

(1981) 07 BOM CK 0030

Bombay High Court

Case No: Criminal Revision Application No"s. 240 and 241 of 1981

R. Parmeshwar Menon and
Ganesh Dattatraya Koli

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision: July 7, 1981

Acts Referred:

- Evidence Act, 1872 - Section 3, 45, 61, 9

Hon'ble Judges: R.S. Padhye, J

Bench: Single Bench

Advocate: H. Suresh, D. D'Mello, S.L. Phoujdar and K.G. Menon, in Criminal Revision application No. 240 of 1981, S.S. Citnis, in Criminal Revision application No. 241 of 1981, for the Appellant; K.A. Chopda, Public Prosecutor in Criminal Revision Application Nos. 240 and 241 of 1981, for the Respondent

Final Decision: Allowed

Judgement

R.S. Padhye, J.

These two revision petitions challenging the convictions and sentence imposed upon the original accused No. 3 and 4 respectively in Criminal Case No. 3226/P of 1980 by Additional Chief Metropolitan Magistrate, 24th Court, Borivli, Bombay by a judgment dated 2nd December, 1980 were heard together and are being disposed of by this common judgment. Criminal Appeal No. 606 of 1980 preferred by original accused No. 3, R. Parmeshwar Menon and Criminal Appeal No. 607 of 1980 preferred by accused No. 4 Ganesh Dattatraya Koli were also disposed of by a common judgment delivered by the Additional Sessions Judge, Bombay on 8th and 9th of April, 1981. The learned Additional Sessions Judge also disposed of Criminal Appeal No. 50 of 1981 filed by original accused No. 5, Ramdas Tukaram Patil by the same judgment but the said accused has not challenged his conviction and sentences imposed upon him by filling a revision petition.

2. Original accused No. 1 Abdul Sattar Haji accused No. 2 Gajanan Babu Patil were employers of Pay and Accounts Office situated in the New Administration Building, opposite Sachivalya, Bombay. Claims pertaining to the Bombay City Offices of the State of Maharashtra as well as Central Government were made to these Pay and Accounts Offices up to 1-10-1976. Bills preferred by different officers were presented at Counter No. 2 of cash section and token for each bill was issued and given to the messenger who brought the bills. The bills were then sorted out and entered into registers before sending them to respective sections. The respective sections audited the bills and then submitted them to the Branch Officer for his signature for ordering payment. After entry into the transit registers and the procedure referred to above, the bills were sent to cheque section where cheques were prepared and after making necessary entries in the relevant registers, the bills and the cheques were sent to the Assistant Pay and Accounts Officer for his signature on the cheques. Thereafter the cheques were sent to cash section where respective counter clerks disbursed them to the messengers having respective tokens. These cheques were drawn on Reserve Bank of India and after encashment, Reserve Bank used to send Bank Scrolls along with the cheques and other documents to the Pay and Accounts Office for reconciliation. A scrutiny was carried on in the reconciliation section.

3. Accused No. 3 R.P. Menon was working as Superintendent in Film Censor Board Department. Accused No. 4 Ganesh Dattatrayan Koli was running a furniture mart known as "Dattatrayan Furniture Mart" at Thane. Accused No. 5 Ramdas Tukaram Patil claimed to be a propriety of "Manish Furniture Company". Thane. At this relevant time, during 1976, according to prosecution no furniture mart or company under the name and style of Manish Furniture Mart or Company existed at Thane. Prosecution seeks to prove this by evidence of P.W. 9 Sharad Narayan Sawant P.S.I. who has stated that on enquiries in Kharton Plot, Thane, he learned that there was no furniture mart known as Manish Furniture Company.

4. Accused Nos. 1 and 2 who were employees of Pay and Accounts Office were discharged at the beginning of the trial since there was no evidence against them except finding of certain cash amounts. Thirteen charges were framed against accused Nos. 3 to 5 alleging that they committed offences of cheating and forgery in conspiracy with each other and punishable under sections 420, 467 and 468 of the Indian Penal Code and received appropriate cash obtained by commission of such offences and were further guilty of offences of receiving stolen property. I do not think that it is necessary for me to go into the details of these charges for the purpose of disposal of these two revision petitioners and, therefore, I have broadly stated the nature of these charges.

5. It is not disputed that four cheques for Rs. 16,700/- (Exhibit N-1), Rs. 13,250/- (Exhibit N-3), Rs. 19,835/- (Exhibit O-1) and for Rs. 29,3000/- (Exhibit)-3) were obtained from Pay and Accounts Office on the basis of four bill and four bogus

Tokens which were not in use on the relevant date It is, therefore, not necessary to go into the details of these fraudulent transaction which deprived Pay and Accounts Office of the various amount referred to above. It is further an admitted position that the amount of the first two cheques referred to above were deposited in an account of accused No. 5 in Thane District Central Co-operative Bank, Thane on 30-8-1976 and the amount of the subsequent two cheques were deposited in the said amount of accused No. 5 on 1-10-1976. The first two cheques were obtained on the basis of bill supported to have been drawn by Census Operation Department and it has been established from record that Census Operation Department did not issue such bills. The subsequent two cheques were drawn on the basis of two bills purporting to have been drawn by Central Board of Film Censors, Bombay and it is an admitted fact that the said Board of Films Censors did not draw the said bills. All these bills were payable to accused No. 5 as proprietor of Manish Furniture Company. Accused No. 5 had opened an account in Thane District Central Co-operative Bank, Thane by depositing an amount of Rs. 100/- and accused No. 4 who happens to have an account in the same bank introduced him by signing the necessary forms.

6. After getting amounts deposited in his own account accused No. 5 withdraw some amounts by issuing cheques in his own favour. Since accused No. 5 has not filed any revision petition we are not concerned with these amounts. Accused No. 5 also withdrew certain amounts, according to prosecution, by drawing cheques in the name of K.C. Rao and it is alleged by the prosecution that these cheques were encashed by accused No. 3 at the counter of the Thane District Central Co-operative Bank Ltd., Thane by making a signature on the reverse of the cheques as K.C. Rao. These three times are the subject matters of charges 10, 1 and 12. Prosecution has adduced evidence of P.W., 4 Pandharinath Tukaram Jagtap working as a Cashier in Thane Zilla Madhyavarti Sahakari Bank, Thane to prove that accused No. 3 R.P. Menon encashed cheque No. 569379 for Rs. 6000/- issued by accused No. 5 in the name of K.C. Rao on 15-9-1976. This cheque is at Exhibit Z-15. According to evidence of P.W. 4 Pandharinath Tukaram Jagtap accused No. 3 has signed at two places on the reverse of this cheque Exhibit Z-15. He has stated that accused No. 3 had signed on the reverse of this cheque as K.C. Rao and that at the time of payment he asked accused No. 3 to sign again and, therefore, he again signed on the reverse of the said cheque as "K.C. Rao". Prosecution further examined P.W. 5 Dinkar Dattatrayan Gandhe who works as Senior Clerk in Thane District Central Co-operative Bank Ltd. Thane. This witness has proved that accused No. 3 encashed cheque No. 569381 for Rs. 12,400/-, issued in the name of K.C. Rao by accused No. 5 on 14-10-1976 and accused No. 3 also encashed another cheque No. 569384 for Rs. 5900/- issued by accused No. 5 on the same day i.e. 14-10-1976 in the name of K.C. Rao. These cheques (two) are the subject matter of Charge Nos. 11 and 12. They are Exhibits Z-16 and Z-18, P.W. 5 Dinkar Dattatrayan Gandhe also speaks about another cheque Z-17 issued by accused No. 5 but accused No. 3 is not concerned with it. According

to P.W. 5 Dinkar Dattatrayan Gandhe it was accused No. 3 who made signatures on the reverse of Exhibits Z-16 and Z-18. Prosecution examined P.W. 8 Maheshwar Shantaram Wagh, State Examiner of Documents, C.I.D., Bombay and he has stated in his evidence that Exhibit Z-15, Z-16 and Z-18 were written by the writer of Exhibits Z-28, Z-29, Z-30 and Z-31 which are supposed to be documents containing admitted hand writing of accused No. 3 R.P. Menon and by the writer of Exhibits Z-32 to Z-40 which are supposed to be specimen writings of accused No. 3 R.P. Menon . It is on the basis of this evidence that prosecution contends that accused No. 3 has committed offences of obtaining money by cheating and of fabricating false documents by committing forgery.

7. It is an admitted position that accused No. 4 Ganesh Dattatrayan Koli wrote the contend of certain pay in slips and cheques in dispute for accused No. 5. According to him, he did so because he happened to know accused No. 5 who was running a furniture party by name Manish Furniture Company by the said of his own furniture mart known as Dattatrayan Furniture Mart. He admitted that he had filed in pay in slips Exhibits Z-5, Z-6 and Z-7. He also admitted that the body of cheques Z-13 and Z-14 was in his hand writing. The other allegations against this accused is that he introduced accused No. 5 in the Thane District Central Co-operative Bank Ltd., Thane by giving the signature of the necessary form. Accused No. 4 admits these fact also. Defence of accused No. 3 is that he never signed as "K.C. Rao" on the reverse of the cheques in question and did not receive the amounts from the Thane District Central Co-operative Bank Ltd., Thane under cheques which are Exhibits Z-15, Z-16 and Z-18.

8. Besides the evidence of P.W. 4 and P.W. 5 to the effect that accused No. 3 signed as K.C. Rao on the reverse of the cheque in question an obtained payments of cheques Z-15, Z-16 and Z-18 and besides the evidence of hand writing expert, P.W. 8 Maheshwar Shantaram Wagh to establish the signature "K.C. Rao" appearing behind these three cheques were the signature of writer of the writings supposed to be the admitted hand writing of accused No. 3 at Exhibits Z-28 to Z-30 and specimen writings, Exhibits Z-32 to Z-40, prosecution had also adduced evidence of P.W. 7 Uttam Narayan Sawant Special Executive Magistrate to establish that in an identification parade held by this witness on 8th January, 1977 P.W. 4 Pandharinath Tukaram Jagtap and P.W. 5 Dinkar Dattatrayan Gandhe identified accused No. 3 R. Parmeshwar Menon.

9. Evidence of P.W. 4 Pandharinath Tukaram Jagtap and P.W. 5 Dinkar Dattatraya Gandhi was read over by the learned Counsel for the accused No. 3 for pointing out the futility of the statement of tense two witness that they identified accused No. 3 as the alleged person who signed as K.C. Rao on Exhibits Z-15, Z-16 and Z-18. It was pointed out that these witnesses were working in two shifts between 8 a.m. to 10 a.m. in the morning and 5 p.m. to 7 p.m. in the evening and they had to deal with about 200 to 300 customers every day. Under the circumstances, it was extremely

difficult for P.W. 4 Pandharinath Tukaram Jagtap and P.W. 5 Dinkar Dattatrayan Gandhe to say positively that it was accused No. 3 who signed on the reverse of Exhibits Z-15, Z-16 and Z-18 on 15-9-1976 and 14-10-1976. It cannot be disputed that the Court identification of accused No. 3 by these two witnesses P.W. 4 Pandharinath Tukaram Jagtap and P.W. 5 Dinkar Dattatrayan Gandhe is an extremely weak type of substantive evidence and it could be accepted only if it was corroborated by evidence of identification parade duly held and other independent circumstances. The prosecution has relied upon evidence of identification parade conducted by P.W. 7 Uttam Narayan Sawant, Special Executive Magistrate on 8-7-1977. This identification parade had been held after a lapse of about 3 to 4 months from the date on which the witnesses claimed to have seen accused No. 3 signing on the reverse of three cheques Exhibits Z-15, Z-16 and Z-18 as K.C. Rao. Apart from this aspect, the probative value of this identification parade has been completely destroyed by and admitted fact that accused No. 3 was the only person amongst the dummies who was having an ear phone in one of his ears. He was also having sects but existence of sects is not a circumstance as peculiar as having an ear; none in one of the ears. There is no dispute on the point that none of the dummies were having ear phones. There is also no dispute that accused No. 3 was not told to remove ear phone. P.W. 4 is his evidence claims that "I remember accused No. 3 because he was wearing an ear phone and sects". If this was so, identification of accused No. 3 by P.W. 4 Pandharinath Tukaram Jagtap can be said to be nothing more than a force. An attempt was made on behalf of defence to put two questions relating to omission in this behalf in the police statement of P.W. 4 Pandharinath but the application was not decided by the trial Court and it was just filed. Even without going to these omissions, I feel that the existence of ear phone in the ear of accused No. 3 alone who was made to stand amongst 18 dummies is by itself enough to destroy whatever probative value the evidence of identification parade had. P.W. 5 Dinkar Dattatrayan Gandhe has admitted in cross-examination. "It is true that after I identified accused No. 3 in the parade I did not tell the Executive Magistrate that the accused No. 3 was the person who had encased the cheque dated 9-10-76". This admission reduces identifications of accused No. 3 Dinkar Dattatrayan Gandhe to a nullity because unless accused No. 3 is identified as a person who signed on the reverse of disputed cheques the identifications has no value.

10. If the evidence of identifications by P.W. 4 Pandharinath and P.W. 5 Dinkar Dattatrayan Gandhe of accused No. 3 is not available to the prosecution for reasons stated above, it is extremely difficult to accept the bare statements of these witnesses that on one occasion they saw accused No. 3 who was not known to them earlier and that they remember that he signed as K.C. Rao. This is particularly so in view of the admitted position that there were no special happenings on the relevant dates to enable these two witnesses to particularly remember that accused No. 3 was the person, who signed as K.C. Rao. It is also admitted by these witnesses that he looks

like Sought Indian and there was nothing in particular so as to make them remember this particular person from amongst 300 customers who visit their bank daily.

11. It is argued on behalf of the prosecution that even if evidence of P.W. 4 Pandharinath and P.W. 5 Dinkar Dattatrayan Gandhe is not available to the prosecution, the present conviction can be based upon the testimony of hand writing expert P.W. 8 Maheshwar Shantaram Wagh and comparison of hand writing of disputed documents and admitted documents by Court. The Appellate Court has observed in paragraph 25 of the appellate judgment that :

"It appears that while giving the specimen writing the accused had made some improvements in order to show some difference in the hand writing that was given at that time. I, therefore, though it safe to compare the hand writing of the three disputed signature with that of that inland letter,. After a careful scrutiny of that letter I am of the view that there is continuity in the hand writing in the inland letter and I find the same continuity in the signature made on the reverse of the three cheques namely Exhibit Z-15, Exhibit Z-16 and Exhibit Z-18. I have, therefore, no doubt that the person who has written the inland letter i.e. the accused No. 3 is the same person who has made the signatures as K.C. Rao on the reverse of these three cheques".

12. The evidence of identification of hand writing as furnished by a hand writing expert is opinion evidence. It is not substantive evidence. Therefore, the law that has developed of this point is that a conviction could not be based merely on evidence furnished by a hand writing expert unless there were intrinsic or other circumstances corroborating the inference at which the expert had arrived or the Court concerned being proficient in that language came to a conclusion similar to the conclusion of the expert. The earliest case to which my attention was invited is [Ram Chandra and Another Vs. State of Uttar Pradesh](#), Jagannadhadas, J. delivering the judgment on behalf of the Court observed in paragraph 8:

"It may be that normally it is not safe to treat expert evidence as to handwriting as sufficient basis for conviction. It may be, however, relied upon along with other various items of external and internal evidence relating to the documents in question."

13. The next decision is the case of [Ishwari Prasad Mishra Vs. Mohammad Isa](#), It has been observed :

"Evidence given by experts of hand writing can never be conclusive, because it is, after all, opinion evidence."

14. My attention was also invited to a decision in Magan Bihari Lal v. The State of Punjab, 1977(2) Supreme Court Cases 210, wherein it was found in para 7 of the judgment :

"Expert opinion must always be received with great caution and perhaps none so with more caution than the opinion of a hand writing expert. There is profusion of presidential authority which holds that it is unsafe to base a conviction solely on expert opinion without substantial corroboration. This rule has been universally acted upon and it has almost become a rule of law. This type of evidence, being opinion evidence, is by its very nature weak and infirm and cannot of itself form the base for a conviction".

15. In view of the law on this point as expounded by Supreme Court of India it would not have been possible for the prosecution to urge that conviction of accused No. 3 should be based merely on the evidence of hand writing expert P.W. 8 Maheshwar Shantaram Wagh. However prosecution further relies upon the fact that the Appellate Court for itself has examined the disputed writing the other writing of accused No. 3 purporting to be admitted and specimen writings. It is true that a finding of fact arrived at by the two Courts below on the basis of findings of hand writing expert coupled with comparison of the two writings by the Court itself could not have been interfere in a revision petition as observed by Supreme Court of [Ram Narain Vs. State of Uttar Pradesh](#), but the difficulty in the way of prosecution in the present case is something which goes to the root of the matter. I had an occasion to examine the entire evidence from P.W. 1 to P.W. 8 along with the learned public prosecutor for ascertaining as to whether Exhibit Z-28 to Exhibit Z-30 which are referred to as admitted writings of accused No. 3 and Exhibit Z-32 to Exhibit Z-40 which are referred to as specimen writing of accused No. 3 are documents which have been proved, according to law. It was fairly conceded that Exhibit Z-28 to Exhibit Z-30 which are referred to as admitted writings of accused No. 3 and which include an inland letter which was used by the Appellate Court for comparison, are documents which were not proved by any of the prosecution witnesses. They were also not put to accused No. 3 to elicit an answer from him regarding their authorship. So far as specimen writing Exhibit Z-32 to Z-40 are concerned the learned Public Prosecutor referred to the evidence of P.W.. 9 P.S.I. Sharad Narayan Sawant and contended that these documents were duly proved. The relevant statement upon which reliance was placed is as under :

"Specimen hand writings of all the accused were taken by me on three different dates. They are at Exhibits Z-32 to Z-58. They were sent to hand writings expert on 24-5-1977 along with questioned documents and admitted documents".

As I see it the above statement is hardly a proof of documents Exhibits Z- 32 to Z-40 being documents written by accused No. 3. Apart from the fact that the statement generally refers to specimens writings of three accused being Exhibits Z-32 to Z-58 without ascribing any particular document to particular accused. I am clearly of the opinion that unless the witness state that the contents of a particular document were written by a given person in his presence it would not be possible to hold that the witness has proved the writing of that person. In that state of evidence, as it

is the irresistible conclusion is that the prosecution has failed to prove as to who has written the content of Exhibits Z-28 to Z-30 purporting to be specimen writings of accused No. 3 P.S.I. concerned could have been given better evidence. Relevant panch witness could have been examined. However, noting in that behalf was done. Moreover, these documents have not been put to accused No. 3 during his examination u/s 313 of the Criminal Procedure Code. Of course, in view of the fact that the documents have not been proved they could not have also been put to accused No. 3 u/s 313 of the Criminal Procedure Code, but in case they were put and in case accused had admitted that he had written those documents there was some scope for the prosecution to argue that the documents should be held as proved in view of the admission though even such argument would have been open to controversy.

16. The result, therefore, is that the prosecution has failed to prove that accused No. 3 signed three cheques Z-15, Z-16 and Z-18 by writing K.C. Rao on the reverse, on 15-9-1976 and 14-10-1976 and collected the amounts represented by those cheques across the counter as suggested by P.W. 4 and P.W. 5. Such a conclusion has to be reached in view of the fact that the evidence of P.W. 4 Pandharinath and P.W. 5 Dinkar relating to the above referred allegation is an extremely weak type of evidence and it has not been supported by proper and acceptable identification evidence the evidence of hand writing in respect of P.W. 8 Maheshwar Shantaram Wagh as well as comparison of hand writings of accused No. 3 by the courts below has also to be left out of consideration for the simple reason that Exhibit Z-28 of Exhibit Z-30 and Exhibit Z-32 to Exhibit Z-40 are not proved documents.

17. Case of accused No. 4 who has filed Criminal Revision Application No. 241 of 1981 does not need much argument. The learned Public Prosecutor was also fair enough to concede that the case against accused No. 4 cannot travel beyond suspicion. Besides introducing accused No. 5 to District Central Co-operative Bank, Thane for opening an account and writing the contents of some pay in slips and cheques, he has not done anything else. Regarding the allegation that accused No. 5 did not have a furniture mark by name "Manish Furniture Co." at Thane at the relevant time the only evidence is that of P.W. 9 Sharad Sawant P.S.I. who stated "I made enquiries at Khorton Flats at Thane in order to trace out Manish Furniture Co. I could not find any such Co." Apart from the fact that this evidence may not be admissible i.e., it is certainly not an evidence to establish that there was no such furniture Co. earlier to issuance of cheques in question. In a case which is based on circumstantial evidence alone, it is necessary that the circumstances established by the prosecution must be clinching and must lead to an irresistible conclusion of guilt before a conviction can be recorded on the basis of such circumstances. Suffice it to say that the circumstance against accused No. 4 can in no case be such circumstances which conclusively lead to an irresistible conclusion of conspiracy to commit any of the offences in question with accused No. 5 or other accused.

18. The result, therefore, is that both the Revision Petition being No. 240 of 1981 filed by original accused No. 3 Shri R. Parameshwar Menon and Criminal Revision Application No. 241 of 1981 being revision application filed by original accused No. 4 Ganesh Dattatrayan Koli are allowed, both impugned judgments are quashed and set aside so far as petitioner are concerned and both these accused shall stand acquitted of offences for which they were found guilty by Additional Chief Metropolitan Magistrate, 24th Court, Borivli, Bombay in Case No. 3226/P of 1980. The sentence imposed upon these two accused in the said criminal cases are hereby set aside. Fine if paid, shall be refunded. Bail bonds shall stand cancelled.

19. Shri Chitnis appearing for accused No. 4 in Criminal Revision Application No. 241 of 1981 pointed out that an order regarding disposal of property was necessary, since the Courts below had not passed any order in that behalf so far as his accused was concerned. It appears from record that an amount of Rs. 8945/- was seized from accused No. 4, Ganesh Dattatrayan Koli vide seizure memo Exhibit Z-104 on 6-1-1977 and an amount of Rs. 8,555/- was seized from his relation by name Prabhakar Balu Patil on 7-1-1977 vide seizure memo Exhibit Z-112. In view of the acquittal of accused No. 4 it is necessary to pass a consequential order to the effect that the amounts seized under Exhibit Z-104 and Exhibit Z-112 be returned respectively to the persons from whom they were seized.

20. I am told that some amounts have been seized from accused Nos. 1 and 2 also under seizure memos Exhibits Z-106 and Z-108 and that no orders regarding the disposal of the said two amounts have been passed. In the circumstances the amounts represented by the above referred two seizure memos shall stand forfeited to State.