

(1994) 07 MP CK 0058

In the Madhya Pradesh High Court

Case No : Criminal Appeal No. 398 of 1986

Shri Chand and Others

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 28-07-1994

Acts Referred:

Arms Act, 1959 — Section 25

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 395, 397, 411, 412

Citation : (1995) CriLJ 3547

Hon'ble Judges : D.P.S. Chouhan, J

Bench : Single Bench

Advocate : Prashant Singh, for the Appellant; D.V. Pendharkar, Penal Lawyer, for the Respondent

Final Decision : Allowed

Judgement

D.P.S. Chouhan, J.—The present appeal is directed against the judgment and order dated 10-3-1986 passed by IIId Additional Sessions Judge, Rewa in S.T. No. 105/84.

2. In the aforesaid sessions trial as many as 12 accused persons were sent for trial and their names are Shri Chand, Mullu alias Moolchand, Dulli, Daya Ram, Beni Madhav, Raghvendra, Brindra alias Brindawan, Chhotelal, Sushila, Ramgopal, Gulab Datt and Gaya Prasad. Out of 12 persons, accused Sushila and Gulab Datt were not tried as the charge-sheet against them was quashed by this Court. Rest of the 10 accused persons were put to trial.

3. The occurrence as alleged was in respect of commission of a dacoity and accordingly aforesaid ten accused persons were charged u/s 395/397, I.P.C. According to the prosecution, the dacoity was committed in the house of Ashok Kumar (P.W. 1) and the dacoits were alleged to have been equipped with . deadly weapons, who in the process of committing dacoity caused injuries to Saroj Tiwari (P.W.3) and Vensroop Prasad (P.W.5). Accused Ram Gopal, Chhotelal, Gaya

Prasad and Bern Madhav were also charged, in addition to the above offence, for offence u/s 25(a) of the Arms Act. The said occurrence took place in the intervening night of 4th and 5th April, 1984 at the dead of night i.e. at 1.30 a.m. in Chorgadi at the time when Ashok Kumar (P.W. 1) and the other family inmates were sleeping in the house. The dacoits are alleged to have scaled down in the house from the roof where at the inmates of the house got awakened and saw the persons armed with deadly weapons. The First Information Report of the alleged incident was lodged at P.S. Chorgadi at 5.20 a.m. by Ashok Kumar (P.W.1).

4. The prosecution in support of its case examined as many as (sic) witnesses. Ashok Kumar was examined as P.W.1, Shyamlal Tiwari as P.W.2, Smt. Saroj Tiwari as P.W.3, Smt. Sarojini Naidu as P.W.4, Vanaroop Prasad as P.W.5, Jaibeer Singh as P.W.6, Dayanand Sharma as P.W. 7, Dr. Anand Mahendra (duplicately numbered as P.W.7) as P.W.7, Dr. Rajesh Kumar as P.W.8, Sub-Inspector R. B. Soni as P.W.9 and Devendra Kumar Mishra as P.W. 10.

5. Out of these witnesses, P.W. 1 to P.W.5 are the witnesses of identification of the accused persons as well of identification of the property. P.W.6 and P.W.7 are the witnesses of seizure as well as of the arrest of the accused. P.W.7 is Dr. Anand Mahendra, who examined the injury on the person of appellant No. 1 Shri Chand. P.W.8 is Dr. Rajesh Kumar who also examined Bansroop Prasad one of the prosecution witnesses. P.W.9 R. B. Soni is the Investigating Officer and P.W. 10 Devendra Prasad Mishra is the witness who proved the sanction for prosecution u/s 25 of the Arms Act.

6. The trial Court vide its judgment and order dated 10-3-1986 held that under the circumstances it is not proved beyond doubt that accused persons Shri Chand, Mullu alias Moolchand, Dulli, Daya Ram, Beni Madhav, Raghvendra and Brinda alias Brindawan were the dacoits who committed the alleged dacoity and thus they were acquitted of the charge under Ss. 395/397, I.P.C. The following accused persons were convicted and their conviction can be categorised as :-

(i) The present appellants, namely, Shri. Chand, Mullu alias Moolchand, Dulli, Daya Ram, Beni Madhav, Raghvendra and Brinda alias Brindawan were convicted u/s 412, I.P.C. and were sentenced to 5 years" R.I.

(ii) Accused Chhotelal was convicted u/s 25(a) of the Arms Act and was sentenced to 2 years" R.I. who preferred a separate appeal numbered as Cri. Appeal No. 375/86.

(iii) Accused Ram Gopal was convicted u/s 25(a) of the Arms Act and was sentenced to 2 years" R.I. who preferred a separate appeal numbered as Cri. Appeal No. 390/86.

(iv) Accused Gaya Prasad was convicted u/s 25(a) of the Arms Act and was sentenced to 2 years" R.I., who preferred a separate appeal numbered as Cri. Appeal No. 417/86.

In the present case, the matter for consideration is in respect of Criminal Appeal No. 398/ 86, which is on behalf of the seven accused persons, as has been stated herein before. During the pendency of the appeal, appellant No. 1 Shri Chand and appellant No. 3 Dullu have died and as a result whereof appeal on their behalf stands abated. Now the appeal survives only on behalf of five accused persons.

7. Heard Shri Prashant Singh, learned counsel for the appellants and Shri D. V. Pendharkar, learned Penal Lawyer, for the State.

8. Learned counsel for the appellants argued the appeal challenging the conviction of the appellants u/s 412, I.P.C. He submitted that (a) the prosecution has failed to establish beyond reasonable doubt the guilt of the appellants u/s 412, I.P.C. and as such the appellants are entitled for acquittal, (b) the prosecution has failed to establish beyond reasonable doubt the recovery of the articles, alleged to have been robbed, from the appellants; (c) even if it is found that the articles were recovered from the possession of the appellants, is taken to have been established by the prosecution even then the prosecution has failed to establish the knowledge or belief of the appellants that the articles found in their possession were the articles taken away in the dacoity.

9. So far as the points (a), (b) and (c) are concerned, they are inter-linked and do not require to be dealt with separately.

10. Learned counsel for the appellants submitted that the alleged articles of dacoity, which are alleged to have been recovered from the accused on their pointing out, were not proved in some cases and in other cases, the recovery witnesses did not support the recovery. Ex. P-9 is the recovery memo dated 11-4-84 relating to Beni Madhav and to this recovery memo there were two recovery witnesses, namely, Prahlad Singh and Jaibeer Singh. The prosecution did not examine Prahlad Singh, but examined only Jaibeer Singh. Jaibeer did not support prosecution case on any point and as such so far as the recovery memo Ex. P-9 against the appellant Beni Madhav is concerned, that has become doubtful. Ex. P-18 dated 13-4-84 is the recovery memo relating to the recovery from appellant Raghvendra. There were two recovery witnesses, namely, Sita Ram Singh and Dayanand Sharma. Out of these two witnesses, Sita Ram Singh was not examined, only Dayanand Sharma was examined but Dayanand Sharma did not support the prosecution on any point, therefore, the recovery as against appellant Raghvendra becomes doubtful. Recovery memo Ex. P-27 dated 10-4-84 Ex. P-7 is relating to appellant Mullu alias Moolchand and in this memo two persons are mentioned as recovery witnesses i.e. Mangleshwar Singh and Shivprasad. But the prosecution did not examine any of such seizure witnesses and according to the learned counsel for the appellants that seizure memo has not been proved and as such the recovery under the said seizure memo remains unproved and the same becomes doubtful. Recovery memo Ex. P-29 dated 10-4-84 is related to appellant Dayaram. In this memo Shiv Prasad and Mangleshwar Singh are mentioned as recovery witnesses, but the prosecution did

not examine the seizure witnesses and seizure memo did not prove the seizure and accordingly the possession and seizure both are rendered doubtful. Recovery memo Ex. P-32 dated 22-6-84 is related to appellant Brinda alias Brindawan and in this memo Beerbhan Singh and Sita Ram Singh are mentioned as recovery witnesses, but the prosecution did not examine any of the seizure witnesses, as a result of which possession and seizure both remained unproved rendering the recovery doubtful. Thus according to the learned counsel for the appellants, in the aforesaid facts and circumstances, the recovery as has been alleged to be from the appellants remained either unproved or uncorroborated by the recovery witnesses and in such a situation, the recovery of the alleged ornaments is not acceptable under the law.

11. Learned counsel for the appellants invited the attention of the Court to the statement of Jaibeer Singh (P.W. 6) and submitted that so far as appellant Lallu alias Beni Madhav is concerned, the witness in para 2 of his deposition has stated that Lallu alias Beni Madhav did not give any information regarding the articles to the Police in his presence. He admitted his signatures on information memo Ex. P-8 but he stated that in his presence Lallu alias Beni Madhav did not point out any material to the police. He also accepted that on the Panchnama i.e. seizure memo (Ex. P-9) his signatures are there. In paragraph 9, the witness has stated that his signatures were obtained at the Police Station. Thus, according to the learned counsel for the appellants, the recovery at the pointing of Lallu alias Beni Madhav has not been established by the evidence of the prosecution witnesses. Learned counsel thereafter invited the attention of the Court to the statement of P.W. 7 Dayanand Sharma. This witness has stated that he does not know appellant Raghvendra and he cannot recognise him. He has further stated that the Police persons were collecting the articles but he did not say as to from whom the articles were being collected. He admitted his signatures on the information memo (Ex. P-18), but he stated he does not know as to from whom what was recovered. This very witness in his cross-examination has stated that the recovery was made at the Police Station Raipur and his signatures as witness of seizure were obtained at the Police Station. According to the learned counsel for the appellants this statement falsifies the entire story regarding recovery as according to the witness, the recovery was made at the Police Station Raipur and as such it was not the recovery effected at some other place and at the instance or by pointing of the accused. Learned counsel further pointed out that in the recovery memo, the place of recovery has not been "disclosed, which factor strengthens the doubt regarding recovery, as to whether the recovery was effected actually on the pointing of the accused from their houses or material was collected and subsequently the recovery was assigned to the appellants at the Police Station. On the recovery memos no place of recovery is mentioned. Further the factor of withholding the seizure witnesses is a serious matter. Learned counsel for the appellants relied on the case of Trimbak Vs. The State of Madhya Pradesh, which case related to the conclusion on the statement suffered by the accused during investigation as is done by the learned Judge of the

designated Court and rejected the case of the prosecution and acquitted the appellant. This case is on different footing and is not attracted to the present case. Learned counsel also cited the case of Kartar Singh Vs. State of Punjab, in which it is held that it is the duty of the prosecution in order to bring home the guilt of a person u/s 411, I.P.C. to prove, (1) that the stolen property was in the possession of the accused, (2) that some person other than the accused has possession of the property before the accused got possession of it, and (3) that the accused had knowledge that the property was stolen property. On this basis, learned counsel for the appellants submitted that the ingredients as laid down by the Supreme Court in the above decision have not been satisfied in the present case as the prosecution has not been able to bring home the guilt of the appellants by establishing it by means of cogent evidence that the robbed property was in the possession of the accused persons and further that some person other than the accused had possession of the property before the accused got possession of it and further that the accused had knowledge that the property was robbed property. The case as has been cited is u/s 411, I.P.C. and not u/s 412, I.P.C. But so far as the requirements are concerned, they are same for both the provisions of law, the only distinction is that u/s 411, I.P.C, the property is stolen property whereas u/s 412, I.P.C, the property is out of robbery or dacoity.

12. Learned counsel for the appellants also cited the case of State of U.P. Vs. Hardeo and others, and reliance was placed on Paragraph 4 which says:-

"4. So far as the recovery of the articles said to have been concerned with the case, as held by the High Court there is no satisfactory evidence to connect the first respondent so as to incriminate him with the offence u/s 412, I.P.C. In our considered opinion, the judgment of the High Court does not warrant any interference."

Relying on the above decision, learned counsel for the appellants submitted that in the present case the prosecution case is alike, so far as the recovery of the articles is concerned there is no satisfactory evidence to connect or establish the recovery with the appellants and accordingly he submitted that without recovery being connected or established from the appellants, the appellants cannot be fastened with the guilt u/s 412, I.P.C. Learned counsel next cited the case of Achyut Das and another Vs. State of Assam, It is u/s 412, I.P.C. In that case, the Supreme Court said that the appellants could not give any explanation as to how they came into possession of the stolen property obviously because the property was alleged to have been recovered from the possession of the accused in that case. The Supreme Court said the question is whether it can be said that the appellants knew that those articles were stolen in dacoity. The burden was left on the prosecution by saying that the prosecution has to prove such knowledge since that is an essential ingredient of Section 412 as compared to the ingredient of Section 411, I.P.C. Founding the decision of the Supreme Court in the aforesaid case, learned counsel for the appellants submitted that in the instant

case there is no material to come to the conclusion the appellants knew or had reason to believe that the articles were stolen in the course of the dacoity and thus, the prosecution has miserably failed to establish beyond reasonable doubt the knowledge on the part of the appellants that the property in question was the property stolen or the property stolen in the course of the dacoity.

13. Learned counsel for the appellants further relied on the case of S.L. Goswami Vs. State of Madhya Pradesh, for the proposition that the burden of proving the guilt of the accused person rests on the prosecution. There is no doubt that the burden in criminal cases to establish the guilt of the accused always lies on the prosecution. Learned counsel for the appellants submitted that in the present case prosecution has failed to discharge its burden. In the last, learned counsel submitted that the identification of the alleged ornaments, which were the outcome of the dacoity, was made by one Tahsildar. Though identification memo has been brought on the record, but the prosecution has failed to prove the same and the said Tahsildar who conducted the identification of the ornaments was not examined, therefore, identification of the ornaments is of no consequence under the law and cannot be the foundation for the conviction of the appellants u/s 412, I.P.C.

14. Heard Shri D.V. Pendharkar, learned Penal Lawyer for the State. He submitted that it is a case where the F.I.R. itself contains description of the ornaments and the same ornaments were recovered from the appellants, therefore, identification memo does not lose its significance. This submission prima facie is attractive but legally it has no substance as when identification of ornaments was conducted then the identification memo should have been proved so as to connect stolen articles to those which are mentioned in the F.I.R.. F.I.R. by itself is not a piece of evidence. It is only utilised for the purpose of either corroboration or for contradictions, so I find no substance in this submission. The submission is rejected.

15. Learned counsel for the appellants also submitted that u/s 27 of the Evidence Act only that much information is relevant which relates to the recovery of the articles at the pointing-out of the accused person. So far as the position u/s 27 of the Evidence Act is concerned, it is clear but so far as the facts and circumstances of the case are concerned, the position is different as even if it is supposed that recovery is made at the pointing-out of the appellants but the prosecution is bound to prove that recovery and also to prove the recovery memo and the evidence on the record is just contrary. In the present case, seizure witness has contradicted the prosecution case regarding recovery and as such under the circumstances as advanced is rejected. Learned counsel for the State also placed reliance on Madan Singh v. State of Rajasthan AIR 1978 SC 1511 : (1978 Cri LJ 1531) and submitted that the statement of the Investigating Officer is sufficient for the purpose of recovery as well as seizure irrespective of the fact that the seizure witnesses have denied the recovery as well as seizure. The Supreme Court in that case observed "If the evidence of the Investigating

Officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version". In the present case the Investigating Officer is P.W. 9 R.B. Soni.

16. The question in the present case is whether the evidence of Investigating Officer is said to be convincing one and in this connection it was pointed out that the I.O. has acted in such a manner that he himself made evidence as inconvincing as he has not mentioned in the recovery memo the place of recovery and accordingly thus the aforesaid case does not come to any help in the facts and circumstances of the present case. No other submission has been advanced.

17. In view of the above, I find that the prosecution has failed to prove the guilt of the appellants beyond reasonable doubt as the evidence as led creates doubt and the appellants are entitled for benefit of doubt. The appellants are, therefore, given benefit of doubt.

18. The appeal is accordingly allowed. The conviction and sentence of the appellants is set aside. The appellants are on bail. Their bail-bonds shall stand cancelled and the sureties shall stand discharged.

19. It is a case where the learned Penal Lawyer, Shri D.V. Pendharkar deserves highest appreciation as he tried his best in performance of the discharge of the duty to satisfy the Court for the guilt of the appellants, but the material on record and the facts and circumstances of the case could not come to his rescue.