



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH : NAGPUR**

CRIMINAL REVISION APPLICATION NO.164 OF 2022

- 1) Moreswar s/o Purushottam Gejik
Age : About : 33 yrs. Occ. Labour
R/o. Sonegaon, Begde, Teh : Chimur,
Dist. : Chandrapur

.... Applicant(s)

// VERSUS //

- 1) State of Maharashtra
Through Police Station Officer, Police
Station Warora, Dist. : Chandrapur

.... Non-applicant(s)

.....
Mr. S.D. Umredkar, Advocate h/f Mr. Aniruddha Jaltare, Advocate for the
applicants/s

Ms D.I. Charlewar, APP for the non-applicant/State
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CORAM : SANDIPKUMAR C. MORE, J.

DATE OF RESERVING THE JUDGMENT : 18.11.2024

DATE OF PRONOUNCEMENT OF THE JUDGMENT : 29.11.2024

JUDGMENT :

1. The applicant, who is the accused No.1 in Regular Criminal Case (RCC) No.179 of 2012 has challenged the judgment and order dated 20.06.2022 passed by the learned Additional Sessions Judge, Chandrapur (herein after referred to as “the learned Appellate Court”) in Criminal Appeal No.40 of 2017. In the

impugned judgment, the learned Appellate Court has confirmed the conviction of the applicant-accused in the aforesaid criminal case under Section 379 of the Indian Penal Code (IPC) and sentenced to suffer Rigorous imprisonment for one year and to pay fine of Rs.5,000/-, in default to suffer simple imprisonment for two months.

2. The facts leading to the present Revision Application are as under:

On 21.12.2012 at about 1.30 a.m. the complainant Ashok Anandrao Koli i.e. the Police Inspector of Warora Police Station was on patrolling duty with his staff members. At that time, he saw a tractor attached with trolley coming from the Anandwan Square, Warora towards hotel Royal Plaza. The tractor along with trolley was going towards right direction from hotel Royal Plaza and at that time, the complainant stopped the said tractor. On inspection of the trolley, he found around 80 cubic feet sand in it. The present applicant was driving the said tractor by relevant time and when he was asked about the sand in the trolley, he told that he was not

having any royalty or license regarding the same. Therefore, the complainant lodged report with Warora Police Station on 21.11.2012, mentioning that the applicant-accused and the owner of the tractor, were taking the sand after stealing the same. The crime No.277/2012 was registered and Police Constable (PC) Umakant Gaurkar was assigned with investigation of the same.

3. On completion of investigation, the charge-sheet was filed. The charge against both the accused was framed by the learned trial Court and after conducting trial, the learned trial Court i.e. the Judicial Magistrate First Class (JMFC), Warora convicted the present applicant-accused as mentioned above. The applicant had challenged his conviction recorded by the learned trial Court before the learned Appellate Court, but the same was maintained. Hence, this Revision Application.

4. The learned counsel for the applicant-accused submits that the prosecution has miserably failed to establish all the necessary ingredients to constitute the offence of theft under Section 379 of the IPC. According to him, the act of doing theft of sand not at all proved, since there was no investigation to that effect as to from

which sand was obtained and from whose possession. Considering the fact that all the witnesses are from the police department and they are the interested persons, their evidence cannot be relied upon. According to him, the only independent witnesses i.e. the spot and seizure panch has failed to support the prosecution. Thus, he prayed for acquittal of the applicant-accused by setting aside both the impugned judgments.

5. On the contrary, the learned APP supported the judgments passed by the learned trial Court and as well as the learned Appellate Court and prayed for dismissal of the present Revision Application.

6. Heard the rival submissions and also perused the documents on record.

7. On perusal of both the impugned judgments, it appears that the prosecution has examined in all six witnesses. However, PW 1 to PW 5 are the police personnel, who were on patrolling duty at the relevant time. Whereas, the spot panch Ganesh Ghagi (PW 6) appears to be the only independent witness on the point of seizure of the alleged stolen sand.

8. On going through the evidence of the prosecution, the complainant-Ashok Anandrao Koli (PW 5) and his associates PW 1 to PW 4, have deposed according to the prosecution case. However, the complainant in his cross examination has clearly stated that he was not aware about the ownership of the seized sand. Further, his associates PW 1 and PW 2 admitted that they had not handed over their duty pass to the Investigating Officer (PW 3). Moreover, it is extremely important to note that the Investigating Officer, who is PC Umakant Gaurkar though deposed as per the prosecution case, but clearly admitted in his cross examination that he did not prepare panchnama of the spot from which the allegedly stolen land was being carried. He has also admitted that he did not record any statements from the persons belonging to revenue department to establish that the allegedly stolen sand belonged to the Government. Moreover, PC Sandip Adkine (PW 4) also admitted that they did not measure the said sand. It is an important to note that the only independent witness i.e. the panch Ganesh Ghagi (PW 6) on the point of seizure has not supported the case of the prosecution. Thus, in view of the admissions given by the police

personnel in their cross examination, the story of the prosecution that the applicant-accused was found with stolen sand and it was seized, appears highly unbelievable.

9. It is to be noted here that the learned trial Court, while convicting the applicant-accused has already recorded the main factors, constituting the offence under Section 379 of the IPC in the judgment itself. However, to establish the offence under Section 379 of the IPC, the following ingredients are required to be established beyond all the reasonable doubts, which are as under:

- “(i) that the property in question is movable property;*
- (ii) that such property was in the possession of a person;*
- (iii) that the accused moved such property whilst in the possession of that person;*
- (iv) that he did so without the consent of that person;*
- (v) that he did so in order to take the same out of the possession of that person;*
- (vi) that he did so with intent to cause wrongful loss to that person or wrongful gain to himself.”*

10. In the instant matter, the applicant-accused appears to be convicted merely because he was found in possession of certain sand and that he could not show any royalty or permission about

the ownership of the said property. However, it is significant to note that it is not sufficient for prosecution to show that certain property appears to be stolen, is found in possession of the accused. The prosecution must prove that the property, seized from the accused, confirms the part of the property stolen. Unless it is shown that the property found in possession of the accused is stolen from somewhere else or from somebody's lawful possession, then only the accused can be asked to explain as to how he came in possession of the that property.

11. In the instant case, no prosecution witness is coming with the case that the allegedly stolen sand was stolen by the applicant-accused from some particular place. Moreover, the Investigating Officer only obtained certain letter from the revenue department showing that the applicant-accused was not given any royalty or license. However, it is incumbent upon the prosecution to examine certain revenue officer, if they are claiming that the applicant-accused had stolen sand from the possession of the Government Officials. The presumption of theft cannot be therefore drawn, unless it is established that the articles found in possession of the

applicant-accused are stolen property. Thus, a burden to prove the property seized from the accused is a stolen property, lies on the prosecution first and only after discharging the said burden by cogent evidence, the accused can be asked to explain his possession of the seized articles.

12. In the instant case, this main aspect, constituting the offence of theft, is definitely missing. The prosecution has not established beyond all reasonable doubts that the applicant-accused had stolen the sand from one particular place, from the possession of any person or body, who was supposed to be in lawful possession of the same. It appears that both the learned Courts-below have convicted the applicant-accused merely on the ground that he was found with sand at odd time and could not explain or show any document of ownership over the same. However, the evidence on record clearly indicates that the prosecution has not discharged its burden to establish all the necessary ingredients as aforesaid, constituting the offence of theft and therefore, only on the basis of presumption, the applicant-accused cannot be convicted for

committing theft, especially when it is not established whether the sand found in his possession was stolen.

13. Under such circumstance, the conviction recorded by both the learned Courts-below cannot be sustained. The applicant-accused is therefore, definitely entitled for benefit of doubt. Accordingly, I proceed to pass following order.

- i) The Revision Application stands **allowed** and the conviction recorded by the learned trial Court i.e. Judicial Magistrate First Class, Warora in the judgment and order dated 30.08.2017 in Regular Criminal Case No.179 of 2012 and confirmed by the learned Appellate Court under judgment and order dated 20.06.2022 in Criminal Appeal No.40 of 2017, is set aside and the applicant-accused is acquitted from the offence punishable under Section 379 of the IPC registered with Police Station, Warora in Crime No.277 of 2012.
- ii) His bail bond stands cancelled and the fine amount paid by the applicant-accused be returned to him.
- iii) The Revision Application is accordingly, disposed of along with the Criminal Application Nos.216 and 217 of 2022.

SANDIPKUMAR C. MORE, J