

Ganesh Kumar Vs. State

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Court : Karnataka

Decided On : Feb-06-2020

Judge : K.Somashekar

Appeal No. : CRL.A 1203/2010

Appellant : Ganesh Kumar

Respondent : State

Judgement :

R IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE6H DAY OF FEBRUARY 2020 BEFORE THE HONBLE MR. JUSTICE K. SOMASHEKAR CRIMINAL APPEAL NO.1203 OF 2010 BETWEEN: GANESH KUMAR AGED26YEARS S/O ANNUDAS R/A DEOGO DSOUZA COMPOUND DEVINAGAR, KONCHADY POST PADAVINANGADY MANGALORE ...APPELLANT (BY SRI. MOHAMMED FARUKE, ADV.) AND: STATE BY UDUPI TOWN POLICE. RESPONDENT (BY SRI. M. DIVAKAR MADDUR, HCGP) THIS CRIMINAL APPEAL IS FILED U/S.374(2) CR.P.C PRAYING TO SET ASIDE THE

ORDER

DATED2426.8.2010 PASSED BY THE P.O., FTC, UDUPI IN S.C.NO.9/2008 CONVICTING THE APPELLANT/ - 2 - ACCUSED FOR THE OFFENCE P/U/S120B AND307R/W511OF IPC. THIS APPEAL COMING ON FOR HEARING THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is directed against the judgment of conviction and order of sentence rendered by the trial Court in S.C.No.9/2008 dated 24/26.08.2010, whereby the accused is convicted for the offence punishable under Sections 307 r/w 511 of IPC and 120-B of IPC. The appellant said to be arraigned as accused No.1 is sentenced to suffer an imprisonment for a period of two years for the aforesaid offences.

2. The factual matrix of the case as per the charge-sheet laid by the I.O. is that on 16.08.2006, the appellant-accused No.1, along with accused No.2 Pandu Pai @ Panduranga Pai @ Praveen Pai, had agreed to take away the life of CW-2 Nagesh Devadiga @ Pitti Nagesh for a ransom of Rs.2,00,000/-, because of some - 3 - previous enmity. Accused No.2 had promised to pay the said ransom to accused No.1, but during the course of trial, accused No.2 is reported dead and therefore the case against him stood abated. As on the aforesaid date at around 5 p.m., at Badagubetta Village near Kukkikatte Bus Stop, accused No.1 was present and waiting for CW-2 Nagesh Devadiga @ Pitti Nagesh as he was hatching a plan with accused No.2 to take away the life of CW-2. A photograph of CW-2 was found in the possession of accused No.1, so also a sword which was concealed by accused No.1 in his back. On suspicion and also on information given by PW-4 Anwar, police swung into operation in apprehending this accused. Subsequently, on enquiry with this accused relating to concealment of sword, which is marked as MO-1, he did not give any proper explanation. Therefore he was taken into police custody and on his personal search, they found a purse, on currency notes of Rs.100/-, photo of CW-2 Pitti Nagesh, which are marked as MO-2, MO-3 - 4 - and MO-4, respectively. One paper containing printed letters SKKK Fruits is marked as MO-5 and MO-6 is a photo in a cover. These are all the material objects which were found in possession of the accused which have been seized by the police in the presence of PW-1, PW-4 and PW-8 who is the PSI who filed suo moto complaint as per Ex.P6. Based on his complaint, crime came to be registered by recording an FIR as per Ex.P7. The said material objects which were seized by PW-8, the I.O. in part, during the course of investigation, have been subjected in PF No.112/06 and PF No.17/07. Subsequent to recording the FIR, the case has

been handed over to another I.O, PW-12 who investigated the case and laid the charge-sheet against the accused before the Committal Court.

3. Subsequently, charges were framed against the accused for the offence punishable under Sections 120- B and 307 r/w 511 of IPC, where the accused did not - 5 - plead guilty and claimed to be tried. Subsequently, the prosecution in order to establish its case, examined PWs.1 to 12 and got marked Exs.P1 to P10, MO-1 to MO-6.

4. Subsequent to closure of the evidence, the statement of the accused under Section 313 of Cr.P.C. was recorded. He has declined the evidence of the prosecution. The accused did not come forward to adduce any defense evidence as contemplated under Section 233 of Cr.P.C.

5. Subsequently, the trial Court heard the arguments of the prosecution and defense counsel and on appreciation of the evidence which was facilitated by the prosecution, convicted the accused for the offences punishable under Sections 307 r/w 511 and 120B of IPC. Against the said judgment, the appellant - accused No.1 has filed the present appeal.-. 6 - 6. It is contended by the learned counsel for the appellant by referring to the evidence of PW-1, the Head Constable, then in Udupi Town Police Station, said to be a panch witness that as on 16.08.2006, at around 4 p.m., he was on patrolling duty along with Sub- Inspector of Police and other police constables PC No.1883, PC No.1882 and PC No.2199. At around 5 p.m., near Kukkikatte Bus Stand area, they found that accused No.1, on seeing these police along with Circle Inspector, he made an attempt to run away, but this team surrounded the accused and apprehended him. Subsequently, when they made an enquiry about he frisking, he did not reply satisfactorily, but he said his name as Ganesh Kumar from Mangalore. But they noticed that some articles were hidden by the accused and on enquiry about that object, he did not answer satisfactorily, but made attempt to conceal the said object and thereafter he took out the object from his back, which was a sword. On enquiry about - 7 - concealment of the sword, he has stated that he has concealed the same with an intention to eliminate CW-2 Pitti Nagesh and as per the criminal conspiracy hatched by himself and accused No.2. He further stated that he was waiting for

CW-2 Pitti Nagesh at that time, as he had got an information that said CW-2 Pitti Nagesh had come to that area. Accused No.1 also informed that accused No.2 had engaged his services to eliminate CW- 2. But this CW-2 Pitti Nagesh is also a rowdy sheeter and he is cited as CW-2 in the charge-sheet. But he did not subject himself to examination by the prosecution to prove the guilt of the accused No.1. As this contention is also taken by the learned counsel for the appellant by referring the evidence of PW-1 as he being police official, where the I.O. has conducted mahazar as per Ex.P1, accused No.1 has been apprehended by the Circle Inspector of Police while he was on patrolling duty on the date of the incident. Material objects as per MO-1 to MO-6 have been seized by PW-8.-. 8 - 7. But, on the aforesaid date, even though it is a bus stand, no public were present. Normally, in a bus stand, general public will be present. But on that day, there were no public in the said place. The same has been elicited in the cross-examination of PW-1, said to be a police official. Whereas in Ex.P1 spot mahazar said to be conducted by PW-8 in the presence of PW-1 and PW-4, who is said to be an independent panch witness, and even prior to that panchnama was conducted and in personal search by the panch witnesses in regard to seizure of those material objects, it is not specifically mentioned in Ex.P1 spot mahazar, as this glaring contradiction in between the evidence of PWs.1, 4 and 8 has not been appreciated by the trial Court. But misdirected the evidence of these materials witnesses in respect of the fulcrum of Ex.P1 mahazar said to be conducted by PW-8. Merely because MO-1 sword is found with the accused, it cannot be said that this accused was waiting for CW-2 Pitti Nagesh to eliminate - 9 - him in pursuance of the criminal conspiracy hatched by him along with accused No.2. But this material evidence has not been properly appreciated by the trial Court, but the trial Court has erroneously come to the conclusion that this accused has made an attempt to take away the life of CW-2, and passed an order of conviction. But said CW-2 being a rowdy-sheeter, did not subject himself to examination by prosecution to prove the guilt of the accused that there was a criminal conspiracy hatched, wherein accused No.2 engaged accused No.1 to take away the life of CW-2 Pitti Nagesh for a ransom of Rs.2,00,000/-. The prosecution has not made any efforts or endeavors to examine CW-2 to prove the guilt of the accused and therefore the theory put forth by the prosecution by examining several witnesses

such as PW-1 Head Constable, PW-4 independent witness, PW-8 PSI said to be the I.O. in part, PW-12 I.O. who laid the charge-sheet against the accused, but PW- 2 Raghavendra who is none other than CW-2s brothers - 10 - son, did not support the case of the prosecution and has turned hostile, it appear to be a cloud of doubt. Therefore, in the evidence adduced on behalf of the prosecution by the above witnesses, there are inconsistencies and are contradictory to each other, wherein the evidence of PW-2 is contrary to the evidence of PW-8 and PW-12. Those who have conducted spot mahazar at Ex.P1 and so also the seizure mahazar at Ex.P3 conducted in the presence of PW-6, but this PW-6 did not support the case of the prosecution in respect of the fulcrum of Ex.P3 seizure mahazar. This major contradiction has not been appreciated by the trial Court in a proper perspective. Therefore, in this appeal it is required to re-appreciate the entire evidence on record by referring the evidence of PW-7, the photographer in respect of the photograph of CW-2 Pitti Nagesh, who has also turned hostile. Even though he has given a statement before the I.O., during the course of investigation, he did not stand on the version of his - 11 - statement. The portion of the statement has been got marked at Exs.P4 and P5. Therefore, the evidence of PW-7 which is contradictory to the evidence of PW-1, PW-4 and PW-8 who filed the suo moto complaint as per Ex.P6 and based upon his complaint, the FIR has been registered as per Ex.P7 and the case has been taken up for further investigation by PW-12 who has laid the charge-sheet against the accused.

8. PW-9 Rosario DSouza, PW-10 Head Constable and PW-11 ASI were examined on behalf of the prosecution. Therefore, their evidence is required to be appreciated in a greater care and caution where the ingredients of the offences under Section 511 of IPC, that he made attempt to take away the life of CW-2 Pitti Nagesh, but did not succeed. But it is only a theory put forth by the prosecution in order to lay the charge-sheet against the accused, merely because MO-1 sword was found in his possession, so also other articles marked - 12 - as MO-2 to MO-6. But, merely because MO-1 sword was said to be found in the possession of accused and the same being concealed by him in his back, it cannot be said that the accused had mens rea to commit alleged offence and also did not succeed by actus rea to take away the life of CW-2 Pitti Nagesh.

9. Therefore, in this appeal, entire evidence on record has to be re-appreciated, if not, certainly it would be miscarriage of justice to the accused. Even if he is a perpetrator of hatching a criminal conspiracy of eliminating CW-2, one can infer it is a human phenomena otherwise to say a natural phenomena being a culprit or to be said that as a perpetrator to commit an offence he was in possession of MO-3 Rs.100/- currency note, even if that is accepted, a small amount cannot be utilized by him for even food, before hatching a criminal conspiracy as narrated in the theory of prosecution. Therefore, in this appeal the entire - 13 - evidence has to be re-appreciated, so also the ingredients of Section 307 of IPC. If any hurt is caused to a person, then only an offence under Section 307 of IPC can be constituted, if not, it cannot be constituted. Section 511 of IPC is attempting to commit an offence. The offence under Section 307 of IPC itself is a penal provision of law, hence the question of attempting as noted in the charge-sheet under Section 511 of IPC, does not arise at all, unless having well founded theory with ingredient of the offence. Thus, the theory put forth by the prosecution by laying charge-sheet against the accused, is said to be only for a statistical purpose, it can be inferred.

10. If the evidence of PWs.1, 4, 8 and 12 were to be true, then the evidence of PW-2 Raghavendra palpably appears to be false and further their evidence runs contrary to each other and this contradictory evidence placed by the prosecution, has not been - 14 - appreciated by the trial Court, if not certainly it would be miscarriage of justice.

11. Though the accused is facing trial for the aforesaid offence in a charge framed by the trial Court, but the ingredients of the aforesaid offence has not been established by the prosecution by putting forth cogent, corroborative and acceptable evidence to probabalise that this accused, in pursuance of a criminal conspiracy hatched along with accused No.2 to eliminate CW-2 Pitti Nagesh, there appears to be a cloud of doubt.

12. These are all the contentions taken by the learned counsel for the appellant and seeks to allow the appeal by setting aside the judgment of conviction and sentence rendered by the trial Court.

13. Per contra, learned HCGP for the State vehemently contends that Accused No.1 - appellant herein himself has confessed on 17.08.2006 before PW- - 15 - 8 / I.O. in part who was the then CPI of Udupi Circle when he apprehended accused No.1 and interrogated him in the presence of panch witnesses, that one Pandu Pai had hired Accused No.1 for the purpose of killing Pitti Nagesh whose photograph was in possession of accused no.1, for which act Pandu Pai had assured the appellant to pay Rs.2,00,000/-. The learned HCGP contends that when the appellant himself has stated before PW-8 that he was hired by one Pandu Pai being an Accused No.2, to kill Pitti Nagesh, the case of the prosecution has been proved beyond all reasonable doubt. While answering the further contention of the learned counsel that non-examination of Pitti Nagesh is fatal to the case of the prosecution is concerned, it was learnt from the Public Prosecutor that the said Pitti Nagesh was recently severely injured and admitted to hospital. Hence, the learned HCGP contends that non- examination of Pitti Nagesh is not fatal to the case of the - 16 - prosecution. Though this contention has taken, it doesnt hold any substance. It is further contended by the learned HCGP that the seizure of MO-1 sword and MO-2 photograph of Pitti Nagesh from the possession of the appellant also establishes the guilt of the appellant beyond all reasonable doubt. The learned HCGP further contends that the inconsistency in the evidence of PW-2 would not be fatal to the case of the prosecution. Further, the photographer PW-7 turning hostile also it would not be fatal to the case of the prosecution when the accused himself has admitted his guilt before PW-8, being an IO, in part. Hence, he contends that the Trial Court has considered the evidence of all the witnesses on the part of the prosecution and has rightly come to the conclusion that the accused was guilty of the alleged offences and held conviction. Therefore, he contends - 17 - that the impugned judgment of conviction and sentence rendered by the Trial Court needs no interference in this appeal.

14. On a careful consideration of the contentions advanced by the learned counsel for the appellant - accused no.1 and the learned HCGP for the State as well as on going through the material on record, it is seen that on 16.08.2006 while the police were on patrol duty near Kukkikatte Bus Stop at Badagubetta village at about 5.00 p.m., as well as on the information given by PW-4 Anwar, the police had apprehended accused no.1 who was standing there and on search, found in his

possession a sword hidden on his back and a photograph of CW-2 Pitti Nagesh. On enquiring him thoroughly, they came to know that appellant was hired by accused No.2 in order to kill CW-2 Pitti Nagesh for a ransom of Rs.2,00,000/-. Thereafter on a suo moto complaint by PW-8 as per Exhibit P6, crime came to be - 18 - registered and the matter was taken up for investigation and thereafter charge-sheet was laid against the accused. It has to be noticed that PW-2 Raghavendra who is CW-2s brothers son, had clearly stated that he dont know the accused and he did not say anything about the accused, but his evidence contrary to the evidence of PW-1, PW-4 and PW-8. Further, all the other witnesses examined by the prosecution are all official witnesses except PW-4, an independent witness who had informed the police about the appellants whereabouts and his intention to commit some crime. Except him, no other independent witness has been examined in order to support the case of the prosecution, which in my opinion has proved fatal to the case of the prosecution. Furthermore, having regard to the fact that accused was a habitual offender, it was but natural for the police as well as PW-4 to have doubted about the presence of the accused near the - 19 - Kukkikatte Bus Stop. Moreover, though the police had recovered sword as well as photograph of Pitti Nagesh - CW-2, from the possession of the accused, it is not the case of the prosecution that the appellant had committed any dacoity or murder and he had been arrested only on an apprehension that the appellant was preparing to commit the murder of one Pitti Nagesh, a rowdy sheeter. Without proper material in this regard, the Trial Court has erroneously arrived at a conclusion that the accused had made an attempt to take away the life of CW-2 Pitti Nagesh and thereby proceeded to convict and sentence the accused as aforesaid. In view of the fact that PW-2 Raghavendra did not support the case of the prosecution, the evidence of PW- 2 is contradictory to the evidence of PW-8 and PW-12. Further, the spot mahazar at Exhibit P1 and the seizure mahazar at Exhibit P3 were conducted in the presence of PW-6. Whereas it is seen that PW-6 has not - 20 - supported the case of the prosecution in respect of Exhibit P3 seizure mahazar. The evidence of PW-7 photographer in respect of the photograph of CW-2 Pitti Nagesh also having not withstood the version of his statement given before the I.O., is also fatal to the case of the prosecution. Another flaw which is to be noticed is that though it has been stated that accused

no.2 had engaged the services of the present accused no.1 to take away the life of CW-2 Pitti Nagesh for a ransom of Rs.2,00,000/-, when the accused was apprehended by the police, they had found a sword in his possession which was concealed in his back which is marked as MO-1. Further, they had also found that he was in possession of Rs.100/- currency note which is marked as MO-3. When it is stated that the appellant was engaged to commit the murder one Pitti Nagesh, it is very strange that only a very meager sum of Rs.100/- was recovered from his possession. Even the recovery made from the - 21 - possession of the accused is not anywhere near the sum of Rs.2,00,000/- for which amount appellant was said to be engaged. Added to these flaws, the said Pitti Nagesh CW-2 was also not examined as a witness to the case of the prosecution. Though it is stated by the learned HCGP that Pitti Nagesh was severely injured and could not be examined, I am of the opinion that the prosecution should have made an endeavor to examine him as a witness at least after his discharge from hospital. The same having not been done also has proved fatal to the case of the prosecution. The major flaw in the case of the prosecution is, PW-8 who is the PSI is the one who has filed the suo moto complaint as per Exhibit P6. Further, the very same PW-8 is the Investigating Officer who has conducted the investigation in part and he is the one who had conducted the spot mahazar Exhibit P1 and he is the one who had seized material objects as per MO-1 - 22 - to MO-6. In the present case on hand, the informant himself being the investigating authority, the appellant has been deprived of his right to fair investigation and trial. This view is also supported by the judgment of the Apex Court in the case of MOHAN LAL vs. STATE OF PUNJAB (2018) 17 SCC627 wherein the relevant portion reads thus: 30 It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. In view of all these contradictions, inconsistencies and procedural lapses, I am of the opinion that the offences alleged against the accused have not been established by the prosecution by putting forth cogent, - 23 - corroborative, positive, consistent and acceptable evidence to prove the guilt of the accused beyond all reasonable doubt.

15. Accordingly, I proceed to pass the following:

ORDER

The appeal is allowed. The judgment of conviction and order of sentence dated 24.08.2010 passed by the Presiding Officer, Fast Track Court, Udupi in S.C.No.9/2008, convicting the accused-appellant herein for the offences punishable under Section 307 read with Section 511 IPC and Section 120-B IPC is hereby set aside. The accused is acquitted of the offences levelled against him. The bail bond if any, shall stand cancelled. Sd/- JUDGE RD / KS

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