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Court : Allahabad

Decided On : Mar-16-1961

Reported in : AIR1961All614

Judge : A.N. Mulla and ;B.N. Nigam, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 207 and 207A(4); Evidence Act, 1872 - Sections 9 and 27; Indian Penal Code (IPC) - Sections 412

Appeal No. : Criminal Appeal No. 203 of 1960

Appellant : State

Respondent : Ram Bilas and ors.

Advocate for Def. : K.A. Arabi, ;C.P. John and ;D.P. Arrena, Advs. for Accused (Nos. 2, 4, 7, 13 and 14), ;Kesri Bir Prasad, Adv. for Accused (Nos. 1, 3, 6, 8, 10 and 11), ;J.S. Trevedi, Adv. for Accuses (Nos. 9 and 12)

Advocate for Pet/Ap. : S.B. Mathur, Adv.

Judgement :

Mulla, J.

1. This is an appeal filed by the State in a dacoity case. The Additional Sessions Judge of Sitapur acquitted the fourteen accused respondents, who were

prosecuted under Section 395 I. P. Code, but this decision aggrieved the State and it has filed this appeal.

2. The main ground on which the trial court acquitted the accused-respondents was that only two witnesses were examined before the committing Magistrate and the identification by one of these witnesses was totally unreliable. It ignored to take into Consideration the identification by the other witnesses who were produced for the first time before the trial court in view of a Divisional Bench decision of this Court in Lalla Singh v. The State, Cri. Appeal No. 291 of 1958, D/- 15-12-1959 (All). The Divisional Bench consisted of Mr. Justice James and one of us and the decision was dictated by Mr. Justice James. One of us who sat on that Bench concurred with that decision. It was observed in that decision:

'No witness of identification can be deemed reliable unless he is found to consistently identify an accused person in the jail and in the Courts of the Committing Magistrate and Sessions Judge, and day-to-day experience shows that not unoften, a witness identifies a person in the jail and in the Session Court, but fails to do so in the Magistrate's Court, with the result that his evidence is invariably rejected. No doubt the amended Code of Criminal Procedure does not compel the prosecution to examine every witness in Magistrate's Court, nevertheless the prosecution take a big risk by withholding from Committing Magistrate's Court witnesses whose testimony includes personal identification. Even though his identification of a given accused person may be correct in the jail and in the Sessions Court, I would consider, it trustworthy only if I find him identifying him in the Magistrate's Court also. I am, therefore, not disposed to attaching any value ..... to the identification of a witness who had correctly identified the accused in jail and in Sessions, but who had not been produced before the committing Magistrate.'

It seems that this view was accepted in several decisions and then later on a contrary view wasexpressed and what is extraordinary about it is that this contrary view was also expressed by the same Judge whose view has been cited above. It is all the more amazing that when the learned Judge gave a contradictory view, he did not refer to the earlier view expressed by him and did not indicate that for

some reason the earlier view was not correct and he had changed his view.

This view was expressed in Asharfi v. The State, AIR 1961 All 153. The counsel tor the accused in that case had contended that if an identifying witness is not produced in the Magistrate's Court then the defence loses the reasonable possiblity of contradicting the subsequent identification before the trial court by his failure to do so before the Committing Magistrate. The learned Judges in Asharfi's case, AIR 1961 All 153 considered this argument and observed (p. 167).

'The argument is plausible and merits consideration. Now, the accused has a right to use a witness's statement before the Committing Magistrate for contradicting him, and that right cannot be abridged, 'provided the legislature itself does not decide otherwise'. But what has the legislature done? By introducing Section 207-A in the Code by Act No. XXVI of 1955 it has considerably altered the law relating to the procedure to be adopted in commitment proceedings instituted on a police report, and by virtue of Clause (4) has given to the prosecution absolute discretion in the matter of production of eye-witnesses, and indeed this Bench has held in State v. Yasin, 1958 All LJ 413: (AIR 1958 All 861), that if in a particular case the prosecution do not choose to call a single eye-witness they cannot be compelled to do so. It is clear, therefore, that the legislature itself has conferred a power upon the prosecution which results in the Curtailment of the right of the accused to utilize a witness's statement in the committing Court for his own benefit. Since this is the outcome of a specific statutory provision, no grievance can be made of the fact that by the non-Production of an identifying witness in the Magistrate's Court the acused has been deprived of a possible chance of discrediting him in the event of his failure to identify him in that Court -- we are not aware of any principle of law by which the prosecution can be penalised for exercising a right conferred upon them by the statute.'

3. We have given due consideration to the view expressed above. With all respects to the learned Judges, we are unable to agree with it. The basic question to be considered in our opinion was whether it was within the province of the legislature to lay down rules for the Courts of law as to what evidence they should believe and what evidence they should not believe. They can do so only by

amending the Indian Evidence Act and certain other relevant statutes. They can do so by modifying certain Articles of the Constitution, but' so long as the Indian Evidence Act remains as it is, it is for the Courts of law to determine when a fact can be held to be Proved. Apart from this, we believe, that the legislature amended the Code of Criminal Procedure only to speed up the committal proceedings and not in lessen the degree of proof which was considered necessary earlier.

At any rate there were two contradictory views given by two Divisional Benches of the High Court and the same Judge had given both these views. We have already mentioned above that the first view was followed in several other cases both by Single Judges and by Divisional Benches.

4. We may now give a list of the cases which support the view expressed in Lalla Singh's case, (Criminal Appeal No. 291 of 1958, D/-15-12-1959 (All)). To the best of our knowledge barring Asharfi's case there is a com-plete uniformity in the observations made in the other cases and there are no less than thirteen such cases. These thirteen cases include lour Divisional Bench cases and nine Single Judge cases,, excluding Lalla Singh's case, Cri. Appeal No. 291 of 1958 (All). The position, therefore, is that there are five Divisional Bench cases in support of one view and only Asharfi's case, AIR 1961 All 153 represents the contradictory view. These Divisional Bench cases are :

(1) State of U. P. v. Ram Dayal, (Criminal Appeal No. 330 of 1960, D/- 27-10-1960 (All), by Nigam and Misra JJ.); (2) The State of U. P. v. Jhabbu, (Criminal Appeal No. 511 of 1960, D/-1-2-1961 (All), by the same two Judges); (3) The State v. Ram Autar (Criminal Appeals Nos. 394 and 465 of 1960, D/- 8-2-1961 by the same two Judges). (4) Gayadin v. The State, (Criminal Appeals Nos. 391 and 534 of 1960, D/- 10-3-1961. decided by Jagdish Sahai and Nigam, JJ.).

It was observed in Gayadin's Case Cri. App. Nos. 391 and 534 of 1960, D/- 10-2-61 (All), when the matter came before the Hon'ble Judges, on a reference by a single Judge :

'In our judgment it is not necessary to reier any question of law in this ca,se to a Full Bench because in our opinion no question of law arises. The controversy, if there is any in this Court, is not with regard to the right of the prosecution whether or not to examine witnesses of identification in the committing court but only with regard to the value that is to be attached to the evidence of witnesses of identification who have not been examined in the committing court. There can be no hard and fast rule in a matter like this and every case has got to be judged in the circumstances and on the facts of its own case. Whether or not a particular person should be believed because he has not been examined in the committing court, cannot be a question of law. Consequently, we do not think it necessary to refer either this case or any question, arising in this case to a Full Bench. We direct that this appeal shall be heard on merits by a Divisional Bench of this Court.'

This order was passed on the 3rd of February, 1961 and Gayadin's case, Cri. App. Nos. 391 and 534 of 1960, DA 10-2-1961 (All) was decided on the 10th of February, 1961 and it is one of the Divisional Bench cases referred to above. The Lamed Judges observed in that case :

'The prosecution certainly has a right to refuse to examine all the witnesses in the court of the committing Magistrate. We must however empha-sise that the evidence of identification has always been considered a weak kind of evidence. That is why the courts are very reluctant to convict only on one identification. In order to assure the court that this evidence is reliable, it is desirable thata witness should be repeatedly asked to identify the person he had seen at the time of the dacoity.'

5. We may now give a list of Single Judge cases which cover this point There were Single Judge decisions before Asharfi's case, AIR 1961 All 153 and they were

(1) Rameshwar v. The State (Criminal Appeal No. 386 of 1959, D/- 16-12-1959) (All-LB), (2) Mohammad Umar v. The State, (Cnminal Appeal No. 596 of 1959, D/- 16-3-1960) (All-LB), (3) Baijnath v. The State, (Criminal Appeal No. 254 of 1959, D/- 9-2-1960) (All-LB).

After Asharfi's case, AIR 1961 All 153, other cases which covered this point are

(1) Jadunath Smgh v. The State, Criminal Appeal No. 11 of 1960, D/- 18-8-1960 (All-LB), (2) Maiku v. The State, Criminal Appeals Nos. 474 and 507 of 1960, D/- 29-11-1960 (AIR 1961 All 612), (3) Ambar v. State, (Criminal Appeal No. 424 of 1960, D/- 13-12-1960 (All-LB), (4) Sheo Ratan v. The State, Criminal Appeal No. 526 of 1960, D/- 18-1-1961 (All-LB) (5) Mohammad Husam v. The State, Criminal Appeal No. 530 of 1960, D/- 19-1-1961 (All-LB), (6) Raj Naram v. The State, Criminal Appeal No. 422 of 1960, D/-102-1961 (All-LB).

It is not necessary to quote extracts from every one of these decisions, but we would like to cite a passage fiom, Criminal Appeals Nos. 474 and 507 of 1960, D/- 29-11-1960 (AIR 1961 All 612) (All LB), which runs as follows

It would thus be seen that the weight of authorities is not in favour of the view expressed in Asharfi's case, AIR 1961 All 153, but against it But there is another approach to the question The Legislature cannot take away the rights of the courts of law as to how they should interpret the words of the statute. So far the definition of the word 'proved' in the Indian Evidence Act has not been changed by the Legislature. The definition of 'proved' is 'a fact is said to be proved when after considering the matters before it the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists' The definition makes it clear that a prudent approach is to be made and this is entirely the province of law courts to determine what is a prudent approach and what is an imprudent approach As an instance there is nothing in law that says that when an accused is put for identification he should be mixed up with so many under-trials in order to make the test acceptable The High Court, however, stressing the rule of prudence and caution has observed m several decisions that where there are only one or two suspects, at least ten under-trials should be mixed with each suspect Where this direction given by the High Court is not observed, the High Court has not accepted the results of identification In other words, what should be the approach of prudence is not a question of statute but a question on which the High Court formulates its own approach and its own rules Therefore, where the High Court does not accept the identification made by a witness at the trial court, unless that identification is also supplemented by an earlier identification in the committing

Magistrate's court, it is really not aquestion of interpreting the statute but observing arule of caution The terminology of the amendedSection 207-A Cr. P. Code is, therefore, quite irrelevant in deciding this question and even if it ispermissible under the terminology of that sectionthe results would still be suspect under the rule ofprudence and caution In Asharfi's case, AIR 1961 All 153 with all respect to the learned Judges, onlyan attempt was made to interpret the words ofSection 207-A Cr P Code and what I have observedabove was not considered In my opinion Section 207-Awas introduced only to speed up and simplify theprocedure and not to lessen the degree of proof,but the prosecuting agency misinterpreted this purpose and is abusing it by suppressing material evidence ... It is, therefore, for theHigh Court to give directives of prudence andcaution for the prosecuting agency cannot be permitted to interpret the provisions of Section 207-Aas an excuse for not presenting the evidence insuch a manner that it may create confidence inthe mine of a prudent man I am, therefore, of theopinion that where the circumstances are such fromwhich a reasonable inference can be drawn thatwitness was suppressed because the prosecution didnot want to subject him to be tested at that stage,the rule of prudence demands that the evidence ofthat witness should not he accepted.'

In view of the extract cited above it is not necessary to deal with this matter any further. We agree with the view first expressed m Lalla Singh's case, On Appeal No. 291 of 1958, D/- 15-12-1939 (All) and then followed by so many decisions The trial court was, therefore, justified in feeling doubtful about the identification of those witnesses who were not examined in the committing Magistrate's court If these witnesses are ignored only two witnesses remain and both these witnesses are totally unreliable.

6. The trial court found Durjan to be unreliable because he committed too many mistakes, but it found that P. W. 2 Badlu was a good witness, but it would not be safe to base a conviction on the identification of a solitary witness The performance of Durjan was that m the first parade he-identified five persons correctly and made ten mistakes. In the second parade he identified two Persons correctly and made seven mistakes. In the third parade he identified a suspect correctly and made no mistake. The total performance of this witness, therefore, is

that he correctly identified eight suspects but in doing so he made no less than 17 mistakes Obviously such a witness cannot be seriously considered and his identification is worthless.

The identification of the other witness P. W. 2 Badlu is also unreliable In the three parades he identified no less than 14 persons correctly and this performance by itself makes the evidence of identification doubtful A performance which, is not within the orbit of normaley but amounts to an abnormal feat can seldom inspire confidence Again and again we find that in dacoity cases the witnesses are endowed with extraordinary power of observation and memory and they perform wonders. Their performance always deviates from normaley We, therefore, find that none of these two witnessess is reliable and, therefore, there is no case made out against any of the 14 accused-respondents under Section 396 I. P. Code.

7. Three of the accused-respondents, namely Shanti, Mulhey and Ram Bilas were also charged under Section 412 I. P. Code and it was alleged that stolen property was recovered from their possession. The trial court in assessing the evidence of recovery relied upon Full Bench decision of the Allahabad High Court in Deoman Upadhyaya v. The State, 1959 All LJ. 651 : (AIR 1960 All 1). Following the rule of law laid down in that decision, it held that Section 27 of the Indian Evidence Act was ultra vires of the Constitution and so it did not accept the evidence of recovery in the case.

That decision is no longer good law. for it has been set aside by the Supreme Coourt in State of U. P. v. Deoman Upadhyaya 1960 All LJ 733 : (AIR 1960 SC 1125). We, therefore, find that the recovery of the stolen articles from the possession of these three accused-respondents cannot be ignored on the ground taken by the trial court.

8. So far as the case of Shanti is concerned. the trial court has given good reasons for coming to the conclusion that the prosecution has failed to establish the recovery of the stolen article from his possession. (His Lordship reviewed the evidence and proceeded;)

9. But the case of Ram Bilas can be distinguished. Ram Bilas admits that the Orhni Ex. IV was recovered from his possession. This Orhni was described in the list of stolen property given at the time when Durjan lodged his report. The trial court when it acquitted Ram Bilas observed;

'One identification alone is not sufficient to fix the identity of the property beyond reasonable doubt. As far as the question of fixing the identity of the property from its description in theF. I. R, is concerned, the Orhni has been described in the F.I.R. as 'Hari rangi hui safed butidar derh pat ki safed got lagi'. The Orhni, Ex. 4 is of one and a half breadth (derh Pat) and has a white border all round. It has white flowers also but there areother colours also in the flowers including green and yellow, and the yellow colour is a little more prominent than the white. Regarding the base colour also, the learned Magistrate who conducted the identification proceedings, Sri N. M. Majumdar (P. W. 28) has stated that it is blue, while the complainant Durjan has stated that it is green. I have carefully seen the Orhni, and I consider that the colour is something like slate colour, and in the experience of this Court, this Court has found numerous Persons calling this colour green. Coupled with the evidence of identification by three witnesses. I would have considered the ownership of this Orhni proved beyond reasonable doubt, specially as the accused could not produce any evidence about his own ownership, but in view otthe fact that the evidence of identification has been rejected, I consider that the identity of the Orhni is not established beyond reasonable doubt by its description in the F.I.R. alone.'

We would at once express our disagreement with the last observation in the extract cited above. In our opinion the description given in the first information report tallies completely with the article recovered and this slight discrepancy about the colour being green blue or slatish is of no consequence atall. It is one of those cases where the description given in the list of stolen property is by itself sufficient to bring conviction to one's mind that the article exhibited in the court is the same article. The identity of the article is established by this description alone.

It is one of those cases in which even an identification is not needed to satisfy a court that the property before it was stolen property, unless it felt a doubt that the

list of stolen property was suspicious and reliance cannot be placed upon it Over and above this, there was the identification by P. W. 1 Durjan, which was more than enough to prove that this article belonged to Durjan and it was looted in this dacoity. But we have also failed to appreciate the approach made by the trial court in placing the identification of property on the same footing as the identification of a person.

The trial court completely ignored that identification of person means recognizing the face o a stranger who was seen momentarily only at the time of the dacoity. The identification of property is really the recognition of property for the owner knows his own articles and when he sees them, he picks them out. He is well acquainted with all the peculiarities of that article and even though ostensibly there may be no distinctive mark, an owner can very frequently be trusted to pick out his own article from a large number of similar articles.

There is some peculiarity in the article which is present in his sub-conscious mind and which he himself may not be able to describe. It was, therefore, idle to place the identification of Property on the same footing as the personal identification of an accused person. Apart from this we find that even if this rule was to be applied in this case the description of the property together with the identification by Durjan was more than sufficient to prove this Orhni was stolen property. We, however, want to make it absolutely clear that the rule of law laid down in Lalla Singh's appeal, Cri. Appeal No. 291 of 1958, D/- 15-12-1959 (All) and followed in the other cases is not applicable to the identification of property.

We may mention that so far as identification of person is concerned, the courts have repeatedly hold that at least five similar persons and occasionally a larger number of persons should be mixed before the identification is held to be reliable. In the identification of property frequency only two or three similar articles are mixed and although it is desirable that a larger number of similar articles should be mixed, still the identification of property is not disbelieved if the witnesses are credible and they have been subjected to a fair test merely because the similar articles mixed were only two or three in number. This is only to illustrate that the identification of property stands on a different footing than the identification of

person. The trial court, therefore, misdirected itself when it followed the principle laid down in Lalla Singh's case, Cri. Appeal No. 291 oF 1958, D/- 15-12-1959 (All) and applied it to the identification of Property.

10-11. We, therefore, find that a case under Section 412 I. P. Code is satisfactorily established against Ram Bilas accused-respondent.

12. The result is that we uphold the order of acquittal passed by the trial court in favour of all the accused-respondents under Section 396, I. P. Code and we also maintain the order of acquittal passed by the trial court in favour of Shanti and Mulhey under Section 412 I. P. Code. We, however, find that a case under Section 412 I. P. Code is made out against Ram Bilas, as the stolen property was recovered from him only about three days after the commission of the offence. We, therefore, set aside the acquittal of Ram Bilas under Section 412 I. P. Code and convict him under that section. We award him a sentence of five years' rigorous imprisonment under Section 412 I. P. Code.

All the accused respondents, except Puttu, Kalian and Maiku, are on bail. Kalian and Maiku, we are informed, are in Jail in connection with some other offence. If this is true, they should not be released, but so far as this case is concerned, they are acquitted and they are entitled to be released, unless wanted in connection with some other case. Puttu should be released forthwith, unless wanted in some other case. Ram Bilas should surrender forthwith, to serve out the sentence imposed upon him today. The bail bonds of the other accused respondents are discharged.

13. No further orders are necessary on Criminal Misc. Application No. 53 of 1961.

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