

Umashankar Namdev Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Feb-13-2003

Reported in : 2003(2)MPHT237

Judge : A.K. Shrivastava, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 378 and 379

Appeal No. : Criminal Revision No. 677/95

Appellant : Umashankar Namdev

Respondent : State of M.P.

Advocate for Def. : Chanchal Sharma, Panel Lawyer

Advocate for Pet/Ap. : Siddharth Datt, Adv.

Disposition : Revision allowed

Judgement :

ORDER

A.K. Shrivastava, J.

1. This revision petition has been directed against the judgment of conviction and order of sentence dated 10-2-94, passed by Judicial Magistrate, First Class, Panna, in Criminal Case No. 34/1993, convicting the applicant under Section 379

of the IPC and thereby sentencing him to suffer six months' R.I. and fine of Rs. 500/- in default one month's further R.I. The order has been confirmed in appeal being preferred by the applicant before the Sessions Judge, Panna in Criminal Appeal No. 21/1994, decided on 10-9-1995.

2. The facts shorn of unnecessary detail, lie in a narrow compass that N.K. Nahar (P. W. 5), who is the investigating officer, received information that the applicant/accused is selling the stolen diamonds, on the basis of this information, Shri Nahar proceeded the place and found that the accused/applicant, in front of the shop of Daya Chanda Jain, was standing. It is said that the search of the applicant was taken and in the said search he produced three diamonds worth Rs. 500/-, 2,000/- and 500/- respectively. The applicant was taken in the custody and after investigation, the prosecution filed challan before the Competent Court. The applicant was charged of the offence punishable under Section 379 of the IPC, which he abjured and pleaded complete innocence and maladroitness.

3. In order to bring home the charge, the prosecution examined as many as six witnesses and placed the documents on record.

4. The learned Trial Court, after appreciating the oral and documentary evidence, came to the conclusion that the applicant did commit the offence of which he was charged under Section 379 of the IPC and hence, convicted him and passed sentence mentioned herein above.

5. Feeling aggrieved by the judgment of conviction, the applicant herein, preferred an appeal, the learned Sessions Judge, by the impugned judgment, dismissed the appeal. Hence this revision petition has been preferred by the applicant/accused.

6. In this revision petition, Shri Siddharth Datt, learned Counsel for the applicant, has contended before me that it was incumbent upon the prosecution to have proved the ingredients of the theft as required under Section 378 of the IPC. As the prosecution had failed to prove the essential ingredients of the theft, the Trial Court as well as Appellate Court erred in law in convicting the applicant under the said offence. Shri Datt, learned Counsel for the applicant, has placed heavy reliance upon the decision of the State of Maharashtra v. Vishwanath Tukaram

Umale and Ors., AIR 1979 SC 1825 and Gulab v. State of M.R., 1991 (2) M.P. Weekly Notes 182.

7. Per contra, Smt. Chanchal Sharma, learned Panel Lawyer for the State, in her vehemence, argued that learned Courts below, after appreciating the documents, evidence and considering the relevant law, came to a definite conclusion that the applicant committed the offence, and therefore, he has been rightly sentenced. Heavy reliance has been placed by her in the case of Vimal Singh v. Khuman Singh, AIR 1998 SC 3380.

8. After hearing the rival contentions of the parties, I am of the view that this revision petition deserves to be allowed.

9. This Court in the case of Gulab (supra) has laid down the five factors which require a strict proof so as to hold that the evidence of theft has been made out. They are :--

(i) dishonest intention to take property;

(ii) the property must be movable;

(iii) it should be taken out of possession of another person;

(iv) it should be taken without consent of that person; and

(v) there must be removal of the property in order to accomplish the taking of it.

On the basis of the anvil of the aforesaid ratio it was incumbent upon the prosecution to have established these essential ingredients on the basis of its evidence. It has been contended by Shri Datt that no evidence has been laid by the prosecution so as to prove that the impugned diamonds said to have been stolen were taken out of possession of another person, and therefore, unless and until this material and important ingredient is proved by adducing cogent evidence, the applicant cannot be convicted. I have considered this argument of learned Counsel and I find that there is sufficient merit in his contention. On going through the evidence of the prosecution, I find that the prosecution has utterly failed to adduce any evidence so as to prove that the said diamonds were the property of

any other person and were taken out from the possession of that person without his consent. There is no evidence that there was any dishonest intention to take away the impugned diamonds. The prosecution had failed to produce the material evidence so as to constitute the essential ingredients of Section 379 of the IPC.

10. In the case of Vishwanath Tukaram Umale (supra), the Supreme Court in Paragraph 6 has laid down the law as under :--

'It has to be appreciated that the allegation against accused 1, 2, 5 and the absconding accused was that they had removed the seven tyres from the Down Yard at Bhusawal railway station by breaking open the wagon. That was in fact the reason why they were charged for the commission of offences under Sections 379, 461 and 411, IPC. It is however an essential ingredient of the offence of 'theft' that the movable property which was the subject matter of the theft should have been 'moved' out of the possession of any person without his consent. As is obvious, that could be possible only if the person moving the property had taken it out of the possession of the person concerned and transferred it to his own possession in order to move it for the purpose of taking it dishonestly. It follows that transfer of possession of the property, however transient, is an essential ingredient of an offence of theft.'

11. In the present case also there is no evidence that the seized diamonds were taken out from the possession of any person without his consent. Thus, in my opinion, when there is no evidence to make out the essential ingredients of the theft as envisaged under Section 378 of the IPC, the applicant has been convicted contrary to the law.

12. The case of Vimal Singh (supra), relied by learned Panel Lawyer, is distinguishable for the simple reason that in that case, it has been held by the Apex Court that powers under revision are limited and it cannot be exercised unless and until the judgment suffer from illegality. I have given my anxious consideration to this decision and I find that this case is not at all applicable in the present case. As discussed hereinabove, the present case is of no evidence.

13. In view of the above said premised reasons, I have no hesitation to hold that the learned Courts below erred in law in convicting the applicant for the offence punishable under Section 379 of the IPC. The impugned judgment passed by the Trial Court and affirmed by the Appellate Court is hereby set aside. The applicant is acquitted from the charge under Section 379 of the IPC. The amount of fine, if deposited, be returned to the applicant. The revision petition is allowed.

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