
(1990) 07 BOM CK 0045

In the Bombay High Court

Case No : Criminal Revision Application No's. 131, 132, 133 and 134 of 1989

Swaroopchand Kothari and Others

APPELLANT

Vs

Leela Suryanwanshi and Others

RESPONDENT

Date of Decision : 10-07-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 452

Citation : (1991) 1 BomCR 501

Hon'ble Judges : H.W. Dhabe, J

Bench : Single Bench

Advocate : G. Mishra, A.G.P. in Cr.R.A. 132/89 and L.K. Khamberkar, A.G.P., for respondent in in Cr.R.A. 134/89, R.P. Darda, for the appearing parties; T.R. Kankale, in Cr. R.A. 131, 132, 133 and 134, G. Mishra, A.G.P., for respondent No. 2, in Cr.R.A. 131 and L.K. Khamberkar, A.G.P., for respondent in Cr.R.A. 133, for the Respondent

Final Decision : Dismissed

Judgement

H.W. Dhabe, J.—These revision applications which arise out of the same original criminal case can be disposed of conveniently by the common judgment.

2. In all these revisions the applicant has challenged the common order passed in identical four criminal appeals by the learned Sessions Judge allowing the appeals of the non-applicants and setting aside the order of the learned trial Magistrate about return of property in the criminal case to the applicant.

3. The facts are that three accused by names Sitaram (accused No. 1), Ramsingh (accused No. 2) and Deepak (accused No. 3) were tried for the offences punishable under sections 379, 411 and 414 of the Indian Penal Code in Criminal Case No. 1054 of 80 decided on 3-4-1982. The prosecution case was that Sitaram (accused No. 1) was the driver of the applicant. On 24-1-1980 the applicant who had gone to Lonar in district Buldana with his family to attend the marriage, was returning to his house. The accused No. 1 Sitara, was the driver of his car. The wife of the applicant had taken her ornament box with her for the

marriage. The said box was kept in dicky of the car. However, after returning to their house when the box was opened, it was found that four folden bangles and the necklace kept therein were missing. A report was, therefore, lodged i the Police Station about the theft of the above articles. The matter was investigated into by the Police. The aforesaid three accused were arrested and were prosecuted for the offences under sections 379, 411 and 414 of the Indian penal Code.

4. In the trial before the learned Magistrate, the prosecution led evidence to show that after the accused No. 1 committed theft of the above golden ornaments he handed over the golden bangles and necklace to the accused No. 2 who is related to him as their wives are sisters. The accused No. 2 Ramsingh in turn handed them over to the accused No. 3 Deepak who is a gold-smith. The said Deepak converted them into accused No. 2 Ramsingh had as per his memorandum statement (Ex. 23) made discovery of certain golden ornaments which were seized as per seizure memo (Ex. 24 and Ex. 25). It is the case of the prosecution that an amount of Rs. 2000/- was recovered and seized from Parvatibai who is non-applicant No. 1 in Criminal Case No. 1331 of 89 and mother-in-law of the accused No. 1 and 2. It is also their case that some golden bars were recovered and seized from one Bhaurao who is the non-applicant No. 1 in Criminal Case No. 134 of 89. Then according to the prosecution, from Leelabai the wife of the accused No. 2 Ramsingh one Mangalsutra, wrist watch and some other golden ornaments were recovered and were seized Leelabai is the non-applicant No. 1 in Cr. Revision No. 131 of 89. Similarly it is the case of the prosecution that one golden earring was recovered from the accused No. 2 Deepak.

5. The learned trial Magistrate on the basis of the evidence on record held that the prosecution failed to prove the offence of theft u/s 379 of I.P.C. and other offences under sections 411 and 414 of I.P.C. against the accused persons. He therefore acquitted them. As regards the return of the property, after considering the material on record, the learned trial Magistrate held that the applicant was entitled to return of the proper which was seized from the above non-applicants in the instant revision. Feeling aggrieved by the order of the learned trial Magistrates as regards the return of the properly to the applicant, the above non-applicant No. 1 in each of the appeals preferred an appeal before the learned Sessions Judge who by his common order passed in the said appeals, set aside the order of the learned trial Magistrate as regards the return of the property and directed that the property in question which was seized from the aforesaid non-applicants should be returned to them. It may incidental be stated that against the judgment of the learned trial Magistrate acquitting the accused persons an appeal bearing No. 133 of 82 was referred by the Stage in this Court which was dismissed on 15-6-1987. Feeling aggrieved by the order of the learned Sessions Judge directing return of the property in question to the above non-applicants in these revisions, the applicant has preferred the instant revisions against the same in this Court.

6. The learned Counsel appearing for the applicant in these revisions has sought to support the order of the learned trial Magistrate. He has before me that all the relevant material on record is not considered by the learned Sessions Judge in setting aside the order of the learned trial Magistrate directing return of property to the applicant. In particular, it is urged that the statements of two witnesses viz . Ashok and Vithal recorded by the prosecution u/s 161 Cr.P.C., but who were not examined as witnesses in the trial can be referred to for the purpose of return of property and if they are so referred, they show that the property belongs to the applicant.

7. In appreciating the contentions raised on behalf of the applicant, it is necessary to see that where an order is to be made for return of the property u/s 452 Cr.P.C. after the accused is discharged or acquitted i.e. at the conclusion of the trial, the Court should normally restore the property which is produced before it or which is in its custody to the person from whose custody it was taken. Departure from this statutory rule of practice is not to be lightly made when there is no dispute or doubt that the property in question was seized from the custody of the accused and belonged to him. This is the view taken by the Supreme Court in the case of N. Madhavan Vs. State of Kerala, upon the scope of section 517 of the old Code which is analogous to section 452 of the present Code.

8. The normal rule thus is that the property has to be returned to the person from whom it is seized. As already made clear in the statements of facts hereinbefore given, the property in question which is the subject matter of the instant revision is seized, admittedly, from the aforesaid non-applicants. It is, therefore, necessary for the applicant to show now the above property which was the subject matter of an offence in the instant case belongs to him. In this regard, it is material to see that the original theft by the accused No. 1 itself is not proved in the instant case.

9. It is then urged on behalf of the applicant that as per the prosecution case and also of the applicant, the discovery memoranda of the accused No. 2 Ramsingh was recorded and as per the discovery made pursuant to the said memorandum the articles in question which were seized either in the original form or converted from can be held to be proved as the same articles which were seized from the non-applicant. It is, however, clear that the panch witness who was examined to prove memorandum (Ex. 23) has turned hostile. Perusal of his evidence shows that according to him, Ramsingh was not he person present in the Police Station at the time when the said memorandum was prepared.

He was questioned by the Police and it is, therefore, clear as rightly held by the learned Sessions Judge that the discovery memorandum is not proved. If this is so, it is very difficult to accept the title of the applicant which he claims to the property in question in the instant case, even assuming that the articles of theft in the instant case were handed over by the accused No. 1 to the accused No. 2 Ramsingh.

10. As regards the statements of the alleged witnesses Ashok and Vithal recorded by the Police, they are not admissible as they are hit by section 162 Cr.P.C. However, even assuming that the said material can be taken into consideration, their statement only show that there were some articles found covered in the handkerchief by the accused No. 1 who handed over the said handkerchief to the accused No. 2. Even on the basis of the above statement, the identity and/or the title of the applicant to the property in question cannot be held to be proved. No interference is, therefore, called for in the impugned common order of the learned Sessions Judge which is challenged in these revisions.

11. In the result, the instant revisions fail and are dismissed.