

Chimna Vs. the State

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Court : Rajasthan

Decided On : Mar-07-1960

Reported in : AIR1961Raj35; 1961CriLJ310

Judge : Jagat Narayan, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 162 and 164;
[Evidence Act, 1872](#) - Sections 9 and 114; Indian Penal Code (IPC) - Sections 411

Appeal No. : Criminal Revn. No. 2 of 1959

Appellant : Chimna

Respondent : The State

Advocate for Def. : B.C. Chatterjee, Asst. Govt. Adv. and; J.S. Chordia, Adv.

Advocate for Pet/Ap. : Hasti Mal, Adv.

Disposition : Revision dismissed

Judgement :

ORDER

Jagat Narayan, J.

1. This is a revision application by one Chimna alias Mohan son of Soban alias Bada, Daroga, resident of village Bawalwara, Police Station, Jawas, District

Udaipur, who was convicted under Section 411 I. P. C. and sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 200/-, or in, default to undergo further rigorous imprisonment for one month, by the First Class Magistrate, Kherwara. The conviction and sentence were confirmed on appeal by the Sessions Judge, Udaipur.

2. The prosecution case was that a theft took place in the house of Maji Sahiba of Bawalwara, Smt. Jumna Kaur, while she was away. The theft was discovered on her return from Bawalwara. She sent a report about it to her son Rawatji of Jawas, Shri Takhatsingh, on 12-2-51. This report was sent by Shri Takhatsingh to the S. H. O., Jawas along with a list of stolen property on 15th February, 1951. The relations between Maji Sahiba and Rawatji, Who was her adopted son, were not cordial.

Shri Takhatsingh suspected that no theft had actually taken place and his adoptive mother had really given the ornaments away to her daughter. After investigation, the S. H. O. submitted a final report in the case in which he expressed the opinion that it was doubtful whether any theft had taken place. Later on, Maji Sahiba wrote another letter Ex. D. 2 on 7th April, 1952 to the S. I. in which she mentioned that she had come to know that Pannalal and Amritlal Mahajans, who used to visit the Palace at Bawalwara, had a hand in the theft. There is no evidence that any action was taken by the police on this letter.

3. On 22nd November, 1955 Head Constable Kanji Bhai PW 12 arrested Chimna applicant on suspicion at 11 p.m. outside a Dharamshala in Ahmedabad and upon search a gold pendant of a necklace, weighing about 20 tolas and studded with precious stones, was recovered from his pocket which a man of his means was not expected to possess. When the Head Constable asked him how he came by it, he said that his mother had sent it to him for sale at Ahmedabad and Chhaganlal Mahajan had given it to her.

4. The S. I. of Ahmedabad before whom Kanji Bhai produced Chimna along with the gold pendant inferred that it had been stolen from the house of Chhaganlal. He accordingly sent information about it to Shri Bhanwarlal, S. H. O., Jawas, Pw. 6. Bhanwarlal made inquiries from Chhaganlal and found that no theft took place in

his house. He, however, discovered from his records that a theft had taken place in the Palace of Maji Sahiba of Bawalwara and thought that the pendant might have been stolen in that theft.

He accordingly went to Ahmedabad and took Chimna in his custody and interrogated him. After interrogating him he brought Chimna to Bawalwara along with the pendant. He went and saw Maji Sahiba and asked her whether she had fast a pendant in the theft which had taken place in her house in 1951. She told him -she had and produced the Chirs of the necklace of which the pendant was a part. She identified the pendant as her property. The Chirs had screws which fitted the pendant. The Chirs were taken by the S. I. into his possession in the presence of Khemchand Pw. 4.

5. Chimna applicant stated before Jawansingh Pw. 1 and Pannachand Pw. 2 that he was willing to get stolen property recovered and he took the S. I. and these two witnesses to his house in Bawalwara. He dug the floor of the house and got recovered a gold ingot, weighing 33*4 tolas.

6. An identification proceeding was held by Shri Bhanwarlal, Tehsildar Magistrate, Pw. 7 at which the gold ingot was identified by Bhimraj Pw. 11 as the one which he had prepared after melting a pair of Bindiya weighing 20 tolas, a Sheetolak weighing 4 tolas, and a Madalia weighing 10 tolas. These three ornaments were mentioned in the list of stolen property handed over to the police on 15th February, 1951. Bhimraj said that these ornaments were brought to him by Chimna applicant who told him that they had been sent by Maji Sahiba for getting them melted and converted them into an ingot which he delivered to the applicant.

7. It may be mentioned here that both Chimna and his father were servants of Maji Sahiba at one time or another. Chimna's father was a servant for about 20 years continuously till he died. His death took place after the discovery of the theft. Chimna was also in the service of Maji Sahiba about nine months before his arrest. At the time of his arrest he was working as a labourer at Ahmedabad. It does not appear, however, that he was in her service in 1951 when the theft took place or else there could have been positive evidence to that effect.

8. The pendant was not mentioned in the list of stolen property handed over by Maji Sahiba in 1951. It has come in evidence that the pendant had not been used and it was lying separately from the Chirs for about 10 years. There is no evidence to the effect that the pendant was sealed at the time of its recovery from the possession of the applicant. An identification proceeding of the pendant was also held by Shri Bhanwarlal, Magistrate, Pw. 7. It was identified correctly by Jawansingh Pw. 1, Heeralal Pw. 5, Smt. Jara Bai, Pw. 9 and Maji Sahiba Smt. Juman Kaur Pw. 10.

Jawansingh is a servant of Maji Sahiba. He stated that he had seen the daughter of Maji Sahibau wearing the necklace and so was able to identify the pendant. Heeralal is, a former servant of Maji Samoa. He stated that he had borrowed the necklace on the occasion of his sister's marriage and was therefore familiar with it. Smt. Jara Bai is a female servant of the Thikana for over 35 years. She stated that she had seen this necklace with Maji Sahiba and so was able to identify it, Maji Sahiba testified that it belonged to her.

9. Kalu Pw. 3 stated that he had seen Chimna applicant in Bawalwara near the hotel on one night when Maji Sahiba was away having gone to Udaipur and that when she returned, it was discovered that a theft had taken place in her house. Shri Takhat-singh proved the report which he received from Maji Sahiba and which he sent to the police on 15th February, 1951.

10. Chhaganlal, Mahajan of Bawalwara, Pw. 13 stated that he knew Chimna applicant and his brother and that they earned a living by cultivation and by service. He said that the two brothers between them had 10 bighas of lands and that Chimna was in his service for some time on a salary ranging between Rs. 10/- and 20/- p.m. He said that Chimna's brother borrowed Rs. 245/- from him for defraying the expenses of his marriage.

11. Mohanlal Pw. 17 is the witness in whose presence the pendant was recovered from Chimna at Ahmedabad.

12. This in brief is the prosecution evidence against Chimna. He admitted that the gold pendant was recovered from his possession at Ahmedabad near the

Dharamshala as alleged by the prosecution. He also admitted that he gave information about the gold ingot to the S. I. in the presence of Jawan-singh and Pannachand witnesses and dug it from underneath the floor of his house where it was buried. He, however, claimed that the pendant and the gold ingot both belonged to him and were not stolen property belonging to Maji Sahiba. He examined three witnesses in defence. The first of these two witnesses stated that Chimna's character was good. The third defence witness Chandu D. W. 3 was examined to explain how Chimna came to possess the pendant and the gold ingot. The story given by him was that on the day of his death Chimna's father called him and told him that he had a necklace and a gold ingot buried inside the house and asked him to tell Chimna about it. He said that Chimna's father did not tell his own wife about the ornaments.

13. The learned counsel for the applicant took me through the entire evidence on record and asked me to reassess it on the following grounds:

(1) That the statement of Maji Sahiba that she had lost a pendant in the theft which took place in the year 1951 was inadmissible in evidence as a signed statement to that effect (Ex, P. 9) was taken by the S. I. from her in the garb of a further list of stolen property.

(2) That the pendant was not sealed at the time of recovery and consequently there was no proper test identification proceedings.

(3) That Bhimraj Pw. 11 was not allowed to be confronted in cross-examination by his statement made during investigation.

14. In support of the first ground, reliance was placed on a Single Judge decision of the Oudh Chief Court Bhuneshwari Pershad v. Emperor, AIR 1931 Oudh 172, in which it was observed that:

'the policy underlying the provisions of section 162 Cr. P. C. was that the witnesses at the trial should be free to make any statement in favour of the accused which they should wish to make unhampered by anything which they might have said to the police and that where a police officer during investigation

obtains the signatures of the witnesses to statements made by them in contravention of Section 162, the evidence of such witnesses must be rejected, as there is a breach of a mandatory provision of law.'

This view should be taken to have been overruled by the decision of their Lordships of the Privy Council in *Zahiruddin v. Emperor*, AIR 1947 PC 75, in which it was held that:

'the effect of a contravention of Section 162 depends on the prohibition which has been contravened. If the contravention consists in the signing of a statement made to the police and reduced into writing, the evidence of the witness who signed it does not become inadmissible. There are no words either in the section or elsewhere in the statute which express or imply such a consequence.'

The above decision was approved by their Lordships of the Supreme Court in *Tilkeshwarsingh v. State of Bihar*, (S) AIR 1956 SC 238.

15. No part of the statement of Smt. Jumna Kuar was, therefore, inadmissible in evidence on account of the fact that a further list of stolen property Ex. P. 9 was taken from her duly signed by her in which it was mentioned that a pendant was also stolen in the theft which she omitted to mention in the previous list of stolen property. This document was obtained by the investigating officer bona fide. There was no intention to bind the witness to any particular statement on her part.

16. In support of the second ground, reliance was placed by the learned counsel for the applicant on the following observations made by me in *State of Vindhya Pradesh v. Munni Dhimar*, AIR 1954 Vindh Pra 42.

'No presumption attaches to the identification: proceedings of property. It is for the prosecution to establish affirmatively that every necessary precaution was taken to ensure fair identification. The most essential requirement is that the witnesses should not have had an opportunity of seeing the-property after its recovery and before its identification before the Magistrate. For that purpose, it is necessary to seal the property as soon as it is re-covered and to keep it in a sealed condition till it is produced before the Magistrate.'

17. In the above case, the articles, which were recovered, were such as are commonly used by the village people and are commonly sold in village markets. The accused persons claimed that the property recovered from their possession belonged to them and was not stolen property. It was in these circumstances that the acquittal of the accused persons was upheld in the above case on the ground of the test identification proceeding being defective.

18. In the present case, the property to be identified was not sealed at the time of the recovery. Little value can, therefore, be attached to the test identification proceeding. But, as was observed by their Lordships of the Supreme Court in *Kanta Pra-shad v. Delhi Administration*, AIR 1958 SC 350, even a total failure to hold a test identification proceeding would not make inadmissible the evidence of identification in court.

19. Coming now to the third ground, the Magistrate no doubt erred in refusing to allow Bhimraj to be confronted by his statement made during investigation. He was under the erroneous impression that if the statement of the witness is recorded under Section 164 Cr. P. C., no useful purpose is served by confronting him by his statement under Section 162 Cr. P. C. But the learned counsel for the applicant was unable to say in what respect the statement made by Bhimraj under Section 162 Cr. P. C. differed from the statement made by him in court. As such it cannot be said that any prejudice was caused to the applicant by the refusal of the Magistrate to allow Bhimraj to be cross-examined with regard to the statement made by him during investigation.

20. I accordingly find that no ground has been established necessitating the reassessment of the evidence by this Court in revision. The evidence on record is such that the courts below could have reasonably inferred from it that the pendant of the necklace and the gold ingot were stolen property belonging to Maji Sahiba and the applicant was in conscious possession of them.

21. Next it was argued on behalf of the applicant that his examination under Section 342 Cr. P. C. was not proper inasmuch as he was not asked to account for his possession of the pendant and the gold ingot. After he admitted the recovery of both the articles from his possession in the manner alleged by the prosecution, the

learned Magistrate asked him whether they were stolen. To this he replied that they were not stolen property, but belonged to him. The contention on behalf of the applicant is that he should also have been asked how he came by this property.

Assuming that the Magistrate should have put this question to him, he was entitled to ask the appellate court which was the ultimate court of fact to take the explanation that he could have given in the trial court into consideration when weighing the evidence in just the same way as it would have done if it had been there all along. I asked the learned counsel for the applicant what explanation his client would have given if the question had been put to him by the trial court.

He stated that he was unable to say what reply his client would have given. The accused was fully alive to the need of explaining how he came by this property and examined a witness in defence for this purpose, namely, Chandu Dw. 3. His evidence has been referred to above. Both the Courts below disbelieved this evidence. It cannot be said that any prejudice was caused to the applicant in this case by the failure of the trying Magistrate to put the above question.

22. The last and most important contention put forward on behalf of the applicant in this case was that from the recovery of stolen property from his possession, no presumption could be drawn under Section 114 of the Indian Evidence Act that he had received it knowing it to be stolen even though he failed to account for his possession of it on account of the long time which elapsed between the theft and the recovery of stolen property.

23. The argument was two-fold. Firstly it was contended that such a presumption could only be drawn under Illustration (a) to Section 114 which runs as follows:

'The Court may presume that a man who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.'

24. The Illustrations attached to Section 114 are not intended to lay down rules of law which are exhaustive of the presumptions that may be made under the provisions of the section itself. They are merely examples of circumstances in

which certain presumptions may be made and other presumptions of a similar kind in similar circumstances may be made under the provisions of the section itself. In this connection the following two authorities may be referred to :

1. Chhedda v. Emperor, AIR 1944 All 281.
2. Chavadappa Pujari v. Emperor, AIR 1945 Bom 292.

25. Secondly, it was contended that no presumption can be drawn under Section 114 after a long lapse of time and in this connection reliance was placed on the following cases:

1. Naqli v. Emperor, AIR 1926 Lah 528 -- It was held in this case that possession of stolen property 19 months after theft raises no presumption that the holder thereof was either the thief or received the goods knowing them to be stolen.

2. Chhotey Lal v. Emperor, AIR 1925 All 220: -- In this case four silver ornaments of ordinary type worth Rs. 100/- stolen in a dacoity were recovered from the person of the wife of a goldsmith 3 years after the dacoity. It was observed:

'In judging a case, regard must be had to the nature of the property. The property, as I have already mentioned in this case, is silver ornaments -- articles which would easily change hands from time to time -- and is articles which may, in the common course of events, find their way to a silver-smith's shop. Speaking therefore of the presumption, it is difficult to say that there is any presumption of the guilty knowledge in this particular case.'

3. Hashim v. Emperor, AIR 1942 Sind 85 -- It was held that possession of a stolen buffalo four or five months after the theft is not such possession as will constitute proof of an offence under Section 411. The learned Judges were under the erroneous impression that Illustration (a) to Section 114 was exhaustive and based the decision on that Illustration.

4. Jagnarain Tewari v. Emperor, AIR 1935 Cal 680 -- In this case the stolen goods were recovered six months after the theft. It was held that it was not possible to rely upon the presumption in Illustration (a) to Section 114, owing to the length of time which elapsed between the theft and the finding of the goods in the possession of the accused. The learned Judges did not take into consideration the

presumption which could be drawn in that case under the section itself from the recovery as well as the other circumstances of the case.

26. With all respect, I am in agreement with the view taken in AIR 1925 All 220, referred to above, but I am unable to subscribe to the view taken in the remaining three cases. Whether or not a presumption under Section 114 can be drawn in a particular case depends on the facts and circumstances of that case. No hard and fast rule can be laid down that after the expiry of any particular period, no presumption under Section 114 can be drawn. In the present case, the stolen property consists of a gold pendant weighing 20 tolas studded with precious stones and a gold ingot weighing 33 1/4 tolas. The applicant has not been able to give account for his possession of this property. He gave three explanations at three different stages. The very first explanation, which he gave, was that his mother gave the pendant to him for selling it at Ahmedabad, and that it had been given to her by Chhaganlal Mahajan of Bawalwara. The second explanation, which he gave in his statement in court, was that the property belonged to him. The third explanation, which was put in the mouth of a defence witness, was that his father had had this property with him.

Neither he nor his mother nor his father could have honestly acquired this property. It can be safely presumed that the applicant was fully aware of this. He must therefore, have known fully well that this property, which was in his conscious possession, was stolen property. Further with regard to the gold ingot, there is evidence that the applicant himself took the gold ornaments to Bhimraj and got them melted several years before the recovery. He represented to Bhimraj' that these ornaments belong to Maji Sahiba.

These ornaments were mentioned in the list of the stolen property handed over to the police in 1951 when the theft took place. With regard to these three stolen ornaments, therefore, there is direct evidence that the applicant was in possession of them shortly after the theft. The conviction of the applicant under Section 411 I. P. C. is, therefore, proper. In this connection, the case of Public Prosecutor v. India China Lingiah, AIR 1954 Mad 433 may be referred to,

27. I accordingly find that there is no force in this revision application, I, therefore, reject it.

28. The applicant is on bail. Let a warrant be issued for his arrest. Proceedings should also be taken to recover the fine.

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