Nazir Vs. State

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Court : Kerala

Decided On : Jun-21-2002

Reported in : 2002CriLJ4742

Judge : M.R. Hariharan Nair, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 34, 378, 380, 411 and 457; Code of Criminal Procedure (CrPC) - Sections 222(2) and 313

Appeal No. : Cri. R.P. No. 173 of 1994

Appellant : Nazir

Respondent : State

Advocate for Def. : L. Aloysius Thomas, Public Prosecutor

Advocate for Pet/Ap. : Roy Thomas and; C.B. Sreekumar, Advs.

Disposition : Petition dismissed

Judgement :
ORDER

M.R. Hariharan Nair, J.

1. Is the offence under Section 411 of the Indian Penal Code a minor offence vis-a-vis Section 380 of the I.P.C.? Can one be convicted for the former offence

without a specific charge accusing him of that offence and based on charge under Section 380 for which he faced the trial'? These are some of the questions posed in the present revision.

2. The appellant is the second accused in C.C. No. 83/89 on the file of the Additional Judicial First Class Magistrate I. Ernakulam. He is aggrieved that though the conviction entered against him by the trial Court for offence under Sections 457 and 380 read with Section 34 of the Indian Penal Code was set aside in Cri. A. 141/92 by the Third Additional Sessions Court, Ernakulam the learned Sessions Judge proceeded to convict him for the offence under Section 411 of the I.P.C.

3. Sri C. B. Sreekumar who argued the case of the appellant submitted that in the absence of any charge under Section 411 of the I.P.C. framed against the second accused, there was no question of convicting him for the said offence. It is also his case that the ingredients of Section 411 of the I.P.C. stand unestablished in the case in so far as there is no evidence adduced to show that the second accused received stolen properties from the other accused. What is to be considered, therefore is whether there is any illegality, irregularity or impropriety in the judgment of the appellate Court.

4. The prosecution case was that pursuant to the common intention of the 4 accused to commit theft they went in a country boat at about 11 p.m. on 14-11-1988; approached the barge by name 'Sheeja' belonging to the Arm Rock Company which had been moored in the boat yard of the Harbour Marine Industries situated north of the Fisheries Harbour, Thoppumpady; trespassed into the barge of which P.W. 1 was the watchman and thereafter committed theft of six Life Jackets worth Rs. l000/-each, two chairs worth Rs. 400/- each and two plastic cans worth Rs. 100/- each from the engine room of the barge after opening its door.

5. A perusal of para 8 of the appellate judgment shows that the appellate Court concurred with the finding of the trial Court that the evidence of P.Ws. 1 to 3 clearly established that the above items marked as MOs. 1 to 3 series were stolen from the barge 'Sheeja' on the date of occurrence and that there was no possibility

of P.W. 1 himself fraudulently selling MOs. 1 to 3 after removal from the barge. In para 10 it further found that the available evidence established beyond doubt that the stolen articles were recovered from the house of the present petitioner pursuant to information given by him to the police in the confession statement. The petitioner was acquitted of the offence under Sections 457 and 380 of the I.P.C. only because P.W. 1 could not identity the second accused as one of the four persons who committed the theft. At the same time the appellate Court accepted the prosecution evidence with regard to the fact that the MOs. in question were actually seized from the house of the petitioner based on his own confessional statement.

6. The question then is whether the aforesaid finding is sufficient to justify a conviction under Section 411 of the I.P.C. Section 411 reads as follows :

Dishonestly receiving stolen property- Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

The essential ingredients, therefore, are :- (a) A person knows or has reason to believe a thing to be stolen property.

(b) With such knowledge and dishonest intention he receives or retains it.

7. The contention of the petitioner is that there is nothing to show that anyone among accused Nos. 1, 3 and 4 had handed over MOs. 1 to 3 to him and that there is no evidence of receipt of any stolen property by him. The absence of knowledge that it was stolen property is also raised as a ground justifying exoneration from the offence under Section 411 of the I.P.C. I find no merit in this contention.

8. A perusal of the section itself makes it clear that it is not merely receipt of stolen property that is made punishable. Retention of stolen property with knowledge that it was stolen property also comes with in the sweep of the section. As far as the present case is concerned the evidence of P.Ws. 1 and 3 identifying MOs. 1 to 3

and the evidences of the Investigating Officer and other witnesses with regard to recovery clearly show that the present petitioner was retaining possession of MOs. 1 to 3 which were actually stolen from the barge, of which P.W. 1 was the watchman and P.W, 3, the Syrang. Then the only further question is whether the appellant had the requisite knowledge that it was stolen property. I have perused the answers given by the petitioner when questioned under Section 313 of the Cr.P.C. and it is seen that he had not given any explanation for the finding of these stolen items in his house. Even during arguments today counsel for the petitioner could not give any ' plausible explanation for MOs. 1 to 3 which are proved to be stolen to be found in the house of the second accused. The evidence of P.W. 1 is sufficient to show that the items were stolen on the date of occurrence from the barge belonging to the company which had employed him as watchman. In these circumstances the appellant has to be, fixed with knowledge that the items were stolen. He has thus committed the offence under Section 411 of the I.P.C.

9. The other contention to be gone into is whether in the absence of a specific charge for the offence under Section 411 of the I.P.C. framed by the trial Court, the appellate Court was justified in entering conviction for that offence. In this regard reference is made by the learned Government pleader to Section 222(2) of the Cr.P.C. which reads as follows :

When a person is charged with an offence and facts are proved which reduced it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

9A. The question to be considered then is whether the offence under Section 411 is a minor offence vis-a-vis the offence under Section 380 of the I.P.C. Section 380 which was one of the offences charged against the petitioner and for which he was tried reads as follows :

Theft in dwelling house, etc.- Whoever commits theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or used for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to be fine.

The important element involved in the said offence is theft which is defined in Section 378 of the I.P.C. as follows :

Theft- Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

10. The ingredients of the offence charged thus include movement of movable properties like MOs. 1 to 3 from the possession of the owner of the barge without that persons consent and with dishonest motive. Movement of MOs. 1 to 3 and the dishonest intention in taking them away from the possession of the owner are thus very much included in the offence charged against the accused. I have already quoted Section 411 of the I.P.C. and there also the element to be proved is dishonest intention in receiving or retaining stolen property. The stolen property which was found to have been recovered from the possession of the petitioner were the very same items which were referred to in the charge under Section 380 framed by the trial Court against the petitioner. It is therefore obvious that Section 411 is actually a minor offence vis-a-vis offence under Section 380. In fact it is so found in some earlier cases like Baliram Tikaram Marathe v. Emperor AIR 1945 Nag 1 : 1945 (46) Cri LJ 448 also. In these circumstances I find no merit in the contention of the petitioner that the appellate Court erred in proceeding to convict him for the offence under Section 411 of the I.P.C. without raising specific charge mentioned in that section.

11. The only other point to be considered in the revision is the propriety of the sentence imposed. The maximum punishment contemplated in Section 411 of the I.P.C. is imprisonment of either description for a term which may extend up to three years or fine or both. The sentence imposed by the appellate Court in this case is R.I. for a period of 18 months. By no stretch of imagination can this be said to be excessive when the fact that the accused is not a first offender is taken into account. The revision, in the circumstances, is without merit and is dismissed. The trial Court will enforce the punishment imposed by the appellate Court by issuing appropriate revised warrant as contemplated by rules.