IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:
THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 265 of 2020

SUJOY MONDAL & ANR.
VS.
THE STATE OF WEST BENGAL

For the Appellants	: Mr. Mohan Kumar Sanyal, Adv. Mr. Subhasish Pachhal, Adv. Mr. Dwipayan Sanyal, Adv. Mr. Arunesh Pathak, Adv.
For the Respondent	: Mr. Nequive Ahmed, Adv. Mr. N.P. Agarwal, Adv. Ms. Trina Mitra, Adv.
Hearing concluded on	: 16th November, 2022
Judgement on	: 30th November, 2022

Siddhartha Roy Chowdhury, J.:

1. Challenge in this appeal is to the judgement and order of conviction passed by learned Additional District and Sessions Judge, 3rd Court, Berhampore, Murshidabad in Sessions Case No. 367 of 2018, Sessions Trial No. 2 of 2nd February, 2019.

2. S.I. Subrata Indra of Berhampore Police Station on 17th November, 2017, set the criminal administration of justice into motion by informing the Inspector-in-charge of Berhampore Police Station in writing about the fact that on 17th November, 2017 he along with other police personnel rounded up three persons who were supposed to come to Ranibagan, Bhutia Market in front of Ranibagan Medical Centre

with fake Indian currency notes in their possession and they would exchange the same among themselves. Recording such information in the diary vide Berhampore P.S. G.D. Entry No. 1189 of 17th November, 2017, pursuant to the direction of the Inspector-in-charge of Berhampore Police Station, he alongwith constable Ismail Sk., Village Police Toton Sarkar left the police station for Ranibagan to work out the information by government vehicle no. WB 58T 5096. They arrived at the spot at about 13.45 hours in uniform and waited at Ranibagan More in disguise. At about 14.15 hours two persons were found to have come to Bhutia Market, riding motorcycles registered as WB 58V 1951 and WB 58S 8937 and stopped in front of one person who was waiting at Bhutia Market. The said person gave two bundles of pink colour notes to the motorcycle riders; at that point of time police stepped in and apprehended all the three persons. Police thereafter disclosed their identity and informed them about the reason for which those persons were apprehended. The persons apprehended then disclosed their identity as Sujoy Mondal, Intaj Ali and Obaidul Islam.

3. The informant made an attempt to find out some public witnesses but having found no person willing to be the witness to search, S.I. Subrata Indra offered himself to be searched by the apprehended accused persons one by one. But they refused to do so. Thereafter, Subrata Indra searched the apprehended accused persons one by one in presence of two other police personnel.100 number of fake Indian currency notes in the denomination of Rs. 2000/- found in the right pocket of the pant of the accused person Sujoy Mondal. 99 numbers of

fake Indian currency notes in the denomination of Rs. 2000/- were found from the pocket of accused Intaj Ali and 99 numbers of fake Indian currency notes of denomination of Rs. 2000/- found in the pant pocket of accused Obaidul Islam together with two mobile phones. The accused persons failed to give any explanation for possessing the fake Indian currency notes. However, they admitted before the police officer about their knowledge that those were fake currency notes which they wanted to sell to others for using them as genuine in the market. They also admitted their involvement in the business of trafficking of fake Indian currency notes. The currency notes were seized together with other articles including the motorcycles used by those persons.

4. As the information disclosed offence cognizable in nature Berhampore P.S. case No. 1385 of 2017 dated 17th November, 2017 was registered under Section 489B and 489C of the I.P.C. Police took up investigation which culminated into submission of charge sheet against the accused persons. Charge was framed under Section 489B and 489C of the I.P.C. and pleading their innocence to the charges, the accused persons stood trial.

5. To crown success prosecution examined as many as nine witnesses out of which P.W. 9 is the Investigating Officer and P.W. 1, P.W. 2 and P.W. 3 are police personnel; rest five witnesses did not support the prosecution case. Therefore, the prosecution case rests on the testimony of police personnel.

6. Hon'ble Supreme Court in the case of ***ROHTASH KUMAR VS. STATE OF HARYANA*** reported in **2013 AIR SCW 3208** held:

"The term witness means a person who is capable of providing information by way of deposing as regards relevant facts, via an oral statement, or a statement in writing, made or given in Court or otherwise. In Pradeep Narayan Madgaonkar & Ors. vs. State of Maharashtra, AIR 1995 SC 1930, Hon'ble Supreme Court examined the issue of the requirement of the examination of independent witness and whether the evidence of a police witness requires corroboration. The Court herein held, that the same must be subject to strict scrutiny. However, the evidence of police officials cannot be discarded merely on the ground that they belonged to the police force, and are either interested in the investigating or the prosecuting agency. However, as far as possible the corroboration of their evidence on material particulars, should be sought. Thus, a witness is normally considered to be independent, unless he springs from sources which are likely to be tainted and this usually means that the said witness has caused, to bear such enmity against the accused, so as to implicate him falsely. In view of the above, there can be no prohibition to the effect that police cannot be a witness or that his deposition cannot be relied upon."

7. In ***PROMOD KUMAR VS. STATE*** reported in **2013 AIR SCW 4000** Hon'ble Supreme Court held:-

"The witnesses from the department of police cannot per se be said to be untruthful or unreliable. It would depend upon the veracity, credibility and unimpeachability of their testimony. This Court, after referring to State of U.P. vs. Anil Singh, State of NCT of Delhi vs. Sunil & Anr. And Ramjee Rai & Ors. vs. State of Bihar, has laid down recently in Kashmiri Lal vs. State of Haryana that there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion.

> *Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to be reliable and trustworthy, the Court can definitely act upon the same. If, in the course of scrutinizing the evidence, the Court finds the evidence of the police officer as unreliable and untrustworthy, the Court may disbelieve him but it should not do so solely on the presumption that a witness from department of police should not viewed with distrust. This is also based on the principle that quality of evidence weighs over the quantity of evidence."*

8. Let us now consider the prosecution case in the light of the testimony given by the witnesses who are police personnel or associated with the police, to find out how far they are worth credence in this particular case.

9. S.I. Subrata Indra set the criminal administration of justice into motion by submitting written information while producing three persons before the Inspector-in-charge of the police station together with 298 numbers of fake Indian currency notes in the denomination of Rs. 2000/- along with two motorbikes and mobile phones. The said written information further narrates that Subrata Indra accompanied by Constable Md. Ismail and Village Police Toton Sarkar, left the police station for Ranibagan Bhutia Market to work out a source information in uniform by government vehicle being no. WB 58T 5096 after recording the information in the G.D. Entry book vide G.D. Entry No. 1189 dated 17th November, 2017 with the approval of I.C. Berhampur Police Station. At about 13.45 hrs they reached Ranibagan Bhutia Market, around 14.15 hours two persons were found coming by riding

two motor cycles and they stopped in front of one person waiting at Bhutia Market. The witnesses P.W. 1, P.W. 2 and P.W. 3 noticed the person standing at the Bhutia Market was giving two bundles of pink colour notes to the two motor bike riders and Subrata Indra together with his companions arrived there, disclosed identity and informed them about the ground of their apprehension. In the written information Subrata Indra stated that those three persons admitted that they were quite alive to the fact that they were possessing fake currency notes, even they disclosed their intention to sell those notes to others for using them as genuine. They further made an admission regarding their involvement in trafficking the fake currency notes for past few years. Those notes were seized along with motorcycles and mobile phones from the spot.

10. As P.W. 1, Toton Sarkar stated that on 17th November, 2017, he accompanied Subrata Indra of Berhampur Police Station to Ranibagan Bhutia Market where three persons assembled and 298 numbers of fake currency notes were recovered from the possession of those three persons. Those notes were seized on the spot. At that point of time no other person was available at the place of occurrence. During cross examination he stated that after reaching the place of occurrence they came to know that three persons were carrying fake currency notes and they were nabbed by 'Sir'. Mejo Babu showed the currency notes recovered from the possession of those three persons. This evidence shows that P.W. 1 did not have any direct knowledge about the alleged

incident of recovery of currency notes from the possession of the accused persons. He saw what was shown to him by “Mejo Babu”.

11. P.W. 2, Constable Md. Ismail claimed to have accompanied S.I. Subrata Indra to Ranibagan Bhutia Market around 5.30 p.m. According to P.W. 2, “Subrata Indra stopped three persons asked their name, after that Indra Babu searched them and recovered currency notes in the denomination of Rs. 2000/.” During cross examination this witness stated that the place was a bazaar but no person was present there at that point of time.

12. P.W. 3 is the S.I. Subrata Indra who stated to have seen the person who was standing at Bhutia Market beforehand, two persons came by riding two motor cycles and the man gave two bundles of pink colour notes and soon thereafter those three persons were apprehended. P.W. 3 challenged them for possessing fake Indian currency notes. Thereafter, search was made and 298 numbers of fake currency notes were recovered from three of them. P.W. 3 further stated that he interrogated those three persons and came to know that they were alive to the fact of possessing fake currency notes. Those persons were brought under arrest to the police station.

13. Sadhan Das, P.W. 4, Bharat Mondal, P.W. 5, Ananta Bairagi, P.W. 6, Nasib Sk., P.W. 7 and Goutam Chakraborty, P.W. 8, these five witnesses were examined by the public prosecutor in the light of the Section 154 of the Evidence and I.O. as P.W. 9 also claimed to have examined local witnesses and recorded their statement but all these five witnesses P.W. 4 to P.W. 8 denied to have stated before the

Investigating Officer that on 17th November, 2017 at about 5.00 p.m. one police officer of Berhampur Police Station, Subrata Indra with some police personnel arrested the accused persons for possessing fake currency notes amounting to Rs. 5,96,000/- from Ranibagan Bhutia Market.

14. The testimony of these five witnesses indicates that no person other than three police personnel witnessed the factum of arrest, recovery and seizure of incriminating notes. It is further established that whatever information P.W. 3 claimed to have gathered, he gathered by interacting with or interrogating the accused persons. At this juncture we may consider the provision of Section 25 and 26 of the Evidence Act.

15. Section 25 of the Evidence Act envisages:-

> *"25. Confession to police officer not to be proved.—No confession made to a police officer, shall be proved as against a person accused of any offence.*

16. Section 26 of the Evidence Act envisages:-

> *"26. Confession by accused while in custody of police not to be proved against him.—No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. [Explanation.—In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George [***] or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882)]."*

17. Admission is defined under Section 17 of the Evidence Act which says:-

> *"An admission is a statement, oral or documentary or (or contend in electronic form), which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons and under the circumstances, hereinafter mentioned."*

18. The term 'confession' though has not been defined in the Evidence Act, 1872, but from the definition it may be inferred as something made by the person charged with any criminal offence or in other words it can be said that confession is an admission by the accused person in a criminal proceeding.

Section 25 of the Evidence Act raises an embargo as regards proof of confession before a police officer whereas Section 26 creates an embargo with regards to admissibility of any statement in the nature of confession made by an accused in the custody of a police officer, although such confession may be made before any person who is not a police. It cannot be made admissible unless it is made in immediate presence of any Magistrate.

19. In view of Section 25 of the Evidence Act the admission or confession before the police personnel is inadmissible. The P.W. 3, S.I. Subrata Indra in his oral testimony told that having found the transaction of currency notes pink in colour they apprehended those three persons and disclosed their identity as police persons. Thereafter on interrogation P.W. 3 was told by the persons apprehended about the face currency notes in their possession, their intention to sell the notes

and use the forged notes as genuine one. It goes without saying that in such situation; in view of Section 26 of the Evidence Act, confession made by the accused person cannot be proved against such persons as it was not made in presence of a Magistrate.

20. Of course, information received from the accused persons would have been relevant under Section 27 of the Evidence Act but in a different context, if the statement made by the accused while in custody of police would have led towards discovery of currency notes.

21. But in this case the police officer S.I. Subrata Indra knew that the accused persons were carrying fake currency notes and he also seen the accused persons dealing with pink colour notes.

22. The entire prosecution case with regard to possession of FICN and the intention of the accused persons to sell the same or use the same as genuine is based on the oral testimony of three witnesses who are members of police force. Thus the order of conviction appears to have been passed relying upon absolutely inadmissible evidence.

23. Evidence is required to be considered from the point of view of human probability. In his oral testimony as well as in the written information S.I. Subrata Indra stated that he along with Village Police Toton Sarkar and Constable Md. Ismail went to the place of occurrence by the government vehicle, they were in uniform but he saw those three persons trading pink colour notes and they were caught red handed. This statement indicates that they were standing in a proximate distance so as to identify the notes by colour. But they were not visible to the accused persons. When they proceeded towards those

three persons no attempt was made by any one of them to flee from the place of occurrence even though two of them were on motorcycles.

24. From the testimony of P.W. 1 we find that he was told by the Mejo Babu about the recovery of fake currency notes which indicates that P.W. 1 was not with the other two persons P.W. 2 and P.W. 3, otherwise he would have witnessed everything by himself. Therefore, three persons having found two police personnel would have easily fled away at least one out of those three could have escaped the arrest. But no such thing had happened. P.W. 2, Constable Md. Ismail went one step further to say that they went to the place of occurrence at about 5.30 p.m. while the alleged incident took place, according to P.W. 3 at about 2.15 hours and from the written information Exhibit-5 we find that the entire process of search, recovery, seizure of currency notes continued from 14.15 hours till 17 hrs. The endorsement on the written information however, does not indicate any time as to when the information was given but from the First Information Report Exhibit 11 we find that the information was received at about 18.45 hours i.e. one hour forty five minutes after the alleged incident. While those three witnesses covered the distance between the police station and place of occurrence by forty five minutes, when they came there. Lack of coherence, in the testimony of P.W. 1, P.W. 2 and P.W. 3 makes the prosecution case doubtful. Be that as it may let us now consider the culpability of the appellants in the light of the provision as laid down under Section 489B and 489C of the I.P.C.

25. Section 489B of the I.P.C. envisages:-

"Section 489B in The Indian Penal Code

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 2[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."

Thus, to constitute an offence within the meaning of Section 489B of the Indian Penal Code following facts are required to be established:- The person charged with the offence should be selling, buying, receiving, otherwise trafficking or using the counterfeit currency notes or bank notes having reason to believe or having knowledge that those notes are forged or fake.

26. In the case of ***UMASHANKAR VS. STATE OF CHATTISGARH*** reported in **AIR 2001 SC 3074** Hon'ble Supreme Court held:-

"Apart from the alleged admission/ confession of the accused person no material is brought on record by the prosecution, to show that the appellants had requisite mens rea to commit the offence within the meaning of Section 489B and 489C of the Indian Penal Code. Mens rea of offences under Section 489B and 489C is "knowing or having reason to believe the currency notes or bank notes to be 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 bank notes, is not enough to constitute offence under Section 489B of the I.P.C."

27. Here the intention of the appellants unveiled before the Court though the testimony of P.W. 3, Sub-Inspector of Police Subrata Indra before whom the appellants disclosed such intention after arrest and such disclosure is not admissible in evidence.

28. Section 489C of the I.P.C. envisages:-

> *"Section 489C in The Indian Penal Code*
>
> *489C. Possession of forged or counterfeit currency-notes or bank-notes.—Whoever has in his possession any forged or counterfeit currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both."*

29. In order to prove a charge/prosecution is to establish that under Section 489C of the Indian Penal Code the accused persons had in their possession forged or counterfeit currency notes or bank notes and had knowledge or reason to believe that the notes were counterfeit and at the same time they had the intention to use the same as genuine or may be used them as genuine.

30. In ***BUR SINGH VS. EMPEROR*** reported in **AIR 1931 Lah 24**, the Hon'ble High Court held:-

> *"It should be borne in mind that mere possession of forged notes is not an offence under the Indian Penal Code. In order to bring a case within the purview of Section 489C of I.P.C., it is not only necessary to prove that the accused was in possession of forged notes, but it should be established:* (a)

> *that at the time of his possession he knew the notes to be forged or had reasoned to believe them to be so; and (b) that he intended to use them as genuine or that they might be used as genuine.”*

The knowledge or intention of the accused persons, in this particular case is coming to the fore from the written information and from oral testimony of P.W. 3 who stated that the accused persons told him about their knowledge of having the fake currency notes in their possession and they had the intention to sell those notes, which, with the risk of repetition, I would say, is not admissible under the Evidence Act.

31. P.W. 3 claimed to have left the police station in order to work out a source information that three persons would come to the place of occurrence with fake Indian currency notes and having found them taking pink colour currency notes, he claimed to have challenged those three accused persons by saying that they were carrying FICN.

32. In the impugned judgement, learned Trial Court observed that three accused persons were actively involved in trafficking fake currency notes. It turned out to be an “undeniable fact”. Then again learned Trial Court held “Prosecution witnesses are found trustworthy, believable and corroborative in material particulars”.

33. “To sum up, I find that the evidence is clear, cogent, consistent and convincing and there no room to the credibility of the prosecution witnesses. Prompt and spontaneity of the FIR supports the eyewitness account and thus affirms the story of prosecution. Thus, the prosecution has successfully proved all the ingredient of offence

punishable under Section 489B and 489C of the I.P.C. against the three accused persons namely Sujoy Mondal, Intaj Ali and Obaidul Islam beyond doubt.”

34. I do not find from the judgement impugned the reason that inspired the learned Trial Court to ignore the provision of Section 25 or 26 of the Evidence Act. It is the golden principle of criminal jurisprudence that prosecution is under obligation to prove the charges beyond reasonable doubt. Learned Trial court not only failed to consider the evidence carefully; for all practical purposes learned Trial Court has thrown upon the appellants, the onus of proving that they do not have the intention to palm off the currency notes as genuine.

35. In my humble opinion, the testimony of all three police personnel is not found to be reliable and trustworthy. On the contrary evidence of P.W. 1, P.W. 2 and P.W. 3 are found to be absolutely inadmissible. The impugned judgement passed by learned Trial Court suffers from infirmity and if it is allowed to remain in force it would amount to miscarriage of justice.

36. Therefore, I am inclined to set aside the judgement passed by learned Trial Court. Charges against the appellants cannot be said to have been proved beyond reasonable doubt by the prosecution. The accused/appellants are found not guilty to the charges under Section 489B and 489C and they be set at liberty and be released from bail bonds. Property seized other than 298 numbers of FICN be returned to the persons from whom seized.

37. Let a copy of this judgement be sent down along with lower Court record to the learned Trial Court for information and necessary action.

38. Parties are to act on the server copy of this judgement.

39. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)