
(1978) 11 BOM CK 0009

In the Bombay High Court

Case No : Criminal Revision Application No. 394 of 1978

Sharad Sadashiv Muley

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 28-11-1978

Acts Referred:

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

Evidence Act, 1872 — Section 133

Penal Code, 1860 (IPC) — Section 381

Citation : (1978) 11 BOM CK 0009

Hon'ble Judges : R.A. Jahagirdar, J

Bench : Single Bench

Advocate : R.M. Agarwal, for the Appellant; B.Y. Deshmukh, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

R.A. Jahagirdar, J.—This revision application is directed against the order of conviction recorded u/s 381 of the Indian Penal Code against the petitioner, hereinafter referred to as "the accused", by the two courts below on a concurrent finding of fact. Prima facie, therefore, the learned Advocate appearing in support of the petition Mr. Agarwal had a somewhat difficult task which however he has discharged with success.

2. The case is one of theft of 32 drums of asphalt belonging to the Building & Communication Department and which were lying by the side of the road near mile stone No. 224 on Aurangabad Nagpur Road. According to the prosecution, the accused who was working as a road clerk in the Building and Communication Department at the relevant time is responsible for the theft of 32 drums of asphalt. One Gopal Joshi, a Junior Engineer, was actually in charge of the asphalt work that was going on Aurangabad Waluj and Waluj Kaigaon sections of Aurangabad Nagpur Road. Thirty five drums of asphalt had been kept by the Buildings and Communication Department by the side of the road near mile

stone No. 224. The prosecution alleges that on the night of 4th of February, 1974 one Nelson, who was a watchman, informed Gopal Joshi at his residence that the accused had removed 32 drums of asphalt in a truck from the place where they were lying. Gopal Joshi proceed to the site and was satisfied that 32 drums of asphalt had been removed and theft of the same had been committed. Thereafter, he first reported the matter to his superior officer who directed him to file a complaint with the police which was accordingly done. That complaint treated as the first information report is at Exh. 20. In the investigation which was get in motion pursuant to this complaint, 32 drums which were lying in the compound of the M.I.D.C. at Jalna, a town about 60 k.m. form Aurangabad, were seized. Thereafter, further investigation carried out and according to the prosecution following picture emerged from the same.

3. The accused offered to sell 32 drums which were allegedly in his possession to any one who was in need. One Sitalsingh, who was the landlord of the accused, knew Mahendra Shah who was in need of drums of asphalt. Sitalsingh, therefore, sent a note to Mahendra Shah mentioning that his friend Muley is able to offer the required number of drums of asphalt and arrangement may be made for collecting the same immediately. This note is dated 3rd February, 1974. Thereafter, on 4th February, 1974 the accused and Mahendra Shah are said to have engaged a motor truck BYW 3397 of which one Shabirkhan was the driver. One Mohanlal is the servant of Mahendra Shah and Mirza Shabir Beg is one of the collies who were engaged for loading the said drums of asphalt in the truck. According to the prosecution, after the truck the collies were engaged they all proceeded to the site which was pointed out by the accused. From there 32 drums of asphalt were loaded into the truck which thereafter sped away from that place. On the way, however, the truck had to pass through Aurangabad and Jalna octroi outposts where octroi duty was paid out the number of the vehicle in which the goods were being transported was shown as MBH 3397 and not BYW 3397. As I have already mentioned above, the stolen goods were seized by the police at Jalna.

4. In support of its case the prosecution examined as may as 12 witnesses. The learned trial Magistrate by his judgment and order dated 21st April, 1978 convicted the accused of the offence punishable u/s 381 of the Indian Penal Code and sentenced him to rigorous imprisonment for 3 months. In addition, the sentence of fine of Rs. 300/- was also awarded. In default of payment of fine, rigorous imprisonment for 3 months was directed. I may also mention that the learned trial Magistrate by the same order issued notices to two prosecution witnesses to show cause why they should not be prosecuted for the offence punishable u/s 411 of the Indian Penal Code. This order of conviction and sentence was unsuccessfully challenged by the accused in Criminal Case No. 21 of 1978 which was heard and dismissed by the learned Additional Sessions Judge of Aurangabad by his judgment and order dated 17th August, 1978 which is now the subject matter of the challenge in this petition.

5. Mr. Agarwal recognised the limitations of this Court when it is exercising the powers of revision. Bearing those limitations in my mind, he trimmed his arguments and attempted to show that the guilt of the accused cannot be sustained by any legal evidence which is on record. In order to appreciate Mr. Agarwal's contention, I may mention that the Court below has not relied upon the evidence of Gopal Joshi examined as P.W. 1. Similarly, the testimony of Nelson who according to the prosecution informed Gopal Singh immediately after the theft was committed, is also of no assistance to the prosecution because Nelson has refused to depose to the facts which formed the basis of the prosecution. Ultimately the testimony of five witnesses who were the participants in the lifting of the drums of asphalt became relevant and has been discussed by two courts below. The learned Additional Sessions Judge, sitting as a final Court of facts, has held and, in my, opinion, rightly that Mohanlal the servant of Mahendra Shah, who was the contractor and who purchased the drums of asphalt allegedly from the accused and Sitalsingh who brought Mahendra Shah in contact with the accused, were all accomplices and their testimonies should not be accepted without corroboration from independent source. Shabirkhan, who was the driver of the contractor and Mirza Shabhir Beg, who was one of the colliers who loaded the drums of asphalt into the truck were accepted by the learned Additional Sessions Judge as independent witnesses. According to the learned Additional Sessions Judge, their testimonies disclose the presence of the accused in the truck in which the contractor travelled to the site from where ultimately the drums were lifted. Accepting the identification of the accused as a person who sold the drums to Mahendra Shah on the day in question, the learned Additional Sessions Judge confirmed the order of conviction which has been recorded by the Court of first instance.

6. Mr. Agarwal quarrels with the reasoning of the learned Additional Sessions Judge when he says that Shabirkhan the driver of Mahendra Shah is an independent witness. He invited my attention to certain statements in the testimony of this witness which according to Mr. Agarwal show that he cannot be regarded as a truly independent witness. According to this witness, when the truck was to pass Tol point at Jalna Mahendra Shah's servant Mohanlal paid the octroi duty. Though this witness told Mohanlal Jalna, Mohanlal recorded the number of the truck as MHB 3397. This witness admit that he knew that Mohanlal got a different number recorded on the Tol Naka but is unable to give any reason why Mohanlal did such a thing. Mr. Agarwal with a considerable justification insists that this shows that Shabirkhan was hand in glove with the other prosecution witnesses, such as Mohanlal and Mahendra Shah in the lifting of these drums of a asphalt. However, looking to his entire evidence it is possible to disbelieve this witness without characterising him as an accomplice witness. His testimony discloses that at the earliest opportunity when he was questioned by the police at Jalna he did not disclose the events as mentioned by him in the examination-in-chief which formed the basis of the prosecution cases. He does not explain why he did not disclose to the police the events that had taken place.

He admits that he does not know the name of others who accompanied him except Mohanlal and the accused. It was not as if he was introduced to them by anyone. He admits that after the date of the incident he was seeing the accused in the Court for the trust time. Here again he is frank enough to admit in the cross-examination that the accused was shown to him by the police when he came to the Court for giving evidence. He was also told by the police that the accused was Muley and, therefore, he is telling the Court that he is Muley. No comments need be made on the credibility of this witness when he says that he is identifying the accused in this is not the evidence which could be relied upon in a criminal case for recording a positive finding on identification.

7. The next witness accepted as an independent witness by the learned Additional Sessions Judge is Mirza Shabbir Beg who was one of the several collies. His testimony is equally weak. He has also mentioned that between the date of the incident and on the date on which he gave evidence which was two months later than the evidence given by Shabirkhan he had not seen the accused. He had not known the name of the accused. Though none told him that the contractor Muley was with him in the truck when the drums were lifted, yet he was bold enough to tell the police that contractor Muley was with them. He said so because the name of Muley contractor was revealed when he attended the police station four days later.

8. If agreeing with the learned Additional Sessions Judge, I treat P.W. Nos. 7, 9 and 11 viz. Mohanlal, Sitalsingh and Mahendra Shah as accomplices their evidence cannot be accepted in the absence of independent corroboration and if it is found as I have found now that the two witnesses who though regarded as independent, did not in fact corroborate anything that the accomplice witnesses have said a finding that is recorded by the two courts below about the guilt of the accused, must be deemed to be a finding based upon no legal evidence. Neither of these two witnesses who are regarded as independent witnesses by the learned trial Magistrate inspite confidence in the mind of the Court regarding their ability to remember the face and name of the accused who according to them accompanied them. In my opinion, therefore, bearing in mind always the burden of proof that rests upon the prosecution and looking to the quality of evidence in the instant case it should be held that the prosecution has not proved beyond reasonable doubt that the accused was involved in the lifting of the drums of asphalt. The benefit of doubt, therefore, must be given to him and he will have to be acquitted.

9. In the result, this revision application is allowed. Rule is made absolute. The order of conviction and sentence recorded by the learned Judicial Magistrate of First Class (Railways) at Aurangabad in Criminal Case No. 690 of 1974 and confirmed by the learned Additional Sessions Judge at Aurangabad in Criminal Appeal No. 21 of 1978 is set aside. The direction regarding the issue of notices to the prosecution witnesses issued by the learned trial Magistrate is however not disturbed. The bail bond of the accused shall stand cancelled. Fine, if paid, shall

be refunded.