

**Chhotiya Vs. the State of Rajasthan**

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**Court :** Rajasthan

**Decided On :** Jul-12-1984

**Reported in :** 1984WLN(UC)346

**Judge :** G.K. Sharma, J.

**Appeal No. :** S.B. Cr. Revision Petition No. 250 of 1978

**Appellant :** Chhotiya

**Respondent :** The State of Rajasthan

**Disposition :** Petition allowed

**Judgement :**

**G.K. Sharma, J.**

1. This revision petition has been preferred by Chhotiya, against the Judgment of Sessions Judge, Sikar dated 6th September, 1978, upholding the conviction and sentence of the petitioner under Section 380, 457 IPC.

2. The facts briefly stated that on 9th May, 1972, Sita Ram, was looking after the residential house of Shrilal s/o Kishanlal Gjyanka, residing at Madras. This house is situate at Laxmangarh and was being looked after by informant Sitaram. In the written report Sita Ram, has mentioned that in the night intervening 'Migsar' sudi 'Dooj' or 'Teej' some one after breaking the locks of the rooms committed theft and

took away some clothes and some articles of silver. About this theft he informed the owner Shrilal at Madras and after getting the information from him he submitted this written report at the Police Station, Lakshmangarh Thana. I would like to make it clear that according to information memo Ex. P.14 alleged to have been given by the accused, this theft was committed 8 or 10 months before this information. Ex. P.14, was prepared on 16th May, 1972. The report by Sita Ram, was lodged on 9th May, 1972. Thus, it is clear that about 8 or 10 months prior to lodging this report Ex P.5, this theft was committed.

3. On receipt of this report Ex.P 5, regular FIR was reported which is Ex. P.13. from this Ex. P.13, I find that Sitaram, submitted the report at the police station on 9th May, 19'2, at 7.00 p.m The time for submitting this is very material which will be discussed later on.

4. The Station House Officer, on the information of the accused recovered some clothes and other articles, the recovery memo is Ex P 3. After completing the investigation police submitted the challan against the accused petitioner Hanumac, under Sections 380, 457 IPC.

5. The learned Magistrate, after concluding the trial acquitted Hanuman, from the charges levelled against him but convicted Chhotiya, petitioner for the offence under Section 457, 380 IPC. Petitioner Chhotiya, preferred an appeal was dismissed after reducing the sentence. His conviction under Sections 457, 380 IPC was maintained.

6. The learned Counsel for the petitioner has argued that in this case the report was lodged at the police station after 8 or 10 months of the occurrence. This delay is fatal to the story and the prosecution has not submitted any explanation for lodging the report after 8 or 10 months. The owner of the house resides at Madras. Sita Ram, informant was looking after the house at Lakshmangarh. When he found that theft has been committed, he should have reported the matter to the police immediately. He wrote a letter to the owner of the house at Madras and waited for his direction. The owner of the house Shrilal s/o Kishanlal kept silent for 8 to 10 months. After lapse of 8 to 10 months he directed informant Sitaram, to lodge the report. This circumstance, which has not been explained by the prosecution

creates doubt in the correctness of the story given in the report Ex. P.5. The arguments of the learned Counsel for the petitioner regarding this point has great force. The delay in filing the report has not been explained at all. I agree, and hold that this delay creates doubt in the truthfulness of the story and benefit of doubt should be given to the accused.

7. The learned Counsel for the petitioner has argued that the report Ex. P.5, was submitted at the Police Station, on 9th May, 1972 at 7.00 p m. According to police the accused petitioner Chhotiya, was in custody in some other case Mo. 29/1971 under Sections 457, 380 IPC. The FIR No. of this case is 35 under Sections 457, 380 IPC. So when the report Ex. P.5 was submitted at the Police Station the accused Chhotiya, was already in custody in some other case. According to arrest memo Ex. P.1 the accused Hanuman was arrested but there is no arrest memo of accused petitioner Chhotiya. The SHO, Dharamveer, PW. 14, has stated that accused Chhotiya, was already under arrest in some other case No. 29 of 1971. He should have been arrested in this case No. 35 also. This shows that in the case FIR No. 35, the accused Chhotiya, was not arrested. Ex. P.1, is the information memo given by accused Chhotiya. According to the prosecution the accused Chhotiya, gave this information Ex P.15 for the recovery of some articles and on the basis of this information recovery was made at the instance of accused petitioner Chhotiya, vide Ex. P.3 Dharmveer SHO PW 14, has stated that Chhotiya, gave information for recovery of stolen articles which is Ex P.15, and on the basis of this information Chhotiya got recovered articles from his house vide memo Ex. P.2 Thus Ex. P.15 & Ex.P.13 have been proved by SHO Dharmveer, PW. 14. I have perused Ex P.15 and Ex.P/3, Ex. P.15, information was given on 9-5-1972 when accused Chhotiya, was not arrested by the police in this case. Mere reading Ex P.1 it is clear that when Chhotiya, was under arrest in some other case No. 29 of 1971 he gave his information. Ex. P/4 which is signed by SHO Dharmveer-, shows that the articles were recovered from the house of Chhotiya, on 9-5-1973, at 4 45 p.m. Now if we see the FIR Ex. P.13, it is clear that it was lodged on 9 5197 2 at 7.00 p.m. Thus, the information for the recovery of the stolen articles Ex. P.15 and the recovery of the articles vide Ex. P.13, were prepared by the police before the report Ex. P.5, was submitted by Sitaram at the police station and the FIR Ex. P.13, was registered. What is the value of this information. When

the person is arrested and while in the custody he gives information for the recovery of the articles. While in the custody the person on his information got the recovery of the articles but in the present case, the position is otherwise. The accused was not under arrest in this case. He gave no information for the recovery of the articles after his arrest. He did not get the articles recovered when he was in custody. Even it is not clear from the record of the case as to when the accused Chhotiya, was arrested by the police in this case. Thus, it is strange that information Ex P.1.S for the recovery of the stolen articles and the recovery vide memo Ex. P.3, were prepared even before the complaint of theft Ex. P.5, was submitted by the informant at the police station. In Ex. P.15, the information memo has the mention that in Lakshmangarh town he and Hanumanaram, committed theft from one 'Haveli'. The accused petitioner took them to his house but got some articles recovered at 4-45 p.m. Then at 7.00 p.m. how the case has been prepared by the police before any report of theft, on information under Section 37 of the Evidence Act, was reduced in writing and on the basis of this information the theft articles were recovered. The learned Public Prosecutor, could not explain how this thing had happened. This shows that the report Ex. P.5 is not a bonafide report. It was taken by SHO himself by calling Sita Ram. Had any theft been committed at the 'Haveli' of Shrilal K. Uhanlal and the fact was known to Sita Ram, who was looking after the 'Haveli', the report of theft would have been submitted immediately at the police station. There is no reason why Sita Ram, kept silent for such a long period that is 8 to 10 months. This creates great suspicion in that prosecution story.

8. The learned Counsel for the petitioner also argued that the motbir in whose presence the articles were recovered and memo Ex P.3 was prepared do not support the prosecution story. The statements of these motbirs were read over to me and it is correct that both have not supported the prosecution story. Now remains the solitary statements of SHO Oharamveer, PW 14, about this recovery. I have gone through this statement also and found that his statement is also unsatisfactory. It was also argued that it was the duty of the prosecution to record the information in the same language spoken by the accused. If the information is not drawn in writing in the language of the accused, ilieo reliance should not be placed on such information. This creates doubt about the information given by the

accused. To support his arguments he placed reliance on *Kammu v. State*, 1964 RLW 171 Hon'ble Chhangani, J. in this case has observed as under:

Whenever a Police officer is intimated that the accused proposes to give information leading to discovery he should proceed to record it as far as possible in the language spoken by the accused and in the first person, otherwise, doubts are likely to be entertained as to the accuracy and correctness of the information. Although as a matter of law the presence of motbir witness at the time of recording information is not necessary but as a matter of prudence the Police officer should secure the presence of motbir witnesses, if such witnesses are available without much inconvenience or difficulty. The presence of the motbir witnesses at the time of recording the information and the subsequent production of a motbir witnesses are likely to lend considerable support to the testimony of the Police Officer, AS regards the proving of such information, ordinarily the Police Officer or motbir witness should state in court from memory what information was given by the accused and if such a witness is in a position to give precise information he should do so without referring to the written memo containing the information, if the Police Officer, or the motbir witness on account of lapse of time or otherwise, is not in a position to state with the help of memory what the information was and thus makes out a case for refreshing his memory, he is entitled to do so. But even then he should not merely remain content by proving his signatures on the information memo but should reproduce on court the information given.

9. After going through the judgment cited by the learned Counsel for the petitioner I agree with his contention and hold that the information given by the accused has not been written in the same language which was spoken by him. This also creates doubt in this story.

10. Learned Counsel for the petitioner also argued that there is no evidence on the record to prove the case under Section 457 IPC. I have perused the entire evidence and found that this contention is correct and has force. There is no evidence to prove that the accused broke the lock of the room, entered in the house in the night and committed theft. Thus the offence under Section 457 IPO have not proved at all. Both the learned lower courts have erred in convicting the

accused petitioner for the offence under Section 457 IPC. His conviction under this offence is not sustained.

11. The learned Counsel for the petitioner argued that according to the prosecution the articles were recovered from the possession and at the instance of accused Chhotiya after 8 to 10 months, from the date of alleged theft under these circumstances, the recovery is not sufficient to have the presumption that the accused have stolen away the articles. Even no such presumption can be laid down under Section 11 of the Evidence Act, that the petitioner is a receiver of the stolen property. He has cited *Harisingh and Anr. v. The State* 1978 Criminal Law reporter (Raj) 61. In this case it has been observed as under:

The F R was lodged with much delay but if we overlook this fact even then the alleged recovery was made on 29-12-1971 i.e. more than six months after the report was lodged. In the circumstances of the case, it can not be said that this recovery was soon after the theft so as to enable the court to draw any presumption u/s 114 of the Evidence Act, that the petitioner is either a thief or receiver of stolen property.

12. The case cited above is identical to the present case. In the present case the report of FIR was lodged after 8 to 10 months of the occurrence. Articles were recovered after 8 to 10 months of the report of the theft. So the delay in lodging the report as well as the recovery of the articles do not give any presumption under Section 114 of the Evidence Act, that the petitioner is either a thief or a receiver of the stolen property. In a case where the property has been recovered immediately just after the commission of theft, then such presumption could be drawn under Section 114 of the Evidence Act. But in the circumstances of this case (where the FIR was lodged with delay and the articles were recovered after 8 to 10 months of the occurrence) no presumption could be drawn. Thus, even believing the recovery no presumption can be drawn that the petitioner is a thief and has stolen away the articles. Apart from this, another aspect is that there is no proof on the record that the recovered articles vide memo Ex. P.3, belong to the owner Shrilal Krishan Lal. The owner of these articles has not been examined by the prosecution, to prove that the recovered articles belong to him. But it is not

established that the recovered articles are stolen articles and have been stolen away from the 'Haveli' of Shrilal Kishanlal as reported by informant Sita Ram, vide report Ex. P.5. Thus, the conviction of the petitioner under Section 380 IPC is bad and it can not be sustained.

13. In view of my above discussions I am of the opinion, that the learned Magistrate, as well as the learned Sessions Judge, Sikar, has committed error in convicting the accused petitioner for the offence under Section 457, 80 IPC.

14. As the result, the revision petition is accepted. The conviction of the petitioner Chhotiya, under Sections 380 and 457 IPC is set aside and he is acquitted from the charge of both the offences. The accused is on bail. He need not surrender and his bail bonds are cancelled. The fine if deposited be returned to the petitioner.

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