

(2013) 08 BOM CK 0091

In the Bombay High Court

Case No : Criminal Writ Petition No. 998 of 2010

Anandi Roy

APPELLANT

Vs

The State of Maharashtra, Bhagesh Parekh and Rameshwar
Kumawat

RESPONDENT

Date of Decision : 28-08-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 452, 454
Penal Code, 1860 (IPC) — Section 380, 401, 454

Citation : (2013) ALLMR(Cri) 3898 : (2014) 2 BomCR(Cri) 735

Hon'ble Judges : Abhay M. Thipsay, J

Bench : Single Bench

Advocate : M.D. Narwadkar, for the Appellant; S.D. Shelke, Assistant Public Prosecutor for the State and Mr. S.J. Gaike, Advocate for Resp. Nos. 2 and 3, for the Respondent

Final Decision : Disposed Off

Judgement

Abhay M. Thipsay, J.—Rule. By consent, Rule made returnable forthwith. The respondents waive service. By consent, heard finally forthwith. The petitioner had lodged a report with Osman Pura Police Station, Aurangabad alleging commission of offences punishable under sections 454 and 380 of the Indian Penal Code by unknown persons. It was reported that, theft in respect of the gold ornaments and cash belonging to the first informant and his wife, totally valued at Rs. 89,300/- [Rupees Eighty Nine Thousand Three Hundred only] had been committed by some unknown offenders. The investigation commenced and three (3) persons came to be prosecuted in respect of the said offences. The trial held by the Judicial Magistrate First Class, Aurangabad resulted in the acquittal of all the accused persons. In the course of investigation, the stolen property was, allegedly, recovered by the investigating agency and this property was produced before the Court during trial. At the conclusion of the trial, the learned Magistrate passed an order directing the property to be returned to the respondent Nos. 2 and 3 herein, who are gold-smiths and from whom, according to the

investigating agency, the said property had been recovered. Aggrieved by the order passed by the learned Magistrate with respect to the return of the property to the respondent Nos. 2 and 3, the petitioner herein approached the Court of Sessions by filing a revision application. The revision application came to be dismissed by an order dated 30/10/2009. The petitioner has now approached this Court invoking its constitutional jurisdiction and praying that the order passed by the learned Magistrate be set aside to the extent of the disposal of property and the order passed by the Sessions Judge in revision be also set aside and that the muddemal property be directed to be given to the petitioner.

2. I have heard Mr. M.D. Narwadkar, the learned counsel for the petitioner, Smt. S.D. Shelke, the learned A.P.P. for the State and Mr. S.J. Gaike, the learned counsel for the respondent Nos. 2 and 3.

3. It is clear that the property that was stolen, consisted of gold ornaments and cash of Rs. 6,000/- [Rupees Six Thousand only]. The gold ornaments were belonging to the present petitioner. The case of the investigating agency was that, pursuant to the disclosure statement made by accused No. 1 Ayya Khan, part of the robbed property came to be recovered from respondent No. 2 herein and part thereof came to be recovered from respondent No. 3 herein. Interestingly, what was recovered, is, admittedly not in the same form in which it was stolen. What was recovered, was in the form of ingots. The case of the investigating agency was that, the ingots were prepared after melting the stolen gold ornaments. The fact, therefore, remains that the property recovered was, admittedly, not in the form in which it was stolen.

4. Since the learned Magistrate came to the conclusion that the case against the accused persons was not proved and since he passed an order of acquittal, he was of the view that the property should be returned to the persons from whose possession the same had been seized. Ordinarily, this would be the correct approach to be adopted in the matters of this type. But, in the instant case, there are some aspects of the matter, which are relevant and which were not taken into consideration by the learned Magistrate.

5. It may be observed that the revision filed before the Court of Sessions, against the order passed by the Magistrate, was not maintainable. The order passed by the Magistrate was one falling U/s. 452 of the Code of Criminal Procedure [For short, "Code"], from which order an Appeal is provided for U/s. 454 of the Code. In sub section (4) of Section 401 of the Code, it has been laid down that no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. Thus, the learned Sessions Judge ought to have treated the revision application as an Appeal and ought to have dealt with the matter accordingly.

6. It appears that the accused persons had not claimed the property as belonging to them. The wife of the petitioner, to whom the ornaments in question were belonging, was not examined as a witness during the trial. The identity of

the property, as the same that was robbed, was not established during the trial and as such the order of acquittal was proper and legal. However, the respondent Nos. 2 and 3 were also not examined as witnesses during the trial. Their stand, viz. as to whether the property produced before the Court had been recovered from them and further whether that property had been purchased by any of them from accused No. 1 or any other accused, was also not ascertained during the trial. In such a case, instead of passing an order of return of property to the respondent Nos. 2 and 3, the learned Magistrate ought to have held an inquiry for the limited purpose of the disposal of property. The persons to whom the property was directed to be returned, viz. the respondent Nos. 2 and 3, had not at all appeared before the Court and had not made any claim that the gold that was produced as stolen property, was actually belonging to them or that it had been recovered by the investigating agency from them. In the context of the claim of the petitioner, it was also necessary to ascertain as to from whom the respondent Nos. 2 and 3 had obtained the property and whether it had been obtained by them from the accused No. 1 or anybody else and under what circumstances. It was also necessary to ascertain as to the circumstances in which the property came to the investigating agency and under what circumstances, if at all, it was parted with by the respondent Nos. 2 and 3 without any protest.

7. Thus, this was a fit case where the learned Magistrate ought to have held an inquiry for the disposal of the property. The learned Sessions Judge also while dismissing the revision, observed that the Magistrate ought to have given some opportunity to the petitioner or his wife, but was of the view that absence of giving such opportunity was not an irregularity, which would vitiate the proceedings in respect of the disposal of the property.

8. I am of the view that the matter has not been considered in proper perspective either by the learned Magistrate or by the learned Sessions Judge. This was a case where, though as per the case of prosecution, the property had been recovered from the respondent Nos. 2 and 3, it was also the prosecution case that it was stolen property. The persons to whom the property was directed to be returned, had never claimed that it had been recovered from their possession. Therefore, there was no sufficient material before the Court to decide the question of disposal of the property in a satisfactory manner, and under these circumstances, the decision with regard to the disposal of the property ought to have been done after holding due inquiry by recording evidence on that aspect.

9. Since the impugned orders suffer from a patent error of law, which has resulted in mis-carriage of justice, the constitutional jurisdiction of this Court is required to be invoked to set things right.

10. The Writ Petition is partly allowed. The impugned orders are set aside.

11. The matter is remanded back to the learned Magistrate, who shall hold an

inquiry into the matter and then decide the question of handing over of the custody of the property in question to any party, who, it may appear to the learned Magistrate, to be entitled for the possession thereof. The Writ Petition is disposed of accordingly. Rule is made absolute in the aforesaid terms.