

(2024) 05 CAL CK 0038

In the Calcutta High Court

Case No : Criminal Appeal (SB) No. 169 Of 2023

Majibar @ Mujibor Rahaman & Anr.

APPELLANT

Vs

State Of West Bengal Anr.

RESPONDENT

Date of Decision : 22-05-2024

Acts Referred:

Indian Penal Code, 1860 — Section 34, 489A, 489B, 489C

Evidence Act, 1872 — Section 114

Code Of Criminal Procedure, 1973 — Section 437A

Citation : (2024) 05 CAL CK 0038

Hon'ble Judges : Bibhas Ranjan De, J

Bench : Single Bench

Advocate : Sekhar Basu, Shyanti Poddar, Debasish Roy, Anand Keshari

Final Decision : Allowed

Judgement

Bibhas Ranjan De, J

Preface:-

1. The appeal impugns the judgement and order of conviction dated 17.08.2023 & 18.08.2023 respectively passed by the Additional Session Judge, 4th Court, Berhampore, Murshidabad in Sessions Trial No. 01(July)/ 2012 arising out of the Sessions SL. Case No. 421/2009 wherein the appellants were convicted as under:-

489C of the Indian Penal Code (for short IPC)

Six years rigorous imprisonment and fine of Rs, 10,000/- in default further R.I. for 3 months.

Fact in laconic:-

2. On 12.07.2007 at about 16.45 hours the police received credible information from source to the effect that three persons being carriers/ dealers and sellers of Fake Indian Currency Note(for short FICN) are coming to Berhampore with huge

quantity of FICL to channelize those to open market through their agents in exchange of money for unlawful gain. The police personnel under the leadership of Inspector Bibhas Ganguly, Detective Department, Murshidabad (for short DD) took note of the same and proceeded to Chuapur More on NH 34. At the place of occurrence (for short P.O.) the police requested two persons namely Ashim Sarkar and Ramananda Singh to act as public witnesses and accompany them during raid. Thereafter, an ambush was laid near the P.O. at around 17.10 hours when the three persons were coming from the opposite direction along side NH34 and assembled at P.O. where they were encircled by the raid party. After disclosing their identity Inspector Ganguly searched the accused/appellants in presence of local witnesses and recovered 49 pieces of FICN of Denomination of Rs. 1000/- from the chest pocket of appellant (for short A) no. 1 and 101 pieces of FICN of Denomination of Rs. 500/- was recovered from the chest pocket of A2 and 80 pieces of FICN of Denomination of Rs. 500/- was recovered from the chest pocket of another accused. The total value of FICN recovered was Rs. 1,39,500/-. Inspector Ganguly seized all these FICN from the exclusive possession of the accused and separately kept it in 3 envelopes with proper label. After that the accused/appellants were arrested and accordingly a suo motu case was initiated by the Police being Berhampore Police Station Case No. 310 of 2007 dated 12.07.2007 under Sections 489A/489B/489C/34 of the IPC against all the accused persons including the appellants herein.

3. On completion of investigation police submitted charge sheet against the accused under Sections 489B/489C/ 34 of IPC.

Charges:-

4. On 19.03.2009 the case was committed to the Court of Ld. Sessions Judge, Murshidabad which in turn was transferred to the Court of Ld. Additional Sessions Judge, 4th Court Berhampore, Murshidabad for disposal.

5. On 20.07.2012 charges were framed against all the accused persons under Sections 489B/489C of the IPC to which they pleaded not guilty.

Trial:-

6. Prosecution examined five witnesses namely S.I. Gopal Mukherjee as PW1, Ashim Sarkar @ Bumba as PW2, Dostur Ajim (ASI of Police) as PW3, Babbar Sk. As PW4 and Ramananda Singh as PW5.

7. A good number of documents were admitted in evidence as exhibit 1 to 10 including the forensic examination report, all FICN and envelope and also signatures of the witnesses on the seizure lists.

Trial Court findings:-

8. After evaluation of evidence in its entirety Ld. Judge opined that the seizure of FICN from the possession of accused person had been proved beyond shadow of reasonable doubt. Ld. Judge ignored the issue of non-examination of

investigating officer as well as complainant relying on ocular evidence of eye witnesses. Ld. Judge also ignored the identification of the accused by the public witnesses assigning reason that it was quite natural for a person to fail to identify another person after lapse of 5 years of the incident. Accordingly, appellants were found guilty of committing offence punishable under Section 489C of the IPC.

Argument Advanced:-

9. Ld. Counsel, Mr. Sekhar Basu, appearing on behalf of the appellants mainly advanced two folds arguments:-

- Non-examination of complainant and the I.O. is fatal to the prosecution case.
- Moreover, PW2 and PW5 (seizure list witnesses) failed to identify the accused persons.
- PW5 neither supported the seizure nor ratified the identity of the accused on Dock. He also could not disclose as to why his endorsement was made on the seizure list.
- FIR was also not exhibited by prosecution during trial which makes the entire trial doubtful.

10. Mr. Basu in order to further substantiate his argument has relied on the following cases:-

- Jiban Sasmal Vs. The State of West Bengal reported in 1987(II) CHN
- Saroj Kumar Das Vs. State of West Bengal reported in (2016) 4 C Cr LR (Cal) 14
- Md. Morful Haque State of West Bengal reported in (2017) 2 C Cr LR (Cal) 441.
- Rajen Chhetri Vs. State of West Bengal reported in (2017) 4 E Cr.N (Cal) 215
- Sk. Asgar @ Puja Hizra State of West Bengal and SK. Sabbir Ali @ Sk. Sabir Ali @ Sabbir Ali Vs. The State of West Bengal reported in (2018) 4 C Cr Lr (Cal) 491.

11. From the cases referred above, Mr. Basu has mainly highlighted the following ratios in order to swing the attention of the Court in his favour which are as follows:-

- Mere possession of any forged or counterfeit currency notes or banknotes, knowing or having reason to believe the same to be so, is not sufficient in as much as the Section itself provides that possession coupled with intention to use the same as genuine is required to be satisfied in order to uphold the conviction under Section 489C of the IPC.
- Non-examination of the I.O. during the trial creates serious prejudice to the defence if no satisfactory explanation is given or even attempted for such

omission.

- If the chain of circumstances necessary to establish the offence is not established on the ground that the independent witnesses did not support the case of prosecution then such conviction is not maintainable.
- In the absence of deposition of the defacto complainant his findings cannot be treated as substantive and admissible evidence to connect the accused to the alleged crime.

12. On behalf of the State the arguments advanced on behalf of the appellants has been repelled.

The Court :-

13. Before delving into the merit of this appeal, it would be profitable to recall the duties of the appellate court as observed by the Hon'ble Apex Court in *Ishvarbhai Fuljibhai Patni vs. State of Gujrat* reported in {1995 supreme Court Cases (CrI) 222} in paragraph 4 as follows:-

"4. Since, the High Court was dealing with the appeal in exercise of its appellate jurisdiction, against conviction and sentence of life imprisonment, it was required to consider and discuss the evidence and deal with the arguments raised at the bar. Let alone, any discussion of the evidence, we do not find that the High Court even cared to notice the evidence led in the case. None of the arguments of the learned counsel for the appellant have been noticed, much less considered and discussed. The judgment is cryptic and we are at loss to understand as to what prevailed with the High Court to uphold the conviction and sentence of the appellant. On a plain requirement of justice, the High Court while dealing with a first appeal against conviction and sentence is expected to, howsoever briefly depending upon the facts of the case, consider and discuss the evidence and deal with the submissions raised at the bar. If it fails to do so, it apparently fails in the discharge of one of its essential jurisdiction under its appellate powers. In view of the infirmities pointed out by us, the judgment under appeal cannot be sustained. We, therefore, accept the appeal, set aside the judgment of the High Court and remand the case to the High Court for its fresh disposal after hearing the appeal on merits in accordance with law.

We clarify that we have not gone into the merits of the case and no observation made by us shall be construed as any expression of opinion on the merits of the case."

14. This is a case of seizure of FICN from the possession of the appellants. In order to prove the charge under Section 498(B)/498 (C) of the IPC prosecution examined 5 (five) witnesses in all.

15. From the evidence of PW1 it appears that at the relevant point of time he was sub inspector of police attached to DD Murshidabad at Berhampore. On 12.07.2007 he along with others proceeded to a place namely Chuapur More

under the leadership of inspector Bibhash Kumar Ganguly who received a source information that few men were coming to Berhampore from Malda with FICN. The raid party was accompanied by two witnesses as well. Said inspector Bibhash Kumar Ganguly intercepted three persons including the appellants. After observing all formalities of search, Inspector Ganguly seized certain FICN which are already mentioned above. Then those seized notes were kept in three sealed envelopes and labels were pasted on them.

16. In his cross examination, PW1 stated that he did not lodge any G.D. before leaving the office to work out the source information. He could not recollect the particulars of the two public witnesses. He further stated that although he prepared a note sheet containing the numbers of the recovered FICN but he did not handover that note sheet to the I.O.

17. PW2, Public witness, has testified that he remained present at the time of seizure of the FICN from the possession of three persons including the appellants after they were intercepted by the CID personnel. He proved his signatures on all FICN and on the seizure list. Albeit he refrained from categorically identifying the accused from whom the FICN were found.

18. In cross examination PW2 stated that 30 to 40 persons assembled at the P.O. and also there were many shops in the said building and also in and around that area. He admitted that his house was just beside the office of CID, Murshidabad although he denied having any acquaintance with the CID Officers.

19. PW3/ASI, who was a member of the raid party in his examination in-chief corroborated with the statements made by the PW1 with regard to the factum of seizure and also the place of occurrence.

20. In his cross-examination, PW3 stated that he was unable to show any document to prove that he was accompanying the raid party that day to work out the source information and in addition to that he admitted that he did not put his signature on the seizure list.

21. PW4, manager of the tyre shop near the P.O. deposed that CID personnel apprehended the accused in front of the P.O. and disclosed that FICN worth about Rs. 1,40,000/- was found from the accused including the appellants. He did not put his signature on the seizure list and thereafter he returned to his shop.

22. PW5, public witness in his evidence testified that on the relevant date he visited the P.O. for some personal purposes and upon reaching he noticed that there was a commotion between the CID personnel and the accused in respect of FICN. Though he corroborated the seizure of FICN and put his signature on the seizure list but he was unable to ascertain the exact numbers of the denomination of the FICN seized. He also could not identify the accused.

23. In his cross examination PW5 deposed that he had no idea with regard to why he had to put his signatures on those papers or in which papers he signed or

for what purpose he had to sign and in addition to that he could not state the purpose or whom he was visiting at the concerned P.O. at the relevant date and time.

Evaluation of Evidence:-

24. According to prosecution case, Inspector Ganguly received one source information and to work out that information the raid party (PW1 & PW3) under leadership of Inspector Ganguly reached the P.O., ambushed there and ultimately apprehended the accused including the appellants and seized FICN from the possession of those accused. PW1 testified that Inspector Ganguly lodged G.D. after returning to office. It is pertinent to mention here that no copy of G.D. has been admitted in evidence in order to prove the action of raid party on receipt of source information.

25. Entire seizure was made, as it appears from the evidence, by one inspector Bibhash Kumar Ganguly who has not been examined in this case. From the evidence it appears that at the relevant point of time 30 to 40 persons assembled over there and P.O. is surrounded by a lot of shops but none of those persons or any of the shop keepers was made a witness to the seizure. Two seizure witnesses (PW2 & PW5) could not satisfy the reason of their presence at the scene of occurrence on the alleged date. PW2, Hawker, was asked to be seizure witness who is not a localite rather his house is adjacent to the CID office, Murshidabad. On the other hand, another public witness (PW5) could not satisfy the purpose of his appearance at the scene of occurrence at the relevant date. In addition to that neither of the seizure witnesses/public witnesses could identify the accused/appellants.

26. Thereby, prosecution could not explain as to why Inspector Ganguly, leader of the raid party chose PW2 & PW5 as seizure witnesses instead of any local credible witness.

27. None of the witnesses could explain that where those three seized envelopes were kept prior to sending of it to the CFSL for expert opinion. Such explanation could have been given either by Inspector Ganguly or Investigating Officer of this case. Unfortunately, neither of them were examined causing considerable prejudice to the accused/appellants.

28. It is settled that non-examination of I.O. would not render the prosecution case fatal unless prejudice is caused to the accused.

29. In view of the aforesaid facts and circumstances, I would like to rely on a celebrated judgement of Habeeb Mohd. V. State of Hyderabad reported in (1953) 2 SCC 231 wherein Hon'ble Apex Court handed down the following ratio in paragraph 13:-

"13. In this situation it seems to us that Biabani who was a top ranking police officer present at the scene was a material witness in the case and it was the bounden duty of the prosecution to examine him, particularly when no allegation

was made that if produced, he would not speak the truth; and, in any case, the court would have been well advised to exercise its discretionary powers to examine that witness. The witness was at the time of the trial in charge of the Police Training School and was certainly available. In our opinion, not only does an adverse inference arise against the prosecution case from his non-production as a witness in view of Illustration (g) to Section 114 of the Evidence Act, but the circumstance of his being withheld from the court casts a serious reflection on the fairness of the trial. It seems to us that the appellant was considerably prejudiced in his defence by reason of this omission on the part of the prosecution and on the part of the court. The reasons given by the learned Judge for refusing to summon Biabani do not show that the Judge seriously applied his mind either to the provisions of the section or to the effects of omitting to examine such an important witness. The terms in which the order of the Special Judge is couched exhibit lack of judicial balance in a matter which required serious consideration."

30. In *Habeeb Mohd* (supra) the Hon'ble Apex Court pointed out that it is the duty of the prosecution to examine all material witnesses who could give an account of the narrative of the events on which the prosecution is essentially based. In my opinion, appellants were considerably prejudiced by the omission on the part of the prosecution to examine the complainant (Inspector Bibhash Ganguly) and Sub Inspector Sk. Jamal Hossain who investigated this case in the circumstances of this case. Conviction of appellants, in my humble opinion, based on the testimony of the CID personnel (members of raid party), in the absence of Inspector Ganguly who was admittedly present on the scene and acted as recovery officer, cannot be said to have been arrived at after a fair trial, particularly when no satisfactory explanation has been given or even attempted for this omission.

31. In the premises set forth above, the judgement and order of conviction dated 17.08.2023 & 18.08.2023 respectively passed by the Ld. Additional Session Judge, 4th Court, Berhampore, Murshidabad is hereby set aside

32. As a sequitur, the present appeal being no. CRA (SB) 169 of 2023 is hereby allowed.

33. As a sequel, both the appellants are found not guilty and are thereby acquitted of the charges framed against them and be set at liberty at once subject to furnishing a bond of Rs. 50,000/- each with two registered sureties of Rs. 25,000/-each to the satisfaction of Ld. CJM Berhampore on condition to appear before the Higher Court as and when such Court issues notice in respect of this appeal filed against this judgement and such bail bonds shall be in force for six months from date in terms of the provision of Section 437A of the Code of Criminal Procedure.

34. Pending applications, if there be any, stand disposed of accordingly.

35. Trial Court Record be transmitted back immediately.

36. All parties to this revisional application shall act on the server copy of this order downloaded from the official website of this Court.

37. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.