

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.510 OF 2015

Noor Islam s/o Sadik Ali
Age 25 years, Occu. Labour,
R/o Rohitalab, Tq. and Dist. Shaebganj
(Zarkhand State)

... **APPELLANT**
(Orig. Accused)

VERSUS

The State of Maharashtra
(At the instance of CIDCO Police,
Aurangabad)

... **RESPONDENT**

.....
Shri A.K. Bhosale, Advocate for appellant
Shri R.V. Dasalkar, A.P.P. for respondent/ State
.....

CORAM: A.I.S. CHEEMA, J.

DATED: 15th July, 2016.

Date of reserving judgment : 30th June, 2016

Date of reserving judgment : 15th July, 2016.

J U D G M E N T :

1. The appellant - original accused (hereafter referred to as "accused") was tried along with one Mohammad Yunus for offence punishable under Sections 489(B) and 489(C) read with Section 34 of the Indian Penal Code, 1860 (IPC in brief) in

Sessions Case No.83/2012 before Additional Sessions Judge-5, Aurangabad and, while the other accused came to be acquitted as there was no evidence against the said accused, the appellant was convicted for these Sections. He was sentenced to suffer rigorous imprisonment for ten years and fine of Rs.5000/-, in default of fine, to suffer simple imprisonment for one month, under Section 489(B) of IPC. For offence under Section 489(C), he was convicted and sentenced to suffer rigorous imprisonment for seven years and to pay fine of Rs.5000/- and in default, to suffer simple imprisonment for one month. Thus these appeals.

2. The case of prosecution in short is as under :

On 29.9.2011, at about 3.00 p.m., in Cannaught Market, Cidco, Aurangabad, the accused had gone to one shop, Shivam Mobile Shoppee. He purchased one Vodafone Recharge of Rs.100/- from P.W.2 Dinesh Mahale and offered him a currency note of Rs.1000/-. Dinesh suspected the currency note and on the plea that he will get change, went to adjacent shop of P.W.3 Raju Vetal and explained his suspicion to him. A phone call was made to Cidco Police Station, received by P.I. Dabbewad (P.W.6). The fact was informed on phone to P.I. Dabbewad. The shopkeeper P.W.2 Dinesh and his neighbouring shopkeeper P.W.3 Raju Vetal, with the help of persons who had gathered,

detained the accused till the police came. Police reached the spot in about half an hour and panchas were called including P.W.1 Sanjay Govandar. Search of the bag which the accused was carrying, was taken and in the bag, further 32 notes of Rs.1000/- denomination were found. Accused had a Samsung Mobile phone with him which was also seized. In the bag, there were two Pay-in-slips having contents filled of two different Account Numbers and Rs.25,000/-. Election Identity Card of the accused as well as diary containing phone numbers, 6 steel plates/ dishes and Railway Ticket of Travel, dated 25.9.2011 from Bhagalpur to Manmad were also found. These articles were seized vide panchanama Exh.36. The police took the seized articles along with the accused to State Bank of India, Main Branch, Aurangabad and after verifying from the Branch Manager that the currency notes were fake, the police party reached back to the Police Station and P.W.5 P.S.I. Baburao Bodke, who was along with P.W.6 P.I. Dabbewad at the time of seizure, filed F.I.R. Exh.53. P.W.6 Maruti Dabbewad took up the investigation. Statements were recorded. The seized notes were sent to the General Manager, Currency Note Press, Nasik Road, Nasik on 13.10.2011. The investigation was taken over by the Crime Branch on 25.10.2011 and P.W.4 Harish Khatavkar received the expert opinion on forged notes from the Currency Note Press, Nasik (Exh.46) that the currency notes were counterfeit.

Through Deputy Commissioner of Police S.S. Garge, P.W.4 P.S.I. Harish got sent a letter to Department of Currency Management, informing the numbers of the currency notes which had been seized so that Rs.1000/- denomination currency notes in circulation in the market could be kept under observation. After the investigation, charge sheet came to be filed and the accused was put up to trial. Accused No.2 was stated to be his accomplice and two accused Nos.3 and 4 were shown as absconding, in whose accounts it was claimed accused No.1 had earlier deposited amounts.

3. Prosecution brought on record evidence of six witnesses and the documentary evidence was also proved. The defence of the accused, as can be seen from the cross-examination and his statement under section 313 of the Code of Criminal Procedure (Cr.P.C. in brief) is that of denial.

4. The trial Court, after considering the oral and documentary evidence, convicted the accused and sentence as mentioned above was passed.

5. I have heard learned counsel for the appellant - accused as well as the learned A.P.P. for State. Various grounds have been raised by the counsel for the appellant - accused and

in reply, the learned A.P.P. rebutted the same and relied on the reasonings recorded by the trial Court to submit that the offence has been established. I will refer to the arguments for deciding the matter while discussing the evidence.

6. On record, firstly there is evidence of P.W.2 Dinesh Mahale and P.W.3 Raju Vetal, the neighbouring shopkeeper. The evidence of these two witnesses shows that, the accused indeed had gone to the shop of P.W.2 Dinesh and on purchasing Vodafone Recharge of Rs.100/-, he tendered a currency note of Rs.1000/-. P.W.2 Dinesh deposed that he had suspicion about the currency note given by the accused to be fake and he had told the accused that he does not have change and went to the adjacent shop of P.W.3 Raju. The evidence of P.W.3 shows that P.W.2 Dinesh came to him and showed him the currency note and expressed his suspicion that the same was forged. P.W.3 did not depose that he also felt the note to be forged, but the evidence of both these witnesses is that a phone call was made to the police and police was called. Both these witnesses say that the other of them made the phone call. That, however, is not material. Important is that a phone call was made when the note of Rs.1000/- tendered by the accused was suspected by P.W.2 Dinesh to be fake and police did come to the shop of P.W.2 Dinesh. The evidence of these two witnesses show that, with the

help of people who had gathered, the accused was caught by them and when police came, he was handed over to the police. Regarding this evidence, although efforts have been made in the cross-examination to shatter these witnesses, I do not find that the witnesses are shattered on this count. There is no reason for these two witnesses to unnecessarily speak against the accused or that they had any axe to grind against the accused to involve him for no reason.

7. The evidence of P.Ws.2 and 3 read with the evidence of P.W.1 Panch Sanjay, P.W.5 P.S.I. Baburao Bodke and P.W.6 P.I. Dabbewad shows that, police reached the shop of P.W.2 Dinesh and the accused was taken charge of by the police and the currency note of Rs.1000/- tendered by the accused was taken in charge by the police. The seizure panchanama Exh.36 shows this note to be having No.2BD 790666 . The subsequent report from Currency Note Press Exh.46 admissible under Section 292 of the Cr.P.C. has found this note (along with others) to be counterfeit. I find the evidence that this one note of Rs.1000/- tendered by accused to P.W.2 Dinesh and which was seized by police has been proved to be counterfeit note. The note was tendered by the accused and thus, these facts are established in the present matter. I agree with the trial Court on this count.

8. Now the question is of the remaining 32 currency notes said to have been seized from the right side pocket of the trouser of accused. In this regard, there is evidence of the above prosecution witnesses that, when the police came, they searched the person of the accused and from his pocket, 32 currency notes were seized, the numbers of which notes were entered in the panchanama Exh.36. The learned counsel for the accused argued that, the seizure could not be said to be proved as there was no material to show that the police offered or gave their own search before searching the pockets of the accused.

9. If the evidence of P.W.1, who is the panch, is perused, it shows that, he was called and told that a currency note of Rs.1000/- is found with the accused, and his evidence is that, the police then searched the person of the accused and took out 32 fake currency notes from the right side pocket of the trouser of accused. He deposed (in para 4 of his cross-examination) that, accused No.1 did not take personal search of him and the other panch and police had also not given their personal search to the accused. In this context, the panchanama Exh.36 is silent and does not say anything that the search was offered and declined by the accused or that the accused had taken personal search of the police and panchas. The evidence of P.Ws.2 and 3 is silent regarding any search being offered,

declined, given or taken. The evidence of P.W.5 shows that, this P.S.I., who is the complainant, admitted (in para 3 of his evidence) that it is necessary for the police officer and panchas to give their personal search before taking search of any suspect and the said fact is required to be mentioned in the panchanama. As mentioned, the panchanama is silent on this count. In fact, the F.I.R. Exh.53 filed by this P.W.3 also does not mention that before searching the person of the accused any personal search was offered to him or that he declined or that the accused searched the persons of the police and panchas before his personal search was taken. In oral evidence, however, P.W.6 P.I. Dabbewad claimed that, after the panchas reached, he had asked the accused about their search in presence of panch witness, but he refused. According to this investigating officer, after the accused refused to take their search, they had searched the person of the accused and found 32 currency notes. In the cross-examination, this P.W.6 Dabbewad had to admit that the panchanama Exh.36 does not disclose that the accused had declined to take search.

10. Looking to the above discussion, I find that, the prosecution failed to prove that before putting their hands in the pocket of the accused the police had given their own personal search. Looking to the facts of the present matter, where seizure

of 32 currency notes of Rs.1000/- are shown from the pocket of the accused, which would not be a volume not possible to plant, I find that it was necessary to establish that proper procedure for search was followed and personal search was offered to the accused. This is not to say that the notes were planted in the pocket, but looking to the gravity of the matter, it was responsibility of the police to give fair opportunity to accused and to also make record of the same to claim that offence is proved beyond reasonable doubts.

11. I will ignore the oral evidence of P.W.6 that the police had offered their search but the accused refused.

12. I thus find that, the duly established fact is only of the seizure of one currency note of Rs.1000/-, which was tendered by the accused to the shopkeeper P.W.2 Dinesh. Now, before further discussing the oral evidence, I find it appropriate to make a reference to the judgment in the matter of Umashankar Vs. State of Chhattisgarh [(2001) 9 SCC 642] and the judgment of M. Mammutti Vs. State of Karnataka (1979) 4 SCC 723 relied on by the learned counsel for accused.

13. It has been argued by the learned counsel for the accused that, proving of mere fact of the accused being in

possession of counterfeit currency note or notes is not enough to hold that Section 489(B) or 489(C) is established. The learned counsel has rightly relied on the wordings of these Sections, where it is provided that, the using of the counterfeit currency or possession of the counterfeit currency is punishable if the accused was "knowing or having reason to believe the same to be forged or counterfeit.

14. In the matter of "Umashankar" (supra), the Hon'ble Supreme Court, after referring to Sections 489(B) and 489(C) , observed in para 8 as follows :

"8. A perusal of the provisions, extracted above, shows that mens rea of offences under Sections 489-B and 489-C is "knowing or having reason to believe the currency notes or banknotes are forged or counterfeit". Without the aforementioned mens rea selling, buying or receiving from another person or otherwise trafficking in or using as genuine forged or counterfeit currency notes or banknotes, is not enough to constitute offence under Section 489-B IPC. So also possessing or even intending to use any forged or counterfeit currency notes or banknotes is not sufficient to make out a case under Section 489-C in the absence of the mens rea, noted above. No material is brought on record by the prosecution to show that the appellant had the requisite mens rea. The High Court, however, completely missed this aspect. The learned trial Judge on the basis of the evidence of P.W.2, P.W.4 and P.W.7 that they were able to make out that the currency note alleged to have been given to P.W.4 was fake, "presumed" such a mens rea. On the date of the incident the appellant was said to be an eighteen-year-old student. On the facts of this case

the presumption drawn by the trial Court is not warranted under Section 4 of the Evidence Act. Further it is also not shown that any specific question with regard to the currency notes being fake or counterfeit was put to the appellant in his examination under Section 313 of the Criminal Procedure Code."

15. In the matter of "M. Mammutti" (supra), the appellant before the Hon'ble Supreme Court was found in possession of 2 rupee currency notes which were found to be counterfeit. The appellant-accused in that matter claimed that, two days earlier he had sold 3 quintals of tamarind fruits to a person, who had given him a sum of Rs.390/- and that the currency notes had been given to him by the said purchaser. The appellant therein claimed that, he did not know that these currency notes were counterfeit. The Hon'ble Apex Court observed in that matter that, there was no evidence of any witness to show that the counterfeit notes were of such a nature or description that a mere look at them would convince any person of average intelligence that it was a counterfeit note. The observations of the Hon'ble Apex Court are as under :

"There is no evidence of any witness to show that the counterfeit notes were of such a nature or description that a mere look at them would convince any person of average intelligence that it was a counterfeit note."
..... "Mr. Nettar submitted that once the appellant is found in possession of counterfeit notes, he must be presumed to know that the notes are counterfeit. If the notes were of such a nature that

mere look at them would convince anybody that it was a counterfeit such a presumption could reasonably be drawn. But the difficulty is that the prosecution has not put any specific question to the appellant in order to find out whether the accused knew that the notes were of such a nature."

16. Looking to the above judgments of the Hon'ble Supreme Court, it is clear that, mens rea in such matters is an important ingredient. The mens rea could be attributed if the notes are of such a nature that mere look at them would convince anybody of reasonable intelligence that it is counterfeit. In the present matter, in the statement under Section 313 of Cr.P.C., the accused was asked, and informed that the report Exh.46 from currency note press showed that the currency notes were counterfeit. The accused did not give any explanation in his statement under Section 313 of Cr.P.C. However, looking to the above two judgments of the Hon'ble Apex Court, it would be necessary to see if the evidence brought on record is sufficient to show that the accused had the necessary mens rea that the note or notes which were in his possession were counterfeit. With this object, I have examined the evidence. The evidence of P.Ws.2 and 3 is that when after talking between them it was felt by them that the currency is fake they caught the accused and kept him waiting for about half an hour till police came. These witnesses are silent regarding the talk they had with the accused at such time. In ordinary and natural course of conduct, they must have

told the accused that according to them the note tendered by him is fake and so he must keep waiting till police come. The accused would, in natural course, have said something. He was not accused at that point of time. No material has come as to what was their conversation when they forcibly kept the accused waiting till police came. Then, when the police came and panchas were called, and seizure took place, the evidence of P.W.1 Panch Sanjay and the police officials P.W.5 P.S.I. Baburao and P.W.6 Dabbewad is silent regarding any opportunity being given to the accused to explain as to from where he got the concerned note or notes. The F.I.R. Exh.53 has recorded in a vague manner that when the articles were seized from the accused and he was asked about the notes, the accused was giving "*Udvaudvichi Uttare*" i.e. evasive replies. In the search of the accused, apart from other things, 2 Pay-in-slips of State Bank of India were also found, in which certain Account numbers had been entered regarding deposit of Rs.25,000/- on two occasions in two different accounts on 28.9.2011 and 29.9.2011. Although a mobile phone was seized and a diary with telephone numbers was found, prosecution brought on record no material of source of the amounts. This, in spite of the fact that during the course of investigation P.W.4 P.S.I. Harish took over the investigation so that the Crime Branch would look into the matter. Cross-examination of P.W.6 Dabbewad shows that, on 30.9.2011, vide

Exh.59, State Bank was informed of the deposits made by accused in the two accounts. There appears endorsement on the document by Bank that the notes which had been accepted were genuine.

17. As observed by the Hon'ble Supreme Court in the matter of M. Mammutti, it is now necessary to see if the prosecution proved that the notes were of such a nature that a mere look at them would convince anybody that the same was counterfeit. If this would be so, knowledge could be attributed to the accused. In this context, I have gone through the evidence. P.W.2 deposed that, when accused offered him the currency note of Rs.1000/-, he had "suspicion" about the currency note to be fake. To verify, he went to P.W.3 Raju Vetal. Thus, P.W.2 Dinesh had only a suspicion. In his cross-examination, he deposed that, the fake currency note which was given to him, wire of the same was coming out and its colour was removing. In this regard, the Currency Note Press in report Exh.46 has mentioned that the security thread in the notes was imitated and with reference to "printing ink colour", it is reported that the ink shades were not matching. The report does not appear to be stating that on touch, the colour was going off. In this context, the evidence of P.W.3 Raju Vetal shows in cross-examination (para 3) that if the currency note was to be seen from distance,

he could not identify whether it was fake or original currency note. Further, there is evidence of P.W.5 as well as it is mentioned in the F.I.R. Exh.53 that after the seizure was done at the shop of P.W.2, the police along with the accused went and met the Branch Manager of State Bank of India, Main Branch to get the currency notes checked. Evidence of P.W.5 is that, the Branch Manager told the police that the 33 currency notes were counterfeit. His evidence is that, thereafter the police along with accused went to Police Station and he lodged the complaint. This evidence shows that, even the police wanted to be sure before they register the offence that the currency notes were counterfeit. Keeping such evidence in view, prosecution has not proved that the notes were of such a nature that mere look at them would convince anybody that it was counterfeit. When this is so, it cannot be presumed that, the accused had knowledge that the note or notes which were in his possession were counterfeit. Prosecution did not bring on record any further evidence which would show source from where the accused got the notes or any other material sufficient to assume that accused had the requisite knowledge, or that he had reason to believe the same to be counterfeit.

18. The learned counsel for the appellant - accused pointed out the evidence of P.W.1 where he deposed that when

the accused was caught, he did not try to run away. Then there is evidence of P.W.3 Raju Vetal, which shows (in para 4 of his evidence) that when they asked the accused to stop in the shop till arrival of the police, the accused told them to let the police come and he will remain there till arrival of police. There is no material that in the time of about half an hour when accused was kept waiting till police came, he tried to quietly throw off, drop aside or get rid of the 32 notes from his pocket. The evidence of P.W.5 P.S.I. Baburao shows that when the police reached the concerned shop, the accused was sitting there and two persons were near him. There is substance in the arguments of the learned counsel for the appellant-accused that this conduct of the accused also needs to be kept in view while appreciating the evidence regarding the knowledge or reason to believe. According to the counsel, if the accused knew or had reason to believe that he was carrying counterfeit currency notes, he would have reacted when P.W.2 went giving some excuse to P.W.3 with the currency note. The accused did not try to slip away or run away.

19. Looking to the above discussion, I find that the prosecution failed to prove important ingredient of the offence that the accused was knowing or had reason to believe that the note or notes he was in possession were counterfeit or forged.

This being so, the judgment of conviction and sentence as passed by the trial Court cannot be maintained.

20. I pass the following order :

The appeal is allowed. The impugned judgment of the trial Court, convicting the accused and sentencing him to imprisonment and fine is quashed and set aside. The appellant-accused is acquitted of the offence punishable under Sections 489(B) and 489(C) of the Indian Penal Code, 1860. The accused be set at liberty forthwith unless his custody is required in any other offence. Fine, if paid, be refunded to the appellant - accused.

(A.I.S. CHEEMA, J.)

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