

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.A. 469/2003

**Order reserved on:15.11.2019**

**Date of decision: 28.10.2022**

AJAY GUPTA

..... Petitioner

Through: Mr. Prag Chawla and  
Ms. Ruchi Kapoor, Advocates.

Versus

STATE THR CBI

..... Respondent

Through: Mr. Prasanta Verma, SPP for  
CBI with Mr.Amit Singh,  
Advocate.

**CORAM:**

**HON'BLE MS. JUSTICE ANU MALHOTRA**

**JUDGMENT**

**ANU MALHOTRA, J.**

1. The appellant, vide the present appeal assails the impugned judgment dated 5.7.2003 and the impugned order on sentence dated 7.7.2003 of the then Special Judge, Delhi in RC No.80(A)/96/CBI/ACB/New Delhi whereby Ajay Gupta, the appellant herein, then posted as Sub-Inspector was convicted qua the commission of offences punishable under Section 7 and Section 13(1)(d) read with Section 13 (2) of the Prevention of Corruption Act, 1988, and was sentenced to undergo rigorous imprisonment for a period of four years with a fine of Rs.500/- each under Section 7 and Section 13(2) of the Prevention of Corruption Act, 1988, with the

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substantive sentences having been directed to run concurrently and in default of the payment of the fine, the appellant was directed to undergo rigorous imprisonment for a period of three months on each count.

2. Vide order dated 29.8.2003, the sentence of the appellant was directed to remain suspended during the pendency of the appeal on his furnishing a personal bond in the sum of Rs.25,000/- with one surety of the like amount to the satisfaction of the Trial Court.

3. During the pendency of the appeal, the applicant filed an application under Section 311 read with Section 391 read with Section 482 of the Cr.P.C., 1973, CrI.M.A. No. 8205/2005 seeking directions for recording of the additional evidence to further the interest of justice and to avoid miscarriage of justice and vide order dated 22.10.2005 thereon, the prayer made was allowed in terms of Section 311 read with Section 391 of the Cr.P.C.,1973, and the learned Trial Court was directed to examine the witnesses, Dr.C.S. Prabhu, Dr.Bipin Kumar, Dr.Sumit Sural, Konkan Kumar Mandal, i.e. the injured, the Incharge, VRK (South District) New Delhi with records and the In charge HAP Branch, VI Battalion, DAP and was directed to send the recorded evidence to this Court for the purpose of disposal of this appeal. The said witnesses were examined before the Trial Court.

4. CrI.M.A. No. 3637/2007 was then filed by the appellant seeking retrial of the case from the stage of recording of the statement of the accused in view of the additional evidence recorded but on 6.11.2009, the said application was dismissed as not pressed in view of the directions already given by this Court vide order dated 22.10.2005 in

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CrI.M.A. No.8205/2005 directing the Trial Court to place the additional evidence before this Court and for the purposes of final disposal of the appeal and thus the matter was listed for final disposal on 28.1.2010 at the end of the Board.

5. CrI.M.A. No. 549/2010 once again filed on behalf of the appellant under Section 386(b)(i) read with Section 482 of the Cr.P.C., 1973, by the appellant seeking retrial of the case from the stage of recording of the statement of the accused and the appellant herein under Section 313 of the Cr.P.C., 1973 onwards and passing the judgment afresh was dismissed vide order dated 26.4.2010 and the hearing of the appeal was directed to commence. The appellant however filed CrI.M.A. No. 3025/2011 under Section 482 of the Cr.P.C., 1973 seeking fresh judgment from the Trial Court in light of the additional evidence having come on record and during pendency of this application the appellant filed another application No. CrI.M.A. 18511/2012 seeking preponement of the date of hearing which was dismissed as withdrawn on 6.11.2012 and the matter was brought on Board for hearing and the matter was ultimately listed for arguments during the course of the proceedings on 26.8.2013 but before the hearing could commence, CrI.M.A. No. 10082/2013 under Sections 391 read with Section 311 read with Section 482 of the Cr.P.C., 1973, was filed by the appellant seeking permission to lead additional evidence qua which application it was directed vide order dated 14.7.2015 of this Court that the said application will be considered at the time of hearing of the appeal.

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6. Thereafter the appellant filed another application CrI.M.A. No.13414/2016 under Section 243 read with Section 311 of the Cr.P.C., 1973, seeking recalling of witnesses PW-2 Raj Kumar, PW-3 Satpal and PW-5 Inspector, CBI, R.V.S. Lohmor, and vide order dated 15.9.2016 the prayer having been allowed, the learned Trial Court was directed to examine the said three witnesses who were so examined vide order dated 14.6.2018. It was made clear by this Court vide order dated 15.9.2016 that this Court had not appreciated the evidence on record much less the evidence sought to be brought on record and any observations made in this order had been made only for the purpose of deciding the application CrI.M.A. No.13414/2016.

7. Pursuant to the direction dated 15.9.2016 of this Court, the testimony of PW-3 Satpal and PW-5 Inspector, CBI, R.V. S. Lohmor were recorded by the Trial Court and the statement along with the relevant record were sent by the then Special Judge, Delhi to this Court with it having been reported vide order dated 11.11.2016 of the then Special Judge, Delhi to the effect that the statement of PW-2 Raj Kumar could not be examined as he had died.

8. Vide CrI.M.A. No. 3025/2011, the appellant sought the setting aside of the impugned judgment dated 5.7.2003 and impugned order on sentence dated 7.7.2003 submitting to the effect that vide order dated 29.8.2003, the sentence had been directed to remain suspended during pendency of the appeal with it having been submitted by the appellant that at the time when the CrI.M.A. No.3025/2011 was filed the testimonies of six additional witnesses were recorded by the Trial Court in terms of the order dated 22.10.2005 with documentary

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evidence which includes the departmental enquiry report in which the appellant has been exonerated directing the Trial Court to place the additional evidence recorded before this Court for the purpose of final disposal of the appeal. The appellant had submitted further therein that the defence of the appellant right from the inception of the proceedings against him was that of alibi and denial of presence at the scene at the time of the raid conducted by the CBI in as much as the appellant was busy conducting an enquiry in relation to DD Entry No. 3A of Police Station Badarpur which related to a road accident on 8.11.1996 and that he had also gone to the Safdarjung Hospital for recording of the statement of the injured Kokan Mandal and had also recorded the statement of the injured after the endorsement was made at 4.40 p.m by Dr. Sumit Sural of the Safdarjung Hospital declaring the patient 'fit for statement' and that the appellant had made an endorsement for registration of the case and had sent the rukka at 6:00 p.m. through Ram Bachan, DHG, and it was mentioned in the said endorsement itself that the appellant had developed cold and temperature during the day and that he was under treatment from the Safdarjung Hospital vide OPD slip No. 180610 and that the doctor had advised the appellant to be on rest for two days with it having been submitted further that the appellant had requested that further investigation of the case be entrusted to some other officials and thereafter he had proceeded on medical rest and that thereafter the appellant had surrendered in Court on 18.11.1996 on coming to know that the CBI was after him to arrest him in the case bearing no.R.C.

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No. 80(A)/96/CBI/ACB/ N. Delhi. The matter was thus listed for final disposal.

9. CrI.M.A.No. 549/2010 is however indicated to have been filed once again on behalf of the appellant under Section 386(b)(i) read with Section 482 of the Cr.P.C., 1973, seeking retrial of the case from the stage of the recording of the statement of the accused i.e. the appellant Ajay Gupta under Section 313 of the Code of Criminal Procedure, 1973 onwards and passing of the judgment afresh thereafter which application vide order dated 26.4.2010 of this Court was also dismissed with the matter having been re-listed in the category of “Regular Matters” and when the hearing of the appeal was to commence the application CrI.M.A. No. 3025/2011, under Section 482 of the Cr.P.C., 1973 was filed by the appellant seeking fresh judgment from the Trial Court in the light of additional defence evidence having come on record during pendency of which inter alia CrI.M.A. No. 10082/2013 under Section 391 read with Section 311 read with Section 482 of the Cr.P.C., 1973 was filed by the appellant seeking permission to lead additional evidence qua which application it was directed vide order dated 14.7.2015 of this Court that the said application would be considered at the time of hearing of the appeal whereafter CrI.M.A. No 13414/2016 under Sections 243/311 of the Cr.P.C., 1973 for recalling the witnesses PW-2 Raj Kumar, PW-3 Satpal and PW5 Inspector CBI, R.V.S. Lohmor was disposed of vide order dated 15.9.2016 with directions to the Trial Court to examine the three witnesses namely, PW2 Raj Kumar, PW-3 Satpal and PW5 Inspector CBI R.V.S. Lohmor, observing to the effect that this Court

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had not appreciated the evidence on record, much less the evidence sought to be brought on record and any observations made in the said order had been made only for the purpose of deciding the application CrI.M.A. No.13414/2016 and pursuant to the direction dated 15.9.2016 of this Court, the testimony of PW-3 Satpal and PW-5 Inspector CBI R.V.S. Lohmor were recorded by the Trial Court and the statements along with the relevant record were sent by the then, Special Judge, Delhi to this Court with it having been reported vide letter dated 11.11.2016 of then Special Judge, Delhi to the effect that that the statement of PW-2 Raj Kumar could not be examined as he had died.

**10.** The appellant submits that though he has since been convicted and sentenced vide judgment dated 05.07.2003 and the impugned order on sentence dated 7.7.2003 respectively qua the offences punishable under Section 7 and 13(1)(d) r/w Section 13(2) of the Prevention of Corruption Act, 1988 claiming that he had taken a bribe and thrown away the currency notes on the ground and ran away, he was neither arrested at the spot nor any money was recovered from him with it having been submitted on behalf of the appellant during the course of the arguments on the application CrI.M.A. No.3025/2011 that after the recording of six additional witnesses AW1 to AW6 in terms of the order dated 22.10.2005 of this Court, the three other witnesses have also been examined pursuant to order dated 15.9.2016 of this Court and thus it had been submitted on behalf of the appellant that in the interest of justice he seeks the setting aside of the impugned judgment dated 5.7.2003 and the impugned order on sentence dated

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7.7.2003 and that the Trial Court be directed to pass a fresh judgment after considering the additional evidence that had been recorded pursuant to the order dated 22.10.2005 with the oral prayer made during the course of the submissions also seeking that a fresh judgment be also passed in terms of the evidence recorded by the Trial Court in terms of the order dated 15.9.2016 of this Court submitting to the effect that there were nine witnesses that had been examined after the impugned judgment and the impugned order on sentence dated 5.7.2003 and 7.7.2003 respectively.

**11.** Vide order dated 14.6.2018 CrI.M.A. No.3025/2011 was dismissed with it having been observed by this Court that it had plenary powers to appreciate the evidence directed by it to be collected by the Trial Court which had been so recorded in terms of Section 391 of the Cr.P.C., 1973, which itself does not provide for remand of the proceedings after recording of such additional evidence, and the addition and creation of such further stage of the proceedings before the Trial Court was not considered conducive as it would rather be disruptive of justice with the matter having thus been set down for hearing.

**12.** The Trial Court Record has been requisitioned in the instant case. Written submissions were submitted on behalf of either side. In terms of the order dated 7.1.2019, a compilation of statements of all witnesses was directed to be filed by the CBI which was so filed.

**13.** On 19.12.2018, 10 prosecution witnesses, namely:

*PW1- A.K.Patnaik*

*PW2- Raj Kumar, Junior Assistant, NDMC*

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*PW3- Satpal Singh*

*PW4- Gulshan Kumar Arora*

*PW5- Inspector R.V.S. Lohmor, CBI*

*PW6- C.K.Jain, Senior Scientific Officer, Grade-I, CFSL*

*PW7- Inspector Ajit Singh PCR (PHQ)*

*PW8- Afsar Ali*

*PW9- Khacheru Mal*

*PW10- H.S. Karmyal, SIU-IX, CBI*

are indicated to have been examined before the Trial Court and 5 defence witnesses, namely:

*DW1- Ram Bachan, Delhi Home Guard*

*DW2- Inspect Sq.Ali, CBI*

*DW3- Dharamvir Singh, Head Constable 7094/BAP VI  
Batalion*

*DW4- S. Kumar, Constable 7467-DAP, Delhi Police*

*DW5- Zakir Hussain, 10809-E-Block, Security Line, Delhi  
Police*

were examined by the appellant, 6 additional witnesses, namely,

*AW1- Dr.Somit Sural, Associate Professor Maulana Azad  
Medical College and LNJP Hospital*

*AW2- Rajbir Singh, Record Clerk, AIIMS, New Delhi*

*AW3- Jailpal Singh, ASI, No. 1131-D, West District HAG  
Branch, Delhi Police*

*AW4- Hari Chand, Constable No.877 South District, VRK  
Branch*

*AW5- S.S.Rawat, Medical Record Technician, Safdarjung  
Hospital*

*AW6- Konkan Mandal.*

had testified in terms of order dated 22.10.2005 of this Court.

**14.** The witnesses PW-3, the complainant and PW-5, Inspector CBI, R.V.S.Lohmor after their initial testimonies recorded on 10.7.2002 and 22.10.2002 respectively were further cross-examined in terms of the order dated 15.9.2016.

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**15.** Written submissions were submitted on behalf of either side.

**16.** On behalf of the appellant vide written submissions filed on 28.7.2009 and also submissions made thereafter it was submitted that pursuant to the recording of the six additional Court Witnesses, in terms of the order dated 22.10.2005 of this Court, as AW-1 to AW6 had completely changed the complexion of the case and proved clinchingly the defence of the appellant that at the time of the alleged raid by the CBI at the Police Station Badarpur, the appellant was far away from the spot and also proved his defence through the additional witnesses whose testimony is established that at the relevant time, the appellant was present along with DW1 Delhi Home Guard Ram Bachan firstly at AIIMS and thereafter at Safdarjung Hospital enquiring into the accident matter which had been marked to him vide the DD entry No. 3A dated 8.11.1996.

**17.** The allegations levelled against the appellant are to the effect that the CBI conducted the raid at the Police Station Badarpur on 8.11.1996 in order to entrap SI Ajay Gupta, the appellant herein, who was then posted at Police Station Badarpur on the complaint made by PW-3 Satpal Singh who alleged that on the previous evening i.e., 7.11.1996, he received a telephonic call from SI Ajay Gupta demanding the bribe of Rs. 5,000/- failing which, the complainant would be arrested by him in a false case. The said raiding party was headed by Inspector R.V.S. Lohmor, the Trap Laying Officer, who accompanied by the complainant PW-3 Satpal Singh and two independent witnesses PW-2 Raj Kumar and PW-4 Gulshan Arora reached Police Station Badarpur at about 3.10.p.m. on 8.11.1996 when

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SI Ajay Gupta, the appellant herein, was not found present in his barrack and some policeman in uniform came to the spot and asked PW-3 Sat Pal Singh whether his work had been done and it was further alleged that the said person who had accepted the bribe money was apprehended by the raid team and thereafter he rescued himself and threw away the tainted currency notes at the spot and escaped from the spot after scaling over the wall of the Police Station Badarpur which was adjoining the CPWD godown.

**18.** The prosecution version further alleged that the accused, i.e., the appellant herein had evaded his arrest till he surrendered in the Court on 18.11.1996. The accused, i.e., the appellant herein has however submitted that his version from the beginning has been that on 8.11.1996 at 9.05 a.m. whilst he was present on duty at the Police Station Badarpur, he was marked the D.D. entry No. 3A for enquiry, which pertained to a road accident involving the cyclist Kokan Mandal and that the accused, i.e., the appellant herein had left for the spot i.e. Pul Nahar Mitha Pur accompanied by a Delhi Home Guard Ram Bachan and found the cyclist/injured Kokan Mandal present at the spot, and that the appellant then directed the DHG Ram Bachan to take the injured to the hospital for treatment and the injured was shifted to the AIIMS in the first instance where due to lack of a bed the injured referred to Safdarjang Hospital and the accused, i.e., the appellant herein, in the meantime remained present at the spot being on the lookout for the offending bus which was plying on that particular route. It is the contention of the appellant that at about 2 p.m., the Delhi Home Guard, Ram Bachan came back to the spot

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informing the accused, i.e., the appellant herein, that the injured had been admitted in the AIIMS, New Delhi and the accused, i.e., the appellant herein, accompanied by DHG Ram Bachan went on his motorcycle to the AIIMS hospital from the spot which was at a distance of about 16 Kms taking the driving time of about an hour and the accused reached the AIIMS at about 3 p.m. and then he moved the application before the CMO to know the whereabouts of the injured who had been got admitted in the AIIMS by DHG Ram Bachan. It has been contended on behalf of the appellant that it was informed in writing to him by Dr. C.S. Prabhu of the AIIMS that the injured had been referred to the Safdarjang Hospital at about 2.30 p.m and the accused, thereafter, went to the Safdarjang Hospital and moved another application before the CMO seeking permission to record the statement of the injured Kokan Mandal. The appellant however submits that Dr. Bipin Kumar in the casualty of the Safdarjang Hospital gave in writing that the patient/injured had been taken to the Emergency Operation Theatre (EOT) and then the injured at 4:40 p.m. was declared in writing to be fit for making the statement, by Dr. Sumit Sural at the Safdarjang Hospital. It is submitted on behalf of the appellant that he thereafter proceeded to record the statement of the injured and sent the 'rukka' to the Police Station Badarpur at about 6.00 p.m. through DHG Ram Bachan for registration of a formal case and the accused had sent the injury sheet of the injured which he had prepared at the spot along with the 'rukka' to the Police Station and that the accused, i.e., the appellant herein, had fallen sick, having caught cold and cough as he had been involved in the enquiry since

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morning and therefore, he took his treatment vide the OPD Card No.180610 from the Safdarjang Hospital and the fact of the accused, i.e., the appellant herein, having fallen sick and being under the treatment at the Hospital vide the said OPD Card was also recorded in the rukka which he sent to the Police Station Badarpur.

**19.** Inter alia, it has been submitted on behalf of the appellant that he had moved an application for anticipatory bail dated 14.11.1996 before the learned Special Judge, Delhi wherein he had elaborated all the circumstances detailed above. The appellant submits that paragraph 6 of the said application, it was clearly mentioned, that at about 4.00 p.m. on 8.11.1996, the accused submitted the application to the CMO, Safdarjang Hospital seeking permission to record the statement of the injured Kokan Mandal and the doctor concerned had permitted the accused to do so at 4.40 p.m. after making the endorsement "fit for statement", whereafter he, the accused had sent the 'rukka' to the P.S. Badarpur at 6.00 p.m. in respect of the case which he had been investigating since morning. The appellant further submits that paragraph 8 of the application, the accused mentioned that in his absence during the aforesaid period from the Police Station, the CBI officials conducted the mock trap proceedings and made out a false case against him. It was also mentioned in the said paragraph that the copy of the FIR had been sent to the Court concerned after a delay of 5 days from the date of registration.

**20.** The appellant further submits that the CBI filed its reply to this application filed by the appellant seeking the grant of anticipatory bail mentioning that the present case had been registered on 8.11.1996 at

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11 a.m. and vide paragraph 4 of the response of the CBI, it is submitted that the search of the accused after his escape was made in the nearby area and it was learnt that it had been seen by the people of the locality that a policeman in uniform whose clothes were smeared with 'nala' mud had been given a lift by two persons on their scooter and that one of them was in police uniform and in paragraph 7 of the reply, it was stated that the defence taken by the accused was totally false and intended to mislead the Court and that the Investigating Officer in the reply categorically mentioned that the CBI team remained present at Police Station Badarpur on 8.11.1996 till 9.15 p.m. and that an entry to that effect was made in the Daily Diary of the Police Station.

**21.** The appellant submits that after rejection of the bail application, he surrendered in Court on 18.11.1996 and through the application dated 18.11.1996 for bail under Section 439 of the Cr.P.C., 1973, the defence taken by the appellant was as had been taken by him earlier in his anticipatory bail application. The appellant further submitted that the reply filed by the CBI was that the accused had taken a false and concocted defence about his being present at the relevant times at the hospitals in order to create the plea of alibi but rather vide para 5 of the reply of the CBI it was stated by the Investigating Officer that the proceedings had started at 3.10. p.m. on 8.11.1996 at Police Station Badarpur which concluded at 9:30 p.m. and that an entry to that effect was made in the Daily Diary register of Police Station Badarpur. This bail application is stated to have been rejected by the Special Judge.

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22. It is further submitted on behalf of the appellant that the second bail application dated 28.11.1996 under Section 439 of the Cr.P.C., 1973 was filed by the appellant with necessary documents proving *prima facie* the defence taken by him and he also annexed:

- the photocopy of the DD Entry No. 3A,
- the photocopy of the application moved by the accused, i.e., the appellant herein to the CMO AIIMS to know about the injured Kokan Mandal as to which hospital he had been referred to,
- the photocopy of the application moved by the accused, i.e., the appellant herein, to the CMO, Safdarjang Hospital for seeking permission to record the statement of Kokan Mandal and
- the doctor making the endorsement thereupon at 4.40 p.m. to the effect that the injured was fit for making statement and,

it was reiterated that the accused, i.e., the appellant herein, had submitted his report, i.e. the rukka to Police Station Badarpur at 6 p.m. for registration of the case. It was reasserted by the appellant that the copy of the FIR had been sent to the Court after the lapse of five days from the date of registration of the case.

23. The appellant further submits that the CBI filed its response repeating its allegations that the accused, i.e., the appellant herein had taken a false plea of alibi in order to mislead the Court, the plea of the appellant for release on bail was however accepted and he was granted bail vide order dated 30.11.1996. The appellant submits that the application filed by the appellant under Section 311 read with Section 391 read with Section 482 of the Cr.P.C., 1973, seeking issuance of directions to the Trial Court to record additional evidence, in the

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interest of justice and to avoid miscarriage of justice, was allowed vide order dated 22.10.2005 wherein it was observed categorically that it was in the anticipatory bail application itself that the appellant had raised the plea that at the time of the alleged raid and payment of bribe money to him, he was not present at the Police Station Badarpur, and in fact he was present at the Safdarjang Hospital in connection with the enquiry of a case and that this plea was also in the regular bail application but despite the same the Investigating Officer did not care to carry out investigation into this plea and to collect evidence to show that the appellant was raising a false plea of alibi. It was submitted thus by the appellant that vide order dated 22.10.2005 it had been observed that the facts of the prosecution case against the appellant warranted inquiry into this plea inasmuch as according to the prosecution itself, the appellant, after accepting the bribe from the complainant, threw it away and ran away from the spot. The appellant submits that it was also observed vide the impugned order that the appellant was trying to raise a plea of mistaken identity and thus it was necessary for the Investigating Officer to enquire into the plea of appellant that he was present somewhere else.

**24.** Inter alia, the appellant submits that it had also been observed by the said order that if the appellant had manipulated records to raise a plea of alibi, the Investigating Officer had good reasons and a duty to expose the falsity of his plea and take action against those even who were trying to shield him.

**25.** Inter alia, it has been submitted that the additional evidence of six witnesses examined as Court Witnesses, i.e.,:-

*AW1 Dr. Sumit Sural then posted in the EOT of Safdarjang Hospital, and then working as an Associate Professor, MAMC, proved his endorsement Ex. AW1/B on the application moved by the appellant herein, certifying that the injured was fit for making a statement at 4:40 p.m.;*

*AW2 Rajbir Singh, Record Clerk, AIIMS identified and proved the handwriting and signatures of Dr. C.S. Prabhu (who had since left the country) and his endorsement Mark A on the application Ex. AW2/A;*

*AW3 ASI Jaipal Singh brought the departmental enquiry file, which had been initiated and concluded favourably in favour of appellant herein, and proved the exoneration order Ex. AW3/A and the statements of the departmental witnesses examined during the enquiry i.e. Raj Kumar, Satpal, Ram Bachan, Ajit Singh, RVS Lohmor and HC Dharamvir, the copies of whose statements were proved as Mark X-1 to X-6 in the additional evidence;*

*AW4 Const. Hari Chand, VRK stated to have brought the carbon copy record of the DD Register A and B of P.S. Badarpur from 8.11.96 to 18.11.96 and proved the medical rest intimations given by the appellant and recorded in the DD register of PS Badarpur from 12.11.96 to 18.11.96 on the copy of the DD entry 64-B the copies of entries in DD register B of PS Badarpur for 8.11.96 from 9 p.m. to 10 p.m. and in the DD Register A of the same date from 8 a.m. to 8 a.m. (next day);*

*AW5 S.S. Rawat, Record Clerk of Safdarjang Hospital identified and proved the handwriting, signatures and endorsement of Dr. Bipin Kumar,*

*who was earlier posted in the Safdarjang Hospital (and had since left the country) on the application moved by the appellant herein seeking permission to record the statement of the injured;*

*AW6 Kokan Mandal, the injured, proved his signatures on his statement incorporated in the 'rukka' and he deposed that he had seen the appellant accompanied by DHG Ram Bachan, present in the Safdarjang Hospital from 3:15 p.m. and that the appellant had recorded his statement in the hospital at 4:30 p.m. and that the appellant along with DHG Ram Bachan left the hospital at about 5:15 p.m.*

26. It is submitted on behalf of the appellant that the non-identification of the appellant during the trial and the departmental enquiry entitles the appellant to the benefit of a reasonable doubt. It is submitted on behalf of the appellant that the prosecution witnesses did not identify the accused present in the dock facing the trial:

- *as being the person who was present at the Police Station at the time of raid as being the person who had accepted the bribe money;*
- *as being the person who had thrown away the tainted currency notes on the ground; and*
- *as being the person who rescued himself after being apprehended and ran away from the spot after scaling over the wall of the Police Station.*

27. Inter alia the appellant submitted that no witness has identified the appellant in the Court except the Trap Laying Officer, R.V.S. Lohmor, who identified the appellant in his examination-in-chief but

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failed to do so in his cross-examination where he stated that he could not say who ran away from the Police Station.

**28.** Inter alia, it is submitted by the appellant that this witness, i.e., the Trap Laying Officer, had taken the police remand of the appellant therefore he had all the opportunities to identify the accused, i.e., the appellant herein.

**29.** Inter alia, the appellant submits that apart from the non-identification of the accused by the prosecution witnesses during the trial in the departmental enquiry these very witnesses including the TLO stated that the delinquent facing the inquiry, i.e., the appellant herein was not the person who was present or accepted the bribe money or ran away from the Police Station Badarpur and that thus this was the underlying reason why the prosecution witnesses during the trial were not cross-examined on the point of identification of the accused.

**30.** Inter alia, the appellant submits that there were no finger prints of the accused found on the currency notes and although specimen finger prints of the accused were taken during the police remand no opinion of the expert was placed on record presumably because it was against the prosecution.

**31.** Inter alia, the appellant submits that the accused had proved the defence of alibi by the probability of preponderance of evidence on the record and that the SHO at the Police Station as PW7 had deposed that he had not seen the accused throughout the day at Police Station Badarpur on 8.11.96 after about 9:15 a.m. when he left the Police Station to attend the emergency call. The appellant thus submits that

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the prosecution version suffers from fatal deficiencies, contradictions and shortcomings.

**32.** The appellant submits that none of the prosecution witnesses had categorically pinpointedly pointed out towards the accused present in the dock as being the person who had either accepted the bribe money; thrown the tainted money on the ground or ran away from the spot.

**33.** PW-2 Raj Kumar the shadow witness deposed that he along with the complainant had gone inside and they did not find Ajay Gupta, i.e., the appellant, in his barrack and after sometime a person in uniform came there but he did not identify the accused person as seen by him at the spot.

**34.** The appellant has further submitted that PW-3 Satpal Singh, the complainant, deposed that in October 1996, some S.I. Ajay Gupta had come to his office and residence two/three times in his absence and he deposed that on 7.11.1996 he received a telephonic call from Ajay Gupta, i.e., the appellant herein, and stated that he along with Raj Kumar went inside and the accused Ajay Gupta, i.e., the appellant herein, met them and they wished each other but this witness did not identify the accused present in the Court as a person who had met them or wished them.

**35.** PW4 Gulshan Arora, the recovery witness deposed that Ajay Gupta ran away and could not be arrested and that his evidence is conspicuously silent insofar as the identification of the accused is concerned as being in the person in the Court as the person who had run away or could not be arrested.

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**36.** PW7 Inspector Ajit Singh, the then SHO, P.S. Badarpur deposed that Ajay Gupta, i.e., the appellant herein, accused present in the Court was posted as SI at Police Station Badarpur and as per his testimony, at about 9.15 a.m., the accused Ajay Gupta had left the Police Station to attend the emergency call and thereafter, he had not seen him in the Police Station throughout the day.

**37.** PW8 Afsar Ali, the Truck Driver, deposed that at about 3.00 or 3.15 p.m., some police officials came to his truck and asked him to move the truck but he could not identify the person who asked him to move the truck.

**38.** It is submitted by the appellant that PW-9 Khacheru Mal, Beldar in the PWD godown was an alleged eye-witness to the alleged escape of the accused from the spot and in his testimony he deposed that at 3.00 p.m., he had seen one person running but he failed to identify the accused present in the Court as the person who had been seen by him running as per the prosecution version

**39.** The appellant further submits that PW5 RVS Lohmor, the Trap Laying Officer, who had taken the police remand of the accused and in whose custody the accused remained for two days, stated in his testimony that the accused person present in the Court, on seeing the CBI trap party, had taken out the bribe amount and thrown it on the ground and ran away but in his cross-examination he could not say as to who had run away from the spot at the Police Station Badarpur with it thus having been submitted on behalf of the appellant that this renders his testimony not only doubtful but insignificant because if he had seen the accused taking out the bribe amount and throwing it on

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the ground and running away as deposed by him in his examination-in-chief it could not be explained as to how he could say he could not know as to whether the appellant was the person who had run away from the Police Station.

**40.** Inter alia the appellant submitted that PW-5 R.V.S.Lohmor, Rajesh Mal, the Beldar (who was not examined by the prosecution and was dropped without assigning any reason) were witnesses to the alleged escape of the accused from the spot, that whilst PW-9 Khacheru Mal did not identify the accused at all and he was surprisingly not declared hostile and not cross-examined by the prosecution. It has been submitted further by the appellant that the other witness Rajesh Mal was not examined without any reason.

**41.** Inter alia, the appellant submitted that rather on the other hand AW6 Kokan Mandal, the injured (examined as additional witness) clearly identified the accused present in the Court as being the person who had come to the hospital and recorded his statement.

**42.** It was inter alia submitted on behalf of the appellant that he had been exonerated in the departmental inquiry held against him vide exoneration order dated 11.3.1999 as proved through the testimony of AW3 SI Jaipal Singh and that in this exoneration order dated 11.3.99 it had clearly been recorded that the complainant and the shadow witnesses had stated that the delinquent was not the person who had taken the money.

**43.** The statements of the departmental witnesses have also been placed on record by AW-3, SI Jaipal Singh, the additional witness examined. The appellant reiterates his submissions that the PWs Raj

Kumar, Satpal Singh, Ram Bachan, Ajit Singh, R.V.S. Lohmor, HC Dharamvir made their statements in the departmental inquiry which were proved and all these witnesses had deposed in substance that the delinquent facing the inquiry was not seen by them present at the Police Station at the time of the raid by the CBI and in the clarification made by the Enquiry Officer from PW-2 Raj Kumar, the witness Raj Kumar had stated that the person present during the inquiry was not the person to whom PW- Satpal Singh had handed over the bribe money of Rs.5,000/- and that he was not the person who had thrown the money on the ground and thereafter ran away.

**44. Inter alia, the appellant has submitted that likewise PW-3 Satpal Singh in his statement in the additional evidence categorically deposed in no uncertain terms that the delinquent police official SI Ajay Gupta present in the departmental inquiry was not the same against whom he had got the raid conducted or to whom he had handed over the bribe money and in his cross-examination he admitted that Ajay Gupta had never met him before 8.11.1996 or thereafter and till he was making his statement in the departmental enquiry on 10.8.1998. It is submitted by the appellant that in response to a clarificatory question put to the witness by the Inquiry Officer the witness denied that he had got the raid conducted on the delinquent SI Ajay Gupta or that he had given the bribe money of Rs.5000/- to the said SI.**

**45. The appellant has further submitted that DW-1 Ram Bachan, Delhi Home Guard, in his statement has fully supported the case of the**

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defence and nothing came out in his cross-examination to shatter or demolish his testimony.

**46.** The appellant further submitted that PW-7 Inspector Ajit Singh, the SHO who was examined as a departmental witness stated that he did not know whether SI Ajay Gupta had or had not deputed the Home Guard Ram Bachan to collect the MLC and to attend the call and could not say anything about it because he was not present at the spot from where the accused had sent the DHG Ram Bachan along with the injured Kokan Mandal to the hospital and that the said SHO also stated that he did not see whether SI Ajay Gupta was present at the relevant time of the raid on 8.11.1996.

**47.** The appellant thus submits that the statement of the SHO Ajit Singh made it clear that he had not seen the accused SI Ajay Gupta at the time of the raid by the CBI at Police Station Badarpur on 8.11.1996 and that if the CBI team had come for a raid at the Police Station Badarpur he would have surely come out to see what was happening around but he did not see the accused at the Police Station at the time of the raid and this proves that the accused has been falsely implicated in the manufactured and fabricated case with the allegations that the accused had thrown the money on the ground and had run away after scaling over the wall of the Police Station Badarpur. It is submitted on behalf of the appellant that had the allegations been true it would be difficult to believe that the SHO of the Police Station if he was present at the Police Station would not come to know of all these developments.

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**48.** The appellant further submits that the deposition of AW5 R.V.S. Lohmor in his cross-examination as additional witness that he had not seen the delinquent SI Ajay Gupta on 8.11.1996 as being the person who was present at the Police Station Badarpur who was the one facing the departmental inquiry establishes that the accused was not present at the Police Station Bardarpur on 8.11.1996 when the alleged raid was conducted by the CBI.

**49.** The appellant further submits that the FIR records that it was registered at 11 a.m. on 8.11.1996 but PW3 Satpal has testified in his cross-examination that he reached the CBI office and wrote the complaint at 11:45 a.m but the FIR could not be registered at 11 a.m. when the complainant gave his complaint at 11:45 a.m. on the basis of which the FIR was registered.

**50.** Inter alia, it has been submitted on behalf of the appellant that there has been an inordinate delay in sending the copy of the FIR to the Court in as much as the FIR is alleged to have been registered on 8.11.1996 at 11 a.m. and in terms of Section 157 of the Cr.P.C., 1973, the copy thereof was required to be sent forthwith to the Court concerned and that in the instant case the FIR was received by the learned Special Judge on 13.11.1996 at 11:30 a.m. as per the endorsement on the FIR which delay has not been explained by the prosecution and is *prima facie* fatal to the prosecution case particularly in the facts and circumstances of the instant case.

**51.** The appellant further submits that there are inconsistent testimonies of the prosecution witnesses in relation to the time of the raid in as much as whereas the prosecution version is that the CBI

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team reached the Police Station Badarpur at about 3:10 p.m., PW-2 Raj Kumar in his deposition stated that the team had left the CBI office at about 3:30 p.m. and reached the Police Station Badarpur with it thus having been submitted on behalf of the appellant that the distance between the CBI office at the CGO Complex, Lodhi Road and Police Station Badarpur is such that it takes one hour driving time to reach the Police Station Badarpur around 4:30 p.m.. The appellant submits that on the other hand PW-2 Raj Kumar in his statement in the Departmental enquiry stated that the team had reached the Police Station Badarpur at 5p.m. or 5:30 p.m. Furthermore, the appellant submits that PW-4 Gulshan Arora in his statement during the trial deposed that he left the CBI office at around 3:30 p.m. which thus means that he reached the Police Station at around 4:30 p.m. The appellant thus submits that assertions of the two independent public witnesses render the entire prosecution story suspect and doubtful.

**52.** It is inter alia submitted on behalf of the appellant that the prosecution version in relation to the alleged apprehension of the accused, i.e., the appellant herein, at the spot is also rendered doubtful in view of the factum that PW-2 Raj Kumar and PW-3 Satpal Singh in their deposition had stated that the accused was apprehended at the spot by the CBI team and thereafter he had rescued himself and had run away from the spot but PW-5 R.V.S. Lohmor, the trap laying officer, had deposed that they tried to catch the accused but the latter had escaped thus submitting to the effect that in view of the deposition of the trap laying officer, the accused was never apprehended.

53. A further submission is made on behalf of the appellant that the prosecution version is also inconsistent in relation to the recovery of the currency notes which the appellant had allegedly thrown and escaped, as per the prosecution version. It is submitted on behalf of the appellant whereas PW-2 Raj Kumar in his deposition stated that the Government currency notes were picked up by them, PW-3 Satpal Singh stated that that the CBI Officers picked up the government currency notes with the help of a 'chimty' and PW-4 Gulshan Arora in his deposition deposed that the government currency notes were picked with the help of the 'chimty' but PW-5 R.V.S. Lohmor, deposed to the effect that the CFSL team wearing gloves had picked up the currency notes from the spot and that there was a vast contradiction in the statements of the witnesses on this aspect and that this proved that either the prosecution witnesses had not seen the picking up of the currency notes or that they were not testifying truly.

54. The appellant has further submitted to the effect that the witnesses mentioned in the site plan EX.PW-2/C allegedly prepared at the spot had neither been cited nor examined by the prosecution submitting to the effect that as per the marginal note shown in the site plan in which the witnesses have been referred to by their initials, the witnesses who were allegedly members of the raiding party cited in the list of witnesses named,

*1. Ramnish, Dy.S.P. CBI/ACB cited at serial No. 6 in the list of witnesses shown as 'RD' in the marginal notes appended to the site plan;*

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*2. Shri. C. K. Sharma, Inspector, CBI/ACB cited at serial No.7 in the list of witnesses shown as “CSK” in the marginal notes appended to the site plan and ;*

*3. Shri Vivek Dhir, Inspector CBI/ACB cited at serial No.8 in the list of witnesses shown as “VD” in the marginal notes appended to the site plan,*

though cited had not been examined.

**55.** Furthermore, the appellant submits that the four witnesses shown in the marginal notes in the site plan i.e., Inspector Ved Prakash referred to as “VP” in the marginal notes, Inspector P.K.Sharma referred to as “PKS” in the marginal notes, Ct. Rakesh Kumar referred to as “RK” in the marginal notes and Ct.Manoj Kumar referred to as “MK” in the marginal notes had neither been cited nor examined by the prosecution.

**56.** Furthermore, the appellant has submitted that the marginal note “A” in the site plan indicates the position ‘**Vijay Gupta, Accused**’, and the appellant has submitted that the name of the accused, i.e., the appellant herein is Ajay Gupta and the factum that the site plan being allegedly prepared at the spot in the presence of so many witnesses is falsified by the factum that the name of the appellant is mentioned as Vijay Gupta in place of Ajay Gupta which itself indicates that such a major mistake could not have occurred in the name of the accused which also thus indicates that the site plan was not prepared at the spot and was prepared in the office of the ACB by which time the person preparing the site plan did not even remember the name of the accused.

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**57.** It was inter alia submitted by the appellant that the falsity of the CBI stand about the departure of the raiding party from Police Station Badarpur on 8.11.1996 at 9:15 p.m. is established through the production of the Register A and Register B of 8.11.1996 before the Court produced in the form of additional evidence of AW-4 which established that there was no such entry recorded at Police Station Badarpur in any of the two Registers A and B.

**58.** The appellant further submits that the witness AW4 had proved the relevant entries of Register B for 8.11.1996 and that the entries were proved from 9.05 p.m. to 9.20 p.m. and 9:25 p.m. to 11:20 p.m. but none of them showed any departure entry having been made by the raiding team of the CBI at Police Station Badarpur on 8.11.1996 at any point of time much less at 9:15 or 9:30 p.m. as alleged by the CBI.

**59.** It is further submitted by the appellant that the testimony of PW-3 Satpal Singh is to the effect that his voice specimen had been taken by the CBI on 20.11.1996 vide memo EX.PW-3/E but EX.PW-3/E is the memo qua the specimen voice taken of the accused and not of PW-3 Satpal Singh. It has thus been submitted on behalf of the appellant that the seizure memo was neither placed on record nor proved during the trial in so far as the taking of the specimen voice of PW3 Satpal Singh.

**60.** The appellant further submits that as per the testimony of PW-5, the Trap Laying Officer, R.V.S. Lohmor, the specimen voices of PW2 Raj Kumar and PW4 Gulshan Arora had been recorded in both the cassettes Ex.P51 and Ex.P52 pertaining to pre-raid and spot recording.

**61.** The appellant further submits that PW-2 Raj Kumar and PW-4 testified to the effect that their voices had been recorded in one cassette only and thus the testimonies of the prosecution witnesses were variant in relation to the recording of the specimen voices. The appellant has further submitted that the specimen voices allegedly taken by the prosecution of PW-2 Raj Kumar and PW-3 Satpal Singh had never been taken for the purposes of comparison and had never been sent to the CFSL for expert opinion for the reasons best known to the prosecution which was not even explained on record, and there is no opinion from the experts qua the voices.

**62.** Inter alia, the appellant submits that during the police remand the CBI had taken the specimen voice sample vide memo EX.PW-3/E which was taken without the order or presence of the Court and thus the said specimen voice is rendered bereft of evidentiary value as held by the Hon'ble Supreme Court *Sukhvinder Singh and others v. State of Punjab*( 1994 (2) SCALE 877).

**63.** The appellant further submitted that as per the Memo Ex.PW-3/E, there were two attesting witnesses, named, R.D.Sachdeva and Tahir Hussain but none of them had been cited nor examined by the prosecution.

**64.** The appellant has further submitted that the cassettes Ex.P51 and Ex.P52, as per the prosecution version, as testified by PW-5 R.V.S. Lohmor were sealed at the spot by Inspector R.V.S. Lohmor and the seal after use had been handed over to PW-4 Gulshan Arora but that this prosecution version had not even been remotely established.

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**65.** It is thus submitted on behalf of the appellant that whereas PW-2 Raj Kumar in his deposition stated that he did not recall what had been done with the cassette ExP51, he did not depose about the sealing of the cassettes or the seal being handed over to anyone.

**66.** It is further submitted by the appellant that PW-3 Satpal Singh in his deposition had stated that EX.P51 had been converted into a pulanda and had been sealed with the seal of CBI but he stated nothing in respect of the handing over of the seal after use nor to whom. Furthermore, the appellant submitted that PW-4 Gulshan Arora in his evidence did not say a word about the seal after use having been handed over to him and submitted that the bald statement of the Trap Laying Officer thus did not get any corroboration from this witness in regard to sealing of cassettes or handing over of the seal after use to the witness.

**67.** Inter alia, the appellant submits that PW-2 Raj Kumar in his deposition did not say anything about the sealing of Ex.P-52, i.e., the cassette nor in relation to the seal after use having been handed over to anyone, and that likewise, PW-3 Satpal Singh and PW-4 Gulshan Arora, in their depositions were completely silent on the aspect of sealing of the cassettes or the seal after use having been handed over to anyone.

**68.** Inter alia, the appellant submits that PW5 R.V.S. Lohmor, the Trap Laying Officer, in his testimony had deposed that the seal had been taken by him from PW-4 Gulshan Arora for sealing the cassette Ex.P52 and the seal after used had been handed over back to PW-4 Gulshan Arora and had also stated that the seal was again taken back

from PW-4 Gulshan Arora and the seal impression had been affixed on each page of the recovery memo but that the deposition of PW-5 R.V.S. Lohmor is silent whether the seal after such use had been handed over back to PW-4 Gulshan Arora or to anyone else and that thus in the absence of any such evidence it has to be inferred that after the seal impression of the seal had been affixed on the recovery memo the seal was never returned to PW4 Gulshan Arora from whom it had been taken and that it remained in the custody/possession of PW5 R.V.S. Lohmor since 8.11.1996.

**69.** Inter alia, the appellant submits that in the instant case, as per the record, the cassettes were alleged to have been prepared and sealed on 8.11.1996 and sent to the expert only 28.11.1996 as mentioned in the 'Expert's Opinion' Ex.PW 6/A and thus it is submitted on behalf of the appellant that the seal during the intervening period from 8.11.1996 to 28.11.1996 remained with PW-5 R.V.S. Lohmor, the Trap Laying Officer, and thus there was every possibility that there could be a tampering of the 'pulanda' containing the cassettes.

**70.** Reliance was thus placed on behalf of the appellant on the verdict of the Division Bench of this Court in *Amarjit Singh and others v. State of Delhi* (1995 JCC 91) to submit to the effect that it had been held therein that it has to be proved by the prosecution that the seal was not taken back from the witness till the parcels reached the office of the Examiner.

**71.** A further submission was made by the appellant that the transcriptions of the stated contents of the cassettes were materially different from the version given by the prosecution witnesses.

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72. The appellant submits that a bare comparison of the versions i.e. one recorded in the transcript Ex.PW-3/G and the other recorded in the evidence of PW-2 Raj Kumar and PW-3 Satpal Singh leaves no matter of doubt that either the transcription was not fair nor an accurate transcription of what had transpired at the spot or that the witnesses had made vital deviation in their statements in Court with a view to buttress the case of the prosecution.

73. Inter alia, it was submitted on behalf of the appellant that in any case, the benefit of such major differences in the transcription and the evidence has to go in favour of the accused, i.e, the appellant herein.

74. The appellant has further submitted that the expert was sent only the specimen and the questioned voices of the accused, ie., the appellant herein for comparison and opinion and the expert gave a report EX.PW-6/A according to which the questioned and the specimen voices sent to him were "*probably*" of the same speaker in relation to which it is submitted on behalf of the appellant that this kind of opinion by the expert does not advance the case of the prosecution.

75. The appellant has further submitted that as per the prosecution version, the accused, i.e., the appellant herein ran away from the spot on 8.11.1996 and surrendered himself in Court only on 18.11.1996 and during the intervening period it was alleged by the prosecution that the accused remained absconding and that the learned Trial Court treated this circumstance heavily against the accused and held that the accused remained elusive from 8.11.1996 to 18.11.1996.

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**76.** The appellant has further submitted that through the additional evidence examined by the appellant pursuant to order dated 22.10.2005 passed by this Court, the rukka EX.PW6/A as additional evidence was proved which conclusively shows that the same had been sent by the appellant on 8.11.1996 at 6.00 p.m. from the Safdarjung Hospital, requesting for registration of the case, and the said 'rukka' categorically mentioned that the accused had fallen sick during the day and was taking treatment from the Safdarjung Hospital vide the OPD Card No. 180610 and that he had been advised medical rest for two days. The appellant has further submitted that the 'rukka' had been sent by the appellant to the Police Station Badarpur through DHG Ram Bachan examined as DW1.

**77.** The applicant further submits that he continued to remain on medical leave and periodically informed the Police Station Badarpur vide the D.D. entry No.48-B dated 12.11.1996, Ex. AW4/A, D.D. entry No.44-B, dated 14.11.1996, Ex.AW4/B, D.D. entry No. 35-B dated 16.11.1996, Ex.AW-4/C and lastly, D.D. entry No. 15-B dated 18.11.1996 Ex.AW-4/D seeking extension of medical leave from time to time till he surrendered in the Court on 18.11.1996.

**78.** The appellant has further submitted that these D.D. entries were part of the record of the Police Station Badarpur, although these entries came to be proved by the appellant only during additional evidence examined during the pendency of the appeal. It has been submitted by the appellant that nevertheless these entries were available in the DD registers of Police Station Badarpur and that had the CBI officer cared to make an enquiry from the Police Station

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Badarpur about the whereabouts/joining of the appellant on duty after 8.11.1996 at the Police Station Badarpur it would have come to be known without difficulty that the accused had been on medical rest as intimations given by the accused and recorded vide the said DD entries and it would not have been difficult at all for the Investigating Agency to have looked in to the matter by examining even the DD Entries wherein the OPD card numbers issued to the appellant on the various dates were recorded.

**79.** The appellant has further submitted that there is no evidence on record that the Investigating Agency made any effort to locate the appellant either at the hospital or at his home during the said period when he was on medical leave and it has thus been submitted by the appellant that the CBI can thus not contend that the appellant remained absconding during the said period and that the version of the appellant is proved by the DD entries supported with the OPD cards plausible in contrast to the bald averments and allegations made by the Investigating Agency that the appellant remained absconding.

**80.** The appellant has further submitted that material witnesses were not examined by the prosecution which necessitated the drawing of an adverse inference against the prosecution version in favour of the appellant giving benefit of a reasonable doubt and which also pointed out the innocence of the appellant.

**81.** Inter alia, it was submitted by the appellant that the witnesses DSP Ramnish, Inspector C.K. Sharma and Inspector Vivek Dhir cited as prosecution witnesses at serial No. 6, 7 and 8 in the list of witnesses, all from the office of the CBI/ACB and the alleged

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members of the raiding team had not been examined during trial by the prosecution despite the factum that they were all material witnesses and still in service. It has been submitted by the appellant that in these circumstances of the instant case where the public witnesses namely PWs Raj Kumar, Satpal Singh, Gulshan Arora, Khacheru Mal and Afsar Ali had failed to identify the accused present in the dock as the person who is alleged to have accepted the bribe money, thrown the tainted money on the ground and run away from the spot, it was incumbent upon the prosecution to have proved its case by the testimony of other official witnesses who were the members of the raiding party and were present at the spot and thus necessarily an adverse inference has to be drawn against the prosecution and in favour of the accused/appellant.

**82.** The appellant has further submitted that the Delhi Home Guard Ram Bachan has been cited as prosecution witness at serial No.10 in the list of witnesses by the CBI but was not examined and was dropped. The said witness was produced by the accused, i.e., the appellant herein, as DW1 in his defence who proved the truthfulness of his defence.

**83.** Inter alia, the appellant submits that Rajesh Kumar, Beldar in the CPWD Godown was cited as the prosecution witness at serial No.16 in the list of prosecution witnesses and as per his statement under Section 161 of the Cr.P.C., 1973, he was the witness to the escape of the accused from the spot but he was not examined by the prosecution despite he being allegedly a material witness and his non-examination gives rise to a presumption against the prosecution

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version and leads to the innocence of the accused, i.e., the appellant herein.

**84.** The appellant further submitted that though Head Constable Dharamvir was cited as prosecution witness at serial No.17 in the list of witnesses by the CBI, without any reason he was not examined and was dropped as a prosecution witness and he too was a material witness and thus the accused, i.e., the appellant herein, produced him as DW-3 in support of his innocence and to bring forth the truth.

**85.** The appellant has further submitted that the Investigator had taken into possession on 28.11.1996 the copies of the DD entry No. 64B and DD entry No.3A as mentioned at serial No.1 in the production-cum-seizure memo vide EX.PW-7/A and the copies of the said documents ought to have been placed on the records of the judicial file but were deliberately not so done by the Investigating Agency.

**86.** The appellant has submitted that the copy of the DD entry No. 64B produced by the prosecution was incomplete in as much as not only the time of recording of the DD entry was wrongly recorded as 9:30 p.m. instead of the correct time of 9:20 p.m. but also the last 8 lines of the said DD entry are missing in Ex.DW2/A, and that this incomplete DD entry was proved by the prosecution and was relied upon by the Trial Court to make a scathing criticism of the correct copy of the DD entry proved by the accused, i.e., the appellant herein, as marked DW3/X and Ex.DW-4/A. It was submitted by the appellant that Mark DW-3/X was proved through the testimony of DW3 HC Dharamvir who also produced a copy of DD Entry No. 64B

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which was taken on record as Mark DW-3/X and that likewise DW4 Ct. S. Kumar proved the photocopy of the DD entry No.64B as Ex.DW-4/A from the departmental enquiry file brought by him and it is submitted by the appellant that the DD entries mentioned the correct time of recording the DD entry as 9:20 p.m. . The appellant has also submitted that he examined AW-4 Ct. Hari Chand from VRK who in his testimony proved the photocopy of the DD entry No. 64B as Ex.AW-4/E which also contained the correct time of the entry as 9:20 p.m. as also the complete version recorded by Head Ct. Dharamvir in the DD entry No.64B on 8.11.1996 at Police Station Badarpur.

**87.** Inter alia, the appellant submits that the VRK official had brought the carbon copy record of the DD entry, i.e., the Mussanna, i.e., the official record brought by the official witness from the official custody, the authenticity of which could not be doubted and that copy of DD Entry No. 64B Ex.AW-4/E completely tallied in its contents with the document Mark DW-3/X as produced and proved by the accused, i.e, the appellant herein, through the testimonies of DW-2 and DW-4. The appellant further submitted that the observations made by the learned Trial Court regarding the accused having brought on record a fabricated DD entry were thus uncalled for, unwarranted and unfounded.

**88.** The appellant submits that the said DD entry No.64B from his point of view is important in as much as the said entry clearly records that Head Ct. Dharamvir on being assigned the enquiry, had visited the hospital, met the injured Kokan Mandal and wanted to record his

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statement about the occurrence and that the said DD entry further records that the injured Kokan Mandal had told H.C. Dharamvir that he already made his statement to SI Ajay Gupta, i.e., the appellant herein, and that he did not want to make any further statement and this document proves the defence of the appellant that he was present at the hospital and recorded the statement of the injured after 4:40 p.m. when the injured was declared fit for making a statement.

**89.** The appellant submits that in view of the submissions made by him he has been wrongly convicted and sentenced. Inter alia, it has been submitted on behalf of the appellant that the learned Trial Court did not have the additional evidence before it for consideration and adjudication and thus the impugned judgment of the learned Trial Court is inconclusive.

**90.** The appellant further submits that he has suffered mentally, physically and financially during the span of last 13 years, that the pangs of prosecution and the travails of trial have rendered him a physical wreck. The appellant further submits that during the trial and appeal, he was placed under suspension, served with the order of dismissal and again put under suspension on the orders of the Division Bench of this Court. The appellant thus submits that the circumstances of the case warrant a clear acquittal for him and that alone will be some consolation to the appellant, facilitating his reinstatement.

**91.** The appellant has placed reliance on a catena of verdicts in support of his plea of innocence:

- **State of Kerala & Anr. V. C.P.Rao;** (2011) 6 SCC 450

- **B. Jayaraj Vs. State of A.P. IV(2014) SLT 128**
- **Dipak Babaria & Anr. V. State of Gujarat & Ors.; IV (2014) SLT 130**
- **Sujit Biswas V. State of Assam; (2013) 12 SCC 406**
- **A. Subair V. State of Kerala; (2009) 6 SCC 587**
- **Gurpreet Singh V. State of Haryana; (2002) 8 SCC 18**
- **Shaikh Sattar V. State of Maharashtra; (2010) 8SCC 430**
- **Jitender Kumar V. State of Haryana & Sunil Kumar & Anr. V. State of Haryana; (2012) 6 SCC 204**
- **Jayantibhai Bhenkarbhai V. State of Gujarat; (2002) 8 SCC 165**
- **Mohinder Singh V. State; 1953 AIR (SC) 415**
- **Banarsi Dass V. State of Haryana; AIR 2010 SC 1589**
- **C.M. Sharma V. State of A.P. TH. I.P.; VIII (2010) SLT 497**
- **Vishal Chand Jain @ V.C. Jain V. C.B.I.; 2011 [1] JCC 570**
- **Roshan Lal Saini & Anr. V. C.B.I.; 2011[1] JCC 102**

92. Vide its written synopsis, the CBI has reiterated the prosecution version and submits that the appellant had been evading arrest and on 18.11.1996 he surrendered before the Court. The CBI further submits that it had examined 10 witnesses to prove its case. It is further submitted that the prosecution version of the appellant having demanded a bribe of Rs.5,000/- from the complainant and threatening to arrest him in some other case is brought forth through the testimony of PW-3 Satpal Singh, the complainant, who had stated that the appellant had come to his office and residence two to three times in his absence and he also demanded a bribe of Rs.5,000/- through a telephonic call and the demand of bribe was also proved from the conversation that was recorded on 8.11.1996 in the office of the CBI during the trap proceedings. The CBI further submits that the transaction of bribe has also been proved by the conversation that was

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recorded on 8.11.1996 at the time of trap proceedings and through the transcript, it can be seen clearly that the appellant herein was asking the complainant as to how much amount was there and the complainant submitted that the whole amount was there and that the amount had also been handed over to the accused, i.e., the appellant herein.

**93.** Inter alia, the CBI submits that the testimony of PW3 clearly states that the appellant demanded money by gesture and he gave the money to the appellant and then the appellant accepted the money and put the same in his right hand side pocket and that PW-2 Raj Kumar, independent witness in his examination before the Court had clearly stated that the complainant had handed over the money to the accused, i.e., the appellant herein and that the appellant took the money and put it in his right side pant pocket and also stated that as the CBI team was rushing towards the spot, the appellant threw the money on the ground and ran away by jumping the boundary wall.

**94.** Inter alia the CBI submitted that the identity of the appellant herein was proved by PW-4, R.V.S. Lohmor (TLO) who in his examination stated that on receipt of the pre-appointed signal from the shadow witness, the trap party members rushed inside the Police Station and that the appellant on seeing the CBI trap party took out the bribe amount and threw it on the ground and ran away.

**95.** The CBI further submitted to the effect that the CFSL report also clearly states that the voice sample of the appellant is similar to the voice in the recording made during the trap proceedings and the

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PW-3 has also identified the voice in the recording to be that of the appellant during the Court proceedings.

**96.** Inter alia, the CBI submits that the defence of the appellant that he was not present at the Police Station Badarpur at the time of the trap proceedings and was busy investigating an accident case in relation to which he examined DW-1 Ram Bachan cannot be believed in as much as the statement of the DW-1 is not reliable as the copy of the FIR which was prepared on the basis of the rukka (apparently refers to a rukka stated to have been sent by the appellant) was not produced in Court.

**97.** The CBI also further submits that the contention of the appellant that the injured refused to give any statement stating that the statement had already been recorded by the appellant is erroneous in as much as EX DW-2/B, the statement of the injured recorded by PW-3 on 8.11.1996 had also been produced during trial.

**98.** The CBI further submits that the necessity to depute the DW-3 to enquire into the accident case arose since the appellant had run away from the said Police Station and that the same had also been observed by the learned Special Judge vide the impugned judgment.

**99.** The CBI has further submitted that the defence of the appellant that the learned Trial Court had erroneously convicted the appellant even though the appellant was exonerated in the Departmental enquiry, which was based on the same set of allegations, cannot be sustained because the departmental enquiry, being quasi judicial in nature, has no relevance in the criminal trial and also the standard of

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proof required in the departmental enquiry is much lesser than the criminal proceedings.

**100.** The CBI further submits that the defence of the appellant that the complainant and the shadow witness had stated in the departmental enquiry that the appellant was not the same Ajay Gupta, who was present at the police station during raid, cannot be taken to be true on the face of it because the statement of complainant and the shadow witness before the enquiry officer was recorded much prior in time to their statements before the learned Trial Court. The CBI further submits that the Departmental enquiry was initiated in 1997 and concluded vide order dated 09.03.1999 but the statements before the learned Trial Court were recorded only in the year 2002 and that nothing prevented the witnesses from making the same statement before the learned Trial Court but the witnesses did not even utter a word before the learned Trial Court to question the identity of the appellant.

**101.** The CBI further submits that even though the appellant was well aware of the statements of the complainant and the shadow witness, the same was not brought to the attention of the learned Trial Court. It is further contended by the CBI that this act of the appellant in not producing the statements of the complainant and the shadow witness before the Ld. Trial Court but agitating upon the same point before this Court, goes to prove that some mischief has been perpetrated by the appellant.

**102.** The respondent CBI further contends that even though the appellant was well aware that the shadow witness and the complainant

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had stated in the departmental enquiry that the appellant herein was not the same Ajay Gupta, who took the money on the day of the trap proceedings, no question with regards to the identity of the appellant was put forward to the complainant or the shadow witness during their examination before the Ld. Trial Court.

**103.** The CBI contends further that if the statements made by the complainant and shadow witness before the departmental enquiry were true, it should have been the main point of defence by the appellant before the Ld. Trial Court and the whole matter would have been put to rest by a simple Test Identification Parade but the appellant herein, who was well aware of the procedures and law, chose not to put forward this point, which in itself shows that the appellant herein was the same person, who accepted the bribe from the complainant on 08.11.1996.

**104.** Inter alia, the respondent submits that the statement of Kokan Mandal, the victim of the accident case (as referred to by the appellant), to have been recorded at about 4.30 p.m., cannot be relied upon since the endorsement that the patient is 'fit for statement', was given by the Dr. Sumit Sural at 4.40 p.m., and that is evident from the statement of Dr. Sumit Sural, who was examined as additional witness pursuant to the direction of this Court, vide order dated 22.10.2005.

**105.** The CBI further submits that even otherwise, the CFSL report stating that the voice samples of the appellant are similar to the voice in the recording made during the trap proceedings and the conduct of the appellant in absconding from 08.11.1996 to 18.11.1996, without

any permission and reason, establishes the guilt of the appellant in the present case.

**106.** The CBI has thus submitted that the appeal be dismissed.

**ANALYSIS**

**107.** It is essential to observe that the complainant on whose statement the investigation was initiated on being recalled for cross-examination in terms of the order dated 15.9.2016 had categorically stated in his testimony dated 27.10.2016 to the effect that he had attended the departmental enquiry against the appellant Ajay Gupta, present in Court, at the Defence Colony in August 1998, and that he truly stated therein that SI Gupta who was present in the office was not that Ajay Gupta against whom he had got the raid conducted nor was he the person who had taken the bribe money. He also stated that he had truly stated in his statement Ex.PW3/D-1, i.e., the proceedings in the departmental enquiry against the appellant herein, and on the date 8.11.1996 he had not met the appellant nor before the date 8.11.1996 nor thereafter. He also categorically stated that he had truly stated in his statement EX.PW3/D-1, that on clarification by the Enquiry Officer that it was wrong to say that the person mentioned present as SI Ajay Gupta was the person against whom he had got the raid conducted or that appellant was the person who had taken the bribe money. This witness stated that his statement was recorded in the Court. He also admitted that he correctly stated in his statement EX.PW3/D-2 that the person named SI Ajay Gupta who had taken the bribe money from him behind the Police Station Badarpur at the

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CPWD office and had thrown the same and had run away was not the appellant and that he (Satpal) could identify that person even on that date. This witness, the complainant Satpal Singh also stated categorically that in his statement EX.PW3/D-2 it was correctly stated to the effect that on the date 10.8.1998 when he had gone to testify in relation to the departmental enquiry against the appellant at the DE cell, Defence Colony, the person who was present facing the departmental enquiry, had been seen by him for the first time that day and that the witness PW-3 Satpal Singh had never met him before.

**108.** This witness categorically also stated that he had correctly stated in his statement EX.PW3/D-2 that the complaint that he made on 8.11.1996 to the CBI office against SI Ajay Gupta was against the person who used to telephone him by the name of SI Ajay Gupta but that person facing the enquiry as SI Ajay Gupta was not the person against whom he had lodged the complaint nor was that person facing the departmental enquiry that SI Ajay Gupta to whom the complaint had given the money.

**109.** Significantly, this witness stated that in his testimony on 10.7.2002 before the Special Judge, Tis Hazari Courts, as none i.e. neither the prosecutor, nor the counsel for the accused nor the Court had asked him that day in relation to the identification of the appellant as being that SI Ajay Gupta, he had not stated anything about the same but that if there had been any question to him in relation to the identification of the appellant as being SI Ajay Gupta then his answer would have been the same that the appellant present before the Court was not that Ajay Gupta to whom the complainant had given the

money or against whom the complainant lodged the complaint. This witness further stated that he had truly stated in his statement EX.PW3/D-2 that he had made all statements in the departmental enquiry of his own accord. Inter alia, Satpal Singh, the complainant stated that the voice attributed by him in the cassette to be that of the accused was pertaining the voice of that person who had demanded the money from him and had run away from the spot after throwing away the money. He further stated that it was correct that the accused Ajay Gupta, present in Court that day was not that person who had demanded money from him on 8.11.1996 nor was he that person who had run away from the spot, i.e., the Police Station Badarpur after throwing away money.

**110.** Despite the cross-examination conducted by the learned Prosecutor for the CBI this witness denied that he had been pressurized to make any statement due to the presence of police officials in the departmental enquiry and stated that he did not know whether the present accused, i.e., the appellant Ajay Gupta, was posted at Police Station Badarpur during the year 1996 and stated that he had never met previously SI Ajay Gupta and denied that the accused Ajay Gupta, present in Court, was posted at Police Station Badarpur as an SI at the relevant time and denied that the said accused Ajay Gupta present in Court had demanded Rs.5,000/- from him.

**111.** This witness categorically denied that he had given Rs.5000/- to the accused Ajay Gupta, present in Court and denied that he had deliberately not identified the accused Ajay Gupta as he had been won over by him.

112. Inspector R.V.S. Lohmor, in his testimony, pursuant to order dated 15.9.2016 of this Court vide his testimony dated 27.10.2016 stated that his statement EX.PW5/DX-1 during the cross-examination conducted by SI Ajay Gupta who was present in Court on that day, during the course of the departmental enquiry he (Inspector R.V.S. Lohmor) had correctly and truly stated that he had himself not seen the person present in Court SI Ajay Gupta on 8.11.1996 as being that person Police Station Badarpur. **This witness also stated that he had truly stated vide his statement EXPW5/DX-2 during the cross-examination conducted by Ajay Gupta, the appellant herein, present in Court on the date of his further cross-examination that the person who he had seen as Ajay Gupta during the trap proceedings on 8.11.1996 was not that person present in the Court because he (Inspector R.V.S. Lohmor) had not seen that person because by the time he entered into the Police Station that person had already run away.** This witness further stated that he could not comment on the statements of the shadow witness PW-2 Raj Kumar recorded during the two departmental enquiries nor could he comment about the signatures of PW-2 Raj Kumar as the said statements were not recorded in his presence nor signed in his presence. **On being cross-examined by the learned prosecutor for the CBI, Inspector R.V.S. Lohmor stated that he had seen the accused for the first time after he surrendered in Court.** However this witness stated further that he had sent the search team for searching SI Ajay Gupta at his residence as he was sure that he was the same Ajay Gupta against whom the trap was laid and stated that this opinion he had

formed on the basis of the official loaded revolver of SI Ajay Gupta as well as one of his pagers belonging to him lying on his table and this witness denied the suggestion put forth on behalf of the appellant that no loaded revolver or pager were recovered from the table of the accused.

*(emphasis supplied)*

***113. Through the testimonies of the prosecution witnesses adverted to herein above, the identity of the appellant as being the person named Ajay Gupta who demanded the bribe of Rs.5000/- from the complainant and threatened to arrest him in some other case and who took the bribe amount of Rs.5,000/- , put the same in his right side pocket of his pant and threw the money on the ground as the CBI team was rushing towards the spot by jumping the boundary wall becomes wholly doubtful.***

**114.** The contention of the CBI is to the effect that the appellant had not been identified by the witness in the departmental enquiry but this aspect was not brought to the notice of the Trial Court by the appellant despite being aware of the statement of the complainant and the shadow witness and the appellant now urging the same before this Court is only to perpetrate mischief and that if the contention of the appellant that the statement made by the complainant and the shadow witnesses before the Departmental Enquiry were true it ought to have been the main point of defence of the appellant before the Trial Court and the matter would have been put to rest by a simple Test Identification Parade and the appellant who was well aware of the procedure and law having chosen not to put forward this aspect itself

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indicates that the appellant was the same person who accepted the bribe from the complainant on 8.11.1996.

**115.** On behalf of the appellant, the contention raised is to the effect that the Trap Laying Officer had taken the police remand of the accused and therefore he had all the opportunity to identify the accused and apart from him no one else had identified the appellant in the trial in the examination-in-chief and rather this very witness Inspector R.V.S. Lohmor had failed to state that the appellant was the person who had run away from the Police Station saying that he could not say who ran away from the Police Station.

**116.** The appellant has further submitted that in as much as the witnesses including the Trap Laying Officer had stated in the departmental inquiry that the appellant herein was not the person who was present or who had accepted the bribe, had run away from the police station it was for that reason that the prosecution witnesses were not cross-examined on the point of identification to the accused.

**117. Significantly, as rightly submitted on behalf of the appellant no finger print impressions were brought forth to have been found on the currency notes and the amount of Rs.5,000/- allegedly taken by the appellant who put it into the pocket of his pant despite the specimen finger print impressions of the accused taken during police remand, it has thus been submitted on behalf of the appellant that an adverse inference has to be drawn against the prosecution due to non-placement of the expert opinion.**

**118.** The contention of the appellant is that even through the testimonies of the prosecution witnesses examined prior to the

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recording of additional evidence do not suffice to incriminate the identity of the appellant as being the person who allegedly made demand of the bribe from the complainant and who allegedly accepted the bribe money and had thrown it away on seeing the CBI team coming and ran away thereafter submitting to the effect that the testimony of PW-2 Raj Kumar was only to the effect that he along with the complainant went inside and did not find Ajay Gupta in his barrack and after some time a person came in uniform. Inter alia, the appellant submits that PW-3 Satpal Singh in his deposition also did not identify the accused as being the person who had met them or wished them when he met him along with Raj Kumar. The appellant has further submitted that even the statement of PW-4 Gulshan Kumar Arora, the recovery witness, who stated that Ajay Gupta ran away and could not be arrested is wholly qua the identification of the appellant present in Court as being the person who had run away or could not be arrested.

**119.** Inter alia, the appellant has submitted that the testimony of PW7 Inspector Ajit Singh the then SHO, Police Station Badarpur was categorical that at 9:15 a.m., Ajay Gupta, i.e., the appellant herein, had left the Police Station to attend an emergency call and thereafter he did not see him at the Police Station throughout the day, thus submitting to the effect that the applicant was not at the Police Station at the time of the alleged raid.

**120.** The appellant has further submitted that respondent PW-8 Afsar Ali, the truck driver, had stated that at about 3 to 3:15 p.m. some police officials had come to his truck and had asked him to move the

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truck but he could not identify the person who asked him to move the truck. Apparently there is nothing in the statement of PW8 to incriminate the appellant. A further submission was made on behalf of the appellant that PW9 Khacheru Mal, Beldar, put forth by the prosecution as being the eyewitness at the PWD godown to witness the alleged escape of the accused, i.e., the appellant herein, from the spot had only deposed that at about 3 P.M. he had seen one person running but he had not identified the appellant as being the person who had been seen by him running. It has been further submitted on behalf of the appellant that the Trap Laying Officer Inspector R.V.S. Lohmor who took the police custody remand of the appellant for two days who had stated that the appellant on seeing the CBI Trap Party had taken out the bribe amount and threw it on the ground and had run away in his cross-examination could not say as to who had run away from the spot at the Police Station Badarpur which thus renders his entire testimony doubtful and also shatters the prosecution version for if Inspector R.V.S. Lohmor had seen the accused taking out the bribe money and throwing it on the ground and running away as deposed by the witness Inspector R.V.S. Lohmor in his examination-in-chief the statement that he could not say who ran away from the Police Station was not in consonance with the prosecution version.

**121.** Inter alia, the appellant has submitted that non-production of vital evidence by the CBI in support of its prosecution version has established the innocence of the appellant and it has thus been submitted on behalf of the appellant that PW5 Inspector R.V.S. Lohmor, PW9 Khacheru Mal, the Beldar, and Rajesh Mal (dropped

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and not examined by the prosecution during trial without assigning any reason ) were alleged witnesses to the alleged escape of the appellant from the spot and whilst PW-9 Khacheru Mal, did not identify the appellant at all he was not declared hostile and nor cross-examined by the prosecution and the other material witness Rajesh Mal had not been examined by the prosecution without any reason and that thus an adverse inference has essentially to be drawn against the veracity of the prosecution version. Further the appellant has submitted that AW6 Kokan Mandal, the injured, had clearly identified the accused i.e., the appellant as being the person who had come to the hospital and recorded his statement.

**122.** The appellant has further submitted to the effect that the statements made by the witnesses in the Departmental Inquiry , i.e., by AW3 SI Jaipal Singh and PWs Raj Kumar, Ram Bachan, Ajit Singh Inspector R.V.S. Lohmor and HC Dharamvir, whose statements are marked X1 to X6 had been proved and that the statement of AW3 SI Jaipal Singh had proved the exoneration order dated 11.3.1999 Ex.AW3/A qua the appellant wherein it had been clearly recorded that the complainant and the shadow witness stated that the delinquent was not the person who had taken the money, coupled with the factum that PW2 Raj Kumar stated to the Inquiry Officer that SI Ajay Gupta who was present during the inquiry was not the person to whom Satpal Singh had handed over the bribe money of Rs.5,000/- and that he was not the person who had thrown the money on the ground and thereafter had run away with it thus having been submitted on behalf of the appellant that the identity of the appellant has not thus been

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established even remotely as being the alleged perpetrator of the commission of the crime.

**123.** The appellant reiterated that inter alia the appellant submits that the testimony of PW3 Satpal Singh who stated that the delinquent police official present in the departmental inquiry was not the same Ajay Gupta against whom he had got the raid conducted or to whom he had handed over the money sets at naught the prosecution version in as much as even in his cross-examination this witness had stated that he had never met SI Ajay Gupta neither on or before 8.11.1996 nor thereafter.

**124.** Inter alia, the appellant had submitted that the Inquiry Officer had put a clarificatory question to the witness Satpal Singh in which the witness Satpal Singh had denied that he had got the raid conducted against the delinquent SI Ajay Gupta or that he had given the bribe money of Rs.5,000/-. The appellant has further submitted that DW1 Ram Bachan, Delhi Home Guard, in his statement during additional evidence had fully supported the case of the defence and had withstood the test of cross-examination.

**125.** The appellant has further submitted that the statement of PW7 Ajit Singh, SHO, was examined as the departmental witness had stated that he did not know whether SI Ajay Gupta had or had not deputed the Home Guard Ram Bachan to collect the MLC and to attend the call and that he could not say about this as he was not present at the spot from where the accused had sent Ram Bachan along with the injured Kokan Mandal to the Hospital and that the SHO Ajit Singh

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had stated further that he did not see whether SI Ajay Gupta was present at the Police Station at the time of the raid on 8.11.1996.

**126.** The appellant has thus submitted that it is clear from the statement of the then SHO Police Station Badarpur, Inspector Ajit Singh that he had not seen the accused SI Ajay Gupta, the appellant herein, at the Police Station at the time of the raid by the CBI on 8.11.1996.

**127.** The appellant thus submits that by this statement of the SHO, PS Badarpur it is clear that he had not seen the accused SI Ajay Gupta in the P.S. Badarpur at the time of raid by the CBI on 8.11.96 and that he was the SHO of P.S. Badarpur and if the CBI team came for a raid at the P.S. Badarpur he would have surely come to know and come out to see what was happening around that he did not see the accused present at the P.S. at the time of the alleged raid and this goes to prove that the accused has been falsely implicated in the manufactured and fabricated case with the allegations that the accused had thrown the money on the ground and run away after scaling the wall of the P.S. Badarpur and that had it been true, it is difficult to assume or believe or imagine that the SHO of the Police Station, who was present at the Police Station, would not come to know of all these developments.

**128.** The appellant has further contended that PW5 RVS Lohmor in his statement (at pages 105-107 of the additional evidence Ann.E-6) stated in his cross-examination at page 107 that on 8.11.1996, he had not seen the delinquent SI Ajay Gupta who was present during the departmental inquiry, to be present at P.S. Badarpur. The appellant contends that this statement, coming from the Trap Laying Officer,

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clinchingly proves that the accused was not present at the P.S. Badarpur on 8.11.96 when the alleged raid was conducted by the CBI.

**129.** The appellant has contended that the CBI's version of the departure of the raiding party from PS Badarpur on 08.11.1996 is wholly fabricated in as much as the prosecution failed to prove any D.D. entry pertaining to the departure of the raid party from the P.S. Badarpur at 9.15 p.m.

**130.** In order to prove the falsity of the aforesaid stand of the CBI about the departure of the raid party from the P.S. Badarpur on 8.11.96 at 9.15 p.m., the appellant got produced the Register A and Register B of 8.11.1996 of P.S. Badarpur, and it is brought in evidence of AW4 that there was no such entry recorded at P.S. Badarpur in any of the two Registers A and B. AW4 produced and proved the entries of Register A for 8.11.1996 from 4.06 p.m. to 7.15 p.m. (at page 80 of the additional evidence) and 9.20 p.m. to 9.35 p.m. (at page 81 of the additional evidence). (Ex. PW4/G at pages 80-81 of the additional evidence -Ann.C-6 Colly.). Similarly, the aforesaid witness proved the relevant entries of Register B for 8.11.1996 and according to the entries (Ex. PW4/F at pages 76 and 75 - Ann.C-5 Colly.) the entries were proved from 9.05 p.m. to 9.20 p.m. (at page 76) and 9.25 p.m. to 11.20 p.m. (at page 75). None of these entries show that any departure entry had been made by the raiding team of CBI at P.S. Badarpur on 8.11.1996 at any time, much less at 9.15 or 9.30 p.m. as alleged by the CBI.

**131.** As per the evidence of PW3 Sat Pal Singh (at page 47 - Ann. H-2), his specimen voice had been taken by the CBI on 20.11.1996 in its

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office, vide the memo Ex. PW3/E (at page 347-349 - Ann. K-1). The perusal of the memo Ex. PW3/E shows that the same pertains to the specimen voice taken of the accused and not of PW Sat Pal Singh. Therefore, as rightly contended on behalf of the appellant there is no memo either placed on record or proved during the trial insofar as taking of specimen voice of PW3 Sat Pal Singh is concerned.

**132.** According to the Trap Laying Officer RVS Lohmor PW5 (at page 63 -Ann.K-2), specimen voices of PW2 Raj Kumar and PW4 Gulshan Arora had been recorded in both the cassettes Ex. P51 and P52 pertaining to pre-raid and spot recording respectively.

However, PW2 Raj Kumar in his evidence (at page 41 - Ann. K-3) andPW4 Gulshan Arora in his evidence (at page 55 - Ann. K-4) deposed that their voices had been recorded in one cassette only.

As rightly contended on behalf of the appellant this contradiction throws doubt on the entire proceedings pertaining to the recording of the specimen voices of the witnesses as alleged by the prosecution.

Moreover, the specimen voices alleged to have been taken by the prosecution of PW2 Raj Kumar and PW3 Sat Pal Singh for purposes of comparison and opinion had never been sent to the expert for reasons best known to the prosecution and not explained on record, and thus the contention of the appellant that there is no opinion of the expert on their voices, cannot be overlooked.

**133.** The appellant has contended that during the police remand, the CBI had taken the specimen voice of the accused vide the Memo Ex.PW3/E (at pages 347-349 - Ann. K-1) and that the same was taken without the order nor in the presence of the Court, and such specimen

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voice is rendered bereft of evidentiary value as held by the Supreme Court in *Sukhvinder Singh and Others v. State of Punjab*( 1994 (2) SCALE 877).

As per the Memo Ex.PW3/E, there were two attesting witnesses R.D. Sachdeva and Tahir Hussain but none of the said witnesses has either been cited or examined by the prosecution.

**134.** The prosecution case as per PW5 RVS Lohmor (at page 63 - Ann. K-2) is that both the cassettes were sealed at the spot, and the seal after use had been handed over to PW4 Gulshan Arora.

PW2 Raj Kumar in his evidence (at page 37 - Ann. D-1) stated that he did not recall what had been done with cassette Ex.P51. He stated nothing in respect of either sealing of the cassettes or the seal being handed over to anyone.

PW3 Satpal Singh in his evidence (at page 45 - Ann. D-3) stated that the cassette Ex.P51 had been converted into a 'pulanda' and the same had been sealed with the seal of CBI. This witness again stated nothing in respect of handing over of the seal after use and if so, to whom.

PW4 Gulshan Arora in his evidence (at page 55 - Ann. K-4) did not say a word about the seal after use having been handed over to him. The statement of the Trap Laying Officer (PW5) is thus not corroborated by this witness in regard to sealing of cassettes or handing over of the seal after use to the witness.

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So far as the cassette Ex.P52 is concerned, PW2 Raj Kumar in his statement (at page 39 - Ann. H-1) does not say anything about sealing of the said cassette or the seal after use having been handed over to anyone. Similarly, PW3 Satpal Singh in his evidence (at page 47 - Ann. H-2) and PW4 Gulshan Arora in his evidence (at page 55 - Ann. K-4) are completely silent on the aspects of sealing of the cassettes or the seal after use having been handed over to anyone.

PW5 RVS Lohmor, the Trap Laying Officer, in his testimony (at page 67 -Ann. K-5) deposed that the seal had been taken by him from PW4 Gulshan Arora for sealing the cassette Ex.P52 and the seal after use had been handed back to PW4 Gulshan Arora. He went on to say that thereafter, the seal was again taken back from PW4 Gulshan Arora and the seal impression had been affixed on each page of the recovery memo. His evidence is silent as to whether the seal after such use had been handed back to PW4 Gulshan Arora or to anyone else. The contention thus of the appellant that in the absence of such evidence, the inference is that after the seal impression of the seal had been affixed on the recovery memo, the seal was never returned to PW4 Gulshan Arora from whom it had been taken and that it remained in the custody/possession of PW5 RVS Lohmor since 8.11.1996,- cannot be overruled.

In this case, as per the record the cassettes were alleged to have been prepared and sealed on 8.11.96 and sent to the Expert only on 28.11.1996 as mentioned in the Expert's opinion Ex. PW6/A (at page 315 -Ann. K-6). It appears that the seal during the intervening period

from 8.11.1996 to 28.11.1996 remained with the Trap Laying Officer. There was thus every possibility that there could be tampering of the 'pulanda' containing the cassettes.

**135.** Reliance was placed on behalf of the appellant on the verdict of the Division Bench of this Court in *Amarjit Singh and others v. State of Delhi*; (1995 JCC 91), to contend to the effect that it has been laid down therein that the it has to be proved by the prosecution that the seal was not taken back from the witness till the parcel reached the office of the examiner, thus submitting that in the instant case the same having not been established there was every possibility that there had been tampering of the pulanda containing the parcel.

**136.** The appellant had submitted that the investigator had taken into possession on 28.11.1996 the copies of the D.D. entries Nos. 64-B (at page 171 - Ann. M-1) and 3-A (at page 175 - Ann. M-2), as mentioned at serial No. 1 in the production-cum-seizure memo vide Ex. PW7/A (at page 359 - Ann. M-3) and that the copies of both the D.D. entries, having been seized by the police during the investigation, in all fairness, ought to have been placed on the judicial file. The contention of the appellant that this was deliberately not done by the investigating agency in order to prejudice the case of the appellant, cannot be overlooked.

**137.** In the instant case, the prosecution failed to produce and prove the copy of D.D. entry No.64-B (at page 171 - Ann. 11/1-1) which it had admittedly seized vide the seizure memo Ex. PW7/A by the appellant. The copy of the said D.D. entry which had been seized

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during the investigation vide the memo Ex. PW7/A was got produced and proved as Ex. DW2/A (at page 171 - Ann. M-1). The copy of the D.D. entry No.64-B (at page 171 - Ann. M-1) as produced by the prosecution was incomplete inasmuch as not only the time of recording of the said entry is wrongly recorded as 9.30 p.m. (instead of the correct time 9.20 p.m.) but also the last 8 lines of the said D.D. entry are missing in Ex. DW2/A. This incomplete D.D. entry as proved by the prosecution could not have been relied upon by the learned Trial Court.

**138.** DW3 HC Dharamvir in his evidence (at page 107 - Ann. M-6) proved the photocopy of the D.D. entry No. 64-B, as shown to him and produced by the defence in the evidence, as mark DW3/X (at page 169 - Ann. M-4). Similarly, DW4 Ct. S. Kumar in his evidence (at page 111 - Ann. M-7) proved the photocopy of the D.D. entry 64-B as Ex. DW4/A (at page 177 - Ann. M-5) from the departmental enquiry file brought by him. The documents marked DW3/X(at page 169 - Ann. M-4) as also Ex. DW4/A (at page 177 - Ann. M-5) not only mentioned the correct time of recording the D.D. entry as 9.20 p.m. but also the complete version recorded in the D.D. entry No.64-B.

**139.** In the additional evidence, the appellant examined AW4 Ct. Hari Chand from VRK who in his testimony (at page 37 of the additional evidence - Ann.M-8) proved the photocopy of the D.D. entry No.64-B as Ex. AW4/E (at pages71-73 of the additional evidence Ann. C-4). The said document also contained the correct time of the entry as 9.20 p.m. and the complete version as recorded by H/Ct. Dharamvir in the D.D. entry No.64-B on 8.11.1996 at P.S.

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Badarpur. The VRK official had brought the carbon copy record of the D.D. entry (which is technically called "Mussanna") and this was the official record brought by the official witness from the official custody, the authenticity of which, as rightly contended by the appellant, could not be doubted. The copy of the D.D. entry No.64-B Ex. AW4/E (at pages 71-73 of the additional evidence Ann. C-4) completely tallies in its contents with the documents marked DW3/X (at page 169 - Ann. M-4) and Ex. DW4/A (at page 177 - Ann. M-5) as produced and proved by the accused in the testimonies of DW2 and DW4. The appellant has thus contended that the criticism made by the learned trial court regarding the accused having brought on record a fabricated D.D. entry was, therefore, uncalled for, unwarranted and unfounded.

**140.** The importance of the DD entry No.64-B, from the point of view of the appellant is that the said entry clearly records that HC Dharamvir on being assigned the enquiry, had visited the hospital; met the injured Kokan Mandal and wanted to record his statement about the occurrence. The said DD entry further records that the injured Kokan Mandal told HC Dharamvir that he had already made his statement to SI Ajay Gupta (the appellant) and that he did not want to make any further statement. The appellant submits that this document proves the defence of the appellant that he was present at the hospital and recorded the statement of the injured after 4.40 p.m. when the injured was declared fit for making a statement.

**141.** It has been submitted by the appellant that he has been unjustly and wrongly convicted and sentenced and that he has suffered the

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pangs of prosecution and the travails of trial have rendered him a physical wreck during the trial and appeal and that the appellant was put under suspension served with the order of dismissal and again put on suspension under the orders of the Division Bench of this Court and that the circumstances of the case warrant a clear acquittal of the appellant and that alone will be some consolation to the appellant facilitating his reinstatement.

**142.** On a consideration of the entire available record and the rival pleas addressed on behalf of either side, it is apparent that the identification of the appellant-accused as being the perpetrator of the alleged commission of the crime of having made the demand of the bribe and received the bribe money and having thrown the same thereafter and having escaped the CBI personnel reaching the spot has not been established beyond a reasonable doubt.

**143.** This is so, in as much as, the testimony of the Trap Laying Officer, Insp. R.V.S. Lohmor also indicates that he stated that he had truly stated vide his statement Ex.PW5/DX-2 that the appellant was not the person whom he had seen as being Ajay Gupta during the trap proceedings on 08.11.1996 because by that time, Insp. R.V.S. Lohmor entered into the police station, that person has already run away.

**144.** Significantly, PW-3 Satpal Singh, the complainant, in his additional evidence has categorically deposed that the delinquent police official SI Ajay Gupta who was present in the Departmental Inquiry was not the same, against whom he had got the raid conducted or to whom he had handed over the bribe money and in his cross-examination he admitted that Ajay Gupta had never met him before

08.11.1996 or thereafter and till he was making his statement in the Departmental Inquiry on 10.08.1998. In response to a clarificatory question put to the witness by the Inquiry Officer, the witness denied that he had got the raid conducted on the delinquent SI Ajay Gupta or that he had given the bribe money of Rs.5,000/- to the said SI.

145. Furthermore, it is essential to observe that this witness PW-3 Satpal Singh in his deposition dated 27.10.2016 recorded pursuant to order dated 15.09.2016 of this Court has stated to the effect:-

*“It is correct that I had stated truly in my statement Ex.PW3/D-1 from portion X to X-1 that 'is wat jo SI Ajay Gupta naam ke afsar aapke daftar main maujood hain, yeh veh Ajay Gupta nahin hain jinke khilaf maine us din raid karwai thi aur paise rishwat diye the. Bayan sun liya theek hai'.*

*It is correct that I had also stated truly in my statement Ex.PW3/D-1 from portion X-2 to X-3 in cross examination that ' dinak 08.11.96 se pehle ya uske baad, yahan aane se pehle yeh SI Ajay Gupta mujhe kabhi nahin mile the.*

*It is correct that I had also stated truly in my statement Ex.PW3/D-1 from portion X-4 to X-5 on clarification by E.O that ' yeh kehna galat hai ki SI Ajay Gupta hazira par maine raid karai thi aur isi Ajay gupta ko bataur rishwat 5000 rupai die the'.*

.....

*It is correct that I had stated truly in my statement Ex.PW3/D-2 from portion X to X-1 during the cross examination by Ajay Gupta that " Q.3 kya dinank 08.11.96 mein jis SI Ajay Gupta ne paise lene ke baad fenk kar bhaag gaya, kya veh vyakti main hun?*

*Ans. Jo SI Ajay Gupta ne thana Badarpur ke peeche CPWD office mein paise lie the aur lene ke baad paise fenk kar bhaag gaya tha woh vyakti aap nahin hain. Aur samne aane par us vyakti ko main aaj bhi pehchan sakta hun."*

*It is correct that I had stated truly in my statement Ex.PW3/D-2 from portion X-2 to X-3 during the cross examination by Ajay Gupta that "Q.4 Dinaank 10.08.98 ko DE Cell office Defence Colony main bayan dene se pehle kya main kabhi aapse pehle mila tha?"*

*Ans. Dinaank 10.08.98 jab main SI Ajay Gupta ki DE ke silsile main apna bayan dene ke live DE Cell office Defence Colony aaya tha tab maine pehli baar aapko dekha tha usse pehle meri aapse koi mulakat nahin hui thi."*

*It is correct that I had stated truly in my statement Ex.PW3/D-2 from portion X-4 to X-5 during the cross examination by Ajay Gupta that " Q.5 Aapne 08.11.96 main CBI ko SI Ajay Gupta ke khilaf di thi kya veh complaint mere khilaaf thi?"*

*Ans. Maine dinaank 08.11.96 ko jo complaint CBI office main di thi veh complaint maine us vyakti ke khilaaf di thi jo SI Ajay Gupta ke naam se mujhe phone karta tha. SI Ajay Gupta jo aaj hazir hai maine inke khilaaf koi complaint nahin ki thi aur na hi 08.11.96 ko maine koi paise die the."*

*It is correct that I had stated truly in my statement Ex.PW3/D-2 from portion X-6 to X-7 during the cross examination by Ajay Gupta that " Q.6 dinak 10.07.2002 ko aapne Spl.Judge Tis Hazari Court ke bayan ke dauran bhi yahi bataya tha ki hazir SI Ajay Gupta veh vyakti nahin jo thana Badarpur main 08.11.96 ko*

*rishwat lekar, fenk kar bhag gaya tha. Yadi nahin bataya to kyun?*

*Ans. Special Judge Tis Hazari ke yahan mera bayan darj karte waqt sarkari vakeel, bachao paksh ka vakeel ya judge sahib kisi ne bhi us din hazir isi Ajay Gupta ki pehchan ki babat kpi sawal nahin pucha tha. Agar pucha jata to mera jawab yahi hota ki court mein hazir Ajay Gupta veh aadmi nahin hai jisko maine us din paise diye or uske khilaf complaint ki.*

.....

*It is correct that accused Ajay Gupta, present in the Court today is not that person who either demanded the money from me on 08.11.96 or that he is also not that person who ran away from the spot in P.S Badarpur after throwing the money.*

.....

*Re-examination by Ld.PP for CBI.*

*It is correct that at the time of recording of statement in departmental inquiry in 1998 and 2013, all the personnels who were present were police officials. It is incorrect to suggest that I was pressurized to make the statement due to the presence of the police officials in the said departmental inquiries. I do not know whether the present accused Ajay Gupta was posted in P.S Badarpur during year 1996. (Vol. I had never met or seen SI Ajay Gupta). It is incorrect to suggest that present accused Ajay Gupta was posted in P.S Badarpur as SI at the relevant time. It is incorrect to suggest that present accused Ajay Gupta had demanded Rs.5000/- from me.*

*It is correct that I had, made, a complaint against one Ajay Gupta, who had also demanded money from me on telephone. It is also correct that I had gone to give money as*

*demanded by said Ajay Gupta to the CPWD Godown. It is incorrect to suggest that said money of Rs.5000/- was handed over by me to the accused Ajay Gupta who was present in the Court today. It is incorrect to suggest that I am deliberately not identifying the accused Ajay Gupta present in the Court or that I am deposing falsely as I have been won over by him.”*

**146.** The testimony of Insp. R.V.S. Lohmor, the Trap Laying Officer dated 11.11.2016 recorded pursuant to order dated 15.09.2016 of this Court also states to the effect:-

“.....

*In this statement Ex.PW5/DX-2, I had correctly and truly stated during cross examination by accused Ajay Gupta present in the Court today that "Q. Dinak 08.11.1996 ko aapne mujhe thana badarpur main raid ke dauran dekha tha jo SI Ajay Gupta hazir is wat appke samne hai?*

*Ans. trap ke dauran main Ajay Gupta jo is wagt mere saamne maujood hain ko nahin dekh saka kyonki mere thana ke andar aane se pehle veh bhaag chuka tha.", the said portion is marked from portion A to A-1 on Ex.PW5/DX-2.*

*Today, I have been shown the statements of shadow witness Ra Kumar recorded during the aforesaid two departmental inquiries. I cannot comment anything about the signatures of said Raj Kumar, as the said statements were not recorded in my presence nor he signed in my presence.*

*It is correct that I had not filed the chargesheet in the present case, as investigation was transferred from me to Inspr.H.S.Karmyal.*

*At this stage, Ld.PP for CBI wants to re-examine this witness. Request allowed, as the observation in this regard had already been given while recording the statement of witness PW-3 on 27.10.16.*

***Re-examination by Ld.PP for CBI***

*I had seen the accused for the first time after he surrendered in the Court. I had sent the search team for searching SI Ajay Gupta to his residence, as I was sure he was the same Ajay Gupta against whom the trap was laid and this opinion I formed on the basis as his official loaded revolver as well as one pager belonging to him were lying on his table.*

***XXXXX by Sh.S.K.Saxena, Ld.counsel for accused***

*It is wrong to suggest that no loaded revolver or pager were recovered from the table of the accused.”*

**CONCLUSION**

**147.** It is thus, apparent through the testimony of complainant i.e. PW-3 Satpal Singh and the Trap Laying Officer that the identity of the appellant herein as being the perpetrator of the alleged commission of the demand of the bribe and taking of the bribe money and throwing the same on seeing the CBI personnel coming and then escaping, is not established beyond a reasonable doubt.

**148.** Furthermore, the FSL result dated 31.09.1997 only states that the questioned voice samples marked Q1, Q2 which were then matched with S1, the voice samples of the appellant were “**probably**” of the same speaker. Apparently, the accused cannot be held guilty on the basis of probabilities in a criminal trial. In the circumstances, of the case, the appellant is thus acquitted in relation to the allegations in

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RC No.80(A)/96/CBI/ACB/New Delhi qua the alleged commission of offences punishable under Section 7 and Section 13(1)(d) read with Section 13 (2) of the Prevention of Corruption Act, 1988.

**ANU MALHOTRA, J.**

**OCTOBER 28, 2022**

*Sv/ nc*

