THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

S.B.: HON'BLE MR. JUSTICE SATISH K. AGNIHOTRI, CJ.

Crl. A. No. 07 of 2016

Sunil Rai,
Son of Late Hari Rai,
Resident of Sanchari Bazar,
Ward No. 1, Jhapa,
Nepal.

... Revisionist

versus

State of Sikkim

... Respondent

Appeal under Section 374 (2) of the Code of Criminal Procedure, 1973.

Appearance:

Mr. S.S. Hamal and Ms. Dechen Bhutia, Advocates for the Appellant.

Mr. Karma Thinlay, Additional Public Prosecutor with Mr. Santosh Kr. Chettri and Ms. Pollin Rai, Assistant Public Prosecutors for the State.

J U D G M E N T
(26.09.2016)

Satish K. Agnihotri, CJ

The instant Appeal, filed under Section 374 (2) of the Code of Criminal Procedure, 1973 (for short "Cr. P.C."), is directed against the conviction and sentence vide judgment dated 29.12.2014, whereunder and whereby the appellant was held guilty of offences committed under Sections 489-B and 489-C of the Indian Penal Code, 1860 (for short "IPC") and sentenced to undergo simple imprisonment for a period of 5 (five) years and to pay a fine of Rs.5000/- under Section 489-B IPC and further to undergo simple imprisonment for a period of 2 (two) years under Section 489-C IPC. In default to make the payment of fine, he was further directed to undergo simple imprisonment for a period of 2 (two) months.

2. Provenance of the case leading to the trial and conviction of the appellant/convict as aforestated is that the appellant/convict went to the shop of one Riwan Muslim at Nayabazar, Gyalshing to purchase recharge voucher for his mobile phone at around 1630 hrs. on 31.07.2013. He tendered a currency note of Rs.500/-, which was noticed by the shop owner as fake. Thereafter, the appellant replaced the same by another note which was found to be genuine. On 01.08.2013,

he was found at a tea stall of one Binod Bihari. The complainant tried to enquire about the currency note. Initially the appellant/convict informed that he came from Chamgoan, Namchi. However, on further enquiry, the appellant/convict disclosed his correct name as Sunil Rai and ran away from the shop. He was caught and handed over to the Gyalshing Police Outpost. Immediately some officials of Union Bank of India were brought to examine 6 notes of Rs.500/- denomination found in his possession. The Bank officials reported that the said notes were counterfeit. An FIR was accordingly lodged on 01.08.2013 with Gyalshing Police Station under Sections 489-B and 489-C/34 IPC vide FIR No. 40/2013. Thereafter, the police initiated investigation and raided the room No. 102 of Hotel Attri on 01.08.2013 at 10.30 AM wherein the appellant/convict was allegedly staying. On search, one black purse containing 2 notes of Rs.1000/-, 6 notes of Rs.500/- denominations were sized from him and further 98 counterfeit notes of Rs.500/- denomination were also seized from the room. A personal body search was made, wherein one more fake currency note of Rs.500/- was seized. Reception entry register was also seized. The appellant/convict in his statement submitted that he was a resident of Birtamore, Sanchari Bazar, Ward No. 1, Zilla Jhapa, East Nepal. He was visiting Sikkim frequently to meet his girlfriend Roma Rai, resident of Melli,

Tathang, West Sikkim. According to the appellant, on the evening of 29.07.2013 he boarded a bus for Kakarivitta from Jhapa bus stand to meet his girlfriend at Khetchupari, West Sikkim. On 30.07.2013, he arrived at Kakarivitta and met one Suresh Bengali for exchange of Rs.88,000/- Nepal Currency (NC) notes to Rs.55,000/- Indian Currency (IC) notes. It was further revealed that on 31.07.2013 the appellant/convict reached Siliguri from Kakarvitta, wherefrom he boarded a bus for Pelling and reached Gyalshing and tried to go to Khetchupari, however, not finding a vehicle, he stayed in Hotel Attri. The appellant/convict was charged for committing an offence of using counterfeit currency-notes under Section 489-B IPC on 31.07.2013 at around 1630 hrs and being in possession of counterfeit currency-notes on 31.07.2013 at around 1630 hrs under Section 489-C IPC. Needless to state herein that no charges were framed in respect of discovery of currency-notes from room No. 102 of Hotel Attri on 01.08.2013, as allegedly the appellant was staying in the said room on 31.07/01.08.2013. Tea shop owner namely, Binod Kr. Prasad (PW-2), mobile shop owner, Riwan-Ul-Haque (PW-3), Phur Tshering Lepcha (PW-4), an employee of Union Bank of India, who identified the notes, Ms. Joshna Chettri (PW-5), Assistant Manager, Hotel Attri, Dy. S.P. K.B. Gadaily, OC/CID (PW-6), Ram Bdr. Subba (PW-7), witness of seizure memos and other

police officers were examined. Entry into hotel room as per the reception register is 31.07.2013 that indicates departure date on 31.07.2013 itself. The Receptionist in her first examination-in-chief submitted that the appellant/convict was admitted to the hotel on 01.08.2013 at around 05.30 pm and left the room on the following date. Subsequently, when the matter was remitted back for examination of entry reception register, which was not examined despite having been seized in the trial, it was stated by her that the appellant/convict came to the hotel Attri on 31.07.2013 and was allotted room No. 102 and stayed overnight. The police searched the room and seized the hotel entry reception register from her possession.

3. The trial Court after having examined all the aspects of the matter, came to the conclusion that the two currency-notes of Rs.1000/- denomination and 105 currency-notes of Rs.500/- found in his possession as well as in the room were counterfeit. It was further held by the Court below that the appellant/convict had full knowledge about the nature of the currency-notes, which were fake and had full intention to use the same. The appellant was, accordingly, convicted and sentenced as aforestated.

4. Mr. S.S. Hamal, learned counsel appearing for the appellant/convict would submit that the prosecution has failed

to establish a case beyond reasonable doubt. It is further urged that on having come to know that the appellant/convict was given Indian Currency-notes of a sum of Rs.55,000/- in exchange of Rs.88,000/- Nepal Currency-notes, by one Suresh Bengali, no attempt was made on the part of the prosecution to examine the said Suresh Bengali. It is further contended that learned trial Court has held that the appellant/convict knew that the currency-notes in his possession were counterfeit without there being any cogent and credible evidence. The prosecution has failed to establish that the appellant/convict had given a fake note of Rs.500/- with the intention to use the same as the said note was fake, the appellant/convict has immediately given the other note for mobile charging, which was found to be genuine. The appellant/convict was formally arrested on 01.08.2013 and a total 104 notes of Rs.500/- denomination and 2 notes of Rs.1000/- denomination were seized from the hotel room, wherein the seizure memo indicates seizure of total 105 notes, and it is a substantial discrepancy. It was alleged that 76 nos. of Spasmoproxyvon capsules were seized from the possession of the appellant, but the same was never examined and proved by the prosecution during the trial. It is also not proved that the appellant was the occupant of room No. 102 at the time when search and seizure of said notes were made by the police.

5. Per contra, supporting the conviction and sentence, Mr. Karma Thinlay, learned Additional Public Prosecutor, would contend that possession of aforestated counterfeit currency-notes and also attempt to use the same would establish that the appellant knew the nature of the notes and had full knowledge and intention to use the same. Small discrepancies in respect of entry into hotel are not fatal to the case of the prosecution.

6. Heard learned counsel for the parties, perused the pleadings, examined the depositions and other relevant documents annexed hereto.

7. In the course of arguments, it was stated that the entry reception register of the hotel, which was seized during the search was not produced and examined by the trial Court. Accordingly, on the application made by Mr. Sonam Tenzing Bhutia, Sr. Supdt. of Police/CID, Sikkim Police on 08.06.2016, this Court vide order dated 14.06.2016 directed the trial Court to examine the hotel entry register seized at the time of search and submit the report. The witnesses were re-examined and cross-examined by the trial Court and immediately submitted its report accordingly by an order dated 29.07.2016.

8. On re-examination, it is fully established that the appellant/convict had taken entry into the hotel on 31.07.2013

and stayed overnight in room No. 102, wherein the police seized counterfeit currency-notes. The appellant/convict could not explain the presence of such notes in his room, thus, there was no error in holding that the said fake notes found in the room were in possession of the appellant/convict. The receptionist has clearly stated in her earlier as well as subsequent statement in respect of entry of appellant/convict in hotel on 31.07.2013 for overnight stay. A mere mistake in the entry register, which was on perusal, found that there were mistakes in other entries also, cannot be held as fatal to the case of the prosecution. All the witnesses examined by the prosecution, in whose presence the said currency-notes were seized, were consistent and there was no discrepancy. The bank officials, shopkeeper etc. were also consistent in their deposition in respect of the possession of such currency-notes by the appellant and also an attempt was made by him to use the same while purchasing the mobile recharge.

9. The question as to whether non-framing of charges in respect of recovery of counterfeit currency-notes from the room in occupation of the appellant can defeat the case of the prosecution, particularly when the accused was given full opportunity to explain the possession of fake currency-notes in the room.

10. The issue of non-framing of relevant charges came up for consideration in ***Gurpreet Singh vs. State of Punjab***[1], the Supreme Court held as under: -

> "16. In the present case, it cannot be said that the accused persons were prejudiced merely because charge was framed under Section 302 IPC simpliciter and no charge was framed under Section 302 read with Section 34 IPC. From the evidence of two eyewitnesses, namely, PWs 2 and 3 it would appear that the accused persons shared the common intention to cause death of the victim. They were cross-examined at length from all possible angles and from the suggestions that were put forth to the eyewitnesses, we are fully satisfied that the accused persons were not in any manner prejudiced in their defence. That apart, in their examination under Section 313 of the Code, the appellants were specifically told that they along with the other accused persons armed with *kirpan* came to the place of occurrence and assaulted the deceased whereafter they fled away which shows that the appellants shared the common intention to cause death of the deceased."

11. In ***Sanichar Sahni vs. State of Bihar***[2], the Supreme Court held as under: -

> "25. A Constitution Bench of this Court in *Willie (William) Slaney v. State of M.P. : AIR 1956 SC 116* considered the issue of non-framing of charges properly and conviction of an accused for the offences for which he has not been charged and reached the conclusion as under:
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> > "86. ... In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out. ...
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> > 87. ... If it is so grave that prejudice will necessarily be implied or imported, it may be described as an illegality. If the seriousness of the

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1 (2005) 12 SCC 615

2 (2009) 7 SCC 198

> omission is of a lesser degree, it will be an irregularity and prejudice by way of failure of justice will have to be established."
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> 26. This Court in *Gurpreet Singh v. State of Punjab : (2005) 12 SCC 615* referred to and relied upon its earlier judgments in *Willie (William) Slaney* and *State of A.P. v. Thakkidiram Reddy : (1998) 6 SCC 554* and held that unless there is failure of justice and thereby the cause of the accused has been prejudiced, no interference is required if the conviction can be upheld on the evidence led against the accused. The Court should not interfere unless it is established that the accused persons were in any way prejudiced due to the errors and omissions in framing the charges against him. A similar view has been reiterated by this Court in *Ramji Singh v. State of Bihar : (2001) 9 SCC 528*.
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> 27. Therefore, the law on the issue can be summarized to the effect that unless the convict is able to establish that defect in framing the charges has caused real prejudice to him and that the was not informed as to what was the real case against him and that he could not defend himself properly, no interference is required on mere technicalities. Conviction order in fact is to be tested on the touchstone of prejudice theory.

12. In the facts of the case, the appellant/convict was given full opportunity and had full knowledge about the allegation of possession of fake currency-notes, which was seized from the hotel room wherein he stayed. Thus, non-framing of charge cannot be held as fatal to the case of the prosecution as the appellant/convict was not prejudiced for non-framing of charge in respect of seizure of fake currency-notes from the room.

13. Mr. S.S. Hamal, learned counsel, referring to a judicial pronouncement laid by the Supreme Court in ***Umashanker vs. State of Chhattisgarh***[3], would contend that

mere possession of fake currency note is not enough to prosecute the accused unless it is proved that the accused had full knowledge of the nature of the notes and has an intention to use the same. The Supreme Court, while examining the ambit and scope of provisions of Sections 489-B and 489-C IPC, held as under: -

> "8. A perusal of the provisions, extracted above, shows that mens rea of offences under Section 489-B and 489-C is, "knowing or having reason to believe the currency-notes or bank-notes are forged or counterfeit". Without the afore-mentioned 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 489-B of I.P.C. So also possessing or even intending to use any forged or counterfeit currency-notes or bank-notes is not sufficient to make out a case under Section 489-C in the absence of the mens rea, noted above. No material is brought on record by the prosecution to show that the appellant had the requisite mens rea. The High Court, however, completely missed this aspect. The learned trial Judge on the basis of the evidence of PW 2, PW 4 and PW 7 that they were able to make out that currency note alleged to have been given to PW 4, was fake "presumed" such a mens rea. On the date of the incident the appellant was said to be 18 years old student. On the facts of this case the presumption drawn by the trial Court is not warranted under section 4 of the Evidence Act. Further it is also not shown that any specific question with regard to the currency-notes being fake or counterfeit was put to the appellant in his examination under Section 313 of Criminal Procedure Code. On these facts we have no option but to hold that the charges framed under Sections 489-B and 489-C are not proved. We, therefore, set aside the conviction and sentence passed on the appellant under Sections 489-B and 489-C of I.P.C. and acquit him of the said charges [See : M. Mammutti v. State of Karnataka : AIR 1979 SC 1705."

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3 AIR 2001 SC 3074

14. Further reliance was made by Mr. Hamal on a decision rendered by the Bombay High Court in ***Mohd. Farooque Yusuf Chaiwala & Others vs. State of Maharashtra***[4], wherein a Division Bench of the Bombay High Court held as under: -

> "28. Thus, to bring home the charge of offences punishable under Sections 489B and 489C of the IPC the prosecution is required to establish, *inter alia*, that the accused knew (or had reason to believe) the notes in question to be counterfeit or forged. The prosecution is also required to establish that the accused intended to use the same as genuine. It is true that such knowledge or existence of reason to believe, can be proved by, or can be inferred, only from circumstantial evidence. In this case, the prosecution has not been able to point out the evidence or circumstances showing that each of the Appellants had knowledge that the notes were counterfeit or that each of them wanted to use the same as genuine. If there were any such circumstances appearing in the evidence of the prosecution, such circumstances should have been put to the Appellants during their examination under Section 313 of the Code. No such circumstances were put to any of the Appellants by the trial Court, presumably because the trial Court did not consider this aspect of the matter. In fact, the trial Court also did not put the report received from the India Security Press, Nasik to any of the Appellants in their examination under Section 313 of the Code. Such circumstances, namely viz. evidence showing that the notes in question were counterfeit and the evidence and circumstances suggesting that the accused knew the same should have been put to the Appellants. The Appellants were therefore not given an opportunity to offer any explanation about these aspects, which were held as 'proved' against them, by the trial Court."

15. In ***Panna Lal Gupta vs. State of Sikkim***[5], relied on by Mr. Hamal, a Division Bench of this Court held that it is for

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4 2011 (3) Crimes 307 (Bom.)
5 2010 Crl. L.J. 825

the prosecution to establish that the appellant possess fake currency-notes knowingly or having reason to believe the same to be forged or counterfeit to attract conviction under the provisions of Sections 489-B and 489-C IPC. The relevant paragraphs read as under: -

> "21. In view of the above circumstances, the possibility of the fake currency-notes having been given to him by the customers in the course of his business and he being a layman could not suspect the said currency-notes to be fake cannot be ruled out. It is hardly necessary to observe that mere possession of forged note is not an offence. The offence is directed against trafficking in fake notes and what is essential is that apart from possessing the fake notes, the appellant must know of its falsity and having known uses them. The appellant must have known or at least must have had reason to believe that the notes were counterfeited. It is also the requirement of law that the possession must be accompanied by intention to use that as genuine. Nothing has been brought on record by way of even collateral circumstances to show that the appellant had intention to use the fake notes as genuine. On the other hand, as already noted above, it cannot be said on the basis of the materials on record that the appellant knew or had reason to believe that the currency-notes he was dealing with were counterfeited and issued such notes as genuine.
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> 22. Under the circumstances, we have no hesitation to hold that the appellant did not possess those currency-notes knowingly or having reason to believe the same to be forged and counterfeit and trafficked such notes as genuine. In view of this, we are of the firm opinion to hold that the prosecution has failed to prove its case against the appellant under Sections 489-B and 489-C of the IPC beyond reasonable doubt. Accordingly, in our opinion, the impugned conviction and sentence call for interference of this Court."

16. Referring and relying on a decision of the Supreme Court in ***Hiralal Pandey and Others vs. State of Uttar Pradesh***[6], Mr. Karma Thinlay, learned Addl. Public Prosecutor

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6 (2012) 5 SCC 216

would contend that the conviction cannot be set aside on the ground of every irregularity or illegality in the matter of investigation, unless the lapses on the part of the investigation are such as to cast reasonable doubt about the prosecution story or seriously prejudice the defence of the accused.

17. As discussed hereinabove, the prosecution has clinchingly established that the appellant/convict was in possession of fake currency-notes, in total, 2 notes of Rs.1000/- and 104 notes of Rs.500/- denominations (IC).

18. It is a well settled principle of law as eloquent from the preceding paragraphs that to constitute an offence under the provisions of Sections 489-B and 489-C IPC, there are three essential ingredients. Firstly, the accused must be in possession of any forged or counterfeit currency-note or bank-note; secondly, having knowledge or having reason to believe the same are forged or counterfeit and thirdly have an intention to use the same as genuine. The first ingredient of having possession of fake currency-notes is well established as six Rs.500/- denomination IC notes were discovered from his body (person), two Rs.1000/- denomination IC note from his purse and remaining 98 currency-notes (IC) from the room which was under his occupation. The appellant/convict had full knowledge about the nature of fake currency notes. The appellant/convict

has no other explanation except that he had obtained them from one Suresh Bengali in exchange of NC notes for a sum of Rs.88,000/-. The third ingredient i.e. intention to use it as genuine is also established from the credible and strong circumstantial evidences. During the investigation, the appellant/convict has come up with the plea that the appellant/ convict was a resident of India, initially on being accosted by one police officer namely Sagar Subedi. Thereafter, on further investigation, it was revealed by him that he was a resident of Birtamore, Sanchari Bazar, Ward No. 1, Zilla Jhapa, East Nepal. He further stated in the statement during enquiry that he used to come to meet his girlfriend namely, Roma Rai. Roma Rai was produced for examination before the trial Court and the appellant/ convict declined to examine her to establish that she was his friend and used to come to meet her frequently. The purpose of coming and staying was fully shattered as no attempt was made by the appellant/convict to explain, except that he used to come to meet his girlfriend, who was produced by the prosecution but not examined by the appellant/convict. The second instance to establish that the appellant/convict had the intention to use the said fake currency-notes as genuine is that when the fake currency-note of Rs.500/- was returned by the mobile shop owner, immediately he handed over another genuine note without any discussion and on the second day on

being asked by the police officer about the currency-notes and his whereabouts, he ran away. Initially, he attempted to mislead the police officer by saying that he was an Indian citizen. Thirdly, he was put a specific question in the course of his examination under the provisions of Section 313 Cr. P.C., the appellant/convict did not reiterate his earlier stand that he had obtained the said fake currency-notes from one Suresh Bengali and also did not insist on examination of said Suresh Bengali. In all, he had given a general denial on all queries put to him. Intention to use fake currency-notes, having knowledge of it, was not denied.

19. For the reasons mentioned hereinabove, it is well established that all the three ingredients required to constitute the offence under the said provisions of Sections 489-B and 489-C IPC have been established and the appellant/convict was in possession of fake currency-notes, knowingly with intention to use the same as genuine.

20. In the aforestated circumstance, I do not find any reason to interfere with the finding of conviction and sentence awarded by the trial Court. Resultantly, the appeal is dismissed.

21. The Court records be remitted back forthwith to the Court below.

Sd/-
Chief Justice
26.09.2016

Approved for Reporting : Yes/~~No~~.

jk **Internet : Yes/~~No~~.**