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State of H.P. Vs. Raj Kumar and anr.

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Court : Himachal Pradesh

Decided On : Jul-16-1993

Reported in : 1994CriLJ894

Judge : Bhawani Singh and; D.P. Sood, JJ.

Acts : Indian Penal Code (IPC), 1860 - Sections 380 411, 414 and 457; ;Code of Criminal Procedure (CrPC) - Sections 154 and 313

Appeal No. : Criminal Appeal No. 19 of 1982

Appellant : State of H.P.

Respondent : Raj Kumar and anr.

Advocate for Def. : C.L. Behal and; Anand Sharma, Advs.

Advocate for Pet/Ap. : Shyama Dogra, Adv. General

Disposition : Appeal dismissed

Judgement :

D.P. Sood, J.

1. Sometimes selfishness and greed override the religious faith and spiritual morale of a human being. Even greed has not spared the Almighty 'Lord Vishnoo', who is the Creator of the Universe.

2. Chamba is situated by the side of Ravi river amidst the sub-mountainous region of Himalayas. There is a 'chaugan' in Chamba town. On one corner of 'chaugan', there is a temple known as 'Hari Rai temple' where an idol of 'Lord Vishnoo' of immense value is installed. Hindus residing in this town offer puja and worship 'Lord Vishnoo'. This idol made of bronze was 4-5 feet in height and 1 1/2 feet in width having four hands. A brass plate indicating the identity of the idol was also affixed thereupon.

3. In between the intervening night of 6th and 7th of May, 1971, this idol was found stolen and ultimately it was recovered from a godown of a Clearing Agent at Bombay on June 23, 1971 by the police of Chamba in collaboration with the local police of Metropolitan City of Bombay. The said idol was brought back to Chamba on July 5,1971 and installed in the aforesaid temple on July 7, 1971.

4. Shortly stated, the case of the prosecution is that three persons, namely, S/Sh. Bali Ram, Raj Kumar and Jagdish Bahadur jointly committed theft of the aforesaid idol on the date, time and place earlier referred to. This idol was brought by them to Delhi and allegedly sold to one Shri Hira Lal accused (since deceased) in consideration of Rs. 10,000/-. The prosecution aver that the said accused Hira Lal received this idol knowing fully well that the same is a stolen property. It is then alleged that thereafter he, with the help of his brother Gokal Chand, disposed it of at Delhi to one Shri Mannu Malwani, his co-accused in consideration of Rs, 1,00,000/- (Rupees one lac only), one of the partners of M/s. Malwani and Co. of Bombay. Later on Mannu Malwani, with the help of Sh. B.S. Lama, knowing the said article to be a stolen property, attempted to dispose it of by settling its price in the sum of Rs. 50,00,000 / (Rupees fifty lacs only) with a foreign antique dealer of London.

5. This case has a chequered history. At this stage, it would be pertinent to note that before charge could be framed against all the accused persons, S/Sh. Jagdish Bahadur and Bali Ram expired. Resultantly, their names were struck off vide orders dated 27-5-1978 and 7-4-1979 respectively. Mannu Malwani accused was declared to be a proclaimed offender vide order dated 22-7-1987. Accordingly, charge was framed against the remaining accused only. Shri Raj Kumar was

charge-sheeted for the commission of the I offence under Sections. 380/457, IPC, whereas his other co-accused namely, Hira Lal, Gokal Chand and B. S. Lama were charged for the commission of the offence under Sections. 411 and 414, IPC. I

6. During the course of the trial, Raj Kumar accused was also declared as a proclaimed offender. However, his other co-accused S/Sh. Hira Lal and B.S. Lama expired. The trial continued only against Gokal Chand accused.

7. We may now proceed to closely examine the facts and circumstances of the case, which form the background indicating the involvement of Gokal Chand accused.

8. Ishwari Parshad(PW-l) was the pujari of Hari Rai Temple aforesaid. He used to offer puja daily in the said temple. On May 6, 1971, this witness after performing puja locked the door of the temple at 7-00 p.m. and came home. The entrance door of the temple had iron rods in a portion of it, through which devotees of Lord Vishnoo could have 'darshan' irrespective of the door of the temple remaining locked. One of the devotees, namely, Smt. Punni (P.W. 4), a local resident, as usual came to the temple for having 'darshan' of 'Lord Vishnoo' on 7-5-1971 at about 5-00 a.m. She found the idol missing from inside the temple. Immediately, she informed her husband Budhia Ram (since deceased). The latter sent his daughter Darshana (PW-3) for imparting intimation to Ishwari Parshad, 'Pujari', whereas he himself proceeded to intimate the police of city, Chamba and informed Shri Mali Ram (PW-5), the then Incharge of Police Post (City), Chamba. He telephonically informed Police Station, Sadar, Chamba and then proceeded to the temple. Ishwari Parshad also arrived at the temple. Many other persons including S/ Sh. Kishori Lal, the then MLA (PW-2), Amar Nath (PW-6) arrived at the place of occurrence. Lock of entrance door of the temple was found broken, door opened, articles lying scattered hither and thither inside the temple and idol of 'Lord Vishnoo' missing. One 'gainti' (an instrument of digging), broken pieces of car handle and imprint, of car tyres were also found. Shri Kabul Singh, the then Sub Inspector-Station House Officer, (P.W. 54) had also arrived at the spot. He inspected the spot, prepared site plan, obtained photographs of 'Lord Vishnoo'

(Ex. P-9 to P-13), took into possession the aforesaid articles lying inside and outside the temple referred to above vide various recovery memos in the presence of witnesses. The said Investigating Officer (PW-54) also recorded the statement of Ishwari Parshad, 'Pujari', under Section 154 of the Criminal P.C. It was forwarded to the Police Station, Sadar, Chamba for registration of a case where Moharar Head Constable Vyas Chand (PW-44) registered a criminal case of theft vide FIR Ex. P.W. 44/ A.

9. It was during the course of investigation that the police found three persons having reached Chamba in a car bearing plate No. USK-5758 on May 3, 1971 and stayed in the Youth Hostel, Chamba on May 3, 1971. One of them had made an entry in the Youth Hostel register in his own hand by giving his address as Suresh Chand, R/O 38, Gurud-wara Road, Amritsar. The investigation further revealed that these three persons committed theft of aforesaid idol and carried the case property in the said vehicle after having left Chamba in the early morning of May 7, 1971. The entry in the Youth Hostel register as also plate number of the vehicle were found to be fake. The aforesaid car number was owned by one Shri A. S. Chugh of Dehradun (P.W. 47). It was found that his car remained at Dehradun in between the period commencing from 3-5-1971 to 7-5-1971 but the documents of the car, namely, registration etc. had been stolen therefrom. During investigation, Bali Ram, Jagdish Bhadur Saxena alias Gopal (now both deceased) and Raj Kumar alias Suresh Chander accused were arrested. Bali Ram accused was arrested on 23-5-1971.

10. The next limb of the prosecution version is that during investigation, Bali Ram accused was interrogated. While he was in police custody, he made disclosure statement (Ex.PH) on 14-6-1971 in the presence of Ayodhya Raj (PW-12) and one Kishan Chand about selling of idol of 'Lord Vishnoo' along with his co-accused in New Delhi market, Lajpat Nagar to a man-owner of shop by the side of Kapoor of Kangra Arts through Kapoor of Kangra Arts, in the sum of Rs. 10,000/-.On 16-6-1971, he took the police from Chamba to New Delhi South Extension Market, Part II (which the accused called as Lajpat Market) and then pointed out shop of Kangra Arts and shop situated along with it of Hira Arts. Hira Lal accused was the owner of shop of Hira Arts, who was found to have purchased the idol and was

running antique shop at the material time. Gokal Chand, the sole respondent in the instant appeal, is the brother of said Hira Lal. He was arrested on the same date -- 16-6-1971 from the residential house of Hira Lal. Gokal Chand accused at the material time was the partner of M/s. Lalls Copper Brass Palace, Sunder Nagar Market, New Delhi. The investigation revealed that he helped his brother Hira Lal in disposing of the stolen idol with Manohar Dass Moti Lal Malwani, partner of M/s. Malwani and Co., Bombay and B.S. Lama, proprietor of M/s. Kalimpong Art House, Bombay for Rs. 17 lacs in Rajdoot Hotel, Delhi and from the same hotel, B.S. Lama on telephone settled price of the idol in London (U.K.) with Delia Vanessa Cadenhead and James Donald Cadeuhead for Rupees 50,00,000/-. Both Hira Lal (since deceased) and his brother Gokal Chand, accused, had booked the stolen idol in a wooden case along with two other wooden cases containing printing wooden bullocks, for sending them to Bombay through their nephew Harish Chander (P. W. 40) after getting chit (Ex.PW-40/C) written:

From :

Malwani & Co. Delhi

To

Self Bombay

The police thereafter collected various material documents in this behalf from various sources and recorded the statements of various witnesses in that behalf. Investigation also disclosed that idol was recovered from the godown of M/s. Malwani & Co., who were clearing agents of Malwani & Company.

11. After completion of the investigation, four accused were prosecuted. However, trial could be concluded against Gokal Chand respondent only because of the various subsequent events which happened during the course of trial.

12. The accused raised a defence of denial simpliciter. In his Statement under Section 313 of the Cr. P.C. Gokal Chand accused pleaded false implication. His defence is that he resides at. Greater Kailash, New Delhi and his younger brother, Hira Lal, co-accused was residing at Patel Nagar along with their mother. On the

day of his arrest, he had come to see his ailing mother to inquire about her health but found the police at that place. On inquiry as to their identity, the latter asked about the whereabouts of his brother, to which he replied in the negative by stating that he did not know as to where he was. On this, police threatened him to take into custody if he did not disclose the whereabouts of Hira Lal. After a hot altercation, the police arrested him. He also claims to be inimical to Avtar Singh, Inspector, Crime Branch, Delhi who had raided his shops several times but remained un-successful to find out his involvement in any crime.

13. This accused was tried but ultimately acquitted of the commission of offence under Sections. 411/414 of the IPC vide the impugned judgment, which has been assailed by the State of Himachal Pradesh in this appeal.

14. The trial Court found prosecution evidence wanting with respect to the lurking house trespass and theft of the idol by Raj Kumar with the help of Bali Ram and Jagdish (both now deceased) into and from Hari Rai Temple, Chamba and disposal of the idol at Delhi. It also held that there was no evidence on record to connect S/Sh. Hiral Lal, Gokal Chand or B.S. Lama with the commission of the offence to the effect that they received their help in the disposal of idol of 'Lord Vishnoo' knowing or believing the same to be stolen. However, it was held that Mannu Malwani accused (proclaimed offender) did despatch the same and it was recovered from their possession at Bombay. It also held that idol recovered was the same which was stolen from temple aforesaid. Theft of idol of 'Lord Vishnoo' from Hari Rai Temple, Chamba was committed on the material date, time and place.

15. Now the sole question to be examined is whether the trial Court was right in recording the order of acquittal vide the impugned judgment.

16. The prosecution case is based purely on circumstantial evidence. In a case resting on circumstantial evidence chain of circumstances must be proved completely. If the facts that form a chain of circumstances inescapably point to the guilt of the accused only then he can be convicted and not otherwise. The tests to be applied for determining whether circumstantial evidence should lead to the conviction of the accused have been authoritatively laid down in various judgments

of the Supreme Court. These tests are:

1. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.

2. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

3. The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation on any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

17. If any authority is required for the proposition, the same can be found in the several decisions of the Supreme Court. Some of these are:

1. Gambhir v. State of Maharashtra AIR 1982 SC 1157 : (1982 Cri LJ 1243).

2. Prem Thakur v. State of Punjab, AIR

1983 SC 61 : (1983 Cri LJ 155).

3. Gian Singh v. State of Punjab, AIR 1987 SC 1921 : (1987 Cri LJ 1918). '

4. Padala Veera Reddy v. State of Andhra Pradesh, AIR J 990 SC 79: (1990 Cri LJ 605).

5. S. D. Soni v. State of Gujarat, AIR 1991 SC 917: (1991 Cri LJ 330), and Criminal Appeal No. 115 of 1991, decided on August 31, 1992, Jagga v. State of H.P.

18. While assailing the findings of the trial Court, learned Counsel Mrs. Shyama Dogra, Deputy Advocate General, appearing on behalf of the State has vehemently submitted that the circumstances emerging from the testimonies of

prosecution witnesses when read along with the disclosure statement of Bali Ram accused (since deceased) as also the recovery of the idol from the possession of Mannu Malwani accused at Bombay, form a complete chain of circumstances against Sh. Gokal Chand accused, inescapably pointing out his link with the commission of offences charged against him. According to her, the trial Court has not properly appreciated the sworn testimony of PWs. 12, 13, 26, 34 to 36, 40, 49 and 69 and the documentary evidence consisting of Railway receipt Ex. PM, Keshwani's letter Ex.PW-49/A and other documents Ex.PW-16/B and Ex.PW-16/C respectively.

19. On the contrary, Sh. C. L. Behal, learned Counsel for the accused Gokal Chand submitted that the disclosure statement of Bali Ram (Ex.PH) upon the basis of which Gokal Chand accused has ultimately been arrested, is firstly inadmissible in evidence inasmuch as the police had prior intimation with respect to the whereabouts of the stolen idol; secondly this disclosure statement (Ex.PH) even if it. be held to be admissible, refers to the sale of stolen idol to Malwani & Company through Shri Kapoor of Kangra Arts, South Extension Market, Part-II. Thirdly, idol was not recovered from the shop of Hira Lal accused (since deceased) or his brother Gokal Chand accused. It has ultimately been recovered from the godown of the Clearing Agents of M/s. Malwani & Company, Bombay. He has then pointed out that two versions emerge from the prosecution evidence. The first one is that accused Gokal Chand and his brother Hira Lal both participated in the sale of stolen idol to Mannu Malwani accused for an amount of Rs. 17,00,000/-, as per the prosecution case initially set. up. The second version, as per the testimony of some of the prosecution witnesses show that the stolen idol recovered from the godown of M/s. Malwani & Co. was on consignment basis for and on behalf of these two accused. It is urged that the two versions, being contradictory to each other, create a dent in the prosecution version, to the benefit of which the accused are entitled to and as such, the order of acquittal so recorded by the trial Court is based on correct appreciation of evidence. Also, it is urged that this is an appeal against acquittal and unless the findings of the trial Court are found to be perverse or unintelligible, the same should not be lightly interfered with by this Court.

20. We have considered the respective submissions of the learned Counsel for the parties and have gone through the entire record of the case. There appear to be several patent and latent infirmities in the instant case, which are insufficient for establishing link in between the accused and the commission of the offences charged against him. On the face of these infirmities while looking to all the facts emerging from the record, we do not feel inclined to interfere with the findings arrived at by the learned trial Court.

21. We now proceed to judge the findings on the basis of the evidence which is to be weighed in accordance with the settled principles laid down by the Apex Court in State of Punjab v. Jagir Singh, AIR 1973 SC 2407 : (1973 Cri LJ 1589) (para 23):

In arriving at the conclusion about the guilt of the accused charged with commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures.

22. The prosecution has produced as many as 70 witnesses in support of its case. Two defence witnesses have been produced by the accused.

23. The first question which looms large in our mind is whether theft of 'Lord Vishnoo' was committed, if so, by whom? PWs. 1, 2,4, 6, 8, 56, 67 and 69 are material. P.W. 1 Ishwari Parshad is the 'Pujari' of the temple. He used to offer 'Puja' daily at fixed hours both in the morning and evening and he used to lock the door of Hari Rai temple in routine. Smt. Punni Devi (PW-4) and Kishori Lal, the then Member of Legislative Assembly are the local residents of Chamba, who are devotees of 'Lord Vishnoo' and they used to visit and offer prayers. All these witnesses found idol of 'Lord Vishnoo' missing from the temple in the morning of 7th May, 1971. These very witnesses have identified the photograph of the stolen idol Ex. P-l of 'Lord Vishnoo' to be the same which had been installed at Hari Rai Temple. On its recovery from the godown of M/ s. Keshwani & Co. at Bombay in a

wooden case Ex.P-15, the same was brought back by the police to Chamba. P.W. 2 Sh. Kishori Lal, the then M.L.A., had accompanied the police to Delhi and then to Chamba when it was brought back. He also states on oath that when wooden case Ex.P-15 was brought at Banikhet, the same was opened in the presence of Sh. S. K. Mahajan (P.W. 67), the then Sub Divisional Magistrate, Dalhousie and idol of 'Lord Vishnoo' was displayed for 'darshan' and identification. The idol has been identified not, only by the above said witnesses but various other persons who had its 'darshan' but now not produced by the prosecution. The recovered idol of 'Lord Vishnoo' has been re-installed in Hari Rai temple, Chamba. None of the accused nor any other person much less the antique dealer has claimed ownership of the stolen idol. It would be material to note that no suggestion on behalf of either of the accused persons regarding ownership of the stolen idol has at all been put to either of the witnesses, who categorically stated in their sworn testimonies that the recovered idol which has been installed in Hari Rai Temple, Chamba is the same which had earlier been installed there. The fact that it remained missing from the temple from the intervening night of 6th and 7th May, 1971 to the date of its re-installation on 7-7-1971 coupled with further fact that the idol of 'Lord Vishnoo' was recovered at Chamba and brought back therefrom to Chamba, leaves no doubt in our mind to hold that theft of idol of 'Lord Vishnoo' from Hari Rai temple, Chamba was committed by some miscreants. At this stage, we would like to record that though evidence has been recorded against two accused persons who have been declared to be proclaimed offenders, we are not recording any findings with respect to their participation. We are confining out judgment with respect to the involvement of Shri Gokal Chand, accused the sole respondent in this appeal.

24. The first question which requires determination is whether the disclosure statement (Ex.PH) establishes any link of accused Hira Lal (since deceased) and his brother Gokal Chand, with the commission of the offence under Section 411/414, IPC, As to the nature of the disclosure statement Ex.PH, it may be stated at the very outset that it is inadmissible in evidence. Sh. P.D. Panta (PW-69) had interrogated this accused who made disclosure statement Ex.PH, However, in his cross-examination, this witness categorically admits that nobody was summoned during the interrogation. However, when Bali Ram had already made an oral

statement before him, he summoned the witnesses and thereafter he recorded his disclosure statement. In other words, before the recording of the disclosure statement Ex.PH, the police was already in possession of all the information before it was recorded in writing. Apart from this, PW-69 has also stated that since after the arrest of the accused, he was inter-rogated continuously. Bali Ram accused has expired. He has not been able to state as to under what circumstances he made an oral statement before PW-69, whether it was under coercion, threat or some allurement, these facts remain dormant due to the death of Bali Ram accused. In these circumstances, the disclosure statement having been made on 14-6-1971 after a lapse of 22 days continuous interrogation, appears to be of involuntary character. In any case, the police was possessed of the information before the statement of the accused was recorded in the presence of the witnesses. Therefore, it is inadmissible in evidence. This proposition is fortified by the principles laid down in the case of Hari Ram v. State reported in 1972 Cri LJ 961 (JK), wherein relying upon the view taken by their Lordships of the Supreme Court in the case reported as AIR 1956 SC 56 : (1956 Cri LJ 152), that prolonged police custody immediately preceding the making of the confession is sufficient, unless it is properly explained, to stamp it as involuntary; and Vijay Kumar v. State of H.P. reported in 1978 Cri LJ 1619 (Him Pra). Even otherwise, this disclosure statement (Ex.PH) is of no consequence. Accused Bali Ram led police party to the shop of Kangra Arts pointing out the shop where deal was struck and nearby the shop, owner of which purchased the idol. No witness of this 'Fard Nishan Dehi' (Ex.PW-69/A) has been examined except Shri P.D. Panta, the then Deputy Superintendent of Police, its scribe. No other evidence has been adduced by the prosecution to show that the shop adjacent to Kapoor Arts is owned by Hira Lal accused. Even otherwise, documentary evidence shows that shop of Kangra Arts is located in South Extension Market, Part-II but the accused named it as Lajpat Market and pointed it out as such. The prosecution has failed to produce any cogent or convincing evidence to show that shop adjacent to that of Kapoor Arts is owned by late Hira Lal accused. Even PW-69 has not been able to point out whether shop of Hira Lal is located on the right or left side of the shop of Kapoor. In addition, idol is alleged to have been sold to the owner of the nearby shop of Kapoor Arts but the accused Bali Ram while pointing out the shop, did not

point Hira Lal to be the purchaser. Even the statement of Ajudhya Ram (PW-12), when closely examined, indicates that disclosure statement Ex.PH was not made in his presence. He has not been able to state at which place accused had indicated the presence of stolen idol, whether at Chamba or at Delhi. Also, idol has not been recovered from the shop pointed at Delhi. No direct link of Hira Lal or Gokal Chand is disclosed by this statement qua the sale of the stolen idol. Bali Ram could have named Hira Lal or Gokal Chand directly in Ex.PH. Not only this, PW-40 Harish Chander, who proved forwarding note Ex.PW-40/C, states on oath that he had written that ruqua at the behest of Kapoor of Kangra Arts and at that time, Mannu Malwani accused was present. No doubt, this witness has been declared hostile, he having not supported the prosecution, nothing material has been extracted in his cross-examination by the prosecution which may help them to establish the link of Gokal Chand or his late brother Hira Lal's involvement in the instant case.

25. Another circumstance which belies the prosecution version is Railway Receipt Ex.PM. This RR is signed by Mannu Malwani (Proclaimed offender). Mannu Malwani's presence in Delhi is proved by this document as well. He is the consignee of the goods detailed therein-three wooden boxes including wooden box Ex.P-15, in which idol of 'Lord Vishnoo' was sent from Delhi to Bombay which are shown to have been despatched.

26. Another circumstance linking accused Gokal Chand with the commission of the alleged offence is reflected from letter Ex.PW-35/B. Contents of this letter reveal that it had been written to M/ s. Lalls Copper and Brass Palace, Delhi, inviting attention of Gokal Chand accused. Letter dated 4-6-1971 had been written for and on behalf of Malwani & Company by Basu Mal Malwani (P.W. 35) who had appended his signatures thereupon. This letter has been objected to by the defence on the ground of it being inadmissible in evidence, which objection was to be decided at the time of final hearing. Learned Court below has placed no reliance and rightly so because this letter is a carbon copy obtained by the police from M/s. Malwani & Co. in which Mannu Malwani was one of the partner of this firm. As such, it appears to have been despatched to save himself. Secondly, original of this letter has not been produced nor the prosecution has attempted to

collect it. Rather, there is no proof that this letter has actually been sent to the accused Gokal Chand. Thirdly, the original of this letter was never recovered from the possession of Gokal Chand who in normal course should have been in possession thereof. It is only the statement of PWs. 35 and 36, namely, Basu Mal Malwani and Gopal Malwani, that Siri Chand (brother of accused Gokal Chand) partner of the aforesaid firm located at Sundernagar Market, New Delhi had brought RR Ex.PM referred to above. Both these brothers state on oath that this letter had been drafted by Mannu Malwani accused and it was signed by his brother Basu Mal Malwani-another partner of the said firm. These statements indicate the interes-tedness of both these PWs not only to save themselves but also to save their brother Mannu Malwani from the criminal liability as a consequence of recovery of stolen idol from the godown of their Clearing Agents, namely, Madhwani & Company. This letter, in fact, primarily link Gokal Chand accused with the commission of the offence in question. Evidence to prove this letter is so weak that it automatically becomes bereft of its authenticity.

27. The above said conclusion is further corroborated by the statements of the two witnesses-- PW 35 and 36, who have categorically stated that the recovered stolen idol contained in box Ex. P-15, was received in their shop for the first time on 5th June, 1971. After having seen the nature, size and extent of the idol, as it could not have been displayed in their shop in any show window thereof, they sent back the said wooden case Ex. P-15 along with and containing idol to the godown of their Clearing Agents-- M/s. Madhwani and Company and this fact was made known to Gokal Chand accused through letter Ex. PW 35/B dated 4th June, 1971. Admittedly, partners of M/s. Madhwani and Co. (PWs 35 and 36) had seen the stolen idol for the first time on 5th June, 1971 as per their statements. If it is so, how and in what manner they could have written letter Ex. PW 35/ B to M/s. Lalls Copper and Brass Palace, Delhi, of which Gokal Chand accused was also a partner. The above said facts belies the claim of Malwani brothers in its entirety that they had come to know about the idol of 'Lord Vishnoo' for the first time on June 5, 1971. Learned Court below has rightly discarded this piece of evidence. It has further rightly concluded that this letter was either never , written or the prosecution has attempted to plant the same. We are in agreement with the Court below that PWs 35 and 36 having not owned the authorship of this letter and

rather they attributed that it was written by Mannu Malwani, a co-accused, this letter Ex. PW 35/B is of exculpatory nature and, therefore, its contents cannot be read or relied upon against his other co-accused.

28. Another circumstances, relied upon by the prosecution to show the connection of Gokal Chand accused with the commission of the offence is revealed from letter Ex. PW 49/ A (Copy) allegedly written by Sh. S. B. Keshwani, Advocate (PW49) to Commissioner of Police, Bombay. At the very outset, we are in full agreement with the trial Court that this letter is also inadmissible in evidence, for the reasons, firstly, its original has neither been attempted to be taken possession of from the Commissioner of Police, Bombay to whom it was addressed nor any attempt has been made to show that it was ever received by the Commissioner of Police, Bombay at any time. Secondly, this letter has again been written for and on behalf of the partners, including Mannu Malwani accused, of M/s. Malwani and Co. Thirdly, this letter is undated and has not been shown to have been despatched by Mr. Keshwani (PW 49). Fourthly, both the PWs 35 and 36-- S/Sh. Basu Mal Malwani and Gopal Malwani, categorically deny having imparted any instructions to their counsel Mr. Keshwani (PW 49) and according to them, this letter had also been drafted and sent to the Commissioner of Police at the behest of Mannu Malwani -- a co-accused. Thus, the reasons discussed for the rejection of letter Ex. PW35/.B, are attracted to this letter Ex. PW 49/ A. No reliance can be placed. This letter is also of exculpatory nature and cannot, thus, be used against the other co-accused of Mannu Malwani. In addition, police officers belonging to the office of the Commissioner of Police, Bombay, namely, S/Sh. Suresh Pandey and Binayak Bishnoo (PWs 41 and 68 respectively) both deny the receipt of any such letter. On the contrary, they had raided the godown of M/s. Malwani and Company, on the receipt of a secret information. Thus, this piece of evidence is also of no help to the prosecution.

29. Another circumstance appearing against accused late Hira Lal and his brother Gokal Chand is in the form of account books of Gauri Shankar (PW 26) and forwarding note Ex. PW 40/C. We have already discussed and ultimately concluded from forwarding note Ex. PW 40/ C and the connected statement of the witness thereof, that Mannu Malwani accused was the purchaser of stolen idol at

Delhi and he was the consignee of all those goods. Ganpat (PW34) had received three boxes including Ex. P-15 from labourers and he had booked these with the railway vide railway receipt Ex. PM. This document bears an endorsement on its back whereby address of Hira Art House is disclosed. Gauri Shankar (PW 26) as per his account books stated on oath that he had released commission fee to the extent of Rs. 9/- from M/s. Lalls Copper and Brass Palace of which Gokal Chand accused was a partner. However, we do not find any such statement that the above said three boxes were sent by Hira Lal or Gokal Chand through PW 26 or PW 34. The only incriminating circumstance against both late Hira Lal and Gokal Chand accused, appears in the form of an entry in the account books of Gauri Shankar at page 125 of the ledger account books. It would be relevant to state that as per the entries in the record, Mannu Malwani accused had struck a deal with some persons and with the help of Kapoor of Kangra Arts got forwarding note Ex. PW 40/C written from Harish Chander (PW 40) and through his some persons got them despatched through Gauri Shankar and Ganpat (PWs 26 and 34) respectively. However, Gauri Shankar, PW 26, in his cross-examination has categorically stated that neither Gokal Chand nor late Hira Lal both accused ever came to him personally nor any one of them ever dealt with him personally nor he knows who are their (accused) employees. He further admits that he never visited the shop of Gokal Chand or late Hira Lal accused. He then states that prior to the despatch of the three wooden boxes, referred to above, to M/s. Malwani and Company vide railway receipt No. 7642 (Ex. PM), he used to despatch goods to M/s. Malwani and Company, Bombay several time from and on behalf of the firm M/s. Lalls Copper and Hira Arts. He then states that he himself does not work at railway station but it is his employees who are working there. He has categorically admitted that it is correct if any person brings goods from his customer and tells the name of the customer whom he knows, then he at once used to book the goods irrespective of the fact whether he knew the person who brought the goods or not. According to him, the goods used to be despatched on the basis of a ruqua of their customer. No link has been established by the prosecution that any such ruqua had been written by late Hira Lal or Gokal Chand accused to this witness. Further, no reliance can be placed on any such ruqua as well because as per the deposition of this witness he never used to ascertain whether the ruqua was

actually written or sent by his customer. Ruqua, in the instant case, is mark Ex. P-26 and referred to M/s, Malwani and Co.-- Delhi to Self, Bombay. He admits that as there was no account with him in the name of Malwani and Co., as such, he made an entry regarding the charging of the commission fee etc. in the account of M/s. Lalls Copper and Brass Palace. On the basis of the address of Hira Arts so given by the person who had taken the RR. Thus, from the above evidence, it is apparent that none of the two accused ever instructed Gauri Shankar to send the consignment of three wooden boxes including Ex. P-15 from Delhi to M/s. Malwani and Company, Bombay, nor they ever met this Gauri Shankar at Delhi at the material time.

30. It is apparent from the railway receipt Ex. PM that the goods were sent from Delhi on 24th May, 1971 and received at Bombay by My s. Malwani and Company on 29th of May, 1971. Entries in the reservation control charge of Indian Airlines Ex. PP at Sr. No. 73 shows that Mannu Malwani accused had visited Delhi on 12-5-1971 and thereafter, as per entries in Ex. PW, both accused namely, S/Sh. B. S. Lama and Mannu Malwani had left from Delhi to Bombay on 24th of May, 1971. Ex. PW 13/A to Ex. PW 13/D show the existence of dealings between Lalls Copper and Brass Palace and M/s. Malwani and Company, Bombay prior to 24th of May, 1971. The entries in the reservation Control Chart of Indian Airlines read with railway receipt Ex. PM indicating consignee to be M/s. Malwani and Company and goods-three boxes including Ex. P-15 despatched from Delhi to Bombay show not only the fact that Mannu Malwani accused was in Delhi at least on 24th of May, 1971 and goods had been despatched on that very date and he thereafter left by plane-departure time of which was 15-15 hours. Thus, from the evidence discussed above, no indication of either late Hira Lal or Gokal Chand accused regarding their involvement in the commission of the crime in question is proved. The above said evidence points out to the only circumstance that Mannu Halwani while at Delhi, got booked these three cases with Gopal and revealed address of Hira Lal to Gauri Shankar (PW 26) or his employees in order to save himself. The trial Court was absolutely right in not relying upon the above said pieces of evidence vis-a-vis the involvement of the above said accused persons.

31. The last but not the least circumstance appearing from the record in the instant case is that accused Hira Lal as also his brother Gokal Chand-respondent, have been initially involved in the purchase of stolen idol of 'Lord Vishnoo' and then its sale to M/s. Malwani and Co., Bombay but the prosecution later on has attempted to prove that both these accused persons were the consigner of the three wooden cases even through Malwani and Company of Bombay which had been despatched to Bombay. In other words, allegations and proof are at variance as per the prosecution evidence itself. At the same time, one set of evidence as discussed above, indicate that the stolen idol of 'Lord Vishnoo' was purchased at Delhi by Mannu Malwani accused and therefrom it was despatched along with other goods by him to Bombay vide RR Ex. PM. The conclusions, arrived at by the trial Court qua the involvement of late Hira Lal and his brother Gokal Chand accused in the commission of the crime in question and resultantly recording the order of their acquittal is neither perverse nor can be said to be imaginary. Rather, it is based on sound reasons. The prosecution evidence qua the link of these two accused with the crime is highly suspicious and of doubtful nature. It is well settled that suspicion, howsoever strong it may be, cannot take the place of proof.

32. In view of the above, there appears to be no infirmity in the impugned judgment which calls for no interference at our hands. The appeal is, thus, dismissed and the impugned judgment is upheld.

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