

Laxmi Narayan Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Aug-18-1983

Reported in : 1983WLN497

Judge : S.S. Vyas, J.

Appeal No. : S.B. Criminal Revision No. 156 of 1983

Appellant : Laxmi Narayan

Respondent : State of Rajasthan

Judgement :

S.S. Vyas, J.

1. Accused Laxmi Naraytm was convicted under Section 379/75. IPC and sentenced to 21/2 years' rigoro is imprisonment with a fine of Rs. 200/-, in default of payment of fine to further undergo one month's like imprisonment by the learned Chief Judicial Magistrate, Jodhpur, vide his judgment dated 29. 1983 and order dated February 18, 1983. He went in appeal, but his appeal was dismissed and his conviction and sentence were maintained by the learned Additional Sessions Judge (2), Jodhpur vide his judgment dated March 19, 1983. The accused has, now come in revision to this Court.

2. Briefly stated, the prosecution's case is that PW. 4 Dhanraj and PW. 5 Bulakichand were traveling in a Railway train from Bikaner to Jodhpur in the night of 8.5.80. They had two suit-cases and other articles with them, in the early hours of 9.5.80, they got down at Jodhpur and went out of the compartments. After sometime when they returned, they found their two suit-cases missing. The suit-cases contained clothes and some files. At about 6.00 A.M. on the same day (9.5.80) Suit Dhan Raj presented written report Ex. P.2 to the Station House Officer, GRP Station, Jodhpur. The Police registered a case and proceeded with investigation. The accused was arrested in some other case. In consequence of the information furnished by him on 8.9.80, two stolen Sarees were recovered from Shri Kailash Singh (PW. 1), to whom he had pledged for Rs. 50/-. The accused again gave information to the investigating officer on 20.9.80 and in consequences of it one stolen suit-case was recovered from one Shri Mahaveer Chand Jain. The recovered articles, Viz., the suit-case and the Sarees were put to identification-test. The test-identification was conducted by PW. 9 Shri Mani Sharker, the then Railway Mapistiate Bikaner. The aforesaid articles were correctly identified by PW. 4 Shri Dhan Raj. On the completion of investigation, the police submitted a challan against the accused in the Court of the learned Railway Magistrate, Jodhpur. The learned Magistrate framed a charge under Section 379. IPS against the accused to which he pleaded not guilty and faced the trial. In course of time, the case came for trial before the learned Chief Judicial Magistrate, Jodhpur. During trial, the prosecution examined 9 witnesses and filed some documents. In defence, no evidence was adduced. The accused was found previous convict. Section 75, IPC was added to the charge. On the conclusion of trial, the learned Magistrate held the charge duly proved against the accused. He was consequently convicted and sentenced.

3. I have heard the learned Counsel for the accused and the learned Public Prosecutor. I have also gone through the case file carefully.

4. In assailing the conviction of the accused, the points taken by the learned Counsel are that the prosecution has utterly failed to prove that the recovered articles viz., Sarees Ex. 1 and Ex. 2 and the suit-case Ex. 3, were stolen articles. It was vehemently contended that these articles were alleged to be of Shri Bulaki

Chand (PW. 5), but he was not called in the test-identification. These articles are of common pattern and are generally available. The recovery was made nearly after four months of the alleged theft. It was also argued that the recovered Sarees were not sealed at the time of seizure. It was also argued that the accused was never arrested before the alleged information's were given by him; as such Section 27 of the Evidence Act was not applicable.

5. In reply, the learned Public Prosecutor submitted that since the articles Ex. 1, Ex. 2 and Ex. 3 were recovered in consequence of the information furnished by the accused, it must be presumed that he had stolen them. I have taken the respective contentions into consideration.

6. I find no force in the contention of the learned Counsel that Section 27 of the Evidence Act was not applicable. It is true that the accused was formally arrested on 27.10.80. However, PW. 2 Shri Ram Chandra, the then Station House Officer, GRP, Jodhpur deposed that the accused was in custody in some other case on 8.9.80. His this statement has not been challenged in cross-examination. The accused should, therefore, be taken to be in the custody of police on 8.9.80. Section 27 of the Evidence Act speaks of custody. 'Custody' is not equivalent to arrest. The word 'Custody' in Section 27 does not necessarily mean detention or confinement. If the accused is under surveillance, it amounts to custody. In AIR 1960 SC 145 State of UP v. Deo Man Upadiyaya it was held that when a person, not in custody, approached a Police Officer and offers to give information leading to the discovery of a fact having a bearing on the charge, he may be taken to be in the custody of a police officer within the meaning of Section 27 of the Evidence Act. In the instant case, the accused was arrested in some other case He was taken by the SHO in custody in the instant case for investigation. I, therefore, find no merit in the contention that the accused was not in custody when he gave the information's leading to the discoveries of the stolen articles.

7. Taking the next contention that the recovered articles have not been proved to be stolen property, it was contended that they belong to PW. 5 Shri Bulaki Chand. Shri Bulaki Chand did not participate in the test identification conducted during the investigation by the Magistrate. There is again no force in the contention. It is true

that Bulaki Chand did not participate in the test-identification. It is also true that the recovered Sarees Ex. 1 and Ex. 2 and suit-case Ex. 3 belonged to him. However, he identified them correctly in the court during trial. It is the identification in the court which furnishes substantive evidence. The period test-identification does not constitute substantive evidence. The prior test-identification is only to corroborate the witness and strengthen the trustworthiness of his evidence in Court. Absence of test identification is not fatal to the prosecution if the evidence given in court during the trial is found trustworthy and credible. In the instant case, Bulaki Chand (PW. 5) identified the Sarees and the suit-case during trial and claimed that they belonged to him. His this statement could not be shaken in cross-examination by the accused. The accused has not, also said his claim on these recovered articles. In these circumstances I agree with the Courts below that the recovered articles were stolen property.

8. It was next contended that there is no reliable evidence to show that the accused had given Sarees Ex. 1 and Ex. 2 to Shri Kailash Singh (PW. 1) or suit case Ex. 3 to Shri Mahaveer Chand Jain. The contention is not without force. PW. 1 Shri Kailash Singh no doubt stated that the accused had pledged Sarees Ex. 1 and Ex. 2 to him for a sum of Rs. 50/-, but in cross examination admitted that the accused was not known to him. No test identification of the accused was conducted. Shri Kailash Singh was examined during trial on 3.8.82, i.e. nearly after two years of the occurrence, it is difficult for a witness to identify a person whom he has casually seen once. Kailash Singh (PW. 1) also stated that the accused had given the Sarees to him in the presence of one Bhanwer Lal, but curiously enough, Bhanwer Lal has not been examined in evidence by the prosecution. It is, therefore, difficult to accept the prosecution version that the accused had pledged two Sarees to PW. 1 Kailash Singh.

9. The matter in respect of suit-case Ex. 3 is still worse. It was alleged by the prosecution that suit-case Ex. 3 was recovered from one Shri Mahaveer Chand Jain of Jodhpur, to whom the accused had given it. Again, strangely enough, Mahaveer Chand Jain, who resides in Jodhpur, was not produced in evidence. It was Mahaveer Chand alone who could testify that suit-case Ex. 3 was given to him by the accused. No reasons are forthcoming as to why Mahaveer Chand was

not examined as a witness by the prosecution.

10. In the context of the above circumstances, it is difficult to fasten the accused with the alleged recoveries.

11. There is one more important factor which cannot be lost sight of in assessing the suit or innocence of the accused. When there is a case of theft, the court may presume that a man who is in possession of stolen goods soon after the theft is either a thief or has received the goods knowing them to be stolen, vide illustration (a) to Section 114 of the Evidence Act. Before this presumption is drawn, it must be shown that the accused was found in possession of the stolen property soon after the theft. In such a case, the time and the nature of the stolen property are the most important factors to be taken into consideration. Where the incriminating thing is one which may change hands quite frequently or is commonly available and is recovered from the accused many months after the theft, no presumption that either the accused was thief or a receiver of stolen property, can be drawn against him. If the gap of time between the commission of the theft and the recovery of the stolen article is too much, the presumption that the accused was concerned with the crime, gets weakened.

12. In the instant case, the recovered Sarees & suit-case are commonly available articles which change hands quite frequently. The recoveries were made nearly four months after the commission of the theft. This time gap is too much to raise the presumption under illustration (a) of Section 114 of the Evidence Act against the accused.

13. I am, therefore, unable to agree with (sic) courts below that a presumption against the accused can be drawn under (sic) of the Evidence Act that he was the person who committed (sic) conviction of the accused under Section 379/75, IPC cannot (sic) maintained.

14. No other contention was raised.

15. For the foregoing reasons the conviction of the, (sic) was bad and deserves to be quashed.

16. In the result, the revision is accepted. The judgments of the Courts below are set aside and the accused is acquitted of the offence under Section 379/75, IPC. He is in custody and shall be immediately set at liberty, if not wanted in any other case.

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