

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 13.11.2018

CORAM

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

CRL.A.No.5 of 2013

Duraisamy .. Appellant/Complainant

Vs

Kumarasamy ... Respondent/Accused

Criminal Appeal filed under Section 378 of Cr.P.C. praying to set aside the judgment dated 20.09.2012 in C.A.No.83 of 2012 on the file of I Additional District and Sessions Judge, Thiruppur reversing the judgment dated 17.02.2012 in S.T.No.1307 of 2008 on the file of Judicial Magistrate No. I, Thiruppur and to allow the above Criminal Revision.

For Petitioner : Mr.V.Gopinath, Sr. Counsel
for Mr.R.Nalliyappan

For Respondent : Mr.V.Rajamohan, Legal Aid Counsel

J U D G M E N T

For the sake of convenience, the appellant and the respondent will be referred to as the complainant and the accused respectively. It is the case of the complainant that the accused was his friend for several years; on 24.12.2007, the accused borrowed a hand loan of Rs.5,00,000/- for his urgent expenses and on the same day, he issued a post-dated cheque dated 07.01.2008 for Rs.5,00,000/- drawn on Canara Bank, B.N.Road Branch, Tiruppur (Ex.P1); the complainant presented the cheque for collection on 07.01.2008 through his Bank, viz. Indian Bank, Court Road, Tiruppur Main Branch; the said cheque was returned unpaid on 08.01.2008 on the reasoning "account closed" (vide Ex.P3), which fact was informed to the complainant by his bank vide advice dated 08.01.2008 (Ex.P4); the complainant issued the statutory notice dated 12.01.2008 to the accused (Ex.P5), which was received by the accused on 16.01.2008 (vide Ex.P7); the accused issued a reply notice dated 25.01.2008

(Ex.P8) repudiating the debt. Hence, the complainant initiated a prosecution in STC.No.1307 of 2008 before the Judicial Magistrate No.I, Tiruppur, under Section 138 of the Negotiable Instruments Act. On receipt of summons, the accused appeared and was questioned under Section 251 Cr.P.C. He denied the accusation. To prove the case, the complainant examined himself as PW1. Mr.Ramakrishnan, the Branch Manager of Canara Bank (bank of the accused) was examined as PW2 and Mr.Thirunavukkarasu, Branch Manager of Indian Bank (bank of the complainant) was examined as PW3. On behalf of the complainant, 12 documents were marked. The accused was questioned under Section 313 Cr.P.C. and he denied the incriminating circumstances appearing against him. The trial Court, after considering the evidence on record, by judgment dated 17.02.2012, convicted the accused under Section 138 of the Negotiable Instruments Act and sentenced him to undergo three months rigorous imprisonment and pay a compensation of Rs.5,05,560/- within two months under Section 357(3) Cr.P.C. Challenging the conviction and sentence, the accused filed C.A.No.83 of 2012 in the Court of Session, Tiruppur. The learned I Additional Session Judge, Tiruppur, by judgment dated 20.09.2012, set aside the conviction and acquitted the accused. Challenging the acquittal, the complainant is before this Court, after obtaining special leave to appeal.

2.Though notice was served on the accused, he had not chosen to enter appearance. Therefore, this Court appointed Mr.V.Rajamohan, (Enrolment No.661/1994) as Legal Aid counsel for the accused and papers were furnished to him.

3.Heard Mr.V.Gopinath, learned Senior Counsel appearing for the complainant/appellant and Mr.V.Rajamohan, learned counsel appearing for the respondent/accused.

4.Mr.V.Gopinath, learned Senior Counsel made the following submissions :

a) The appellate Court had failed to properly consider the evidence of the complainant (PW1) in the right perspective and had erred in holding that he had failed to prove the debt.

b) He took this Court through the evidence of the complainant (PW1) and the reply notice dated 25.01.2008 (Ex.P8) that was issued by the accused and pointed out the contradictions found therein.

5.He placed strong reliance on the judgment of the Supreme Court in Rangappa Vs Sri Mohan [2010 (4) CTC 118] and the judgment of this Court in M.Aruchamy Vs. S.Kasiviswanathan [2018 (1) MWN (Cr.) DCC 1 (Mad.) and submitted that once the accused

admits the signature in the impugned cheque, then, the burden under Section 139 of the Negotiable Instruments Act will shift to the accused and it is for the accused to prove that there was no legally enforceable debt.

6.Per contra, Mr.V.Rajamohan, learned counsel appearing for the respondent/accused, refuted the contentions.

7.This Court gave its anxious consideration to the rival submissions.

8.It is trite that in an appeal against acquittal, when there are two views possible, the appellate Court should be slow in disturbing the order of acquittal. This principle has been reiterated by the Supreme Court in V.Sejappa Vs State by Police Inspector, Lok Ayukta, Chitradurga (2016) 12 SCC 150, the relevant portion of which is extracted hereunder :

"22.If the evaluation of the evidence and the findings recorded by the trial court do not suffer from any illegality or perversity and the grounds on which the trial court has based its conclusion are reasonable and plausible, the High Court should not disturb the order of acquittal if another view is possible. Merely because the appellate court on reappreciation and re-evaluation of the evidence is inclined to take a different view, interference with the judgment of acquittal is not justified if the view taken by the trial court is a possible view. In State v. K. Narasimhachary [State v. K. Narasimhachary, (2005) 8 SCC 364 : (2006) 1 SCC (Cri) 41], this Court reiterated the well-settled principle that if two views are possible, the appellate court should not interfere with the acquittal by the lower court and that only where the material on record leads to an inescapable conclusion of guilt of the accused, the judgment of acquittal will call for interference by the appellate court. The same view was reiterated in T. Subramanian v. State of T.N. [T. Subramanian v. State of T.N., (2006) 1 SCC 401 : (2006) 1 SCC (Cri) 401]"

9.Bearing in mind the aforesaid legal principle, this Court now proposes to evaluate the evidence on record. In Rangappa (supra), the Three Judge Bench judgment of the Supreme Court has clearly held that once the signature in the cheque is admitted, the presumption under Section 139 of the Negotiable Instruments Act will operate and the burden will shift on the accused to prove that the cheque was not issued for any legally enforceable debt. However, in the same judgment, the Supreme Court has held

that the accused can discharge the said presumption by preponderance of probability. The relevant portion of the said judgment reads as under :

"While Section 138 of the Act specifies a strong Criminal remedy in relation to the dishonour of cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. However, it must be remembered that the offence made punishable by Section 138 can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a Civil wrong whose impact is usually confined to the private parties involved in commercial transactions. In such a scenario, the Test of Proportionality should guide the construction and interpretation of reverse onus clauses and the accused/Defendant cannot be expected to discharge an unduly high standard or proof. In the absence of compelling justifications, reverse onus clauses usually impose an evidentiary burden and not a persuasive burden. Keeping this in view, it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is that of 'preponderance of probabilities'. Therefore, if the accused is able to raise a probable defence which creates doubts about the existence of a legally enforceable debt or liability, the prosecution can fail. As clarified in the citations, the accused can rely on the materials submitted by the complainant in order to raise such a defence and it is conceivable that in some cases the accused may not need to adduce evidence of his/her own."

10.It is the specific case of the complainant that the accused was his friend and that, the complainant had given Rs.5,00,000/- as hand loan on 24.12.2007, towards which, the accused gave the impugned cheque on the same day, i.e., 07.01.2008. However, it is the case of the accused that the complainant was not his friend and that, he had not borrowed any amount from the complainant on the said date. This stand has been taken by the accused, even at the earliest point of time in his reply notice dated 25.01.2008 (Ex.P8), which was issued in response to the statutory demand notice dated 12.01.2008 (Ex. P5) issued by the complainant.

11.However, Mr.V.Gopinath contended that in the cross-examination of the complainant (PW1) by the accused, the complainant has stated that the complainant's brother was occupying the first floor of the premises, in which, the accused was having his business in the ground floor and that, he got acquainted with the accused. Thus, from this piece of evidence

given by complainant, it is clear that the accused was not directly known to the complainant and that, the complainant knew the accused only through his brother. However, in the cross-examination, the complainant has clearly stated that he did not tell his brother at all about this transaction. The complainant is aged about 56 years and the accused is aged about 46 years. Thus, there is a 10 year gap between them. However, the complainant, in the cross-examination, has stated that he did not even inform his brother about the loan of Rs.5,00,000/- that was given to the accused, nor was his brother informed about the dishonour of the cheque. In the cross-examination of the complainant (PW1), the accused has questioned him about his very capacity to give a huge loan of Rs.5,00,000/- on the very same day of request, viz. 24.12.2007. The complainant has admitted that he did not obtain any document like pro-note, etc. from the accused, for giving the loan. He has also admitted that the amount was not handed over to the accused, in the presence of any other person. In the cross-examination, the complainant has admitted that his monthly income is around Rs.10,000/- to Rs.15,000/- and that, there is no other earning member in his family.

12.Mr.V.Gopinath contended that in the cross-examination, the complainant has stated that earlier also, he had given some small loans to the accused without documentation and the same has also been returned and therefore, the complainant had given the present loan also in good faith. Though, this argument did sound a little plausible, yet the overall evidence of the complainant (PW1) does not inspire the confidence of this Court for the following reasons:

a) The complainant has admitted that he has not given such a huge amount of Rs.5,00,000/- at any time earlier. While that being so, it is indeed strange, as to how the complainant gave Rs.5,00,000/- by cash, without even obtaining any receipt or pro-note from the accused and without even telling his own brother through whom he got acquainted with the accused.

b) The accused has satisfactorily shown that the complainant is not a man of means to raise a sum of Rs.5,00,000/- on the very same day of requesting for the loan by summoning the Bank Account details of the complainant and marking them as Ex.P12. On a perusal of Ex.P12, during the relevant point of time i.e., in and around December 2007 - January 2008, the maximum amount that was available in the account of the complainant was only Rs.1,29,126/-. To this, the complainant has given a stretched explanation in the cross-examination that he would not deposit the amount in the Bank and that, he would keep them in his house. He has also accepted that he is not an Income Tax Assessee.

c) To the specific question put by the accused, as to how

one can give a huge loan of Rs.5,00,000/- on the very same day of request, viz. 24.12.2007, the complainant stated that the accused had requested the loan some 15 days back and that, he arranged for it. However, contrary to this assertion, in the cross-examination, the complainant, in the statutory demand notice dated 12.01.2008 (Ex.P5) and in the complaint, has categorically said that the accused had approached him on 24.12.2007 and on the same day, he gave the loan of Rs.5,00,000/- by cash without anything more. In this case, the account was closed in the year 2005 itself, as could be seen from the endorsement made by the Bank on the impugned Cheque.

d) Mr.V.Gopinath contended that in the reply notice (Ex.P8), the accused has taken a stand that the impugned cheque was given to one of his customers and that, the same has been misused by the complainant and therefore, the burden is on the accused to prove the cheque trail.

13.In the opinion of this Court, it is not in all cases the evidence relating to the cheque trail requires to be adduced by the accused for discharging the burden under Section 139 of the Negotiable Instruments Act. As laid down in Rangappa (supra), if the accused is able to show from the very evidence of the complainant that the alleged debt is unbelievable, he is said to have discharged the burden under Section 139 of the Negotiable Instruments Act. In M.Aruchamy (Supra), relied upon by Mr.Gopinath, the facts were entirely different. In that case, the accused had borrowed Rs.2,00,000/- on 05.09.2006 and executed a pro-note (Ex.P1) to the complainant and has also issued a cheque, which was dishonoured. In that case, the Appellate Court had acquitted the accused on a specious reasoning that the complainant should have maintained records under the Tamil Nadu Money Lenders Act, 1957. Therefore, in those facts, this Court interfered with the order of acquittal passed by the Appellate Court and restored the order of conviction of the trial Court.

14.In this case, the complainant has stated that the accused was his friend, but, in the cross-examination, when he was asked as to whether he knows about the family size of the accused, he pleaded ignorance. This Court hastens to add that it may not be a thumb rule that the accused would be entitled to acquittal in a case, where the complainant had given the loan without documentation or that, there was no witness to the transaction, or that the same was not shown in the Income Tax returns of the complainant or that the complainant has failed to establish his means to give the loan, etc. Each case has to be decided on its own facts, based on appreciation of the evidence on record. The accused will be entitled to take conflicting defences. But, in this case, from the earliest point of time, viz. from the reply

notice dated (Ex.P8), the accused had been taking a stand that the account was closed in the year 2005 and there was no borrowal as alleged by the complainant on 07.01.2008 and that, the impugned cheque was not issued to the complainant. One peculiar feature, which this Court has observed in the conduct of the complainant is that, according to the complainant, the post-dated cheque for Rs.5,00,000/- was given on 07.01.2008 and that, he had not even taken any step to verify from the bank of the accused about the very validity of the cheque, especially, when he is giving a huge loan of Rs.5,00,000/- without any documentation. Had he done that, he would have known that the account itself was closed in the year 2005.

15.Thus, when all the aforesaid factors are cumulatively appraised (and not individually) together with the general tenor of the evidence of the complainant, this Court finds no reason to upset the order of acquittal, in the light of the settled legal position governing appeals against acquittals set out in the judgment in V.Sejappa (supra).

In fine, this appeal fails and is accordingly dismissed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Judicial Magistrate No.I,
Tiruppur.
2. Do through The Cheif Judicial Magistrate,
Tiruppur.
3. The I Additional District and Sessions Judge,
Tiruppur.
4. Do through The Principle Session Judge, Tiruppur.

Copy To: The Section Officer,
Criminal Section, High Court, Madras.

+1 cc to Mr.N.Mohideen Basha, Advocate Sr.No.78065

+1 cc to Mr.R.Nalliyappan, Advocate Sr.No.77457

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SV(CO)

CSL/14.12.2018