

(1992) 03 GUJ CK 0007

In the Gujarat High Court

Case No : Criminal Revision Application No. 51 of 1989

Meghaji Godadji Thakore and Another APPELLANT

Vs

The State of Gujarat RESPONDENT

Date of Decision : 20-03-1992

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 397, 401, 491

Evidence Act, 1872 — Section 114, 24, 25, 26, 27

Penal Code, 1860 (IPC) — Section 114, 380, 389, 390, 457

Citation : (1993) CriLJ 730 : (1992) 2 GLR 1347

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

Bench : Single Bench

Advocate : A.J. Patel, for the Appellant; S.P. Dave, Addl. P.P., for the Respondent

Final Decision : Allowed

Judgement

J.N. Bhatt, J.—By this revision under " Section 397 read with Section 491 of the Code of Criminal Procedure, 1973 (Code for short hereinafter) petitioners have challenged the conviction and sentence order passed by the Learned J.M.F.C., Visnagar in Criminal

Sl. No. P. W. No. Name Ex. No. 1. 1 Gandabhai Mevabhai Vaghri 8 2. 2 Kanubhai Narasinhbhai Soni 12 3. 3 Sevanthilal Natvarlal 13 4. 4 Kantilal Leelabhai 16 5. 5 Jaisinh Gulabsinh 18

The prosecution also relied on the following documentary evidence.

Sl. No. Particulars Exh. No.

1. FIR 9 2. Discovery Panchnama in respect of place 14 of muddamal article 3. Discovery Panchnama in respect of place 17 of the complainant

accused No. 2, Mobuji Keshuji Darbar, guilty for the offence punishable under Sections 457 and 390 of the I.P. Code. Original accused No. 2, Kacharaji Anopji Thakore came to be acquitted from the said charges against him. The original

accused Nos. 1 and 3 were sentenced to undergo rigorous imprisonment for three years and to pay fine of Rs. 1,000/- and in default, to undergo further rigorous imprisonment for three months for the offences punishable u/s 457 of the I.P. Code. No separate sentence order was passed against them for the offence punishable u/s 380 of the I.P. Code. This conviction and sentence order came to be passed on 20-2-1988.

6. Being aggrieved by the said judgment of conviction and sentence the original accused Nos. 1 and 3 had preferred a conviction appeal No. 13/88 in the Session Court at Mehsana, which came to be decided along with Criminal Appeals Nos. 14 and 15 of 1988 by the Learned Sessions Judge on 16-1-1989. The conviction order was confirmed against the accused persons. However, sentence order was modified to the extent that it shall run concurrently. It was clarified by the Learned Sessions Judge while passing the final order that the conviction order against both the accused persons, in Criminal Cases Nos. 1754, 1756 and 2010 of 1986 (Three years rigorous imprisonment and fine of Rs. 1,000/- and in default, to undergo rigorous imprisonment for three years) shall run concurrently while confirming the conviction in all the three criminal cases.

7. Being aggrieved by the order of the learned Sessions Judge passed on 16-1-1989, the original accused Nos. 1 and 3 have now come up before this Court challenging its legality and validity by filing this revision under the provisions of Section 397 read with Section 401 of the Code.

8. Mr. Dave, the learned A.P.P. is right in his submissions that the scope under the revision against concurrent findings of the fact is very much limited. It is a settled proposition of law that the jurisdictional sweep of this Court in a revision like one on hand is very much circumscribed. Ordinarily revisional court will be at loath to interfere with the concurrent findings of fact unless and until the misreading of evidence or perversity or manifest error of law or miscarriage of justice is successfully pointed out. Having examined the facts and circumstances of the present case and the entire evidence on record, it becomes crystal clear that the impugned conviction and sentence orders are not only perverse but are illegal, which has resulted into grave miscarriage of justice.

9. There is no dispute about the fact that there is no direct evidence to prove the complicity of the accused. The prosecution has relied on the circumstantial evidence. Circumstantial evidence is consisted of two discovery Panchanamas alleged to have been made by the accused persons. The question which would arise for consideration is as to whether the circumstantial evidence consisted of two discovery panchanamas is sufficient to transfix the complicity of the accused persons with which they are charged.

It is true that the conviction can be based on reliable circumstantial evidence. The circumstances relied on by the prosecution should be so clear and cogent that they must point out culpability of the accused persons without any shadow of doubt. It is, now very well settled law that in case of circumstantial evidence

of the incriminating facts and circumstances is to be fully established by the credit-worthy and cogent evidence and the facts so established must be consistent with the guilt of the accused and should not be capable of being explained away on any other reasonable hypothesis. In short the circumstantial evidence must show that within all reasonable probability the impugned act must have been done by only the accused and none else. Thus it is incumbent upon the prosecution to show that the circumstances proved against the accused are such that they inevitably and exclusively point to the guilt of the accused. In case of such circumstantial evidence there can be no any circumstances or reason which may reasonably considered as consistent with the innocence of the accused. Even in the case of circumstantial evidence the Court will have to be kept in mind the cumulative effect of all the circumstances in a given case and weigh that case as an integrated whole. Any missing link in the chain is fatal to the prosecution. In the present case the two circumstances relied on by the prosecution are not proved to the hilt. Assuming that the circumstances relied on by the prosecution are proved, in that case also, those circumstances are not complete and sufficient enough to base the conviction thereon. The Courts below have unfortunately, failed to appreciate the facts and have committed serious error in interpreting the relative provisions of law in general and in particular the provisions of Section 27 of the Indian Evidence Act, 1872.

10. The prosecution has relied on 2 circumstances as follows : (i) The discovery panchanama in respect of place of the complainant from where the offence of house breaking was committed. It is at Ex. 17. The discovery Panchanama produced at Ex. 17 in respect of the place of complainant from where alleged offence of house-breaking was committed by the accused. (ii) The discovery Panchanama at Ex. 14 in respect of place of shop of a goldsmith to whom, allegedly the stolen ornaments were sold.

11. There is no dispute about the fact that except aforesaid two circumstances consisted of discovery Panchanama allegedly made by the accused persons to prove the guilt of the accused. Therefore, the question, now, arise as to whether the two aforesaid circumstances are established. In the present case if aforesaid two circumstances are established then the second question will arise as to whether those circumstances are sufficient to transfix the culpability of the accused persons with the offence they are charged with. The aforesaid Panchanamas are not proved to the hilt and they are not reliable.

12. The discovery panchanamas in respect of the place of complainant, from where the offence of house-breaking was committed is produced, at Ex. 17. It was prepared by the investigation officer on 3-7-1986. Police had called two Panchas namely Kantilal Leelabhai, prosecution witness No. 4, Ex. 16 and another panch Leelabhai Mafabhai, who is not examined. The evidence of P.W. No. 4, Ex. 16, Kantilal Leelabhai, as such not support the prosecution version. It is found from his evidence that on 3-7-1988, accused persons jointly made discovery statement that they had committed theft in respect of ornaments from

the house of complainant Gandhabhai. On reading the evidence as a whole it becomes very clear that two accused persons jointly made a discovery statement in respect of the house of the complainant from where ornaments were stolen and that too on being specifically questioned on this point by the investigating officer. It becomes clear from the testimony of Kantibhai Leelabhai, at Ex. 16, that there was no separate statement made by each accused, that even the joint statement of both the accused was not voluntary one, that the statement made by the accused persons jointly in response to a pointed question put to them by the investigating officer. The aforesaid three circumstances emerging from the evidence of the Kantibhai Leelabhai, P.W. No. 4 Ex. No. 16, would undoubtedly go to show that the said statement cannot be used against the accused persons, invoking the aids of the provisions of Section 27 of the Evidence Act. This aspect was overlooked by the trial Court as well as by the appellate Court, which has resulted into grave miscarriage of justice. The aforesaid circumstances relied on by the prosecution is not helpful to the prosecution to establish the guilt of the accused beyond reasonable doubt.

13. The second circumstance relied on by the prosecution is discovery of the place of one goldsmith to whom the stolen ornaments were sold. The Panchnama in this behalf was prepared by the investigating officer on 10-7-1986, which is produced at Ex. 14. In order to prove this Panchnama the prosecution has relied on the evidence of Panch Sevanthilal Natvarlal, P.W. No. 3, Ex. 13. Unfortunately, the said Panch witness has turned hostile and not supported the prosecution version. The second Panch Keshavalal Kantilal is not examined by the prosecution. Even while taking the entire evidence of Panch Sevanthilal Natvarlal, Ex. 13 it does not prove the version of the prosecution. Prosecution has not given any explanation why the second Panch is not examined. Be as it may. The evidence of the investigation Jaisingh Gulabsinh, Ex. 18 does not prove the Panchnama at Ex. 14 to the hilt. Apart from that even if it is assumed that the Panchnama Ex. 14 is admissible and acceptable, in that case also it is made by one accused and it cannot be used against the co-accused. This aspect is also not examined by the Courts below.

14. The aforesaid two circumstances are not proved so as to prove the complicity of the accused persons for the offences they are charged with. It appears that the correct proposition of law u/s 27 of the Evidence Act was not brought to the notice of Courts below.

15. Section 27 of the Indian Evidence Act is founded on a principle that even though the evidence relating to the confessional or other statements made by a person while he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable in so far as it distinctly relates to the fact thereby discovered. Even though Section 27 is in the form of a proviso to Section 26, the two sections do not necessarily deal with evidence of the same character. The ban imposed by

Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts. By Section 27, even if facts are disposed of as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered. By Section 27 of the Evidence Act deals with the information and the facts discovered by the accused. Section 27 is an exception to Sections 25 and 26. It will be expedient to mention the conditions attracting the provisions of Section 27 of the Evidence Act. The conditions necessary for invoking the aids of Section 27 can be enumerated as under :

(i) There must be discovery of fact albeit relevant fact, in consequence of the information received from a person accused of an offence.

(ii) The discovery of such fact must be deposed to.

(iii) At the time of the receipt of the information the accused must be in police custody.

(iv) That only so much of the information as relates distinctly to the fact, thereby, discovered is admissible.

16. It can be very well concluded that allowed to be proved is the information, such part thereof, as related distinctly to the fact thereby discovered. The word "distinctly", means "directly", "indubitably", "strictly" and "unmistakably". As per the settled proposition of law a statement made by the accused should be split up and so much of the statement that is the immediate cause of discovery will be a legal evidence u/s 27 of the Evidence Act.

17. For the applicability of Section 27 two conditions are prerequisite, (i) the information must be such as caused discovery of the fact, (ii) the information must relate distinctly to the fact discovered so much of such information, whether, it amounts to a confession or relate distinctly thereby discovery may be proved. It also assumed that there should be a statement first and it would be followed by the discovery and if there was first discovery followed by the statement such statement would be inadmissible. It is also settled proposition of law that the statement of the accused must be volunteered. It should not be given by prompt or threat with any pointed question. It is found from the evidence on record that on the aforesaid two panchanamas, even if they are presumed to be proved. In that case also that cannot be said to be volunteered. Specific questions were put to the accused persons by the investigating officer before alleged statements, by the accused, persons, were made. Thus two circumstances relied on by the prosecutions, as such, cannot be said to be incriminating circumstances much less establishing unmistakably the culpability of the accused persons for the said offence.

18. There is one more infirmity in the aforesaid two Panchnamas. Prosecution has not been able to distinctly prove as to what statement was made by whom. In so far as the discovery Panchnama of the place of the complainant, at Ex. 17,

is concerned the Panch witness Kantilal, at Ex. 16 has stated that two accused persons made the statement leading to the discovery. It is incumbent upon the prosecution to prove as to who, what statement leading to the discovery, permissible u/s 27, in case of joint statement, was made. In the present case the prosecution failed to point out as to who made, what statement, which led to the discovery or the place of the complainant. Prosecution cannot place reliance on such joint statement against the accused under the provisions of Section 27. In view of the provisions of Section 27 of the Evidence Act, which is in form of proviso to Sections 24, 25 and 26. A joint statement made by the accused is not per se inadmissible in the evidence but it is very very weak piece of evidence on which any reliance can be placed by the prosecution. In case of joint statement by the accused, like one on hand, it would be very difficult to come to the conclusion which of the two accused persons gave any specific and definite information to the police and panchas which related distinctly to the discovery of the place of complainant from where the offence of house breaking was committed. In this of the matter the aforesaid discovery evidence cannot be used against the accused persons in order to connect them with the crime in question beyond doubt. Similarly in so far as discovery Panchnama at Ex. 13, in respect of the shop of the goldsmith is concerned, prosecution is not in a position to take any slightest of the profit out of the discovery Panchnama. In fact panch witness has turned hostile. Apart from that even if the said Panchnama is believed to have been proved in that case also the fact discovered is the shop of the goldsmith, who has not supported the prosecution version. The goldsmith, whose shop is alleged to have been discovered by original accused No. 3, Mobhji Keshuji Darbar, does not distinctly as such relate to the culpability of the accused. There is no dispute about the fact that no ornaments were found from the shop of that said goldsmith. The ingots alleged to have been made out of the stolen ornaments and found from the shop of goldsmith does not prove that they were made out of the ornaments stolen from the house of complainant Gandabhai Mevabhai, who is examined at Ex. 8. Unfortunately, the goldsmith has also not supported the prosecution case. There is no evidence worth the candle to establish the guilt of the accused for the offences punishable u/s 457 and 380 of the I.P. Code, are concerned. The aforesaid two circumstances, as such are tainted with material discrepancies. Even assuming that those circumstances are proved, then in that case also they cannot be said to have established the complete chain incriminating only and only accused persons for the offences punishable under Sections 457 and 380 of the I.P. Code. Those circumstances cannot be said to be wholly in-compatible with the innocence of the accused. Unfortunately, the learned Trial Magistrate, with due respect, has failed to appreciate the relevant facts and the material provisions of the Section 27 of the Evidence Act and the settled proposition of law on this score. This Court is extremely, unable to uphold the conviction and sentence order passed by the learned Trial Magistrate and which came to be confirmed by the learned Sessions Judge, Mehsana.

19. The prosecution had also relied on the FIR produced at Ex. 9. It is dated 3-7-1986. The FIR is filed by the complainant Gandabhai Mevabhai, who stated in his complaint that the theft in his house occurred almost 15 days before. No reasonable explanation is given as to why FIR is lodged very late. In absence of any explanation for delay in FIR the version of the prosecution is weakened. In the present case it will be unsafe to place reliance on such FIR. Delayed FIR does not help the prosecution. Mere delay is not fatal in every case. Delay has to be explained. It is found from the facts of the present case that the complainant could have given the FIR on the same day as there is an outpost in village Bhotwa, where complainant is residing. The FIR is lodged after almost 15 days before Police Inspector Mr. Parmar on 3-7-1986. That in the present case delay in lodging FIR also creates suspicion about the version of the prosecution. The Trial Court as well as the Sessions Court have committed serious illegality in not considering this aspect in favour of the accused in the present case.

20. The FIR in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be over emphasised from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the Police in respect of commission of an offences is to obtain prior information regarding the circumstances in which the crime was committed the names of the actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. Delay in lodging the FIR often results in embellishment which is the creature of an after-thought. On account of delay the report only gets bereft and the advantage of spontaneity danger creeps in and the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is therefore, essential that the delay in the lodging of the FIR should be satisfactorily accounted for. This proposition of law is very well settled. It is true that FIR is not substantive piece of evidence. It is also true that the FIR need not be elaborate with meticulously prepared. Nonetheless the importance of FIR made promptly cannot be minimised. The underlying object of Section 154 of the Code is to obtain earlier information of an alleged criminal activity on record the circumstances before there is time for them to embellishment the prosecution story. The learned P.P. has not been able to show any reason why FIR came to be lodged 15 days after the occurrence of the alleged theft in the house of the complainant. It appears that the P.S.I. on suspicion arrested the accused persons and thereafter in view of the alleged confession of the accused the FIR is lodged without explaining the delay. In such a situation the FIR cannot be said to be reliable. Courts below have seriously erred in placing reliance on such FIR.

21. Even assuming that the two aforesaid circumstances, relied on by the prosecution are established then, in that case also it cannot be concluded that the complicity of the accused persons is established beyond reasonable doubt for the alleged offences punishable under Sections 457 and 380 of the I.P. Code.

22. It must also be remembered that inference u/s 114(a) should never be reached unless it is a necessary inference from the circumstances of the given case which cannot be explained on any other hypothesis save and except that of the guilt of the accused. Such is not the fact scenario in the present case. The Court is entitled to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. In view of the provisions of Section 114 of the Evidence Act, the aforesaid two circumstances even if they are accepted at their face value then also they do not lead to any impeachable inference of the guilt of the accused persons. This is not a case of recovery or discovery of some visible material from the place shown by the accused. It is true that the expression "fact discovered" includes not only the physical object produced but also the place from which it is produced and the knowledge of the accused as to this. This proposition is settled. This view is supported by the decision of Supreme Court rendered in *Mohmed Inayatullah Vs. The State of Maharashtra*, . In that judgment the decision of Supreme Court in *Udaibhan v. State of Uttar Pradesh*, AIR 1962 SC 116 : (1962 (2) Cri LJ 251) is relied on. In the present case no physical object is produced either from the house of the complainant. It is also an admitted fact that the stolen ornaments are also not produced from the shop of the goldsmith. The goldsmith also has not supported the prosecution case. The prosecution case is that accused Mohuji Keshuji had shown the shop of the goldsmith. The panch has also not supported the prosecution case. Second Panch is not examined. Therefore the discovery Panchanama at Ex. 14 is not proved. Even if it held to be proved, it is not reliable. The discovery in Ex. 14, Panchanama is pursuant to the statement of one accused Mohuji Keshuji. Such a statement cannot be used against co-accused persons. As per the Panchanama at Ex. 17 accused Meghaji Gondaji pointed out the place of complainant from where nothing was found or produced. The Panch witness Kantibhai Leelabhai, at Ex. 16 has not supported the prosecution version. The second panch Lelabhai Mafabhai is not examined. Under this circumstances the Panch at Exs. 14 and 17 are not reliable and the Courts below have committed serious error in placing reliance on them.

23. The accused persons came to be convicted only on the aforesaid two circumstances. The trial Court and the Sessions Court have committed serious illegality in placing reliance on the aforesaid two circumstances of discovery. It is highly unsafe to convict the accused persons merely on the basis of uncorroborated circumstantial evidence pertaining to the alleged discovery or recovery of place. Therefore, even if it is presumed that the aforesaid circumstances are proved as required then also that cannot be relied on simpliciter without corroboration to prove the complicity of the accused persons for the offences punishable u/s 457 and 380 of the I.P. Code. In *State of Punjab Vs. Gurnam Singh*, , the Apex Court has held that the conviction based merely on uncorroborated evidence as to recovery of weapon at the instance of accused is unsafe.

24. In the facts and circumstances of the present case and on the close analysis and appreciation of the evidence this court has no hesitation in holding that the conviction of the accused persons for the offences punishable under Sections 457 and 380 of the I.P. Code is bad in law and deserves to be quashed. The conviction and sentence order passed by the Trial Magistrate and confirmed by the Sessions Court are required to be set aside.

25. Learned counsel for the petitioner original accused persons has also fairly stated that the accused persons do not claim any right over the muddamal gold ornaments. The muddamal ornaments were recovered by the investigation officer from the shop of one Soni Kanubhai Narsinhbai, who was examined at Ex. 12, who was turned hostile to the prosecution case. It appears that while convicting the accused persons the trial Court was pleased to return the gold ornaments to the complainant as he was found best entitled to the possession thereof. This finding is confirmed by the Learned Sessions Judge in a conviction appeal No. 13/1988. Still however this Court had issued notice to goldsmith Shri Soni Kanubhai Narsinhbai. Notice is served on him and he has not appeared in the present revision. No claim is made on behalf of the accused persons by the Learned counsel appearing for them. In the facts and circumstances the order of the trial Magistrate to return the gold ornaments to the complainant appears to be justified and requires no interference even in the revision while setting aside the impugned conviction and sentence order.

26. In the result the Revision Application is allowed the impugned conviction and sentence order passed by the Learned Trial Magistrate in Criminal Case No. 1754/86 and confirmed by the Sessions Court in Criminal Appeal No. 13/88 is quashed. The petitioner-original accused Nos. 1 and 3 are acquitted from the charges against them for the offences punishable under Sections 389, 457 read with Section 114 of the I.P. Code. The amount of fine, if paid, by the accused person shall be refunded to the accused. The order of returning of muddamla articles to the original complainant is confirmed. Rule made absolute accordingly.