

Court No. - 27

Case :- CRIMINAL REVISION No. - 955 of 2023

Revisionist :- Kamal Kishore

Opposite Party :- State Of U.P. Thru. Prin. Secy. Deptt. Of Home, Civil Sectt. Lko. And Another

Counsel for Revisionist :- Suyesh Pradhan

Counsel for Opposite Party :- G.A.

Hon'ble Subhash Vidyarthi,J.

1. Heard Sri Suyesh Pradhan, the learned counsel for the revisionist and Sri Ananat Pratap Singh, the learned A.G.A appearing on behalf of the State.

2. The instant criminal revision has been filed under Section 397/401 Cr.P.C, the revisionist has assailed the validity of the judgment and order dated 18.05.2022 passed by the Judicial Magistrate-I, Sitapur in Criminal Case No. 1464 of 2019 arising out of Case Crime No. 183/2012, under Sections 394, 411 I.P.C, Police Station Khairabad, District Sitapur, acquitting the revisionist for the charge of commission of offence under Section 394 I.P.C and convicting the revisionist for commission of an offence under Section 411 I.P.C and granting him benefit of Section 4 of the Probation of Offenders Act. The revisionist has also challenged the validity of the judgment and order dated 03.08.2023 passed by the Session Judge, Sitapur, dismissing a Criminal Appeal No. 31/2022 filed by him against the order of conviction passed by the trial court.

3. Briefly stated the facts of the case are that an F.I.R was lodged, stating that when the informant was going on a motorcycle with his friend Kamal Kishore (the revisionist) on 27.08.2012, two unknown persons intercepted them, snatched away three mobile phones, two ATM cards and a motorcycle and they also snatched away mobile phones, Rs.350/-, driving license and an ATM card of the revisionist, who was accompanying the complainant.

4. The police claimed to have arrested five persons, including the revisionist, on the basis of information received from a mukhbir and while they were riding on two motorcycles and one person is said to have escaped. On their pointing out, a total of five stolen motorcycles were recovered. Thereafter, the revisionist was made an accused. The trial of the revisionist was held separate from the other four co-accused persons. During his examination-in-chief, the complainant Bhanu Pratap Singh, supported the F.I.R allegations and he further stated that he and the revisionist, both were taken for medico legal examination. In his cross-examination, the complainant stated that the police had recovered his motorcycle and a mobile phone from the cousins of the revisionist. He stated that the revisionist was accompanying him at the time of the incident and he had also suffered injuries in the incident. He further stated that he could not say as to how the police made him an accused in the case. Neither the revisionist was involved in commission of the robbery, nor was anything was recovered from him in presence of the complainant. The complainant used to study with the revisionist in B.Tech.

5. P.W.2- Head Constable Abdul Rafe proved the recovery and the judgment mentions that the recovery memo was not brought on record of the case, for which reason the examination-in-chief of P.W.2 was deferred and it continued after a certified copy of the recovery memo was brought on record after commencement of recording of oral evidence. In his cross-examination P.W.2- Head Constable Abdul Rafe admitted that the revisionist was accompanying the complainant at the time of the incident and Rs. 350 and a mobile phone had been robbed from him.

6. P.W.5 was the doctor who had conducted the medico legal examination of the complainant and the revisionist, who proved the injuries suffered by both of them.

7. D.W. 1- Jay Prakash examined as a defense witness stated that 6-7 police personnels had taken away the revisionist in the night of 29.08.2012 from his home. In his cross-examination, D.W.1 stated that there are two houses between his house and the house of the complainant. He was lying down inside the house and had come out after hearing some noise and had seen the police personnel taking away the revisionist. Thereafter, the revisionist was taken into custody and was released after one month. Similar statements were given by other two defense witnesses i.e. D.W.2 and D.W.3.

8. The trial court held that the revisionist was accompanying the complainant at the time of the incident and he was not involved in commission of the robbery. However, accepting evidence of police witnesses, who had allegedly recovered a motorcycle from the accused person, the trial court held that the revisionist was guilty of commission of offence under Section 411 I.P.C.

9. The trial court had taken note of the fact that the D.W.1,2 and 3 have stated that the police have taken away the revisionist from his home in the night of 29.08.2012 and afterwards they came to know that he had been made an accused in the case. The court held that as the police has mentioned in the case diary that the accused was arrested during checking, this entry of the case diary will carry more weight than the statement of the independent witnesses and it discarded the evidence of D.W1, D.W.2 and D.W.3.

10. The Appellate court discarded the testimony of D.W. 1, 2 and 3 merely for the reason that they reside in the neighborhood of the revisionist's house and they are interested witnesses.

11. The approach of the learned Trial Court and the learned Appellate Court in discarding the testimony on oath given by three defense witnesses, even when no major discrepancy could

come to light in their cross-examinations making their testimony unreliable, gives rise to a patent error in the judgments of the trial court and the appellate court rendering both the judgments liable to be set aside.

12. The prosecution has to established the guilt of the accused person beyond reasonable doubt. The prosecution could not prove the charge of commission of offence under Section 394 I.P.C. The allegation of commission of offence under Section 411 I.P.C was proved merely on the basis of testimony of police personnel and no independent had witnessed the recovery. The recovery memo had not been filed while filing the charge-sheet whereas all the documentary evidence is necessarily required to be filed at the time of the submission of the charge sheet that the accused person can effectively defend the case set up against him. When the relevant documentary evidence is not provided to the accused person before commencement of the trial, it causes a serious prejudice to the rights of the accused person to actively defend himself. The sole material to established the revisionist's involvement in commission of an offence under Section 411 I.P.C was a copy of the recovery memo filed after commencement of examination-in-chief of P.W.2 and the statement of police witness and no independent witness had proved the alleged recovery. This aspect has not been considered by the trial court and the appellate court.

13. On the other hand three defense witnesses, none of whom is said to be related to the revisionist, had stated that the police had taken the revisionist from his house in the night of 29.08.2012 and thereafter he was taken into custody and was released after one month. The alleged recovery was made on 31.08.2023 while the revisionist was already in custody of the police since 29.08.2022. No discrepancy in the statements of D.W.1, 2 and 3 came to light during their cross-examination.

Merely because they reside in the neighborhood of the revisionist's house, their testimony cannot be discarded as that of interested persons. Their presence on the spot while the police had come to take away the revisionist, was the most natural thing and both the courts below have committed a grave error in discarding the testimony of the aforesaid three defense witnesses, which proves that the appellant had been taken away from his home in the night on 29.08.2012 and which establishes the fallacy of the prosecution case that he was arrested during routine checking on 31.08.2023.

14. Accordingly the instant revision is ***allowed***. The judgment and order dated 18.05.2022 passed by the Judicial Magistrate-I, Sitapur in Criminal Case No. 1464 of 2019 arising out of Case Crime No. 183/2012 under Sections 394, 411 I.P.C, Police Station Khairabad, District Sitapur and judgment and order dated 03.08.2023 passed by the Session Judge, Sitapur, dismissing a Criminal Appeal No. 31/2022 filed by the revisionist are hereby set aside and the revisionist stands acquitted of commission of offence under Section 411 I.P.C.

(Subhash Vidyarthi,J.)

Order Date :- 5.1.2024

Preeti.