

**IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE,  
UDALGURI**

**CRIMINAL APPEAL: 26/2019**

**Present** : **Sri Nisanta Goswami**  
Addl. Sessions Judge, Udalguri

**Appellant** : **Musst. Sahar Banu**  
W/o Md. Mahej Ali  
Vill: Fakidia, Rowta

**Respondent** : **State of Assam**  
Represented by PP, Udalguri

**Counsel for the Appellant:** Sri Phanindra Sutradhar, Adv

**Counsel for the Respondent:** Sri Rajiv Sarmah, Addl. P.P

**Date of Hearing** : 22.11.2021 & 29.11.2021

**Date of Judgment** : 20.12.2021

**JUGDMENT**

1. This appeal has been filed U/S 374(3) of the CrPC, against the judgment and order dated 11-10-2019 passed by the Ld. JMFC, Udalguri Smt. Kumari Arti, in GR Case No. 24/2017, convicting the accused/appellant and sentencing her to undergo rigorous imprisonment for 1 year and fine of Rs. 5000/- U/S 406 of IPC and rigorous imprisonment of 2 years and fine of Rs. 5000/- U/S 420 of IPC.

## **Facts of the Case:**

2. The facts in brief, relevant for the disposal of this appeal, are that on 05-01-2017, one Sahina Khatun lodged an FIR at the Rowta police station alleging therein that about 8 years ago, accused Mustt. Sahar Banu along with accused Sri Nikunja Biswas and Sri M. Bahadur Chetry entered into a conspiracy and thereby they collected Rs. 1,86,000/- from thirty-seven numbers of women of their village, promising them to deposit the amount at a private bank named Prayag Group, situated at Dhekiajuli. The amounts were collected on monthly basis. The informant Smt. Sahina Khatun has alleged that subsequently when the depositors visited the accused Mustt. Sahar Banu and enquired about their money, the accused refused to pay them money and instead, she rebuked and intimidated them.
3. Based on that FIR, police started investigation and after completion of investigation, a charge-sheet was submitted against accused Mustt. Sahar Banu, Sri Nikunja Biswas and Sri M. Bahadur Chetry U/S 406/420 of IPC. Cognizance of the offence was taken against these three accused persons U/S 406/420 of IPC. The learned Court of JMFC framed charges against them U/S 406/420 of IPC. When the charges were read over to

the accused, they pleaded not guilty and claimed to be tried and, thus, the case proceeded to the trial stage.

4. During the course of the trial, the prosecution side adduced evidence of seven witnesses. The accused persons were examined U/S 313 of CrPC. The defense side has not adduced any evidence.
5. Though initially cognizance of the offence was taken by Learned CJM, Udalguri, subsequently the case was made over to the Learned Court of JMFC. After hearing the parties and perusing the evidence on record, the Learned JMFC pronounced its judgment on 11-10-2019, whereby she convicted accused Mustt. Sahar Banu U/S 406/420 IPC. Accused Mustt. Sahar Banu was sentenced to undergo rigorous imprisonment for 1 year and to pay a fine of Rs. 5000/- U/S 406 of IPC and she was also sentenced to undergo rigorous imprisonment for 2 years and to pay a fine of Rs. 5000/- U/S 420 of IPC. It was also ordered that the sentences of imprisonment shall be consecutive.
6. Being highly aggrieved by the above order of conviction and sentence, accused/appellant Mustt. Sahar Banu preferred this appeal.

### **Grounds of Appeal:**

7. The appellant has filed the appeal on the following grounds.

i) For that the court below has convicted the appellant without considering the facts and circumstances of the case when, as a matter of fact, from the entire prosecution case and evidence on record, no offences have been made out against the appellant.

ii) For that the learned court below has not appreciated the evidence on record properly and has based its finding on surmise and conjecture and the same is not sustainable in the eyes of law.

iii) For that the learned Court below has failed to consider the fact that no material is attracted against the appellant under section 406 IPC and 420 IPC as all of the witnesses admitted the fact that the money collected from them were deposited in the bank by the appellant and they received money receipt issued from the bank against such deposit. Hence, question of misappropriation and cheating does not arise.

iv) For that the IO of the case casually investigated the case. He never visited the place where the bank was situated, did not interrogate the officials of the bank nor

seized any document of the bank. He even did not contact the Head Office of the bank, though address and phone number of the same are clearly printed in the money receipts he seized. The appellant is nothing but a soft target. He even admitted during his cross-examination that the money was deposited by the accused/appellant in the bank and misappropriation was done by the bank and the bank absconded.

v) For that there was an ordinate delay of long 8 years in filing of the FIR and there is no explanation of such delay and the matter has been completely ignored by the learned Trial Court while disposing the case.

vi) For that there are many contradictions in the evidence of the witnesses and none could specifically mention how much amount they had deposited. The amount alleged to be misappropriated in the FIR does not tally with their depositions. Moreover, the FIR, charge-sheet and depositions are also vague in respect of period of years during which alleged misappropriation took place.

vii) For that the prosecution has failed to prove the case beyond all reasonable doubt which is foundation of our criminal jurisprudence and as such the impugned judgment and order is liable to be set aside and the appellant is liable to be acquitted for the ends of justice.

8. I have heard the Ld. Counsel for the accused/appellant as well as the Ld. Addl. PP for the state.
9. At this stage, a brief survey of the evidence adduced by the prosecution witnesses needs to be done to find out whether the learned Trial Court had correctly appreciated the evidence before recording a finding of conviction.
10. PW1 Sahena Khatun is the informant. She stated that the incident occurred in the year 2008. She along with other 30 persons used to deposit Rs. 200/- per month in Rose Valley bank. However they never visited the bank. The PW1 and the other depositors used to hand over the money to the accused person and the accused person used to deposit the same in the bank. PW1 has further stated that she never received back the deposited money and it appears to her that the same has been misappropriated by the accused persons. The PW1 has exhibited the FIR lodged by her as Ext.1 and her statement recorded in the Court as Ext.2.
11. In her cross-examination, the PW1 has stated that she did not file any case against the bank and also she never visited the bank. Accused Sahar Banu is an *Asha* worker. The accused persons belong to her village.

12. PW2 Abu Kalam Ali has stated that accused Sahar Banu posed as an agent of a bank and collected money from the members and deposited the same in the bank. The PW2 used to pay Rs. 300/- per month to be deposited in the said bank through the agent Sahar Banu. They were told that the money so collected was deposited in the bank at Dhekiajuli. They never got the return of the deposited money. The PW2 has confirmed the seizure of some money receipts by the police.
13. In his cross-examination, the PW2 has stated that the money collected from them was deposited in the bank. Since the PW2 has never seen the bank in which the money was supposedly deposited, he did not file any case against the bank.
14. PW3 Sahidul Ali has stated in his evidence that accused Sahar Banu posed as an agent of a bank and collected money from the persons and deposited the same in the bank. PW3 was not able to recollect the name of the bank but he used to pay Rs. 300 per month to be deposited in the said bank through the agent Sahar Banu. They were told that money so collected was deposited in the bank at Dhekiajuli. They never got the return of the deposited money.
15. In his cross-examination, the PW3 has stated that he received money receipts from Sahar Banu, on which she

put her signature. He could not say where he put his thumb impression on the seizure-list as he is an illiterate person. The PW3 was told that the bank was situated at Dhekiajuli and money was deposited in the said bank. He didn't file any case against the bank because he could not recognize the bank in which the money was deposited by the accused persons. PW 3 has further stated that he had given money on monthly basis to the accused Sahar Banu.

16. PW4 Kamla Khatun has stated that accused Sahar Banu collected Rs. 200/- per month from her in order to deposit the same in the bank. The amount was refundable after five months but the same was never refunded. When the PW4 approached the accused for repayment of the money deposited by her, the accused abused her and refused to repay the same. PW4 has exhibited the seizure-list as Ext.4.
17. In her cross-examination, the PW4 has stated that when she approached the accused Sahar Banu for the money, she replied that the bank in which the money was deposited was closed.
18. PW5 Kulesha Khatun has stated that in 2008 she started depositing Rs. 200/- per month for 3 years in the hands of accused Sahar Banu for depositing the same in some bank. PW 5 was supposed to get back the return of the

money so deposited, after expiry of five years but she did not get any money. When the PW 5 approached Sahar Banu for her money, then the accused obtained her signature on some paper and she also abused her.

19. In her cross-examination, the PW 5 has stated that she paid money to Sahar Banu and the latter deposited the same to the bank and had given her the receipt. The PW 5 never visited the bank in which the money was supposed to be deposited.
20. PW 6 Gulap Ali has stated that Sahena Khatun and others including him deposited Rs. 100/- per month in the hands of the accused Sahar Banu for more than two years, but they did not receive any return on that money deposited. When they asked Sahar Banu about this, the accused informed them that there was some confusion in the bank and that they cannot get the return.
21. In his cross-examination, the PW 6 has stated that they paid money to Sahar Banu so that the latter may deposit the same in the bank. They were issued bank receipts against such deposits. The PW 6 never visited the bank personally. PW 6 has further stated that Sahar Banu is an Asha worker.

22. PW 7 SI Nur Hussain has stated in his evidence that on 05-01-2017 he was posted at Ikrabari outpost under Rowta PS on which date the FIR was lodged by Sahena Khatun and PW 7 was given the task of investigation. He recorded the statements of witnesses in the police station and he seized the money receipts. After completion of investigation he submitted the charge-sheet U/S 406/420 IPC and the same has been exhibited as Ext.32.
23. In his cross-examination, the PW 7 has stated that money receipts were issued to the consumer by Prayag Finance Company. The registered office of the company is at Kolkata. The PW 7 neither went to Dhekiajuli nor visited Kolkata for investigation.
24. When the accused Sahar Banu was examined U/S 313 of CrPC, she admitted the fact that she used to collect money from the informant and other persons for depositing the same in the bank.
25. The evidence adduced by the prosecution witnesses and the response of the accused Sahar Banu, while answering the questions put to her U/S 313 of CrPC, squarely suggest that the accused Sahar Banu used to collect money from the informant and the other witnesses ostensibly for the purpose of depositing the same in some "bank". While examining the PW 1

Sahena Khatun and PW 6 Gulap Ali, it was suggested on behalf of the defense that accused Sahar Banu was an Asha worker and she was not engaged in any other job. The PW 1 and 6 responded to this suggestion affirmatively. However, it was nowhere suggested that the accused Sahar Banu was not engaged in the collection of money from the villagers on behalf of some financial institution. As a matter of fact, the accused has herself clarified, during her examination U/S 313 CrPC, that she used to collect money from the informant and the other witnesses. Being an Asha worker, she was otherwise not supposed to collect money on behalf of some financial institution. These facts support the hypothesis that the accused deceived the informant and some other persons by posing herself as an agent of a bank and thereby she dishonestly induced them to deliver money to her on monthly basis. The accused has not clarified, when she was afforded the opportunity to explain the incriminating circumstances appearing in the evidence against her, in what capacity she collected money from the informant and other persons, given the fact that she was an Asha worker and professedly not engaged in any other works.

26. By suggesting to PW 1 and PW 6 that Sahar Banu is an Asha worker and that she was not engaged in any other job, the defense counsels tried to distance the accused

from the whole incident on the one hand and on the other hand they tried to prove the innocence of the accused by underscoring that part of the evidence of PW 2, where it was stated that the money collected from the depositors were duly deposited by the accused in the bank. During the course of argument, the Ld. Counsel for the appellant referred to that part of the evidence of PW 1 where it was stated that the bank issued receipts for the deposits of money and also to that part of the evidence of PW 2 where it was admitted that the money collected was deposited in the bank. This way, the defense has relied on two contradictory stances.

27. Though the accused had admitted that she used to collect money for depositing the same in some bank, she could not explain in what capacity she worked on behalf of that bank or financial institution. This shows that, as a matter of fact, she pretended to be an agent of a bank, apparently for inducing others to deliver money to her. Her dishonest intention was also reflected in her subsequent conduct of abusing some of the depositors (PW 4 & 5), when they approached her, seeking return of their deposited money.

28. While cross examining PW 4 it was suggested that she did not mention before police that the accused Sahar

Banu abused her when she asked her for the return of money. The witness denied this suggestion. However, while cross examining the IO (PW 7) no efforts were made to prove this omission/contradiction. Hence the contradiction was not proved in the manner provided u/s 145 of Evidence Act.<sup>1</sup> While cross examining PW 5 (Gulesa Khatun), the fact that the accused abused her was not even challenged. Therefore, the fact that the accused abused the depositors when they approached her, seeking return of their deposited money, stands proved.

29. It is worth noting that all the witnesses/depositors, including the informant Sahina Khatun are illiterate persons. Some of them are daily labours and cultivators. The accused used to collect money from them on monthly basis with a false assurance that the same will be deposited in some bank. The informant and the other witnesses were under the misconceived notion that their money was being deposited in some bank at Dhekiajuli, albeit, they never went to verify the location of that bank. The PW 1 has referred to some Rose valley bank and the PW 7 has referred to one Prayag Finance Company. This Court takes judicial notice of the fact that no such bank, with the names mentioned above, exists. Monies were collected from the informant

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<sup>1</sup> V.K. Mishra v. State of Uttarakhand (2015) 9 SCC 588

and the other witnesses by the accused Sahar Banu with the false promise of depositing the same in some bank. Such conduct on the part of the accused permits this Court to presume the existence of dishonesty, as envisaged under section 420 of IPC, in the mind of the accused when she started collecting money from the informant and the others.<sup>2</sup>

30. The Ld. Counsel for the accused/appellant has submitted that the investigation in this case was done in a very casual manner. The IO has recorded the statements of the witnesses after twelve days of lodging of the FIR. Moreover, he never visited the place where the bank was situated and he had not seized any documents from the bank. In this respect, the Ld. Counsel has referred to **Gajibur Rahman and Anr vs. State of Assam 2006 (Suppl) GLT 39**. It was held in that case that when delay occurs in recording statements of witnesses by police, the prosecution needs to explain the reason for the delay. However, I am of the humble opinion that the observations of the Hon'ble High Court need to be understood in the light of the factual background of that particular case. Gajibur Rahman (Supra) was a case u/s 302/34 of IPC, a vital witness in that case voluntarily remained silent for a long period of thirteen months and only thereafter he

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<sup>2</sup> Section 114 of the Evidence Act.

conveyed a vital information to the police. It was observed by the Hon'ble Court in that case that there was no negligence on the part of the police in recording the statement and that the negligence of Investigating Police Officer does not adversely affect the prosecution. That being the factual position of the case referred above, it is easily understandable that in a case of cheating involving money, when a delay of only twelve days occurs, apparently because of a negligence on the part of the investigating officer, in recording statements of witnesses, that delay cannot be taken as a ground to suspect the credibility of the witnesses. While considering the effects of a delay, we need to consider the nature and gravity of the offence. Appreciation of evidence in a case of cheating cannot be the same as in the case of a murder.

31. Moreover, the fact that the IO never visited or communicated with the bank or financial institution, where the accused claims to have deposited the money collected by her from the victims of this case, is of no consequence, since there was no contract between the victims and the financial institution. The evidence reveals that the informant and the witnesses never ever visited any bank or other financial institution for opening any account. They transacted only with the accused person. The accused merely posed herself to

be an agent of some bank. The informant and the witnesses, being illiterate persons, reposed faith on the accused and thus they got cheated. If the accused was indeed an agent of some financial institution and she collected money from others for the *bona fide* purpose of depositing the same in the accounts of those persons; that fact must be especially within her knowledge and the burden of proving that fact is upon her only. In this context, we may refer to the following illustration to Section 106 of the Evidence Act:

*Illustrations*

- (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

32. The learned counsel for the appellant has further argued that in the present case there is no element of entrustment of property to the accused and hence the provision of Section 406 IPC is not attracted in this case. The learned counsel has also submitted that a person cannot be accused of having committed criminal breach of trust and cheating at the same time based on the same facts. In this context, he has referred to the case of **Mahindra & Mahindra Financial Services Ltd. & Anr v. Delta Classic Pvt. Ltd. 2009 (4) GLT 741**. In that case, after explaining the distinction between criminal breach of trust and cheating, it was

observed by the Hon'ble Court thus: *"17. In the light of the distinction, which exist between an offence of 'criminal breach of trust' and an offence of 'cheating' it becomes clear that if a person is accused of having committed an offence of 'criminal breach of trust', he cannot, on the same facts and in the same breath, be accused to have committed the offence of 'cheating' too."*(Emphasis supplied).

33. This Court agrees with the submission of the learned counsel for the appellant that the elements of entrustment of property is absent in the present case, though his submission is based on a different premise, since the conduct of the accused Sahar Banu reflects the presence of a dishonest intention in her mind from the very beginning. Even though she was neither an employee nor an agent of any bank, she started collecting money from some illiterate villagers, promising to deposit the same in a bank. None of those depositors received back the amount deposited by them. The accused never took them to any bank or any financial institution for opening any sort of account. Though she posed as an agent of some financial institution, there was no debtor creditor relation between the depositors and that institution. The accused deceived the depositors and dishonestly induced them to deliver money to her. The elements of

cheating, as defined under section 420 of IPC, have been proved in this case.

34. Now I propose to discuss whether the prosecution has proved its case against the accused beyond reasonable doubt. The reasonableness of that doubt depends, to a large extent, on the nature of the offence and the punishment it entails. *A reasonable doubt must be one arising from the evidence or from the want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.*<sup>3</sup> What degree of probability amounts to proof is an exercise particular to each case. Reasonable doubt is free from a zest for abstract speculation, from over emotional response. Doubt must be actual and substantial, doubt as to guilt of the accused, arising from evidence or from the lack of it, as opposed to vague apprehensions.<sup>4</sup> In the present case the conduct of the accused in collecting money from some illiterate persons, posing herself as an agent of some bank and her subsequent conduct of abusing those depositors when they came to ask for the return of those money, leads us to believe that in all probability the accused cheated the depositors with a dishonest intention. The fanciful probabilities like the accused might have worked in good faith on behalf of

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<sup>3</sup> Wharton, Law of Evidence, P 31 quoted in State of Haryana v. Bhagirath AIR 1999 SC 2005

<sup>4</sup> Krishnan v. State AIR 2003 SC 2978

some bank, subsequently that bank might have been closed for no fault on the part of the accused etc., in support of which there is no evidence, need not have to be considered while appreciating evidence.

35. In view of the above discussions, this Court is of the view that the case against the accused Musstt. Sohar Banu u/s 420 of IPC has been proved beyond all reasonable doubt and that the learned trial Court has rightly convicted her u/s 420 of IPC. However, her conviction u/s 406 of IPC is not based on merit and the same is hereby set aside.
36. On the question of sentence, it has been found that the learned trial Court has not recorded any reason for awarding the sentence of two year's rigorous imprisonment and fine of Rs.5000/- to the accused. Though the judgment says that a sentence hearing was done, actually what factors were considered by the learned Court below has not been enunciated. One fact has been recorded that the accused is a first time offender. That apart, the record reveals that the accused is a countrywoman, engaged in a humble job as a Asha worker and the total amount involved in the crime is relatively small. These appear to be some mitigating circumstances, warranting a reduction in the rigour in the sentence imposed upon the accused. On

the other hand, the nature of the crime committed by the accused is such that, if she is released on probation of good conduct without imposing any sentence, some other likeminded persons in the society may be prompted to resort to similar deeds as a lucrative option. Moreover, the accused has committed the crime over a period of time. Sufficient times were available with her for retrospection and correction.

37. On the question of sentencing, the following observations of the Hon'ble Supreme Court, in **State of Madhya Pradesh vs. Suresh (2019)14 SCC 151**, are worth mentioning in the present context: *...awarding of just and adequate punishment to the wrong doer in case of proven crime remains a part of duty of the Court. The punishment to be awarded in a case has to be commensurate with the gravity of crime as also with the relevant facts and attending circumstances. Of course, the task is of striking a delicate balance between the mitigating and aggravating circumstances. At the same time, the avowed objects of law, of protection of society and responding to the society's call for justice, need to be kept in mind while taking up the question of sentencing in any given case. In the ultimate analysis, the proportion between the crime and punishment has to be maintained while further balancing the rights of the wrong doer as also of the victim of the crime and the society at large. No strait jacket formula for sentencing is available but the requirement of taking a holistic view of the matter cannot be forgotten.*

(Emphasis supplied)

## ORDERS

38. Considering all aspects of the matter, the conviction of accused Mustt. Sohar Banu u/s 420 IPC is upheld and the conviction u/s 406 IPC is set aside. The accused is sentenced to undergo simple imprisonment for a period of 6 (six) months for the offence u/s 420 IPC. To this extent the sentence imposed by the trial Court stands modified.
39. Period of detention undergone by the accused, if any, shall be set off against this sentence of imprisonment.
40. Let a copy of this judgment be furnished to the accused free of cost forthwith. *The accused is directed to surrender before the learned Court of JMFC, Udalguri, within 20 (twenty) days of this order, for serving the sentence imposed upon her.* Let the LCR be sent back to the concerned Court, along with a copy of this judgment.
41. With these findings and orders, this criminal appeal is disposed of.
42. Given under my hand and seal of this Court on this 20<sup>th</sup> day of December, 2021.

(Nisanta Goswami)  
Addl. Sessions Judge  
Udalguri