

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Rabindranath Samanta

C.R.A. 571 of 2018

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CRAN 1 of 2018 (Old CRAN 3636 of 2018)

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CRAN 2 of 2020 (Old CRAN 698 of 2020)

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CRAN 3 of 2020 (Old CRAN 3995 of 2020)

Dolon Sk. @ Tuhin & Ors.

-Vs-

State of West Bengal.

For the Appellant No.1 : Mr. Dilip Kr. Samanta, Advocate,
Mr. Biswajit Hazra, Advocate,
Mr. Debapriya Samanta, Advocate,
Mr. Samrat Ghosh, Advocate
Mr. Archisman Sain, Advocate
Mr. Arit Mohammad Khan, Advocate

For the Appellant Nos. 2 & 3 : Mr. Baidurya Ghosal, Advocate

For the Appellant No. 4 : Mr. Subrata Karmakar, Advocate

For the State : Md. Nuguive Ahmed, A.P.P.
Ms. Zareen N. Khan, Advocate
Ms. Trina Mitra, Advocate.

Heard on : 8th February, 2022

Judgment on : 8th February, 2022

Joymalya Bagchi, J. :-

With the consent of the parties, the appeal is taken up for hearing.

Appeal is directed against the judgement and order dated 6th September, 2018 and 7th September, 2018 passed by Learned Additional

Sessions Judge, 1st Court, Jangipur, Murshidabad in Sessions Case No. 14 of 2017 and Sessions Trial No. 04(2) 2007 convicting the appellants for commission of offence punishable under Section 489B/489C of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for ten years each and to pay a fine of Rs. 20,000/-, in default to suffer simple imprisonment for two years more for the offence punishable under Section 489B. No separate sentence was imposed on the offence under Section 489C of the Indian Penal Code.

Prosecution case as alleged against the appellants is to the effect that on 19.09.2016 at around 14.30 hours S.I. Indranil Mahanto (P.W.1) along with P.Ws. 2, 4 and 5 went out of the police station on special mobile duty at Dhuliyani Ferry Ghat area where they found four persons were loitering suspiciously. They chased the miscreants and apprehended them. Number of local people assembled at the spot. They requested the local people to participate in the search but the local people refused. Upon search of the apprehended persons, 55 pieces of Indian Currency Notes suspected to be fake in denomination of Rs. 1000/- each wrapped in a plastic packet was recovered from the left side pocket of the trouser of Dolon Sk @ Tuhin along with some genuine cash; upon search of Mithu Sk, a poly bag containing 55 pieces of currency notes suspected to be fake in denomination of Rs. 1000/- each was recovered from left waist wrapped in his lungi; 50 pieces of Indian Currency Notes suspected to be fake in denomination of Rs. 1000/- wrapped in a plastic packet was recovered from the left waist in the lungi of Soni Sk. @ Titu and along with genuine cash and a plastic packet containing 69 pieces

of suspected Indian Currency Notes out of which 29 pieces in denomination of Rs. 1000/- each and 40 pieces in denomination of Rs. 500/- each was recovered from the left waist of the trouser of Abu Sufiyan Sk. along with genuine cash. The total amount of currency notes suspected to be fake was valued at Rs. 2,09,000/- and genuine cash of Rs. 890/- was also recovered. Upon questioning, they failed to explain the illicit possession of the currency notes suspected to be fake. Subsequently, they made confession that they had gathered for circulating the FICNs in the market as genuine with the help of others. Upon seizure of the aforesaid counterfeit notes, they were properly labelled and sealed. Appellants being Dolan Sk @ Tuhin, Mithu Sk, Sony Sk. @ Titu and Abu Sufiyan Sk were arrested and brought to the Samsherganj Police Station where P.W. 1 lodged written complaint resulting in registration of Samsherganj Police Station Case No. 363 of 2016 dated 19.09.2016 under Sections 489B/489C of the Indian Penal Code.

In the course of investigation, the seized counterfeit notes were sent for examination and upon receipt of report that the same were fake, charge sheet was filed. Charges were framed under Sections 489B/489C of the Indian Penal Code against the appellants. Appellants pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined six witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication. On conclusion of trial, the trial Judge by the impugned judgment and order dated 6th September, 2018 and 7th September, 2018 convicted and sentenced the appellants, as aforesaid.

Learned Counsels appearing for the appellants argued that the ingredients of the offence punishable under Section 489B of the Indian Penal Code have not been proved. No evidence of selling, receiving or use of counterfeit notes as genuine has been established in the instant case. Trial Judge erred in law in coming to a finding that the appellants were guilty under Section 489B of the Indian Penal Code. It is further submitted that the seizure of the alleged counterfeit notes were not supported by independent witnesses and the chain of custody of the counterfeit notes have not been established. Hence, the appellants may be acquitted of the charges levelled against them.

In reply, Mr. Ahmed, learned Additional Public Prosecutor argued that the appellants were apprehended with a large volume of FICNs totalling to over Rs. 2,00,000/-. They were in conscious possession of the FICNs and were carrying the said counterfeit notes through a public place in the market. Hence, they were trafficking/circulating the counterfeit notes and the ingredients of Section 489B of the Indian Penal Code have been established. P.W. 1 had requested independent witnesses to join the search but they refused to do so. Hence, non-examination of the independent witnesses has been duly explained and would not affect the credibility of the prosecution case. Accordingly, the appeal is liable to be dismissed.

P.W. 1, Indranil Mahanto is the informant and the leader of the raiding party. He deposed on the relevant day, he along with Constable Md. Sajahan Ali (P.W. 4), Harigopal Das (P.W. 2) and Arun Basak (P.W. 5) had gone out on special mobile duty after diarising such fact in the general diary register.

They reached at Dhuliyar Ferry Ghat around 14.30 hours. They noticed that four persons were moving suspiciously and seeing the police party the miscreants tried to flee away. Police party chased the aforesaid persons and apprehended them. On interrogation they remained silent. P.W. 1 informed the matter to the Officer-in-charge over telephone and after getting permission proceeded with the enquiry. Many people assembled at the spot. He asked them to join the search but they refused to do so. At this stage, P.W. 1 offered the apprehended persons to search the police officers but they declined. Thereupon, the apprehended persons who disclosed their identities as Dolan Sk @ Tuhin, Mithu Sk, Sony Sk. @ Titu and Abu Sufiyan Sk were searched. Upon search, 55 pieces of FICNs in denomination of Rs. 1000/- each, amounting to Rs. 55,000/-, wrapped in a packet were recovered from the left pocket of the trouser of Dolon Sk. @ Tuhin along with some cash from his shirt pocket. Upon search of Mithu Sk, a similar bundle wrapped in poly bag containing 55 pieces of currency notes suspected to be fake in denomination of Rs. 1000/- each, amounting to Rs. 55,000/-, was recovered from the left waist wrapped in his lungi. Similarly, 50 pieces of currency notes suspected to be fake in denomination of Rs. 1,000/- each, amounting to Rs. 50,000/-, was recovered in a poly bag from the left waist of Sony Sk. @ Titu. Upon search of Abu Sufian Sk., a packet containing 69 pieces out of which 29 pieces of currency notes suspected to be fake in denomination of Rs. 1,000/- each and 40 pieces of currency notes suspected to be fake in denomination of Rs. 500/- each, totalling Rs. 49,000/- was recovered. The total value of the currency notes suspected to be counterfeit was to the tune

of Rs. 2,09,000/-. The said currency notes were seized under a seizure list which was prepared by him, Exhibit 1. He sealed, labelled the bundles and marked them separately as A, B, C and D vis-a-vis the recoveries made from Dolan Sk @ Tuhin, Mithu Sk, Sony Sk. @ Titu and Abu Sufiyan Sk respectively. Upon interrogation, the accused persons admitted their guilt and stated that they were dealing in fake Indian currency notes. P.W. 1 arrested them. Upon return to the police station along with the arrested accused persons and seized articles, he prepared the written complaint and the same was lodged at the police station resulting in registration of the instant criminal case. He, however, was unable to identify the accused persons in Court. He identified the FICNs in Court as Material Exhibits 1, 2, 3 and 4. He also identified the sealed packets and the labels prepared by him to keep the FICNs.

P.W. 2, Hari Gopal Das, P.W. 4, Md. Sajahan Ali and P.W. 5, Arun Kumar Basak were members of the raiding party. They have corroborated the evidence of P.W. 1. They also proved their signatures on the seizure list.

P.W. 3, Swagata Das is a Constable attached to Samsherganj Police Station. On 21.11.2016, he went to Salboni and collected the expert opinion with regard to the seized alamats as per authorisation letter. The expert opinion has been proved as Exhibit 4.

P.W.6, Md. Meser Ali is the Investigating Officer of the case. He deposed that he received the papers and alamats from the duty officer of the police station. He sent the seized FICNs to Reserve Bank Note Mudran Pvt.

Ltd., Salboni for opinion through the A.C.J.M., Jangipur. He collected the expert opinion, Ext.4. He also identified the seized alamats in Court.

From the evidence of the prosecution witnesses particularly P.Ws.1, 2, 4 and 5, it appears that the appellants had been apprehended on 19.09.2016 around 14.30 hrs. at Dhuliyān Ferry Ghat with a large volume of FICNs valued over Rs.2,0,000/-. Evidence of the prosecution witnesses in this regard are clear, cogent and convincing. Cross examination of the witnesses have not elicited any contradiction and/or inconsistency so as to render them untrustworthy. It has been argued that the evidence of the official witnesses are not corroborated by independent witness. Failure to adduce independent witness has been explained by P.W.1. He deposed a number of people had assembled at the place of occurrence when they undertook the search. However, upon request none of them agreed to participate in the search. When the evidence of official witnesses are clear, cogent and convincing and plausible explanation for non-availability of independent witness has been given, the prosecution case cannot be thrown out on the mere ground that the official witnesses did not receive corroboration from independent source. That apart, the ocular version of the official witnesses viz., P.Ws. 1, 2, 4 and 5 are supported by the contemporaneous documents prepared in discharge of official duty viz., seizure list and the envelopes wherein the seized counterfeit notes were kept and the labels parted thereon. All these documents have been duly exhibited and do not show any sign of tampering.

It is argued that the appellants could not be identified in Court by the official witnesses. Identification of the persons has not been seriously disputed during trial. That apart, P.Ws. 4 and 5 have identified the accused persons in Court. Oral and documentary evidence with regard to the apprehension at the place of occurrence have also been proved beyond doubt. Hence, failure of P.Ws. 1 and 2 to identify the appellants in Court does not sound a death knell in the prosecution case particularly when the other members of the raiding party viz., P.Ws. 4 and 5 had duly identified the appellants in Court.

Chain of custody of the seized articles have also been proved. The counterfeit currency notes seized from the appellants were kept in separate envelopes and marked A, B, C and D respectively. The envelopes were labelled and sealed in presence of the accused persons and upon seizure, the articles were handed over at the police station by P.W.1. P.W.5, Investigating Officer collected the seized alamats from duty officer and sent them to Reserve Bank Note Mudran Pvt. Ltd., Salboni through A.C.J.M., Jangipur. P.W. 3 collected the report of the expert under authorisation letter. Report of the expert has been exhibited as Exhibit 4 which shows that the seized currency notes were fake. Thus, the link between the seized alamats and the articles which were examined at Reserve Bank Note Mudran Pvt. Ltd., Salboni has been duly established.

There is, however, some substance in the argument of the appellants that the conviction under Section 489B of the Indian Penal Code is unfounded. It is true that the appellants were found loitering at Dhuliyān

Ferry Ghat carrying large volume of FICNs. Conduct of the appellants in moving around in a public place with a large volume of counterfeit currency notes clearly establishes the fact that they were knowingly transporting FICNs. No explanation was forthcoming from the appellants with regard to the reason or circumstance in which they came into possession of the FICNs. However, the charge in the present case has not been framed with regard to trafficking of counterfeit currency notes.

For better appreciation, the charges framed in the instant case are set out as follows:

“Firstly, that you on 19.06.2016 after 14.30 hrs. at Dhuliyan Ferry Ghat under P.S. Samserganj, Dist. Murshidabad you were found possession fake Indian currency notes of Rs.2,09,000/- consisting of 01 bundle containing 55 pieces of such notes of denomination of Rs.1000/- each possession by Dolon Sk and 01 bundle containing 55 pieces of such notes of denomination of Rs.1000/- each possessing by Mituhu Sk along with another bundle containing 50 pieces of such notes of denomination of Rs.1000/- each possessing by Soni Sk and another bundle containing 29 pieces of such notes of denomination of Rs.1000/- each possession by Abu Sufian Sk with knowledge that the said currency notes are fake Indian Currency Notes and thereby committed the offence punishable u/s. 489B of I.P.C. and which is within the cognizance of this court of sessions.

Secondly, that you on the same date, time and place you were in possession of fake Indian currency notes of Rs.2,09,000/- consisting of 01 bundle containing 55 pieces of such notes of denomination of Rs.1000/- each possession by Dolon Sk and 01 bundle containing 55 pieces of such notes of denomination of Rs.1000/- each possession by Mithu Sk along with another bundle containing 50 pieces of such notes of denomination of Rs.1000/- each possessing by Soni Sk and another bundle containing 29 pieces of such notes of denomination of Rs.1000/- each possessing by Abu Sufian Sk and you were trying to use the same as genuine knowing it fully well that the said currency notes are fake Indian currency notes and thereby you committed the offence punishable u/s 489C of I.P.C. and which is within the cognizance of this court of sessions.”

A plain reading of the aforesaid charges would show that the appellants were charged merely for possession of currency notes and nothing more. When the appellants had not been called upon to answer a charge with regard to trafficking or transportation of currency notes, in my estimation, it would prejudice them and defeat the ends of justice in the event the conviction is recorded on such score. To record conviction of such score, it was incumbent on the part of the trial judge to reframe the charges and give an opportunity to the appellants to answer the same in accordance with law. Trial court singularly failed to discharge this duty and proceeded to convict the appellants for transportation or trafficking of currency notes without re-framing the charge.

I am conscious that the saving provision, namely, Sections 464/465 of the Code of Criminal Procedure which, inter alia, provides no finding, sentence or order ought to be interfered with due to failure to frame or error or omission in charge until and unless the same has occasioned failure of justice.

Section 489B of the Indian Penal Code inter alia makes any one of the following acts viz., selling, buying, receiving, using as genuine or otherwise trafficking in counterfeit currency notes culpable. When separate and distinct acts or illegal omissions independently constitutes a crime, it is incumbent on the Court to indicate which act or illegal omission the accused is charged of in the trial of the offence. In the present case, the accused has been charged merely of “possession” which by no stretch of imagination constitutes any of the aforesaid ingredients of Section 489B of the Indian

Penal Code. Although the evidence on record may show that the accused persons were moving around in a public place with a large volume of FICNs, no charge of transportation/trafficking in currency notes was framed against them. They were never put on notice during trial that they were being accused of “otherwise trafficking in” counterfeit currency notes in addition to “possession” of such notes.

Under such circumstances, without re-framing the charge and giving the accused persons an opportunity to respond to it, to convict the accused persons on the score of trafficking of counterfeit notes clearly prejudiced them. Thus, I am of the opinion that the conviction of the appellants for transportation/trafficking in counterfeit currency notes on the one hand while framing a charge for mere possession on the other hand has amounted to a mistrial and such failure of justice cannot be cured by reference to either Section 464 or Section 465 of the Code of Criminal Procedure.

In this regard, it may be apposite to mention that under similar circumstances, this Court in ***Hoda Sk. Vs. State of West Bengal***¹ held as follows:

“Section 489B of the Indian Penal Code reads as follows:-

“S.489B. Using as genuine, forged or counterfeit currency-notes or bank notes. – Whoever sells to, or buys or receives from, any other person, or otherwise traffics in or uses as genuine, any forged or counterfeit currency-note or bank note, knowing or having reason to believe the same to be forged or counterfeit, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

¹ 2020 SCC OnLine Cal 1478

Analysis of the aforesaid section shows whoever sells, buys or receives from any other person or otherwise traffics in or uses as genuine any forged or counterfeit currency notes or bank notes with the knowledge or reasonable belief that the said notes are forged or counterfeit is said to have committed the offence. Hence, sale, purchase or receipt from any person, or otherwise trafficking in counterfeit currency notes as genuine is a sine qua non of such offence. There is no evidence that the appellants had sold, received or used any counterfeit notes. However, it has been argued on behalf of the prosecution that the appellant was “otherwise trafficking in” counterfeit notes by knowingly transporting a large volume of forged currency notes in a bag through a public road and had reached the ferry ghat when they were apprehended. Hence, he had committed the offence under section 489B of the Indian Penal Code.

What would the expression “otherwise traffics in” mean in the context of aforesaid offence?

*In **K. Hasim Vs. State of Tamil Nadu, AIR 2005 SC 128**, the Apex Court interpreted the object of section 489B of the Indian Penal Code as follows:-*

“42. Similarly Section 489B relates to using as genuine forged or counterfeited currency notes or bank notes. The object of Legislature in enacting this section is to stop the circulation of forged notes by punishing all persons who knowing or having reason to believe the same to be forged do any act which could lead to their circulation.”

Expression “otherwise traffics in” when interpreted in the light of the aforesaid object would include any act undertaken by the accused which would lead to circulation of notes.

In **Black's Law Dictionary, 10th edition, p. 1725**, the word 'traffic' is defined as follows:-

“traffic- 1. Commerce; trade; the sale or exchange of such things as merchandise, bills, and money. 2. The passing or exchange of goods of commodities from one person to another for an equivalent in goods or money. 3. People or things being transported along a route. 4. The passing to and fro of people, animals, vehicles, and vessels along a transportation route.” (emphasis supplied)

Lexicographically the expression 'traffic' means transportation or movement of goods through a route or public road. Interpreting the expression “otherwise traffics in” in section 489B of the Indian Penal Code in that perspective, transportation of a large volume of fake currency notes with the knowledge or reasonable belief that such notes are forged would definitely fall within the penal ambit of section 489B IPC. However, in the present case no charge of transportation of fake currency notes has been framed. On the other hand, charge framed under the head of section 489B of the Indian Penal Code is as follows:-

“Firstly, that you on 10.10.2013 at about 11:05 am at Dhuliyān ferry Ghat under P.S. Samserganj, Dist. Murshidabad you were found possessing fake Indian currency notes of Rs.4,00,000/- consisting of 400 pieces of such notes of denomination of Rs.1,000/- and also found possessing 597 pieces of FICN of denomination of Rs.500/- with knowledge that the said currency notes are fake Indian Currency Notes and thereby committed the offence punishable u/s 489B of I.P.C. and which is within the cognizance of this court of sessions.”

Hence, the appellant had not been called to answer a charge of “otherwise trafficking in” fake currency notes by transporting such notes through a public thoroughfare for commercial use. To convict the

appellant on such score at the appellate stage without reframing the charge would cause prejudice to them and occasion failure of justice. In this factual backdrop, I am constrained to hold that the appellant is entitled to an order of acquittal under section 489B of the IPC in the present case.”

In the light of the aforesaid discussion, I uphold the conviction under Section 489C of the Indian Penal Code and set aside the conviction under Section 489B of the Indian Penal Code.

Coming to the issue of sentence, I note that the trial court had imposed a sentence of rigorous imprisonment for ten years and to pay a fine of Rs. 20,000/- each, in default to suffer simple imprisonment for two years more for the offence punishable under Section 489B of the Indian Penal Code, while no sentence was awarded for the offence punishable under Section 489C of the Indian Penal Code on the plea that the said offence is included in Section 489B of the Indian Penal Code. Be that as it may, as the trial Court has imposed a higher sentence in respect of the graver offence of which I am of the view that the appellants are not guilty, imposition of a lesser sentence by this Court for the minor offence would not prejudice the appellants and no independent rule for imposition of sentence on the score of Section 489C of the Indian Penal Code is necessary.

In the light of the aforesaid discussion, I modify the sentence imposed upon the appellants and direct that they shall suffer rigorous imprisonment for seven years each and to pay a fine of Rs. 20,000/- each, in default to

suffer simple imprisonment for two years more for the offence punishable under Section 489C of the Indian Penal Code.

The appeal is accordingly disposed of.

In view of the disposal of the appeal, all connected applications are also disposed of.

Period of detention suffered by the appellants during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon the appellants in terms of Section 428 of the Code of Criminal Procedure.

Copy of the judgment along with LCR be sent down to the trial Court at once.

Urgent photostat certified copy of this judgment, if applied for, shall be given to the parties, as expeditiously as possible on compliance of all necessary formalities.

I agree.

(Rabindranath Samanta, J.)

(Joymalya Bagchi, J.)