

Brij Mohan Agarwal Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jul-21-2005

Reported in : RLW2005(4)Raj2369; 2005(4)WLC308

Judge : K.C. Sharma, J.

Acts : [Evidence Act, 1872](#) - Sections 114; Indian Penal Code (IPC) - Sections 379 and 411; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 161, 397 and 482

Appeal No. : S.B. Criminal Misc. Petition No. 661 of 2005

Appellant : Brij Mohan Agarwal

Respondent : State of Rajasthan

Advocate for Def. : Ashvini Kumar Sharma, Public Prosecutor

Advocate for Pet/Ap. : Ashok Mehta and; Dinesh Kala, Advs.

Disposition : Petition allowed

Judgement :

K.C. Sharma, J.

1. The petitioner through this petition seeks to quash the order dated 28.5.2005 passed by the learned Additional Sessions Judge, Khetri in revision petition No. 26/2005 arising out of the order dated 13.4.2005 passed by the learned Judicial

Magistrate 1st Class, Khetri, by which the learned Magistrate has ordered to frame charge under Section 411 IPC against the accused petitioner.

2. The facts relevant for the purpose of decision of the present petition filed under Section 482 Cr.P.C. may be summarised as under:

3. On 24.3.2004 at 8.00 AM, complainant Ram Chandra lodged a written report at Police Station Khetri with regard to an incident of theft alleged to have taken place in the night intervening 15th and 16th August, 2003. It was alleged in the report that in the intervening night of 15th and 16th August, 2003 while his daughter Shakuntala was sleeping in a room, some one pulled her golden chain weighing 2 Tolas which she was wearing in her neck from the window of the room. She saw two boys running after the incident, but she could not identify them because of darkness.

4. On the basis of above report, the police registered a case for offence under Section 379 IPC vide FIR No. 54/2004 and proceeded with the investigation. In the course of investigation, the police recorded the statement of complainant Ram Chandra on the same day, wherein the complainant narrated the same facts as were embodied in his written report. The Investigating Officer also recorded the statement of another witness on the same day. On 24.3.2004 he arrested Naseer at 12.00 noon and Kishan Singh at 12.25 PM. Accused Naseer furnished information at 12.20 PM and pursuant to his information, a golden chain weighing 10 grams 150 mgs. was recovered from accused petitioner Brij Mohan from his shop. One more accused namely Farookh was arrested on 19.5.2004 at 2.10 PM. After completion of investigation, the police submitted a charge sheet against Kishan Singh and Farookh for offence under Section 379 IPC and against accused Naseer and Brij Mohan for offence under Section 411 IPC. The learned Magistrate, on hearing arguments on charge, ordered to frame charge under Section 411 IPC against the present petitioner vide order dated 13.4.2005. The petitioner, feeling aggrieved by this order, preferred a revision petition before the Court of Sessions. The learned revisional court vide its order dated 28.5.2005 affirmed the order passed by the learned Magistrate and dismissed the revision petition.

5. I have gone through the contents of the petition, the papers annexed therewith and the impugned orders. Having gone through the impugned orders it appears that both the courts have failed to consider the salient features of the case in right perspective, which may be noticed below:

(a) the complainant in his written report and in his statement under Section 161 Cr.P.C. has specifically disclosed the weight of stolen chain to be 2 Tolas. However, Shakuntala in her statement has disclosed the weight of the stolen chain as 10 grams 150 ml. grams. It appears that statement of Shakuntala was recorded at Satya Sai Hostel, Jaipur after the chain was recovered. The memo of recovery of chain indicates her presence as motbir of memo of recovery;

(b) As per the allegation in FIR the chain was pulled away. However, the memo of recovery of chain reflects that the chain recovered was intact, which in my view cannot be so for the simple reason that practically the chain should have been broken in a piece or pieces as the thief applied force in the course of pulling the chain from the neck of Shakuntala. The condition of chain recovered tells a different story as if Shakuntala voluntarily handed over the chain to the thief;

(c) the complainant and his family members including Shakuntala have deposed that one Goldsmith of village Sindhana had made (manufactured) the stolen chain. But, surprisingly enough the Investigating Officer neither bothered to record the statement of the goldsmith nor he called him for identification of chain;

(d) Shakuntala was present as Motbir at the time of recovery of chain and she alleged to have identified her chain at that time. Generally, the stolen property is kept sealed at the time of recovery for the purposes of identification by the owner or by the person in possession of it before the proper authority. However, the Investigating Officer prefer to adopt the above mode for the reasons best known to him. It is also worthy to note that after recovery of chain it was not got identified even by complainant Ram Chandra or by any member of his family;

(e) As per the prosecution, Brij Mohan, the present petitioner kept the chain intact for 7 months, which in the normal course appears to be highly improbable.

6. From what has been stated above, it is established that weight of the recovered chain is different from that of stolen chain, the Investigating Officer did not get the recovered chain identified either by complainant Ram Chandra or Shakuntala or by any member of his family before the property authority, the Investigating Officer did not examine the goldsmith who had made the chain and the recovered chain was intact, which was practically not possible in the facts and circumstances of the case. For the reasons therefore, it must be concluded that it is highly doubtful that Investigating Officer recovered the stolen chain from the possession of the petitioner.

7. Be that as it may, the only evidence to connect the accused petitioner as brought forth by the prosecution is the recovery of chain. Even if it is taken to be correct on its face value that the stolen chain was recovered from the possession of present petitioner, still the prosecution is obliged to establish the recent possession of the stolen property so as to attract the presumption under Section 114(a) of the Evidence Act. It is well settled that unless the possession is recent, the application of Section 114(a) of the Evidence Act is not attracted and until prosecution proves something more, the offence under Section 411 IPC is not established. In the case at hand, the FIR of the incident of theft alleged to have taken place in the night intervening 14 and 16th August, 2003 was lodged on 24.3.2004 i.e., after 7 months of the alleged theft and, therefore, possession of Brij Mohan petitioner cannot be said to be recent.

8. It is also worthy to note that according to the prosecution case, Naseer sold the chain to Brij Mohan to whom thieves Farookh and Kishan Singh handed over the chain for the purpose of sale. Accused Naseer has also been charge sheeted for offence under Section 411 IPC. Further, accused Brij Mohan who carries on trade in gold items may naturally be expected to buy and sale such goods in the usual course of his business. He could not be expected to be over circumspect as to the customers with whom he was to deal, unless indeed there is anything in their demeanour and mode of business which arouses his suspicion. That apart, it is also not on record that what price petitioner Brij Mohan actually paid for the chain. Further, the fact that petitioner kept the chain intact for 7 months shows his bona-fides in purchase of chain at fair market price. To prove the ingredients of Section

411 IPC it is essential for the prosecution to bring some sort of circumstances to indicate shady transaction or which irresistably give rise to a conclusion that the accused knew or had reason to believe that the property was stolen. In the instant case there is nothing on record which could indicate shady transaction or which irresistably may give rise to a conclusion that petitioner knowingly or believing that the property i.e., the chain, which he was purchasing was the stolen property.

9. Now comes the scope of Section 482 Cr.P.C. In the case at hand, the Trial Court has ordered to frame charge under Section 411 IPC against the accused petitioner. The revisional court has affirmed this order in exercise of powers under Section 397 Cr.P.C. Having lost before two courts, the petitioner has now invoked inherent power under Section 482 Cr.P.C. Therefore, the question which now merges for consideration of this Court would be whether it is a fit case to invoke inherent power. It is well settled that inherent jurisdiction though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in Section 482. It envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of Court, and (iii) to otherwise secure the ends of justice. The principle to be adopted by this Court in such cases should be that if the entire evidence produced by the prosecution is to be believed, would it constitute an offence or not. In the instant case even if the entire prosecution case is taken to be correct on its face value, the only evidence that has come on record is the recovery of chain, which in my considered view is not sufficient to prove even the recent possession of the stolen property so as to attract the presumption under Section 114 of the Evidence Act, inasmuch as the FIR of the incident of theft alleged to have taken place in the night intervening 14 and 16th August, 2003 was lodged on 24.3.2004 i.e., after 7 months of the alleged theft and further the recovery of the chain was made on the same day.

10. Thus, on evaluating the material and documents on records, I am satisfied that prima facie there exist no sufficient ground for proceeding against the accused petitioner. In my considered view it is fit case for invoking inherent power under Section 482 Cr.P.C. Continuance of proceedings against the petitioner would

certainly an abuse of the process of the court. Hence the impugned orders deserve to be quashed.

11. In the result, this petition succeeds and is hereby allowed. The impugned orders passed by the courts below, ordering to frame charge under Section 411 IPC are set aside and the petitioner is discharged from the offence under Section 411 IPC.

12. It is made clear that since trial against other accused is pending, the Trial Court shall not be influenced by the observations made in this order and shall conclude the trial and decide the case on merits.

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