

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

214

CRA-S-2546-SB-2004 (O&M)
Reserved on 09.02.2023
Pronounced on 17.02.2023

Sanjeev

. . . Appellants(s)

Versus

State of Haryana

. . . Respondent(s)

CORAM: HON'BLE MR. JUSTICE SANJAY VASHISTH

PRESENT: Mr. Akash Mehta, Advocate
Amicus Curiae, on behalf of the appellant
(appointed vide order dated 07.02.2023).

Mr. Pawan Kumar Jhanda, AAG, Haryana.

SANJAY VASHISTH, J.

1. Present appeal has been filed by appellant- Sanjeev Kumar, against the judgment of conviction and order of sentence dated 07.12.2004 passed by the Additional Sessions Judge, Yamuna Nagar at Jagadhari, in session case No. 93 of 2002 arising from FIR No. 167 dated 06.04.2002, under Sections 395/397 IPC, registered at Police Station City Yamuna Nagar.

2. However, in the proceedings of the said FIR, five accused i.e. Sanjeev, Mausam, Sudesh, Manoj and Harish were tried, but vide judgment of conviction and order of sentence dated 07.12.2004, only

appellant-Sanjeev was convicted for the offence punishable under Section 411 IPC and resultantly was sentenced for a period of 01 year as rigorous imprisonment alongwith fine of Rs. 500/- and in default of payment of fine, to further undergo R. I. for 03 months.

3. Appellant was found in possession of partial looted amount of Rs. 13,000/- alongwith photographs and one bag belonged to the complainant. Initially, FIR (ExpJ/2) was registered on 05.04.2002 under Section 379 IPC on the version given by the complainant- Joginder Singh. Subsequently, on 15.04.2002, by recording the supplementary statement of complainant Joginder Singh, offence was upgraded to the incident of dacoity and thus, Sections 395/397 IPC were added during investigation with an allegations of using of country made pistol by the accused and of snatching the amount of Rs. 37,000/-.

4. In order to prove its case, prosecution examined 13 witnesses, and thereafter, closed the evidence on the statement of learned public prosecutor.

5. Findings, recorded by the trial Court in paragraph No. 11 is that undoubtedly, in F.I.R., there were no allegations that any of the accused was armed with weapon or used such weapon while committing the offence of theft.

Relevant paragraph No. 11 says as under:

“11. *I have considered the rival contention of the parties and I agree with the defence counsel that the*

only witness of the occurrence namely Joginder Singh PW11 has not been able to identify either of the accused present in the court. As far as offence under section 395 IPC is concerned, there are no allegations that either of them has used any weapon or threat while committing the offence of theft. Thus, apart from the fact that no offence U/s 395/397 IPC is made out, it is also not proved beyond doubt that either of the accused were the member of that gang which committed the theft. The point for determination, as such is decided against the prosecution.”

6. PW-2-Manoj Kumar has stated about the factum of recovery of Rs. 13,000/- from the appellant- Sanjeev, Rs. 10,000/- from accused Mausam, Rs. 5000/- from Manoj and Rs. 1000/- from Suresh. Version of said recoveries has been supported in the statement of SI Amar Nath (PW 12) and PW 8-Kishan Singh also.

7. Findings given by learned trial Court in paragraphs No. 14, 15, 16 and 17 are reproduced here-in below:

“14. *After considering the rival contentions of the parties, I find that, as far as, identification of the accused by the police party is concerned, the same could not be shattered. I also agree that weightment slips would not*

ordinarily be kept by the thief and they would only keep the cash with them. However, simply because the complainant has for-got to tell that there were photographs, also cannot be said that there is any improvement in this behalf. The amount of Rs. 13,000/- having been recovered from the possession of accused Sanjeev Kumar alias Kalu alongwith bag and one photo. Thus, as far as recovery of Rs.13,000/- from accused Sanjiv Kumar alias Kalu is concerned, it has been proved beyond doubt. However, the recovery of amount from the remaining accused persons does not stand identified and the story of the prosecution that weighing slips were also with it, is not believable.

- 15. In nut shell, thus, I find that the prosecution has been able to prove that the accused Sanjeev Kumar was found in possession of stolen articles. However, with regard to remaining accused, the prosecution has failed to prove that they were found in possession of stolen articles. The point for determination is decided accordingly.*
- 16. Once I came to the conclusion that Sanjeev Kumar accused was found in possession of the money of*

Rs.13,000/- along with photographs and the bag belonging to the complainant, the question arises as to for which offence, he is liable. Once decoity is not proved, we are to see that the goods recovered from him were obtained in a theft. Thus, presumption can be drawn that either he has committed theft or retainer of stolen property. As such, he is liable for offence punishable under section 411 IPC.

17. In nut shell, thus, all the accused are acquitted of charges framed against them. However, as far as accused Sanjeev Kumar is concerned, he is held guilty for the commission of offence punishable under section 411 IPC and convicted accordingly. The case property be however, returned to the complainant, because none of the accused has claimed that property.”

8. Learned Amicus Curiae (appointed by this Court vide order dated 07.02.2023) submits that the appellant and other accused are not found connected with the offence of theft and dacoity and already learned trial Court has acquitted the appellant and other accused for all the charges levelled by the prosecution only on the basis of alleged recovery of Rs. 13,000/- alongwith photographs and the bag which belonged to the complainant, presumption has been raised about the knowledge of

retaining of the stolen property and thus, appellant has been wrongly convicted for the offence under Section 411 IPC.

9. While submitting so, learned *Amicus Curiae* reads out the findings recorded by the trial Court in paragraphs No. 15 and 16 of its judgment, ***which has already been discussed here-in above.*** It is argued that said findings itself show that neither there is any evidence with the prosecution to prove that the appellant was having prior knowledge of the property of having been stolen nor had any reason to believe the same to be stolen property. Therefore, receiving or retaining the property dishonestly by the appellant also remains unproved.

For reference Section 411 of The Indian Penal Code, is reproduced here below:

Section 411 of The Indian Penal Code

“411. ***Dishonestly receiving stolen property.—Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.***”

10. While submitting so, learned *Amicus Curiae* relies upon the judgment passed by Apex Court in Criminal Appeal No. 1503 of 20022 (Arising out of SLP (Crl.) No. 9141 of 2019) titled as “***Shiv Kumar v. The State of Madhya Pradesh***”, decided on 07.09.2022, Law Finder Doc

Id # 2031528.

Relevant paragraphs No. 14 and 15 says as under:

14. *"Dishonestly" is defined under Section 24 of the IPC as, "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly". The key ingredient for a crime is, of course, Mens Rea. This was nicely explained by Justice K. Subba Rao in the case of **Dr. Vimla v. Delhi Administration AIR 1963 SC 1572** in the following paragraphs: -*

*"9A. A Full Bench of the Madras High Court, in **Kotamraju Venkataadu v. Emperor [(1905)ILR 28 Mad 90, 96, 97]** had to consider the case of a person obtaining admission to the matriculation examination of the Madras University as a private candidate producing to the Registrar a certificate purporting to have been signed by the headmaster of a recognized High School that he was of good character and had attained his 20th year. It was found in that case that the candidate had fabricated the signature of the headmaster. The court held that the accused was guilty of forgery. White, C.J., observed:*

"Intending to defraud means, of course, something more

than deceiving." He illustrated this by the following example:

"A tells B a lie and B believes him. B is deceived but it does not follow that A intended to defraud B. But, as it seems to me, if A tells B a lie intending that B should do something which A conceives to be to his own benefit or advantage, and which, if done, would be to the loss or detriment of B, A intends to defraud B." The learned Chief Justice indicated his line of thought, which has some bearing on the question now raised, by the following observations:

"I may observe, however, in this connection that by Section 24 of the Code person does a thing dishonestly who does it with the intention of causing wrongful gain or wrongful loss. It is not necessary that there should be an intention to cause both. On the analogy of this definition, it might be said that either an intention to secure a benefit or advantage on the one hand, or to cause loss or detriment on the other, by means of deceit is an intent to defraud."

But, he found in that case that both the elements were present. Benson, J. pointed out at p. 114:

"I am of opinion that the act was fraudulent not merely by

reason of the advantage which the accused intended to secure for himself by means of his deceit, but also by reason of the injury which must necessarily result to the University, and through it to the public from such acts if unrepressed. The University is injured, if through the evasion of its bye-laws, it is induced to declare that certain persons have fulfilled the conditions prescribed for Matriculation and are entitled to the benefits of Matriculation, when in fact, they have not fulfilled those conditions for the value of its examinations is depreciated in the eyes of the public if it is found that the certificate of the University that they have passed its examinations is no longer a guarantee that they have in truth fulfilled the conditions on which alone the University professes to certify them as passed, and to admit them to the benefits of Matriculation."

Boddam, J., agreed with the learned Chief Justice and Benson, J. This decision accepts the principle laid down by Stephen, namely, that the intention to defraud is made up of two elements, first an intention to deceive and second the intention to expose some person either to actual injury or risk of possible injury; but the learned Judges were also inclined to hold on the analogy of the

definition of "dishonestly" in Section 24 of the Code that intention to secure a benefit or advantage to the deceiver satisfies the second condition."

- 15.** *To establish that a person is dealing with stolen property, the "believe" factor of the person is of stellar import. For successful prosecution, it is not enough to prove that the accused was either negligent or that he had a cause to think that the property was stolen, or that he failed to make enough inquiries to comprehend the nature of the goods procured by him. The initial possession of the goods in question may not be illegal but retaining those with the knowledge that it was stolen property, makes it culpable."*

11. On the other hand, while opposing the submission made by learned *Amicus Curiae* on behalf of the appellant, learned State counsel submits that there is ample material available on record to presume that appellant had prior knowledge about the stolen bag and also the amount of Rs. 13,000/- in it. While saying so, reliance is placed upon the statement of ASI Hari Raj (PW1), who proved the disclosure statement of appellant- Sanjeev as Ex. PB.

12. After giving ample opportunities to both the sides, this Court has also perused the statement of ASI Hari Raj (PW1) and finds that said

witness appeared to prove the disclosure statements of three other accused also, but all the other accused have already been acquitted by the trial Court.

13. It is also noticed that disclosure of the factum of committing of crime of looting an amount on the date of incident is also there in the said disclosure statement.

In the cross examination, same witness admits that *‘none of the accused got anything recovered in XXXXXXXX my presence. The disclosure statements are not in my hand-writing. Disclosure statements also bear signatures of HC Ram Mehar besides me and the accused. XXXXXXXX. No public person was joined in the investigation at the time of recording of the disclosure statement.’*

14. Prosecution failed to examine the second witness who was the signatory over the disclosure statement i.e. HC Ram Mehar and was left as unnecessary. It would also be a question without there being an answer that if the other accused are not held to be involved in the incident and were accordingly acquitted for the charges under Sections 395 and 397 of IPC, how prosecution would claim that the recovered property i.e. Brown bag and currency of Rs. 13,000/- is stolen/looted property. Identification of the same by the complainant Joginder Singh is unbelievable because identifying the currency notes after 10-15 days to be the same as those recovered from the accused does not appeal to the prudence of a common person.

15. In the absence of strong evidence i.e. evidence of knowledge or strong belief of knowing the articles to have been stolen, appellant could not be convicted for the offence under Section 411 IPC in the case. Prosecution is left a very weak evidence i.e. disclosure statement of the accused. Apart the said disclosure statement, there is no other proof with the prosecution to prove that the possession of articles such as bag, photographs, currency notes of Rs. 13,000/- is with the knowledge of having been stolen. Thus, prosecution lacks with the fundamental evidence warranted for holding the appellant as guilty.

16. Paragraphs No. 21 to 24 of the Judgment in **Shiv Kumar's Case (Supra)**, which deals with the standard of the disclosure statement(s) of the accused as a weak quality evidence, are reproduced here-in below:

21. In *Trimbak v. State of Madhya Pradesh AIR 1954 SC 39*, this Court discussed the essential ingredients for conviction under Section 411 of the IPC. Justice Mehr Chand Mahajan, in his erudite opinion rightly observed that in order to bring home the guilt under Section 411 IPC, the prosecution must prove,

"5. (1) that the stolen property was in the possession of the accused, (2) that some person other than the accused had possession of the property before the accused got possession of it, and (3) that the accused had knowledge

that the property was stolen property...."

22. *When we apply the legal proposition as propounded to the present circumstances, the inevitable conclusion is that the prosecution has failed to establish that the appellant had the knowledge that articles seized from his possession are stolen goods. This essential element was not established against the appellant to bring home the charge under Section 411 of the IPC against him.*

23. *That apart, the disclosure statement of one accused cannot be accepted as a proof of the appellant having knowledge of utensils being stolen goods. The prosecution has also failed to establish any basis for the appellant to believe that the utensils seized from him were stolen articles. The factum of selling utensils at a lower price cannot, by itself, lead to the conclusion that the appellant was aware of the theft of those articles. The essential ingredient of mens Rea is clearly not established for the charge under Section 411 of IPC. The Prosecution's evidence on this aspect, as they would speak of the character Gratiano in Merchant of Venice, can be appropriately described as, "you speak an infinite deal of nothing." [6*]*

[6 William Shakespeare. Merchant of Venice, Act 1 Scene 1.]*

24. *In a case like this, where the fundamental evidence is not available and the law leans in appellant's favour, notwithstanding the concurrent finding, the Court has to exercise corrective jurisdiction as the circumstances justify. As such, taking a cue from **Haryana State Industrial Development Corporation v. Cork Manufacturing Co (2007) 8 SCC 120.**, the exercise of extraordinary jurisdiction under Article 136 is found to be merited to do justice to the appellant who was held to be guilty, without the requisite evidence to establish his mens rea in the crime.”*

17. After examining the record and considering all the aspects, I find that there is no evidence available on record to hold the appellant guilty for the offence under Section 411 IPC. Thus, judgment dated 07.12.2004 passed by the Additional Sessions Judge, Yamuna Nagar, is here by **set-aside** and resultantly, appeal stands **allowed**.

18. Disposed of.

(SANJAY VASHISTH)
JUDGE

17.02.2023

Riya

Whether speaking/reasoned: Yes/~~No~~
Whether Reportable: ~~Yes~~/No