GHULAM DIN BUCH ETC. ETC.

v.

STATE OF JAMMU AND KASHMIR

APRIL 3, 1996

[G.N. RAY AND B.L. HANSARIA, JJ.]

(Jammu & Kashmir) Prevention of Corruption Act, 2006 (1949 AD) : Section 5(2).

Conspiracy—Accused causing wrongful loss to State—Contract given for transportation of 10,000 bamboo poles against actual need of 4,700—On per kilometer per pole basis—Notice inviting tenders specified this number as about 6,000—No efforts made to get Government vehicles for transportation of poles—Rates paid to contractors—Unreasonable—Notice inviting tenders—Issued as per pre-arranged plan to firms of co-accused not engaged in transportation business—Ultimately their tenders accepted—Held : accused rightly convicted—Prevention of Corruption Act, 1947, Section 5(2)—Ranbir Penal Code, Sections 120-B, 109/116/119—Penal Code, 1860 Sections 120-B, 109/116/119.

Section 5(2) proviso—Sentence—Mitigating circumstances—Causing wrongful loss to State—Offence committed about two decades back—Accused already suffered in body and mind—Held : it was fit case for invoking proviso to Section 5(2)—Sentence reduced to RI for two months—Prevention of Corruption Act, 1947, Section 5(2) proviso.

Transportation of bamboo poles—Contract for—Accused effecting cost analysis—Justifying the higher rates tendered by contractors—Rates found unreasonable—Matter dealt with in extreme hurry—No enquiry about prevailing rates made—Held : accused rightly convicted because of their apparent complicity in recommending the acceptance of the rates, characterising the same as justified.

Transportation of bamboo poles—Between 20 to 30 feet length—Accused allowed transportation of poles below 20 feet length—No payment made for such poles—No financial loss caused to State—Held : accused committed no offence.

A *Evidence Act, 1872 :*

Section 10—Non-applicability—Plea of—Charge of conspiracy—Absence of—Effect—Close relationship existed between contractors who acted in concert—Held : absence of charge of conspiracy inter-se between contractors not material.

B

Code of Criminal Procedure, 1973 :

Section 313 : Circumstances coming on record in respect of which accused not examined—Accused neither asked about his having entered into C *conspiracy with anybody—Nor about rates of carriage of poles whether unreasonable or high—Held : these circumstances could not be used against the accused—Further these circumstances being crux of the prosecution case non-providing of opportunity to him to explain the same rendered his conviction unsustainable.*

D **The appellants were convicted under Section 5(2) of the (Jammu & Kashmir) Prevention of Corruption Act, 2006 (1949 AD) read with Sections 120-B, 109/116/119 Ranbir Penal Code.**

According to the prosecution the appellants were entrusted with the E **work of electrification of tehsils for which a lot of bamboo poles were required. With the onset of the fruit season all available transport was diverted to carry fruits and no transport was available for electrification work. This apart, food grains were required to be stored in the valley and tehsils to cater to the needs of the people during winter season. This being high priority area, the concern of the Government was to see that this work** F **did not suffer for want of transport vehicles.**

The work was to arrange transport vehicles to carry required number of poles to the tehsils before the onset of winter season, after which the region became virtually inaccessible. This situation permitted the appel- G **lants to take advantage of the same and a conspiracy was hatched to give contract of transportation to such persons who showed their willingness to share the booty with the officers. The conspiracy came to the notice of the Minister as some complaints were received by him regarding giving of contracts of transportation to private firms on per kilometre per pole basis and the poles being also of sub-standard quality. The appellants had** H **effected cost analysis in extreme hurry and justified the rates which were**

found unreasonable without making any further enquiry about prevailing rates. They had made no efforts to get Government vehicles for carriage of poles although trucks were available in the Mechanical Division. They had given the contract for transportation of 10,000 poles as against the need of about 4,700 poles and wrongly allowed loading and unloading charges. They had also allowed transportation of poles below the length of 20 feet. An enquiry was ordered into the matter, after completion of which, a charge-sheet was submitted against the appellants- accused.

On the basis of evidence adduced on behalf of the prosecution, the trial court came to the conclusion that the charges levelled against the appellants-accused were fully established. This finding was upheld by the High Court.

In appeal to this Court, on behalf of the appellants it was contended that payment on the basis of per kilometer per pole was not a new device adopted for the first time, but had been in vogue for a long time; that the rates were quite reasonable; that in order to implement the electrification scheme before the onset of winter season trucks made available by the contractors had to be engaged as the Road Transport Corporation expressed difficulty in making the same available; that the rates had been fixed after inviting tenders and the lowest tender was accepted; that Section 10 of the Evidence Act, 1872 was not applicable as there was no charge of conspiracy against the three contractors; that no motive could be ascribed if 10,000 poles were transported; that the circumstances coming on record were not put to them when they were examined under Section 313 of the Code of Criminal Procedure, 1973 for which reason the circumstances had to be excluded from consideration; that no other data or material was available in the office of the Chief Engineer to make an enquiry about the rates; that omission of enquiry did not show any guilty mind that no payment was made for carriage of poles below the length of 20 feet; and that they had suffered in body and mind and, therefore, a lenient view should be taken while awarding the sentence.

Disposing of the appeal, this Court

HELD : 1.1. The Road Transport Corporation (RTC) functioning in the State which owns a fleet of vehicles, used to charge on the basis of per truck, and not per k.m. The private transport carriers also used to charge the same amount per truck. It was the obligation of the appellants to bring

A the poles from to forest the the stocking/dumping site. The payment of loading and unloading charges resulted in additional burden on the State Exchequer. Although trucks were available in the Mechanical Divisions no efforts had really been made by the appellants to get the Government vehicles. Hence the rates agreed to with the contractors were not
B reasonable. [1131-D-E; 1133-B; 1134-D-F; 1133-F]

1.2. Under normal circumstances, giving of contract, following issuance of tender notice, to the lowest tenderer cannot be regarded as objectionable in any way. In the case at hand, however, issuance of Notice Inviting Tender (NIT) was as per pre-arranged plan. What has made the
C matter worse for the appellants is the acceptance of the tender by the contractors which, apparently was not a firm engaged in the business of transport. [1135-D; G-H]

1.3. An understanding had been arrived at between these firms/per-
D sons and the tender exercise was a camouflage. This conclusion gets fortified when it is noted that though according to the officials, tenders had been received from some transport carriers, in fact it was not so. The lowest amounts tendered were also those about which there had been a meeting of mind between the tenderer and appellants. It is unbelievable that without such an understanding, the contractors would have under-
E taken the work of transport even before the NIT was issued. They must have done so, on being told what the lowest rates would be, at least, could be. Non-transporters were brought in the picture even when firms of transporters were known to exist and there was no dearth of trucks proved by the fact that the three contractors could arrange many trucks within a
F short span only because of some prior understanding with them to share the extra profits with the officials. And this extra profit was ensured by allowing carriage per pole per k.m. basis, though the contractors themselves engaged trucks on lumpsum basis. So, everything pieces well; all acted concertedly to allow wrongful gain to the contractors on the understanding that the booty would be appropriately shared. [1136-A-B; 1137-C-F]
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1.4. There is no doubt that the first and second appellants played key role in giving of the contracts and formed the inner circle of the conspiracy. There can also be no doubt that their actions were actuated by ill motive, and the same was not inspired to get the poles at site to see that
H the electrification scheme gets shape before winter sets in. They got

transported about 10,000 poles as against the need of about 4,700. The NIT itself had specified this number at 6,000. As the rate at which the poles were agreed to be carried were unreasonable, there was motive in allowing carriage of poles beyond what was strictly needed. The greater the number of poles carried, the higher would be the amount which become payable to the contractors because of the rate being per pole; and the high profit would benefit these appellants also. Thus a case of conspiracy to cause wrongful loss to the State had been made out against these appellants. They were rightly found guilty of the charges, which qua them were commission of offence under Section 5(2) of the (Jammu & Kashmir) Prevention of Corruption Act, 2006 (1949 AD) and Sections 120-B/109/116/119 of the Ranbir Penal Code. [1138-B-F]

1.5. It would be too harsh to award even the minimum punishment at this length of time in view of the hardship already undergone and the amount which the State had ultimately to lose because of the conspiracy. As about two decades have passed since the commission of the offence and as during the interregnum these appellants had undoubtedly suffered in body and mind it is a fit case where the proviso to Section 5(2) of the Act should be invoked, which states that for special reasons recorded in writing, the court may refrain from imposing a sentence of imprisonment or impose a sentence of imprisonment of less than one year. Though the proviso permits not to impose a sentence of imprisonment at all and confine the sentence to fine only, the present is not a case where the punishment to be awarded should be only fine, as any softness in this regard could produce an undesirable result, namely, encouragement to adoption of corrupt means by public servants which has indeed to be checked, and not allowed to be encouraged. Keeping in view all the attending circumstances, a sentences of RI for two months would be adequate sentence, apart from the fine of Rs. 15,000, in respect of appellants in Criminal Appeal No. 521 and 530 of 1981. [1139-F-H; 1140-A-B]

2.1. Sitting in the office of the Chief Engineer it would not have been difficult for the third and fourth appellants to find out the rate either of the RTC or private carriers. The omission to make these inquiries stares one at the face and so they were rightly prosecuted and ultimately convicted, because of their apparent complicity in recommending the acceptance of the rates, characterising the same as justified. This shows the extreme hurry in which the matter was dealt with. There was no occasion for hurry

A at that stage inasmuch as transport of bamboo poles had almost been completed and what remained to be done was only the payment. Thus the appellants in Criminal Appeal Nos. 523 and 526 of 1981 were rightly convicted. However, the substantive sentence awarded on them is reduced to RI for one month as the main culprits were sentenced to imprisonment for two months. But the sentence of fine is left unaltered. [1142-E-G; 1143-D-E]

B

Abdulla Mohammed Pagarkar v. *State (Union Territory of Goa, Daman & Diu),* [1980] 3 SCC 110, held inapplicable.

3. Though the appellants in Criminal Appeal Nos. 522, 528 and 529 of 1981 had sought to assist the carriers to cause wrongful gain to them C by allowing transportation of poles below 20 feet, ultimately no financial loss on this count was caused to the State because the carries had not been paid for poles carried by them which were below 20 feet. Therefore, these appellants deserve to be acquited. [1144-H; 1145-A]

D 4.1. As to there having been no charge of conspiracy *inter-se* between the three contractors, the same is not material because there was close inter-relationship between the three firms and all of them acted in concert. The plea of non-applicability of Section 10 of the Evidence Act, 1872, therefore, fails. [1146-E]

E *Natwarlal Sakarlal* v. *State of Bombay,* (1963) Bombay Law Reporter 660, referred to.

4.2. The appellant in Criminal Appeal No. 524 of 1981 was not asked, in any form, about his having entered into conspiracy with anybody. He was F not even asked that the rates at which poles were carried by him were unreasonable or high. As these allegations/circumstances are the crux of the prosecution case insofar as he is concerned, the non-providing of opportunity to him to explain the same has rendered his conviction unsustainable. The circumstances coming on record were, therefore, not put to this appellant when he was examined under Section 313 of the Code of G Criminal Procedure, 1973 for which reason the circumstances have to be excluded from consideration. This appellant is, therefore, acquited.

[1145-D-F-H; 1146-A-B; 1149-E]

4.3. As far as the appellant in Criminal Appeal No. 525 of 1981 is concerned, a perusal of his examination under Section 313 of Cr.P.C. H shows that the facts which emerged against him were put to him to enable

him to explain the same. The law, therefore, does not exclude the circumstances brought against him. His conviction, therefore, has to be sustained as there is no doubt about his complicity. In view of the sentence awarded on the principal accused his sentence is reduced to RI for one month. [1147-H; 1148-A-B]

Sharad Birdhichand **v.** *State of Maharashtra,* **[1984] 4 SCC 116, relied on.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 521 of 1981.

From the Judgment and Order dated 16.4.81 of the Jammu & Kashmir High Court in Crl. A: No. 3 of 1981.

Sushil Kumar, P. Wadhwani, Ms. Purnima Bhatt and E.C. Agarwala for the Appellants.

P.L. Handoo, G.K. Kawoosa and Ashok Mathur for the Respondent.

The Judgment of the Court was delivered by

HANSARIA, J. The 1975 accord with Sheikh Abdullah saw a dynamic person from Ladakh coming to the fore. He was made a Minister. He wanted to do many things for Ladakhis. One of the projects which the Minister (Shri Sonam Narboo) wanted to get fructified was electrification of tehsils of Leh and Kargil. The fund for the same was to be provided by the Central Government under Rural Electrification Scheme. To see that the scheme was implemented within time, a separate Electric Construction Division was created at Leh. This was in February 1977. An Executive Engineer was put in charge of the Division and he was one N.A. Salaria, who was selected because of his dashing character which had come to light by his getting established a generating station at Choglamsar within record time. The electrification scheme was taken up after Shri Narboo, who was Minister for Works, Power, Tourism and Ladakh Affairs, had toured the area from 5.6.1976 to 13.7.1976. The idea was to electrify areas around Leh first for which it was felt that 3100 bamboo poles would be required. It was also noted that from September onwards the fruit season starts and all available transport is diverted to carry fruits to the plane and no transport is available for Ladakh. This apart, food grains are required to be stored in Kashmir valley and Ladakh to cater to the needs of the people during

A winter season. This being high priority area, the concern of the Government is to see that this work does not suffer for want of transport vehicles.

2. It is in the aforesaid situation and scenario that Salaria took up work in right earnest from first week of September 1977, after the Chief B Engineer, Electric Maintenance and RE, Kashmir had toured the two tehsils from 17th to 23rd August, 1977. The work was to arrange transport vehicles to carry required number of poles to Leh before November, after which Ladakh region becomes virtually inaccessible. The allegation is that the situation permitted persons in the Power Department to take advantage C of the same and a conspiracy was hatched to give contract of transportation to such persons who showed their willingness to share the booty with the officers. According to the prosecution, these persons included even the highest officer of the Power Department, namely, Power Development Commissioner and it went down to the Sectional Officer. The conspiracy came to the notice of none else than Shri Narboo as some complaints were D received by him in November, 1977 regarding giving of contract of transportation to private firms on per kilometre per pole basis and the poles being also of sub-standard quality. He wanted information about the same by writing a D.O. letter to the Power Development Commissioner on 18.11.1977 followed by a reminder on 5.12.1977. After receipt of reply, the E Minister asked for a report from the Chief Engineer. On receipt of the same, he felt the matter required deeper probe and appointed Qazi Mohd. Afzal as Enquiry Officer in December, 1977. His report was submitted on 3.4.1978 which highlighted some serious irregularities. After considering the report, the Government entrusted the matter for further probe to the F Anti-Corruption Organisation set up under the (Jammu & Kashmir) Prevention of Corruption Act, 2006, (hereinafter the Act). A case was accordingly registered on 26.4.1978 and a Senior Superintendent of Police, one Shri S.S. Ali, was entrusted with the investigation, who after completion of the same and after obtaining sanction from the Government, submitted charge-sheet on 10.8.1978 against 42 accused.

G

3. In the trial which commenced, after discharge of one (a labourer), 65 witnesses were examined by the prosecution and 2 by the defence. Great number of documents were also exhibited. The trial court by its very exhaustive judgment dated 29.9.1981, which runs into 420 pages, acquitted H 11 persons including Power Development Commissioner, Shri Ahangar

and Chief Engineer, Shri Naqash; and convicted 30 under various sections of law including section 120-B Ranbir Penal Code and section 5(2) of the Act.

4. On appeal being preferred, the High Court of Jammu & Kashmir acquitted 19 more including Superintending Engineer Shri Kaul and sustained conviction of 11 persons who are the appellants in the 10 appeals at hand. Of them, 7 are officials and 4 are contractors. The officials are : (1) Executive Engineer, N.A. Salaria; (2) Assistant Engineer, G.D. Buch; (3-4) two employees of the Chief Engineer's office - T.K. Kantroo and V.K. Razdan; (5-7) three officers who had passed the poles-they being H.L. Dhar, Farooq Ahmed Zadoo and Mohd. Siddiq. The four contractors are; (1) Hafeezullah, (2) Farooq Ahmed Qurashi, (3) Abdul Rashid Khan and (4) Peer Gulam Nabi.

5. The appeals being by the convicted persons and there being no appeal against acquittals either by the trial court or the High Court, it is apparent that we have to see whether the persons ultimately convicted by the High Court had been rightly found guilty of the charges, inter alia, of conspiracy. We have mentioned about this aspect at the threshold because the principal charge being of conspiracy and that too involving highest officer of the Power Department, and he having been acquitted even by the trial court along with the Chief Engineer, followed by acquittal of Superintending Engineer by the High Court, we shall have to see whether the links which have been left in the chain of conspiracy do leave a thread to piece together the actions of the convicted appellants so as to establish a conspiracy by them.

6. Many of the learned counsel appearing for the appellants made a grievance that the State has allowed higher ups to remain unavailable to this Court and has thought it fit to press the case against small fry. According to them if there was a conspiracy at all, the same could not have been worked out without the connivance of at least the Chief Engineer and Superintending Engineer. Shri Handoo, appearing for the State, felt some what uncomfortable at the non-filing of the appeals by the State, first in the High Court and then in this Court against the acquittals of higher-ups. But then, no appeal having been filed, the ultimate submission was that the core of the conspiracy had not been adversely by the acquittals and the evil design resulting in causing wrongful loss to the State Exchequer by causing

A wrongful gain to the contractors and themselves has to be punished. Differently put, the submission was that the inner circle of the two concentric circles has not been damaged because of the outer circle getting wiped out. According to Shri Handoo, therefore, the acquittals of the higher-ups cannot per se see the acquittals of the appellants.

B 7. To appreciate the aforesaid submission, we have basically to note the key role assigned to appellant Salaria who, according to the prosecution, was duly supported by appellant Buch. These two according to Shri Handoo were the main actors in the drama, which was enacted about two decades back in an area which had not seen a conspiracy of the type at C hand causing loss of lacs to the State Exchequer, which had drawn attention even of the State Cabinet.

8. Loss of lacs (the total loss to the State Exchequer having been estimated at Rs. 1, 62, 117, 89) was undoubtedly of great concern two D decades earlier and we can appreciate the great consternation this case had caused in the State requiring appointment of a senior Session Judge to constitute the Special Court under the Act to try the case. The heroic effort made by the prosecution to bring home the guilt also speaks for itself. The lapse of time, therefore,. cannot be allowed to come to the aid up the appellants, as has been one of the submissions on behalf of the appellants, E based on the fact of long suffering already undergone. We would, therefore, examine the materials on record objectively without being influenced by the hardship undergone, which could be taken note of, if need would arise, while dealing with the question of sentence. May it be stated that we would undertake this exercise as we are satisfied about the core of con- F spiracy, referred to by Shri Handoo as inner circle of the conspiracy, having remained unaffected despite aforesaid acquittals, as would appear form what is being stated later.

9. The first and foremost question which needs to be looked into is whether the acts attributed to the appellants were at all meant to cause G wrongful loss to the State by the alleged conspiracy. Almost all the learned counsel appearing for the appellants were at pains to convince us that the arrangement which was made with the contractors to carry poles was not at all aimed to cause any wrongful gain to them inasmuch as payment on the basis of per kilometer per pole was not a new device adopted in 1977 H for the first time, but that had been in vogue at least since 1971. This apart,

the rates which were agreed upon was also quite reasonable. The same was 30 or 35 paise per k.m. per pole depending upon the size, which is in the close neighbourhood of what had been paid even in 1976 for carrying poles to Leh itself by the arrangement finalised by Shri Bassu, who was the immediate predecessor of Salaria. Shri Handoo seriously contested this claim and urged that per k.m. basis had been adopted for the first time in 1977 for long haulage; in earlier years this was being accepted for carrying materials to short distances. As to the reasonableness of rates, the State's case is that the amount agreed to be paid was almost three times of what was being paid earlier.

10. We would, therefore, first examine the aforesaid crucial question. We would then see whether the giving of contract at the lowest tendered rate made any difference.

Reasonableness of the contractual rates.

11. There is no dispute before us that the Road Transport Corporation (RTC) functioning in the State of Jammu & Kashmir, which owns a fleet of vehicles, used to charge on the basis of per truck, and not per k.m. This rate was Rs. 1400 in the relevant year. The private transport carriers also used to charge the same amount per truck. But then, the number of poles to be carried by these trucks to a place like Leh used to be around 25. This made a difference, according to the learned counsel for the appellants, as the number of poles carried by the trucks which had been engaged by the contractors at hand used to be even 70. Shri Handoo contended that though the number of poles carried were more, the same did not really matter inasmuch as total cft. (cubic feet) transported was not in any significant manner more than carried by the trucks of RTC of private transport owners because each of those trucks used to carry about 280 cft. whereas from Statement No. 2 filed by Shri Thakur it would appear that the cft carried in the present case ranged between 200 to 300, though in some cases it went upto 400 also. As to the contention that the rates of carriage per pole came to 30.49 paise insofar as the transportation done by Shri Bassu is concerned, Shri Handoo's submission was that this calculation as put on record on behalf of the appellants is wrong. As per his contention the per pole rate then was 9.36 paise as mentioned in the Charge-Sheet filed in the case, a copy of which is from pages 1 to 86 of Volume 1 of the Paper Book prepared by the appellants. This figure has

A been mentioned at page 72 of this Volume.

12. As to the calculation furnished on behalf of the appellants the same being that the rate was Rs. 30.49 per pole if what was paid for the carriage to Leh in 1976 during the incumbency of Shri Bassu - we would observe that calculation has been arrived at by showing, inter alia, that the B charge of loading and unloading per pole at Rs. 52. When Shri Thakur was questioned on this, the learned counsel had referred us to the evidence of the Investigating Officer (I.O.) finding place at page 230A of Volume IV. A reference to that statement showed that the unloading charge came to Rs. 18 per pole and the loading charge to Rs. 7.80. Thus the total came to C about Rs. 26 from stocking site to the truck. The learned counsel contended that this figure had to be doubled because the same amount used to be incurred of bringing poles at the stocking site from the forest. The I.O. had not said anything about this on his own, nor was he asked any such question in cross-examination. However, to convince us that the figure of Rs. 26 is required to be doubled, in the written submissions filed on D 21st/27th March, the learned counsel appearing for the appellants quoted the following evidence of PW 24 Bassu :

> "Expenses for loading and unloading as well as the manual carriage from loading site and unloading site. For manual carriage E of the poles we have to pay extra. By referring to the manual charges I mean the lifting of poles by manual labourers from Depo site to the truck and also their removal after unloading to the stock site.
>
> Q/ When you took these poles for installation from Choglamsar F you again had to incur expenses for manual carriage, loading and unloading of poles ?
>
> A/ Yes."

12-A. From the above quoted evidence of PW 24, it is not known G how much had been paid during his incumbency as total loading and unloading charges. It is not known which instances the I.O. had in mind when he had stated about loading and unloading charges. It deserves to be pointed out that the poles which had been carried in 1977 had basically been supplied by Mustaq & Company and it was the obligation of this firm, H as per Shri Handoo, to bring the poles from the forest to the stock-

ing/dumping site. What is more important is that the decision which was taken in the joint meeting held on 11.5.77 was that the poles would be carried from Kangan and Sonmarg vide page 22 of Vol. III. Mention has been made about this in para 69 of the charge-sheet also, which is at pages 1-86 of Volume I. But for some inexplicable reason, the stocking/dumping site was changed and poles were carried from Waltab which resulted in additional burden on the State exchequer. Shri Handoo made a serious grievance about this change of site.

13. For the aforesaid reasons, we do not accept the contention of the appellants that loading and unloading charges when poles were carried during the incumbency of Shri Bassu came to Rs. 52. Therefore, we would not agree that the rate of carriage per pole in 1976 was Rs. 30.49. So, we accept the prosecution case that the rates agreed to in the present case were not reasonable. This is almost writ large on the face as the carrying charge per pole came to Rs. 144.60. This has come out clearly in the Office Note, which starts at page 12 of Volume IX. (This figure has been mentioned at page 13). In this context, it would be apposite to refer to what has been stated in the impugned judgment of the High Court at page 158 of the volume containing this judgment. It has been mentioned therein that the payment made to the contractors showed that the same per truck worked out to Rs. 10, 561, 66, whereas the rates of the RTC would have been Rs. 1993.57. The same would have been even less (Rs. 1839.57) if trucks of private carrier would have been engaged.

14. Being satisfied that the rates agreed to with the contractors were not reasonable, let it be seen whether the higher was payment was motivated or was agreed upon to take of the exigency of the situation. Shri Thakur strenuously urged that implementation of the rural electrification scheme within the time spelt out by the Minister was the need of the hour, for which purpose a dashing character like that of Salaria was brought to the scene. The concerned persons were duty bound to do all that could reasonably be done to carry poles to Leh before the onset of winter season which cuts off Ladakh from the Valley for a long period. The fruit growing season being round the corner and the need for storing food for the winter being the prime concern of the Government, the concerned officers had to implement the scheme before the onset of winter and had on alternative but to engage trucks made available by the contractors as the RTC had expressed difficulty in making the trucks available. To satisfy us that there

A was no evil design in giving the contract of carriage to non-transport firms, it was also urged that the rates had been fixed after tenders had been invited and the lowest tender was accepted.

15. Shri Handoo would not like us to accept the aforesaid statements because, according to him, large number of Government trucks could be B used for the purpose if proper approach would have been made. In this connection, he referred us to the communication from the office of the Transport Commissioner to the Investigating Officer (I.O.) dated 24.5.78, which is at pages 269 to 270A of Volume VII. It has been mentioned therein that the State had about 4,000 trucks operating on J & K roads C only and about 400 to 800 trucks used to lie idle everyday. This letter further informed the I.O. that no officer of the Electric Department had approached the office of the Transport Commissioner for arranging trucks for the carriage of poles. The further statement was that the Minister for Ladakh had personally contacted the writer on 5th November, 1977 stating about the urgent need of transporting four lac litres of High Speed Diesel D to Leh and despite shortage of time they were able to complete the massive operation within three weeks. We have also been referred by Shri Handoo to the evidence of PW 29, Shri SD Shanglio, Executive Engineer, Mechanical Division, Srinagar, which is at page 48-49 of Volume IV that their Department was having 39 trucks in its fleet and they had received no E requisition from REC Leh for carriage of poles.

16. The aforesaid does show that no efforts had really been made by the concerned officers to get the Government vehicles. Shri Thakur and Shri Jain, however, urged that before floating of tender, RTC officials had F been personally contacted by Salaria and on being stated that trucks could not be made available "at the present time", the exigency of situation left no alternative but to invite tenders. This information to Salaria was in the document which is at page 256 of Volume VII. The catch, however, is that when the signatory of this letter, Sardar Jai Singh, appeared the witness box as PW 2 he deposed that on his being approached by Salaria on 15th G September, 1977 what he had really told was that there was no objection to supply of trucks but due to earlier commitments with other departments trucks could not be supplied for "2 to 3 days". Salaria however did not come subsequently asking for trucks and so no trucks got supplied by the RTC. Shri Thakur contended that this gloss put by Jai Singh does not merit H acceptance, as, if that was what was really told to Salaria, the same should

have found place in the aforesaid communication. In this context we were taken through the various questions which were asked to Jai Singh on this aspect and which find place from pages 50 to 55 of Volume III. If the evidence of Jai Singh alone would have been on record, we could have perhaps agreed to what was submitted by the learned counsel for the appellants in this regard; but having noted what had been stated by the Transport Commissioner in the afore-noted letter and what had been the evidence of the Executive Engineer, Mechanical Division, we are of the view that Notice Inviting Tender (NIT) came to be issued as pre-arranged, to which aspect of the matter we shall advert now.

Issuance of NIT and subsequent happenings.

17. Under normal circumstances, giving of contract, following issuance of tender notice, to the lowest tenderer cannot be regarded as objectionable in any way. In the case at hand, however, issuance of NIT was as per pre-arranged plan, as already mentioned. We have said so because the same came to be issued, not in the wake of denial, even if there was any, by the RTC official to make their vehicles available. That tenders would be invited had been stated even by 8.9.77 by Buch to appellants Hafeezullah and Qurashi. The letter of Buch of 8th September addressed to Salaria, which is at pages 50 and 51 of Volume X, mentioned that the former had negotiated with M/s. Arfa Electrical Company (which is the name of the concern of appellant Hafizullah) and M/s. Farooq Ahmed Qurashi and they had accepted to carry poles from Srinagar Valley to Kargil and Leh on the condition that the rates of carriage charges could be those which would be found lowest after floating tender. Buch further stated in the letter the the firms had been advised to start the carriage of poles : of course, the charges to be paid would be known after receipt of tender to be floated in this regard. There is thus nothing to doubt that a decision had been taken with the consent of Salaria to float tenders even by 8th September. The contact with the RTC official at Srinagar was on 15th and the obtaining of the aforesaid letter from Jai Singh may, therefore, just be a ruse for issuance of the NIT. What has made the matter worse for the appellants is that a copy of NIT was sent even to M/s. Khan Electric and General Stores, the firm of appellants Abdul Rashid Khan and Peer Gulam Nabi, whose tender was ultimately accepted, which, apparently was not a firm engaged in the business of transport.

A 18. Shri Handoo, therefore, rightly submitted that an understanding had been arrived at between these firms/persons and the tender exercise was a camouflage. This conclusion gets fortified when it is noted that though according to the officials, tenders had been received from some transport carriers, to wit, Sopore Transport Workers' Union, in fact it was
B not so. This has transpired from the evidence of PWs 21 and 22, who were the Manager and President respectively of the Sopore Transport Workers' Union. Both of them stated that their Society had not submitted any tender and the one which was said to have been filed in its name had really not emanated from their office. Even the seal put in the tender was not theirs
C and the tender had not been signed by any authorised person. Shri Thakur urged that tender might have been signed by the Accountant, who was in employment at Srinagar Branch, as admitted by PW 22 in his cross-examination. Shri Handoo replied that PW 22 had stated that the Accountant was not authorised to submit quotations. We are inclined to think that similar must have been the position qua some other transporters who had
D purportedly submitted tenders. Shri Handoo further contended that the NIT had been issued to selected persons as would appear from the evidence of PW 19 (at page 220 of Volume II) to the effect that his firm had not received any tender notice. The firm of this witness, named Diamond Motors, was a leading transporter of Srinagar as about 100 trucks
E were attached to his firm.

19. At this stage we may indicate that the firms styled as Arfa Electrical Company and Khan Electrical and General Stores are closely knit, as would appear from the evidence of DW 1 Farooq Uddin, who
F stated about his being a partner in the firm of Arfa Electrical Company, alongwith Hafeezullah. Though he stated in the examination-in-chief that his firm had nothing to do with the firm of Khan Electric and General Stores, from the statements made by him in cross-examination it appeared that Arfa Electrical Company was not running a shop and that firm had
G no headquarter. He further stated that Hafeezullah used to run his father's shop named Khan Electric and General Stores and correspondence for Arfa Electrical used to be from the shop of Khan Electric. He further admitted that Afra Electrical had no registration with the Sales Tax Department. Even the bill-head of Khan Electric and General Stores was
H used by Arfa Electrical after erasing the name of the former and overwrit-

ing name of the latter. These statements do show the inter relationship and closeness of Arfa Electrical Company and Khan Electric and General Stores. A

20. The above is not all inasmuch as there is material on record to show that Qurashi is related to Hafeezullah being a son of his father's brother-in-law. This would definitely indicate that Qurashi too had acted in concert with Hafeezullah. B

21. The aforesaid facts leave no doubt in our mind that the exercise of issuing the NIT and accepting the tender of Khan Electric and General Stores were parts of pre-arranged plan. We have reasons to believe that the lowest amounts tendered were also those about which there had been a meeting of mind between the tenderer and appellants Salaria and Buch, if not others. We are inclined to think so because it is not believable that without such an understanding, Arfa Electrical and the firm of Qurashi would have undertaken the work of transport even before the NIT was issued. They must have done so, on being told what the lowest rates would be, at least, could be. There is much merit in the submission of Shri Handoo that the non-transporters were brought in the picture even when firms of transporters were known to exist and there was no dearth of trucks proved by the fact that the three contractors could arrange 132 trucks within a short span of 8.9.77 to 7.11.77 only because of some prior understanding with them to share the extra profits with the officials. And this extra profit was ensured by allowing carriage per pole per k.m. basis, though the contractors themselves engaged trucks on lumpsum basis. (This figure was given as Rs. 8000 by DW 1). So, everything pieces well; all acted concertedly to allow wrongful gain to the contractors on the understanding that the booty would be appropriately shared. C D E F

22. Having come to the aforesaid conclusion which does make out a case of conspiracy to cause wrongful loss to the State, let it be seen whether the appellants herein were the conspirators; and, if so, whether the charges against them have been brought home in accordance with law. We propose to examine this qua each of the appellants separately. We would first take up the case of the two persons, who had played the key role in the conspiracy according to the prosecution. They are appellants N.A. Salaria, the then Executive Engineer; and G.D. Buch, the then Assistant Engineer. G H

A *Appellants N.A. Salaria and G.D. Buch*
(Criminal Appeal Nos. 521 and 530/1981)

23. There is no doubt, in view of what has been stated above, that they played key role in giving of the contracts and formed the inner circle of the conspiracy. There can also be no doubt in view of what has already B been held that their actions were actuated by ill motive, and the same was not inspired to get the poles at Leh to see that the electrification scheme gets shape before winter sets in. Apart from what has already been mentioned about the tainted steps taken by them, Shri Handoo has brought to our notice another facet of the case, which was to get transported about C 10,000 number of poles as against the need of about 4,700. The NIT itself had specified this number as about 6000.

24. Shri Thakur learned senior counsel who appeared for Buch, contended that the total requirement for 1976-77 came to about 12,400; and as during Bassu's period only about 2,000 poles could be carried, no D motive could be ascribed if 10,000 poles were transported during the period in question.

25. We would have accepted the submission of Shri Thakur, but having found that the rate at which the poles were agreed to be carried were unreasonable, we read motive in allowing carriage of poles beyond E what was strictly needed. The greater the number of poles carried, the higher would be amount which would become payable to the contractors because of the rate being per pole; and the high profit would benefit the appellants also.

F 26. Nothing further remains to be said to come to the conclusion that these appellants were rightly found guilty of the charges, which qua them were commission of offences under section 5(2) of the Act and 120-B/109/116/119 Ranbir Penal Code. At this stage we say something about the submission made by Shri Jethmalani, who had appeared for two of the contractors namely Hafizullah and Farooq Ahmed Qurashi, that the charge G having only mentioned about section 5(2) was not quite explicit inasmuch as it did not spell out which particular misconduct specified in sub-section (1) of section 5 was being attributed. The learned counsel further submitted that of all the four types of misconducts taken care of by sub-section (1) in its four clauses, it is the one mentioned in clause (d) which could apply, H which speaks of abuse of the position by a public servant by "corrupt or

illegal means". The contention as to this clause was that no corrupt or illegal means had been adopted by the public servants because the contract had been given following invitation to submit tenders which is a known and legal mode of giving contracts; it was in also not a corrupt means. There is no force in this contention, as the undertaking given to the aforesaid two contractors that they would be allowed to carry poles at the lowest tendered rates followed by how the NIT was issued and what happened thereafter, there can be no dispute that the public servants in question did abuse their position. It so deserves to be noted that clause (d) does not speak only about "corrupt or illegal means" but also takes within its fold obtaining by public servant for himself or for any other person any pecuniary advantage "otherwise" as well. We, therefore, do not find any infirmity in the charges as framed.

27. So, we uphold the conviction as awarded against these appellants. Coming to the question of sentence, we have noted that section 5(2) of the Act has stated that the punishment shall not be less than one year's imprisonment but may extend to seven years. The trial court, being satisfied about the need of deterrent punishment had awarded imprisonment for four years and a fine of Rs. 25,000. The High Court has, however, reduced the sentence to two years and fine too has been reduced to Rs. 15,000, despite of having noted that evil of corruption had of late assumed menacing proportion and was the deadliest enemy of a free civilised society.

28. According to us, it would be too harsh to award even the minimum punishment at this length of time keeping in view the hardship already undergone and the amount which the State had ultimately to lose because of the conspiracy - the same being a sum of Rs. 1,62,117.89. As about two decades have passed since the commission of the offence and as during the interregnum the appellants had undoubtedly suffered in body and mind, according to us, it is a fit case where the proviso to sub-section (2) of section 5 of the Act should be invoked which states that for special reasons recorded in writing, the court may refrain from imposing a sentence of imprisonment or impose a sentence of imprisonment of less than one year. Though the proviso permits not to impose a sentence of imprisonment at all and confine the sentence to fine only, we do not think if present is a case where the punishment to be awarded should be only fine, as any softness in this regard could produce an undesirable result, namely, encouragement to adoption of corrupt means by public servants which has

A indeed to be checked, and not allow to be encouraged. Keeping in view all the attending circumstances, we are of the view that a sentence of RI for two months would be adequate sentence, apart from the fine of Rs. 15,000. On failure to pay the fine, each of the appellants would suffer imprisonment for two months.

B 29. Crl. Appeal Nos. 521 and 530 of 1981 therefore, stand dismissed, subject to the aforesaid modification in sentence.

Appellants T.K. Kantroo and V.K. Razdan
(Criminal Appeal Nos. 523 and 526/1981)

C 30. These appellants were working at the relevant time as Assistant Engineer and Sectional Officer in the office of the Chief Engineer and, according to the prosecution, they had affected cost analysis and had justified the proposal which had been submitted by appellant Salaria to the Chief Engineer seeking his approval to the rates tendered by Khan Electric
D and General Stores.

31. What had happened was that after the bills had been submitted by the contractors for payment, an objection was raised by the Accountant relating to non-approval of the contract by the Chief Engineer. This needed clearance of the Chief Engineer for which purpose Salaria addressed a
E communication on 4.10.1977 to the Chief Engineer (a copy of which is at pp.10 and 11 of Volume IX) seeking his approval to the tender rates in question. In the memo of the aforesaid date, which was endorsed to the Chief Engineer Salaria had mentioned in its margin (and this endorsement, according to Shri Handoo, is not to be found in the original of the letter)
F stating, inter alia, that the tender rates were as per the Superintending Engineer Memo dated 27.5.1975, a copy of which was also enclosed. After receipt of this letter on 22nd October, the Chief Engineer desired processing of the matter. The file was endorsed to Assistant Engineer Kantroo by Technical PA to the Chief Engineer on 22nd itself; and Kantroo, in turn
G endorsed the letter to Razdan on 24th.

32. An office note running into 3 and 1/2 pages was prepared by Razdan on 25th which came to be signed by Kantroo also on that date. The Technical PA to the Chief Engineer submitted the office note on the same date to the Chief Engineer. The Chief Engineer, however, found that
H the standing procedure regulating invitation of the tenders and processing

the case thereafter had not been followed strictly due to extreme urgency involved as stated by the Executive Engineer. The Chief Engineer in his note, asked the Superintending Engineer to get the case processed at his level and to obtain the observation of FA (Financial Adviser) and to get the agenda put up thereafter by the Executive Engineer for discussing and deciding in a committee of the Superintending Engineer, Executive Engineer, FA and CAO (or his representative) and himself within a week.

33. The aforesaid shows the extreme hurry in which the matter was dealt by the appellants Kantroo and Razdan. A perusal of the office note, which is at pages 12 to 15 of volume IX, shows that they regarded the accepted tender rates as justified solely because of the approval by the Superintending Engineer, REST (Rural Electrification and Sub-Trans) Circle of the carriage rates in 5/75 ranging between 51 to 75 per km. per pole. (This document is at page 99 of Volume VII).

34. Shri Handoo contended that the complicity of these two appellants is apparent from the fact that they had confined their attention only to the one time approval given by the aforesaid Superintending Engineer without at all trying to know as to under what circumstances the rates were approved and, what is more without trying to know what were the other accepted mode of carrying poles and what were the rates thereof.

35. Shri Sushil Kumar, learned senior counsel appearing for these appellants, submitted that no other data or material was available in the office of the Chief Engineer, and so, the appellants confined their attention to the rate about which mention had been made in the communication of the Executive Engineer. That no other material was available in the office of the Chief Engineer is the evidence of PW. 1 who was the Inquiry Officer. PW. 26 who was the Technical PA to the Chief Engineer and, last but not the least, the IO, PW. 65, also deposed the same.

36. The further submission of Shri Sushil Kumar was that if these appellants had omitted to make any further inquiry, about which the observation of the trial court was that they did not "conduct research", the same did not really show any guilty mind, though that could be a case of negligence for which departmental action may be merited but not a criminal prosecution. In this connection our attention was invited to the recommendation of the Inquiry Officer stating that these appellants have to "explain their negligence in not trying to ascertain and apprise the Chief

A Engineer of the vital information appertaining to the carriage rates at which poles had been carried to Ladakh by ....." (Page 105 of Volume V.)

37. To support him on the legal submission, we have been referred to *Abdulla Mohammed Pagarkar* v. *State (Union Territory of Goa, Daman & Diu),* [1980] 3 SCC 110. That was also a case where the appellants had B been convicted, inter alia, under Prevention of Corruption Act. While setting aside the conviction and ordering or acquittal of the appellants, this Court observed in paragraph 24, to which our attention is invited in particular, that if the appellants proceeded to execute the work in flagrant disregard of the relevant rules of the General Financial Rules and even of C ordinary norms of procedural behaviour of Government officials and contractors in the matter of execution of work undertaken by the government such disregard had not been shown to amount to any of the offences for which the appellants convicted. The submission, therefore, was that we may not read ingredients of any of the offences for which the appellants have D been convicted merely because of their not having made some enquiries and having acted against accepted norms.

38. We have found it difficult to agree with Shri Sushil Kumar because a perusal of the aforementioned office note clearly shows two things. First, the extreme hurry in which the assigned work was completed, E as the file came to Razdan on 24th October and was sent back on 25th, after the same had been examined, not only by him, buf Kantroo also. There was no occasion for hurry at that stage inasmuch as transport of the bamboo poles had almost been completed and what remained to be done was only the payment. Secondly, the note discloses that these appellants F knew that the cost of carriage per pole even as per the lowest tenders would be Rs. 144.60. This must have shocked their conscience and they must have tried to know what could have been the cost of poles were carried, not on the basis of per km. per pole, but as per truck loads. Sitting in the office of the Chief Engineer it would not have been difficult for these officers to find out the rate either of the RTC or private carriers. The G omission to make these inquiries stares one at the face and so they were rightly prosecuted and ultimately convicted, because of their apparent complicity in recommending the acceptance of the rates, characterising the same as justified.

H 39. Shri Sushil Kumar advanced yet another submission. He urged

that the acquittal of the Chief Engineer by the trial court and of the Superintending Engineer by the High Court show that these courts had not read any criminal intent in the role they had played in the matter; and the same view is merited qua the two appellants. We do not propose to examine the justification or otherwise of the acquittals, because of there being no appeal against acquittals before us. It would be enough to point out that the Chief Engineer had been acquitted as the trial court took the view that Salaria was interested in keeping the Chief Engineer in dark about salient features of the contract, because of which it was stated that the Chief Engineer could not be a conspirator. As to the acquittal of the Superintending Engineer what the High Court stated was that he had neither been informed about the floating of tenders on 17.9.1977, nor was taken into confidence when tenders were opened on 27.9.1977. Even a copy of the NIT had not been sent to him. This apart, the High Court has referred to a communication addressed by the Superintending Engineer to Salaria in which the former asked the latter as to why poles were not carried by RTC trucks and why the carriage contractors had been introduced. We do not propose to dilate further.

40. We, therefore, conclude by stating that the two appellants were rightly found guilty. As to the substantive sentence awarded on them, we would reduce the same to RI for one month, as we have sentenced the main culprits to imprisonment for two months. The fine of Rs. 3,000 on each of the appellants is left unaltered. In default of payment of fine, each of them would undergo imprisonment for one month.

41. Criminal Appeal Nos. 523 and 526 of 1981 are, therefore, dismissed, subject to the aforesaid modification in sentence.

Appellants H.L. Dhar, F.A. Zadoo and Mohd. Siddiq
(Criminal Appeal Nos. 522, 528 and 529 of 1981)

42. The alleged role of these appellants was that they had passed poles below specification inasmuch as poles below the length of 20 feet were allowed to be transported. There is no dispute that the contract was to transport poles whose length was required to be between 20 feet to 30 feet. This has its importance because poles of smaller size would not have the required girth which would effect their strength and they would not be able to with stand the normal wear and tear. Of the aforesaid appellants, Dhar was a Sectional Officer in the Power Development Department,

A Zadoo a Store-keeper cum Clerk and Siddiq a Junior Clerk engaged on work charged basis. Their defence was that as poles below the length of 20 feet had been transported earlier, they had permitted the same this tune as well, not knowing that the contract was to carry poles of 20 feet and above. This defence has to be rejected for two reasons : (1) It cannot be believed that the Passing Officers would not know about the size of poles B to be transported; and (2) it is the case of appellant Buch that he had informed about the size of the poles to be accepted.

43. The High Court has strongly criticised the rule of the Passing Officers by stating that had they not been parties to the conspiracy, the entire conspiracy would have flopped and the carriage contractors could C not have carried such a great number of poles in such short span of time and could not have earned so much.

44. Shri Agarwal, learned senior counsel appearing for these appellants, contended that even if it were to be accepted that these officers were D informed about the contract being to carry poles of 20 feet and above, the poles below 20 carried were small in number and the percentage of the pole so carried was in the neighbourhood of what had been done earlier. From Statement No. 4 filed in the case by Shri Thakur, it appears that even RTC trucks and private carriers, who too were supposed to carry poles of the length of 20 feet and above, had transported some poles below 20 feet, E whose percentage came to 20.9, whereas the percentage of such poles transported by the three carriers contractors was 21.3.

45. We have also found from the judgment of the High Court that the contractors had billed for those poles only which were of 20 feet and above. This is admitted by Shri Handoo and is apparent from the bills F submitted by the carriers which are on record. To bring home this point, it would be enough to refer to the bill of Arfa Electrical Company which is at page 286 of Volume XII. The total number of poles for which bill was submitted comes to 822, of which 647 were between 20 feet to 26 feet and the remaining 175 between 27 to 30. In all, however, the contractor had G carried 1125 poles, as mentioned at page 75 of the High Court's judgment. There is no dispute that similar is the situation as regards the two other carriers.

46. It thus appears that though these three appellants had sought to assist the carriers to cause wrongful gain to them by allowing transportation H of poles below 20 feet, ultimately no financial loss on this count was caused

to the State because the carriers had not been paid for poles carried by them which were below 20 feet. We are, therefore, of the view that these appellants also deserve to be acquitted, as were some of the Field Officers, who had accepted the under-sized pole at the receiving point had been acquitted by the High Court. May it be mentioned that the High Court had acquitted the Field Officers mainly because of acquittal of the supplier, namely, Mustaq & Company, by the trial court against which no appeal had been filed. The High Court observed that if no offence had been committed by the supplier on this score, the persons who had received those poles cannot be faulted with. We would say the same qua these three appellants.

47. Criminal Appeal Nos. 522, 528 and 529 of 1981 are, therefore, allowed by setting aside the conviction of the appellants and by ordering their acquittal.

Appellants Hafeezullah and F.A. Qurashi
(Criminal Appeal Nos. 524 and 525 of 1981)

48. These are the contractors who had been approached by Buch and had started transporation work from 18.9.77 - the date of the issuance of the NIT being 17.9.77. Appellant Qurashi had executed the work from 18th for 6 days and had transported 1038 poles. Appellant Hafizullah started transportation work from 24th September and this continued till 29th, during which period 1125 poles were carried.

49. Shri Jethmalani, learned senior counsel appearing for these appellants, contended that there were some legal infirmities in their conviction. He first stated in this regard that the charges framed against them being one of conspiracy with accused 5 and 6 (who are appellants Salaria and Buch) and through them with accused 1 to 4 (who were the Power Development Commissioner, the Chief Engineer, the Superintendent Engineer and Technical PA to the Power Development Officer), and accused 1 to 4 having been acquitted, the charge of conspiracy against these appellants has to fail on this count alone. Further leaf of this argument was that there being no charge of conspiracy *inter-se* among the three contract carriers, even if there was some conspiracy between accused Rashid Khan and P. Gulam Nabi, who were the partners of the firm of Khan Electric and General Stores, no illegal act at all was committed by these appellants, as after all what they had agreed to do was to transport poles at the rate

A to be found lowest on tender being floated. It was also contended that there was wrong use of section 10 of the Evidence Act because there is no evidence alliunde about these appellants having "conspired together" with others in which case alone section 10 becomes operative. Final flaw mentioned was that the circumstances which had come on record against these appellants had not been put to them in their examination under section 313 B Cr.P.C., because of which the circumstances have to be excluded from consideration, as held by this Court in *Sharad Birdhichand* v. *State of Maharashtra,* [1984] 4 SCC 116.

50. It is no doubt correct that accused 1 to 4 were acquitted but C accused 5 and 6 were not; and we too have upheld their conviction. Though the charge stated about ultimate conspiracy with accused 1 to 4, the same was alleged through accused 5 and 6. We have already dealt as to what is the effect of acquittal of accused 1 to 4 on the charge of conspiracy, and it has been pointed out that the acquittal did not affect the inner circle of the conspiracy which remained intact inasmuch as appellants Salaria and D Buch are comprehended in that circles.

51. As to there having been no charge of conspiracy *inter-se* between the three contractors, the same is not material because of our finding that there was close inter-relationship between the three firms and all of them E had acted in concert. The submission about non-applicability of section 10 of the Evidence Act, therefore, fails. So, it is not necessary to advert to what was held in this regard in *Natwarlal Sakarlal* v. *State of Bombay,* (1963) Bombay Law Reporter 660 to which we were referred by Shri Jethmalani to support his submission relating to section 10 of the Evidence Act.

F

52. This leaves for consideration the submission that the circumstances coming on record were not put to the appellants when they were examined under section 313 Cr.P.C. for which reason the circumstances have to be excluded from consideration. In support of this submission Shri G Jethmalani read out to us the questions asked to Hafeezullah, which (alongwith his answers) are at page 283 of Volume II and read as below :

> "Q/ It has transpired in evidence that without having anything to do with Arfa Electrical Co. Red-Cross-Srinagar you have submitted a bill for Arfa Electrical Co., which was originally shown H to be a bill on behalf of Khan Electrical and General Stores ?

A/ I am a partner of Arfa with one Farooq Ahmed Zargar. The bill was given for typing and the typist committed a mistake, which was corrected by hand. The bill was due because of the arrangement made by me and my partner with ECD Leh on 8.9.77

Q/ Further that Farooq Ahmed Qurashi S/O your Father's Brother-in-Law had submitted quotation in response to NIT issued by Xen. ECD Leh as proprietor of Arfa Elec. Co. with which you had no connections ?

A/ That is not correct. That quotation Ex PW 3/10 which I have seen today was signed by me partner Farooq Ahmed Zargar Ahmed and bears the signature of said Farooqi Ahmed Zagar and not of Farooq Ahmed Qureshi.

Q/ Why you are being prosecuted ?

A/ I do not know.

Q/ Why the witness are deposing against you ?

A/ No witness has deposed anything against me.

Q/ Would you like to lead (sic, make) any other submission ?

A/ I am innocent.

Q/ Would you like to lead any defence ?

A/ Yes."

53. The aforesaid does show that Hafeezullah was not asked, in any form, about his having entered into conspiracy with anybody. He was not even asked that the rates at which poles were carried by him were unreasonable or high. As these allegations/circumstances are the crux of the prosecution case insofar as he is concerned, the non-providing of opportunity to him to explain the same has rendered his conviction unsustainable. We, therefore, accept his appeal and order for his acquittal.

54. Insofar as appellant Qurashi is concerned, a perusal of his examination under 313 (at pages 280 to 282 of Vol. II), however, shows that the facts which emerged against him were put to him to enable him

A to explain the same. The law, therefore, would not require us to exclude the circumstances brought on record against him. His conviction, therefore, has to be sustained as we are satisfied about his complicity. But then, keeping in view the sentence which we have awarded on the principal accused, namely Salaria and Buch, we would reduce his sentence to RI for one month. Fine of Rs. 20,000 as awarded by the High Court is left B unchanged. In default of payment of fine, the appellant would suffer imprisonment for two months.

55. Criminal Appeal No. 524/81 is, therefore, allowed. But Criminal Appeal No. 525/81 is dismissed, subject to the aforesaid modification in C sentence.

Appellants A.R. Khan and P. Gulam Nabi
(Criminal Appeal No. 527 of 1981)

56. These appellants are the partners of Khan Electrical and General D Stores. It is this firm whose tender being the lowest was accepted on 27.9.1977 in the wake of issuance of NIT on 17.9.1977.

57. In view of all that has been stated above there is nothing to doubt about their involvement in the matter. Shri Thakur, appearing for these appellants also, made no independent submission relating to them. All that E he had urged was to bring out our notice the circumstances under which their firm was given the contract and how the contract having been given at the lowest tendered rates was not tainted. We have expressed our opinion on these submissions while dealing with the case of Salaria and Buch. We may not repeat the same. We may only point out that from what F has been stated above we are satisfied that the contract given to the firm of these appellants was as per pre-arranged plan and the same was given to enable them to earn extra profit for appropriate sharing afterwards.

58. We are, therefore, satisfied that they were rightly found guilty both by the trial court and the High Court. As to their substantive sentence, G we would reduce the same to RI for one month keeping in view the sentence we have awarded on appellants Salaria and Buch, and what we have done regarding the sentence of appellants Kantroo and Razdan. We would, however, leave the sentence of fine as awarded which is a sum of Rs. 20,000 on each unaltered. In default of payment of fine, each of them H would suffer imprisonment for two months.

59. Criminal Appeal No. 527/81 is, therefore, dismissed, subject to the aforesaid modification in sentence. A

Conclusions

60. We may sum up our conclusions. These are :

B

(1) Conviction of appellants N.A. Salaria and G.D. Buch is upheld. Their substantive sentence is, however, reduced to RI for two months. Fine of Rs. 15,000 as awarded by the High Court, is left unaltered. In default of payment of fine, each of these appellants would undergo imprisonment for two months.

C

(2) Conviction of appellants T.K. Kantroo and V.K. Rajdan has been confirmed. Their substantive sentence has, however, been reduced to RI for one month. Fine of Rs. 3,000 as awarded by the High Court is left unaltered. In default of payment of fine, each of the appellants would undergo imprisonment for one month. D

(3) Conviction of appellants H.L. Dhar, F.A. Zadoo and Mohd. Siddiq has been set aside and they have been acquitted.

(4) Conviction of appellant Hafeezullah has been set aside and he too stands acquitted. E

(5) Conviction of appellant F.A. Qurashi is Confirmed. His substantive sentence has, however, been reduced to RI for one month. Fine of Rs. 20,000 as awarded by the High Court is left unaltered. In default of payment of fine, this appellant would suffer imprisonment for two months.

F

(6) Conviction of appellants A.R. Khan and P. Gulam Nabi has been confirmed. Their substantive sentence has however, been reduced to RI for one month. Fine of Rs. 20,000 as awarded by the High Court is left unaltered. In default of payment of fine, each of the appellants would suffer imprisonment for two months.

Col. V.S.S. Appeal disposed of.