

Rajinder Kumar Vs. State

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Court : Delhi

Decided On : Sep-02-1982

Reported in : 1983(1)Crimes941; 23(1983)DLT42; 1983(4)DRJ95

Judge : A.B. Rohtagi, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 392

Appeal No. : Criminal Appeal No. 264 of 1980

Appellant : Rajinder Kumar

Respondent : State

Advocate for Pet/Ap. : D.R. Sethi and; H.C. Gulati, Advs

Judgement :

Avadh Behari Rohatgi, J.

(1) These are four appeals from the order of the Additional Sessions Judge dated 3.9.1980. This judgment will govern them all.

(2) Four persons Rajinder Kumar, Balbir Singh, Rattan Lal and Joginder Lal were put on trial under sections 397/392/34 and Section 411 IPC. Joginder, Rajinder and Balbir were convicted for offences under section 392/34. The charge under Section 397 Indian Penal Code was dismissed against them. They were convicted

and sentenced to R.I. for four years and a fine of Rs. 200.00 each and in default R.I. for three months under section 392/34 Indian Penal Code Rattan Lal was convicted under section 411 Indian Penal Code He was sentenced to Ri for two years. From the order of the trial judge these four convicted persons appealed to this court against their sentence and conviction.

(3) It is a case of broad day light robbery. The facts are as follows. Uma Kapila, complainant was a lecturer in Miranda College. She was living with her husband Raj Kapila and her mother-in-law Parkash Wati in house No. 182, Tagore Park, New Delhi. OnF 29.8.74 these two women, Uma Kapila and Prakash Wati, were in their House. At about 2.30 p.m. Prakash Wati had gone up stairs to the terrace for drying clothes. It is alleged that three persons came on the terrace. They showed knives and forced Prakash Wati to come down stairs. Uma Kapila was present on the ground floor. She saw her mother-in-law being brought forcibly at the point of knives down stairs by three persons. These persons then asked these women to hand over whatever they possessed. From Uma's person they took a cash of Rs. 251-, her two gold bangles, a Roamer wrist watch and a pair of earrings. From the person of Prakash Wati they took one gold bangle. They then ransacked the wardrobe of Uma and took away seven gold bangles, four pairs of earrings, three gold chains, one pendant and a cash of Rs. 400.00 . From the almirah of Prakash Wati they took three gold bangles, one gold chain, one pendant and some coins. Uma's husband's wrist watch was also taken away. Culprits left the place after cutting the telephone wires.

(4) The trial judge mainly relying on the evidence of the two women convicted Rajinder, Balbir and Joginder under section 392/34, as I have said. Rattan Lal was convicted under section 411 as the receiver of the stolen property. The learned judge found the evidence of Uma 'illuminating and convincing', though he was not unmindful of the 'lapses' on the part of the police in proving the case.

(5) In my opinion all the four appeals must be allowed. Crl. A. No. 318 of 19SO :

(6) I first take up the appeals of Balbir (Grl. A. No. 318 of 1980). The only question in this appeal is whether there has been an identification of the accused. In the case of Balbir an identification parade was held. The two women Uma Kapila and

Prakash Wati (Public Witness 1 and Public Witness 2) could not identify. Ralbir, appellant. He was identified in court at the time of the trial.) Where a witness identifies an accused who is not known to him in the court for the first time, his evidence is absolutely valueless unless there has been a previous identification parade to test his powers of observation. The idea of holding test identification parade under section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no identification parade is held then it will be wholly unsafe to rely on his bare testimony regarding the identification of an accused for the first time in Court. This principle has been enunciated in a large number of authorities. It is sufficient to refer to the latest decision in *Kanan v. State of Kerala*, : 1979 CriLJ919 . Applying this principle what do we find against Balbir? Nothing. There has been no proper identification. Nor has there been any recovery of the stolen articles from him. His guilt has not been proved beyond reasonable doubt. His appeal can be decided on two short grounds, no identification and no recovery. It is therefore not safe to base the conviction on the bare testimony of these two women who identified him for the first time in court and who failed to identify him at the test identification parade. Such evidence is suspect where there has been no previous identification. It has been said that mistaken identification is by far the greatest cause of actual or possible wrong convictions. (Cross on Evidence 5th ed. p. 58). I therefore allow Balbir's appeal and set aside his sentence and conviction. Crl. A. No. 274 of 1980:

(7) Next I come to the appeal of Joginder. He was the first to be arrested in the case. According to the police he was arrested at Rohtak at 3 a.m. in the night between 4th and 5th December, 1974. He, however, denies this. He says that he was arrested in Shastri Nagar, New Delhi from his uncle's house. Even this is not of much consequence. Let us take the prosecution case to its logical conclusion. Suppose Joginder was arrested at Rohtak as the prosecution says. He was produced before Mr. J.N. Chadha, Magistrate, Rohtak for a test identification parade. Now the prosecution case is that Joginder on 5.12.1974 before the said magistrate refused to participate in the test identification parade. So no test identification parade was held. The two women identified Joginder in court. But that evidence of identification, as I have already said, is valueless. So the question

remains : Did the appellant Joginder refuse to participate in the test identification parade before Mr. Chadha? The appellant in his statement under section 313 Criminal Procedure Code . has denied that he ever refused to' participate in the test identification parade. Now the important point is that Mr.J.N. Chadha, Magistrate of Rohtak, has not been produced in evidence to prove the refusal of Joginder to participate in the test identification parade. His non-production, in my opinion, is fatal to the prosecution case. It is not proved that the appellant ever refused to participate in the test identification parade. Unless his identity is established the appellant cannot be convicted. His appeal must be allowed. I allow the appeal and set aside his conviction and sentence. ' CrI. Appeal No. 264 of 1980:

(8) The third appeal is of Rajinder. In this appeal, as in the other two appeals, the principal question is about the identification of the accused. This question of identification looms large on the horizon. The material on the record shows that Rajinder made an application for anticipatory bail on 27.11.74 to the court of Additional Sessions Judge, Delhi. That application was rejected. Rajinder was immediately arrested and taken into custody. The prosecution case is that 18.12.74 was fixed for a test identification parade. This is in the evidence of the investigating officer. He says that he made an application Ex. P. 1/15 on 11.12.74 for judicial remand of the accused Rajinder in which it was mentioned by him that 18.12.1974 had been fixed for holding the test identification parade of the accused. But the accused on that day i.e. 18.12.74 refused to participate in any identification parade.

(9) So the positive case of the prosecution is that the test identification parade was fixed for 18-12-74 and on 18-12-1974 when the police asked for judicial remand he, the appellant, refused to participate in it. But the refusal has not been duly proved, The Magistrate before whom the appellant refused to participate in the test identification parade has not been produced. The record reveals that to begin with 5-12-74 was fixed by the metropolitan magistrate for test identification parade. We do not know what happened on 5-12-74. Was there an identification parade or not? If not, why not? The remand was taken on 27-11-74. It was due to expire after 14 days on 18-12-1974. therefore, the appellant was produced in

court on that day. If that is so, how can 18-12-74 be fixed for test identification parade. It is impossible that the accused will be produced in court on 11-12-74 for taking a judicial remand when the date for test identification parade is already fixed on 18-12-74, as is the prosecution case. If on 11-12-74 the accused was produced in court and 18-12-74 was fixed for the test identification parade the accused can well complain that after production in court there was no point in his participating in the test identification parade. This is the fatal flaw. We do not know whether 5th December 1974 was fixed for test identification and actually what happened on that date. If 18th December 1974 was fixed for test identification parade the production of the accused on 11th December 1974 in open court before the Magistrate is disastrous for the prosecution because the possibility of the accused being shown to the witnesses cannot be ruled out. Whatever may have been the date for test identification parade, the refusal of the accused in any case has not been proved. It is admitted that there was no test identification parade in his case. It was incumbent on the prosecution to prove the appellant's refusal by producing the Magistrate as a witness in the case.

(10) The appellant was identified by the two women in court. As I have said, this visual identification is valueless. It is in evidence that some photographs of bad characters were shown by the police to the two women in this case. Whose photographs were shown we do not know. These photographs have not been produced nor preserved. May be that the photograph of Rajinder appellant alone was shown without placing the photographs of others. If photographs are shown before hand, the identification is worthless. In *L. Chharia v. State of Maharashtra*, 0065/1967 : 1968 CriLJ1124 it was held : 'Showing a photograph prior to the identification makes the identification worthless.' The ability of a witness 'to identify should be tested without showing him the suspect, or his photograph or furnishing him data for identification.'

(11) There is no shortage of suspects. The fair thing is to show a series of photographs, and to see if the person who is expected to give information can pick out the prospective accused. It is clearly illegitimate, it would be most improper, to inform a witness before hand who is to be called as an identifying witness by the process of making the features of the accused familiar to him through a

photograph.

(12) Apart from this it is clear from evidence that on 12th and 13th December 1974 the appellant was shown to the witnesses when his recovery statement was recorded. If this is so, no adverse inference can be drawn from the appellant's refusal to participate in the test identification parade, which was fixed, according to the prosecution case, for 18th December, 1974.

(13) There has been no identification of persons and properties in this case. The process of identification by the identifying witnesses involves the statement by the identifying witnesses that the particular properties identified were the subject matter of the offence, and the persons identified were involved in the offence. In criminal cases it is improper to identify the accused only when in the dock ; the police should place him before hand, with others, and ask the witness to pick him out. The witness should not be guided in any way, nor asked, 'Is that the man?' So, with photographs; that of the prisoners should be placed with others and the witness asked to pick it out. Phipson on Evidence 12th ed. p. 512. If the accused refuses to participate in the test identification parade without any good reason adverse inference can be drawn against him. But before this can be done refusal has to be proved by satisfactory and reliable evidence.

(14) In all these three appeals one thing must be noted. There has been no test identification parade of the stolen property. The learned judge himself excluded the recovery in all the cases. After excluding recovery he found sufficient evidence against the appellants for their conviction. I cannot agree. Minus recovery there is nothing in these cases. There is neither recovery nor identification of the accused. Nothing to connect the appellants with the crime. Nor has there been an identification of the property. Of all these serious infirmities in the prosecution case the appellants are entitled to take advantage. The prosecution case has not been proved beyond reasonable doubt.

(15) For these reasons this appeal also must be allowed. Cri. A. No. 284 of 1980.

(16) Now I turn to the appeal of Rattan Lan (Cri. Appeal No. 284 of 1980). He was charged under section 411 Indian Penal Code as a receiver of stolen property. All

that was found in his possession was a melted gold piece weighing about 1 tola 2 mashas. It has not been proved that this ingot of gold was the product of the stolen articles. Unless it is established by clear and cogent evidence, Rattan Lal cannot be held guilty of receiving stolen property. It is the duty of prosecution in order to bring home the guilt of the person under section 411 Indian Penal Code to prove (i) that the stolen property was in the possession of the accused, (ii) that some person other than the accused had possession of the property before the accused got possession of it, and (iii) that the accused had knowledge that the property was a stolen property. (Trimbak v. State of M.P. : AIR 1954 SC39). None of these elements have been proved. It has not been proved that it was the stolen property which was in the possession of the appellant Rattan Lal. Nor has it been proved that any of the three other accused persons had possession of the property before Rattan Lal got possession of it. I have already held that the recovery of stolen property has not been duly proved because there has been no identification parade of the stolen ornaments. The learned trial judge has himself excluded the recovery of ornaments. Unless the identity of the stolen articles is established beyond reasonable doubt, it is difficult to sustain the conviction of Rattan Lal as a receiver of stolen property.

(17) The same criticism can be leveled against the evidence of Tara Chand and Parshottam. The prosecution case is that Rattan sold one piece of gold to Tara Chand and pawned another piece with Parshottam. Tara Chand and Parshottam have supported the prosecution. But on their evidence Rattan Lal cannot be convicted unless it is established beyond reasonable doubt that Rattan received the stolen property and the melted gold was from that property. If at the outset there is identification of stolen property the prosecution case against Rattan must fail. The trial judge admits that there is no direct evidence to prove that the stolen jewellery was melted into three golden pieces. As with identification of persons so with property. The guilt of the appellants has not been proved beyond shadow of doubt. In my opinion Rattan Lal is entitled to an acquittal. I, therefore, accept his appeal and set aside his conviction and sentence.

(18) For these reasons, all the four appeals are allowed and the convictions and sentences of the appellants are set aside.

