

Shankar Vs. State

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Court : Delhi

Decided On : Feb-10-1989

Reported in : ILR1989Delhi35

Judge : P.K. Bahri, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 392; [Evidence Act, 1872](#) - Sections 114

Appeal No. : Criminal Appeal Nos. 118 and 169 of 1988

Appellant : Shankar;premchand

Respondent : State;state

Advocate for Pet/Ap. : J.K. Sharma,; R.K. Sanghi,; amices Curiae and;

Judgement :

P.K. Bahri, J.

(1) These two appeals arise from the same judgment of the Additional Sessions Judge, so they are being disposed of by this common judgment.

(2) APPELLANT-SHANKER and appellant-Prem Chand were charged for an offence punishable under Section 392 read with Section 397 of the Indian Penal Code for having committed robbery on March 14, 1985, at house No. C-1/19,

Safdarjang Development Area, New Delhi, at about 2.30 P.M. of one Vcr make National Panasonic 370, one two-in-one make National Panasonic, one another two-in-one make Sharp and one transistor make Philip belonging to Smt. Uma Malhan.

(3) Vide judgment dated October 4, 1988, Shri S, C. Jain. Additional Sessions Judge, had sentenced accused Prem Chand to undergo rigorous imprisonment for five years and to pay a fine of Rs. 500.00 and in default to further undergo simple imprisonment for one month under section 392, Indian Penal Code. and had sentenced accused Shanker to undergo rigorous imprisonment for seven years and to pay a fine of Rs. 200.00 and in default to further undergo simple imprisonment for one month under Section 392 read with Section 397, Indian Penal Code.

(4) One Mohinder Puri from telephone No. 666287 had given information to Police Control Room regarding theft having been committed at the aforesaid house and the report was written in the daily diary No. 42B at 4.30 P.M. and Si Raj Kumar Along with Constable Mahinder Singh proceeded to the spot and there he recorded the statement of Kamlapati (Public Witness I), the employer of Smt. Malhan, who made the statement Ex. Public Witness 1/A in which he mentioned that he was alone present in the house while his employer had gone to visit her brother in Malcha Marg and her daughter had also gone for some work and while) he was ironing some clothes that two persons aged about 30-35 years, one of short stature having semi black complexion of heavy built wearing black pant and white shirt and the other somewhat taller having wheatish complexion strongly built, entered the house and the short statured person took one video make National Panasonic 370 and tied in a sheet while the other person had placed a knife on his neck and after they left the house, he managed to come out from a window and informed the neighbour domestic servant Gopal and then police came to the spot and later on it was checked that besides the said video, two two-in-one one of National Panasonic make and the other of Sharp make. and one transistor of Phillip make also had been taken away by the said culprits. The case was registered on the basis of this statement vide F.I.R., copy of which is Ex. Public Witness 2[B. Site-plan Ex. Public Witness 3/B was also prepared.

(5) These two appellants came to be arrested on August 13, 1985, in some other case and they are stated to have made disclosure statement regarding their having committed thefts and robberies including the robbery at the house in question and they offered to get recovered the case property of this case as well. Appellant-Shanker is stated to have led the police party to his house No. 97, Lane No. 3, Durga Puri and he got recovered a large number of case property including the video make Np 370 of this case vide recovery memo of which copy is Ex. W 7/B. Similarly Prem Chand-appellant got recovered one two-in-one National make Along with other goods of other cases from his house in bearing No. E-29, Jyoti Colony, East Shahdara, Delhi, which were taken into possession vide. recovery memo of which photo copy is Ex. Public Witness 71C. Smt. Malhan and her servant are stated to have identified the said case property at the Police Station. No identification parade was held in respect of the case property in the presence of any Magistrate. The accused were also not got identified in any identification parade from Public Witness 1 who was the only witness of the robbery. It is pertinent to mention that Public Witness I in court went on to identify the appellants as the two robbers who committed the robbery on that day. Indeed there cannot be any doubt that the robbery had taken place at the said house as mentioned by Kamlapati. There was no reason for Kamlapati and Smt. Malhan to make a wrong statement on the point of robbery.

(6) It has been argued by the learned counsel for the appellants that Kamlapati had stated that he had bolted the premises from inside while he was performing the domestic work and the culprits had forced open the door which had the effect of denting the kundi of the door but the police had not cared to take into possession the said dented kundi and so a doubt is caused regarding the factum of robbery itself. I do not agree. After all, the kundi had not broken and fallen apart so that the Investigating Officer should have taken into possession the said kundi. The culprits were not known. So, in the F.I.R. only some physical features of the unknown culprits were mentioned. I hold that in fact the robbery did take place as stated by Kamlapati (PWI). The question which assumes significance is whether the said two culprits who committed the robbery are the two appellants before this Court

(7) The appellants were arrested after about five months of the commission of offence. No facial features of the culprits had been enumerated in the F.I.R. If Kamlapati had noticed the facial features of the culprits, he would not have failed to mention them in the F.I.R. when he went on to mention other physical features of the culprits. It is also significant to mention that on August 30, 1985, a statement was made by this witness to the police to the effect that he was not in a position to recollect the faces of the culprits meaning thereby that he was not in a position to now identify the said culprits. He was duly confronted with this statement in his cross-examination (portion A to A of mark 'A' document). When Kamlapati was not in a position to identify the culprits on August 30, 1985, it is not understandable how he came to identify these two culprits in the court. At any rate, a serious doubt arises regarding the identity of the culprits being established in view of the fact that there is no other evidence to prove that in fact these appellants had committed the robbery. The learned Additional Sessions Judge has not noticed this particular lapse appearing in the prosecution case in his judgment. He only examined the statement of Public Witness 1 and came to the conclusion that Public Witness 1 had identified the appellant as the culprits and there is no reason to doubt his testimony. The learned Additional Sessions Judge forgets that Public Witness 1 had categorically stated in his statement under Section 161, Code of Criminal Procedure, recorded on August 30, 1985, that he was not in a position to recollect the faces of the culprits with which statement he was duly confronted. So, he cannot, in my opinion, be believed when he went on to identify the appellants as the said two culprits.

(8) As far as the recovery of the robbed articles is concerned I have no reason to doubt the statement of the police officials PW7 Si Laxmi Narain Rao, and Public Witness 8 Si Chattar Singh. They have stated that at the time of effecting the recovery the public witnesses were requested to join but none came forward. The disclosure statements made by the two accused were also proved by the said witnesses including Public Witness 4 Head Constable Balwan Singh and Asi Om Parkash.

(9) The learned counsel for the appellants have vehemently argued that there is no satisfactory evidence brought on the record to show that the articles recovered

at the instance of the appellants were the robbed property belonging to Smt. Marian. I may mention that the testimony of Public Witness 5 Smt. Malhan went unchallenged to the effect that video Ex. P1 and the two-in-one Ex. P2 belonged to her which were robbed from her house and which she identified in the police Station. She had brought original documents showing the ownership of said two articles, photo copies of the same were proved on record as Ex. Public Witness 5/A. PW5/B & Public Witness 5/C. The learned counsel for the appellants contended that no special features of the robbed articles were mentioned in the F.I.R. which could be linked with Exs. P1 & P2 and thus, it should be held that these articles were not belonging to Public Witness 5. I do not agree. After all Public Witness 5 made a categorical statement in court that these articles belonged to her and there is no reason to doubt the said statement when particularly her statement has gone unchallenged.

(10) 10. It is evident that these two articles Exa. P1 & P2 were the robbed property and were not recovered from the appellants. In the absence of any direct evidence of the involvement of the appellants in the commission of robbery, resort can be had only to the provisions of Section 114 of the Indian Evidence Act which lays down that if a man is in possession of stolen goods soon after the theft the court may presume that either he is a thief or has received the goods knowing them to be stolen unless he can account for his possession. In *Amar Singh & Others v. The Crown* (1), the stolen goods were found to be in possession of the culprit after four months of the occurrence. The offence was brought home under Section. 411 of the Indian Penal Code read with Section 114 of the Indian Evidence Act in that case.

(11) In *Sheo Nath v. The State of Uttar Pradesh*, : 1970 CriLJ601 , if it has been laid down that three presumptions are possible when recovery of stolen goods from a particular culprit is proved soon after the occurrence i.e. the culprit took part in the dacoity or that he received the stolen goods knowing that the goods were stolen in the commission of the dacoity or thirdly, that he received those goods knowing them to have been stolen. It was held that choice is to be made for drawing any of such presumptions keeping in view the facts proved in the case. In the cited case, all the property which was stolen was not recovered from the

appellant. Only some of the property was recovered from the appellants in that case and the appellant was held to be guilty of offence punishable under Section 411 of the Indian Penal Code in that case. Similarly, in the present case the appellants, in my view, cannot be convicted of offence punishable under Section 392 read with Section 397 of the Indian Penal Code inasmuch as the whole of the robbed property had not been recovered from the appellants and only some of the case property had been recovered'. The appellants were liable to be convicted of offence punishable under Section 411 of the Indian Penal Code only.

(12) I, hence, partly allow the appeals, set aside the convictions and sentenced of the appellants under Sections 392 & 397, Indian Penal Code and instead I convict each of them for offence punishable under Section 411, Indian Penal Code. The appellants have been in judicial custody and they have already undergone the required sentence under Section 411, Indian Penal Code, so they be set at liberty forthwith if not required to be detained in any other case. The appeals are disposed of with above modification.

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