
(2012) 08 BOM CK 0091

In the Bombay High Court

Case No : Criminal Revision Application No. 216 of 2012

Shri Rajesh Ganeshmal Oswal Presently Applicant is in
Yerawada Central Prison, Pune

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 10-08-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 34, 379, 411

Citation : (2013) 1 BomCR(Cri) 302

Hon'ble Judges : Abhay M. Thipsay, J

Bench : Single Bench

Advocate : A.H.H. Ponda with Mr. Mitesh Jain, Mr. Inderpal Singh, Mr. Daljeet Singh Bhatia instructed by ALMT Legal, for the Appellant; D.R. More, APP for the State, for the Respondent

Final Decision : Allowed

Judgement

Abhay M. Thipsay, J.—The applicant was the accused no. 4 in Regular Criminal Case No. 110 of 2008 which was decided by the Judicial Magistrate, First Class, Railway Court, Pune. The allegation against the applicant was that, he had committed an offence punishable u/s 411 of the Indian Penal Code. The allegation against the other three accused i.e. Accused no. 1 Sandeep, Accused No. 2 Harish and Accused no. 3 Nilesh was that they had committed an offence punishable u/s 379 of the Indian Penal Code read with section 34 of the IPC. The trial resulted in conviction of all the accused, including the applicant. The Magistrate sentenced all the accused - including the applicant - to suffer RI for nine months and to pay a fine of Rs. 2,000/- each in default to suffer SI for one month. The applicant filed an appeal in the Court of Sessions, challenging his conviction and the sentence as imposed by the learned Magistrate. The Addl. Sessions Judge Pune, who heard the appeal, however, upheld the conviction and dismissed the appeal.

Being aggrieved by the order of the Magistrate, convicting and sentencing the

applicant, and the order of dismissal of his appeal by the Addl. Sessions Judge, the applicant has approached this Court by filing the present revision application.

2. It may be mentioned that there were five more cases against the applicant and the said three accused before the Magistrate and in those cases also, the applicant and the said other accused were similarly convicted and sentenced. The appeals filed by the applicant against his conviction in those cases, were also dismissed by the Addl. Sessions Judge. In those matters also, the applicant has approached this Court by filing similar applications for revision. Those revision applications were also heard along with the present one, and they are also being disposed of, by separate orderRs.

3. The prosecution case, as put forth before the Magistrate, was as follows:-

On 29 October 2007, at about 1.30 p.m, one Smt. Savita was travelling from Pune to Daund by Nanded Passenger. She was occupying a seat near the window. As soon as the train left the Pune station, somebody snatched the gold mangalsutra which she was wearing around her neck. It was snatched by somebody by putting his hand inside the window of the bogie of the said train. Savita raised cries and thereafter, the passengers pulled the chain for stopping the train. The train stopped. However, Savita did not do anything on that day but, proceeded to Daund. On the next day, she lodged a report with the Pune Railway Police, which was treated as the First Information Report (Exhibit 21). On 28 July 2008, the accused nos. 1, 2 and 3 were arrested by Head Constable Mr.Luis Makasare - PW 4, attached to LCB Railway Police, in some other case. During the course of investigation of the said case, pursuant to the information disclosed by the Accused no. 3 - Nilesh, nine gold ingots of different sizes and weights were recovered from the possession of the applicant. These ingots were said to be the property involved in various crimes and was accordingly, seized. After completion of investigation, a charge-sheet was submitted in the present case, as also in the aforesaid other cases; and the applicant and the other accused were prosecuted as aforesaid and convicted.

4. It is contended by Mr.A.H.H. Ponda, learned counsel for the applicant that the conviction of the applicant came to be recorded without any legal evidence. He submitted that there was absolutely no case for holding the applicant guilty. According to him, the identity of the property allegedly recovered from the possession of the applicant, was not at all established to be the stolen property, and that on this count itself, the charge against the applicant could not have been held to be proved.

5. It is well settled that the revisional jurisdiction is different from the appellate jurisdiction. It is also well settled that in revisional jurisdiction, this Court does not undertake an independent re-appraisal of the evidence adduced during trial, for the purpose of ascertaining whether the finding of fact arrived at, by the trial Court, is correct. The revisional jurisdiction is meant for correcting a manifest error of law, resulting in miscarriage of justice. The evidence adduced during trial

therefore, needs to be examined only for ascertaining whether the conclusions arrived at by the trial Court, are based on any evidence and whether the conclusions can, logically, be arrived at on legally admissible evidence.

6. In the present case, the prosecution had examined totally four witnesses. The first witness was Smt.Savita, the first informant herself, the second was Pralhad Bondre, a panch in respect of the alleged disclosure statement made by accused no. 3 Nilesh and the recovery of certain gold from the applicant, pursuant to such statement. The third witness was Santosh Chandane, a police constable and the fourth one is the Investigating Officer, Head Constable Mr.Makasare.

7. In her evidence, Smt. Savita (PW 1) mentioned about the incident. She stated that the gold mangalsutra, which she was wearing around her neck, was snatched by somebody by putting his hand inside the window of the boogie. In the cross-examination, she admitted that she did not see the face of the person who had snatched her mangalsutra. In fact, it was not the case of the prosecution, at all, that Savita had seen the thief.

8. During her evidence, the property allegedly recovered from the applicant was not shown to Savita. What she stated is that "her stolen mangalsutra had been seized in the form of gold ingot". Interestingly, not only such ingot was not shown to her during her evidence but, according to her, it was not shown to her even during investigation.

9. Thus, two aspects which were anyway undoubted, became very clear from the evidence of Savita. The first is, that she had not seen the thief and consequently, no one had been identified by her as the thief. The second aspect is that, she had not seen the property which was recovered by the police, in the course of investigation and was claimed by them to be the stolen property in this case, either in the court, or during the course of investigation.

10. A reference may now be made to the evidence of other witness. Pralhad Bondre - PW 2 states that on 28 July 2008, he was called at the DB Office at Tadiwala Road, Pune. According to him, the accused Nilesh had given his memorandum to the police and had shown his willingness to go to the shop of Rajesh Jewellers, situated at B.T. Kawde Road. According to him, the Investigating officer, Head Constable Makasare, recorded the memorandum of accused Nilesh and obtained the signature of this witness and also of the other panch. According to him, thereafter, the accused Nilesh, he himself, the other panch and Head Constable Makasare went to B.T.Kawde Road, Pune, in a police jeep and that on reaching there, accused Nilesh showed the shop of Rajesh Jewellers. According to him, the applicant was present in the said shop and he gave information to the police and the panchas that he had melted the gold ornaments and prepared gold ingots from them. According to Mr.Bondre, totally nine gold ingots were produced by the applicant which were taken charge of by the police, under a seizure panchnama (Exhibit 28). In the cross examination, he admitted that he was doing labour work at railway station without any licence

from the Railway Administration, and that he knew the Railway Police very well. It is not necessary to discuss the reliability of his evidence, and one may proceed on the basis that certain information was indeed given by the accused Nilesh and that pursuant to that information, the police and the panchas had gone to the shop of the applicant from where nine gold ingots were taken charge of, and seized by the police.

11. The evidence of Santosh Chandane, PW No. 3 shows that on 28 July 2008, accused Nilesh made some statement before the police and shown willingness to produce the ornaments. According to him, all the three accused were taken to the applicant's shop where the applicant, who is the proprietor of Rajesh Jewellers, was present. That on the police making inquiry with the applicant, applicant produced 9 gold ingots from his shop which was seized by Head Constable Makasare-PW No. 4 in the presence of the panchas. This witness was cross examined by the accused persons but, it is not necessary to go into the question of the reliability of his evidence.

12. In his evidence, Luis Makasare, the Investigating Officer stated that on 24 July 2008, he was on duty at the Local Crime Branch office of Pune Railway, and that, at that time, he received information about the residential addresses of chain snatchers of Mundhawa area. On suspicion, the aforesaid accused nos. 1, 2 and 3 were taken in custody from Mundhawa area. When inquiries were made with them, they gave certain information and thereafter, all of them were placed under arrest in Crime No. 1 of 2008, registered at Daund Railway police station. According to Mr. Makasare, when the said accused persons were in custody, accused Nilesh gave certain information which was recorded in the presence of panchas and that, pursuant to the said information, the police party and the panchas went to the shop of the applicant, that the applicant produced nine gold ingots from his shop which were taken charge of, under the panchnama as they were found to be the stolen property involved in various crimes. It is thereafter that the statement of the applicant was recorded, and he was arrested on 5 September 2008. This witness was also extensively cross examined but, it is not necessary to discuss the reliability of his evidence.

13. Admittedly, the First Informant - or anybody else for that matter - had not seen the thief, who snatched the mangalsutra. Admittedly, no mangalsutra was recovered during the course of investigation. What was recovered, was a gold ingot - one out of total nine ingots - collected from the shop of the applicant. The claim of the Investigating Agency and the prosecution is that, this particular ingot which was seized in connection with this case, was the stolen property, inasmuch as it had been prepared by melting the gold mangalsutra of Savita that was snatched. It is however, admitted position that, even that ingot was not shown to Savita during the investigation stage and interestingly, it was not shown to her in the Court also while she was in the witness box.

14. What was stolen was a gold mangalsutra, and what was recovered is a gold ingot. It is quite elementary that unless it would be established that what was

recovered from the applicant was the stolen mangalsutra of Savita which had got converted by the applicant in a gold ingot by melting the same, it would be impossible to hold the applicant guilty of receiving the stolen property. Now, the question is what is the evidence to show that the gold mangalsutra of Savita, which was stolen, had been converted into the gold ingots which was seized by the Investigating Agency in the course of investigation. There is absolutely no evidence to indicate that. As a matter of fact, it would require little intelligence to understand that such evidence could be available only from the applicant himself. Even the thief would not be able to know whether the ingot has been made from out of the stolen property.

15. Undoubtedly, merely because the property is converted, it would not cease to be stolen property and it will be open for the Investigating Agency to seize it, in the changed or converted form. However, for holding that the ingot is the stolen property, which had been got converted, the least that must be established is that the property was stolen by a particular person, and that the said property had been given by him to the person from whom the property in converted form, is recovered. In the instant case, therefore, it ought to be established that the accused Nilesh had committed the theft of Savita's mangalsutra, and that the stolen mangalsutra had been given by him, to the applicant. There is no evidence to show that. The statement allegedly made by Nilesh, did not lead to the discovery of the stolen property but, it led to the discovery of a gold ingot. The discovery of the ingot would be relevant only if it would be established that it had been converted from out of the stolen property. There is no such evidence at all.

16. It is clear that the whole case was based on the statements allegedly made by the accused Nilesh, before the police. It is quite elementary that such statements could not have been taken into consideration as evidence. In fact, this proposition is so elementary that it is shocking that, not only the Magistrate based the conviction of the accused persons on such statements but, even the Sessions Court, which is manned by a Senior Judicial Officer, endorsed the mistake committed by the Magistrate.

17. Apart from the absolute non availability of evidence on the only and basic aspects of the prosecution case, there were also several other shortcomings in the prosecution case. For instance, the theft had been committed on 29 October 2007. The accused nos. 1, 2 and 3 were arrested on 24 July 2008 on the basis of general information that chain snatchers were residing in a certain area (of which the other three accused are said to be the residents). The said accused persons were not arrested on the suspicion of their being involved in the present case, but on the basis of a general suspicion that they are chain snatchers, and they were shown to be arrested in Crime No. 1 of 2008 of Daund Police station. Further, the whole case was on the basis that only one person had snatched the chain; but after investigation, three persons are claimed to be the thieves. The manner in which the theft had taken place does not indicate that there would be more persons than one in the incident of the snatching of mangalsutra, and to

support the claim that the snatching was done by the accused Nilesh, in furtherance of the common intention of the other two accused then, there ought to have been some evidence to indicate their presence at the time of the offence. There is no such evidence.

18. When the identity of the recovered property was not established to be the same as the stolen property, there was no question of convicting even the other accused. When the thief had not been seen by anyone while committing the theft, the charge against him could be proved only by the recovery of stolen property from him or at his instance. At the cost of repetition, it needs to be emphasized that the recovery of a gold ingot from the applicant, even if pursuant to the disclosure statement allegedly made by co-accused Nilesh, cannot be construed as recovery of the stolen property.

19. It is very clear that all the conclusions are based only on the statements allegedly made by the accused persons themselves before the police. For instance, that the chain snatching had been done in furtherance of the common intention of all the other three accused, is based on an alleged statement made by one of them before the police. The claim that he had snatched the chain of Savita, is also based on the alleged disclosure statement made by Nilesh before the police. That the ingot that was recovered from the applicant's shop was the converted form of the gold mangalsutra, is also based on what the accused persons allegedly told the police. It is therefore, clear that the finding of guilt of the accused persons was arrived at, without any evidence whatsoever. In fact, it was a case which ought not to have gone for trial, at all.

20. The approach of the Addl. Sessions Judge in deciding the appeal is distressing. The learned Addl. Sessions Judge in paragraph No. 13 of his judgment observed as follows:

So far as identity of the thief, it is eloquent from her (PW 1) evidence that accused had snatched her gold marriage string when she was travelling by railway. The said evidence remained intact for want of effective cross examination.

21. These observations are shocking. The First Informant (PW No. 1) nowhere stated in her evidence, that her gold mangalsutra was snatched by the accused. With the assistance of the learned APP, the evidence of this witness was minutely examined to see whether it contains any statement to that effect but, no such statement is found in her evidence. On the contrary, in the examination in chief itself, she has stated that someone had snatched her gold mangalsutra. It was further got clarified that she had not seen the face of the person who had snatched the mangalsutra. In fact, this was not necessary at all, inasmuch as the prosecution case itself was that the thief at that point of time, was "unknown".

22. The order of conviction of the applicant (and even of the other accused) is patently illegal and erroneous. It has been arrived at without any evidence, whatsoever. The finding of guilt has been arrived at only on a consideration of

the statements allegedly made by the applicant and other accused before the police. The statements allegedly made by one accused before the police leading to the alleged discovery, was used against the co-accused, who had not made the statement. The Magistrate as well as the Addl. Sessions Judge who heard the appeal have displayed ignorance of the fundamentals of the provisions of Evidence Act. Even otherwise, factually wrong statements are found in the judgments delivered by them.

23. The conviction of the applicant without any evidence, whatsoever, is bad in law, and needs to be interfered with, in the revisional jurisdiction.

24. The Revision Application is allowed. The order of conviction of the applicant and the sentence imposed upon him by the trial court, is set aside.

25. The applicant stands acquitted. His bail bonds are discharged.