008 before the High Court of Himachal Pradesh. The High Court, by impugned judgment dated 08.09.2011, partly allowed the appeal and set aside the conviction under Section 7 of the P.C. Act and confirmed the same under Section 13(2) of the said Act.

(i) Aggrieved by the said order of the High Court, the appellant preferred this appeal by way of special leave petition.

4) Heard Mr. Parag P. Tripathi, learned senior counsel for the appellant and Ms. Kiran Bala Sahay, learned counsel for the respondent-State.

5) Mr. Tripathi, learned senior counsel for the appellant, after taking us through all the materials, the decision of the trial Judge and the reasoning of the High Court submitted that conviction of the appellant under Section 13(2) of the P.C. Act is unsustainable in law since his conviction under Section 7 has been set aside by the High Court. He further submitted that inasmuch as Section 13(2) of the P.C. Act

merely provides for punishment for criminal misconduct which is defined in Section 13(1), the substantive provision applicable in the case is Section 13(1)(a) of the P.C. Act. He further pointed out that Section 13(1)(a) was held inapplicable since the offence under Section 7 was not proved, hence, there cannot be any conviction under Section 13(2) without there being a conviction under Section 7 of the Act. He further submitted that in the absence of any evidence for the demand of bribe, the conviction is liable to be set aside. He also pointed out that though according to the prosecution, a demand was made to Shri S.S. Sidhu (PW-1), the complainant, over mobile phone, no call record was produced and reliance based on the contradictory statement of Shri Dharam Chand (PW-18), I.O., cannot be accepted. He further submitted that since the order, viz., registration certificate was made ready before the alleged demand of bribe on 02.05.2003, the entire case of the prosecution for demand and acceptance does not hold good. On the other hand, Ms. Kiran Bala Sahay, learned counsel for the State supported the case of the prosecution and, according to her, the High Court was fully justified in convicting the appellant.

6) We have carefully considered the rival contentions and perused all the relevant materials.

7) At the foremost, in order to understand the stand of both the parties, it is useful to refer the charge sheet which reads as under:

"IN THE COURT OF SH. C.B. BAROWALIA, SPECIAL JUDGE,
KANGRA AT DHARAMSHALA

STATE VS. RAKESH KAPOOR

CHARGE SHEET CC2/05

I, C.B. Barowalia, Special Judge, Kangra at Dharamshala do hereby charge you accused Rakesh Kapoor son of Shri Joginder Paul (HAS Officer), resident of H.No. 702, Old Chari Road, Dharamshala, District Kangra as under:-

That on 05.05.2003, at about 6.55 p.m. while you were posted as Divisional Tourism Development Officer at Dharamshala and being a Public Servant obtained Rs.10,000/- for the registration of Hotel of Shri N.S. Gill which was your official duty as a motive for doing the said official act and thereby committed an offence punishable under Section 7 of the Prevention of Corruption Act, 1988 and within my cognizance.

That on the above said date, time and place you being Divisional Tourism Development Officer at Dharamshala, District Kangra accepted a gratification of Rs.10,000/- other than legal remuneration from the complainant for registration of his Hotel and thus you committed the offence of criminal misconduct punishable under Section 13(2) of the Prevention of Corruption Act, 1988 and within my cognizance.

And I hereby direct that you be tried by this Court for the aforesaid charges.

Sd/-
Special Judge
Kangra at Dharamshala"

A reading of the charge sheet shows that the claim made by the prosecution in paras 2 and 3 is one and the same. It is not in dispute that the High Court on appreciation of the evidence led in by the prosecution and the stand taken by the defence exonerated the appellant in respect of the offence punishable under Section 7 of the P.C Act. Now, the moot question for consideration is whether in the absence of Section 7, conviction under Section 13(2) is permissible, particularly, when there is no reference to Section 13(1)(a) of the P.C. Act. It is not in dispute that Section 13(2) only speaks about punishment for committing criminal misconduct. Section 13(2) reads thus:

“13. Criminal misconduct by a public servant.- (1)

xxx xxx

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall be not less than one year but which may extend to seven years and shall also be liable to fine.”

We have already extracted the charge sheet which contains the offence under Sections 7 and 13(2) of the P.C. Act. The relevant substantive provision is Section 13(1)(a) which reads thus:

“13. Criminal misconduct by a public servant.- (1) A public servant is said to commit the offence of criminal misconduct,-

(a) if he habitually accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person any gratification other than legal remuneration as a motive or reward such as is mentioned in section 7; or
xxx xxx”

In the light of the language used in Section 13(1)(a) and in view of the conclusion by the High Court that the offence under Section 7 has not made out, the prosecution has not explained how Section 13(1)(a) is applicable. In this regard, it is useful to refer the decision of this Court in **Joseph Kurian Philip Jose vs. State of Kerala**, (1994) 6 SCC 535. The case relates to popularly known as ‘Punalur Liquor Tragedy’ in Kerala in which certain persons died and others received injuries due to consumption of poisonous adulterated arrack, ethyl alcohol adulterated with methyl alcohol. After investigation, a case under Section 272 IPC and Section 57(a) of the Kerala Abkari Act was registered. After trial, A-1 was convicted and sentenced under Sections 272 and 328 of the IPC along with the relevant provisions of the Kerala Abkari Act and the High Court confirmed the same, who filed an appeal before this Court. The High Court, however, set aside the similar conviction and sentence of A-4 recorded by the Court of Sessions and instead convicted him

under Section 109 IPC for having abetted commission of offence punishable under Sections 272 and 328 IPC whereunder, without specificity, he was awarded rigorous imprisonment for two years. The said order was also under challenge before this Court. In para 13, this Court has held as under:

“.....Going by the High Court findings, Section 109 IPC could in no case be attracted and more so without charge to that effect put to A-4 to plead at the trial. Section 109 IPC is by itself an offence though punishable in the context of other offences. A-4 suffered a trial for substantive offences under the IPC and the Abkari Act. When his direct involvement in these crimes could not be established, it is difficult to uphold the view of the High Court that he could lopsidedly be taken to have answered the charge of abetment and convicted on that basis. There would, as is plain, be serious miscarriage of justice to the accused in causing great prejudice to his defence. The roles of the perpetrator and the abettor of the crime are distinct, standing apart from each other. The High Court was thus in error in employing Section 109 IPC to hold A-4 guilty. We thus set aside the conviction of A-4 and order his acquittal on all charges”.

8) In ***Wakil Yadav and Another vs. State of Bihar***, (2000) 10 SCC 500, this Court held that *when the appellant was charged and convicted along with others for offences under Section 302 read with Section 149 IPC, the High Court cannot convict him for the offence under Section 302 read with Section 109 in appeal. In that case, it is undisputed that no charge was framed against the appellant with the aid of*

Section 109. As in **Joseph Kurian (supra)**, here again, this Court held that Section 109 IPC is a distinct offence. In this way, this Court held that *“the appellant having faced trial for being a member of an unlawful assembly which achieved the common object of killing the deceased, could in no event be substitutedly convicted for offence under Section 302 IPC with the aid of Section 109 IPC. There was obviously thus not only a legal flaw but also a great prejudice to the appellant in projecting his defence. He, on such error committed by the High Court, has rightly earned his acquittal....”* By saying so, this Court allowed the appeal of the accused and set aside the conviction and sentence imposed on him.

9) The criminal misconduct which is defined in Section 13(1)(a) has not been included in the charge. In such a circumstance, the accused lost an important opportunity to defend himself, particularly, when he was acquitted under Section 7 of the Act. By applying the ratio rendered in the above decisions and in the light of the undisputed factual position that conviction of the appellant under Section 7 has been set aside by the High Court and in the absence of any appeal by the State against such acquittal and substantive

charge under Section 13(1)(a), the conviction under Section 13(2) cannot be sustained.

10) Coming to the next argument that there was absolutely no demand for bribe and in the absence of such claim by the accused duly established by the prosecution, the conviction cannot be sustained. In support of the above claim, learned counsel for the appellant relied on the decision of this Court in **Banarsi Dass** vs. **State of Haryana**, (2010) 4 SCC 450. It was an appeal under Article 136 of the Constitution of India filed against the judgment and order of conviction dated 20.11.2002 passed by the learned single Judge of the High Court of Punjab and Haryana at Chandigarh. In that case, it was contended before this Court that there is no evidence to prove demand and voluntary acceptance of the alleged bribe so as to attract the offence under Section 5(2) of the Prevention of Corruption Act, 1947. The other contentions were also raised regarding merits with which we are not concerned. The accused was charged for the offence punishable under Section 5(2) of the 1947 Act as well as Section 161 (since repealed) of the IPC. In para 23, this Court

held that “to constitute an offence under Section 161 IPC, it is necessary for the prosecution to prove that there was demand of money and the same was voluntarily accepted by the accused”. It was further held that “similarly in terms of Section 5(1)(d) of the Act, the demand and acceptance of the money for doing a favour in discharge of his official duties is sine qua non to the conviction of the accused”. In para 25, this Court quoted the decision rendered in **C.M. Girish Babu vs. CBI**, (2009) 3 SCC 779 and held that mere recovery of money from the accused by itself is not enough in the absence of substantive evidence of demand and acceptance. In the same para, a reference was also made to **Suraj Mal vs. State (Delhi Admn.)** (1979) 4 SCC 725 wherein this Court took the view that mere recovery of tainted money from the circumstances under which it is paid is not sufficient to convict the accused when the substantive evidence in the case is not reliable. This Court further held that mere recovery by itself cannot prove the charge of the prosecution against the accused in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be

bribe. After underlying the above principles, and noting that 2 prosecution witnesses turned hostile, while giving the benefit of doubt on technical ground to the accused, this Court, set aside the judgment of the High Court and acquitted the accused of both the charges i.e. under Section 161 IPC and under Section 5(2) of the 1947 Act.

11) In the case on hand, though prosecution heavily relied on the evidence of PW-1, the complainant that the demand was made to him over mobile phone, admittedly the call details have not been summoned. No doubt, the statement of PW-1, according to the prosecution is corroborated by Ashwani Bhatia (PW-3) who stated that he overheard PW-1 saying that he had brought the money, when the latter went to the office of the appellant in the evening of 05.05.2003. Interestingly, the I.O. who was examined as PW-18 has mentioned that PW-1 received the demand from the accused over landline and, hence, he could not secure those call details. Whatever may be the reason, the fact remains that except the oral testimony of PWs 1 and 3, there is no other proof in respect of the demand of bribe money and the I.O.

could not collect the call details as stated by PW-1 from the department concerned. Accordingly, learned senior counsel for the appellant is right in contending that there is no material/evidence for the demand of bribe. In the light of the categorical enunciation in **Banarsi Dass (supra)**, in the absence of the demand and acceptance, the accused is entitled to the benefit of doubt. In addition to the same, in the case on hand, even the official witness, Shri Madan Singh-who helped in the search of the accused- Municipal Commissioner, was examined as PW-14 but did not support the prosecution case and turned hostile.

12) Another important aspect which is in favour of the appellant accused is that the order, namely, granting licence in favour of PW-1 – the complainant was made ready before the alleged occurrence i.e. on 02.05.2003. In fact, the original order was available on the table and the same was in the hands of PW-1. Admittedly, he did not hand over the original to the I.O. and his only explanation was that he kept it under his custody to continue his business. As rightly pointed out, when the order itself was ready and available

that too in the hands of the complainant, the demand of the accused as claimed by the prosecution is highly improbable. This aspect has also not been properly explained.

13) In the light of the above discussion and in view of the lacunae in the prosecution case, by giving the benefit of doubt to the accused, we hereby set aside the judgment of the High Court and the trial Court and acquit the accused of the remaining offence under Section 13(2) of the P.C. Act. Since the appellant was ordered to be released on bail on 13.02.2012 by this Court, the bail bonds shall stand discharged. The appeal is allowed.

.....J.
(P. SATHASIVAM)

.....J.
(RANJAN GOGOI)

NEW DELHI;
NOVEMBER 22, 2012.

SUPREME COURT OF INDIA



JUDGMENT