

Subhan and ors. Vs. Rex

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Court : Allahabad

Decided On : Aug-30-1949

Reported in : AIR1950All180

Judge : Chandiramani, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 367; [Indian Penal Code \(IPC\), 1860](#) - Sections 411 and 412

Appeal No. : Criminal Appeal No. 141 of 1949

Appellant : Subhan and ors.

Respondent : Rex

Advocate for Def. : Government Adv.

Advocate for Pet/Ap. : G.G. Chatterji and ;Babu Ram Gir, Adv.

Disposition : Appeal allowed

Judgement :

Chandiramani, J.

1. The appellants Subhan, Gaddi and Bharosey Chamar, were convicted under Section 412, Penal Code, by Mr. Raja Ram Mehra, Civil and Sessions Judge, Sitapur, and sentenced each to rigorous imprisonment for five years and a fine of

Rs. 100 on 25th April 1949. In the same case the learned Judge convicted Matai Dhobi, and Tonri, Pasi, appellants under Section 395, Penal Code and sentenced them each to rigorous imprisonment for seven years.

2. The prosecution case briefly was that on the night of 11th/12th April 1948, a dacoity was committed at the house of Paragi Lal, Brahman, P. W. 2, in village Musha, Police Station Kotwali, Sitapur. In this dacoity considerable property was looted and several inmates of the house, Janki, Mt. Sukhdei, Moti Lal, Mt. Mahdei and Mt. Savitri were injured. The dacoits were 15 or 16 in number. The dacoits had some electric torches with them and were armed with a country-made revolver and some lathis. A report of this occurrence was made the next day at 12-30 P.M. As a result of the investigation the four appellants and three others, Jamna Prasad, Mahadeo and Jagannath were sent up for trial.

3. The prosecution alleged that from the house of Subhan appellant a rumal, Ex. L, which is the property of the victims of the dacoity, was recovered on 20th April 1948, and that from the possession of Bharosey were recovered a jhanj, EX. II, and Sutia, EX. III, on the same date; that from the possession of Matai was recovered a pair of handkerchiefs, Ex. IV; and from the house of Tonri was recovered a karanphul jhumka, EX. v. It was alleged that all this property was the property stolen by the dacoits. Proceedings for identification of property and of the arrested persons were also held.

4. The four appellants stated in regard to the property recovered from their houses that it belonged to them or their family. In respect of his identification Tonri stated that the witnesses who all belonged to one family, already knew him from before. Some evidence in defence was produced in respect of the claim to property.

5. After considering the entire evidence the learned Judge convicted Subhan and Bharosey under Section 412, Penal Code, and Matai and Tonri under Section 395, Penal Code.

6. It has been urged in this appeal that the evidence on the record does not justify the conviction. I have heard the learned counsel and am satisfied that the appeal must be allowed.

7. So far as Subhan appellant is concerned he is said to have been found in possession of a rumal of orange colour, Ex. I. The recovery was made in the presence of Sheo Charan Lal, P. W. 11 and Ram Dayal, P. W. 12. It is not denied that the recovery was made but Subhan's defence was that this rumal belonged to him. It appears that the identification of property was held on 2nd July 1948, by Sardar Chaman Singh, P. W. 1, a Magistrate of the 1st class. According to his evidence, he mixed the articles to be identified with other similar articles and the number of articles mixed was equal to the number of articles to be identified. According to the witness, he mixed one rumal similar to Ex. I. The witness admitted that the articles to be mixed had been collected by one Babu Ram, contractor, before being sent to him in a sealed packet and that he did not enquire from this contractor whether the articles he had brought for mixing had or had not been seen by witnesses. No attempt was made to examine Babu Ram as a witness in the case so that he could state that the prosecution witnesses for identification had had no chance to see the articles which were to be mixed. When there is no evidence to show that the articles to be mixed had not been seen by the prosecution witnesses for identification it cannot be said that the identification proceedings actually held were genuine. This lack of necessary precaution by the learned proceedings held in respect of the property recovered from each of the four appellants. [Sic. Sentence is incomplete in the certified copy. Editor], To give greater value to the identification the Magistrate holding the proceedings ought not to content himself merely with mixing an equal number of articles with the articles to be identified, but the number of articles to be mixed ought to be as far as practicable at least two or three times the number of articles to be identified. In the present case the identification proceedings of the property cannot be relied upon and so the identification evidence of Paragi Lal, Mt. Savitri, Mt. Hira Kuer, Mt. Mahdei, Sheo Ratan and Sheo Balak in respect of the rumal, Ex. 1, must be discarded. In the case of Subhan, Sheo Charan has stated that he had seen Subhan appellant in possession of a rumal like Ex. 1. The rumal does not appear to be of any extraordinary type and in this state of affairs it is impossible to say that the rumal does not belong to Subhan. In these circumstances his conviction under S 412, Penal Code, is unjustified. He is entitled to an acquittal.

8. So far as Bharosey is concerned, a jhanj, Ex. II and sutia, Ex. III have been recovered from his possession. He admits the recovery and says that the jhanj belonged to his brother's wife while the sutia belonged to his mother. Sheo Din D. W. 4, brother of the appellant, and one Maiku Lal, D. W. 5, a goldsmith, support the claim of the appellant that the two ornaments belonged to the family of Bharosey. On the other hand, in the identification proceedings the property has been identified by Paragi Lal, Mst. Savitri, Mst. Mahdei, Mst. Hira Kuer, Sheo Balak and Sheo Ratan to belong to the complainant Paragi Lal. While dealing with the case of Subhan I have pointed out that the identification proceedings are defective and cannot be relied upon. The jhanj and sutia were put up for identification in those proceedings. A sutia is undoubtedly mentioned in the first information report and in the first information report there is also a mention of one pair of some ornaments for the feet, though the name of the ornament has been omitted. The weight of the ornaments, which might have strengthened the claim of the complainant, has not been given either in the first information report or in the recovery list. The ornaments apparently are of a common type. In these circumstances it is not possible to hold the jhanj and sutia to be the property of the complainant Paragi Lal. There was another circumstance in favour of Bharosey appellant, namely, that it was not established that the articles recovered were in his exclusive possession. Sheo Din, witness for the defence, who is brother of Bharosey, stated that Bharosey and his wife, he himself and his wife and his younger brother Ram Charan and their mother live in one house and that they are all joint. Khem Karan, P. W. 13, a witness of the recovery, admitted that Bharosey and his brothers live in the same house and jointly though his case was that Bharosey lives in a room separate from Sheo Din. The recovery of the ornaments was made from a basket. It is impossible in such circumstances to hold that Bharosey was in exclusive possession of the ornaments and so even if the property had been proved to be the proceeds of a dacoity it would not have been possible to convict Bharosey. I am satisfied that the offence has not been brought home to the appellant Bharosey and he must be acquitted.

9. So far as Matai is concerned, the evidence against him consists of his identification by Paragi Lal, and the recovery of a pair of gulabi rumals, Ex. IV. The property has been identified by Paragi Lal, Mt. Hira Kuer, Mt. Savitri, Mt. Madhei,

Sheo Ratan and Sheo Balak to be that of Paragi Lal complainant. This evidence, however, is of little value in view of the defective identification proceedings, as mentioned in the case of Subhan. In those very same proceedings the two rumals, Ex. IV, were put up for identification. The appellant Matai has claimed the two rumals to belong to him. These rumals were certainly not mentioned in the first information report though they were mentioned in the subsequent list Ex. 2, given to the police before they started investigation. No particular description of the rumals is given apart from the fact that they are gulabi in colour. An examination of the rumals shows that there are embroidered flowers on them. No note has been made in the identification memo that the rumals had this characteristic identifying mark. In these circumstances also the identification proceedings have little value. It is not established that the rumals, EX. IV, belong to the complainant. There then remains the solitary evidence of Paragi Lal, who has identified Matai. This cannot be considered to be sufficient to bring home the charge of dacoity to the appellant. He must get the benefit of the doubt and be acquitted.

10. So far as Tonri appellant is concerned, the evidence against him consists of the recovery of the jhumka-karanphul Ex. V and his identification by the witnesses Paragi Lal, P. W. 2, Sheo Ratan, P. W. 6, Sheo Balak, P. W. 7, Puran Lal, P. W. 8, Janki, P. W. 9 and Jagannath P. W. 10. The jhumka Karanphul has been identified as the complainant's property by Paragi Lal, Mt. Savitri, Mt. Mahdei, Mt. Hira Kuer and Sheo Ratan. The identification evidence has little value for the reason given in the case of Subhan as in the same proceedings the jhumka karanphul was also put up for identification. As regards his identification by the witnesses, that also has little value. Bhagwan Din, Murao, P. W. 28, has admitted that Tonri appellant used to be in the service of Someshwar Dutt and this Someshwar Dutt is the son of the sister of Paragi Lal complainant. It also appears that Someshwar Dutt lives in Andapur where the appellant resides and that in this village another sister of Paragi Lal is also married. It seems to be in the highest degree improbable that Paragi Lal P. W. 2 has not known the appellant from before. The other witnesses, who identified Tonri, are close relations of Paragi Lal. Sheo Ratan, P. W. 6, is his nephew; Sheo Balak, P. W. 7, is his son ; Puran Lal, P. W. 8, Janki, P. W. 9, and Jagganath, P. W. 10, are all his cousins. It is unlikely that they too did not know the appellant from before. It is significant to note also that, although the appellant

was put up for identification on 29th September 1948, more than three months after the other three appellants had been put up for identification, as many as six witnesses were able to identify Tonri without making a single mistake, whereas in the case of the other appellants Matai alone was identified by one witness. In the circumstances mentioned above I am unable to place any reliance either on the identification evidence of property or on the identification evidence of the appellant. The appellant must be acquitted.

11. The result, therefore, is that I allow the appeal, set aside the convictions and sentences of the four appellants and direct that they be released forthwith unless required in any other case.

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