

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.A. 231/2006**

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Reserved on: 20.07.2015

Date of Decision: 24.07.2015

V.K.JAIN

..... Appellant

Through: Mr.O.P.Sharma with Ms.Sangita
Bhayana and Mr.Vikas Sharma,
Advocates.

versus

C.B.I.

..... Respondent

Through: Ms.Sonia Mathur, Standing
Counsel with Mr.Rajat Soni,
Advocate.

CORAM:

HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J:

1. V.K.Jain impugns the judgment and order of conviction dated 21.3.2006 and 24.3.2006 respectively passed by the learned Additional Sessions Judge, New Delhi in Sessions Case No.560/1996 arising out of RC No.9/88, SIU-XI, New Delhi whereby the appellant has been convicted under Section 489C of the IPC and has been sentenced to undergo R.I for two years, fine of Rs.1000/- and in default of payment of fine simple imprisonment for one month.

2. On 28.10.1987, the premises of the appellant was searched pursuant to the search warrant issued by J.C.Makhija (not examined),

Assistant Director, Enforcement Directorate. During the search 1563 US dollars (15 of 100 denomination, 61 of 1 denomination and 1 of two denomination) along with other foreign currency and gold were seized. The aforesaid articles including the currency notes were found kept in a cloth bag which was concealed in the room which was in occupation of the appellant.

3. After the investigation, chargesheet was submitted against the appellant whereupon cognizance was taken and the appellant was put on trial.

4. Eleven witnesses were examined on behalf of the prosecution in order to bring home the charges under Section 489C of the IPC.

5. Mr.R.N.Mishra (PW.5) who at the relevant time worked as Enforcement Officer in the Enforcement Directorate deposed that search warrants were issued by Sh.J.C.Makhija, the then Assistant Director, Enforcement, to conduct the search in the house of the appellant. With the assistance of other personnels including police men, the house of the appellant was raided and two gold biscuits of 1 kg each and 2 small biscuits weighing about 187 grams and foreign currency (1563 US dollars) plus other miscellaneous currency, undischarged travelers' cheques and a passport in the name of Mr.Rakesh Kumar Gupta was recovered. The documents and the currency notes were seized and a panchnama was prepared which was signed by the appellant. The photocopy of the panchnama is Ex.PW.3/A. The original panchnama was enclosed in the record of another case against the appellant. The

suggestion given to PW.5 regarding non-availability of the appellant at the time of raid was denied. He has categorically stated that the search operation was conducted in front of two witnesses namely Nand Kumar Bagri (PW.1) and Vimla Devi (not examined).

6. S.A.Ali (PW.3), Assistant Director, Enforcement Headquarters who was part of the raiding team deposed before the Court that in front of two independent witnesses, one being a lady, the search was conducted in the house of the appellant. The appellant was available in his house. During the search, documents and currency notes of different denominations of US dollars and gold biscuits were recovered. He has testified to the fact that he has seen the original panchnama which was enclosed with the original record of the Criminal Appeal No.158/1998. He has also supported the fact that the panchnama in question was signed by the appellant.

7. The evidence of R.N.Madan (PW.5) and S.A.Ali (PW.3) clearly establishes that 1563 US dollars were recovered from the house of the appellant when the same was raided on 28.10.1987.

8. R.K.Sharma (PW.2), OSD to the Secretary Revenue, Government of India has deposed that his report regarding seizure of foreign US dollars was sent to S.P, CBI. The report has been exhibited as Ex.PW.2/A. It has been stated by him that prior to sending of the report (Ex.PW.2/A) to CBI, the matter was referred to Crime Branch, Delhi Police. CBI was entrusted with the investigation later on. PW.2 has further deposed that the currency was forged and the Crime Branch and

later the CBI was entrusted with the investigation after a report was received from the bank that the seized currency notes were forged.

9. N.C.Verma (PW.9), DIG, CBI, Lucknow has deposed that on 30.12.1988 he received a secret complaint in the hand of R.K.Sharma (PW.2) reporting about the recovery of counterfeit dollars. On his endorsement on the said complaint, FIR was registered (Ex.PW.9/A).

10. In order to establish that the US dollars which were recovered from the house of the appellant was counterfeit, the prosecution has examined Sunil Kumar (PW.4) and James R.Walkinshaw (PW.8).

11. Sunil Kumar (PW.4) who at the relevant time was manager, Bank of Baroda International Business branch, Parliament Street, New Delhi deposed before the Court that he dealt with inward remittances. Foreign currency was received in the bank and the same was tested with the help of a dollar tester which is an electronic device. Whenever a dollar currency is rubbed on the dollar tester it would give a beep sound if the dollar is genuine. If the dollar currency is not genuine no such sound would be emitted by the dollar tester. There were many 100 dollar currency notes in the CBI office, which were found to be fake. However, PW.4 categorically stated that without the dollar tester it cannot be said with certainty that the dollar currency was fake or genuine. He has also stated before the Court that he would not know that the currency note/dollars which were shown to him at the trial were same which were tested by him in the CBI office. However, the suggestions given to him

that he was never called by the CBI or that he had never tested any currency note was vehemently denied.

12. James R.Walkinshaw (PW.8), a senior special agent from the U.S Secret Service, Honolulu field office, deposed and proved before the Court the signature of Richard Garnes who had given his expert opinion in three pages (Ex.PW.8/A1 to A3) regarding the US dollars being counterfeit. While deposing before the Court, PW.8 made a mention of the process by which the fake currency notes are tested. The suggestions given to him that he was deposing falsely and that he was not working as an agent in the U.S.Secret Service and, therefore, he could not have seen Mr.Richard Garnes writing or signing any report, was specifically denied. PW.8 had brought his identity card in the Court to establish that he was working in the U.S.Secret Service. He has also deposed that that Ex.PW.8/A1 to A3 has not been signed by anybody else.

13. The substance of the deposition of the aforesaid witness namely PW.4 and PW.8 prove the fact that the U.S dollars which were seized from the house of the appellant were fake currency notes and were not genuine.

14. It has been argued on behalf of the appellant that prior to the entrustment of the matter to CBI, initial investigation was done by the Crime Branch of Delhi Police. In that process the US dollars were first tested by Sunil Kumar (PW.4), Manager, Bank of Baroda. It was only then that the US dollars were sent for testing on 3.3.1989 to U.S Secret Service. In the absence of any report, the US dollars were again sent for

testing on 22.9.1992 i.e. after more than 3½ years. In that view of the matter, the report which is Ex.PW.8/A3 cannot be relied upon for holding such currency notes to be counterfeit.

15. It has further been argued that Ex.PW.8/A3 has been prepared by some unknown examiner and the same has been forwarded by James R.Walkinshaw (PW.8).

16. The further objection of the appellant is that the prosecution was under an obligation to prove that the dollars in question were duly sealed, kept in safe custody and demonstrated that there was no possibility of any tampering at any stage. That not having been done, the judgment and order of conviction was totally vitiated.

17. Nand Kumar Bagri (PW.1), it has been argued on behalf of the appellant, has not supported the prosecution version in its entirety. He has stated before the Trial Court in his cross examination that his signatures were obtained on certain documents in his room after he was told about the alleged recovery.

18. With respect to the deposition of Sunil Kumar (PW.4), it is urged that if an expert banker, dealing with inward remittances was not in a position to conclusively state whether the dollars in question were counterfeit, it would be too much for the prosecution to presume that the appellant had the knowledge of such US dollars to be counterfeit and fake.

19. The counsel appearing for the CBI on the other hand stated that though PW.1 did not support the prosecution version in its entirety

nonetheless, the entire prosecution version of recovery of counterfeit currency cannot be thrown overboard only on that account. The testimony of R.N.Madan (PW.5) and S.A.Ali (PW.3) clearly establish that during the raid conducted in the house of the appellant, 1563 US dollars were recovered along with other incriminating documents and gold biscuits, which US dollars were found to be fake and counterfeit on further examination.

20. Ms.Sonia Mathur, learned advocate for the CBI stated that minor contradictions in the statement of the prosecution witnesses would not be fatal to the prosecution case. The statement of James R.Walkinshaw (PW.8) clearly established that the US dollar currency which was sent for examination through the US Secret Service proved the fact that the appellant was in possession of counterfeit currency.

21. No attempt has been made by the appellant, it has been argued on behalf of the CBI, to establish that the currency notes recovered from his house were genuine or that he did not have any knowledge about those currency notes to be fake. The entire effort of the appellant has been to disprove the factum of recovery of any currency note from his house in the raid. There was no statement of the appellant under Section 313 of the Code of Criminal Procedure regarding the source of the counterfeit currency. There is nothing on record which would explain as to how and from where the appellant could lay his hand upon such foreign currency.

22. Section 489C provides for punishment for possession of forged or counterfeit currency notes or bank notes. The same reads as under:-

Section 489C in The Indian Penal Code

489C. Possession of forged or counterfeit currency-notes or bank-notes.—Whoever has in his possession any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

23. From a reading of this Section it becomes very clear that mere possession of forged or forfeited currency notes or bank notes with the knowledge that the same was forged or counterfeit is punishable.

24. If a person is found to be in possession of counterfeit currency and chooses not to give any explanation for such counterfeit currency and denies altogether the recovery which defence is ultimately found to be false, the only inevitable inference could be that he had reasons to believe that the currency notes were counterfeit and it was precisely for this reason that the appellant has been denying or has made attempts at denying the same to have been recovered from him.

25. Knowledge and intention are the state of mind which cannot be proved by direct evidence and have to be inferred from the attending circumstances. Possession of counterfeit currency about which there is a denial simplicitor accompanied with no attempts at explaining as to how the appellant came into possession of such currency is sufficient to infer

such requisite knowledge which would attract the mischief of Section 489C of the Indian Penal Code.

26. True it is that in a criminal case the prosecution is under an obligation to prove all the ingredients of the offence but when the circumstances have been proved by the prosecution and if a fact which remains in the exclusive knowledge of the accused which would be compatible with his innocence, the accused has to account for the same.

27. Section 106 of the Evidence Act reads as hereunder:-

Section 106 in The Indian Evidence Act, 1872

106. Burden of proving fact especially within knowledge.—When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

28. The prosecution must discharge the initial burden of establishing prima facie the guilt of the accused beyond all reasonable doubts. Section 106 of the Evidence Act, being an exception to Section 101 of the Evidence Act is attracted after the initial burden of the prosecution is proved.

29. The recovery of the counterfeit currency US dollars have been proved. The recovered currency being counterfeit also stands proved through the evidence of PW.4 and PW.8. It was upon the appellant to

discharge the burden of explaining away his innocence by either disclosing the source from where he obtained such currency notes or his lack of knowledge about such currency notes being fake. The appellant has only labored during trial for disproving the factum of recovery itself. Complete denial of the fact of raid and recovery and non explanation even by way of statement under Section 313 of the Code of Criminal Procedure with regard to the source from where such currency notes were obtained, goes a long way in establishing the guilt and requisite intention and knowledge on the part of the appellant, thereby establishing only the long and discarding the short of the prosecution version.

30. The attempt of the appellant at raising doubt over the panchnama being genuine is without substance. It has been proved by the witnesses that panchnama was prepared at the time of the raid. The original panchmana was tagged with the record of another case and the signature was identified by the witness. Once the panchmana of the seized currency note has been proved, it matters not if the currency notes were kept in a cavalier manner or in a properly sealed envelope. The panchmana refers to the serial and the index numbers of the currency notes. The same could not have been changed even if they were sent for examination with respect to its genuineness to the U.S. Secret Services twice.

31. After having given an anxious consideration over the issues involved in this case, I find it difficult to find any fault with the Trial Court judgment of conviction of the appellant. The conviction of the

appellant under Section 489C of the IPC, therefore, is maintained and upheld.

32. It has been urged on behalf of the appellant, in the alternative that the trial in this case took 20 years to conclude and the appellant being of an advanced age, should not be sentenced for two years imprisonment but be allowed to be let free on the period of custody which he has already undergone. Papers have been enclosed with the affidavit demonstrating that the appellant is not in good health.

33. Ms.Sonia Mathur seriously opposed such a contention and submitted that the medical papers would not show any such debilitating disease for this Court to consider the prayer of the appellant. It was also argued by Ms.Mathur that the Trial Court has already taken a very lenient view while imposing a sentence of two years and a fine of Rs.1000/- when the maximum punishment for the said offence is imprisonment upto seven years with or without fine. Ms.Mathur also points out the number of cases in which the appellant was tried.

34. Sentencing a convict in a criminal case is a serious business and the same cannot be done without going into the gravity of the offence, its impact on the society and other relevant factors. No capriciousness could be shown while sentencing a convict. In order to properly operate the sentencing system under the four corners of law, it should be viewed more as a corrective machinery rather than seeing it as a deterrent methodology. Only a deft modulation of the sentencing process could achieve the purpose for which a convict is sentenced. Undue sympathy in

imposing inadequate sentence would do more harm to the justice system and it would undermine the public confidence about efficacy of law. At the same time the sentence should conform to the principle of proportionality.

35. Nonetheless since this case is of the year 1987 and the appellant has faced the ordeals of a long and protracted trial, interest of justice would be served if the appellant is sentenced to imprisonment for a period of six months. This Court does not deem it proper to make any alteration in the imposition of fine which has been calibrated at Rs.1000/- by the Trial Court.

36. Thus on the above noted ground, the sentence imposed on the appellant is modified and is reduced from two years to six months but with no change in the quantum of fine, with the benefit of Section 428 Cr.P.C to which he is entitled.

37. The appeal is partly allowed but with the modification in the impugned order of sentence as stated above.

38. Trial Court records to be returned.

39. A copy of the judgment be sent to the concerned Jail Superintendent for information and compliance.

July 24, 2015
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ASHUTOSH KUMAR, J