

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Criminal Appeal No. S-572-SB of 2004

Date of decision : July 27, 2018

Sunil alias Sonu and another

....Appellants

versus

State of Haryana

....Respondent

Coram: Hon'ble Mr. Justice Fateh Deep Singh

Present : Mr. Sandeep Kumar, Advocate, for the appellants

Mr. Siddarth Sanwaria, DAG, Haryana for the State/respondent

Fateh Deep Singh, J. (Oral)

This is an appeal by appellants convicts Sunil alias Sonu and Om Parkash as a consequence of their conviction through judgment/orders of sentence dated 3.3.2004/4.3.2004 by the court of learned Additional Sessions Judge, Panipat whereby in case FIR No. 6 dated 4.1.2003, under sections 457,436, 380 read with section 34 IPC pertaining to Police Station

Model Town, Panipat, they were held guilty for offences under sections 457/34, 436/34, 411 IPC and were sentenced as follows:-

<i>U/s 436 read with section 34 IPC</i>	<i>To undergo rigourous imprisonment for a period of five years and to pay a fine of Rs 3000/- each. In default of payment of fine, to further undergo RI for two months each.</i>
<i>U/s 457 read with section 34 IPC</i>	<i>To undergo rigourous imprisonment for a period of three years and to pay a fine of Rs 1000/- each. In default of payment of fine, to further undergo RI for one month each.</i>
<i>U/s 411 IPC</i>	<i>To undergo rigourous imprisonment for a period of two years and to pay a fine of Rs 1000/- each. In default of payment of fine, to further undergo RI for one month each</i>

Heard Sh. Sandeep Kumar, counsel for the appellants and Mr. Siddarth Sanwaria, DAG, Haryana and perused the records.

The brief facts as has been brought to the notice of the Court and could be gathered from the records is that on 24.12.2002, Balwan Singh son of Hari Singh, resident of Idgah Colony, Panipat along with his family had gone out of station and when on 25.12.2002, he returned and discovered that a fire has broken out in his house and that the lock of the room was broken and articles lying therein were burnt. The fire was extinguished by Fire Brigade with the help of the people of locality. It is alleged by the complainant that on checking his room, he found that a colour TV of Samsung brand, seven tolas of gold, 3 kgs of silver and Rs 5000/- in cash and brass utensils had been stolen. His suspicion fell on the present appellants. It was on his statement Ex. PC made on 4.1.2003 before ASI

Mehtab Singh who made his endorsement Ex. PC/1 and SI Ram Narain who also made his endorsement Ex. PC/2, FIR Ex. PD was registered on 4.1.2003. Thereafter on the same very day, the place was photographed and the photographs Ex. P1 to P6 were taken into police possession vide memo Ex. PE. Rough site plan of the place Ex. PF was prepared and documents Ex. PG and PG/1 by way of telephone receipts were taken into police possession. Accused Sunil was arrested on 9.1.2003 and his disclosure statement Ex. P1, led to recovery of TV make Samsung Ex. P7 which was taken into possession through memo Ex. PJ. Accused Om Parkash was arrested on 17.1.2003. He made disclosure statement Ex. PK, the same very day leading to the recovery of two pair of pjaebs and other articles on 20.1.2003. On the basis of these recoveries rough site plan Ex. PL and Ex. PM were prepared. Upon completion of investigations, challan against the accused was presented.

The prosecution examined PW1 Head Constable Ram Chander, PW2 ASI Mehtab Singh, PW3 Atma Ram Mudgil, Accounts Officer, PW4 Jangsher Singh, PW5 Balwan complainant, PW6 ASI Ram Niwas and lastly PW7 Anil Kumar Malik, Photographer and thereafter the prosecution evidence was closed.

The accused in their stand under section 313 Cr.P.C. denied the allegations and in their defence examined DW1 Hawa Singh and DW2 Phulla to bring about their innocence. Consequent upon hearing, the

impugned findings were recorded and that is how the appellants are before this Court in this appeal.

Appreciating the submissions of the two sides, it is the own case of the prosecution that while the complainant and his family had gone out of station on 24.12.2002, in their absence their house was put on fire and it was only on 25.12.2002 when they arrived at their house discovered the fire. It is thereafter on 4.1.2003, the statement has been made by the complainant leading to the registration of the FIR the same very day. Thus, as has sought to be put forth by the counsel for the appellants there is clearly a delay of 11 days between the alleged occurrence and the registration of the FIR. The only reason that is forth coming from the side of the prosecution as per the submissions of the State counsel is that a Panchayat has intervened. However, to the specific query of the Court, learned State counsel could not convince as to what tangible and cogent evidence has come forth to explain this delay. As per the golden principle of criminal jurisprudence, the onus is on the prosecution to prove its case beyond shadow of reasonable doubt and therefore, is also supposed to explain the delay as by now it is well settled proposition of law, support is taken from the ratio of **State of U.P. Vs Munesh, AIR 2013 SC 147** and **P.Venkataswarlu vs State of A.P., AIR 2003 SC 574** that mere delay is not fatal for the prosecution and each and every day's delay is supposed to be explained by the prosecution. However, in the present case nothing has

come forward in this direction to fill in this yawning gap between the occurrence and the registration of the FIR and therefore, the inability of the prosecution to explain satisfactorily the delay certainly is fatal for it.

The next point raised by the appellants' side pertains to lack of any direct evidence against the appellants. The only witness independently examined is PW4 Jangsher Singh immediate neighbour of the complainant and who has not supported the prosecution story and even otherwise admitted his statement has been recorded on 20.8.2003 and thus even otherwise does not carries any weight for the prosecution. This witness rather admits that the accused had helped them in extinguishing the fire at the house of the complainant which is another distressing feature for the prosecution. The FIR lodged by the complainant is merely on suspicion and mere suspicion cannot take the place of proof and therefore, the prosecution story is to be scrutinized with care and caution. It is no where brought forth why the accused would put the house on fire when there is no animus between the accused and the complainant brought on the record.

The only semblance of the evidence that has sought to be put forth by the State counsel revolves around the disclosure statement of Sunil consequent upon his arrest on 9.1.2003 by way of Ex. P1 leading to alleged recovery of Samsung TV which was taken into police possession through memo Ex. PJ. The evidence against Om Parkash upon his arrest on 17.1.2003 is his disclosure statement Ex. PK leading to recovery of certain

ornaments. It is the case of the prosecution as has been detailed by the Investigating Officer PW2 ASI Mehtab Singh that the recovery has been effected from an open room and in the absence of any evidence that the place from where the recoveries have been effected was in exclusive possession/occupation of the accused, it cannot be assumed that information given by the accused leading to recovery of such articles is a legitimate piece of evidence in this circumstance. The State counsel with all fairness concedes that there is no such investigations and evidence on the record to show the possession of the place from where recoveries have been effected to be in conscious and legal possession of the accused and therefore, another doubt is cast upon the prosecution story. Further more as per the arguments put forth by the counsel for the appellants, the complainant has not proved on the record any document to show ownership of the television nor the manner in which the identification of the articles has been brought about. As has been pointed out, the complainant has only identified the alleged TV only in court and earlier at no point of time consequent upon its recovery any such effort has been made by the police is certainly adding another feature of disadvantage to the prosecution story. The most important submission that has been canvassed and could not be refuted by any means by the State counsel is the manner in which the identification of alleged articles of jewellery has been conducted. It is not the case of the prosecution that the same were mixed with similar articles

and out of the same, the complainant has identified his belongings. Rather what is reflected from the documents and the evidence after the recovery, the police has shown the same to the complainant who identified it to be his, thus, contrary to the settled norms for carrying on fair investigations to unravel the truth. The delay in arrest of the accused who are residents of the area and recovery of the articles certainly have its adverse impact on the prosecution story and which cannot by any means be thwarted by fervent arguments of the learned State counsel. The accused have been convicted firstly with the aid of section 436 IPC and which necessitates that the prosecution must prove commission of mischief by fire and that it has been committed by the accused knowing to cause or knowing it to be likely to cause destruction of any premises of the complainant which is used for residence or as a place for the custody of property. However, in the present case since there is no direct evidence how the fire has been caused or who has caused the fire as there is no independent witness. The million dollar question whether it was the accused who have caused the fire and the State counsel could not satisfy as to for what one of the accused who happens from the neighbouring residence of the complainant would do it and thus in the absence of any substantive evidence, motive or explanation certainly is a distressing feature. The other offence for which the accused have been convicted is under section 457 IPC which deals with the lurking house trespass. The prosecution has not brought about any such evidence of

concrete nature that the accused had taken active steps to conceal their presence while committing lurking house trespass and done it so at night or morning and there is no evidence to that effect on the record and further more in the absence of any cogent and reliable substantial evidence that there was house breaking by the accused after trespassing and it was with a view to commit an offence which is punishable and that recovery of the alleged articles was subject matter of theft was from the conscious possession of the accused are material drawbacks, in the prosecution story, these are the essential ingredients to prove the offence that some property was stolen and that it was accused who have received that property dishonestly and were fully aware that the property was stolen certainly are matters which could not be satisfactorily brought by evidence on the record.

The learned lower court has clearly lost sight of the fact that the entire story of the prosecution is mere based on hearsay and there are serious irregularities and illegalities in the investigations and thus, in the absence of any legal evidence worth reliance, the prosecution certainly has failed in its endeavour to establish its case against both the accused beyond shadow of reasonable doubt. The impugned findings certainly are incorrect appreciation of evidence and law and thus needs to be set aside by way of acceptance of the present appeal. The appeal is hereby accepted and the judgment of conviction passed by the learned trial court is set aside.

The appellants are already on bail in this case. Bail bonds furnished by them shall be discharged.

July 27, 2018
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(Fateh Deep Singh)
Judge

Whether speaking/reasoned ?
Whether Reportable ?

Yes/No
Yes/No