

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE**

CRIMINAL APPEAL NO.314 OF 2013

Mohammed Rashid Kunju,
Aged about 48 years,
Occupation Business, Residing at
Radhakrishna Apartment, F-8,
Flat No.1/4, Brindavan
Co-operative Housing Society,
Behind Terana Medical College,
Taluka Panvel, New Panvel,
District Raigad, At present
undergoing the sentence imposed
upon him at Kolhapur
Central Prison, Kolhapur.

... **Appellant**

V/s.

01. State of Maharashtra
At the instance of the
Senior Inspector of Police,
Santacruz Police Station,
EOU-VI/CBI/New Delhi,
vide C.R.NO.RC SIJ20009E005,
CC.No.1900277/PW/2010)

02. Superintendent of Police,
Central Bureau Investigation,
EOU-VI, Core-5-B,
New HQ Building, Opp.Scope
Building, CGO, New Delhi

... **Respondents**

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Mr.A.M.Sachwani i/b.Sandeep Singh, Advocate for the Appellant
Mr.H.S.Venegaonkar, Advocate for the Respondent/CBI.
Ms.S.S.Kaushik, APP for the Respondent/State.

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CORAM : ABHAY M. THIPSAY J.

DATED : 15TH JANUARY, 2015

ORAL JUDGMENT :

1. On the basis of a report under Section 173(2)(i) of the Code of Criminal Procedure (for short, “the Code”) submitted by the Inspector of Police, CBI/EOU-VI/New Delhi, the appellant and two others were prosecuted on the allegation of having committed offences punishable under Section 120-B of the Indian Penal Code (for short, “the IPC”) read with Section 489B and 489C of the IPC. The appellant was the accused No.3 in the said case. After holding a trial, the learned Ad-hoc Additional Sessions Judge, Mumbai found the appellant and the other two guilty. The appellant was convicted of an offence punishable under Section 120-B of the IPC, and was sentenced to suffer Rigorous Imprisonment for seven years, and to pay a fine of Rs.2,000/-, with a default sentence. The other accused i.e. accused Nos.1 and 2 were convicted of offences punishable under Sections 489-B and 489-C of the IPC read with Section 120-B of the IPC and sentenced to suffer Rigorous Imprisonment for seven years each and to pay a fine of Rs.2,000/- each, with a default sentence in respect of the offence punishable under Section 489-B of the IPC read with 120-B of the IPC and to suffer Rigorous Imprisonment for five years and to pay a fine of Rs.1,000/- each, with a default sentence in respect of the offence punishable under Section 489-C read with Section 120-B of the IPC.

2. Being aggrieved by the judgment and order convicting him, the appellant has filed the present appeal.

3. I have heard Mr.Sachwani, the learned counsel for the appellant, Mr.Venegaonkar, the learned counsel for the CBI and Ms.S.S.Kaushik, the learned Additional Public Prosecutor for the respondent/State.

4. With the assistance of the learned counsel for the parties, I have gone through the impugned judgment and evidence that was adduced during the trial.

5. The facts leading to the prosecution of the appellant and other two are somewhat unusual. The prosecution case as put forth before the trial Court was that on 02/02/2009, the Deputy Director of the Directorate of the Revenue Intelligence (for short, "DRI") had received a specific intelligence to the effect that two persons traveling by Gorakhpur-Lokmanya Tilak Terminus Express by Coach No.S-5 were having Fake Indian Currency Notes with them. On receipt of this information, a trap was laid by calling panchas; and when the said two said persons traveling by Gorakhpur Express got down from the train at the Lokmanya Tilak Terminus Station, they were apprehended. One of them i.e. accused No.1-Khaleel Chalkara Mohd. was found to be possessing Fake Indian Currency Notes of the purported value of Rs.19,79,500/-. The other person is said to be the accused No.2-

Moh.Shabbir. That, these two persons admitted before the officers of the DRI that they were possessing Fake Counterfeit Currency Notes. As it was thought not feasible to take personal search of accused Nos.1 and 2 on the spot, they were taken in DRI office and their personal search was taken there. Fake Indian Currency was found with the said accused No.1-Khaleel Chalkara Mohd. In the course of interrogation, the accused Nos.1 and 2 disclosed that Fake Indian Currency Notes were smuggled in India at the instance of Mohd. Rashid Kunju i.e.the present appellant. The accused Nos.1 and 2 reportedly also gave information to the officers of the DRI that the appellant was, at that time, hospitalized and was in Dhirubhai Ambani Hospital. DRI officers, thereafter, visited the said hospital, made inquiries as to whether any person by name Mohd. Rashid Kunju had been admitted there and learnt that in the hospital, the appellant had been admitted in the said hospital. Panch witnesses were called and search of the room, in which the appellant had been kept, was taken. Several objectionable things were found in this search, but admittedly, no counterfeit currency was found in the said room, or with the appellant.

6. In the course of further investigation opinion with respect to the Notes that had been recovered from the possession of the accused No.1-Khaleel Chalkara Mohd.was obtained from the Currency Note Press, Nashik. The notes were opined to be counterfeit. On 04/03/2009, one of the officers of the DRI

lodged a report with the EOU-VI, CBI, New Delhi, alleging commission of the aforesaid offences by the appellant and the other two accused giving rise to the prosecution which led to the conviction of the appellant that is under challenge in the present appeal.

7. The prosecution examined totally 13 witnesses during the trial. The learned Judge concluded that the prosecution had succeeded in proving its case against all the accused including the appellant.

8. It is not necessary to discuss the entire evidence that was adduced during the trial. It is because the appellant was admittedly charged only with respect to the offence of conspiracy to import and possess Fake Indian Currency Notes. It is nobody's case that the appellant *himself* was found in possession of counterfeit currency at any time. In fact, as aforesaid, the appellant has been convicted only on the charge of offence punishable under Section 120-B of the IPC (read with Sections 489-B and 489-C of the IPC).

9. The learned counsel for the appellant submitted that there is absolutely no evidence against the appellant. He submitted that there were several factors, which created a doubt about the truth of the prosecution version, but that, even if the

case against the accused Nos.1 and 2, is held as having been satisfactorily proved, still there was no satisfactory evidence to show the involvement of the appellant in the alleged offence.

10. It is clear that the case of the prosecution is that the involvement of the appellant was revealed on the basis of the information given by the accused Nos.1 and 2 to the officers from DRI. It is also clear that the statements of accused Nos.1 and 2 were recorded under the provisions of Section 108 of the Customs Act, 1962. However, admittedly these statements were not produced before the trial Court. Thus, the crucial evidence implicating the appellant is held back, and even if, an adverse inference is not drawn against the prosecution on account of their failure to produce the said statements, the fact remains that what exactly was stated by the accused Nos.1 and 2 to the officers from DRI is not cleared. The non-production of the statements recorded under Section 108 of the Customs Act, would, by itself be fatal to the prosecution case.

11. The learned counsel for the appellant also pointed out that the accused Nos.1 and 2 were not, or any of them was not taken by the officers of DRI, while going to the Dhirubhai Ambani Hospital, where the appellant had already been admitted.

12. The appellant is alleged to be guilty only on the

strength of evidence showing his connection with the other accused i.e. accused Nos.1 and 2. In this regard, the case of the Investigating Agency is that a Mobile Telephone Instrument *without a Sim Card* was found with the appellant. That, the IMEI number of the said Mobile Telephone Instrument was noted and on obtaining Call Data Records (for short "CDR"), thereof, it was noticed that a particular Sim card, creating a particular connectivity number, was used in the said Mobile Telephone Instrument. The CDRs also indicated that there were telephonic contacts between said mobile telephone having that particular number, and the mobile telephone which was being used by the accused No.1. Thus, it is on the basis that, there were telephonic contact between the accused No.1 and the appellant, the involvement of the appellant in the alleged offence is sought to be established.

13. In my opinion, merely because of such telephonic contacts, the case against the appellant cannot be held to be proved. The telephonic contact would only establish that the accused No.1 and the appellant knew each other, but it would be difficult to stretch the matter further and to hold that the appellant knew about the counterfeit currency notes, which were found in possession of the accused No.1. Apart from this, there are a number of weaknesses in the evidence in that regard.

14. It appears that the appellant was already in custody

when DRI officers visited the said hospital. What for and since when he was in custody has not been brought before the Court. Though the appellant was found to be possessing a Mobile Telephone Instrument, it had no Sim card. Though the accused No.1 is said to have used a particular mobile telephone, having a particular number, such mobile telephone was not found with the accused No.1, when he was apprehended at the Lokmanya Tilak Terminus station. The said Mobile Telephone Instrument is claimed to have been recovered from the house of the accused No.1, after his apprehension by the officers of DRI. It also appears that when the DRI officers visited the house of the accused No.1, the accused No.1 was not taken by them with them. In any case, as aforesaid, the telephonic contact between appellant and accused No.1, even if accepted as satisfactorily proved, would not, by itself be sufficient to hold the appellant guilty of the alleged offence.

15. The impugned judgment of conviction of the appellant, as recorded by the learned Ad-hoc Additional Sessions Judge is not in accordance with law. This was a case where there was indeed a reasonable doubt about the truth of the prosecution version, so far as it related to the appellant. The appellant was entitled to have the benefit of such doubt and to be acquitted.

16. Appeal is allowed.

17. The impugned Judgment and order, so far as it relates to the conviction of the appellant and the sentence imposed upon him, is set aside.
18. The appellant stands acquitted. He be set at liberty, unless required to be detained in connection with some other case.
19. Fine, if paid, be refunded to the appellant.
20. The appeal is disposed of accordingly.

(ABHAY M. THIPSAY J.)