

State Vs. Ibrahim Sumar

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Court : Gujarat

Decided On : Aug-02-1983

Reported in : (1984)1GLR126

Judge : S.L. Talati and; I.C. Bhatt, JJ.

Appellant : State

Respondent : ibrahim Sumar

Judgement :

I.C. Bhatt, J.

1. The State of Gujarat being aggrieved by the acquittal order passed by the learned Additional Sessions Judge, Kutch at Bhuj in Sessions Case No. 7 of 1981 passed on July 24, 1981 has preferred Criminal Appeal No. 1108 of 1981, whereas Criminal Appeal No. 957 of 1981 has been filed by Cachu Karsan against the order dated 24-7-1981 of confiscation of the truck No. GTY-3073, before this Court.

2. The respondents-accused were tried for offences punishable under Sections 395, 332, and 149 of the Indian Penal Code. The prosecution case in short is that Range Forest Officer, Dayapar, Mr. H.J. Upadhyaya received information that truck No. GTY-3073 had entered reserved forest namely Ravaleshvar Forest for the purpose of carrying away wood obtained by illegally felling trees from the

forest. Therefore, he with a constable and his subordinates took certain position on 17-7-1980. It is the further case of the prosecution that on 18-7-1980 at about 4-00 a.m. a truck loaded with wood and bearing registration mark in question was seen approaching the main road from the direction of the Ravaleshvar reserved forest. Upadhyaya gave a signal to the truck driver to stop the truck but the truck did not stop and, therefore, it was chased. It is the case of the prosecution that the men on the truck threw stones with the result that the wind screen glass of the jeep was broken and one Kuber a public servant was hit by a missile. The case of the prosecution is that three rounds were first fired in the air, then four more rounds were fired and three wheels of the truck were punctured and the truck stopped. The men who were on the truck even tried to snatch away the rifle from Police Constable Ganpatsinh. However, the men taking advantage of the darkness disappeared. After usual investigation the charge-sheet was submitted before the Judicial Magistrate, First Class, Kutch at Bhuj, who committed the case to the Court of Sessions, Kutch at Bhuj. The accused were arrested on 23-7-1980. The accused pleaded not guilty. The learned trial Judge after considering the entire evidence on record has given the benefit of doubt to the accused.

3. Learned Public Prosecutor, appearing for the appellant-State in Criminal Appeal No. 1108 of 1981 drew our attention mainly to the evidence of the three witnesses, namely, Harshadrai Jayantilal Upadhyaya P.W. 1 Exh. 10, who is the complainant and who has filed complaint Exhibit 11, Balaji D. Kuber P.W. 2 Exhibit 12 and Ganpatsinh Chandgiram Police Constable P.W. 3 Exhibit 15. Learned Public Prosecutor has argued that relying on these three witnesses the trial Court ought to have convicted the accused for the offences with which they were charged. On the other hand learned Advocate for the respondents-accused supported the acquittal order and submitted that these witnesses are not at all reliable and it is not possible to place any reliance on their evidence. There is no other positive evidence for coming to the conclusion that the accused were the persons in the truck.

4. This is an acquittal appeal. Governing and exercise of the appellate jurisdiction in an acquittal appeal the principles are well settled. We are conscious of the fact that the decision in the present case is one which has resulted in the acquittal of

the accused persons. It is true that we have full powers to review the case and it is open to us to reconsider the evidence on which the order of acquittal is founded. However, in exercising the appellate power one has to take into consideration and give proper weight to matters such as view of the trial Court as to credibility of the witnesses; presumption of innocence in favour of the accused; the right of the accused to the benefit of any doubt and the slowness of the appellate Court in disturbing the finding of fact arrived at by a Judge who had the advantage of seeing the witness and such finding would not be disturbed if two reasonable conclusions can be reached on the basis of the evidence on record. If two views are possible and if there are plausible reasons and the conclusions are reasonable, we should be reluctant in interfering with the acquittal order. As far back as 1934, the Privy Council in *Sheo Swamp and Ors. v. King Emperor* 0043/1934 observed as under:

It cannot be said that the High Court has no power of jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the Lower Court has 'obstinately blundered' or has 'through incompetence, stupidity or perversity' reached such 'distorted conclusions as to produce a positive miscarriage of justice' or has in some other way so conducted or misconducted itself as to produce a glaring miscarriage of justice or has been tricked by the defence so as to produce a similar order.

It was further observed as under:

Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusion upon fact, the High Court should and will always give proper weight and consideration to such matters as-

(1) the views of the trial Judge as to the credibility of the witnesses;

(2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial;

(3) the right of the accused to the benefit of any doubt; and

(4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses.

In a recent judgment, the Supreme Court in *Babu v. State of U.P.* : 1983 CriLJ334 has reaffirmed the principles, governing acquittal appeals, laid down in the case of *State of U.P. v. Samman Doss* 1972 SCC (Cri.) 285-86 which reads as under:

There are, however, certain cardinal rules which have always to be kept in view in appeals against acquittal. Firstly, there is a presumption of innocence in favour of the accused which has to be kept in mind, especially when the accused has been acquitted by the Court below; secondly, if two views of the matter are possible, a view favourable to the accused should be taken; thirdly, in case of acquittal by the trial Judge, the appellate Court should take into account the fact that the trial Judge had the advantage of looking at the demeanour of witnesses; and fourthly, the accused is entitled to the benefit of doubt. The doubt should, however, be reasonable and should be such which rational thinking men will reasonably, honestly and consciously entertain and not the doubt of a timid mind which fights shy - though unwillingly it may be - or is afraid of the logical consequences, if that benefit was not given.

Keeping in view the well settled principles for dealing with an acquittal appeal we will now examine the merits of the present case. Now, the evidence of Harshadrai Jayantilal Upadhyaya P.W. 1 Exhibit 10 is required to be appreciated only on the point whether this witness and the other witnesses could have seen the accused in the truck in dark night in a jungle when the truck was in motion and whether it was possible for this witness to identify the accused persons in such a situation. On this aspect of the matter Upadhyaya has stated in examination-in-chief that they had given signal by torch and hand to stop the truck, but the truck did not stop and ran towards Bhuj in speed. In the cross-examination this witness has stated that when they saw the truck first time, it was coming in full speed. The head lights

were on and on coming the truck nearer eyes were dazzled. He has further stated that the truck had passed speedily in a second. This witness has stated that when the truck passed through them after taking a turn, at that time, they identified the driver in the light of the torches. He has further stated that he has not stated anything in the complaint as to how he knew accused No. 1. He has again stated that he has not written in the complaint that he identified the accused No. 1 in the light of the torch. In view of this state of evidence of this witness, it is not possible to believe that this witness might have identified the driver in the torch light. The learned trial Judge has rightly rejected the evidence of this witness and we agree with that conclusion regarding this witness.

5. The prosecution has placed reliance on the evidence of Balaji D. Kuber P.W. 2 Exhibit 12. On the aspect of the identification of the accused, this witness in paragraph 2 of his deposition has stated that they had seen a truck coming from Ravaleshwar Rakhal and they gave signal to stop that truck but it was not stopped. This witness has stated that Police Constable Ganpat had thrown torch light on the driver and had told this witness that Ibrahim Sumar was the driver. He says he had not identified the driver. Now, in the cross-examination this witness has stated that no identification parade was held. At the time of incident the night was dark. He states that he has not stated before police that they had seen the truck driver in the torch light and Ganpat told him that his name was Ibrahim Sumar. Therefore, in view of this deposition this witness also cannot be believed on the point of identification of the driver when the truck had passed.

6. Witness Ganpatsinh P.W. 3 Exhibit 15 states that they had seen a truck No. GTY-3073 at about 4-00 a.m. They had shown light, shouted, gave whistle and tried to stop the truck but the truck did not stop. Therefore, they chased the truck in the jeep. In cross-examination this witness has stated that when the truck was taking turn, he had identified accused No. 1 driving the truck in torch light. This witness further stated that he has not stated in the police statement that he had identified the driver in the torch light. He has stated that he had seen accused Nos. 2 & 4 in the light of the jeep, when the jeep was chasing the truck. This witness also cannot be relied on for the purpose of identifying the accused Nos. 1 or 2 & 4.

7. Therefore, considering the evidence of all these witnesses it is not possible to come to any definite conclusion as to who had thrown the torch light for the purpose of identifying the driver. Moreover, it is very difficult to swallow that, for the persons standing on the road it will be possible to identify the driver when the truck was taking a turn and was in speed merely by throwing torch light. It is in evidence that the truck had passed through them in one second. The learned trial Judge, therefore, rightly did not place any reliance on the evidence of these witnesses for the purpose of identification of the accused and has rightly rejected the prosecution version that accused No. 1 was identified by them in the torch light.

8. The learned Public Prosecutor has taken us through the entire evidence on the record including the judgment of the learned trial Judge. After going through the judgment of the trial Court, in any view of the matter it cannot be positively said that the view taken by the learned trial Judge is unreasonable or not possible in the facts and circumstances of the case. The reasons given by the learned trial Judge are plausible on the materials on the record and we entirely agree with the same. Therefore, we confirm the order of acquittal passed by the learned Additional Sessions Judge, Kutch at Bhuj in Sessions Case No. 7 of 1981. Criminal Appeal No. 1108 of 1981 is, therefore, dismissed.

9. Criminal Appeal No. 957 of 1981 has been filed by Bhachu Karsan against the order dated 24-7-1981 of the confiscation of the truck bearing No. GTY-3073. Learned Counsel appearing for the appellant submitted that the order of confiscation is illegal and contrary to the evidence on record, without jurisdiction and violative of the principles of natural justice. According to the learned Counsel for the appellant the truck was of the ownership of the present appellant, which was seized on 18th July, 1980 and as the present appellant was not accused of any offence and was one of the prosecution witnesses the confiscation of the truck was illegal and without jurisdiction.

10. Learned Counsel Mr. R.A. Mehta placed reliance on a case of *Mohomed Yusuf v. Jivraj Premjibhai* and Anr. 4 G.L.R. 1019, wherein this Court observed that, ordinarily, a Criminal Court passing an order under Section 517 of Criminal Procedure Code, 1898 should not go into the question of the title of the property.

But if a person reasonably claims to be entitled to possession thereof and if the property has, in fact been taken from his possession, the property should be returned to him, unless the property is stolen property within the meaning of Section 410 I.P.C. But if the property has been produced in Court from the possession of someone, the Court should not pass an order directing the property to be returned to somebody else, without giving a notice to that person unless he happens to be an accused person or the complainant and unless the order of the disposal of property is passed in the judgment itself.

11. It was submitted that this Court in *Balmal Matlomal v. State of Gujarat* 11 G.L.R. 130 observed that the powers of the Court, under Section 517 of the Criminal Procedure Code no doubt extends to confiscation of property in the custody of the Court, but it is not every case in which the Court must necessarily pass an order of confiscation irrespective of the circumstances of the case. It is possible to conceive of cases where the subject-matter of the offence may be property which under the law relating the offence is liable to be confiscated as a punishment on conviction. The section contains a general provision for disposal of the property in the circumstances mentioned in the latter part of the section. Therefore, though the Magistrate has power to confiscate any such property under Section 517 of the Criminal Procedure Code, he has to exercise his powers in a reasonable and judicial manner. In that case this Court held that it was too much to say that the auto-rickshaw was used in commission of an offence of theft in respect of the catch-pit covers from the municipal gutters. All that he did was that he placed the stolen property in it and went away in that rickshaw and for that reason it cannot be said that rickshaw was used in commission of that offence.

12. Mr. Mehta also placed reliance on a decision of the Supreme Court in *State Bank of India v. Rajendrakumar Singh and Ors.* : 1969 CriLJ659 , wherein it has been observed by the Supreme Court that, it is true that the statute does not expressly require a notice to be given or a hearing to be given to the parties adversely affected but though the statute is silent and does not expressly require issue of any notice, there is in the eye of law a necessary implication that the parties adversely affected should be heard before the Court makes an order of return of the seized property.

13. Mr. R.A. Mehta further placed reliance on a case in *N. Madhavan v. State of Kerala* : 1979 CriLJ1197 wherein the Supreme Court observed that when after an inquiry or trial the accused is discharged or acquitted, the Court should normally restore the property, which is produced before it or which is in its custody to the person from whose custody it was taken. Departure from this rule of practice is not to be lightly made when there is no dispute or doubt that the property was seized from the custody of such accused and belonged to him. It was further observed that where the Sessions Judge did not give any reason for directing confiscation of the licensed gun belonging to accused and there was no material indicating special circumstances which would warrant departure from the general rule. The Supreme Court held that the order of confiscation which was passed without giving opportunity of being heard to the accused specifically, was manifestly arbitrary and, therefore, liable to be set aside.

14. Mr. R.A. Mehta, in support of his case also placed reliance on the decision in *Natvarlal Damodardas v. The State of Gujarat and Anr.* 10 GLR 361, in *Suleman Issa v. State of Bombay* 56 BLR 1180.

15. Now, in the instant case, from the judgment of the trial Court it appears that the trade was used for the commission of the crime. The order of disposal of muddamal property can be passed under Section 452 of the Code of Criminal Procedure, whereunder, after the inquiry or trial is concluded, the Court may make such order as it thinks fit for the disposal, by destruction, confiscation or delivery to any person claiming to be entitled to possession thereof or otherwise of any property or document produced before it or in its custody, or regarding which, any offence appears to have been committed or which has been used for the commission of any offence. The learned trial Judge does not appear to have passed order under Section 452 Criminal Procedure Code but appears to have taken recourse under Section 55 of the Forest Act, 1927, without following procedure as prescribed in Chapter-IX of the Forest Act, 1927.

16. Section 452(1) of the Code of Criminal Procedure reads as under:

452(1). When an inquiry or trial in any criminal court is concluded, the court may make such order as it thinks fit for the disposal, destruction, confiscation or

delivery to any person claiming to be entitled to possession thereof, or otherwise, of any property or document produced before it or in its custody, or regarding which any offence appears to have been committed or which has been used for the commission of any offence.

It is true that the inquiry which is contemplated by this provision is a summary inquiry of limited ambit and the detailed inquiry is not contemplated. This kind of inquiry cannot be allowed to take the form of regular trial because the order under this Section 452 Cr.P.C. which is passed in the summary inquiry of disposal of muddamal property to any individual who is claiming to be entitled for the possession thereof or otherwise is passed in the summary inquiry and it never determines the title or ownership of the said property. That question is left entirely to the Civil Court and the party which is aggrieved by that order has got a remedy in the Civil Court. Therefore, while passing an order under this Section 452 Cr.P.C., the Court has to find out prima facie as to who is entitled to possession of the property and whether there are any rival claims. For doing so, as held by the Supreme Court in State Bank of India's case (supra)(1969 SC 401), though the statute is silent and does not expressly require issue of any notice, there is in the eye of law, necessary implication that the parties who may be adversely affected, should be heard before the Court makes an order for the confiscation or the return of the seized property. Therefore, parties to be adversely affected, should be heard before passing any order regarding disposal of the muddamal articles under Section 452. Cr.P.C. There may be certain cases where the persons who claim the property are already before the Court and if they have appeared before the Court before passing the order of disposal of the muddamal, it may not be strictly necessary to issue fresh notices and hear the concerned persons again.

16.1 Keeping in mind the above authorities and the provisions of law we will now consider the validity of the order passed in the present case. The main grievance of the appellant is that though he is the owner of the truck in question, he has not been even heard before passing the order of confiscation even though he is adversely affected. From the record of the case, it is clear that none of the concerned parties were heard or given any opportunity before passing the order of confiscation. Therefore, without going into the propriety or otherwise of the

confiscation order, we feel that the learned trial Judge should have at least heard the concerned parties, or parties to be adversely affected should have been given opportunity of being heard before passing the order of confiscation. Therefore, passing of confiscation order, without hearing the affected parties, amounts to violation of principles of natural justice and contrary to law. From the record, it is clear that the truck was produced as muddamal article No. 33 and that muddamal article was handed over to the accused Ibrahim after taking personal bond of Rs. 5,000/ -. We have also the evidence of Bhogilal and the appellant on the record. Bhogilal, in his evidence before the Court Exhibit 24, has stated that he was the owner of the truck GTY-3073 and he had sold that truck to Bhachu Karsan for Rs. 50,000/-. He has further deposed that there was an agreement regarding the sale of this truck on which Bhachu Karsan had signed in his presence. That agreement is produced at Exhibit 25. Evidence of Bhachu Karsan is also at Exhibit 26. He has also stated that he had purchased the said truck from Bhogilal and he had sold the said truck to Sumar Valimamad for Rs. 45,000/-, and that the truck has been transferred on his name. He produced the agreement at Exhibit 27. He has in cross-examination stated that this agreement was entered into on 15-8-1980 and the possession of the truck was given to Sumar after the said agreement. From agreement Exhibit 27, it clearly appears that the possession is handed over and that he has received part payment towards the full consideration. From these documents, it is not clear as to in whose name the truck stands in the Registration Book. At the same time, this Bhachu has filed an affidavit stating that he has sold the truck and has handed over the possession. Therefore it is not possible from this state of evidence to come to any definite conclusion as to who is entitled to get the possession of the truck. However, from the judgment of the trial Court, it is evident that the order of confiscation has not been passed under Section 452(1) of the Cr.P.C., but Section 55 of the Forest Act, 1927, appears to have been resorted to without following even the procedure prescribed in Chapter IX of the Forest Act, 1927. Therefore, the order of confiscation passed by the learned trial Judge is vitiated by law and liable to be set aside. Under these circumstances, we are of the opinion that this matter should be sent back to the trial Court and the trial Court after hearing the parties to be adversely affected, is directed to pass appropriate order under Section 452 of the Cr.P.C. according to law.

17. In the result, we allow this appeal. The order of confiscation of the truck passed by the learned Additional Sessions Judge is set aside. The trial Court is directed to pass appropriate order regarding disposal of the muddamal property after giving reasonable opportunity of being heard to the concerned parties.

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