
(2019) 11 KAR CK 0039

In the Karnataka High Court

Case No : Criminal Revision Petition No. 605 Of 2016

Shivakumar @ Sai And Ors

APPELLANT

Vs

State Of Karnataka

RESPONDENT

Date of Decision : 19-11-2019

Acts Referred:

Indian Penal Code, 1860 — Section 224

Code Of Criminal Procedure, 1973 — Section 167(2), 313, 386, 390, 391, 397, 401, 428

Constitution Of India, 1950 — Article 21

Citation : (2019) 11 KAR CK 0039

Hon'ble Judges : K.Somashekar, J

Bench : Single Bench

Advocate : Harish .H.V, Thejesh .P

Final Decision : Disposed Of

Judgement

1. This petition is filed by the petitioners/accused Nos.2, 3 and 5 challenging the judgment and order dated 17.2.2016 rendered by the Court below in CrI.A.No.5012/2015 dismissing the appeal and confirming the judgment of conviction and order of sentence passed by the trial Court in C.C.No.957/2009 dated 30.06.2015 convicting the petitioners/accused persons for the offence punishable under Section 224 of IPC.

2. The factual matrix of this petition is that on 22.07.2009 at 11.00 p.m. to 12.00 in the mid-night, the accused persons who were the under trial prisoners housing in the Madhugiri sub-jail which is in front of the Madhugiri police station, broke open the iron bars of cell No.5 and escaped from the lawful custody. In pursuance of filing of the complaint by the concerned jail authorities, the crime came to be registered against the accused persons for the offence under Section 224 of IPC. Subsequently, the case was taken up for investigation by the IO and after thorough investigation charge sheet was laid against the accused in C.C.No.957/2009. After securing the presence of the accused, the trial court read

over the charges to the accused persons and they did not plead guilty and claimed to be tried.

3. In order to prove the case, the prosecution examined 16 witnesses as PWs.1 to 16 and got marked 9 documents as Exs.P1 to P9 and M.O.1 to M.O.4. The statement of the accused persons were recorded as prescribed under Section 313 of Cr.P.C. and the accused persons denied the incriminating evidence. However, they did not adduce any oral evidence nor produced any documentary evidence. After hearing both the sides, the trial Court held the accused persons guilty of the offence punishable under Section 224 of IPC and sentenced them to undergo six months SI with Rs.5,000/- fine and in default to undergo imprisonment for two months and further ordered that if they were in judicial custody during trial, the same shall be, set-off against the sentence. Aggrieved by the judgment of conviction and sentence rendered by the Court below, the accused persons preferred the appeal before the lower Appellate Court. The Appellate Court vide judgment and order dated 17.02.2016 dismissed the appeal by confirming the judgment of conviction and order of sentence passed by the trial court in C.C.No.957/2009. Hence, this petition by the petitioners for seeking set-aside the judgments of the Court below.

4. Learned counsel for the petitioners contends that the judgment and order of sentence passed by both the Courts below are without considering the facts and probabilities of the case and they suffer from legal and factual infirmities. The Courts below erred in believing the evidence of PW.1 who has given a clear go-by to the prosecution case in his cross-examination that he did not hear breaking open of the iron bars of the cell. Further, the Courts below have erred in believing the evidence of PWs.1 and 8 said to be the interested and officials. The courts below erred in believing the case of the prosecution, though the evidence adduced by the prosecution witnesses is not cogent, convincing and corroborative to each other.

5. Further, he contends that the courts below erred in not giving benefit of doubt when the prosecution has failed to prove the fulcrum of Ex.P2 and P3, the spot mahazar and seizure mahazar. It was the case of the prosecution that PW.9 was unconscious and using the said situation, the accused persons have escaped from cell No.5. The evidence of PW.1 has not been corroborated by any of the under trial prisoners be examined as witness for the prosecution. PW.2 has clearly stated that the police did not call to Madhugiri sub-jail and they have not conducted any panchanama and not seized any articles and they have obtained his signature on Ex.P2 in the Madhugiri bus stop. This clearly throws a doubt about foisting a false case against the accused persons as they have not committed any offence as alleged under Section 224 of IPC. Further, the Courts below have not properly appreciated the cross-examination of PWs.1, 4, 5 and 7 in a proper perspective manner and they ought to have given benefit of doubt to the accused. He further contends that the Courts below have not taken into consideration the evidence of PWs.10, 11 and 12 who have turned hostile to the

case of prosecution. The courts below have failed to appreciate the oral and documentary evidence on record in a right perspective manner and have proceeded to convict the accused and the same is contrary to the evidence available on record. Hence, the same requires interference of this Court. On all these grounds, he prays for setting aside the impugned judgments passed by the Courts below by allowing the present petition.

6. Per contra, learned HCGP for the State contends that the accused have admitted that they have gone out of the lawful custody and the prosecution has been able to prove the allegations against the accused persons beyond reasonable doubt for commission of offence punishable under Section 224 of IPC. He further contends that there is no infirmity or illegality in the judgments passed by the Courts below and there is no scope for this Court to interfere with the same. The trial Court in C.C.No.957/2009 on appreciation of oral and documentary evidence available on record has rightly convicted these accused persons for the aforesaid offence. So also, the lower Appellate Court in Crl.A.No.5012/2015 has rightly dismissed the appeal by confirming the judgment and order of conviction and sentence passed by the trial court. Hence, he seeks for dismissal of the petition being devoid of merits.

7. In this context of the contentions as taken by learned counsel for the petitioners/accused No.2, 3 and 5 and so also, learned HCGP for the State, it is relevant to refer to Ex.P1 - complaint lodged by the concerned Jail authority as wherein the incident has been narrated in detail about the modus operandi of the accused that how they have escaped from the clutches of law and that too from the sub-jail of Madhugiri which is situated in front of Madhugiri Police station. The prosecution case is that on 22.07.2009 in between 11.00 p.m. to 12.00 mid night, the accused persons who were the under trial prisoners in Cell No.5 of Madhugiri sub-jail, broke open the iron bars of the door of the cell and escaped from there and thereby they have committed the offence punishable under Section 224 of IPC. In this connection, the prosecution has examined PW.1 who is the complainant and also a witness to the fulcrum of Ex.P.2 seizure mahazar. He has narrated how the accused persons escaped from the cell on 22.07.2009. The panchanama was conducted and 5 iron bars and wooden frame were seized under Ex.P2 and they are marked as M.O.1 and M.O.2. The said accused persons were habitual offenders and they were confined in the cell and required to facing of the trial for other crimes. Subsequent to the registration of crime and during the investigation these accused Nos.2, 3 and 5 were apprehended by the IO.

8. As stated earlier in detail the prosecution has examined several witnesses as PWs.1 to 16. But PWs.10, 11, 12 and 13 have given their statements before the IO during the course of investigation but they did not withstood with the contents of their statements which was contradictory to their statement as per Exs.P4, P5, P7 and P8 and their evidence runs contrary to the evidence of PWs.15 and 16. It is relevant to state that M.O.1 to M.O.4 have been seized by the IO during the course of investigation. But M.O.1 - iron bars 5 in numbers were seized by the IO

at the instance of the accused and as per the disclosure statement given by them. PW.1 and 8 are the interested and official witnesses and they have committed laches in discharging their official duties entrusted to them. It is relevant to note that the Courts below have not taken into consideration the evidence of PWs.10, 11 and 12 as they have not supported the case of the prosecution and they have turned hostile.

9. At a cursory glance of the evidence of prosecution witnesses, it could be seen that the Courts below erred in believing the evidence of PW.1 when the same was not corroborated by evidence of any of the under trial prisoners said to be a witness for recording their evidence and their statements during investigation. Further, PW.2 has clearly stated that the police have not called to Madhugiri sub-jail and they have not conducted any panchanama and not seized any articles in his presence and they obtained his signature on Ex.P2, the spot mahazar in Madhugiri bus stop. Further, it appears that the courts below have not properly appreciated the evidence in cross-examination of PWs.1, 4, 5 and 7 in a proper perspective manner and the benefit of doubt ought to have been given to the accused. The trial Court has erred in believing the theory of the prosecution which is not cogent, convincing and corroborative with each other.

10. At this stage, learned counsel for the petitioners submits that neither the First Appellate Court nor the trial court have considered the fact that accused Nos.2, 3 and 5 were in judicial custody during the course of the trial. Accused No.2 - Shivakumar @ Sai was in judicial custody for a period of two years four months. Accused No.3 - S.Raju @ Durga has undergone judicial custody for a period of two years and five months and Accused No.5 - Nagendra 2 Gollanaga has undergone judicial custody for a period of two years six months. But this period under judicial custody has not been considered by the trial Court or by the Appellate court keeping in view the scope and object of Section 428 of Cr.P.C. for set off period that they have undergone in judicial custody. Even the consideration of sentence relating to offence under Section 224 of IPC shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. Without noticing this aspect of the matter both the Courts below erred in sentencing the accused persons to undergo SI for six months with Rs.5,000/- fine and in default to pay fine, to undergo further imprisonment for two months. Even taking into consideration the period of sentence undergone by the accused persons during the course of trial, it appears that these accused have served the sentence considerably. Therefore, it requires intervention of this Court not only to consider the scope and object of Section 428 of Cr.P.C. but even to the extent for consideration of provision of Sections 397 and 401 Cr.P.C. and so also scope and object of Section 386 of Cr.P.C. as where this matter is required to be dealt as an appeal.

11. The Hon'ble Apex Court in the case of Hussainara Khatoon and others vs. Home Secretary, State of Bihar reported in AIR 1979 SC 1377 has held as under:

"Where certain undertrial prisoners remained in jail without trial for periods longer than the maximum term for which they could have been sentenced if convicted, and such persons had been in detention for periods longer than the maximum terms (as prescribed in proviso to Section 167(2) Cr.P.C.) without their trial having been commenced, their continued detention was clearly illegal and in violation of their fundamental right under Article 21 of the constitution. As such, they must be released forthwith.

12. Keeping in view the observations made by the Hon'ble Apex Court in the judgment referred supra, and in totality of the facts and circumstances of the case relating to involvement of accused Nos.2, 3 and 5, it is required to re-appreciate the entire evidence on record and so also, keeping in view the scope and object of Sections 386, 390 and 391 of Cr.P.C read with Section 401 of Cr.P.C., since the accused Nos.2, 3 and 5 have already undergone considerable period of detention for a period of more than two years, it requires to exercise the powers under Section 428 of Cr.P.C. relating to set-off. Both the Courts below have erroneously given findings and held conviction against the accused for the offence punishable under Section 224 of IPC whereas, the maximum period of sentence is for a period of two years and fine or even both. However, in the peculiar facts and circumstances of the case, it does not require in detail to discuss the matter and based upon the material evidence available on record, but the fact that the accused persons have already served sufficient sentence during the course of trial and the same shall be termed as service of sentence to meet the ends of justice.

For the aforesaid reasons and findings, I have to proceed to pass the following:

ORDER

Criminal Revision Petition is allowed in part. Consequently, the judgment of conviction and order of sentence rendered by the trial Court in C.C.No.957/2009 dated 30.06.2015 and confirmed by the Appellate Court in CrI.A.No.5012/2015 dated 17.02.2016 is hereby modified, holding that the period of sentence served by accused Nos.2, 3 and 5 during the course of trial is termed as service of sentence and the accused shall be set at liberty, forthwith, if not required in any other case by the investigating agency.

In view of the disposal of the criminal revision petition, I.A.No.1/2016 for suspension of sentence does not survive for consideration and accordingly, the same stands rejected.