



IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cr. Appeal No. 181 of 2006

Judgment Reserved on 13th April 2016

Date of Judgment 3rd May 2016

State of Himachal Pradesh

....Appellant

Versus

Baba Suraj Nath son of Shri Mangal Nath

....Respondent

Coram

The Hon'ble Mr. Justice P.S. Rana, J.

Whether approved for reporting?¹ Yes.

For the Appellant:

Mr. M.L. Chauhan and
Mr. Rupinder Singh Thakur
Additional Advocates
General and Mr. R.K. Sharma
Deputy Advocate General.

For the Respondent:

Ms. Uma Manta, Advocate

P.S. Rana, Judge

JUDGMENT

Present appeal is filed against the judgment dated 23.12.2005 passed by learned Judicial Magistrate Court No.V Shimla in criminal case No. 100/2 of 2003/2002 title State of H.P. vs. Baba Suraj Nath.

¹ *Whether Reporters of Local Papers may be allowed to see the judgment? Yes.*

Brief facts of the case

2. Complainant Surinder Kumar who was employed as Junior Assistant in the department of Tourism had deposited his salary in PNB The Mall Shimla. It is alleged by prosecution that complainant is unmarried and complainant met accused Baba Suraj Nath and disclosed the accused that complainant was suffering from mental tension etc. upon which accused assured the complainant to solve all his problems in life and also assured that he would be promoted in job. It is alleged by prosecution that accused demanded money from complainant and complainant had given three cheques to accused i.e. cheque No. 444247 dated 6.11.2001 amounting to Rs. 21000/- (Rupees twenty one thousand only), cheque No. 444248 dated 6.11.2001 amounting to Rs.21000/- (Rupees twenty one thousand only) and cheque No. 444250 dated 12.11.2001 amounting to Rs.50000/- (Rupees fifty thousand only). It is alleged by prosecution that accused defrauded the complainant to the tune of `92000/- (Rupees ninety two thousand only) in view of mental condition of complainant. It is alleged by prosecution that FIR was registered and investigation was

completed and investigation report under Section 173 of Cr.P.C. was filed before the competent Court of law.

3. Charge was framed against the accused on 8.7.2003 by learned Trial Court under Section 420 IPC. Accused did not plead guilty and claimed trial.

4. Prosecution examined nine witnesses in all and also tendered documentary evidence.

5. Learned Trial Court acquitted the accused under Section 420 IPC. Feeling aggrieved against the judgment passed by learned Trial Court State of H.P. filed present appeal.

6. Court heard learned Additional Advocate General appearing on behalf of the State and learned Advocate appearing on behalf of the accused and also perused the entire record carefully.

7. Following points arise for determination in present appeal:-

Point No.1

Whether judgment of learned Trial Court is perverse and based upon non-appreciation of evidence properly as mentioned in memorandum of grounds of appeal?

Point No.2

Final Order.

8. Findings upon Point No.1 with reasons

8.1. PW1 Surinder Kumar has stated that he is posted as Junior Assistant in Tourism department and his salary is deposited in PNB The Mall Shimla. He has stated that his salary is `7000/- (Rupees seven thousand only) per month. He has stated that in the month of October 2001 accused came in his contact and told him that accused would get promotion of him and would also solve all worries of him. He has stated that on one day he was on leave but by mistake his attendance was recorded in attendance register. He has stated that he was suspended. He has stated that he has issued three cheques in favour of accused amounting to Rs.92000/- (Rupees ninety two thousand only). He has further stated that accused has committed cheating with him. He has stated that thereafter he filed criminal complaint Ext.PW1/A before police department. He has stated that police took into possession cheque book vide seizure memo Ext.PW1/B. He has stated that cheque book is Ext.PAZ. He identified the accused in Court. He has denied

suggestion that he used to get perform religious activities from accused. He has stated that he does not know that accused has performed religious prayer in Shiv temple for the complainant. He has denied suggestion that ` 92000/- (Rupees ninety two thousand only) spent upon expenditure involved in religious activities. He has denied suggestion that accused did not commit cheating with him. He has denied suggestion that accused did not assure the complainant that complainant would get promotion in service. He has denied suggestion that he was not suspended in service. He has stated that he could not produce any suspension order. He has denied suggestion that he has handed over the cheque to accused in presence of family members voluntary.

8.2 PW2 Kishore Kumar has stated that he was associated in investigation process and ` 52845/- (Rupees fifty two thousand eight hundred forty five only) recovered from possession of accused. He has stated that seizure memo bears his signatures. He has stated that Surinder Kumar is his brother and police officials were present at the spot prior to his arrival. He has stated that when he reached at the spot then currency was in possession of

police officials. Again stated that police was taking out the currency from bag. He has denied suggestion that religious activities were performed by accused on behalf of complainant. He has stated that his brother Surinder Kumar is mentally and physically fit. He has denied suggestion that false case filed against the accused in collusion with investigating agency.

8.3 PW3 Ram Swarup Sr. Manager PNB The Mall Shimla has stated that he is posted as Branch Manager in PNB The Mall Shimla. He has stated that as per demand of investigating agency he supplied copy of cheque No.444248 dated 6.11.2001 to the tune of ` 21000/- (Rupees twenty one thousand only) in favour of accused and also supplied copy of cheque No. 444250 dated 12.11.2001 amounting to ` 50000/- (Rupees fifty thousand only) and also supplied copy of cheque No. 444247 dated 6.11.2001 amounting to ` 21000/- (Rupees twenty one thousand only) in favour of Baba Suraj Nath. He has stated that amount was debited from account No. 44032 which was in the name of Surinder Kumar. He has stated that copies of cheques are Ext.PW3/A, Ext.PW3/B and Ext.PW3/C. He has denied suggestion that he has given

statement in collusion with police officials and Surinder Kumar.

8.4 PW4 Gulshan has stated that he was posted as I.O. at P.S. Sadar in the year 2001 and he received ruka Ext.PW1/A and thereafter he recorded FIR Ext.PW4/A.

8.5 PW5 Arun Kumar has stated that in the year 2007 he was posted as Manager in PNB. He has stated that three photo copies of cheques were produced which were took into possession by police vide seizure memo.

8.6 PW6 Inspector Jagdish has stated that he is posted as SHO in the year 2000 and further stated that after investigation he filed challan before the competent Court of law.

8.7 PW7 Lal Chand has stated that he is posted as Agent in LIC and associated in investigation of case. He has stated that accused was searched in his presence and ₹52845/- (Rupees fifty two thousand eight hundred forty five only) recovered from him by police. He has stated that seizure memo Ext.PW2/A was prepared which was signed by him as a marginal witness. He has stated that he identified the accused in Court.

8.8 PW8 Bidhi Singh has stated that in the year 2001 he was posted as CIA Incharge Shimla. He has stated that on 12.11.2001 statement of complainant Surinder Kumar recorded under Section 154 Cr.P.C. which is Ext.PW1/A. He has stated that thereafter FIR No. 314 of 2001 was registered under Section 420 IPC. He has stated that investigation was conducted and site plan Ext.PW8/A was prepared. He has stated that accused has obtained the cheques from complainant by way of cheating. He has stated that ` 52845/- (Rupees fifty two thousand eight hundred forty five only) recovered from possession of accused. He has stated in cross examination that tampering is committed in case property of Rs.52845/- (Rupees fifty two thousand eight hundred forty five only) and only Rs.395/- (Rupees three hundred ninety five only) shown in Court. He has stated that after completion of investigation file was handed over to SHO.

8.9 PW9 Ramesh has stated he was associated in investigation of case and further stated that bag of accused was searched on 12.11.2001. He has stated that ` 52845/- (Rupees fifty two thousand eight hundred forty five only) was found from possession of accused and

seizure memo was prepared which was signed by him as marginal witness. He has stated that he is brother of complainant and complainant Surinder Kumar is not married. He has stated that Surinder Kumar is posted as Assistant in tourism department. He has stated that complainant is mentally sound and further stated that accused and complainant used to meet each other. He has stated that when he reached in police station at that time seizure process was already conducted by police.

9. Following documentaries evidence adduced by the prosecution. (1) Ext.PW1/A is statement of Surinder Kumar complainant recorded under Section 154 Cr.P.C. (2) Ext.PW4/A is FIR No. 314 of 2001 dated 12.11.2001 registered under Section 420 IPC. (3) Ext.PW8/A is site plan. (4) Ext.PW2/A is seizure memo of recovery of currency notes to the tune of ` 52845/- (Rupees fifty two thousand eight hundred forty five only) along with cheque No. 444252. (5) Ext.PW2/B is seizure memo of articles recovered from accused. (6) Ext.PW1/B is seizure memo of cheque book issued from PNB The Mall Shimla. (7) Ext.PW5/A is seizure memo of documents i.e. photocopy of cheque amounting to ` 50000/- (Rupees fifty thousand

only). (8) Ext.PAR is seal impression upon plain cloth. (9) Ext.PAZ is cheque book. (10) Ext.PB is cheque amounting to ` 50000/- (Rupees fifty thousand only) issued in favour of accused which was later on cancelled. (11) Ext.PW3/A is copy of cheque amounting to ` 21000/- (Rupees twenty one thousand only) issued in favour of accused. (12) Ext.PW3/B is copy of cheque amounting to ` 50000/- (Rupees fifty thousand only) issued in favour of self. (13) Ext.PW3/C is copy of cheque amounting to ` 21000/- (Rupees twenty one thousand only) issued in favour of accused. (14) Ext.PW3/E is statement of account of Suirinder Kumar. (15) Ext.PXZ is application filed to Bank Manager PNB Branch The Mall Shimla by Incharge CIA Staff Shimla for supply of copy of cheques.

10. Submission of learned Additional Advocate General appearing on behalf of State that learned Trial Court did not properly appreciate the testimony of PW1 complainant is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused testimony of PW1 complainant namely Surinder Kumar. PW1 Surinder Kumar has specifically stated when he appeared in witness box that his salary was to the tune

of `7000/- (Rupees seven thousand only) per month and he came into contact with accused in the month of October 2001. PW1 has stated in positive manner that accused told PW1 that he would get complainant promoted in service and would also remove all worries of complainant. PW1 has stated in positive manner that accused demanded consideration amount and he paid an amount to the tune of `92000/- (Rupees ninety two thousand only) to complainant by way of three cheques issued upon different dates i.e. cheque to the tune of `21000/- (Rupees twenty one thousand only) dated 6.11.2001, cheque to the tune of `21000/- (Rupees twenty one thousand only) dated 6.11.2001 and cheque to the tune of `50000/- (Rupees fifty thousand only) dated 12.11.2001. Court has perused all cheques. PW1 has admitted in positive manner that cheque to the tune of `50000/- (Rupees fifty thousand only) was not encashed due to some defect. PW1 has admitted that he believes in God and also believes in prayer. PW1 has admitted in his testimony that he had given all cheques to the accused on pretext that he would be promoted in service and on the pretext that all his worries would be removed. It is proved

on record that when in the year 2001 cheques were issued by PW1 to accused at that time PW1 complainant was major and complainant was in sound state of mind. There is no documentary evidence on record in order to prove that complainant was of unsound mind when complainant issued three cheques in the year 2001 in favour of accused. No medical certificate placed on record that complainant was of unsound mind when complainant issued three cheques in favour of accused in the year 2001. PW1 did not state when appeared in witness box that accused was dishonest abinitio when cheques were issued in favour of accused. It is well settled law that for offence of cheating there must be deception intention and intention of accused should be dishonest at the time of making promise. It is well settled law that mere fact that accused did not abide commitment would not fasten accused with criminal liability. *See AIR 1974 SC 301 title Hari Parsad vs. Bishun Kumar. See AIR 1973 SC 326 title State of Kerala vs. A.P. Pillai.* In view of the fact that PW1 did not state when he appeared in witness box that intention of accused was dishonest abinitio Court is of the opinion that

it is not expedient in the ends of justice to convict the accused under Section 420 IPC in present case.

11. Submission of learned Additional Advocate General appearing on behalf of the State that on the basis of statement of PW2 accused be convicted is rejected being devoid of any force for the reasons hereinafter mentioned. PW2 Kishore Kumar is witness of seizure memo of articles. PW2 is younger brother of PW1 complainant namely Surinder Kumar. PW2 has stated in positive manner when he appeared in witness box that when he reached at the spot then currency was already in hands of police officials. PW2 has specifically stated that he does not know about construction of Shiv temple at Mathura. PW2 did not state when he appeared in witness box that accused promised for promotion of complainant Surinder Kumar in service and PW2 also did not state that accused promised to remove all worries of complainant Surinder Kumar. PW2 has stated in positive manner that PW1 Surinder Kumar is mentally and physically healthy. Court is of the opinion that testimony of PW2 is not sufficient to convict the accused under Section 420 IPC in present case because PW2 did not state that intention of

accused was dishonest from ab-initio at the time of making promise to complainant namely PW1 Surinder Kumar.

12. Court has also perused testimony of PW3 Ram Swaroop carefully. PW3 has simply proved Ext.PW3/A, Ext.PW3/B and Ext.PW3/C i.e. cheques. PW3 did not state when he appeared in witness box that intention of accused was dishonest from ab-initio at the time of making promise to complainant. It is held that it is not expedient in the ends of justice to convict the accused on testimony of PW3 only.

13. Court has also perused the testimony of PW5 Arun Kumar carefully. PW5 is Manager and he has proved issuance of cheques Ext.PW3/A, Ext.PW3/B and Ext.PW3/C. PW5 did not state when he appeared in witness box that intention of accused was dishonest ab-initio at the time of making promise to complainant. It is held that testimony of PW5 is not sufficient to convict the accused.

14. Submission of learned Additional Advocate General appearing on behalf of State that in view of testimony of PW7 accused be convicted is rejected being

devoid of any force for the reasons to be recorded hereinafter. Court has perused the testimony of PW7 Lal Chand carefully. PW7 is recovery witness of ₹ 52845/- (Rupees fifty two thousand eight hundred forty five only).

As per seizure memo currency was recovered in the following manner. (i) $500 \times 18 = 9000$ (Rupees nine thousand only). (ii) Three bundles of Rs.100/- each i.e. ₹ 30000/- (Rupees thirty thousand only). (iii) $100 \times 120 = 12000$ (Rupees twelve thousand only). (iv) $50 \times 29 = 1450$ (Rupees one thousand four hundred fifty only). (v) $20 \times 2 = 40$ (Rupees forty only). (vi) $10 \times 35 = 350$ (Rupees three hundred fifty only). (vii) One note of ₹ 5/-. Total amount was ₹ 52845/- (Rupees fifty two thousand eight hundred forty five only). PW7 when appeared in witness box has specifically stated in positive manner that only currency notes of rupees ten were shown to him. In view of the fact that PW7 has stated in cross examination that only currency notes of rupees ten were shown to him and currency notes of rupees 500, 50, 20 and 5 were not shown to him relating to case property Court is of the opinion that it is not expedient in the ends of justice to convict the accused.

15. Submission of learned Additional Advocate General appearing on behalf of State that as per testimony of PW8 accused be convicted is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has perused testimony of PW8 i.e. Bidhi Singh Inspector Vigilance North Zone Dharamshala. Seizure memo of recovery of ` 52845/- (Rupees fifty two thousand eight hundred forty five only) prepared by Bidhi Singh PW8. PW8 has specifically stated in Court that from parcel Ext.PA only currency of ` 395/- (Rupees three hundred ninety five only) were shown to him in Court during trial of case. PW8 has specifically stated that he does not know about remaining currency and PW8 has further stated that officials of police station could disclose whereabouts of remaining currency. PW8 has specifically stated in Court that tampering is committed relating to case property of Rs.52845/- (Rupees fifty two thousand eight hundred forty five only) and only currency to the tune of Rs.395/- (Rupees three hundred ninety five only) shown in Court. Court is of the opinion that in view of above stated facts it is not expedient in the ends of justice to convict the accused.

16. Submission of learned Additional Advocate General appearing on behalf of State that as per testimony of PW9 accused be convicted is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has perused testimony of PW9 Ramesh. PW9 is real brother of complainant Surinder Kumar. PW9 has specifically stated in cross examination that when he reached in police station then all articles were already recovered by investigating agency. PW9 has stated that currency recovered from accused was not shown to him in Court. In view of the fact that entire currency notes were not shown to the witness in Court it is not expedient in the ends of justice to convict the accused in present case.

17. Submission of learned Additional Advocate General appearing on behalf of State that there is no enmity of prosecution witnesses with accused and on this ground accused be convicted is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that suspicion however strong cannot take place of legal proof. *See: (2005) 9 SCC 765 title Anjlus Dumdung Vs. State of Jharkhand. See: AIR 1979 SC 1382 title State (Delhi Administration) Vs. Gulzarilal Tandon.* It was held

in case reported in *2010 (3) Recent Criminal Report (SC) 549 title Nanhar Vs. State of Haryana* that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of the defence. It is well settled law that moral conviction however strong or genuine cannot amount to legal conviction under law. *See AIR 1979 SC 1382 title State vs. Gulzari Lal. See AIR 1983 SC 906 title Bhagdomal vs. State of Gujarat.*

18. It is well settled principle of law that vested right accrued in favour of the accused with the judgment of acquittal by learned Trial Court. *See (2013) 2 SCC 89 title Mookkiah and another Vs. State. See 2011 (11) SCC 666 title State of Rajasthan Vs. Talevar and another. See (2012)4 SCC 722 title Govinda vs. State. See (2012)1 SCC 602 title State of Rajasthan vs. Shera Ram.* It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned trial Court are perverse or otherwise

unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact, learned trial Court failed to take into consideration any admissible fact (iv) That learned trial court took into consideration evidence contrary to law. *See AIR 1974 SC 2165 title Balak Ram and another Vs. State of UP. See (2002) 3 SCC 57 title Allarakha K. Mansuri Vs. State of Gujarat. See (2003) 1 SCC 398 title Raghunath Vs. State of Haryana. See AIR 2007 SC 3075 title State of U.P Vs. Ram Veer Singh and others. See (2009) 10 SCC 206 title Arulvelu and another Vs. State. See (2009) 16 SCC 98 title Perla Somasekhara Reddy and others Vs. State of A.P. See (2010) 2 SCC 445 title Ram Singh @ Chhaju Vs. State of Himachal Pradesh.* It is held that liability of accused is only civil liability and dispute inter se complainant and accused is purely of civil nature. It is held that there is no positive cogent and reliable evidence on record that accused has received the amount with dishonest intention from ab-initio. Point No.1 is answered in negative.

Point No. 2(Final Order)

19. In view of findings upon point No.1 above appeal is dismissed. Benefit of doubt is given to accused. File of learned Trial Court along with certified copy of judgment be sent back forthwith. Criminal appeal is

disposed of. All pending miscellaneous application(s) also stands disposed of.

May 03,2016(ms)

(P.S.Rana)
Judge.

High Court of H.P.