

(1977) 08 BOM CK 0006
In the Bombay High Court

The State of Maharashtra

APPELLANT

Vs

Abid Husen Sahib Husen

RESPONDENT

Date of Decision : 22-08-1977

Acts Referred:

Penal Code, 1860 (IPC) — Section 115, 34, 420

Citation : (1978) CriLJ 429

Hon'ble Judges : Naik, J

Bench : Single Bench

Judgement

Naik, J.—This is an appeal by the State challenging the order of .the learned Judicial Magistrate, First Class, Dhulia, dated 16th Aug. 1974 acquitting the accused who was charged along with two others for an offence u/s 420 read with Sections 34 and 511 of the IPC

2. Briefly stated the allegations on which the prosecution was founded are these: On 5th March 1974 between 4.00 and 4.30 p.m., Mr, Chandrakant Bharati (P.W. 1) the Office Superintendent of Vidhya Vardhini College, Dhulia, Mr. Deshpande (P.W. 2) a Chartered Accountant who was working as a part-time Professor in the said college and Professor Jain and Librarian Suryavanshi were sitting in the office of the college at Dhulia. At that time respondent-accused No. 1 entered the office and asked these persons viz. Bharati and Deshpande as to whether they wanted cement. It may be mentioned that at that time construction of some portion of the college premises was in progress. Mr. Deshpande gave a reply in the affirmative and they asked the accused from where he had brought it and the accused replied that he had some work at Sakri and that after finishing that work about 50 bags had still remained with him for disposal. The accused further stated that the cement was of A.C.C. Company. They asked the accused about the rate. The accused initially quoted the rate at Rs. 18/- per bag but came down to Rs. 15/- per bag. It may be mentioned that at that time the market rate was Rs. 25 to 30 per bag. That is why both Bharati and Deshpande became suspicious. Both Bharati and Deshpande asked the accused as to how he could

afford to sell at a cheaper rate. The accused-respondent replied that he was selling the cement at a cheaper rate to the educational and religious institutions. Another reason which tW .accused gave was that because he was short of money for storing the cement he was selling at a cheaper rate. That again aroused the suspicion of these gentlemen. The accused, however, called Bharati and Deshpande to see the cement which according to him was loaded in a lorry which was parked in front of the college on the Nagpur-Dhulia road. That is why at the instance of the accused Mr. Bharati and Mr. Deshpande, Mr. Jain and Mr. Suryavanshi together went near the lorry. Accused Nos. 2 and 3 who were driver and cleaner of the lorry were present there. Accused No. 1 showed the cement which was in the lorry. He also showed some sample. But Mr. Deshpande did not feel that it was cement. On the other hand he suspected that- it might be stone powder. Accused No. 1 said that they can show the cement to their mistry. He also asked for a bearer cheque from Mr. Deshpande and offered to bear the commission charges. Thereafter , Deshpande and Bharati returned to the college office and Deshpande rang up the police station and informed P.S.I. Mohamad Altaf Ahmedi {P.W. 7) that one truck was parked in front of the college and that the owner was representing that it was loaded with cement and that he himself suspected that it was not genuine cement. That is why P.S.I. Ahmedi went to the college. He contacted M/s. Deshpande and Bbarati and the accused. The accused then produced one receipt from R. Hiralal and Sons" issued in his name. The P.S.I, then attached the bags and the accused stated to him at that time that the bags contained stone powder. A sample of the contents of the bag was also taken and sent to the Chemical Analyser. The Chemical Analyser reported that it was not cement but stone powder. On these facts, the accused, his driver and cleaner were all prosecuted for an offence u/s 420 read with Sections 34 and 511 of the I.P.C.

3. All of them pleaded not guilty to the charge. So far as accused No. 1. the present respondent is concerned, he admitted of his having gone to the college office and contacted the prosecution witnesses Bha-rati and Deshpande. His defence is that he did not represent to them that he had cement to sell and that on the other hand he had told them that he had stone powder to be sold. When asked as to why they should falsely depose against him he stated that the prosecution witnesses Bha-rati and Deshpande had demanded the cement on credit, and, therefore, they have falsely involved him.

4. For proof of its case against the accused the prosecution examined Mr. Bharati (P.W. 1), the Office Superintendent of the College, and Prof. Deshpande (P.W. 2). The prosecution also examined P.S.I. Mohamad Altaf and Head constable Rajaram Shinde, and the panchas.

5. The learned Magistrate having regard to the fact that there is no conceivable reason for Mr. Bharati and Prof. Deshpande to depose falsely against the accused did hold as a fact that the accused had offered to sell cement and not stone powder as he would have the Court believe. However as Mr. Bharati has stated in

answer to the Court question that if in fact it were cement the same would not have been purchased as they never intended to purchase, the learned Magistrate held that no offence of attempt to cheat was committed by observing as under at the end of para 6 of his Judgment:

I would have understood the evidence of Bharati and Deshpande if they really had a desire and intention to purchase cement. In fact here we find that accused No. 1 casually happened to meet them and then the trouble to him started. In fact the evidence disclosed that the two witnesses were not at all interested in cement and therefore to my mind the question of cheating them by representing to them stone powder to be cement does not arise at all for even if it was genuine cement the witnesses would not have purchased it.

6. It is in that view of the matter that he acquitted the accused.

7. The correctness of that judgment and order is challenged by the State by filing this appeal.

8. Mr. Damle, learned Public Prosecutor has assailed the reasoning of the learned Magistrate by relying on the judgment of the Supreme Court reported in Bashirbhai Mohamedbhai Vs. The State of Bombay, Mr. Naik however, supported the reasoning of the learned Magistrate.

9. It would appear from the facets found which could not be disputed before me that the accused did approach the prosecution witnesses in the office of the College and did represent to them that he had cement to sell and that he justified the low price quoted by him on the ground that because it was an educational institution and also because he was short of funds for storing the cement he was offering a lower price. There is absolutely no reason for me to suspect the testimony of respectable witnesses Bharati and Deshpande who are absolute strangers to the accused. If their evidence is accepted as I do, it would appear that the accused tried his best to cheat the witnesses and but for the fact that they felt suspicious and contacted the police he would have succeeded in cheating Mr. Deshpande from whom he even asked for a bearer cheque. The reasoning of the learned Magistrate that because they had no intention to purchase cement even if it were genuine cement no attempt to commit the offence of cheating is committed is not correct in law having regard to the decision of the Supreme Court in Bashirbhai Mohamedbhai Vs. The State of Bombay, Their Lordships have observed in para 5 of that judgment as under:-

The last point argued was that there was no attempt to cheat because the complainant had not been deceived. It is true that the complainant had not been taken in. He had never believed that the accused could actually duplicate currency notes. He feigned belief only in order to trap the accused. That however clearly makes no difference so far as an attempt to cheat is concerned. The accused had attempted to cheat the complainant. That they had failed in their attempt is irrelevant in considering whether they had committed the offence of attempting to cheat. This view of the matter has been accepted in the High

Courts uniformly. In *Goyt. of Bengal v. Umesh Chunder Mit-ter* ILR(1889) Cal 310 , it was observed that

A man may attempt to cheat, although the person he attempts to cheat is forewarned, and is therefore not cheated.

10. Having regard to the above view of the law, the fact that the complainant was not deceived in fact is immaterial for the offence u/s 420 read with Section 511 of the IPC Differing therefore from the view of the learned Magistrate, it must be held that the accused has in fact committed an offence u/s 420 read with Section 511 of the Indian Penal Code.

11. Coming to the question of sentence, it would appear that the accused wanted to dispose of 50 bags of stone powder at the rate of Rs. 15/- each on the representation that it was cement. The incident has occurred more than three years back. Under the circumstances, I think that a sentence of one month's rigorous imprisonment and a fine of Rs. 500/- will meet the requirements of the case.

12. In the result, the appeal is allowed. The order of acquittal of the accused dated 16th Aug. 1970 is set aside. The accused-respondent is convicted u/s 420 read with Section 511 of the IPC and is sentenced to R.I. for one month and to pay a fine of Rs. 500/- in default to suffer R.I. for one week.