

*** "REPORTABLE"**
HIGH COURT OF DELHI AT NEW DELHI

+ CRL. APPL. No. 932/2004 & Crl. M.A.
No. 13500-501/2006

Date of decision : January 23, 2009

BHAGWAN DASS & ORS. Appellants
! Through : Nemo.

Versus

\$ STATE Respondent
^ Through : Mr. O.P. Saxena, APP
Mr. Neeraj Chaudhary, Adv.
for the complainant.
% Complainant in person.

CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

J U D G M E N T

ARUNA SURESH, J.

1. By way of this appeal, appellant has assailed the judgment dated 30.11.2004 and order on sentence

dated 2.12.2004 of the learned Additional Sessions Judge passed in Sessions Case No. 54/2001, FIR No. 3/93 under Sections 147/148/149/448/395/34 Indian Penal Code (hereinafter referred to as IPC) registered at Police Station Bara Hindu Rao.

2. In brief the allegations of the prosecution are that complainants Prakash Kaur and her son Jagjit Singh were running crockery shop in premises No. T-56 and T-57 till two or three months prior to the riots of 1984. The accused persons were residing in the neighbourhood of the shops of the complainants. After the riots, complainants were informed by one Shyam and Kaushalya that their shops had been occupied by some persons. Complainant Prakash Kaur visited the shop on 20.11.1984 and found lock of the shop broken as well as goods looted and also found the accused persons in possession of the said shops. Despite her persistent complaints, Police did not register any FIR about robbing of their articles from the shop and forcible occupation of the shops by the accused persons. When Jain Aggarwal Committee

was constituted, the complainants got an opportunity to file their respective affidavits about the incident. On the directions of the said committee an FIR was registered against the accused persons in January 1993.

3. After filing of the chargesheet, the trial court framed charges against the accused persons under Sections 147/395/448/34 IPC. After completion of the trial, the Court assessed evidence of the parties and found appellants guilty of having committed offences of house trespass punishable under Section 448 read with Section 34 IPC and of committing theft under Section 379 read with Section 34 IPC. Appellants were accordingly sentenced to undergo one year rigorous imprisonment and a fine of Rs. 1000/- each and in default of payment of fine to undergo simple imprisonment for three months for offence under Section 448/34 IPC and three years rigorous imprisonment and a fine of Rs. 25,000/- each and in default of payment to undergo simple imprisonment for a period of one year for offence under Section

379/34 IPC. Court also awarded benefit under Section 428 Cr.P.C. to the accused persons and also ordered the sentence to run concurrently. Aggrieved by the said conviction and sentence, the present appeal has been filed by the appellants.

4. The appellants have challenged the judgment of conviction and order on sentence of the trial court on the following grounds:

I. The conviction of the appellants is bad in law as well as on facts on the record.

II. There was a delay of about 10 years in lodging the FIR against the accused persons and this fact has not been considered by the trial court.

III. There is no eye witness in the case and the named eye-witnesses in the affidavit of the complainant did not appear before the court for deposition.

IV. The accused persons were not charged under Section 379 IPC though they have been convicted by the trial court for theft under Section 379 IPC and

sentenced for the same.

V. There was no recovery of the alleged stolen goods at any time during the trial of the case.

VI. The trial court had also not taken into record the civil suit filed by the complainant Inder Singh being suit No. 462/85 (old) 344/89(new) for possession of property.

VII. The trial court had failed to appreciate that Manmohan Singh one of the witnesses did not support the prosecution case and denied the possession or ownership of the complainant of the alleged property.

VIII. The genuineness of the affidavits filed by the complainant before the riot commission had not been proved as prosecution did not bring any evidence to show that the said affidavits were attested on solemn affirmation and were taken before them. The trial court failed

to give benefit of doubt to the appellants though prayed by the counsel for the appellants in the trial court.

IX. The trial court did not take into consideration the cross-examination of the witnesses and the defense witnesses.

X. The contradictions and confrontations appearing in the statement of the witnesses and the defence witnesses.

XI. The age of the accused persons was not considered by the trial court and the accused persons should have been released on probation or convicted only under Section 448 as per charge.

XII. The trial court has wrongly taken the cognizance under Section 456 Cr.P.C. as decree of the civil court existed against the accused persons.

XIII. The police reports of Police Station Bara Hindu Rao did not support the case of the complainant that any incident of riots took place in the area of

Tokriwalan, Azad Market, where the property is situated.

5. Since appellants did not hand over the possession of the impugned shops to the complainants, an order was passed by this Court on 8.12.2004 directing the SHO to remove the appellants from the premises in question in terms of the orders passed by the trial court but would keep the property in his custody till further orders from this Court. Consequently the SHO got the shops vacated and kept the possession of the said shops with him. Since complainants succeeded in their civil suit and obtained a decree for possession of disputed premises besides damages and the appeal filed against the said decree also stood dismissed, they filed an application in this Court for modification of the order dated 8.12.2004. The order was accordingly modified and the SHO was directed to hand over possession of the disputed premises to the complainants. The SHO accordingly handed over the possession of the impugned property to the complainant which fact was

admitted by the complainant before this Court on 27.5.2008. In view of the complainant having received the possession of the disputed property, appellants settled their disputes with the complainants towards full and final settlement of their claims to which the complainants also agreed. Some time was sought by the parties to record the settlement and to pay the amount as agreed. But the appellants failed to make any arrangement for payment of the settled amount despite enough opportunity being given to the appellants to make the payment as settled between them. Appellants made another request for making the payment of the said amount in installments to which the complainants did not agree and further time was granted to the appellants on their request to pay the said settled amount to the complainants. Appellants, therefore, completely flouted the undertaking given by them in their affidavits, filed in this Court.

6. Time was given to the appellants to submit on the appeal but again appellants failed to submit

arguments on the merits of the appeal. On 29.8.2008 none appeared on behalf of the appellants. Under the circumstances, this Court proceeded with hearing of arguments on behalf of the State as well as complainant and after conclusion of arguments reserved the orders. Even, since thereafter, no efforts have been made by the appellants to make the payment of the settled amount to the complainants.

7. The incident in question took place as an aftermath of unfortunate event of Indira Gandhi's assassination by her own Sikh bodyguard and chaos befell clouding the capital. The Sikh community became the target of assault. Their houses were looted and shops were ransacked. The neighbours turned on their neighbours and the Indian civilisation broke down in two separate societies. The complainant Prakash Kaur and her husband made complaints to the Police alleging that appellants had looted their shops at Tokriwala along with details of losses incurred. However, Police failed to take any action on the

said complaint, now registered as FIR. The Police adopted an attitude of indifference and allowed the agitated mob to continue to assault indulge into incarceration, massacre, looting of properties and forcible occupation of the various properties belonging to the Sikh community. Under these circumstances, Jain Aggarwal Committee was constituted and immediately after formation of the committee, the complainant Prakash Kaur and her husband and her son Jagjit Singh filed affidavits before the committee with the allegations against appellants who all belonged to same family, alleging that they had looted the shops at T-56 and T-57 along with details of losses incurred. After Jain Aggarwal Committee directed the Police authorities to register an FIR and investigate the matter, FIR No. 3/93 under Sections 147/395/448/149/34 IPC was registered at Police Station Bara Hindu Rao. Under these circumstances, delay of 10 years in lodging the FIR against the accused persons is fully justified. If the Police authorities were negligent and were not

ready and willing to perform their part of the duties, complainants under these circumstances could not be made to suffer on the plea that FIR was got registered after about nine years of the incident. The trial court has dealt with this issue in a comprehensive manner in para 3 of the judgment. Ineffectiveness of the Police might be cause of their other primary important activities at the time of the riots like; saving of persons, properties, picking up the dead bodies, checking further commission of riots, arrest of people etc. and also to ensure restoration of normalcy in the affected areas.

8. In ***Apren Joseph v. State of Kerala - (1973) 3 SCC 114***, it was observed:

“11..... Undue unreasonable delay in lodging the FIR, therefore, inevitably gives rise to suspicion which puts the court on guard to look for the possible motive and the explanation for the delay and consider its effect on the trustworthiness or otherwise of the prosecution version. In our opinion, no duration of time in the abstract can be fixed as reasonable for giving information of a crime to the police, the question of reasonable time being a matter

for determination by the court in each case. Mere delay in lodging the first information report with the police is, therefore, not necessarily, as a matter of law, fatal to the prosecution. The effect of delay in doing so in the light of the plausibility of the explanation forthcoming for such delay accordingly must fall for consideration on all the facts and circumstances of a given case.”

9. In ***State of Himachal Pradesh v. Gian Chand - (2001) 6 SCC 71***, the Supreme Court observed:

“12. Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if ordered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case.....”

10. In the present case the delay in lodging the FIR has been reasonably and satisfactorily explained by the prosecution and therefore, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case.
11. Under the circumstances in which the offences were committed by the appellants, there could not have been any eye-witness to the incident. The trial court while considering the submissions of the appellants that there was no eye-witness to the incident, in the right perspective observed in paragraph 4 of its judgment that the witnesses whose shops were looted and forcibly occupied by trespassing were not present at the time when the incident of rioting or breaking open the locks of the shops had taken place. The trial court observed:

“4. At the very outset it may be stated that the witnesses including those whose shops have been looted and forcibly occupied after trespassing were not present at the time when the incident of rioting or breaking open of the lock of shop had taken place, so they had not testified against the

accused persons as far as formation of unlawful assembly and riots is concerned, however, their testimony is in respect of forcible occupation of the shop no. T-56 and T-57 by the accused persons and removal of the goods, stock lying in the shop by the accused persons. The defence taken by the accused persons is that complainant was not in possession of the shop in question at the time of riots and it was accused persons who were in possession of the premises. It is not in dispute that shop no. T-56 and T-57 are in possession of Udai Ram, Munni Devi and Bhagwan Dass."

12. The trial court assessed the circumstantial evidence as well as evidence adduced on the record regarding possession of the complainants in the premises in dispute, which were trespassed by breaking open the locks by the appellants, who also looted the shops after trespassing them.
13. The trial court has discussed and assessed the entire evidence of the prosecution as well as that of the appellants in a comprehensive manner. I do not find any infirmity in the assessment of the evidence, made by the trial court. As regards PW7,

Dr. Manmohan Singh Grover is concerned, to say that he did not support the prosecution case and denied the possession and ownership of the complainants in respect of the disputed shops would be incorrect. He happened to be brother of Inder Singh and the only testimony he gave was that there was a family settlement and a compromise deed was executed between the family members regarding the property in dispute which was also signed by him. Therefore, this witness in no manner can be considered as hostile to the prosecution case.

14. True, that appellants were not charged for offences under Section 379 IPC, though they have been convicted by the trial court for having committed theft under Section 379 IPC and sentenced accordingly. FIR was registered against the appellants under Section 395 IPC i.e. looting of the impugned shops by the appellants. Offence under Section 395 IPC is heinous in nature and if the Court was of the opinion that a lesser offence was found to had been committed by the offender, the

Court was within its right to convict the offender for the lesser offence. For that purpose there is no requirement of law to amend the charges, as no prejudice could be said to have been caused to the appellants for having been convicted for offence under Section 379 IPC instead of under Section 395 IPC.

15. Recovery of alleged stolen goods is not a pre-requisite for convicting an offender for an offence under Section 379 IPC. Affidavits filed by the complainants before the Riot Commission were proved to have been filed by PW1 Inspector B.S. Patwal, PW2 S.L. Chopra, retired IAS, PW3 Rajesh Arora, Advocate who attested the affidavit of Inder Singh Grover, PW5 S.P. Singh Advocate who attested the affidavit of Prakash Kaur Ex. PW5/A and PW15 Inspector Ram Kishan Malik who had made endorsement on the affidavit. None of these witnesses were cross-examined on behalf of the appellants. Therefore, the genuineness of the affidavits, filed by the complainants before the Riot Commission, stood duly proved by the prosecution

in the trial court.

16. The trial court also took into consideration certified copies of the court proceedings and the statements recorded before the civil court in a suit for possession filed by Inder Singh Grover, the husband of the complainant Prakash Kaur, against the appellants Uday Ram, Kishori, Smt. Assi and Sh. Bhagwan Dass. The trial court also took into consideration the judgment of the civil court dated 31.5.2001 upholding the claim of Inder Singh that he was in possession of the property before riots and appellants Uday Ram, Assi and Bhagwan Dass were unlawful and illegal occupants and trespassers. Appeal against the said judgment and decree was also dismissed by the learned ADJ vide his judgment dated 19.3.2005. Except that the quantum of damages awarded to the complainants by the trial court were modified.

17. The trial court did consider the evidence adduced by the parties if any carnage had taken place in Tokriwalan to come to the conclusion that since no riot had taken place in their Mohalla, it was

obvious that no other rioter had looted the shop and it was the appellants who had taken benefit of riot going on in Delhi and looted the shop of the complainants on which they were having eyes and occupied them forcibly.

18. The trial court was within its powers to pass an order under Section 456 Cr.P.C. directing the appellants to hand over possession of the premises No. T-56 and T-57, Tokriwala to the complainants Inder Singh, Prakash Kaur and Jagjit Singh within three weeks with further directions to the SHO, Police Station Bara Hindu Rao, to remove the appellants from the said property.
19. The trial court rightly refused to release the appellants on probation keeping in mind the circumstances in which the appellants took forcible possession of the shops in question and looted them. The Court observed:

“2. The accused persons were living in the neighbourhood of the complainant. The complainant family shifted from the area and left these two shops locked. The accused persons took benefit of the riots and broke open the lock in

November 1984 and took possession of the shop as well as the property lying in the shop. They are in possession of the shop since 1984. The possession of the shop was not handed over despite decree of Civil court and appeal has been preferred against the judgment of civil court. Taking any lenient view against the accused persons shall amount to putting premium on the crime. If a person takes forcible possession of the premises and continues using it for decades and the trial takes very long time because the cases are not registered against the accused persons due to police apathy, I consider that the court must give exemplary punishment in such cases so that people are discouraged from grabbing the property and doing riots and taking forcible possession of the properties of others. I therefore, sentence 1 year RI u.s. 448 IPC with fine of Rs.1000/- to each accused in default of payment of fine to further undergo SI for 3 months. I sentence accused persons to RI for 3 years u.s.379IPC and fine of Rs. 25,000/- each in default of payment of fine to further undergo SI for one year. Both sentences shall run concurrently. Benefit of section 428 Cr.P.C. shall be given to the accused persons.

20. I find no merits in the present appeal. There is no

infirmity or illegality in the impugned judgment dated 30.11.2004 and order on sentence dated 2.12.2004 of the trial court. Appeal is accordingly dismissed. The appellants shall surrender before the trial court within one week from the date of this order to suffer the sentence inflicted upon them failing which the trial court shall proceed in accordance with law to ensure the arrest of the appellants and make them to undergo the sentence inflicted by it in this case.

Attested copy of the order be sent to the trial court as well as to the State.

(ARUNA SURESH)
JUDGE

January 23, 2009
jk