
(2012) 05 MP CK 0011
In the Madhya Pradesh High Court
Case No : Criminal Rev. No. 433 of 2001

Ramcharan

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 09-05-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 397, 401
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 379

Citation : (2012) ILR (MP) 2575

Hon'ble Judges : U.C. Maheshwari, J

Bench : Single Bench

Advocate : Sanjay Patel, for the Appellant; Vandana Shrivastava, P.L., for the Respondent

Final Decision : Allowed

Judgement

U.C. Maheshwari, J.—The applicant has directed this revision u/s 397/ 401 of Cr.P.C. being aggrieved by the judgment dated 25th April 2001 passed by Sessions Judge, Sagar in Criminal Appeal No. 52/2001, whereby till the extent of applicant by affirming the judgment dated 30.1.2001 passed by the Chief Judicial Magistrate, Sagar in Criminal Case No. 760/2000 convicting him and one co-accused Karan u/s 379 of IPC with direction to undergo for RI one year the co-accused-Karan has been acquitted from such charge. The facts giving rise to this revision in short are that on dated 30.7.2000, the complainant - Mukesh (PW-3) gave a report in writing at P.S., GRP, Sagar contending that his father working as Head Constable in the Police Department had passed away on 22.6.2000, on which to get the sum of his terminal benefits and to submit the application for compassionate appointment he went to the office of the Superintendent Police of Railways, Jabalpur on dated 27.7.2000. After submitting the aforesaid application in such office before Dy. Superintendent of Police he obtained the sum of terminal benefits of his father Rs. 41,935/-, out of which Rs. 40,000/-, in four bundles having the denomination of Rs. 100/- alongwith some documents in

some bag of blue colour and remaining Rs. 1935/- was kept by him in his pocket. Thereafter the aforesaid bag, he boarded the train Godwana Express from Jabalpur and got down at Katni, where he met the applicant accompanied with acquitted co-accused Karan. The applicant introduced himself to be a person of Police Department, Sagar. Thereafter he accompanied with the applicant and his aforesaid companion went to some hotel and took their meals and came back to Railway Station, Katni from where he accompanied with the applicant and his companion boarded the Passenger Train No. 1506 Up Katni Bina for Sagar. On the way of such travelling aforesaid bag of currency note was kept by him under his head and they were talking to each-other upto Damoh and thereafter he slept. On reaching Sagar, he awoke and found missing his aforesaid bag having the currency note of Rs. 40,000/- alongwith the papers. The applicant and his companion Karan were also absent from the train. He tried to trace them out but could not get success, on which he went to Police Station Sagar on 30.7.2000 and gave the aforesaid report in writing, on which, vide dated 31.7.2000, the first information report for the offence of Section 379 of IPC was registered against the applicant and co-accused Karan Ahirwar. In the course of investigation, the applicant and co-accused-Karan were arrested. On their interrogation, they disclosed the information regarding the place where the stolen currency were concealed by them. On such information their respective memorandum u/s 27 of the Evidence, (Ex. P-7 and P-8) were recorded. Pursuant to it, at the instant of the applicant and the co-accused-Karan such currency were seized, from the place shown by them in the memorandum, by preparing the seizure memo, (Ex. P-9 and P-10) in presence of the witnesses, Pradeep Kumar, (PW-4) and Sunil Kumar, (PW-5). As usual interrogatory statements of the witnesses were recorded. Other formalities of the investigation was carried out and on completion of the same, the applicant and acquitted co-accused Karan were charge sheeted for the offence of Section 379 of IPC.

2. On evaluation of the charge sheet, the charge of Section 379 of IPC was framed against the applicant and co-accused Karan. They abjured the guilt, on which the trial was held in which as many as ten witnesses were examined by the prosecution while no one was examined in defence. On appreciation of the evidence, after holding guilty to both the accused for the aforesaid offence each of them was punished by the trial court for RI one year. On filing the appeal on consideration, the co-accused - Karan was acquitted while the conviction and sentence of the applicant has been affirmed, on which the applicant has come to this court with this revision.

3. Shri Sanjay Patel, learned appearing counsel of the applicant after taking me through the evidence adduced by the prosecution as well as exhibited papers of the charge sheet from the record of the trial court argued that on proper appreciation of the evidence, the applicant also ought to have been acquitted by the courts below but he has been convicted under wrong premises. In continuation he said that mere perusal of the deposition of the complainant - Mukesh, (PW-3), it is apparent that he has not identified the applicant or

acquitted co-accused Karan as culprit of the incident. As such he stated inconsistent facts of different stages of his deposition, he was also declared hostile and cross examined by the prosecution even then no fruitful thing has come implicating the applicant with the offence. He also argued that the memorandum of applicant recorded u/s 27 of the Evidence Act and pursuant to it prepared seizure memo have also not been proved by the independent source of evidence. The independent witnesses of seizure memo, on recording their depositions had turned hostile. So in the lack of any independent supporting evidence mere on the testimony of the Police Officer/Investigation Officer or of other Police Officials such memorandum and seizure memo could not be the foundation to hold guilty to the applicant for the alleged offence. He also argued that as per available evidence the currency note and the papers were not recovered from the exclusive possession of the applicant or at his instance. For the sake of arguments, if it is deemed that the same were recovered from some house where other persons are also residing, then such house could not be deemed to be in exclusive possession of the applicant. So in such premises, the applicant could not be connected with the alleged recovery and the seizure memo. Lastly he argued that there is no distinguishable case against the present applicant in comparison of the acquitted co-accused Karan and on extending the acquittal to him by the appellate court, then on the ground of parity such benefit ought to have been extended to the applicant also. But the same was not given under the wrong premises and prayed to extend the acquittal to the applicant by allowing this appeal.

4. On the other hand, responding the aforesaid arguments, by justifying the aforesaid conviction and sentence of the applicant, Ku. Vandana Shrivastava, learned PL argued that same being based on proper appreciation of the evidence and in conformity with law do not require any interference at this stage either for extending the acquittal or even for reducing the awarded jail sentence of the applicant. In support of her arguments, she specifically referred paragraph no. 13 of the impugned judgment and prayed for dismissal of this revision.

5. Having heard the counsel at length, keeping in view their arguments, I have carefully gone through the record of the trial court alongwith the judgment of the courts below. In the available factual matrix of the matter, the courts below have committed grave error in convicting the applicant under the alleged offence of Section 379 of IPC.

6. In order to prove the case the prosecution had examined as many as ten witnesses including the aforesaid complainant - Mukesh Kumar (PW-3). On perusing his deposition, it is apparent from paragraphs 1 and 2 that he did not identify the applicant and the acquitted co-accused Karan as culprits of the alleged incident. Although he stated entire story as stated by him in Annexure P-5, report in writing on which FIR, (Ex. P-6) was registered but he did not depose anything implicating the applicant with the alleged offence. As such he did not identify the applicant as culprit of the incident in the court dock, on which

he was declared hostile by the Public Prosecutor and cross examined. Even in such cross examination also no fruitful thing has come in support of the prosecution. On going through his entire cross examination, I have not found any single sentence implicating the applicant with the alleged offence. I am of the considered view that mere on the aforesaid deposition of Mukesh - complainant the applicant was entitled for extending the acquittal because he was the only affected person and the material witness of the alleged theft. So in the lack of such material evidence in the deposition of complainant himself mere on the basis of the depositions of some officials of the Police Department namely Shri Pramod Kumar, Head Constable, (PW-1) Shri K.D. Sharma, Constable, (PW-6), Shri Ansar Ali, Constable, (PW-8), Raghuvendra Urmaliya, Constable, (PW-9) and Shri K.P. Singh, Constable, (PW-10), as alleged who were accompanied with the Investigating Officer of the case at the time of making the arrest of the applicant and accused and co-accused, on recording their memorandum u/s 27 of the Evidence Act and at the time of recovering the currency note, the applicant could not be held guilty for the alleged offence as they are not the eye witnesses of the incident. In any case their statements could not be taken into consideration for holding the conviction unless the same is supported by the testimony of some independent witnesses. Besides this, on recording the deposition of Pradeep Kumar Yadav, (PW-4) and Sunil Kumar, (PW-5), the witnesses of aforesaid memorandum of the applicant and seizure memo, both had turned hostile and have not stated anything implicating the applicant. So in view of such evidence of the independent witnesses, the testimony of the aforesaid Constable or other Police Officials could not be a foundation to hold guilty to the applicant as memorandum and seizure memo have not been proved beyond reasonable doubt by the prosecution.

7. Apart the above, the Investigating Officer Shri M.S. Sikarwar, (PW-7) deposed that in pursuance to the aforesaid memorandum of the applicant, the alleged recovery of currency was made from the house of the applicant but through any document he could not prove that the house from which the alleged currency and documents were recovered and seized was in exclusive possession of the applicant. The same has also not been proved by the other evidence available on record. In such premises, the inference could only be drawn that at the time of alleged recovery the applicant was in custody of the Police and such house was in possession of some other person and in such circumstances the alleged recovery could not be said to be at the instance of the applicant from his house. It is not the case of the prosecution that at the time of seizure, the alleged house was closed or locked and same was opened at the instance of the applicant. In such premises, exclusive possession of the applicant over such house could not be deemed and I am of the considered view that unless the exclusive possession of the applicant over the house, from where the alleged currency and documents were seized is proved by any admissible or documentary evidence, the alleged house could not be deemed to be the house of the applicant and in such premises, the applicant could not be connected with the alleged recovery. My

aforesaid view is fully fortified by the decision of the Apex Court in the matter of Ghuran Yadav Vs. State of Bihar, , in which it was held as under:-

4. The search, if any, which is said to have led to the recovery of the six bags in question appears to us on the existing record to have been effected in a manner which does not inspire confidence. But we need say nothing more on this point because the absence of evidence of ownership of the house is enough to determine the fate of the prosecution case.

5. On going through the record and examining the evidence which we have just discussed we are clear that there is no legal evidence on the record on which we can sustain the conclusions of the Courts below that it was the appellant's house which was searched.

8. It is apparent from the deposition of the complainant, Mukesh Kumar, (PW-3), as stated above, that he has not supported the case of the prosecution against the applicant. On the contrary he has stated some inconsistent facts at different stages of the same deposition as such in chief he has stated something and after declaring him hostile on his cross examination by the Public Prosecutor, he stated some other thing and in cross examination of the defence counsel, he stated some different thing and when his testimony was not relied on by the appellate court to convict Karan, then no different Yardstick to evaluate such evidence to affirm the conviction of the present applicant could have been adopted by the appellate court. My such aforesaid view is fully fortified by the decision of the Apex Court in the matter of Suraj Mal Vs. State (Delhi Administration), in which it was held as under:-

2... It is well-settled that where witnesses make two inconsistent statements in their evidence either at one state or at two stages, the testimony of such witnesses becomes unreliable and unworthy of credence and in the absence of special circumstances no conviction can be based on the evidence of such witnesses. For these reasons, therefore, when the Special Judge disbelieved the evidence of PWs. 68 and 9 in regard to the complicity of Ram Narain, It was not open to him to have convicted the appellant on the same evidence with respect to the appellant, which suffered from same infirmities for which the said evidence was disbelieved regarding the complicity of Ram Narain, If the witnesses drew no distinction in the examination in chief regarding acceptance of bribe by Ram Narain and by the appellant and the witnesses were to be disbelieved with respect to one, they could not be believed with respect to the other. In other words, the evidence of witnesses against Ram Narain and the appellant was inseparable and indivisible....

9. It is also apparent on record that in order to prove the bonafide of the Investigation Officer and accompanied Police Officials to show that in fact they visited the alleged place/house, for recovery of the stolen currency at the instance of the applicant, pursuant to his memorandum recorded u/s 27 of the evidence Act, the concerning Rojnamcha Entries regarding their departure from

the Police Station to such place so also such entry of their returning and arrival to Police Station, with the description of the work done, have neither been produced nor exhibited on record. In the lack of such evidence, it could not be deemed beyond reasonable doubt that to make the alleged recovery, the aforesaid Police Officials alongwith the applicant at his instance visited the alleged house and seized the alleged sum and document at his instance from his possession. Therefore, on this ground also the applicant deserves to extend the acquittal.

10. In the aforesaid premises, I have come to this conclusion that the prosecution has failed to prove the alleged offence of Section 379 of IPC against the applicant beyond reasonable doubt and in such premises, the approach of the trial court as well as the appellate court holding guilty to the applicant for such offence being perverse and contrary to the record is not sustainable.

11. Besides the aforesaid, it is apparent fact on record that present applicant as well as co-accused Karan are situated in similar circumstances in the matter and on consideration by the appellate court if co-accused Karan was extended acquittal, then on the basis of same evidence and contrary to the principle of parity, the conviction of the applicant could not be affirmed by the appellate court. So on the ground of parity also the applicant is entitled for extending the acquittal. So in such premises also the judgment of the appellate court till the extent of this applicant being perverse is not sustainable.

12. In view of the aforesaid, this revision is allowed and by settling aside the judgments of both the courts below till the extent of the applicant - Ramcharan holding conviction and sentence against him u/s 379 of IPC are set aside and he is acquitted from such charge. His bail bonds are hereby discharged. The revision is allowed, as indicated above.