

**COURT NO.2, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

OA 344/2010

Nb Sub/Clk Karnesh Maharaj **....Petitioner**

Versus

UOI & Ors. **....Respondents**

For petitioner : None

For respondents : Mr. J.S. Yadav, Advocate

CORAM:

HON'BLE MR. JUSTICE SUNIL HALI , MEMBER.

HON'BLE AIR MARSHAL J.N. BURMA, MEMBER.

J U D G M E N T

21.01.2015

By Justice Sunil Hali

The petitioner stands convicted by a General Court Martial on 05.02.2009. Out of three charges leveled against the petitioner, he was found guilty of charges No.2 & 3 and was awarded following sentences:

- a) to be dismissed from service;
- b) Rigorous Imprisonment for six months.

Under these circumstances the present appeal has been preferred in this court.

2. The case of the prosecution is that the appellant while serving in the Base Hospital, Delhi Cantt., was approached by one Ms. Neha Dimiri and her father, Mr. Krishna Gopal Dimri in connection with the Review Medical Board to be conducted on Ms. Neha Dimri, which was

to be held on 26.01.2008. It is alleged that the petitioner demanded Rs.3,500/- from Mr. Krishna Gopal Dimri, father of Ms. Neha Dimri for getting Ms. Neha Dimri medically fit. The petitioner is also stated to have demanded Rs.1,00,000/- from Mr. Krishna Gopal Dimri for placing Ms. Neha Dimri very high in the merit list of selected candidates.

3. A court of inquiry was ordered and the petitioner was ordered to be put to trial by a GCM. Following charges were leveled against the petitioner:

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| a) | Charge 1
Army Act
Sec.69 | <p>COMMITTING A CIVIL OFFENCE THAT IS TO SAY, BEING A PUBLIC SERVANT, OBTAINING FOR HIMSELF GRATIFICATION OTHER THAN LEGAL REMUNERATION, AS REWARD FOR RENDERING A SERVICE CONTRARY TO SECTION 7 OF THE PREVENTION OF CORRUPTION ACT, 1988.</p> <p>In that he</p> <p>At Delhi, between 15 Jan 08 and 18 Jan 08, while working as a JCO Clerk in the Medical Board Section of Base Hospital, Delhi Cantt obtained for himself Rs.3,500/- (Rupees three thousand five hundred only) from Mr. KG Dimri, a gratification other than legal remuneration, as a reward for getting Ms. Neha Dimri, daughter of Mr. KG Dimri, resident of 717, Anand Vihar, Kaulagarh Road, Dehradun declared as "fit" in her Appeal Medical Boards for temporary rejection in eye (exetropia)</p> |
| b) | Charge 2
Army Act
Sec.69 | <p>COMMITTING A CIVIL OFFENCE, THAT IS TO SAY, BEING A PUBLIC SERVANT, OBTAINING FOR HIMSELF GRATIFICATION OTHER THAN LEGAL REMUNERATION, AS REWARD FOR RENDERING SERVICE CONTRARY TO SECTION 7 OF THE PREVENTION OF CORRUPTION ACT, 1988</p> <p>In that he,</p> <p>At Delhi, between 17 Mar 08, while working as a JCO Clerk in the Medical Board Section of Base Hospital, Delhi Cantt obtained for himself Rs.75000/- (Rupees Seventy Five Thousand only) from Mr. KG Dimri, a gratification other than legal remuneration, as a reward for getting Ms Neha Dimri, daughter of Mr. KG Dimri, resident of</p> |

717, Anand Vihar, Kaulagarh Road, Dehradun, in the merit list for Short Service Commission (Women entry) to Officers' Training Academy, Chennai.

- c) Charge No3 AN ACT PREJUDICIAL TO GOOD ORDER AND
Army Act MILITARY DISCIPLINE
Sec 63

In that he,

At Delhi, on 17 March,2008, was found to have sub let the Government married accommodation Quarter No.116/1, MH Line allotted to him, to No.13984432 Sept/PNA BK Pradhan of Base Hospital, Delhi Cantt, for monthly rent of Rs.1000/- (Rupees One thousand only) since June2007, contrary to Para 1016 of Regulations for the Army,1987.

4. In support of the charges, the prosecution produced eight witnesses. Whereas the defence produced five witnesses. On the conclusion of the trial, petitioner was found guilty of charges No2 &3. In order to appreciate the controversy, it is necessary to indicate the crux of the charges against the petitioner.

5. The allegation is that the petitioner had demanded Rs.1,00,000/- as gratification for placing PW-3 Ms. Neha Dimri high in the merit list in the Short Service Commission for entry to Officers Training Academy, Chennai. The crux of the charges is that for placing the petitioner higher in the merit list, gratification of Rs.1,00,000/- was demanded by the petitioner. In support of this, the prosecution has produced eight witnesses. It is necessary to examine the statement of the witnesses produced by the prosecution.

6. PW-1, Lt. Col. S.S.Katoch was detailed as a member of the raiding party and had to go to Army HQ Liaison Unit. He states that Ms. Neha Dimiri and her father Mr. K.G.Dimiri were handed over Rs.75,000/- to be given to the accused. They entered the house of the accused while the raiding party remained outside. After they came out from the house of the accused, they told to the witness that the money had been kept in front of the photograph of the Goddess Lakshmi. He admitted that he was not a witness to the demand and acceptance made by the accused. On entering the house of the accused, he was caught hold of by the members of the raiding party and the money was recovered from his pocket. He also stated that the videograph of the whole event was taken by the raiding party. 75 currency notes of Rs.1,000/- denomination were seized and accordingly seizure memo was prepared.

7. In his cross examination the witness states that there was one lady Intelligence Officer attached with the raid. She had accompanied the complainant party to the house of the accused in whose presence the demand was made. Telephone message was received by the lady Intelligence Officer that the money has been handed over to the accused and she informed the raiding party about the same. He admits that the money had not been handed over to the accused in his presence. He also admits the presence of the lady Intelligence Officer.

He is a witness to search which is stated to have been conducted by the raiding party.

8. PW-2. Mr. Krishan Gopal Dimri is the father of Ms. Neha Dimiri. He states that his daughter had been selected by the Service Selection Board but was temporarily rejected by the Medical Board at Allahabad on account of some eye problem. She was directed by the Medical Board to report to the Base Hospital, Delhi for Appeal Medical Board for "exotropia". On 04.01.2008 Ms. Neha Dimri came to Base Hospital and reported to the accused. She was advised by the accused to do exercise for the eyes. The accused is stated to have told her to bring her father alongwith her. On 15.01.2008 he alongwith his daughter came to the Base Hospital to meet the accused. On 16.01.2008 the accused handed over the file pertaining to temporary rejection of his daughter and sent them to Col. Neeraj Bhargava, the Eye Specialist at Base Hospital. Col. Neeraj Bhargava examined his daughter and declared her medically fit. After obtaining the certificate of fitness, PW-2 and his daughter was accompanied by the accused upto the gate and he demanded Rs.5,000/- for helping his daughter. On his insistence, the witness states that he paid Rs.3,500/- to the accused. It is at this stage the accused had told him that he would get his daughter placed higher in the merit list of 48 for which Rs.1,00,000/- is required. The conduct of the accused had caused a lot of pain and anguish and

PW-2 decided to approach the Military Intelligence for filing complaint against the accused.

9. The witness met Col. Gopal Verma alongwith his daughter and narrated the entire episode at his office. Col. Gopal Verma, directed the witness to contact the accused again. On the asking of Col. Gopal Verma, the witness and his daughter met the accused in his office who told him to come to his house where the matter could be discussed. The witness was accompanied by his daughter and Capt. Riti . In the presence of the above two persons the accused informed the witness that there would be no problem in getting his daughter placed higher in the merit list. After negotiating with the accused it was decided that Rs.75,000/- will be paid. The witness further states that on 04.03.2008 they received a telephonic call from the accused that the merit list was out on the internet. The name of his daughter was found second in the merit list. The accused thereafter constantly called his daughter. He approached Col. Gopal Verma who in turn told the witness that it was beyond the purview of the accused to even make an iota of difference in the formulation and declaration of the merit list. The copy of the result was not received by the witness and his daughter. They came to Delhi and obtained a duplicate copy of the joining instructions.

10. The witness further stated that an amount of Rs.75,000/- was arranged by Col. Gopal Verma. The amount was handed over to his

daughter to be given to the accused. The money was offered by the witness and his daughter to the accused who told them to keep the same before the photograph of the Goddess Lakshmi. After their leaving the house of the accused, the raiding party went inside the house of the accused. The witness stated that he had no knowledge as to what happened inside the house of the accused thereafter.

11. In his cross examination he stated that he had decided to punish the accused after he demanded Rs.5,000/- for obtaining the fitness certificate from the Medical Board. He admits that he was distressed by the conduct of the accused who demanded Rs.5,000/- from his daughter as a result of which he decided to punish him. He also admits that his daughter received the original joining instructions within 3-4 days. The witness further admits that he was aware that it was beyond the purview of the accused to place his daughter higher in the merit list. He further admits that he did not see the accused keeping the envelope containing the tainted money in his pocket.

12. PW-3 Ms. Neha Dimri has by and large supported the version given by her father, PW-2. She states that she met the accused in his house alongwith her father and Capt. Riti. Capt. Riti was carrying a digital video recorder in her purse and her father was carrying a voice recorder in his pocket. In her examination she has stated that she received a phone call from accused after she received her appointment letter. After handing over the money the witness stated that she gave a

missed call to Capt. Riti as per pre decided signal. She also admits that she left the room alongwith her father. Thereafter what happened inside the room, she does not know. She admits that she wanted to expose the corruption in the Army. She admits that after getting the documents containing joining instructions her job was over but she still wanted to teach a lesson to the accused. She admits that the envelope containing the currency was not opened and currency notes were not shown to the accused, when the same were kept in front of photograph of Goddess Lakshmi.

13. PW-5 Hav. BK Yadav stated that he was posted with HQ Delhi Area Provost Unit on 17.03.2008 and was performing the duty of Military Police and was detailed to go to the site of occurrence. He was a member of the raiding party headed by Lt. Col. Shivinder Singh. He stated that one lady and her father entered the quarter No.116/1 MH Lines where the accused was residing. After they left the room, the raiding party headed by Maj.Poonia reached inside the quarter. He entered the quarter at the time when the accused was already being questioned by Maj. Poonia. On searching the accused, Rs.75,000/- in an envelope were recovered from the left pocket of the trouser of the accused. He admits that when he entered the room, 3-4 persons were already inside the house of the accused and they were questioning the accused. He states that the search was carried out on the instructions of Maj. Poonia.

14. PW-6 L/Nk Vasu Ram states that he was posted with HQ Delhi Area Provost Unit on 17.03.2008 He was told by Desk NCO Nk SK Jha to get ready to go for MP duty along with Hav BK Yadav. He repeated the version given by Hav. BK Yadav. He admits that when he alongwith B.K.Yadav entered the house of the accused, 3-4 persons of the raiding party were already in the room and were questioning the accused. On being asked, he conducted the search of the body of the accused and recovered an envelope containing currency notes from the left pocket of his trouser. He stated that the suit case of the accused was also searched from where Rs.20,666/- were recovered. He also stated that a couple was residing in the house at the time when the raid was conducted. In his cross-examination he states that he did not count the money which was recovered from the accused. He admits that the videograph of the incident was taken.

15. PW-7, Hav NT Kannan was working in Army HQ LU at the relevant time. He is the one who is stated to have video graphed the whole incident. He states that he switched on the camera throughout the operation and recorded the whole incident. He produced the camera, the details of which were recorded in his statement which was taken on record and marked as ME-80 and the Sony cassette taken on record was marked as ME81. The video cassette was reviewed by the court and accordingly a transcription was prepared. The transcription which was made from the cassette contains the details of

the conversation made by the accused and other members of the raiding party. A specific question was put to the accused as to whose money it was, that had been recovered from the accused. The accused specifically stated that he did not know whose money it was. The other question asked was how was this money found in his possession to which he stated that the man who conducted the search had put the money in his pocket and then recovered the same. The witness also stated that the Cassette which he has prepared was shown to him in the court and it was and the same as shown in the video clips. In his cross-examination he has stated that he has not done any course in photography or videography. He admits that he handed over the camera to Lt. Col. Shivinder Singh. He also admits that the camera and cassette were not sealed in his presence by the Presiding Officer of BOO and Lt. Col. Shivinder Singh.

16. PW-8 , Major Anoop Poonia of CIJW is the witness under whose supervision the raid was conducted. He stated that he was detailed by his Commanding Officer, Col. Gopal Verma. He stated that he met the complainant party on 17.03.2008. It is in his presence that the complainant party contacted the accused on mobile phone and fixed the time and place for delivering the money. The money was arranged by the Unit. He stated that as per the plan the complainant party had to first hand over the money to the accused and it was only after they came out that the raid was to be conducted for recovering the said

amount. He stated that the accused tried to run away from the place but the Presiding Officer of the BOO caught him. It is further stated by him that the search of the accused was conducted by the MP representatives and the envelope containing the amount was recovered from the left pocket of the trouser of the accused. He further stated that when questioned by him as to who had given the money to the accused, he told the witness that the said money was given by Ms. Neha Dimri and her father. It is further stated that there was one other person living with his family in the house and paying Rs.1,000/- per month as rent to the accused.

17. In his cross examination he admits that besides other members of the raiding party Capt. Riti was also accompanying the raiding party. He denied that any pressure was put on the accused.

18. Statement of the accused was also recorded by the court. In his statement, the accused stated that had not demanded Rs.5,000/- from the complainant persons as alleged. Instead it was PW-2, who had called him on 15.01.2008 at around 2100 hours and offered him Rs.2,000/- to ensure that PW-3 be declared medically fit in her Appeal Medical Board. He also stated that when he had offered the money, he had rebuked and rejected the same. He stated that he never made any phone call to PW-2 & PW-3. Instead they have made the phone calls which was clearly visible from the call details, which were part of the record. He further stated that the raiding party manhandled him

and put the envelope containing the money in his pocket. He never demanded the money from any one.

19. The defence witnesses produced by the accused relates to the charge No1. Therefore, it need not to be addressed by us as the petitioner already stands acquitted of the charge.

20. This in nut shell is the evidence which has come on record. From the perusal of the statements recorded, the following emerge from the statements of the prosecution witnesses.

- a) that a demand of Rs.75,000/- was made by the petitioner from the PW-2 & 3 in presence of Capt. Riti;
- b) that the matter was referred to Commanding Officer Lt. Col. Gopal Verma, who constituted a team of officers to conduct the trap against the petitioner;
- c) that the money was provided by the Unit for organizing the trap;
- d) that PW-2 & 3 entered the house of the accused and offered him Rs.75,000/- as gratification for putting the name of PW-2 at a higher place in the order of merit. The amount was not accepted by the petitioner and he directed them to put it before the photograph of Goddess Lakshmi;
- e) that as already decided, a missed call was given by PW-3 to Capt. Riti who in turn informed the raiding party that the money had been handed over to the accused. On receiving this message the members of the raiding party entered the house of the accused;
- f) that PW-8 directed the officer of Corps of Military Police to conduct the search of the accused and an envelope containing Rs.75,000/- was recovered from the left pocket of the trouser of the accused;
- g) the accused was taken into custody. The amount was seized and the seizure memo was prepared;

- h) transcription of the video cassette was made which is part of the record.
- i) PWs5 &6 have stated that before the recovery, members of the raiding party had entered the room and were questioning the accused.

This in essence is the evidence of the prosecution.

21. In order to establish a trap, the demand, acceptance and recovery must be proved by the prosecution.

Demand. According to the prosecution evidence, PW-2& PW-3 are the only witnesses who have been examined by the court, before whom the demand was made by the petitioner. It has also come on record that PW-2 & PW-3 had gone to the house of the accused alongwith Capt. Riti in whose presence the said demand was raised. Capt. Riti was also a witness to the trap laid by the prosecution. For reasons best known to the respondents, Capt. Riti has not been examined as a witness before the GCM. She was an essential witness, who could have corroborated the version of the prosecution that the demand was made by the accused. She was also an important witness, who informed the raiding party that the accused had accepted the money from the complainant. She informed about the acceptance of money by the PW-3, through a message sent on her mobile. Thus she was a witnesses to demand and acceptance. However, she has not been examined. Therefore, we are left with only the evidence of complainants, PW-2 & PW3. There is no independent witness before whom the said demand was made.

Acceptance According to the prosecution story, the money was supposed to have been accepted by the accused from PW-2 & PW-3. They are the only two witnesses who have deposed that money was accepted by the accused. It has also come on record that the money was not accepted by the accused from PW-1 & PW-2 and the petitioner is supposed to have directed them to keep it before the photograph of Goddess Lakshmi. No other member of the raiding party has witnessed the demand and acceptance.

Recovery It is clearly stated by PW 5 & PW-6 that the money was recovered from the left pocket of the trouser of the accused. Search was conducted by the officers of Corps of Military Police. It has also come on record that the persons who conducted the search of the accused had entered the room of the accused only after the members of the raiding party had already entered the room of the accused. This has clearly come in the evidence of PW-5 & PW-6. The search was conducted by the officers of Corps of Military Police who are admittedly not witnesses to the demand and acceptance. It is also an admitted fact that phenolphthalein powder was not applied to the currency notes. The factum of recovery is admitted by the prosecution witnesses. The search was conducted in the absence of PW-2 & PW-3 who are supposed to have handed over the envelope containing Rs.75,000/.

22. The question now requires to be determined is whether reliance can be placed on the statement of PW-2 & PW-3, who are the complainant party. It is trite that if the statement of complainant is reliable, then no independent witness is required. However, if the statement of the complainant cannot be relied, independent corroboration is necessary.

23. The question that now calls for consideration is whether the facts as revealed do constitute an offence for which the accused has been convicted? Undoubtedly the demand of illegal gratification is sine qua non for constitution of an offence under the provisions of the Prevention of Corruption Act. It is necessary that before arriving at a conclusion all the three ingredients must be satisfied i.e. demand, acceptance and recovery of the amount of illegal gratification. It is also necessary that if the amount is recovered from the person of the accused, presumption under section 20 of the Act can be raised. The burden of proof will shift on the accused to rebut the presumption that the amount was not accepted as an illegal gratification. Before any presumption can be drawn against the accused, the prosecution is under law bound to prove that there has been demand and acceptance. In the absence of demand and acceptance no presumption can be raised against the accused even if the amount has been recovered from the pocket of the accused. This view is fortified by the judgment of the apex court reported in State of Maharashtra Vs. Dnyaneshwar Laxman

Rao Wankhede (2009) 15 Supreme Court Cases 200 wherein the apex court has observed as under:

“Indisputably, the demand of illegal gratification is a sine qua non for constitution of an offence under the provisions of the Act. For arriving at the conclusion as to whether all the ingredients of an offence viz. demand, acceptance and recovery of the amount of illegal gratification has been satisfied or not, the court must take into consideration the facts and circumstances brought on the record in their entirety. For the said purpose, indisputably, the presumptive evidence, as is laid down in Section 20 of the Act, must also be taken into consideration but then in respect thereof, it is trite, the standard of burden of proof on the accused vis-a-vis the standard of burden of proof on the prosecution would differ. Before, however, the accused is called upon to explain as to how the amount in question was found in his possession, the foundational facts must be established by the prosecution. Even while invoking the provisions of section 20 of the Act, the court is required to consider the explanation offered by the accused, if any, only on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt.”

24. The import of the judgment clearly indicates that unless the prosecution proves the fundamental facts of demand and acceptance, no presumption can be drawn against the accused under section 20 of the Act. If the amount is recovered from the person of the accused, it is necessary for the prosecution to prove the demand and acceptance. It is also important to note that the only independent witness to the demand was Capt. Riti whose statement has not been recorded by the prosecution. Her statement was a vital evidence for the prosecution. It is trite that if the statement of the complainant is reliable then no

independent witness is required. However, from the statement of the complainant, there is no reliable independent corroboration which is necessary. In order to appreciate this fact it is necessary to examine the context in which the present trap was laid. It is admitted that there are only two witnesses to the demand and acceptance and both of them are complainants. It has come on record that the petitioner had initially demanded Rs.5,000/- from them for obtaining clearance from the Medical Board declaring Ms. Neha Dimri fit. The deal was ultimately settled for Rs.3500/-. However, the prosecution failed to prove this charge before the GCM . It has also come in the statement of PWs 2 &-3 that they were shocked with the conduct of the accused in demanding money for getting PW-3 cleared by Medical Board. Therefore, they decided to punish the accused.

25. The charge for which the petitioner was facing trial was demand of Rs.75,000/- for placing PW-3 higher in the merit list. It was very well known to PW-2 & PW-3 that the petitioner would not be in a position to alter the merit position as he had absolutely no role in the said selection process. He was not even remotely connected with the selection process. This fact was conveyed to PW-2 & PW-3 by the Commanding Officer of LU, Col.Gopal Verma. Therefore, both the complainants were aware of this fact that the petitioner would not be in a position to keep PW-3 higher in the merit list. It has also come in the statement of the witnesses that when the trap was laid, the result

had already been published and PW-3 was in possession of the joining letter. Therefore, they could have easily ignored the demand made by the petitioner. It is highly improbable that the accused could have demanded this money from the PW-2 & PW-3 after the result was declared. Despite knowing this fact, it is highly improbable they would have adhered to the demand made by the accused. Therefore, an element of suspicion arises as to whether the trap was genuine or not. What prompted PW-2 & PW-3 to go ahead with the demand made by the accused was only to punish him for having demanded an amount of Rs.5,000/- for her clearance by the Medical Board. Therefore, their statement has to be scrutinized with great care and caution. The statement of both the complainants does not create the desired degree of confidence in the mind of the court as they were interested witnesses. Therefore, it is necessary that there has to be some corroboration to their statements. There is no independent witness who has supported the prosecution story. Therefore, their sole statement cannot be accepted for proving the charge.

26. Doubt also arises with respect to the manner in which the money has been recovered. The presence of member of the raiding party in the room before the two independent witnesses to the recovery had entered the room creates a doubt in the prosecution story. More particularly when the independent witnesses PW5 & PW-6 stated that the accused was being questioned by the members of the raiding party

when they entered the room. The presence of the raiding party in the room before the independent witnesses entering in the room by itself creates doubt as to whether the money was actually recovered from the left pocket of the pant of the accused or it was thrust in his pocket . The independent witnesses were asked to search the pocket of the accused. What had transpired before these witnesses could enter into the room creates doubt in the mode in which the recovery was effected.

27. It is an admitted fact that Rs.75,000/- were recovered from the left pocket of the pant of the accused. The search was conducted by two officials of Corps of Military Police on the instructions of Maj. Poonia. It has been stated by the independent witnesses PW-5 & PW-6 that before they entered the room, the raiding party was already questioning the accused. At the time the search was conducted, the accused was already being questioned by the raiding party headed by Maj. Poonia. The presence of Major Poonia alongwith the raiding party excluding two officials of the Corps of Military Police raises sufficient doubt as to whether the money was actually recovered from the accused or it was thrust into his pocket as stated by the accused in his statement. Absence of the complainant at the time of recovery is also a factor which creates doubt in the mind of the court. Normal course is that once the money is handed over by the complainant to the accused, the raiding party will immediately give a signal and enter the room and

conduct the search. It is the complainant party who informed the raiding party about the acceptance of the money. Even though in this case the message was sent by the complainant that the money had been accepted by the accused, the fact as to why they left the room is not forthcoming from any of the witnesses. The presence of the raiding party before the independent witnesses entered the room is one more factor which creates a doubt in the mind of the court. It is the raiding party who directed the independent witness to search the pocket of the accused. It clearly means that they were aware before the search was conducted that the money was in the pocket of the accused. The complainant had informed the raiding party that the money was kept before the photograph of Goddess Lakshmi. Admittedly the money was not accepted by the petitioner nor was it kept in his pocket in the presence of the complainant party. Reasonable doubt is raised as to whether the money was kept by the accused in his pocket or it was thrust into the pocket of the accused by the raiding party. This doubt arises from the manner in which the recovery had been effected. How did the raiding party come to know that the money has been kept by the accused in the left pocket of his pant? Under these circumstances the explanation given by the accused that the money was thrust into his pocket cannot be disbelieved. While invoking the provisions of Section 20 of the Prevention of Corruption Act, the Court is required to consider the explanation offered by the accused. The explanation has to be

judged on the touchstone of preponderance of probability and not on the touchstone of proof beyond all reasonable doubt.

28. As already stated in supra, the prosecution has failed to prove the demand and acceptance. Reliance has been placed by the learned counsel for the petitioner on a judgment reported in (2011) 6 Supreme Court Cases 450 titled as State of Kerala and another Vs. C.P.Rao. In the said judgment the apex court observed as under:

“ In the background of these facts, especially the non-examination of CW-1, was found very crucial by the High Court. The High Court has referred to the decision of this Court in Panalal Damodar Rathi Vs. State of Maharashtra wherein a three Judge Bench of this Court held that when there was no corroboration of testimony of the complainant regarding the demand of bribe by the accused, it has to be accepted that the version of the complainant is not corroborated and, therefore, the evidence of the complainant cannot be relied on. In the aforesaid circumstances, the three Judge Bench in Panalal Damodar Rathi case held that there is grave suspicion about the appellant's complicity and the case has not been proved beyond reasonable doubt.

In C.M. Girish Babu Vs. CBI, this court while dealing with the case under the Prevention of Corruption Act, 1988 by referring to its previous decision in Suraj Mal Vs. State (Delhi Admn) held that mere recovery of tainted money, divorced from the circumstances under which it is paid, is not sufficient to convict the accused when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused. In the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe, conviction cannot be sustained”.

29. The import of the judgment clearly reveals that when the statement of the complainant cannot be relied upon independent corroboration is required. In the absence of independent corroboration charge against the accused cannot be sustained.

30. In Pandharinath Shelke Vs. State of Maharashtra, 2005 CrL. KL.J.5114, the Bombay High Court has observed as under:

“ The Supreme Court in the case of Suraj Mal Vs. State (Delhi Administration), reported in 1979 CrL. L.J 1087 has observed in para 2 of the said judgment that where witnesses make two inconsistent statements in their evidence either at one stage or at two stages, testimony of such witnesses becomes unreliable and unworthy of credence. The Supreme Court in the case of Sita Ram Vs. State of Rajasthan, reported in 1975 CrL.L.J 1224 has observed that if demand of bribe by the accused is not proved then, in that case, story of payment of money by the complainant also is not established beyond the reasonable doubt and the presumption raised under the Act cannot be drawn for convicting the accused. The Supreme Court in the case of Panalal Damodar Rathi Vs. State of Maharashtra, reported in 1979 CrL.L.J 936 has held that position of the complainant is not better than that of accomplice and, therefore, unless there is a corroboration to his testimony by other independent witnesses, the evidence of complainant alone cannot be relied upon on the question of demand made by the accused.

It is, therefore, essential to see whether there is corroboration to the evidence of the complainant regarding demand of bribe by the other witnesses.”

31. On the other hand the respondents have relied upon two judgments of the apex court reported in AIR 1966 SC 1762 V.D.Jhingan Vs. State of UP and AIR 1955 SC 70 Mahesh Prasad Vs. State of Uttar

Pradesh. In both these judgments the prosecution had proved that the receipt of money, acceptance and demand by the accused. Therefore, the burden was shifted on the accused to rebut the same. In the present case no such presumption can be raised as demand and acceptance has not been proved by the prosecution.

32. The import of the judgment clearly provides that if the demand and acceptance has not been proved beyond any reasonable doubt, no presumption can be raised under section 20 of the Prevention of Corruption Act. The statement of the complainants cannot be solely relied upon in the present case in the absence of independent corroboration. Therefore, we find that the charge No.2 has not been proved against the accused.

33. The third charge framed against the accused is that on 17.03.2008 he was found to have sublet the Govt. married accommodation quarter No.116/1, MH Line allotted to him to B.K.Pradhan of Base Hospital, Delhi Cantt for monthly rent of Rs.1000/- since June 2007, contrary to para 1016 of Regulations for the Army, 1987. In this behalf the statement of B.K.Pradhan has been recorded as PW-4 by the prosecution.

34. In his examination-in-chief PW-4 has stated that he was sharing the accommodation with the accused. He also admits that he used to pay Rs.1000/- to the accused as rent. The accused allowed him to stay after the request was made by the witness that his son was falling sick frequently because of unhygienic water supply in the rented

accommodation where he was residing. On the request of the witness, the accused had agreed to share his residence. He is also a witness to the trap. He stated that he saw some people photographing the incident on 17.03.2008. In his cross examination he stated that the accommodation where the accused was residing was in a dilapidated condition. The accused had to spent lot of money from his pocket to keep the house in ordinary shape. He deposed that the money given by him to the accused might have been used for the maintenance of the quarter. He also admits that the practice of allowing, shared accommodation is not uncommon in the Army. Such sharing can be permitted after obtaining permission from the Company Commander. Witness has stated that he was not aware whether any permission was given by the Company Commander .

35. None of the prosecution witnesses have stated that no permission was given to the petitioner for allowing any person to share the accommodation. Accused in his statement recorded before the GCM stated that the witness B.K.Pradhan approached him 5-6 times alongwith his family for sharing the accommodation allotted to him. He was staying alone in the said accommodation. He admits that B.K.Pradhan was contributing Rs.1000/- towards maintenance and repair of the house especially of the blocked toilets which required to be cleared almost every second day. Each such clearance coasted him about Rs.300/-. He also stated that inspections were conducted by the staff of the Company Commander, who used to visit the family quarters and used to prepare a

list of occupants/personnel sharing residence and the same list used to be put up for the perusal of the Commandant. Part-I order was also published.

36. From the evidence which has come on record, it is evident that the accused was sharing his accommodation with B.K.Pradhan. It is also admitted that the prosecution has not come out with any evidence to suggest that no permission was granted to the accused in this behalf. Accused admitted that Rs.1000/- was paid by B.K.Pradhan but that money was used for the maintenance of the quarter. Sharing of accommodation by itself is not an offence if prior permission was obtained from the Company Commander. Therefore, for proving this charge against the petitioner, the prosecution was required to show that no such permission was given to the accused. Since family quarters were inspected by the Officers of the department as stated by the accused and one of the functions of the inspection was to list the number of occupants alongwith the person who were sharing the accommodation, it is presumed that the administration was aware of the fact . Moreover, such list was routinely published for which part-I order were also issued. Therefore, it would not be proper to hold the accused guilty on this count. In the absence of any proof that he did not have the permission, the conviction cannot be sustained. The respondents were aware that accused was sharing his accommodation. They did not take any action against him. Therefore, it is assumed that this was done with their tacit knowledge.

37. In view of above, we allow the petition and set aside the conviction order recorded by the GCM. Petitioner shall be reinstated in case he has not attained the age of superannuation with all consequential benefits. However, he is not entitled to the pay and allowance during the period he remained out of service. The judgment shall be implemented within a period of three months. No order as to costs.

(SUNIL HALI)
MEMBER (J)

(J.N. BURMA)
MEMBER(A)

New Delhi
21.01.2015
brh

FORM NO. 4
(See Rule 11 (1))
COURT NO. 2, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI

OA 344/2010

Nb Sub/Clk Karnesh Maharaj

....Petitioner

Versus

UOI & Ors.

....Respondents

For petitioner : Mr. S.S. Chhawal, Advocate

For respondents : Mr. J.S. Yadav, Advocate

CORAM:

HON'BLE MR. JUSTICE SUNIL HALI, MEMBER

HON'BLE AIR MARSHAL J.N. BURMA, MEMBER

Judgment

21.01.2015

Notes of the Registry	Orders of the Tribunal
21.01.2015	Vide separate judgment, the petition is allowed. No order as to costs. Learned counsel for the respondents orally prayed for granting leave to appeal. There is no question of law of public importance involved in this matter. This is not a fit case to grant leave to appeal before the Hon'ble Supreme Court as it does not involve any question of public importance. As such the prayer is declined.

(SUNIL HALI)
MEMBER (J)

(J.N.BURMA)
MEMBER (A)