Vijay Kumar Vs. State

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Court : Delhi

Decided On : Feb-21-2014

Judge : V. K. Jain

Appellant : Vijay Kumar

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Date of Decision:

21. 02.2014 Crl Appeal no.459/2010 + TEJ SINGH @ TEJA .Appellant Through: Mr. Mohit Bhardwaj, Adv. Versus STATE Through: .Respondent Mr. Feroz Khan Ghazi, APP Crl Appeal no.700/2010 RAJINDER STATE .Appellant Through: Ms. Alpana Pandey, Adv. with appellant in person Versus .Respondent Through: Mr. Feroz Khan Ghazi, APP Crl Appeal no.701/2010 VIJAY KUMAR .Appellant Through: Ms. Alpana Pandey, Adv. with appellant in person Versus STATE Through: .Respondent Mr. Feroz Khan Ghazi, APP CORAM: HON'BLE MR. JUSTICE V.K.JAIN

JUDGMENT
V.K.JAIN, J.

(Oral) In the night intervening 13/14.04.2004, the dead body of a person aged about 25-26 years was found on the Service Road behind Ambedkar College Park

in the jurisdiction of Police Station Shahdara. The information in this regard was recorded at Police Station Shahdara vide DD no.40A which was given to Inspector N.P. Singh, SHO of the aforesaid police station for investigation. He reached the spot, and seized the dead body. An FIR under Sections 302/201 of IPC was registered on the basis of endorsement made by the SHO on the copy of the DD No.40A. A label of RL Tailor, Kailash Nagar, Delhi-110031 was found stitched on the pant which the deceased was wearing. On the inquiries being made with R.L. Tailor, Kailash Nagar, it came to be known that the deceased, who used to get the clothes stitched from the said tailor was residing in some nearby locality. On 15.4.2004, Bhagwandin Yadav identified the dead body to be of Maharajdin Yadav. He told the Investigating Officer that the deceased Maharajdin Yadav was using mobile phone number 9810580501. When the details of the aforesaid mobile phone were scrutinized, it came to be known that the last call from the said mobile number was made to another mobile number 9811425733. When the call details of mobile number 9811425733 scrutinized, it was found that the last call from the aforesaid mobile phone was made to mobile number 9811425733. The call details of mobile No.9811425733 revealed that the last call from the said phone had terminated on mobile No.9811335789. The user of mobile phone number 9811335789, when contacted, informed that the mobile phone number 9811425733 belonged to the elder brother of Vijay who was residing in Loni. On the basis of the aforesaid details, a person whose name initially came to be known as Vijender Kumar @ Fauji was apprehended. The brother of deceased Maharajdin also told the police that his brother was working at a shop and living as paying guest with a neighbouring shopkeeper Mahender Prasad and that on 13.4.2004 when Maharajdin Yadav left the house, Mahender Prasad had also accompanied him. On inquiry being made at the shop of Mahender Prasad, it came to be found that on 13.4.2004 at about 1.30 pm, a person aged about 50 years came to his shop, handed over the keys of the safe in the shop and took a carton kept in the safe on the pretext that Mahender had asked for the said carton. On this information Virender Kumar was formally arrested and his confessional statement was recorded.

2. This is also the case of the prosecution that during the course of investigation, the dead body of the deceased Mahender was recovered from Yamuna river near

the police station New Friends Colony. According to the prosecution, the appellant Vijay got recovered Rs.23,000/- from his house and on 18.4.2004, the appellant Virender @ Fauji got recovered a mobile phone instrument from his house. The appellant Virender @ Fauji refused to join TIP on 23.4.2004 and thereafter he was identified by the witness Prem Singh and Amit Kumar. It was also revealed during investigation that the name of Virender @ Fauji was also Tej Singh @ Teja. This is further the case of the prosecution that on 29.4.2004, the appellant Rajinder while in judicial custody got the mobile phone of deceased Maharajdin Yadav recovered from his house. All the three appellants were prosecuted under Section 364//328/392/302/201/120B/411/419 of IPC.

3. Vide charge dated 03.11.2004, the appellants Vijay Kumar was charged under Section 120B of IPC read with Section 364, 302 and 201 thereof abducting Mahender Prasad and Mehrajuddin Yadav and committing their murder in the night of 13/14.4.2004 and disposing of their dead bodies in order to conceal the evidence of the crime and screening them from legal punishment. He was also charged under Section 120B read with Section 392 of IPC for committing robbery of Rs.90,000/- from the shop of Mahender Prasad. The appellants Tej Singh @ Teja and Rajinder were charged under Section 364/302/201 read with section 34 thereof for committing the murder of the aforesaid two persons and disposing of their bodies with a view to conceal the evidence of the crime and screening themselves from legal punishment. Appellant Vijay was further charged under Section 392 IPC read with Section 34 for committing robbery of Rs.90,000/- from the shop of Mahender. The appellant Rajinder was also charged Section 411 of IPC for receiving or retaining the mobile phone instrument of deceased Mahender Prasad knowing or having reason to believe the same to a stolen property. The appellant Vijay was also charged under Section 411 for receiving or retaining the amount of Rs.23,000/-, alleged to have been recovered from his house knowing or having the reasons the same to be stolen property.

4. Vide impugned judgment dated 24.2.2010, the appellants were convicted under Section 120B of IPC read with Section 420 thereof for cheating PW3 Prem Singh by inducing him and were also convicted for the substantive offence punishable under Section 420 of IPC. They were acquitted of rest of the charges. Vide

impugned Order on Sentence dated 25.2.2010, all the three appellants were sentenced to undergo RI for seven (7) years each and to pay fine of Rs.3,000/- each and in default to undergo SI for six months each for the offence under Section 120B of IPC read with Section 420 thereof for cheating PW3 Prem Singh, by inducing him. For the substantive offence punishable under Section 420 of IPC, the appellants Tej Singh and Rajinder were sentenced to undergo RI for seven years each and to pay a fine of Rs 3,000/- each or to undergo RI for six months each in default. The appellant Vijay was sentenced to undergo RI for six months for the substantive offence punishable under Section 420 of IPC and was further sentenced to pay a fine of Rs 1,000/- or to undergo RI for three months in default.

5. The first contention of the learned counsel for the appellants is that none of the appellants was charged for being a party to a criminal conspiracy to cheat PW3 Prem Singh nor were they charged for the substantive offence punishable under Section 420 of IPC and therefore their conviction under the said sections is bad in law.

6. Section 222 (2) of the Code of Criminal Procedure, 1908 to the extent it is relevant provides that where a person is charged for an offence and the facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he is not charged with it. The illustration to the said Section reads as under:

(a) A is charged, under section 407 of the Indian Penal Code (45 of 1860), with criminal breach of trust in respect of property entrusted to him as a carrier. It appears, that he did commit criminal breach of trust under section 406 of that Code in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under the said section 406. (b) A is charged, under section 325 of the Indian Penal Code (45 of 1860), with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under section 335 of that Code.

Moreover, I find that neither PW-3- Prem Singh nor PW-7 Amit Kumar has stated that the carton/ box which Tej Singh took from them contained cash amounting to Rs 90,000/- or any other amount in cash. Since the carton, according to the

witnesses, had been duly taped, there is no way they could have seen cash, if any, kept in the said carton. Therefore, neither the deposition of Prem Singh nor the deposition of Amit Kumar makes out a case of cheating by the appellant Tej Singh to the extent of Rs 90,000/- or some other amount in cash. In these circumstances, while defending themselves during the course of trial, the appellants could not have even thought of the meeting a charge of cheating Prem Singh to the extent of Rs 90,000/-.

7. Under Section 211 of the Code of Criminal Procedure, the charge should state the offence with which the accused is charged and should contain other particulars specified in that Section. The purpose of framing a charge primarily is to put the accused to notice regarding the offence for which he is being tried. For want of requisite information of the offence and details thereof, the accused should not suffer prejudice nor should there be failure of justice on this account.

8. It is not permissible in law to punish the accused for a less grave offence if the ingredients of the less grave offence are completely different and distinct from the grave offence with which he has been charged. In other words, the accused should have been charged with a grave offence which would take within its ambit and scope the ingredients of a less grave offence. Usually, the offence of grave nature includes in itself the essentials of a lesser, but cognate offence. In the normal course of events, the question of grave or less grave offence would arise in relation to the offences falling in the same clause. For instance, there are classes of offences like offences against human body, offences against property and offences relating to cheating, misappropriation, forgery, etc. If a person has been charged for instance under Section 302 of IPC, he can be convicted for offence punishable under Section 304 of the Penal Code since the two offences are cognate offences and the ingredients of the offence under Section 304 of IPC are included in the offence under Section 302 thereof. Similarly, if a person has been charged say under Section 325 of IPC for causing grievous grievous hurt to a person he can be convicted under Section 323 thereof for causing simple hurt. But where the grave offence and the less grave offence fall in different classes, it would be difficult to say that a person charged with a grave offence falling in one class can be convicted for a less grave offence which falls in some other class.

The offences punishable under Sections 299 to 377 of the Code fall in Chapter XVI of IPC, under the class Of Offences Affecting the Human Body and there is further sub-classification of the offences affecting the human body. On the other hand, the offence punishable under Section 420 of IPC falls in Chapter XVII of the Code under the class Of Offences Against Property. Therefore, an offence against property such as cheating cannot be considered to be less grave offence qua the offence punishable under Section 302 of the Penal Code which falls in an altogether different class, for the purpose of conviction with the aid of Section 222 of the Code of Criminal Procedure.

9. The expression cognate offences indicate similarity and common essential features between the offences and they are primarily based on difference of degree. The lesser offence is stated to be related to a greater offence when it shares several of the elements of the greater offence and is of the same class or category. Therefore, where the offences are cognate offences with commonality in their features and evidence is produced which would justify conviction for a cognate but less grave offence, the court would be entitled to punish the accused for the less grave offence since no prejudice is suffered by him on account of such conviction.

10. In Shamsaheb N. Multani Vs. State of Karnataka 2011 (5) SCC577 the Honble Supreme Court inter alia observed that although the expression minor offence is not defined in the Code of Criminal Procedure, it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well and only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis--vis the other offence.

11. In Bimla Devi & Anr. Vs. State of Jammu & Kashmir (2009) 6 SCC629 the appellants before the Apex Court were charged under Section 302 of IPC but were convicted under Section 306 & 498A thereof. The Apex Court, however, set aside the order of their conviction on the ground that they had not been charged with the offences for commission of which they were convicted. In Shamsaheb N. Multani

(supra), the appellant before the Apex Court was charged under Section 302 of IPC but was convicted under Section 304B thereof. Noticing that the composition of the offence under Section 304B of IPC was vastly different from the formation of the offence of murder under Section 302 of IPC, it was held that the former cannot be regarded as minor offence vis--vis the latter. The position, however, would be different when the charge also contains the offence under Section 498A of IPC. During the course of the judgement it was observed that if the prosecution fails to make out a case under Section 302 of IPC but the offence under Section 304B of IPC is made out, the Court has to call upon the accused to enter on his defence in respect of the said offence and without affording such an opportunity a conviction under Section 304B of IPC would lead to real and serious miscarriage of justice. In Makkhan & Ors. Vs. Emperor AIR1945 Allahabad 81, the appellants were charged under Section 395 of IPC. They were acquitted of the said charge but were convicted under Sections 458 & 323 of the Indian Penal Code; setting aside the conviction, the High Court noted that before a person can be convicted for a minor offence, the major and the minor offences must be cognate offences which have the main ingredients in common, and a man charged with one offence which is entirely of a different type from the offence which he is proved to have committed, cannot in the absence of a proper charge be convicted of that offence, merely on the ground that the facts proved constitute a minor offence. The Court was of the view that where the facts are not put to the accused in detail, in the charge, it is impossible to hold that it had not occasioned a failure of justice, as it is not known what explanation the accused might have given if the facts were properly put to him. In Vazhambalakkal Thomachan Vs. State of Kerala 1978 Crl.LJ498 the accused was charged under Section 302 of IPC. Being aggrieved from his conviction he filed an appeal. When the High Court found that the charge under Section 302 of IPC did not stand prove the learned Public Prosecutor relying on Sections 221 & 222 of the Code of Criminal Procedure pressed for a conviction of the appellant for the offence punishable under Section 411 of IPC on the ground that there was acceptable evidence that of the stolen property having been recovered from the place pointed out by the appellant. Rejecting the contention, the High Court held that the prosecution had no case, at the commencement of the trial that the appellant had committed robbery or theft or any other cognate

offence. The High Court was of the view that the accused charged with one offence which is entirely of a different type from the offence which is proved to have been committed cannot, in the absence of a proper charge be convicted of that offence merely on the ground that the facts proved constituted a minor offence.

12. Under Section 313 of the Code of Criminal Procedure, the Court is mandatorily required to explain the circumstances appearing in evidence against an accused to him so as to enable him to explain such circumstances. However, in the case before this Court, it was not put to the appellants that they had induced PW3 & PW7 to deliver a sum of Rs.90,000/- to them by misrepresenting to them that the packet containing the said amount was required by deceased Mahendra Prasad. The appellant, therefore, got no opportunity to offer their explanation, if any, with regard to the aforesaid circumstances.

13. A perusal of the charges framed against the appellants would show that none of them was charged for being a party to the criminal conspiracy to cheat PW3 Prem Singh by inducing him to part with a parcel which as per the case of the prosecution contained Rs.90,000/-. None of them was charged with the substantive offence punishable under Section 420 of IPC for cheating Prem Singh by inducing him to deliver a parcel containing Rs.90,000/- to them. In fact, in none of the charges there was any reference to any sort of cheating or inducement qua PW3 Prem Singh. In the absence of any charge of being a party to the criminal conspiracy to cheat Prem Singh or the charge for the substantive offence punishable under Section 420 of IPC by cheating and inducing PW3 Prem Singh to part with a carton/box containing cash, the appellants had no occasion or opportunity to defend themselves against the aforesaid charges. While defending themselves in respect of the charges framed against them, they could not have anticipated conviction under Section 120B read with Section 420 thereof or for the substantive offence punishable under Section 420 of IPC for cheating PW3 Prem Singh by inducing him to part with parcel containing cash of Rs.90,000/-.

14. Section 464(1) of the Code of Criminal Procedure, to the extent it is relevant provides that no, sentence or order by a Court of competent jurisdiction shall be

invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge, unless, in the opinion of the Court a failure of justice has in fact occasioned thereby. Sub-section (2) of the said Section, inter alia, provides that if the court of appeal is of the opinion that the failure of justice has, in fact, been occasioned on account of omission in the charge, it can order that a charge be framed and that the trial be recommenced from the point immediately after framing of the charge.

15. The appellants, in my view, were seriously prejudiced on account of their conviction, without their having been charged either for being a party to the criminal conspiracy to cheat Prem Singh or for the substantive offence of cheating Prem Singh and the said prejudice has resulted in a failure of justice. In determining whether any error, omission or irregularity in framing the relevant charges has led to the failure of justice or not, the Court must inter alia have regard to the fact that every accused has a right to a fair trial, where he is aware of what he is being tried for and what case the prosecution has set out against him.

16. Since the appellants could not have been convicted with the aid of Section 222 of the Code of Criminal Procedure, the next question which arises for consideration is as to whether the court should in this case, order framing of an independent charge under Section 120B read with Section 420 thereof and/or for the substantive offence under Section 420 of IPC and then direct re-trial from the stage of framing of the charge. The learned counsel for the appellants submit that the offence under Section 420 of the IPC is triable by a Magistrate and the maximum punishment prescribed in the Indian Penal Code is imprisonment up to seven (7) years and appellants Rajinder and Vijay have already remained in custody for more than seven (7) years. As far as appellant Tej Singh is concerned a perusal of his nominal roll would show that as on 7.3.2011, he had spent six (6) years ten (10) months and five (5) days in custody excluding of the remission earned by him which at that time was four (4) months and seventeen (17) days. Thus, inclusive of remission he also spent more than seven (7) years in custody. In these circumstances it would be gross injustice to the appellants if they are subjected to a fresh trial after framing a charge under Section 120B read with Section 420 thereof and/or under Section 420 of the Indian Penal Code.

17. For the reasons stated hereinabove, the appeals are allowed and the impugned judgment and order on sentence are hereby set aside. The bail bonds of the appellants are discharged. One copy of this order be sent to the concerned Jail Superintendent for information & necessary action. LCR be sent back along with a copy of this order. FEBRUARY21 2014/rd V.K. JAIN, J.