

(1985) 05 AHC CK 0022
In the Allahabad High Court
Case No : Criminal Revision No. 476 of 1983

Lal alias Chhotey Lal and Others

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 17-05-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Evidence Act, 1872 — Section 114

Penal Code, 1860 (IPC) — Section 380, 411

Citation : (1985) ACR 409

Hon'ble Judges : N.N. Sharma, J

Bench : Single Bench

Advocate : C.P. Misra and Daya Shanker, for the Appellant; Kamlesh Kumar, for the Respondent

Judgement

N.N. Sharma, J.—This revision is directed against order dated 19-2-1983 recorded by Sri G.D. Dubey learned Special Additional Sessions Judge, Jaunpur who dismissed Criminal Appeal No. 67 of 1981 by revisionists and upheld the conviction and sentence of each revisionist of two years rigorous imprisonment and fine of Rs. 2000/- and in default of payment of fine, three months rigorous imprisonment u/s 411 of Indian Penal Code awarded by Sri Binda Prasad, learned Chief Judicial Magistrate, Jaunpur in Criminal case No. 119/81/76.

2. Revisionist Lal alias Chhotey Lal is father of Bachcha Lal alias Hanuman, resident of Daraganj, Allahabad. Ram Lakhan revisionist is also resident of Daraganj, Allahabad.

3. Briefly the prosecution case was that there is temple of Ram Janki Ji in village Muradganj, police station Zafrabad, district Jaunpur. Idol of lord Hanuman along with idols of Lord Ram Chandra Ji, Laxman Ji etc. were installed in this temple. All these idols were of rare variety.

4. It was at an unknown hour of night between 4th/5th December, 1972 that the idol of Lord Hanuman Ji along with pedestals of various idols were stolen along

with some utensils used for worship.

5. Shamsheer Singh (PW 1) owner of the temple, lodged a written report (Ext. ka 1) on 5-12-1972 at 5.40 p.m. at police station Zafrabad about this theft. Distance of police station from the place of occurrence is about eight miles. Ext. ka 7 was drawn on the basis of this written report. The police submitted a final report on 31-12-1972.

6. However, a news was published in news paper that the stolen idol was recovered from the shop of revisionists in Allahabad. Thereupon, the police started investigation.

7. Sub Inspector Sri Raj Bahadur, posted at police station Daraganj along with Amar Singh (PW 8) and others raided the shop of Bachcha Lal on the night of 16/17th September, 1975 and recovered idol Ext-I from the shop of Bachcha Lal revisionist. The raid was organized on the basis of information that a rare idol of lord Hanuman Ji had been brought to the shop of Bachcha Lal with intention to sell it. Recovery memo, duly attested by witnesses, was drawn on the spot.

8. Bachcha Lal ran away but the revisionists Chhotey Lal and Ram Lakhan were apprehended.

9. The recovered idol in sealed up condition was carried to Jaunpur where the identification proceedings were conducted by Sri K.K. Dwivedi (PW 7) on 5-3-1976 vide Ext. ka 8. Four similar idols were mixed in that parade. Idol Ext. 1 was correctly picked up by PWs 1 to 5.

10. Revisionist Ram Lakhan denied his connection with the crime. Lala alias Chhotey Lal and Bachcha Lal alias Hanuman revisionists alleged that the idol belonged to them and did not answer the description of stolen property.

11. Prosecution examined nine witnesses, some formal witnesses were also examined as Court witnesses, two witnesses were examined in defence.

12. Both the Courts below found that the ingredients of offence u/s 411 of Indian Penal Code have been fully brought home to the revisionists. However, co-accused Banwari, who was charged u/s 380 of Indian Penal Code was acquitted.

13. I have heard learned Counsel for parties and perused the record,

14. A conviction u/s 411 of Indian Penal Code is possible only if stolen property is received by convict with dishonest intention. It was the duty of the prosecution to prove:

(i) that the stolen property was in the possession of the accused;

(ii) that some person other than the accused was in possession of that property before the accused got possession of it; and

(iii) that the accused had knowledge that it was stolen property.

15. It appears that both the Courts below did not approach the case properly and recorded the conviction on the ground that the accused revisionists failed to explain satisfactorily their possession over the stolen property.

16. Learned AGA and learned Advocate for complainant also, invited my attention to the shifting stand of revisionists Lala alias Chhotey Lal and Bachcha Lal alias Hanuman, who, in their earlier statement alleged that co-accused Banwari had brought the stolen property to their shop although this stand was subsequently given up by them, at, the stage of statements (under) Section 313 of Code of Criminal Procedure when they alleged that the property belonged to them and the idol was in his shop prior to the birth of Bachcha Lal alias Hanuman.

17. Three cardinal principles of criminal jurisprudence are well settled, namely:

(i) that the onus lies affirmatively on the prosecution to prove its case beyond reasonable doubt and it cannot derive any benefit from weakness or falsity of the defence version while proving its case;

(ii) that in a criminal trial the accused must be presumed to be innocent unless he is proved to be guilty; and

(iii) that the burden of the prosecution never shifts.

18. Thus even if the two revisionists aforesaid shifted their stand from stage to stage, they cannot be convicted u/s 411 of Indian Penal Code for that reason. Co-accused, Banwari who was charged u/s 380 of Indian Penal Code for the commission of theft, has already been acquitted and by his acquittal, the prosecution case against the revisionists has become weaker and not stronger. Prosecution is bound to establish the idol Ext. 1 as stolen property.

19. A mere look at the judgments recorded by both the Courts below go to disclose that they found Ext. 1 to be stolen property for the simple reason that Ext. 1 was mentioned as stolen property in the written report. Ext. ka 1 describes this idol of the height of 1/2 feet weighing about 25-30 Kgs. of gold colour worth Rs. 1000/-. No description of posture with folded hands was given.

20. It is significant to note that the recovery memo which was alleged to have been drawn on the spot at the time of recovery, was not produced in Court. Raj Bahadur, Sub-Inspector, who was the most important witness and who is alleged to have prepared that recovery memo, has been withheld. Even a copy of that recovery memo has not been produced to show that the possession by the accused in Ext. 1 was dishonest not a single witness from the public was picked up while conducting this search. So a presumption arises u/s 114(g) illustration of Law of Evidence that such evidence, if adduced, would have been unfavourable to prosecution.

21. The idol was neither weighed nor measured at the time of recovery as was conceded by PW 8 S.I. Amar Singh and Sri K.K. Dwivedi, SDM (PW 7), who conducted the identification proceedings. It is in the statement of Shamsheer

Singh (PW 1) and Narsingh Bahadur Singh (PW 5) and memo Ext. ka 8 that the idol recovered from the possession of revisionists was only 9 kgs. and 200 grams in weight. This discrepancy in the weight is not explicable simply on the ground that the weight given in the written report was a rough estimate only. It cannot also be explained away by alleging that 25 kgs. included the weight of pedestal when the weight of pedestal has been separately given in Ext. ka. 1.

22. It was contended on behalf of revisionists Lala alias Chhotey Lal and Bachcha Lal alias Hanuman that Ext. 1 recovered from their possession was not of Asth Dhatu (Ad mixture of eight metals) and so they applied on 27-1-1979 that this idol should be sent to the Chemical Laboratory for metallurgic test. That prayer was rejected by an unreasonable order by learned Magistrate who directed that such examination could only be possible if, besides the expenses of escort, the revisionists should deposit a sum of Rs. 2,50,000 (Two and half lacs) in each to avoid the apprehension of loss of idol. Obviously, it has been a negation of the right of revisionists as it was not possible for them to deposit such a huge amount for conducting the test which was to be carried out by the prosecution and not by the accused as was held in Mahabir Sao alias Mahadeo Sao Vs. The State of Bihar, and Gauri Ram v. State of U.P. 1972 ACR 438. So the revisionists were wrongly convicted as they could not establish to the hilt that the idol Ext. 1 was not made of Asth Dhatu. Such approach by learned trial Magistrate is against the cardinal principles of criminal jurisprudence which is based on the English law.

23. In this connection the following observations of Lord Chancellor in Woolmington v. Director of Public Prosecution 1935 AC 462 are worth nothing:

Throughout the web of English Criminal Law one golden thread is to be seen that it is the duty of the prosecution to prove the prisoners' guilt subject to matters as to defence of insanity or any statutory exception. If at the end of and on the whole of the case there is a reasonable doubt created by the evidence of either the prosecution or the prisoner, the prisoner is entitled to acquittal.

It is not till the end of the evidence that a verdict can properly be found....At the end of evidence it is not for the prisoner to establish his innocence but for the prosecution to establish guilt...But where the prosecution must prove the guilt of the prisoner there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the criminal law of England and no attempt to whittle it down can be entertained.

24. As regards the identification proceedings, it has been shown above that the mere ipse dixit of PWs 1 to 5 and 8 about the weight and height of idol Ext. 1 was not sufficient to establish its identity. The recovery memo could have shown that from the place of recovery till the identification, the article was kept in sealed up condition, That has not been done. So the identification proceedings in

this case was simply a farce. It has been shown above that the distinctive marks about the posture and weight of Ext. 1 do not answer the description of stolen property.

25. Moreover, the property is alleged to have been stolen on the night of 4th/5th December 1972 and the news published in the news paper was that the idol was recovered from the shop of revisionists in Allahabad towards the end of December, 1972. DW 1 was examined in defence on this point.

26. It was conceded by Deena Nath Singh (PW 2) and Nam Singh, Bahadur PW(?) had learnt this news from the news papers. It is difficult to rely on such identification of idol photo of which had already been published in news paper. It is also difficult to believe that when this idol had already been recovered from the shop of revisionists in December, 1972 it was again recovered from the possession of revisionists on the night of 16th/17th September, 1975. Such recovery of the property in 1975, which had already been recovered in December, 1972 itself renders the prosecution story fantastic.

27. Thus, the prosecution failed to establish the identity of idol Ext. 1. Under such circumstances, it cannot be presumed that the possession of such property by the accused could have been dishonest or could have exposed them to the liability u/s 411 of Indian Penal Code

28. Before parting with this revision, I may further point out that Ram Lakhan had absolutely nothing to do with the shop of Bachcha Lal. Bachcha Lal was not even present at his shop at the time of recovery. Under such circumstances, the benefit of reasonable doubt must be extended to all the revisionists who are acquitted herewith.

29. In the result, the revision is allowed. The impugned order is set aside. The revisionists are acquitted. They are on bail. They need not surrender to their bail bonds which are discharged. Fine if already deposited shall be refunded.

Revision allowed.