
(1991) 06 MP CK 0004

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 185 of 1985

Shashi Kumar Gupta

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 24-06-1991

Acts Referred:

Arms Act, 1959 — Section 25, 27

Evidence Act, 1872 — Section 27

Madhya Pradesh Dakaiti Aur Vyaparan Prabhavit Kshetra Adhiniyam, 1981 — Section 11, 13

Penal Code, 1860 (IPC) — Section 114, 120B, 365, 377, 384

Citation : (1992) JLI 366

Hon'ble Judges : Shacheendra Dwivedi, J

Bench : Single Bench

Advocate : Lokendra Gupta and Rajeev Gupta, for the Appellant; S.B. Mishra, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Shacheendra Dwivedi, J.—This Judgment shall dispose of the two criminal appeals Nos. 185 of 1985 and 189 of 1985 preferred against the common order of conviction and sentence passed by Special Judge, Morena, in Special Case No. 190 of 1983 dated 23.9.85, whereby three persons were convicted including the two Appellants. Appellant Shashikumar has been convicted and sentenced under Sections 384 and 377 read with Section 114 IPC to two years" R.I. for each of the offences and Appellant Koksingh under Sections 384 and 120B IPC to two years" R.I. The third co- accused Onkar was convicted u/s 365 IPC read with Section 11 and 13 of the Madhya Pradesh Dakaiti & Vyaparan Prabhavit Kshetra Adhiniyam (for short "the Adhiniyam) and sentenced to three years" R.I. and u/s 377 IPC to four years" R.I. He was further convicted and sentenced u/s 387 IPC read with Section 11 and 13 of the Adhiniyam to four years" R.I. and for an offence u/s 384 IPC to three years" R.I. Criminal Appeal No. 197 of 1985 preferred by Onkar against the impugned order, was decided on 9-12-86 to have

abated as the Appellant died during the pendency of the appeal.

2. The facts giving rise to these appeals are that according to the prosecution, on 29.5.83, at about 3.00 p.m. complainant Brijmohan (P.W. 1) was sitting at Navbharat Transport Co., in the town of Morena along with one labour, conductor and a businessman from Gwalior named Matadin who had come by car. When Matadin went to his car for going to Gwalior, it is stated that co-accused Onkar who was running a Pan-shop in front of the transport company also came to the car and abused Matadin. When Brijmohan went to the car to intervene, accused Onkar asked him to go to his shop. Thereafter it is stated that Appellant Onkar came to the shop of Brijmohan. He had handgranades in his hand. On entering the shop, he gave slaps to complainant Brijmohan and conductor Rajesh and under the threat of handgranades, asked Brijmohan to accompany him. Onkar himself called a rickshaw and carried Brijmohan to his room in Gancshpura.

3. It is further stated that Appellant Onkar by closing the doors assaulted Brijmohan by slick and fists and got a letter written from him to his Minim Jagdish (not examined) stating therein that he would return by 7 O'clock in the evening. Thereafter by opening the door Onkar asked some one to call for a photographer and on photographer reaching the room, accused Onkar got naked and also made the complainant so naked and kept his penis on the anus of Brijmohan and got both of them photographed. Then further he kept his penis into the mouth of Brijmohan and got photographed again. More photographs were taken in different positions and abusing the complainant, a threat was given that these Photographs would be published in news papers. After this, Onkar again opened the door, asked someone to bring Rukka (promissory note) and on having received it, it was got executed by Brijmohan for Rs. 20,000/-. Onkar asked Brijmohan to give him Rs. 10,000/- and further told to him that the person who brings the photographs, be paid Rs. 10,000/- and then Brijmohan was returned his clothes and was allowed to go, thereafter he came to his house.

4. It is stated that in the meantime on receiving the letter addressed to Munim Jagdish by Brijmohan, wife of Brijmohan along with his sister went to P.W. 3 Madanlal and narrated the incident of Brijmohan having been carried by Onkar, a report Ex. P/I was lodged by Madanlal Gupta (P.W. 3) at P.S. Morena, but the letter written by Brijmohan was not seized by the police at that time and the police started investigation. By then Brijmohan had returned home and from home he went to his transport company where police recorded his statement and registered the offence.

5. Police apprehended accused Onkar after three days and at his instance and on the information given by him in the presence of the witnesses namely Radheshyam and Matadin (none examined) handgranades were seized from a wooden box kept in his room and further on his information, a Rukka for Rs. 20,000/- was seized under Ex. P/8 from co-accused Appellant Koksingh. Further a photoreel is stated to have been recovered at the instance of co-accused Onkar from Appellant Shashikumar and was seized vide Ex. P/10 and on

completing the investigation, police filed a challan against all the three accused persons.

6. At the trial, the prosecution examined as many as seven witnesses, out of which two witnesses namely Dr. O.P. Gupta (P.W. 6) and Dr. V.K. Jain (P.W. 7) are the witnesses, who have medically examined Brijmohan and Appellant Onkar. Out of remaining five witnesses Gulabchand Sharma (P.W. 4) is a clerk from Arms Section of the Office of the District Magistrate, Morena to prove sanction to prosecute co-accused Onkar u/s 25/27 of the Arms Act, Rajeshchand (P.W. 5) is a driver, who is said to be present at the transport company when Onkar carried Brijmohan with him. Witness Madanlal Gupta (P.W. 3) is on the fact that he lodged report with the police on being informed by the wife and sister of complainant Brijmohan. Remaining two witnesses are Brijmohan the complainant himself and Ramakant Tiwari the investigation officer.

7. Witness Brojmohan (the complainant) does not allege anything against the two co-accused-Appellants. His statement is confined to the allegations against the co-accused Onkar alone (since dead). Witness complainant Brijmohan has neither identified any of the Appellants even in the Court nor has also given any description of the photographer or the person who brought the blank Rukka to show their presence at the spot. The sole witness of the prosecution whose evidence may be called relevant as against the Appellants is Investigating Officer Ramakant Tiwari (P.W. 2). The prosecution evidence and circumstances against co-accused Onkar need not be discussed in details as his appeal (Cr. A. No. 197/85), on his death was decided on 9.12.86, to have been abated. Thus with regard to the Appellants the evidence and circumstances which have been relied upon by the learned trial Court, while convicting them for the offences are:

(1) with regard to Appellant Shashi Kumar, the seizure from him, of a film at the instance of co-accused Onkar which contains photographs of the complainant and co-accused Onkar in different poses of commission of unnatural offence,

(2) with regard to Appellant Koksingh the seizure from him of Rukka executed by complainant Brijmohan for Rs. 20,000/- in favour of co-accused Onkar.

On the basis of presumptions raised from the seizures of the two articles i.e. the photo-reel from Appellant Shashikumar and Rukka from Appellant Koksingh, the Appellants have been convicted and sentenced as stated above.

8. The defence of Appellant Shashikumar was that he has been falsely implicated at the instance of police photographer's "Shama Studio". He has challenged the seizure of photo-reel i.e. negatives from him. Ramakant Tiwari (P.W. 2) has admitted the fact that brother of Appellant Shashikumar runs a photography shop in Morena,

9. The defence of Appellant Koksingh was that his brother Ramjilal was absconding and for that reason the police was after him and he has been falsely implicated. He denied any seizure of Rukka from him.

10. Before discussing the evidence and the conclusions drawn by the learned trial Court, it is significant to mention that the trial Court, in the impugned order against Appellant Shashikumar has only held of an abetment in collusion with co-accused Onkar to extract money from Brijmohan under fear of publication of photographs, but the fact remains that under the evidence of the prosecution it is not an attempt only but commission of offence u/s 384 IPC as a Rukka (promissory note) which is a valuable security, was got executed by co-accused Onkar under such threat. In this light, prosecution case is to be examined.

11. With regard to alleged seizures, the prosecution failed to examine any of the two Panch witnesses. No explanation has come from the prosecution for such non-examination. The learned trial Court has not at all applied its mind to the lapse. The two panch witnesses were material for unfolding the prosecution version as to the circumstances and the place of seizure of the Rukka (promissory note) and the photo reel. The prosecution evidence is discrepant on the point.

12. In the instant case, as a joint venture Shri Lokendra Gupta learned Counsel for the Appellant Koksingh and learned Advocate Shri Rajeev Gupta counsel for Appellant Shashikumar have submitted that the prosecution has not succeeded even in proving the seizure of Rukka (Promissory note) and photo reel itself from the possession of the Appellants by cogent and independent evidence. They further submit that the trial Court erred in not drawing inference adverse to the prosecution for withholding the material independent witnesses of the seizure of Rukka Ex. P/8 and of photo reel Ex. P/10.

13. For the prosecution to seek conviction of an accused from a certain set of circumstances for offence under Sections 384 and 377 IPC with the aid of Section 114 IPC it has to prove the circumstances under which his presence may be inferred at the spot. The only circumstances against Appellant Shashikumar is the seizure of a photo reel in which according to the prosecution itself, two photographs are of other persons taken in the studio and the remaining 13 photographs are of co-accused Onkar, of commission of unnatural offence on complainant Brijmohan. Now, the best circumstances which was available to the prosecution was to establish the identity of those persons who were allegedly photographed at the studio and to further establish from them the person who photographed them and the studio where they were so photographed. Then the prosecution could have sought the desired conclusion, if it succeeded in proving the seizure of film from the possession of Appellant Shashikumar.

14. P.W. 2 Ramakant Tiwari, in his statement (para 9) has stated that co-accused Onkar supplied information vide memo Ex. P/4 to him in the presence of panch-witness and took him and the two panch-witnesses to the shop of Appellant Shashikumar where the Appellant was arrested and on his production, the photo reel Article 15 was seized. Whereas in panchnama Ex. P/10 the place of seizure of reel is shown as house of Shashikumar. Further, the witness (complainant) Brijmohan (P.W. 1) has not proved the photo reel nor it was shown to him to seek his statement that it contained his photographs. This witness has proved

the photographs (Articles 3 to 14) but the prosecution has failed to establish that the alleged photographs (Articles 3 to 14) are from the seized reel nor the photographer, who prepared the photographs has been examined. The prosecution case rests on the seizure of photo reel and when from this circumstances, the conclusion of the guilt is to be drawn, it should be fully and cogently established that it was seized from the Appellant and that the photographs (Articles 3 to 14) on which the prosecution relied, are from the so seized photo reel. In this regard there is sole statement that of investigating officer Rama Kant Tiwari (P.W. 2)., withholding a panch witnesses and non-production of photographer who prepared photographs (Articles 3 to 14) without any explanation, is a material circumstances, which introduces infirmity in the prosecution case.

15. This Court in *Piranwa v. State of M.P.* 1978 J.L.J. SN 74 taking into account the non-examination of panch witnesses in a case of circumstantial evidence of seizing of articles and considering the question when it may be made the basis of conviction, held:

The seizure memo does not recite the place from where the pistol was recovered. The witnesses to the seizure memo are Ramdas and Bhaiyadeen. The prosecution, however, did not examine any of these witnesses. The evidence of recovery of the pistol from the possession of Appellant Ramgopal, therefore, solely consists of the testimony of Sub-Inspector Yadvendra Singh (P.W. 7). No reason was given why the witnesses to the seizure memo Ex. P/18 were not examined by the prosecution. It is, therefore, not possible to accept the bare statement of Sub-Inspector Yadvendra Singh (P.W. 7). The prosecution has thus failed to prove that the Appellant Ramgopal was in possession of the pistol.

Further in *Bachchan v. State of M.P.* 1978 (1) MPWN 264 the Court was of the opinion that when independent evidence was available and not produced, the implicit reliance on the bare statement of Investigating Officer cannot be placed and it was held that:

The result is that even though there was enough independent evidence available to prove the prosecution case, if it be true, no attempt has been made to adduce the best evidence in the case and no explanation has also been given for not doing so. In such a situation, to rely on the uncorroborated testimony of the investigating officer P.W. 19 Ramesh Chandra Shitble alone to sustain the conviction, would be extremely unsafe.

There may be cases where the independent evidence was not available and the Court in those cases may have to examine and base conviction on the testimony of police officers, if found reliable, as they are also the competent witnesses, but when the independent evidence though available yet not produced, the Court would be slow in accepting the testimony for proving discovery and actual recovery of articles. The Apex Court in *State of Kerala v. Thomas Bobby* 1983 CAR 114 found that:

But from the material on record relating to this discovery we find that the same has not been properly proved by the prosecution as discovery of the ornaments at the instance of the accused purely rests upon the evidence of police officer.

16. This apart, when the prosecution seeks its raising of a presumption against an accused of the commission of an offence, on the basis of the seizure of any incriminating article, it has to prove the two elements of the facts: firstly, that the article or the object was in exclusive possession of the accused and secondly that there were no circumstances which may reasonably explain such possession. In *Daulla Shojji Ram v. State* 1959 MPLJ 862 this Court held that if exclusive possession of accused is not proved, he is entitled to the benefit of doubt. No presumption could be raised for arriving at a conclusion of accused being guilty if the possession is explainable from the prosecution evidence itself. Their Lordships of the Supreme Court in *Mohmed Inayatullah Vs. The State of Maharashtra*, found that if the facts proved by the prosecution give rise to alternative hypothesis and if one is wholly compatible with his innocence, he would be entitled to the benefit of doubt.

17. Further more, for drawing inference against an accused in possession of incriminating article, a distinction has to be drawn in cases where the property is recovered in consequence of information supplied by the accused and in those cases where there is no such information of an accused who produces the property, on being so told by co-accused. In the cases of later kind, the strong inference would be drawn from such recovery against that accused whose information led the production of the property. In the absence of any incriminating statement by an accused who produced the seized property its production alone cannot sufficiently establish the guilt of the accused. The learned Counsel for the two Appellants have pressed into service the authorities of *Emperor Vs. Chavadappa Pujari*, *Kedar Nath Chakravarty Vs. The State*, and *Kacharji Hariji v. State of Gujrai* AIR 1969 Guj. 100.

18. In *Chayadappa Pujari and Ors. v. Emperor* (supra) the High Court of Bombay has held as under:

In such cases a good deal depends upon whether the production was accompanied by information given by the accused in custody as would be admissible in evidence u/s 27. Such information can be relied upon by the prosecution as incriminating evidence against the accused along with the production or discovery of stolen property. But the production of property by itself would not necessarily prove its possession. It would at the most show that he had knowledge where the property was kept or concealed.

The High Court of Gujrat in *Kacharji Hariji v. State of Gujrat* (supra) while dealing with the question of raising of presumption from recovery of incriminating article found that:

In the absence of any other evidence and in the absence of any incriminating statement made, at the time of giving information, as for example, that he was

the author of concealment , this circumstance, found against that person can be explained on any other rational hypothesis.

19. However, presumption to be raised from the seizure of an incriminating article is a presumption of Fact and not of Law. No hard and fast rule can be laid down with regard to the circumstances in which any fact or facts may be presumed to exist. At the same time, presumption cannot be raised at random. There must be connection between the facts proved and those to be provided.

20. The statement of co-accused Onkar in Ex. P/4 u/s 27 of the Evidence Act which led the police to the seizure of articles from the Appellants is to the effect that he has given photo reel to Appellant Shashikumar and Rukka to Appellant Koksingh and the statement in the absence of any other circumstances itself exonerates the two Appellants of the liability of incriminating possession of film and Rukka to connect them with the offence. As such, no inference against the Appellants could be available to the prosecution. Appellant Shashikumar has been convicted with the aid of Section 114 IPC but Section 114 is itself a deeming provision and from the seizure of photo reel, no presumption can be raised for applying Section 114 IPC, deeming that it was the Appellant who took the alleged photographs, abetted the offence of extortion and the commission of unnatural offence by co-accused Onkar.

21. The above circumstance is also well explainable as firstly: the photographs Articles 3 to 14 could well be taken by anyone or even by the brother of the Appellant who runs a photo studio, secondly the photo reel could very well reach to the shop where it is allegedly seized from an individual customer or co-accused Onkar for developing purposes. In the investigation a camera Article 16 was also seized by Police along with the reel under panchnama Ex: P/10 but the prosecution has not established any connection of the camera with the reel as both were not sent for any such examination. From the knowledge or possession of photo reel, even if accepted at face value, the only irresistible conclusion that the Appellant was the person who took the photographs could not be arrived at for connecting him with the offence under Sections 384 and 377 read with Section 114 IPC.

22. Now, turning to the evidence against Appellant Koksingh, from whom the Rukka Article 2 has been seized on the information of co-accused Onkar the challenge to his conviction is on the same reasonings of law as have been discussed above with regard to Appellant Shashikumar. Further on the facts, the writing on the Rukka for showing the connection of the accused was not examined by any hand-writing expert. With regard to the seizure of Rukka, no information or statement was given by the Appellant As discussed above, it was seized on the information of co-accused Onkar that he had given the Rukka to the Appellant. In the circumstances from the seizure of Rukka Article 2 no presumption against the Appellant can be raised. Appellant Koksingh has been convicted for an offence u/s 384 I.P.C. with the help of Section 120B on the allegation of hatching a conspiracy to commit the offence, but it is unfortunate

that out of the total three accused persons in the case, the charge of Section 120B IPC was framed only against Appellant Koksingh. It is needless to say that for an offence of conspiracy the charge against two or more persons is essential and the charge of Section 120B being only against the Appellant and he having been convicted with the help of Section 120B, for an offence u/s 384 IPC, the conviction of the Appellant cannot be sustained.

23. In the Indian Penal Code "criminal conspiracy" has been defined in Section 120A as:

120-A. Definition of Criminal conspiracy:

When two or more persons agree to do, or cause to be done,-

(1) an illegal act, or

(2) an act which is not illegal by illegal means, such agreement is designated a criminal conspiracy ;

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties such agreement in pursuance thereof.

When a similar question arose before the Hon''ble Supreme Court in *Topandas Vs. The State of Bombay*, it was observed that:

By the terms of the definition of Criminal Conspiracy itself, there ought to be two or more persons who must be parties to an agreement and it is trite to say that one person alone can never be held guilty of criminal conspiracy for the simple reason that one cannot conspire with oneself. If, therefore, four named individuals were charged with having committed the offence u/s 120B, Penal Code, and if three out of these four were acquitted of the charge, the remaining one accused could never be held guilty of the offence of criminal conspiracy.

In *Lennart Schussler and Another Vs. The Director of Enforcement and Another*, it was found by the Hon''ble Court that:

Under Section 120B there must be an agreement between two or more persons to commit an offence or where the agreement does not amount to an offence in the doing of an act which is legal, in an illegal way there should also be established an overt act

24. The case of Appellant Koksingh stands on better footings as he alone has been charged for the offence of Section 120B IPC to commit an offence u/s 384 IPC.

25. Shri S.B. Mishra, Government Advocate, while supporting the order of convicting, submitted that though P.W. 2 Tiwri is a police officer, he is a competent witness and that the defence does not get any advantage from the non-production of Panch witnesses. In this regard he has placed reliance on *Som Prakash Vs. State of Delhi*, , *Raghubir Singh Vs. State of Punjab*, and *Hazari Lal*

Vs. State (Delhi Administration), wherein, according to Shri Mishra, their Lordships found that the police officers were good witnesses and could be relied upon for basing conviction. But their Lordships have also found that as a matter of caution there ought to be some corroboration of the testimony of police officer, by ocular or circumstantial evidence. In Som Prakash (supra) the Court observed.

The demanding degree of proof traditionally required in a criminal case and the devaluation suffered by a witness who is naturally involved in the fruits of his investigative efforts, suggest the legitimate search for corroboration from an independent or unfaltering source - human or circumstantial. - to make judicial certitude doubly sure. Not that this approach casts any pejorative reflection on the police officer's integrity, but that the hazard of holding a man guilty or interested, even if honest, evidence may impair confidence in the system of justice.

It was a bribery case and the statement of police officer P.W. 4 was corroborated by the testimony of bribe-giver P.W. 1 and a Government official P.W. 3. Taking into account, the testimony of P.W. 1, the Court found: His deposition has been read again before us and nothing to brand him a liar has come out. "Discussing the prosecution evidence the Court observed:

The evidence of P.W. 4 coupled with that of P.W. 1, was itself sufficient to establish the acceptance of the tainted currency notes by the Appellant from Om Prakash, which was a pivotal fact of the prosecution case. Then there was the evidence of P.W. 3 apart from that of the Police Officer.

26. In Raghubir Singh (supra) Supreme Court referring to Som Prakash (supra) acquitted the accused in the bribery case finding the prosecution was not such as to inspire confidence and cannot be implicitly accepted. In Hazarilal (supra), there was some corroboration of the deposition of police officer with the statement of one Panch-witness and the other Panch-witness was not examined by prosecution as he had become mentally deranged before the trial of the case. Further ocular evidence was corroborated by circumstances. The present case stands differently as discussed above, from the above authorities cited by Government Advocate Shri Mishra, and is distinguishable.

27. Viewed from any angle, the prosecution has failed to bring home the guilt to the accused-Appellants beyond the shadow of reasonable doubt, and both the accused-Appellants are entitled to an acquittal.

28. As a necessary result, both the appeals (Shashikumar v. State) Cri. A. No. 185/85 and Koksingh v. State Cri. A. No. 189/85 are allowed, setting aside the impugned order of conviction and sentence passed against the Appellants and they are acquitted of the charges. They are on bail and their bail bonds are discharged.