IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 307 OF 2014

Gafoor Baig Dastagir
through his LR Hussain Gafur Beg
Gafoor Baig .. Applicant
v/s.
Laxman Surve & Anr. ..Respondents

WITH
CRIMINAL APPLICATION NO. 308 OF 2014

Aslam Gafur Beg Gafoor Baig
Dastagir .. Applicant
v/s.
Laxman Surve & Anr. ..Respondents

WITH
CRIMINAL APPLICATION NO. 309 OF 2014

Hussain Gafur Beg Gafoor Baig .. Applicant
v/s.
Laxman Surve & Anr. ..Respondents

Mr. Mohd. Shine a/w R. Mishra for the applicant
Mr. H.J. Dedhia, APP for the respondent State

CORAM: SMT. ANUJA PRABHUDESSAI, J.
DATED: 23rd OCTOBER, 2015.

P.C.

1. By these applications filed under Section 378 (4) of the

Cr.P.C., the applicants herein are seeking leave to appeal from the order of acquittal dated 30.06.2014 in SCC No.19314 of 2012, SCC 19315 of 2012 and 19316 of 2012 whereby the learned J.M.F.C. 4th Court, Vashi, Dist. Thane has acquitted the respondent no.1 accused of offence under Section 138 of the N.I. Act.

2. The applicants herein are the original complainants. The complainant in Application No.308 of 2014 and 309 of 2014 are the sons of the complainant in Application No.307 of 2014. It was the case of the complainants that due to friendly relationship, they had advanced a loan of Rs.34,30,050/- to the respondent no.1 accused. Out of which, Rs.14,80,000/- was advanced by the complainant Gafoor Dastagir, the applicant in Application No.307 of 2014, the loan of Rs. 10,00,050/-was advanced by Aslam Dastagir, the applicant in Application No. 308 of 2014 and the loan of Rs.9,50,000/- was advanced by Hussain Baig, the applicant in Application No.309 of 2014. It is the case of the applicants / complainants that the respondent no.1 accused had issued two

cheques dated 04.08.2012 for Rs.10 lakhs towards repayment of the loan amount advanced by the complainant / applicant in Application No. 308 of 2014 and another cheque also dated 04.08.2012 for Rs.10,00,000/- towards repayment of the loan advanced by the complainant applicant in Application No.309 of 2014. All the said cheques were deposited in the bank and were dishonoured with an endorsement “account closed” . Statutory notices in all these three complaints were issued on 20.08.2012 and the same were received on 30.08.2012. The respondent no.1 accused did not make the payment of cheque amount hence, complaints under Section 138 of the N.I. Act came to be filed on 12.10.2012.

3. Upon service of the summons, respondent no.1 accused put in his appearance, pleaded not guilty and claimed to be tried. The complainant as well as the accused adduced evidence in support of their respective claim and defence. The defence of the accused was that the complainant wanted to do some business in

the name of the company of the accused and he had deposited the said amount in the account of the accused and had thereafter withdrawn the same from the said account. The learned Magistrate after considering the evidence on record held that the defence was probable and hence, acquitted the accused.

4. The learned Counsel for the applicant submitted that the defence raised by the respondent accused is not probable. He has further submitted that the evidence of CW-1 discloses that the amount was deposited in the account of the accused and that there is no evidence to prove that the said amount was withdrawn by the complainant. He, therefore, contends that the defence was not probable and that the presumption arising from Section 139 is not rebutted.

5. With the assistance of the learned Counsel for the applicant, I have gone through the notes of evidence and perused the impugned judgment. At the outset, it may be mentioned that in

the case of ***Ghurey Lal Vs. State of Uttar Pradesh (2008) 10 SCC 450*** the Hon'ble the Supreme Court has reiterated that the Appellate Court in dealing with the case in which the Trial Courts have acquitted the accused should bear in mind that the Trial Court's acquittal bolsters the presumption that he is innocent. The Appellate court must give due weight and consideration to the decision of the Trial Court as the Trial Court had the distinct advantage of watching the demeanour of the witnesses, and was in a better position to evaluate the credibility of the witnesses. It is, therefore, well settled that the appellate Court should not lightly disturb the order of acquittal, unless the order is patently illegal and perverse.

6. Reverting to the facts of the present case, the applicant complainant in Application No.307 of 2014 has deposed that he had advanced loan of Rs.14,80,000/- and that accused had assured to repay the same with the profit and accordingly had issued a cheque of Rs.20,00,000/- towards repayment of the loan.

There is no evidence on record to prove that the complainant and the accused were partners in any business or that there was any agreement between them to share the profit. On the contrary, in the cross-examination, CW-1 has admitted that the accused had not agreed to give any additional benefit / profit to his father. The complainant in Application No.307 of 2014 has not explained as to why the accused had issued cheque for Rs.20,00,000/- when he had allegedly advanced the loan of Rs.14,80,000/-. The learned Magistrate has, therefore, justified in holding that the complainant has failed to prove that the cheque for Rs.20,00,000/- was towards legally enforceable debt.

7. The evidence of PW-1 reveals that an amount of Rs.14,80,000/- was deposited in the account of Apollo Chemicals on 10.12.2009 and the same was withdrawn on 12.12.2009.

8. The defence of the accused is that he had issued blank cheque to the complainant and that the complainant had used the

said cheque for withdrawing the amount. In this regard, AW-1 Milind Surve, the son of the accused has deposed that his father had brain stroke and was under medical treatment for the same since the year 2003. He further deposed that in the year 2010, the Rajasthan Bank has taken over by the ICICI Bank and that he was called by the Manager and he was informed that the account in the said Rajasthan Bank was not being operated since 2003 and that the same should be closed. He has stated that he had taken the copy of the statement of accounts, which reveal that someone has deposited by RTGS and was withdrawn. He has stated that it was informed that the said amount was deposited by the complainant and the same was also withdrawn by the complainant. The evidence of CW-2 the Manager of Apollo Chemicals also reveals that the accused had suffered brain stroke in the year 2003, 2007 and 2012 and the Apollo Company is closed from the year 2003. He has further stated that since the year 2003, the accounts in the Rajasthan Bank had not been operated because of brain stroke and that he has not entered into any banking transaction since 2003. He has further stated that the said account is closed from the year 2010. He has stated that thereafter he had obtained the statement of account of the said bank. He has stated that the Apollo Chemical company has not received any money from the said account. The evidence of CW-3 and 4 also supports the contention that the accused is suffering from brain stroke from the year 2003.

9. The evidence thus reveals that the accused had suffered the brain stroke and Apollo Chemical was closed in the year 2003. Hence, the question of obtaining any loan for business purpose is bleak. The evidence of the son of the accused also reveals that the amount had been deposited in the account of the accused and that he was informed by the Bank Manager that the same was withdrawn by the complainant within a period of two weeks. All these facts which are brought in record probablise the defence raised by the accused. The order is neither illegal nor perverse. The order cannot be interfered with even if two views are possible.

10. Considering this fact and also considering the the decision of the Apex Court in the case of ***Ghurey Lal Vs. State of Uttar Pradesh (Supra),*** in my considered view, no interference is required in the impugned judgment. Therefore, the above Criminal Applications are dismissed.

(ANUJA PRABHUDESSAI, J.)