

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

C.R.A. 163 of 2019

***Md. Tousif @ Gara @ Tinku*
Vs.
State of West Bengal**

For Appellant	:	Mr. Arnab Chatterjee Mr. Soumya Basu Roy Chowdhury
For the State	:	Mr. Saswata Gopal Mukherjee, Id. P.P. Ms. Faria Hossain Mr. Sandip Chakraborty Mr. Anand Keshri

Heard on : 17.02.2022, 18.02.2022

Judgment On : 18.02.2022

Bibek Chaudhuri, J.

The judgment and order of conviction passed by the learned Additional Sessions Judge, 1st Court at Howrah on 15th February, 2019 in Sessions Trial No.309/2016 thereby convicting the appellant for the offence under Sections 489B/489C read with Section 120B of the Indian Penal Code is under challenge in the instant appeal.

By passing the impugned order of conviction the accused/appellant was convicted under Section 489B read with Section 120B of the Indian Penal Code and directed to serve sentence of rigorous imprisonment for five years with fine of Rs.5,000/-, in default, further rigorous imprisonment for three months for committing offence under Section 489B read with Section 120B of the Indian Penal Code. The same punishment was passed for the offence under Section 489C read with Section 120B of the Indian Penal Code and it was directed that both the sentences will run concurrently.

The appellant faced trial in the above mentioned case under charge of Section 489B read with Section 120B of the Indian Penal Code and Section 489C read with Section 120B of the Indian Penal Code on the allegation that he was in possession of fake Indian currency notes (FICN for short) for the purpose of trafficking and while possessing FICN he was arrested by the police attached to Shibpur Police Station, Howrah on 12th October, 2015 at about 21.10 hours.

The F.I.R. reveals that S.I. Sibayan Dey at Shibpur Police Station received a secret information that the accused would come to Fazir Bazar More on G.T. Road to deliver some FICN to his associates namely Sultan Ali and Barbadi. Accordingly, they laid a trap in the said area and apprehended the appellant at about 21.40 hours near

Howrah Jute Mills Gate. After apprehension, S.I. Sibayan Dey conducted search observing all necessary formalities of the person of the accused and recovered 11 (eleven) numbers of FICN in denomination of Rs.1,000/- and Rs.500/- from the right side pocket of his pant. Seizure was made in presence of two local witnesses. After search, recovery of FICN and seizure of FICN the accused was arrested and brought to the police station. Sub-Inspector lodged a complaint before the Officer-in-Charge of Shibpur P.S. On the basis of which Case No.503 of 2015 dated 12th October, 2015 under Section 489B/489C/120B/34 of the Indian Penal Code was registered.

I have heard the learned advocate for the appellant and learned Public Prosecutor, perused the entire materials on record and duly considered the same. The learned advocate appearing for the appellant has impeached the findings of the Court below that the charge was framed under Section 489B and 489C read with Section 34 of the Indian Penal Code. A separate head of charge was also framed under Section 120B read with Section 34 of the Indian Penal Code. It is submitted by the learned advocate for the appellant that there is no material in the evidence on record in support of the charge under Section 120B of the Indian Penal Code. The written complaint does not refer even a single word of criminal conspiracy committed by the appellant. It is needless to say that in order to commit criminal

conspiracy, there must be more than one person. Conspiracy cannot be made singularly. In view of such circumstances, the order of conviction with the aid of Section 120B of the Indian Penal Code is absolutely untenable.

It is further argued by the appellant that even assuming the legal evidence on record inculcating the appellant that come only to the extent of the charge against them under Section 489C and not under Section 489B of the Indian Penal Code. There is absolutely no evidence that the appellant illegally "sells to or buys or receives from any other person, or otherwise traffics or uses as genuine any forged or counter fake currency note or bank note...."

Learned P.P.-in-Charge, on the other hand, has supported the findings and the order of conviction and sentence handed down by the Court below and argues that necessary ingredients of Sections 489B and 489C have been established and hence the appeal be rejected.

It is the case of the prosecution that on the basis of source information the de facto complainant, S.I. Sibayan Dey with force laid trap in Fazir Bazar More within P.S. Shibpur. The complaint also states that before leaving the P.S. S.I. Sibayan Dey diarized the source information in the General Diary Book maintained in the Police Station. However, during trial the said G.D. entry or the copy of the same has not been produced. From the evidence of P.W.1 it is found

that after apprehension of the appellant the police party conducted search of his person and found one black colour money purse in his right side pant pocket and on search recovered FICN of Rs.500/- and Rs.1,000/- denomination. Thereafter S.I. Sibayan Dey seized those currency notes under a seizure list. The seized currency notes were not sealed and labelled. It is further claimed by P.W. 1 that the process of search and seizure of FICN was made in presence of independent witnesses.

P.W. 2, Ali Akbar and P.W. 5, Md. Nasim are the so-called independent witnesses in presence of whom the search and seizure was made, prosecution claimed. However, from the evidence of P.W. 2 it is ascertained that P.W. 2 was called in the Police Station on the date of occurrence at night. He went to Shibpur Police Station. Police told him to put a signature on a seizure list and he signed on the seizure list under the instruction of Police. His signature on the seizure list was marked as exhibit-1/1. P.W. 5, Md. Nasim is an employee of the shop of P.W. 2. It is also found from his evidence that he accompanied P.W. 2 in Shibpur Police Station and Police obtained his signature on the said seizure list in the Police Station.

It is important to note that the said independent witnesses did not support the prosecution case relating to their presence at the place of occurrence when the accused person was searched and FICN was

recovered from his possession. The above-named witnesses were not declared hostile by the prosecution. Therefore, it is safely concluded that the said two witnesses were not present at the place of occurrence at the time of search and seizure of FICN from the possession of the appellant. Thus, the claim of the prosecution that search and seizure was made in presence of independent witnesses appears to be false. Apart from the above-named two witnesses, prosecution examined one Sanjoy Mondal as P.W. 3 and Prabir Kumar Khan as P.W. 4. It is found from their evidence that they could not say the number of seized FICN from the possession of the appellant on 12th October, 2015. From the cross-examination of P.W. 4, it appears that he was examined by the Investigating Officer at the spot immediately after seizure. It is surprising to note that P.W. 4 was interrogated by the Investigating Officer before initiation of any case against the accused.

The prosecution case has two parts involving two incidents. It is the case of the prosecution that on 16th October, 2015 while the accused was in Police custody he made a statement admitting illegal possession of more FICN and on the basis of such disclosure statement, Police recovered twenty pieces of FICN of Rs.500/- denomination each from his house. P.W. 6, Md. Azad and P.W. 7, Md. Sultan Khan were shown as independent witnesses to the second seizure of FICN. However, they did not support the prosecution case while P.W. 6, Md. Azad was declared

hostile by the prosecution. P.W. 7 was not even declared as such during his examination.

It is not disputed that the seized FICNs are counterfeit currency notes which would appear from the evidence of P.W. 8 who was the Manager of Bharatiya Reserve Bank, Note Mudran (P) Ltd. at Salboni.

Learned Public Prosecutor-in-Charge refers to a decision of the Division Bench of this Court in the case of ***Jubeda Chitrakar @ Jaba @ Zubeda Chitrakar & Ors. -Vs.- The State of West Bengal*** (CRA 562 of 2018 and CRA 592 of 2018, Judgment delivered on 22nd November, 2019). The Hon'ble Division Bench held that illegal possession of huge quantity of FICN cannot be treated "as those of mere dormant possession but are of active transportation of fake currency notes which would fall within the sweep of Section 489B of the Indian Penal Code. In holding so, it was stated that when the accused person is found carrying sizable quantity of fake currency notes on a public road, or otherwise, in a concealed manner, it would amount to active transportation of such currency note at the time when the accused person is apprehended. No explanation being offered by the accused when questioned under Section 313 of the Code of Criminal Procedure regarding the possession of the counterfeit currency, the burden of proof of facts within the knowledge of such person was held as not discharged by that person in terms of Section 106 of the Evidence Act. We completely agree with those

judicial precedents and follow them, they being applicable on the facts of these appeals as we would elaborate hereunder”.

It is needless to say that judicial precedent is applicable under the facts and circumstances of a particular case. In the aforesaid decision delivered by the Division Bench of this Court it was held that the prosecution was able to prove the raid, interception and recovery of FICN on the basis of secret information. The prosecution also was able to prove the modality of the raid and recovered of huge quantity of FICN by adducing satisfactory evidence which was accepted by the Division Bench of this Court.

In other words, if the prosecution is able to prove search, seizure, raid and recovery of FICN by adducing credible evidence in support of the prosecution case, the judicial precedents to the fact that illegal possession of huge quantity of FICN does not only attract Section 489C of the Indian Penal Code but the offence under Section 489B is also held to be proved.

Coming to the instant case it is ascertained that the prosecution during trial failed to produce the relevant G.D. entry on the basis of which they left the Police Station to work out the secret information. The independent witnesses did not support the prosecution case. The raiding party did not offer themselves for search by the accused. Recovery of FICN on 16th October, 2015 has not been proved in view of

the fact that the prosecution failed miserably to produce the statement of the accused while in Police custody leading to recovery of FICN from his house.

Therefore, the prosecution has failed to prove the basic ingredients of offence under Section 489C of the Indian Penal Code and accordingly, the charge under Section 489B also fails. This Court further fails to understand as to why and how a charge under Section 120B of the Indian Penal Code was framed in the absence of any material of criminal conspiracy against the accused. The allegation that the accused wanted to hand over FICN to two other persons is not sufficient, there must be certain *prima facie* evidence to frame charge under Section 120B of the Indian Penal Code against the accused. The prosecution failed to produce the minimum evidence in support of the said charge.

For the reasons stated above, this Court respectfully is of the view that the precedent laid down in ***Jubeda Chitrakar @ Jaba @ Zubeda Chitrakar & Ors.*** (supra) is not applicable under the facts and circumstances of the case.

The instant appeal, therefore, is **allowed**. The order of conviction and sentence passed by the learned Trial Judge in Sessions Trial No. 309/2016 and G. R. Case No. 7581/2015 arising out of Shibpur Police Station Case No. 503/2015 dated 12.10.2015 is set aside.

The accused be released from the Correctional Home and the accused is discharged from his bail bond.

Parties are at liberty to act on the server copy of this order.

(Bibek Chaudhuri, J.)