

N. Lokesh and Others Vs. State

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Court : Karnataka

Decided On : Sep-23-2014

Judge : Anand Byrareddy

Appeal No. : Criminal Appeal No. 737 of 2013 connected with Criminal Appeal No.764 of 2013

Appellant : N. Lokesh and Others

Respondent : State

Judgement :

(Prayer: This Criminal Appeal filed under Section 374(2) Code of Criminal Procedure, 1973, by the Advocate for the appellants/accused No.3 to 8 praying to set aside the judgment dated 15.7.2013 passed by the V Additional District and Sessions Judge, Tiptur in S.C.No.55/2011, 129/2011 and 315/2011 - convicting the appellants/accused for the offence punishable under Section 395 read with 397 of IPC and etc;

This Criminal Appeal filed under Section 374(2) Code of Criminal Procedure, 1973, by the Advocate for the appellants/accused No. 1 and 2 praying to set aside the judgment dated 15.7.2013 passed by the V Additional District and Sessions Judge, Tiptur in S.C.No.55/2011, 129/2011 and 315/2011 - convicting the appellants/accused for the offence punishable under Section 395 read with 397 of IPC and etc;)

1. These appeals are heard and disposed of by this common judgment.

2. The facts of the case are as follows:

It was alleged that by virtue of a conspiracy entered into between Accused no. 14, who was serving time in Parapana Agrahara jail, and Accused nos.1 and 13 having agreed to commit dacoity on the instigation and prompting of Accused no. 14, as was sought to be established by reference to call details of their respective cellular phones of having contacted each other, and in furtherance thereof, as on 14.4.2010 at about 5.30 p.m., the accused nos.1 to 12, had armed themselves with deadly weapons and occupying two vehicles, namely a Tata Sumo, bearing registration no. KA-53-3293 and a Honda City, bearing registration no. KA-02 Z 6667, had followed another vehicle, namely, a Tata Indigo car, bearing registration no. KA-05 MB 947, with the knowledge that the occupants were carrying large amounts of cash and with the intention to commit dacoity had intercepted the said vehicle, which was going from Tiptur to Turuvekere, behind the Albu tank on Tiptur - Yediyur road, within the jurisdiction of Nonavinakere Police Station, and had smashed the front and rear wind shields of the said vehicle and while threatening to cause grievous hurt to the occupants of the car, with the deadly weapons which they were all wielding, had snatched a cash bag containing Rs.2,05,200/-, a gold finger ring and a cell phone from Chandrakeerthi (PV/-1) one of the occupants; a cash bag containing Rs.2,10,000/- from K.N. Vinod (PW-2) and another cash bag containing Rs.2,10,000/- from one Arkakeerthi (CW -3) the other occupant. While departing, they had inflicted simple injuries to all the occupants of the car and had sped away in their vehicles.

One Vajregowda, PW-5 who was travelling to Bellur in his car is said to have noticed that the complainant and others had been waylaid and their car damaged and hence, had taken CWs-4 and 5 in his car to the Turuvekere hospital. While PW-1 and CW-5 had boarded a KSRTC bus to go to Turuvekere, on the way, CW-5 who was said to be acquainted with a police constable at Turuvekere Police Station is said to have contacted him on his cell phone and informed him of the incident. After having received first aid treatment at Turuvekere hospital, they had proceeded to Nonavinakere Police Station and PW-1 had lodged the complaint.

In the meanwhile, the PSI Nonavinakere Police Station is said to have received a message of the dacoity from Turuvekere Police Station at about 5.45 p.m. Thereby, he had rushed to the Turuvekere hospital, met the injured victims and visited the spot where the dacoity had taken place and came back to the Station to receive the complaint from PW-1, at about 7.30 p.m. The wireless control room, Tiptur is said to have received the message of the dacoity at 5.45 p.m., which was relayed to the concerned superior officers and on further instructions, the message was flashed to all the police stations of Tumkur District to put up check points and to look out for the accused.

The driver of a Highway patrolling and escort vehicle (PW-15) who had routinely intercepted the message, had noticed that the very vehicles of the accused were going towards Amruthur and had responded by informing the Amruthur Police Station of having spotted the vehicles and reported the direction in which they were proceeding. He did not follow the vehicles since he was assigned with other duties. On receipt of the information, PW-14 is said to have immediately informed PW-10 and PW-23. The latter is said to have directed PW-10 and his staff to immediately proceed to Kempegowda Circle at Amruthur to intercept the accused. They are said to have immediately reached the said place and put up barricades awaiting the arrival of the accused. As expected, the vehicles in which the accused were proceeding are said to have come to the Kempegowda circle and were immediately surrounded by PW-10 and his men. But four of the accused are said to have got out of the vehicles and are said to have run away. PW-23 is also said to have arrived at the spot and had taken charge of the situation and had arrested eight of the accused. On a search of the cars, four long bladed machetes (described as 'longs'), 2 chilly powder packets and 2 cash bags are said to have been recovered from the Honda City vehicle and found 2 long bladed machetes and four machetes (described as sickles) and a cash bag with cash and one gold finger ring from the Tata sumo vehicle. PW- 23 is also said to have recovered five mobile phones and a 'dragon' knife, from the accused.

After having apprehended the accused, at about 8 p.m., PW-23, PW-JO and other personnel are said to have produced them before the Circle Police Inspector, PW-24 at about 12.00 midnight on 14.4.2010. PW-23 is said to have submitted a report

about the interception, the search and seizure, to PW-24, who is then said to have drawn up a mahazar in the presence of witnesses. On 15.4.2010, the accused 1 to 8 were said to have been formally arrested and produced before the Magistrate.

The case was thereafter committed to the court of sessions. The case against accused nos. 9 to 12 was split up as they had absconded and were not traceable. Three case numbers were assigned before the trial court for the reason that case no. S.C.55/2011 was against Accused nos.1 to 8, case no.S.C. 129/2011 was against accused no. 13. Accused no.2 is said to have briefly absconded and hence the case had been split up against him and a case no.315/2011 assigned to his case. But since he was later traced and his presence was secured, all the above three cases were tried together and disposed of by a common judgment.

After further proceedings, charges having been framed against the accused and they having pleaded, not guilty and having claimed to be tried, the prosecution had tendered evidence and had examined PW-1 to PW-24 and marked several documents and material objects. The trial court had then recorded the statements of the accused under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Cr.P.C.,' for brevity) and after having heard both sides had framed the following points for consideration:

"1. Whether the prosecution proves beyond reasonable doubt that accused No. 14, the convicted accused at Parappana Agrahara Jail, Bengaluru from 22.01.2010 to 22,04.2010 through mobile phone No.9611567544 contacted accused No.1 and 13 to their mobile phone No.9686569443 and mobile phone No.9743049205 respectively and agreed with accused No.1 and 13 to do an illegal act i.e., committing dacoity and in pursuance of the said agreement, accused No. 14 instigated accused No.1 and 13 to commit dacoity and also directed them to commit the said dacoity, which is punishable under Section 395 IPC and thereby committed the offences punishable under Section 120-B and Section 109 of I.P.C.?"

2. Whether the prosecution proves beyond reasonable doubt that in pursuance of said agreement and abetment of accused No. 14, on 14.04.2010 at 5.30 p.m. behind the Albur Tank at Tiptur-Yadiyur Road, within the jurisdiction of

Nonavinakere police station, accused No.] to 8 along with absconded accused No.9 to 12 went in TATA-Sumo Vehicle bearing No.KA.53.3293 and Honda City bearing No.KA.02.Z.0667 with deadly weapons, chilly powder packets and salt packets and followed the Indigo Car bearing No.KA.05.MB.947, which was going from Tiptur to Turuvekere and stopped the said vehicle in the above said road and committed dacoity of Rs.2,05,200/- cash, a gold finger ring, a mobile set with Copra sales chits along with bag from CW-1 Chandrakeerthi, of Rs.2,10,000/- cash, with Copra sales chits along with bag from CW-2-K.N.Vinod; of Rs.2 10,000/- cash, with Copra sales chits along with bag from CW-3-Arkakeerthi and they have used deadly weapons and attempted to cause grievous hurt to CW-1 to 5 and threatened them with dire consequences by showing longs, sickles and dragon knives and assaulted CW-1, 2, 4 and 5 and caused simple injuries to them and thereby committed the offence punishable under Section 395 read with 397 I.P.C.?

3. What order?"

The court had answered point no.1 in the negative and point no.2 in the affirmative. Accused nos.1 to 8 have been convicted and sentenced to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.50,000/-, each. Accused no. 13 and 14 were acquitted. It is that which is challenged in the present appeals.

The appeal in Criminal Appeal 737/2013 is filed on behalf of Accused nos. 3 to 8, whereas the appeal in Criminal Appeal 764/2013 is filed on behalf of Accused nos.1 and 2. It is contended by the learned counsel for the appellants that the following infirmities would vitiate the proceedings and hence it could not be said that the prosecution had established its case beyond all reasonable doubt in order to justify the conviction by the court below.

3. It is contended that the complainant who was examined as PW-2, as well as PW-1, who were both said to be the alleged victims of the crime had not identified the accused before the court. Further, the said witnesses have deposed that they had identified the material objects exhibited at the trail, a day after the incident. Whereas the police are said to have seized the said material objects, MO-1 to M0 26 on the very date of the incident. It is pointed out that the said witnesses have

also stated that when the test identification parade was conducted to ascertain the identity of the accused, held on the jail premises, the Tahshildar is said to have merely obtained the signatures of the above witnesses, without a word. It is on record that the test identification parade was conducted a clear two months after the incident. And the presence of the respondent police which was noticed by the witnesses further indicated that the entire proceeding of a so called test identification parade was stage managed and contrived and was of no significance. The evidence of these two witnesses being most crucial to bring home the charges, and when they have not supported the case of the prosecution, the trial court was not justified in convicting the accused.

It is contended that the registered owners of the two vehicles involved in the incident, PW-8 and PW-9 had been treated as hostile witnesses by the prosecution and hence the case of the prosecution was substantially diluted and hence the order of conviction could not be sustained.

Similarly a witness to the mahazar drawn as regards the material objects seized from the accused and recovered from the cars, PW-13. had turned hostile and did not support the case of the prosecution.

The evidence of PW-10 and PW-22, the witnesses who were involved in apprehending the accused, was totally inconsistent and ridden with contradictions and hence could not have been reconciled by the trial court in arriving at its findings. It is contended that the PSI of Amruthur Police Station, examined as PW-23 who had lead the team of police men to apprehend the accused, had admittedly seized various articles including cash from the person of the accused and is said to have recovered other articles and cash from the two cars, but had not drawn up a mahazar at the spot, but had subsequently prepared a report and placed it before the CPI at Tiptur, who in turn is said to have drawn up the mahazar in his office. This, it is contended is a serious infirmity that would vitiate the entire proceedings.

The learned counsel have placed reliance on the following authorities to contend that the recovery of an object is not a discovery of fact:

1. Jasbir Singh vs. State of Punjab 1998 SAR (Criminal) 473
2. State of Rajasthan vs. Talevar and Anr. 2011 Cri.L.J.3937
3. Dhan Raj @ Dhand vs. State of Haryana 2014 SAR (Criminal) 819.

In the absence of the recovery being corroborated by independent evidence, it cannot be inferred by the mere recovery of any articles that the accused had indeed committed the crime. The only admissible fact which could be inferred was that they were in possession of stolen goods. When there were no independent witnesses to the seizure, reliance being placed on the evidence of the police alone could not be relied upon.

It is contended that Section 100 (4) of the Cr.P.C. requires that before making a search, the officer or other person about to make it, shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situated or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do. The courts generally look for compliance of the aforesaid requirement, to the extent possible in the facts and circumstances of a given case. The same has not been complied in the present case on hand.

(See: Pradeep Narayan Madgaonkar and others vs. State of Maharashtra (1995) 4 SCC 255)

4. In the above facts and circumstances and the position of law, the learned counsel for the appellants seek that the appeals be allowed and the conviction of the appellants be set aside.

5. The learned State Public Prosecutor on the other hand would seek to justify the judgment of the court below.

6. From a perusal of the judgment of the trial court, the material on record and on a consideration of the rival contentions, the circumstance that PW-1 the complainant, who was an injured victim along with PW-2 and others were

travelling in the Tata Indigo car bearing registration no.KA- 05/MB-947 and that they were carrying large amounts of cash after having sold copra is adequately established by their evidence coupled with the evidence of PW-3, 4, 6 and 7, who were copra merchants who had purchased the goods from them. The fact that their vehicle was waylaid by the accused who had followed their vehicle in a Tata Sumo car and a Honda City car is also established, the incident which apparently would have occurred over a few minutes or less, and with a dozen accused being involved would have hardly enabled the victims to gather their wits and memorize the identity of the accused. That their car had been damaged and that they were stranded has been spoken to by PW-5 who had come along in his car immediately after the incident and helped the complainant reach the police station to lodge the complaint. He had also spoken to a constable of Turuvekere Police Station, with whom he was acquainted and informed him about the incident. It is this which had galvanized the police into swift action as is established in retrospect, in that, the search for the accused had commenced even before a formal complaint was lodged. On PW-5 having conveyed the information, the jurisdictional police sub-inspector PW-20, is said to have been informed at about 5.45 p.m., and all the police stations in Tumkur District were informed about the incident. The vehicles bearing the accused were spotted on the road by a highway patrol and escort vehicle driver, who had intercepted the radio message of the incident and by the description of the vehicle. He in turn had informed the concerned of the direction in which the vehicles were headed, thereby enabling the police to set up a strategic road block to stop and apprehend the accused. The accused were thus nabbed within three hours from the time of commission of the offence. Though four of the accused had managed to escape, Accused nos. 1 to 8 were apprehended. The said sequence of events is adequately established by the evidence of PWs-10, 14, 15, 23 and 24.

The point for consideration on the grounds that are raised is whether the several infirmities that are highlighted would require the judgment impugned to be set aside. In this regard the primary attack against the findings of the trial court is that the accused have not been identified with any degree of certainty at the test identification parade or at the trial. That the alleged apprehension of the accused and seizure of incriminating material and recoveries made cannot be said to have

been established, in the absence of the proper procedure in drawing up a mahazar at the very spot that they were allegedly apprehended having been drawn up and witnessed by independent witnesses. The several witnesses for the prosecution not having supported the case of the prosecution and the glaring contradictions in the evidence of several of the witnesses.

In *Earabhadrapa v. State of Karnataka*, AIR 1983 SC 446, the Apex court has held that the nature of the presumption under illustration (a) of Section 114 of the Evidence Act must depend upon the nature of evidence adduced. No fixed time limit can be laid down to determine whether possession is recent or otherwise. Each case must be judged on its own facts. The question as to what amounts to recent possession sufficient to justify the presumption of guilt varies according "as the stolen is or is not calculated to pass readily from hand to hand". If the stolen articles were such as were not likely to pass readily from hand to hand, the period of one year that elapsed could not be said to be too long particularly when the appellant had been absconding during that period.

In *Gulabchand v. State of MP*, AIR 1995 SC 1598, the apex court upheld the conviction for committing dacoity on the basis of recovery of ornaments of the deceased from the possession of the person accused of robbery and murder immediately after the occurrence

In *Tulsiram Kanu v. State*, AIR 1954 SC 1, the apex court has indicated that the presumption permitted to be drawn under Section 114, Illustration (a) of the Evidence Act, 1872, has to be drawn under "the important time factor". If the ornaments in the possession of the deceased are found in possession soon after the murder, a presumption of guilt may be permitted. But if a long period has expired in the interval, the presumption cannot be drawn having regard to the circumstances of the case. In the instant case on hand, if we notice the speed with which the accused were nabbed and the recovery of the exact amount of cash that was taken from the victims apart from the gold finger ring and the cell phones would certainly give rise to a presumption that could be drawn against the accused as laid down by the Apex court. This singular circumstance is strong enough to bring the case home against the accused.

The fact of the accused not having been clearly identified by the victims at the trial or the infirmities that are highlighted in so far as the test identification parade is concerned, the swift and furious attack on the victims would have left them paralyzed with fear and anxiety and their vague recollection of the accused, who were said to be twelve in number, is but natural. Especially when the test identification parade is said to have been held two months after the incident. Even if it had been held soon after the incident it is doubtful whether all the accused could have been identified unerringly by all the victims. Therefore, not much significance can be placed on the identity of the accused being vague.

In so far as the infirmity in the manner in which the seizure was made of the incriminating materials and the mahazar being drawn up much later at the office of the concerned Circle Inspector of Police, here again the interception of the accused was at a traffic junction, amidst high drama- the escape of four of the accused would have placed the police under extreme pressure to salvage the situation. This coupled with the tendency of people to gather and mill around out of excited curiosity and the possible escape of other accused in the process, would possibly have been uppermost in the mind of the officer who had lead the team of policemen and this would adequately explain the accused being quickly moved from the spot where they were nabbed and being brought to the CPI's office, to have the mahazar drawn up. PW-10 and PW-23 and other team members belonged to the Amruthur Police station and the concerned police station was Nonavinakere Police Station, this would also explain the accused and the vehicles being brought to the Office of the CPI for a thorough search and a comprehensive mahazar being drawn up though the vehicles were intercepted and a cursory search made at Kempegowda Circle.

How far the Court can rely upon the testimony of the search officer where the witnesses are not examined or though examined, (as in the present case on hand) do not support the prosecution would depend on the facts of each case. (See: Nabakumar Das v. State of WB, AIR 1974 SC 777)

Non compliance with the procedure being adhered to strictly, would not render the search illegal; The principle is that admissibility of evidence is not affected by the

illegality of the means by which it has been obtained.

5. In the present case on hand, PW-24, the CPI having produced the properties and articles seized , before the court on the same day, would not render the search and seizure suspicious or give the impression of the accused being sought to be falsely implicated. The police had performed a commendable task and the irregularity if any in the proceedings does not vitiate the same.

The essential ingredients to bring home the charges against the accused therefore are certainly established by the overwhelming evidence on record. The inconsistencies or irregularities sought to be highlighted does not dent the case of the prosecution in so far as the trial court or this court arriving at a finding that the prosecution has proved its case beyond all reasonable doubt.

Consequently the appeals are dismissed. The bail bond executed by Accused no.1 to 4 stands cancelled.

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