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Court : Allahabad

Decided On : Dec-12-1958

Reported in : AIR1959All718; 1959CriLJ1271

Judge : A.P. Srivastava and ;S.K. Verma, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 411; Evidence Act, 1872 - Sections 114; Code of Criminal Procedure (CrPC) , 1898 - Sections 342

Appeal No. : Criminal Revn. No. 55 of 1957 and 1573 of 1958

Appellant : Rajjaua

Respondent : The State

Advocate for Def. : Asst. Govt. Adv.

Advocate for Pet/Ap. : C.S.P. Singh, Adv.

Disposition : Revision dismissed

Judgement :

A.P. Srivastava, J.

1. These two applications in criminal revision are connected with each other in the sense that thesame question of law arises in them. They can, therefore be disposed of by the same judgment.

2. Criminal Revision No. 55 of 1957 is on behalf of Rajjaua. He was convicted by a Magistrate First Class of Fatehpur under Section 411 I. P. C., and was sentenced to nine months' R. I. His conviction was upheld by the learned Sessions Judge in appeal, but he reduced the sentence to six months' R. I. The facts found against him by the two Courts are that in the night between the 15th and 16th of July 1956 certain ornaments marked Exs. I to VIII in the case were stolen from the house of Jagdeo. On 19-7-1956 the house of the applicant was searched and these stolen ornaments were recovered from a room in the exclusive possession of the applicant where they were lying buried under the ground. The applicant denied the factum of recovery and did not offer any explanation as to how the stolen ornaments came into his possession,

3. In the other case, criminal revision No. 1573 of 1958, Roshan was convicted by a Magistrate First Class of Meerut under Section 411 I. P. C. and sentenced to six months R. I. His conviction and sentence were both confirmed by the Sessions Judge in appeal. The facts found against him were that a theft was committed at the house of Bal Makund in the night between the 21st and 22nd of November 1957. The thieves broke into the house and stole a blanket, shirts and a cycle pump along with other articles. These stolen articles viz. the blanket, shirts and cycle pump were recovered from a Kotha in the exclusive occupation of the applicant Roshan. The Kotha was locked and was opened by Roshan himself. The recovery was made on the 22nd of November 1957.

4. In revision the case of Rajjaua came up before Mr. Justice Takru and the case of Roshan came up before Mr. Justice Chaturvedi. The only point which was raised on behalf of the two applicants before the learned Judges was that the conviction of the two applicants under Section 411 I. P. C. was not justified, because one of the essential ingredients of that offence had not been established, by the prosecution. It was pointed out that the only facts which the prosecution had proved in the cases of the two applicants were that a theft had been committed and that soon after the theft the stolen property had been recovered from the possession of the applicants.

It was urged that in addition to these facts the prosecution was bound to prove that the stolen property had been in the possession of some other person before it had come into the possession of the applicants and if that was not proved the conviction of the applicants under Section 411 I. P. C. was not justified. Reliance was placed in this connection on certain observations made by their Lordships of the Supreme Court in the case of Trimbak v. State of Madhya Pradesh : AIR 1954 SC39 . Reference was also made to a case decided by Mr, Justice Asthana on 30-10-1956 (Criminal Revn. No. 1142 of 1956 Ramdeo v. State).

Learned counsel for the State in his turn referred to the case of Hanuman v. State. Criminal Revn. No. 634 of 1958, D/- 27-5-1958 (All). Mr. Justice Takru found that there was a conflict between the two single Judge decisions of this Court which needed to be resolved. Mr. Justice Chaturvedi also found some difficulty in accepting the interpretation that was being suggested in respect of the decision of the Supreme Court in : AIR 1954 SC39 . Both the learned Judges were of opinion that the point which was being raised was of frequent occurrence and that it was necessary that it should be decided by a larger Bench. That is bow the two cases have come up before us.

5. The question which we have to decide therefore is whether it is not necessary in every case for the prosecution in order to secure a conviction under Section 411 I. P. C. to prove by positive evidence in addition to the factum of theft and the recent recovery of property from the possession of the accused, that the property was in the possession of some one else before it came into the possession of the accused.

6. In : AIR 1954 SC39 , the facts were that a dacoity had been committed in the house of one Namdeo Moti Ram in the night of the 11th of December 1950. The appellant Trimbak was prosecuted under Section 395 I. P. C. for having participated in that dacoity. The only substantial evidence that was produced against him was that on his pointing out some property taken away by thedacoits had been recovered from an open field which was accessible to all. The learned Magistrate acquired Trimbak on the ground that evidence of the recovery was insufficient to prove that Trimbak was in possession of the stolen goods.

The other evidence regarding his participation in the dacoity was disbelieved. Against the acquittal, the State Government preferred an appeal to the High Court. The High Court upheld the acquittal under Section 395 I.P.C., but convicted Trimbak under 'S. 412 I. P. C. for receiving stolen property. The view taken was that the stolen ornaments having been taken out of the field by Trimbak and he having given no explanation regarding his knowledgeof the place from which the ornaments were taken out, it could be presumed that he must have kept the ornaments there.

Special leave for appeal was granted by the Supreme Court to Trimbak and while disposing of his appeal, Mahajan J., fas he then was) pointed out that the High Court's approach to the decision of the case under Section 411 I. P. C. was not a correctone. He said:

'It is the duty of the prosecution in order to bring home the guilt of a person under Section 411 I. P. C. to prove (1) that the stolen property was in the possession of the accused, (2) that some person other than the accused had possession of the property before the accused got possession of it and (3) that the accused had knowledge that the property was stolen property.'

7. It was held that in the case of Trimbak none of these essential ingredients of the offence had been proved. As the field from which the ornaments had been recovered was an open one and accessible to all and sundry, it was found to be difficult to hold positively that the accused was in possession of the articles. It was stressed that the fact of the recovery by the accused was compatible with the circumstance of somebody else in having placed the articles there and of the accused somehow acquiring knowledge about their whereabouts and that being so, the fact of discovery could not he regarded as conclusive proof that the accused was in possession of the articles.

The learned Judge observed that on the evidence it could not be held that Trimbak was the thief and as there was no evidence that the ornaments were in the possession of someone else before the appellant got them (even if he was held to have got them) he could not be held guilty of receiving the stolen property. The appeal of Trimbak was therefore allowed and he wag acquitted under section 411

I. P. C. also.

8. It is stressed on behalf of the applicants that in Trimbak's case : AIR 1954 SC39 the Supreme Court enumerated the essential ingredients of Section 411 I. p. C. and the second ingredient according to their Lordships was that some person other than the accused had possession of the property beforethe accused got possession of it. If, therefore, the prosecution does not establish this ingredient, the accused is entitled to say that the case is not proved against him and that he should be acquitted.

9. While pointing out the second ingredient of Section 411 I. P. C., their Lordships of the Supreme Court were only reiterating the well recognised distinction between a receiver and a thief. When the thief removes the stolen property from the possession of its owner and takes it into his own possession, he not only commits theft but is also in possession of stolen property knowing it to be stolen. He cannot, however, be convicted of both the offences. If he is the 'ihief he possesses the stolen property in his capacity as a thief, and not as a receiver. It has, therefore, been held that the same person cannot be convicted of theft as well as of receiving stolen property knowing it to be stolen. As is laid down in Halsbury's Laws of England, III Edition, Volume X, page 811:

'A person who is guilty of stealing goods as a principal in either the first or the second degree cannot be convicted of receiving them.' Vide also Narendra v. State : AIR1956 All336 . If therefore a person is sought to be made liable as a receiver of stolen property, there must be something to show that he is not the thief. If he is the thief he cannot be a receiver. Before he can be held to be a receiver, it has to be shown that he received the property from another person, either the thief or some one else who was an earlier receiver.

10. In Trimbak's case : AIR 1954 SC39 , however, their Lordships were not dealing with the way in which the three essential ingredients of Section 411, I.P.C. were to be proved. In that case it was not necessary for them to deal with that question, because they found as a fact that it was not proved that Trimbak had been in actual possession of the stolen property.

11. In every case under Section 411, I.P.C. two facts viz.:1. that a theft was committed and certainarticles were stolen, and 2, that the stolen articles were recovered fromthe possession of the accused, have to be established by direct evidence. They cannot be presumed. If these two facts are established and the recovery from the possession of the accused is a recent one, it will be open to the Court to presume under illustration (a) to Section 114 of the Indian Evidence Act that the accused is either the thief or a receiver of stolen property. The presumption is, however, a discretionary one and may not be available at all in certain cases, e.g. where in the circumstances of the case the recovery cannot be held to have been made soon after the theft.

In such cases it will be necessary for the prosecution to prove by direct evidence not only that the stolen property was in the possession of some person other than the accused before it came to his possession but also that the accused knew or had reason to believe that the property was stolen property. In a case in which the presumption under illustration (a) to Section 114 of the Indian Evidence Act is available all the essential ingredients of the offences including possession of some one else at an earlier stage will be presumed and it will be for the accused to rebut the presumption, to show that any of the essential ingredients of the offence is missing and to offer a reasonable explanation of his possession of the articles.

12. The basis of the Rule enacted in illustration (a) to Section 114 of the Indian Evidence Act appears to be the well established principle of com-mon law which has been stated in Halsbury's Laws of England, III Edition, Volume 10 at page 813;

'The possession by a person of property which has been recently stolen is some evidence in the absence of a reasonable explanation by him as to how it came into his possession, that he either stole it or received it knowing it to be stolen. Whether it is evidence of larceny or of receiving depends upon the circumstances of the case. The weight of the evidence depends upon the nature of the goods and the length of time which has elapsed from the time when they were stolen to the time when they are proved to have been in the possession of the accused.'

13. Their Lordships of the Privy Council reiterated the same principle in Otto George Gfeller v. The King, 45 Cri LI 241: (AIR 1943 PC 211), when they observed:

'that upon the prosecution establishing that the accused was in possession of goods recently stolen, they may in the absence of any explanation by the accused of the way in which the goods came into his possession which might reasonably be true find him guilty, but if an explanation were given which the jury think might reasonably be true, and which is consistent with innocence although they were not convicted of its truth the prisoner was entitled to be acquitted.'

14. If therefore it is proved that a theft was committed and that soon after it was committed, the stolen property was recovered from the possession of the accused, the prosecution can without proving any additional fact request the Court to presume that the accused is either the thief or the receiver of the property knowing it to be stolen.

15. The presumption mentioned in illustration (a) to Section 114 of the Indian Evidence Act, it will be noticed, is an alternative one. Whether in a particular case the Court will presume that the accused is a thief or whether it will be presumed that the accused is a receiver of stolen property knowing it to be stolen, depends upon the facts and circumstances of each case. Generally speaking, if the recovery is very recent and there is no explanation at all as to how the accused came into possession of the stolen goods, it would be preferable to presume that he is the thief. But, keeping in view the circumstances of a particular case, mere is nothing to prevent the Court from presuming that the accused is a receiver of stolen property. As Pollock C B. laid down in R. v. Langmead, (1864) 9 Cox. CC 464:

'If no other person is involved in the transaction, and the whole of the case against the prisoner is that he was found in possession of the stolen property, the evidence would no doubt point to a case of stealing rather than a case of receiving; but in very case, except indeed where the possession is so recent that it is impossible for any one else to have committed the theft, it becomes a mere question for the jury whether the person found in possession of the stolen property

stole it himself or received it from some one else. If there is no other evidence, the jury will probably consider, with reason, that the prisoner stole the property; but if there is other evidence, which is consistent either with his having stolen the property, or with his having received it from some one else, it will be for the jury to say which appears to them the more probable solution.'

If this presumption is drawn it will be in respect of all the essential ingredients of the offence concerned. If, for instance, the offence presumed is theft it will be presumed and will not have to be proved that the accused removed the property from the possession of another person dishonestly. In case the presumed offence is one under Section 411, I.P.C.guilty knowledge and earlier possession of another person will be presumed and will not have to beproved.

16. We find nothing in Trimbak's case : AIR 1954 SC39 , to support the contention of the learned counsel for the applicants that in every case under Section 411, I.P.C. the prosecution must prove by positive evidence that the property, before it came in the possession of the accused, was in the possession of some one else and that the presumption referred to in illustration (a) to Section 114 of the Indian Evidence Act cannot be available to the prosecution in such a case.

17. In the case of Cri. Revn. No. 1142 of 1958 D/- 30-10-1956 (All) Asthana J. only purported to follow Trimbak's case and did not consider whether all the ingredients of the offence enumerated in that case could be presumed to exist in view of illustration (a) to Section 114 of the Indian Evidence Act.

18. The view we are taking appears to be in consonance with the decision of a Division Bench of the Orissa High Court in Sadasiv Das v. State, AIR 1958 Orissa 51. In that case a dacoity had been committed and it had been proved that certain properties which had been taken away, had been recovered from the possession of the appellants. The appellants had therefore been convicted under Section 412 I. P. C. It was contended that the conviction was not justified because no evidence had been led to prove that before the properties had come into the possession of the accused they had been in the possession of some one else. Both the learned Judges repelled the contention. Narasimham C. J. observed :

'The impression that when an accused is charged with an offence under Section 411 I. P. C. the prosecution must invariably establish affirmatively that the stolen property was first in the possession of some other person and then was transferred to the possession of the accused, is erroneous and is not supported by the decisions in : AIR 1954 SC39 and Bali Nath v. The State 22 Cut. L. T. 456.

Where the facts found justify the drawing of the presumption under illustration (a) to Section 114 of the Evidence Act and a Court draws such a presumption, it is obvious that the accused who was found in possession of stolen property soon after theft and who is unable to give satisfactory explanation for his possession, is either a thief or a guilty receiver, and it is not necessary for the prosecution to further show that possession was transferred to him from some other person.'

P. B. Rao J. concurred in that conclusion and laid down :

'Sections 411 and 412 I. P. C. lay down the conditions required to be proved in order to convict a person as a receiver or retainer of stolen property. But if in the process of proof the Court draws a presumption under Section 114, Evidence Act that a person who is in possession of the stolen goods soon after the theft has received the goods knowing them to be stolen, then the requirements of Sections 411 and 412, I.P.C. are complied with and the conviction of the accused under Section 411 or Section 412 on the basis of such presumption cannot be held to be bad on the ground that there is no evidence that the accused received the properties recovered from them or from somebody else.'

19. In view of what we have said above the two applicants before us cannot get any advantage of the omission of the prosecution to lead direct evidence to prove that before the stolen property came into their possession it was in the possession of some other person. Against both these applicants it waswell established that a theft had been committed and that the stolen property had been recovered from their possession soon after the theft. In the case of Roshan the learned Sessions Judge expressly utilised the presumption mentioned under Section 114 of the Indian Evidence Act.

In the other case of Rajauwa the learned Sessions Judge did not refer to the section, but was obviously drawing the presumption mentioned in it when he said that the appellant could be held to have dishonestly received or retained the property knowing or having reason to believe the same to be stolen, because he had been found in exclusive possession of the same only three days after the theft. In the circumstances that were established in the two cases the two applicants could certainly have been presumed to have been the persons who had actually committed the thefts, but the Courts in their discretion raised the alternative presumption that they were guilty as receivers.

We are unable to say that the discretion was not judicially exercised or that any interference is called for in that respect. The presumption having been raised the prosecution was relieved of the necessity of proving the ingredient the absence of which is being stressed upon on behalf of the applicants. They cannot therefore claim an acquittal on account of absence of evidence in respect of it.

20. The learned counsel for Rajauwa raised an additional point and urged that the examination of his client under Section 342 Cr. P. C. was defective End that on that account his conviction stood vitiated. It is however, now well settled that every case of omission to properly examine an accused person under Section 342 Cr. P. C. is not necessarily fatal to the prosecution. Before the accused can be allowed to take any advantage of the omission, he must show that he has been prejudiced in any manner. In the present case it was not even alleged before the Sessions Judge in appeal that the applicant had been prejudiced in any manner because of his defective examination under Section 342 Cr. P. C.

The learned counsel has not succeeded in showing any prejudice to his client even before us. Rajauwa denied the theft as well as the recovery. His denial in respect of the recovery has been found to be false. He had no explanation to offer as to how the stolen articles came into his possession. When his defence was a complete denial and he had not set up any positive case of his own, a more detailed examination under Section 342 Cr. P. C. would not have been of much use. The applicant was not prejudiced in any manner on account of the absence of such an examination.

21. The convictions of both the applicantstherefore appear to us to be quite correct. Thesentences do not call for any interference. The applications are therefore rejected. Rajauwa must surrender and serve out his sentence if he is on bail.

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