The State Vs. Sk. Usman and anr.

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Court : Orissa

Decided On : Nov-28-1964

Reported in : 1965CriLJ569

Judge : S. Barman and ;G.K. Misra, JJ.

Appellant : The State

Respondent : Sk. Usman and anr.

Judgement :

G.K. Misra, J.

1. Nine accused persons stood trial and were acquitted, The appeal has been filed only against Sk. Ushman and Sk. Zamiruddin. Prosecution case is that at about 3 a. m. on 31-8-62 there was a dacoity in the house of Bhikari Jena (P. W. 1). Some of the inmates of the house were tied and assaulted. Ornaments, cloths and other articles were stolen. F. I. R. Ext. 1 was lodged by P. W. 1 at 2 P. M. on the very day. The defence is one of denial.

2. The learned Assistant Sessions Judge found that a dacoity was committed in the house of P. W. 1. This finding is not assailed. There is copious evidence in-support of the finding. The ornaments recovered from the Kutabari (straw heap) of Sk. Ushman were found as belonging to the informant's family. He was, however, acquitted on the disbelief of the prosecution story of production of ornaments by him. The production of cloths from the house of Sk. Zamiruddin was also disbelieved.

3. We would take up the case of Sk. Zamiruddin first. Cloths were recovered under seizure list (Ext. 7). It is mentioned therein that this accused stated that he had concealed the cloths inside the cowdung heap in his Bati and so saying he produced the cloths by digging them out. P. W. 10 and the I. O. P. W. 18 are the seizure witnesses. Both of them simply spoke of the production of the cloths by this accused and omitted to state in their evidence about the accused having said that he had concealed the cloth bundle inside the cowdung heap. Mr. Ray con-tends that as there is no substantive evidence in Court as to the factum of the accused having said that he had concealed the cloth bundle inside the cowdung heap that portion of the statement in Ex. 7 is inadmissible in evidence and must be excluded from consideration. The contention is well founded. The statement in the seizure list is a former statement of P. W. 18. It could be used either for corroboration under Section 157 for contradiction under Section 145 of the Evidence Act - See Public Prosecutor v. Venkata Reddi AIR 1945 Mad 202, Public Prosecutor v. India China Lingiah : AIR1954Mad433 and Ramkrishna Mithanlal Sharma v. State of Bombay (S) : 1955CriLJ196 . P. W. 18 has not made any such statement in Court. We hold that there

is no substantive evidence before the Court that the accused stated that he concealed the cloth bundle in the cowdung heap and so saying he produced the same. The evidence regarding production given by the accused is, however, admissible. P. Ws. 10 and 18 deposed to this fact and this is corroborated by the seizure list. It need hardly be stated that due to carelessness on the part of the Advocate conducting the prosecution case and the absence of necessary control and supervision of the trial Court over the proceeding, this defect has cropped up. The public prosecutor should have put a question to P. Ws. 10 and 18 that the accused made a statement before them that he had concealed the cloth bundle in the cowdung heap. If the Public Prosecutor failed in his duty, the learned Asst. Sessions Judge ought to have invited the attention of the Public Prosecutor to the statement in the seizure list. The statement cannot otherwise also be used against the accused as no question has been put to him in his examination under Section 342, Cr. P. C. giving him an opportunity to explain as to whether he made such a statement.

In the statement under Section 342, Cr. P. C., the accused claims these cloths as belonging to him. On the other hand P. W. 1 identified them as belonging to his family members. The learned Asst. Sessions Judge did not accept the prosecution story that the cloths belong to P. W. 1. We are unable to accept his finding. Not only the evidence of identification given by P. W. 1 is satisfactory but the further circumstance that the cloths were recovered from under the cowdung heap inside the Bari of the accused would itself indicate that the cloths were not of the accused. No owner would keep his cloths under cowdung heap. In Ext. 1, P. W. 1 mentioned of the theft of cloths of his family and he supplied a supplementary list of cloths (Ext. 2) before the starting of the investigation. We are satisfied that the cloths belong to P. W.] and not to the accused.

The only evidence available against this accused is the production of cloths from inside the cowdung heap in his Bari. It is in evidence that the Bari is unfenced and accessible to others. From the mere fact of the knowledge of the accused of the existence of cloths inside the cow-dung, he cannot be said to have received or retained any stolen property. In Trimbak v. State of M.P. : AIR1954SC39 , their Lordships observed that when the field from which the ornaments were recovered was an open one and accessible to all and sundry, it was difficult to hold positively that the accused was in possession of those articles. The fact of recovery by the accused is compatible with the circumstances of somebody having placed the articles there and of the accused somehow acquiring knowledge about their where, abouts and that the fact of discovery cannot be regarded as conclusive proof that the accused was in possession of those articles.

The identical principle applies to the facts of this case. Though we find that the cloths belong to P, W. 1 and had been stolen from his house on account of the commission of a dacoity, we find it difficult to convict the accused under Section 411, I. P. C , due to the absence of proof of the element of possession of those cloths by the accused. He is given benefit of doubt and the appeal against him is dismissed,

4. Sk. Ushman gave recovery of the ornaments from a straw heap in his Bari. In the seizure list (Ext. 8) there is a statement that Sk. Ushman said to have concealed the ornaments there. The seizure witnesses P. Ws. 10 and 18 do not depose to that effect. The statement cannot otherwise also be used against the accused as no question has been put to him in his examination under Section 842, Cr. P. C. giving him an opportunity to explain as to whether he made such a statement. The statement

regarding concealment in the seizure list cannot be treated as substantive evidence for reasons already given.

5. Some of these ornaments were identified by P. W. 4 (daughter-in-law of P. W. 1) and other ornaments by both P. W. 4 and P. W. 6 (wife of P. W. 1) as belonging to their family. Those ornaments are mentioned in the supplementary list (Ext. 2) filed before investigation started. In his statement under Section 342, Cr. P. C. the accused does not claim those ornaments as belonging to him. The Bari of the accused where the straw heap exists is surrounded by fence and is in the exclusive possession of the accused not accessible to outsiders. The ornaments belonging to P. W. 1's family removed by the commission of dacoity were found in his possession. Thus the prosecution has established the ownership and the theft of the ornaments and their recent possession by the accused. The articles were stolen on 31-8-62 and were recovered on 11-9-62 about 10 days after.

6. Under Section 114, Illus. (a) of the Evidence Act, the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. No fixed time can be laid down to determine whether the possession is recent or otherwise. Every case must depend upon its own facts and circumstances. The presumption also varies according to whether the stolen articles are calculated to pass readily from hand to hand. In any view, the discussion in this case is academic as the recovery was within 10 days of the dacoity and the presumption under Section 114, Evidence Act, must apply with full force. The only legitimate inference is that the accused dishonestly received the stolen property having reason to believe the same to be stolen and is liable to be convicted under Section 411, I. P. C. Section 412, I. P. C., has no application as there is no evidence that the accused knew or had reason to believe that the possession of the property was transferred by the commission of dacoity, or that he received the property from a person whom he knew or had reason to believe as belonging to a gang of dacoits.

7. In these days dacoities are on the increase despite strict measures adopted by the Government to prevent them. Receivers of stolen property encourage the commission of dacoity. Deterrent punishment should be meted out to prevent these anti-social activities. In the circumstances, we impose the maximum sentence of three years.

8. In the result, the appeal against Sk. Zamiruddin is dismissed and that against Sk. Ushman is allowed. He is convicted under Section 411, I. P. C., and sentenced to undergo rigorous imprisonment for three (3) years.

S. Barman, J.

9. I agree.