IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.455 of 2015

Arising Out of PS.Case No. -493 Year- 2012 Thana -SAHARSA District- SAHARSA

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Pushpa Devi, wife of Late Sunil Bhagat, Resident at Village- Maheshi, P.S.- Maheshi, District- Saharsa.

.... Appellant/s

Versus

The State of Bihar .... Respondent/s

with

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Criminal Appeal (SJ) No. 498 of 2015

Arising Out of PS.Case No. -493 Year- 2012 Thana -SAHARSA District- SAHARSA

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Santosh Kumar S/o Dhirendra Yadav Resident of Village Gangjala (Gokul Chauk), P.S. Saharsa, District Saharsa.

.... Appellant/s

Versus

The State of Bihar .... Respondent/s

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Appearance:

(In CR. APP (SJ) No.455 of 2015)

For the Appellant/s : Mr. Birendra Kumar Tiwary, Adv.

For the State : Mr. Z. Hoda, APP

(In CR. APP (SJ) No.498 of 2015)

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv.
Md. Imteyaz Ahmad, Adv.
Mr. Ritwaj Raman, Adv.

For the State : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 02-04-2018

Criminal Appeal (SJ) No.455 of 2015 wherein Pushpa Devi is the appellant and Criminal Appeal (SJ) No. 498 of 2015 wherein Santosh Kumar is the appellant commonly originate against the judgment of conviction dated 13.07.2015 and order of sentence dated 16.07.2015 passed by Second Additional Sessions Judge, Saharsa in Sessions Trial no.38/2013 convicting both the appellants for an offence punishable under Section 489B of the IPC and directing each of them to undergo R.I. for ten years as well as to pay fine appertaining to Rs.5000/-, 489C of the IPC and sentenced to undergo R.I. for four years as well as to pay fine appertaining to Rs.5000/- in default thereof, to undergo S.I. for six month, additionally, with a further direction to run the sentences concurrently on account thereof, have been heard together and are being disposed of by a common judgment.

2. PW.3, Chandan Kumar, S.I. Sadar P.S., Saharsa recorded his self-statement on 17.08.2012 divulging the fact that after getting confidential information with regard to transportation of Counterfeit Indian Currency Notes, informed the superior officials and, as per direction constituted raiding party consisting of S.I. Chandrakant Gauri, Awadhesh Kumar, Pramila, constable Vinay Kumar and Brahamdeo Yadav and reached at the destination, Chandani Chowk where, they have perceived suspicious activities of a women who was along with a man and further, were depicting resemblance of physical feature as disclosed by the spy whereupon, they were interrogaged. Then thereafter, they were searched out. S.I., Pramila had searched the lady namely Pushpa, as disclosed, and from a bag possessed by her 28 currency notes of 500 denomination, mobile were seized while from the possession of Santosh who was searched by him, one note of one thousand denomination, 15 notes of 500 denomination, five notes of one hundred denomination along with mobile were seized and for that, seizure list was prepared at the spot. Furthermore, they confessed their guilt and also disclosed their kingpin who was actively involved in the racket. It has further been disclosed that a requisition was made to the Branch Manager, Main Branch, SBI for examination as well as submission of report with regard to seized notes and, after examination of the aforesaid notes, Branch Manager had found by way of recording his opinion that all the notes were counterfeit Indian currency except, rupees one hundred of denomination.

3. On the basis of the aforesaid self-statement of PW.3, Chandan Kumar Saharsa Sadar P.S. Case No.493 of 2012 was registered followed with an investigation as well as submission of charge sheet facilitating the trial meeting with the result, the subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. In order to substantiate such plea, ocular evidence has also been adduced.

5. In order to substantiate its case prosecution had examined altogether seven PWs namely, PW.1-Brahamdeo Yadav, PW.2-Pramila, PW.3-Chandan Kumar, PW.4-Chandrakant Gauri, PW.5-Gajendra Tiwary, PW.6-Vinay Kumar, PW.7-Shrikant Mishra. Side by side had also exhibited, Ext.1-Signature of Pramila over the seizure list relating to recovery of counterfeit Indian currency relating to Pushpa, Ext.2-Seizure list relating to recovery and counterfeit Indian currency notes from the possession of Santosh, Ext.3-Self statement of Chandan Kumar, Ext.4-Signature of Santosh over inculpatory extra judicial confessional statement, Ext.4/1-Signatrue of Pushpa Devi over inculpatory extra judicial confessional statement, Ext.5-Report submitted by PW.5-Gajendra Tiwary, on a requisition made by PW.3 Chandan Kumar, Ext.6-Requisition having in pen of PW.3 Chandan Kumar, Ext.7-FSL report, Ext.8 to 8/A-Inculpatory extra judicial confessional statement of Ram Bilash

Yadav and Amit Kumar Raja @ Amitabh. On the other hand DW.1 Md. Akram has been examined in defence.

6. Learned counsel for the appellants have submitted that no offence under Section 489B,C of the IPC is made out in the background of the fact that prosecution could not succeed in substantiating the *mens rea*. Elaborating the issue, it has been submitted that times without number, the Hon'ble Apex Court has deduced after proper scrutiny of the relevant section that in absence of *mens rea*, the conviction and sentence would not survive. So far facts of the present case is concerned, though prosecution had not substantiated the same, but, to some extent, in order to fill up the lacuna inculpatory extra judicial confessional statement has been introduced, more particularly entangling the status to justify that there was racket and members of that racket were deeply involved in printing, circulating the counterfeit Indian currency notes and on that very score, apart from these appellants others (since acquitted) have also been arrayed as an accused but, the inconsistency amongst PW.2 as well as PW.3 on that very score completely demolishes the allegation whatever been at the end of the prosecution. So submitted that the basic ingredient attracting to justify prosecution for an offence punishable under Section 489B,Cof the IPC is found lacking.

7. Apart from this, it has also been urged that seizure list witnesses have not been examined. Whoever been examined, are police officials. In the background of non-examination of seizure list witnesses the event of search, seizure, was really a genuine one shrouds under doubt. In its continuity, it has also been submitted that neither in the self-statement of the PW.3 nor during course of examination the witnesses had disclosed that the seized so alleged counterfeit Indian currency notes were deposited in Malkhana as, PW.7 during cross-examination at para-8 had stated that seized counterfeit Indian currency notes were not handed over to him. Though, he had stated that same was deposited in Malkhana but, the lapses on the part of the prosecution also creates doubt over authenticity of the prosecution version in the background of the fact that Malkhana register has not been produced in court to substantiate the same. Furthermore, so alleged seized counterfeit Indian currency have not been produced in court, Ext.7 FSL report, worsen the situation as, it divulges that vide memo no.2492 dated 30.10.2012, the so alleged seized materials were transmitted for FSL examination through special constable 417 Bhuneshwar Sah which reached at the office on 22.01.2013 so, it was incumbent upon the prosecution to have divulged the cause of delay as well as custody of the seized article during the intervening period and that has got relevancy in the background of the fact that the Ext.7 FSL report does not contain serial number of the counterfeit Indian currency notes which have been alleged to be recovered from the possession of these two appellants. Furthermore, the witnesses are completely silent whether any specific mark was put over the seized counterfeit Indian currency notes, whether it was sealed at the place of occurrence and so, the cumulative effect did not justify the finding having been recorded by the learned lower court.

8. On the other hand, the Additional Public Prosecutor vehemently controverted the submission having been raised on behalf of appellants and submitted that there happens to be presence of both the appellants over the seizure list and that lend credibility with regard to search and seizure. Furthermore, it has also been argued that PW.3, informant Chandan Kumar appears to be very much sensitized towards his activity that no innocent person should be prosecuted and for that, before recording of his self statement took the seized counterfeit Indian currency notes to the State Bank of India, filed requisition, tendered notes which were examined by the PW.5, Branch Manager of the State Bank of India, Main Branch and then, having a report that those seized notes were counterfeit, then thereafter, recorded his self statement which happens to be the basis of instant prosecution. Ext.5,6 emphatically support the same. Certain lapses while prosecuting the case is bound to occur but the court has to see whether the evidences having been produced before the court satisfy the ingredients justifying the recording of finding and from the materials available on the record, it is evident that by way of oral as well as documentary evidence, prosecution has succeeded in substantiating its case whereupon, the finding so recorded by the learned lower court is fit to be confirmed.

9. After perusal of the self statement of PW.3, it is apparent that other witnesses shown their presence during course of search and seizure while PW.7 Investigating Officer also took an effort to justify, however relevant exercise that means to say search and seizure were made by PW.2 as well as PW.3 whereupon, their testimony are tested at first instant.

10. PW.2 had stated that S.I., Chandan Kumar had informed her that a raiding team has been constituted relating to apprehension of counterfeit Indian currency notes consisting of her along with Awadhesh Kumar, Chandrakant Gauri, Chandan Kumar himself including two home guards Vinay Kumar and Brahamdeo whereupon, they all have gone to Chandani Chowk. After sometime they have seen one lady in Salwar Suit being accompanied by a gent, proceeding towards western direction, whereupon they were singled to halt. On interrogation, female had disclosed her name as Pushpa while male as Santosh. Female was searched by her and during course thereof, from a bag hanging from her left shoulder 28 notes of Indian currency denomination of rupees five hundred each (detailed with serial number) were seized along with two mobiles. Chandan Kumar had searched Santosh and relating thereto, seizure list was prepared by Chandan. She had also stated that during course of interrogation they confessed their guilt and have made inculpatory extra judicial confessional statement wherein they have identified one Ram Bilash, Awadhesh Kumar and Kundan Kumar to be the kingpin of the racket. Identified the accused. During cross-examination she had stated at para-9 that Chandan had informed a day prior to the search and seizure as well as on the date of occurrence at about 06:00 AM whereupon she had gone to police station. In para-10 she had stated that before searching the culprit, she had also done her search in presence of a lady but, she is unable to disclose her name. That lady also does not happens to be the seizure list witness.

11. PW.3 is the informant who had stated that on 17.08.2012 at early morning he got confidential information regarding passing of Counterfeit Indian Currency Notes by a member of the gang deeply involved in transportation of Counterfeit Indian Currency Notes wherein, one lady also happens to be its member, constituted a raiding party including Chandrakant Gauri, Awadhesh Kumar, Pramila, constable Vinay Kumar and Brahamdeo Yadav. They reached at Chandani Chowk, scattered and during course thereof, had seen one lady along with a man proceeding from Chandani Chowk towards Mahavir Chowk who were signaled to stop, interrogated and then, Pramila searched the lady who on interrogation disclosed her name as Pushpa, and from her purse 28 Indian currency notes of denomination of rupees five hundred was seized along with Nokia Mobile set and for that, seizure list was prepared by the Pramila. The male who disclosed his identity as Santosh was searched by him and during course thereof, one Indian currency note of denomination one thousand, fifteen currency notes of denomination 500 each, five currency notes of denomination one hundred were seized from him and for that, seizure list was prepared by him. Then thereafter, both two accused persons confessed their guilt and made their inculpatory extra judicial confessional statement disclosing presence of other members of the racket being organized by Kundan Singh who at that very moment was under custody manned by Vilash Yadav, Amit Rana. Then thereafter, he gone to SBI Branch along with aforesaid two apprehended accused, seized counterfeit Indian currency notes, made requisition to the Branch Manager, tendered the currency notes which were examined by the Manager who declared all the Indian currency notes to be counterfeit and to this effect, he had noted down his opinion. Then thereafter, he recorded his self-statement and handed over to the officer-in-charge. He had exhibited the seizure list having specific mentioning of the serial number of notes having recovered from the possession of Santosh. Identified the accused. During cross-examination, nothing substantial has been procured save and except that both the accused were apprehended at the spot, searched and for that search cum seizure list was prepared. He denied the suggestion that all happens to be the table work.

12. PW.1 is the one of the constable who had simply stated that on the alleged date and time of course, he was home guard constable and accordingly, had participated during course of conduction of raid at Chandani Chowk, Saharsa. He had further stated that Santosh and Pushpa were apprehended. Officer-in-charge had searched Chandan from whose possession counterfeit note of rupees one thousand denomination as well as five hundred denomination were recovered and seized while Pramila Devi had searched Pushpa and from her possession 700 amount was recovered. Then thereafter both of them were taken to police station. Officer-in-charge had gone to bank where the recovered counterfeit notes were examined and found to be counterfeit. During cross-examination he had stated that at the time of production of the notes at the bank, he was not present.

13. PW.4 had stated that on 17.08.2012 he was posted at Sadar Police Station as SI. He was one of the member of the raiding team constituted by Chandan for the apprehension of the culprit who were engaged in transportation of counterfeit Indian currency notes. As per confidential information, they reached at the Chandani

Chown Saharsa at about 09:45 AM and where they found one lady and a gent having resemblance as per confidential information whereupon, singled to stop and then were interrogated. The lady who disclosed herself to be Pushpa Kumari was searched out by the Pramila and from a bag which she was carrying twenty-eight counterfeit Indian currency notes each containing denomination of five hundred were recovered along with a mobile and for that, she had prepared search cum seizure list while from the possession of Santosh, one Indian currency notes of denomination of one thousand, fifteen Indian currency notes being denomination of five hundred, five Indian currency notes each containing denomination of one hundred, mobile set were seized by the Chandan and for that search cum seizure list was prepared by him. On interrogation both the accused had confessed their guilt, made inculpatory extra judicial confessional statement. Then thereafter, Chandan took the aforesaid currency notes to SBI, filed written requisition for examination placed the notes which were examined and found to be counterfeit and this effect, the bank official also issued certificate. During cross-examination at para-11 he had admitted that he had not searched. In para-19 he had stated that he is not remembering whether any specific mark was put over seized counterfeit Indian currency notes. He had further stated that he is not remember whether signature of informant was put over the same. He also stated that he is not remembering whether notes were sealed or not. At para-21 he had stated that after recovery, seizure list was prepared and then, gone to bank, got examination of the seized counterfeit currency notes and then thereafter statement was recorded. In para-24 he had stated that he is not remembering whether the competent authority, after examination the counterfeit Indian currency notes had put specific mark or not. He is also not remembering whether the notes were sealed or not. He is not remembering whether notes were returned from the Bank in sealed cover. In para-33 had said that Pramila had given her search in presence of a lady but he is not remembering her name nor she stood as seizure list witness.

14. PW.5 is the bank official who had stated that on 17.08.2012 he was Branch Manager at Saharsa SBI Market Branch. On that day, police official Chandan Kumar had made written prayer to examine the notes and to report whether those were counterfeit or not. Chandan Kumar had produced the same, which he examined manually as well as through machine and then found the same to be counterfeit and to this effect, he had submitted his report (exhibit). During cross-examination at para-7 he had stated that all the notes which were produced by the police were opened. He had further stated that there was no signature either of accused or police official over the notes. He had further stated at para-11 that after examination of the notes, neither he put any specific mark nor sealed. He had further stated at para-15 that neither he put his signature nor seal of the bank over counterfeit currency notes in support of examination.

15. PW.6 is the another home guard constable who had stated that Pushpa and Santosh were apprehended who were searched out and during course thereof, counterfeit Indian currency notes were recovered from them. He had further stated that as he was standing away therefrom on account thereof, he had not seen the same. In the aforesaid background, his cross-examination is not at all relevant.

16. PW.7 is the investigating officer. During his examination-in-chief he had stated that after having been entrusted with the investigation, he was handed over the written report, inspection report issued by the State Bank of India, Saharsa, seizure list relating to seized article, inculpatory extra judicial confessional statement of the respective accused. He had recorded all those things in the case diary in chronological manner right from para-2 to 8. In para-3 he had stated that he had incorporated under para-3 place of occurrence. Then had stated that he had gone at place of occurrence and interrogated the shopkeepers having their shop adjacent to the place of occurrence who disclosed that one lady and a gent were apprehended and from their possession, counterfeit Indian currency notes were recovered. Then had inspected the place of occurrence which happens to be the road proceeding ahead from Chandani Chowk to Mahavir Chowk. Then had stated under para-30, 31 that he had incorporated the statement of the witnesses. In para-43 he had recorded inculpatory extra judicial confessional statement and that of Amit Kumar, Ext.8/1. He had sent the seized counterfeit Indian currency notes for FSL examination after taking permission from the court. In para-54 there happens to be disclosure relating to criminal antecedent of accused and then thereafter he submitted charge sheet under Section 489A, 489B and 489C, 120B of the IPC against the accused persons after completing investigation. During cross-examination at para-8 he had firstly stated that he had received counterfeit currency notes as per seizure list. Again corrected that counterfeit Indian currency notes were not handed over to him then, again stated that it was deposited in Malkhana. He had further stated that for the first time he had seen the counterfeit Indian currency note on 30.10.2016. He had not referred in the case diary whether the seized counterfeit Indian currency notes carried signature of the informant or accused persons. In para-9 he had further stated that he had not mentioned in the case diary whether counterfeit currency notes were in sealed packet or not. He had further stated at para-11 that he had not mentioned the fact that from Malkhana hehad recovered the seized counterfeit currency notes in sealed condition but it is incorporated in the case diary that after obtaining court's order, it was sealed and then transmitted for FSL examination. In para-12 he had stated that he had not put signature over counterfeit Indian currency notes, he had put his signature over seal. In para-24 he had stated that there happens to be no female seizure list witness. Then had said that in his presence the seized currency notes were not sealed nor he had given any symbol over the currency notes.

17. From the evidence, as referred hereinabove it is crystal clear that two seizure list witnesses have not been examined nor, there happens to be any sort of explanation at the end of the prosecution regarding non-examination. That means to say, whoever been examined in this case are only the police personnel who allegedly been engaged in search and seizure. It is not the prudence that the evidence of police officials be always seen with suspicion but, when the facts and circumstances of the case exposes like so, then in that circumstance, their evidences are to be properly scrutinized. From the evidence of the PW.2, PW.3 as well as PW.7 that so many persons have assembled there at the time of search and seizure, so many shops are present adjoining to the place of occurrence at both side of the road, even then no independent witness has been procured to corroborate the same. In the aforesaid background, when the other activities are being perceived, the situation suggest otherwise. PW.1, PW.2, PW.3, PW.4 have not stated who was officer-in-chare at the relevant time. PW.3 informant had not claimed to be officer-in-charge. From the self statement as well as from the evidence of PW.3 it is not clear that he had handed over seized counterfeit Indian currency notes to the officer-in-charge nor he had spoken that he deposited the same in the Malkhana. Furthermore, from the evidence of PW.7 it is apparent that even having been entrusted with the investigation, all the papers were handed over to him but not the seized counterfeit Indian currency notes. Furthermore, it is apparent from the evidence of PW.4 as well as PW.7 that those counterfeit Indian currency notes were not sealed nay was carrying any specific mark. The aforesaid seized counterfeit were not at all produced before the court and so, the prosecution is found deficient on that very score. If the aforesaid event is taken together with Ext.7, FSL report, less said is better. Ext.7 suggest that it was sent by the special messenger, Constable 417 Bhuneshwar Sah vide memo no.2492 dated 30.10.2012 which was received by the office of FSL on 22.01.2013 and again, during course of evidence PW.7, I.O. failed to explain.

18. True it is that witnesses be given an opportunity to explain the same. Unless and until that questions are confronted to the witness, one would not expect any kind of explanation but, there happens to be obligation on the part of the prosecution to come with clean hand in order to substantiate its case. It is not the duty of the prosecution to create evidence or to suppress the evidence which could have, if properly placed, expose the activity of the prosecution. PW.7 had stated that he transmitted the seized currency notes in sealed cover after taking permission from the court, then in that circumstance, it was upon him being an Investigating Officer having properly explained the same in the background of the fact that in para-8 of his cross-examination he had stated that for the first time he had seen currency notes on 30.10.2012. That means to say more than 2 and half months after the alleged occurrence. Moreover, Ext.7 also did not divulge the serial number of the currency notes which was transmitted to FSL for examination and was examined. That being so, the deficiency, as indicated hereinabove did not justify the finding recorded by the learned lower court and on account thereof, the judgment of conviction and sentence recorded by the learned lower court is hereby set aside. Both the appeals are allowed. Appellants are on bail hence are discharged from its liabilities.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/~~NAFR~~	A.F.R.
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