REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.787 OF 2011

D. VELAYUTHAM **APPELLANT**

VS.

STATE REP. BY INSPECTOR OF POLICE, SALEM TOWN, CHENNAI **RESPONDENT**

WITH

CRIMINAL APPEAL No.788 of 2011

J U D G M E N T

VIKRAMAJIT SEN, J.

1 These two Appeals before us assail the common Judgment dated 8.9.2010 of the Madras High Court which only partly allowed the Appeals before it, in favour of the Accused-Appellants. The Appellant in Criminal Appeal No. 787/ 2011 is the First Accused; Appellant in Criminal Appeal No. 788/ 2011 is the Second Accused. The High Court partly allowed both Appeals, setting aside the conviction of Accused 1 under Section 13(1) (d) read with 13(2) of the Prevention of Corruption Act, 1988, whilst upholding Accused 2's conviction thereunder; and affirming the

conviction of both Accused 1 and Accused 2 but reducing their sentence under Section 120B, IPC, and Section 7 of the PC Act, to imprisonment of one year each.

2 Recapitulating the facts leading up to these Appeals, Accused 1 and Accused 2 were, at the time of the perpetrations, employed as officers with Central Excise IX 'E' Range. Accused 1 held the rank of Superintendent, and Accused 2, his subordinate, Inspector of Excise in the same office. The Complainant (PW2 before the Trial Court), a manufacturer of 'camel back rubber slab', received a show cause notice for payment of Excise duty amounting to Rs. 1,01,333/-. PW2 attended an enquiry held before the Assistant Commissioner (PW4) of Central Excise, on 07.20.1996; the notice was recalled following this Enquiry. Thereafter, PW2 received yet another show cause notice, dated 24.05.1996, issued by Accused 1 as its signatory, demanding 'difference amounts' (as recorded by the Trial Court) of Rs. 1,23,193/-. PW2 visited the office of both Accused on 04.06.1996 at 11:30 am, where he met both Accused 1 and Accused 2. Upon questioning the Accused persons about the second notice, PW2 was confronted with a bribe demand from Accused 1 of Rs.1000/- for each Accused whereto Accused 2 concurred. The bribe demanded was to be paid by PW2 to both Accused on the same day, at 4:30 pm. PW2 immediately thereafter went to the office of the Superintendent of Police and reported this illegality, whereupon PW6, the Inspector, prepared a trap. As was planned, PW2 handed over to PW6 currency notes totalling Rs. 2000, in presence

of two independent witnesses, PW3 and another. PW6 explained to PW2 the working of the Sodium Carbonate test characteristic of trap cases, and proceeded to smear the notes (M.O.1 currency series) with phenolphthalein powder, before returning them to PW2, who placed them in his shirt pocket. An entrustment mahazar was prepared. PW2 was instructed to signal the trap team upon handing over the notes to the Accused, and PW3 was instructed to accompany him and witness this receipt of the illegal gratification. PW2 went to the office cabin of Accused 1, who was not to be found present there, but on encountering Accused 2, PW2 was told by him that Accused 1 had shortly earlier left the office, to visit his indisposed wife. Accused 2 told PW2 that he had been instructed by Accused 1 to collect the moneys on behalf of them both. PW2 handed over the currency notes to Accused 2, who then handled these with both hands, and placed them in his shirt pocket. PW3 witnessed the transaction, having stood alongside PW2. PW2 walked out of the office and signalled to the trap team, whereupon PW6 entered the office and subjected Accused 2 to the sodium carbonate solution test, which tested affirmative, both hands of Accused 2 having been dipped in the solution, turning it pink. Accused 2 was then directed by PW6 to return the notes, which he did, by first going into Accused 1's office, and, thereafter back to his own desk, where the currency notes had been kept inside his right drawer. The currency notes were then surrendered to PW6. A mahazar was prepared, the incriminating property

seized, and two witnesses signed the mahazar. Accused 1 was subsequently arrested.

3 Both Accused were charged with offences under the IPC and the Prevention of Corruption Act, namely, Section 120-B, IPC, read with Sections 7 and 13(2) read with Sections 13(1)(a) and (b) thereof. The Trial Court concurrently convicted and sentenced both Accused for all of the offences wherefore Accused were charged, the crest of their awarded incarceration being 2 years, for the convictions secured under Sections 7 and 13 of the Prevention of Corruption Act. The Madras High Court, as finds mention in our exordium, partly allowed the Appeals before it, modifying the Trial Court's order therewithal.

4 The conviction of Accused 2 is unproblematic. Accused 2 was successfully entrapped by the trap team with Rs. 2000/- recovered from his possession. He has admitted the receipt of the bribe amount. The only effort at proving his innocence has been the submission that receipt of the entire sum was on behalf of Accused 1, no part of which was demanded by Accused 2 for his own keeping and consumption. This specious defence would have us believe that Accused 2's *mala fides* extended only to being an abettor to the principal perpetrator, Accused 1, and went no further. We are more inclined to accept PW2's more robust and rounded account that Accused 2 accepted the sum both for himself and on behalf of Accused 1, in preference to Accused 2's claim that he was personally uninvolved,

but merely an abettor-custodian on Accused 1's behalf. Since the defence of Accused 2 stands already breached by his admission of his facilitation of an illegal act albeit allegedly on Accused 1's behalf, we can safely proceed further and affirm the concurrent conclusion from the Complainant's evidence that part of that sum would have been for the fulfilment of the bribe demand of Accused 2.

5 A commentary on conviction of Accused 1 will, in the face of the facts, necessarily be more elaborate. Accused 1 was not present at the execution of the trap, and is at first glance, conveniently poised to deny any and all knowledge of the bribe-taking by Accused 2 on his behalf. Accused 1 has expectedly disavowed Accused 2 and denied making any bribe demand from the Complainant, and has in turn thrown doubt on the Complainant's testimony by accusing him of being an interested or partisan witness, exacting vengeance against Accused 1 for issuing the second notice. Accused 1 has maintained that the second notice was *bona fide*, and was issued only for the purpose of extending the limitation period connected with the Excise demand in question. The Assistant Commissioner, PW4, accepted this rationale in his evidence given before the Trial Court but deposed that Accused 1 ought to have obtained the necessary permission from him before issuing the second notice, which issue had already been adjudicated earlier by PW4. It is on this basis that the second notice was held to be illegal by both the Courts below.

6 This Court has ratiocinated in significant length and detail on the nature of evidence commonly encountered in trap cases in anti-corruption prosecutions, appreciably drawing the distinction between accomplice evidence, and decoy/ trap witness evidence. Both categories are vitally important in this case. Accomplice evidence is addressed by Sections 133 and 114 (b) of the Evidence Act, which though does not make explicit use of the word "accomplice". In M.O.**Shamsudhin** v. State of Kerala (1995) 3 SCC 351, this Court has observed that "the relation between Section 133 which is a rule of law and Illustration (b) to Section 114 which is a rule of prudence has been the subject of comment in a large number of decisions. However, it has emerged that a conviction based on the uncorroborated testimony of an accomplice is not illegal though an accomplice may be unworthy of credit for various reasons. Reading Section 133 and Illustration (b) to Section 114 of the Evidence Act together, the Courts in India have held that while it is not illegal to act upon the uncorroborated testimony of the accomplice the rule of prudence so universally followed has to amount to rule of law that it is unsafe to act on the evidence of an accomplice unless it is corroborated in material aspects so as to implicate the accused. The reasons for requiring corroboration of the testimony of an accomplice are that an accomplice is likely to swear falsely in order to shift the guilt from himself and that he is an immoral person being a participator in the crime who may not have any regard to

any sanction of the oath and in the case of an approver, on his own admission, he is a criminal who gives evidence under a promise of pardon and supports the prosecution with the hope of getting his freedom". In the prosecution confronting us, Accused 2 has given testimony from the locus of an alleged accomplice to the crime. His incriminating asseverations against his co-accused would, on the evidence available in this case, require interactive corroboration: the testing and authentication of Accused 2's testimony against the strength and degree of circumstances suggestive of Accused 1's guilt.

7 Insofar as the Complainant's testimony against Accused 1 is concerned, the salutary ratio extractable from previous decisions on the standing of trap witnesses is that Courts are not to be swayed by the semantics of describing these witnesses as antecedently "interested" or "partisan" in their testimonies. Rather, their testimonies can only be so stigmatised, and suffer the evidentiary consequence of necessary corroboration, on a casuistic basis, that is to say, whether corroboration is necessary or not will be within the discretion of the court, depending upon the facts and circumstances of each case.

8 Witnesses who are *particeps criminis*, on the other hand, correctly carry a lower degree of presumed credibility, their evidentiary motivations sullied by their prior participation in the criminal act precisely whereagainst they subsequently elect to testify. This selfsame distinction and posture may derive sustenance from

the decision of a Constitution Bench of this Court in State of Bihar v. Basawan Singh AIR 1958 SC 500, where Their Lordships held that no inflexible rule had been laid down in an earlier Judgment that the evidence of the witnesses of the raiding party must be discarded in the absence of any independent corroboration. Their Lordships opined that: "if any of the witnesses are accomplices who are *particeps criminis* in respect of the crime charged, their evidence must be treated as the evidence of accomplices is treated; if they are not accomplices but are partisan or interested witnesses, who are concerned in the success of the trap, their evidence must be tested in the same way as other interested evidence is tested by the application of diverse considerations which must vary from case to case, and in a proper case**,** the Court may even look for independent corroboration before convicting the accused person".

9 It would therefore be a derogation and perversion of the purpose and object of anti-corruption law to invariably presuppose that a trap/ decoy witness is an "interested witness", with an ulterior or other than ordinary motive for ensuring the inculpation and punishment of the accused. The burden unquestionably is on the defence to rattle the credibility and trustworthiness of the trap witness' testimony, thereby bringing him under the doubtful glare of the Court as an interested witness. The defence cannot be ballasted with the premise that Courts will, from the outset, be guarded against and suspicious of the testimony of trap witnesses. We are of the

opinion that the law hitherto expressed by this Court upholds precisely this exposition**.**

10 Here, a bald allegation by the defence of PW2's (Complainant/ trap witness) interest in falsely implicating Accused 1 will not suffice. By all accounts, PW2 had initially earned a favourable order by the Assistant Commissioner, who recalled the demand notice issued to PW2. Thereafter, Accused 1 proceeded to issue another demand notice. Only pursuant to this vexatious, illegal and unchartered demand notice did the first meeting take place between the Complainant and Accused 1 and Accused 2, where the graft demand made by both these officers arose, followed by the Complainant's complaint to the Police, and the laying of the trap. There is no discernible motive for the victim to falsely implicate Accused 1.

11 The Complainant's testimony evinces verity on yet another count. In his complaint, the Complainant has listed Accused 1- the absentee at the trap- as the First Accused, whereas Accused 2, his subordinate, is the Second Accused. It is at once apparent that, having apprised the trap officer, and set up the trap against Accused 1 and Accused 2, the Complainant could neither have previsedd nor foreknown that Accused 1 would suddenly leave for the hospital to attend to his ailing wife, and thereby, be so mischievously or fortuitously inculpated in absentia, as is being put to us by Accused 1. Had the Complainant's snare been mischievously and mendaciously directed towards Accused 1, it as open a

possibility that the Complainant as trap witness would actually have encountered both Accused 1 and Accused 2, and been met with instead by Accused 1's rejection of the bribe, as Accused 1 would have us believe. In other words, the motive and modus operandi attributed by Accused 1 to the Complainant would demand as its predicate that the Complainant knew that Accused 1 would not be in the office at the time of entrapment. This predication cannot stand, as it has not even remotely been suggested by Accused 1 whether, and if so, how, the Complainant could have known or imagined that Accused 1 would be absent from the office at the precise hour of entrapment.

12 From the perspective of the Complainant, Accused 1 would have been the ostensibly competent authority, and not his junior, Accused 2. Accused 2 did not have the ostensible authority to himself withdraw the demand notice which was issued and signed by Accused 1. The source of the bribe demand would most likely have been the ostensible authority as regards the notice, that is to say Accused 1 and not Accused 2, though it is proven that Accused 2 too demanded his moiety, and he was eventually trapped while taking it. The Trial Court was palpably percipient of this ostensibility, albeit a different dimension thereof, concluding that the evidence of PW2 decoy is well corroborated by circumstantial evidence.

13 Any defence of bona fide issuance by Accused 1 of the second notice, putatively issued for limitation purposes, is swiftly undercut by the proven illegality of the notice, prior imprimatur of the Assistant Commissioner neither having been sought, nor received. Both Courts below have rightly recognised the issuance of the notice as a graft-inducing ploy, designed to browbeat the Complainant into paying bribes to the Accused-Officers for their recalling/ rescinding the demand notice in return.

14 Though this Court has stressed the need and significance of phenolphthalein as a trap device in corruption cases, so as to allay doubts about the actual receiving of bribes by accused persons, there may be cases where there are multiple demanders in a common or conjoint bribe demand, and for whatsoever reason, only one receives the sum on their behalf, and is entrapped in consequence. Depending on strength of the remainder of evidence, in these cases, constructive receipt by co-accused persons is open to establishment by the prosecution, in order that those who intermediately obtain bribes be latched with equal culpability as their co-accused and entrapped receivers. This will, of course, discount those cases where the trap is successful only against one and not the other official, the latter having refused to accept the bribe tendered. In this case, the trap would have clearly failed against such an official, and there could be no question of the application of constructive receipt. If the receipt and handling of bribe money by

Accused 2 so convincingly and inexorably points towards his custodianship of part of the same bribe amount on behalf of his superior officer, namely Accused 1, then Accused 1 cannot rely on mere non-handling/ non-receipt of the bribe money, as his path to exculpation. This Court's construal of anti-corruption cases is sensitive even to these byzantine methods of bribe-taking, and where an evader escapes a trap, constructive receipt has to be an alternate means of fastening criminal culpability.

15 Accused 1's counsel before the Trial Court denied both Accused 1's presence, as also participation, in any meeting in the office with PW2 on the morning of 04.06.1996, stating that Accused 1 could not have been present at the alleged preliminary meeting where the bribe demand surfaced, as Accused 1 had been summoned to the Head Office that very morning. The Trial Court correctly negated this claim, finding that Accused 1 had not himself stated anything to this effect under Section 313, Cr.P.C., nor led any evidence by examining any of the officials from the head office. The testimonies of DW2 and DW3, stating the absence of Accused 1 in the office at the relevant time, were disbelieved, keeping in view their subordination, and therefore likely tutelage as witnesses, being beholden to Accused 1 and his status as superior. The attendance register of the office also marked the presence of Accused 1 on 04.06.96, and whilst it has been accepted that Accused 1 was not present at the time of receipt (in support whereof

he examined the doctor attending to his wife), Accused 1 does not have any similar external alibis to uphold his claim of having been summoned to the head office at the hour of the bribe demand. It is, in our view, positively settled that Accused 1 was present in the office that forenoon. Beyond this point, the conviction of Accused 1 will depend upon a convincing commixture of circumstances and testimonies of the Complainant and Accused 2, which, as we have already declared, we find firmly substantiated.

16 M.O. **Shamsudhin**, bearing some degree of factual resemblance to this case qua the trapping of one accused and evasion by other, is analogically assistive for the present determination. In that case, the senior accused, A-1, had been requested to issue a patta in favour of the complainant. A-2, A-1's junior officer, was given the trap money in A-1's office and on his behalf by the complainant, who was accompanied by a trap witness. On exiting the office of A-1, A-2 was at once apprehended. Although A-1 had not been entrapped per se, he was found to be conclusively incriminated by the circumstances and evidence of the complainant. The Court held: "In the instant case, PW1 has no axe to grind against A-1. It is not in dispute that he had to get a patta issued A-1 and he categorically stated that A-1 had made the demand.A-2 was his assistant and the tainted money was recovered from A-2 while he was just going out of the office of A-1. Unless A-1 has demanded the money and has also directed him to hand over the same to A-2, there

was no reason at all as to why PW1 should hand over the money to A-2. PW1 has consistently stated that A-1 demanded the bribe and that A-2 received the amount as stated by him. Therefore it cannot be said that there is no corroboration regarding the demand. This is a case where each of the accused tried to throw the blame on the other but taking the overall circumstances into consideration in the light of evidence of PWs 3 and 4 along with the evidence of PWs 1 and 2 both Courts below have consistently held that the evidence of these witnesses establishes the guilt of the accused and we see no reason to come to a different conclusion".

17 Analogously applying the facts of this case to the present fact set, we find the conviction of Accused 1 perfectly sustainable. It is an argument a fortiori supportive of Accused 1's conviction herein, since in **Shamsudhin**, A-2's receipt in A-1's office on behalf of A-1 could conceivably have been repudiated by A-1 on the ground that he himself could have taken receipt of the bribe amount in his own office, being physically present there at the time of payment, and need not have relied on his junior officer to take receipt thereof on his behalf. Contrarily, in the case before us, Accused 1's absence from the office at the time of the trap strengthens, rather than weakens, the claim that his junior officer, Accused 2, was receiving part of the bribe amount as a custodian on his behalf.

18 In view of the above conspectus, we dismiss both Appeals, and sustain the Impugned Judgment and Order of the Madras High Court below. Bail of both Accused stands hereby cancelled. Consequently, it is directed that the Accused persons are to be taken into custody forthwith, to serve out the remainder of their sentences.

19 The Appeals are dismissed accordingly. The Interim Order is recalled.

.....J.
(DIPAK MISRA)

.....J.
(VIKRAMAJIT SEN)

NEW DELHI;
MARCH 10, 2015.