State of U.P. Vs Nawab

Court: Allahabad High Court

Date of Decision: April 1, 2014

Acts Referred: Arms Act, 1959 â€" Section 25, 27
Criminal Procedure Code, 1973 (CrPC) â€" Section 161, 313, 378
Penal Code, 1860 (IPC) â€" Section 379, 390, 392, 395, 397

Citation: (2015) 1 ACR 932 : (2014) 86 ALLCC 499

Hon'ble Judges: Rakesh Tiwari, J; Kalimullah Khan, J

Bench: Division Bench

Advocate: S.N. Tripathi, A.G.A, Advocate for the Appellant; G.R.S. Pal, Advocate for the Respondent

Final Decision: Dismissed

Judgement

Kalimullah Khan, J.
We have heard Sri S.N. Tripathi, learned A.G.A. appearing for the appellant-State, and Sri G.R.S. Pal, learned

Counsel appearing for the respondents-accused. Perused the record. This government appeal is preferred u/s 378 Cr.P.C. on behalf of State of

U.P. against the accused-respondents, namely Nawab son of Ashik Husain and Gandhi Rana son of Moti Rana. The appellant challenges the

validity and correctness of the impugned judgment and order dated 4.7.1984 passed by Assistant Sessions Judge, Badaun in S.T. No. 59 of

1984.

2. As per report of C.J.M. Badaun, dated 17.4.2012 and order of the Court dated 9.7.2012, accused-respondent No. 2, Gandhi Rana has died

during pendency of appeal hence, appeal against him is abated.

3. The accused-respondents were put on trial for the charges under sections 392/397 and section 411 I.P.C. by the Police Station-Kotwali,

District-Badaun and acquitted by the impugned judgment and order dated 4.7.1984, aforesaid.

4. The prosecution case before the Sessions Court in brief was that on 25.6.1983 complainant Mohar Singh alongwith Malik Jalil Ahmad

Tonkbala were going to Astana Alia Tonknagla at about 9.00 A.M., two accused persons appeared and one of them put his tamancha on the

chest of Mohara Singh and directed to handover all his belongings and also threatened to kill him if he raised any hue and cry. His other companion

standing with tamancha, snatched his purse containing Rs. 120/- or 125/- and certain documents and the wrist watch. Accused persons also took

a search of Jalil Ahmad but nothing was found on his person. Thereafter, the accused persons ran away towards Sahbajpur. On an alarm being

raised by the complainant, some member of the public reached there and chased the assailants, but due to fear of tamancha they were unable to

apprehend them.

5. Subsequently, complainant Mohar Singh lodged a first information report of the incident at Police Station-Kotwali, District-Badaun at about

9.35 A.M. on 25.6.1983 naming accused Nawab with his address u/s 392I.P.C

6. On an information received from the informer that two accused persons were standing near the Kothi of Harish Chandra Singh, the police party

proceeded along with informer. When the accused persons saw the police party, they tried to run away, but complainant and other members of

public succeeded in arresting the accused persons during which some injuries were caused to the accused persons by the police in their self

defence as accused are said to have fired with their country made pistol at police personnel.

7. On their search, Nawab was found in his possession of a Purse of Mohar Singh containing Rs. 120/- and an extract of Khatauni. A tamancha

and three live cartridges were also recovered from his possession. From the possession of Gandhi Rana, wrist watch of Mohar Singh, one

tamancha and four live cartridges, were also recovered.

8. After recovery, the relevant recovery memos were prepared and the case was investigated and charge-sheet was submitted against the accused

persons under sections 392/411 IPC and a separate charge-sheet was also submitted u/s 397 IPC against them which was tried in Sessions Trial

No. 403 of 1983: State of U.P. v. Nawab and Gandhi Rana, Sessions Trial No. 404 of 1983: State of U.P. v. Gandhi Rana, u/s 25 of Arms Act,

and Sessions Trial No. 405 of 1983: State of U.P. v. Nawab, u/s 25/27 of Arms Act. The accused persons pleaded not guilty to the charges and

claimed their trial.

9. The prosecution in support of its case examined Mohar Singh (P.W. 1), Malik Jalil Ahmad (P.W. 2) and V.S. Yadav (P.W. 3).

10. On appreciation of the facts and evidence on record, the Sessions Court-acquitted all the accused persons by the impugned judgment and

order dated 4.7.1984, mainly on the grounds; that besides the two victims prosecution did not produce any independent witness although these

two witnesses admitted that other witnesses from public were also present there; that there was no mention in the First Information Report

regarding specific role played by the two miscreants and there is contradiction in their statements; that the reliability of the prosecution witnesses

was doubtful and that the accused persons were entitled for benefit of doubt.

11. Aggrieved, State of U.P. has filed present appeal.

12. We have heard Sri S.N. Tripathi, learned A.G.A. and Sri G.R.S. Pal, Counsel for the accused-respondents. Perused the record.

13. Learned A.G.A. has assailed the impugned judgment and order on the grounds; that it was broad day light incident regarding which first

information report was lodged promptly and the accused persons were arrested soon after the crime and looted properties were recovered from

their possession; that learned Trial Court wrongly rejected the testimony of victims only on the ground of non-mentioning of specific role of the

accused persons in the First Information Report; that the Trial Court wrongly treated the omission in the first information report as contradictions,

inasmuch as, the First Information Report in which it was clearly mentioned that one accused placed tamancha on his chest and the other was

looting the victims. Thus, there was no contradictions at all in between the statement of the prosecution witnesses and the FIR. He has also assailed

the impugned judgment and order on the ground that finding of the Trial Court that such an act of robbery could not have been committed in day

light on a busy road is merely based on surmises and conjectures; that recovery memos fully corroborate the prosecution version as mentioned in

the first information report; that prompt action on the part of the police has wrongly been criticised by the Trial Court when from the evidence, it is

clear that there was hardly any time to make out a false case against the accused persons; that recovery of illicit arms and ammunitions were fully

proved by the prosecution by examining reliable and independent witnesses, but the same has been wrongly rejected by the Trial Court.

14. Per contra, learned Counsel for, the accused-respondent has submitted that the view taken by the learned Trial Court is possible view. The

prosecution has failed to prove its case beyond all reasonable doubts. No independent witness has been produced either to prove the incident of

loot or recovery of looted property. Both the witnesses are interested witness and belong to one group, therefore, they are not trustworthy.

According to him appeal lacks merit and deserves dismissal.

15. Before making re-appraisal of the prosecution evidence available on record we would prefer to discuss the legal position of the matter involved

in this case.

Section 392 I.P.C. reads as under:-

Section 392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be

liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

Robbery has been defined in section 390, I.P.C. Section 392, I.P.C. contemplates that the accused should have from the very start, the intention

to deprive the complainant of the property and should, for that purpose, either hurt him or place him under wrongful restraint. The charging section

is section 392.

Section 390 I.P.C. reads as under:--

Section 390. In all robbery there is either theft or extortion.

Theft is ""robbery"" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property

obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of

instant death or of instant hurt, or of instant wrongful restraint.

Extortion is ""robbery"" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion

by putting that person in fear of instant death, or instant hurt, or of instant wrongful restraint to that person, or to some other person, and, by so

putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation--The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant

wrongful restraint.

16. Lord Macaulay, the Authors of Code have remarked, ""There can be no case of robbery which does not fall within the definition either of theft,

or of extortion. But in practice it will perpetually be matter of doubt whether a particular act of robbery was a theft, or an extortion. A large

proportion of robberies will be half theft, half extortion.

17. When an accused is guilty of robbery he is to be convicted u/s 392, I.P.C. When accused is found guilty u/s 392 for committing robbery and

u/s 411 for retaining stolen property, his conviction u/s 411 I.P.C. is improper. For considering the language of section 411, dishonest retention is

contradistinguished in that section from dishonest reception. The act of dishonest removal within section 379 constitutes dishonest reception within

section 411 and so the thief does not commit the offence of retaining stolen property merely by continuing to keep possession of the property he

stole. The theft and taking and retention of stolen goods form one and the same offence and cannot be punished separately.

18. Therefore, in the case in hand accused cannot be convicted u/s 392, I.P.C. as well as u/s 411, I.P.C. in the facts and circumstances of this

case because the articles which are said to have been recovered from their possession are said to have been looted soon before its recovery, from

first informant Mohar Singh P.W.-1, by the same accused.

Section 411 I.P.C. reads as under:--

S. 411. Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be

punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

19. Section 410 explains what comes under the words ''stolen property''. Things which have been stolen, extorted, or robbed, or which have been

obtained by criminal misappropriation or criminal breech of trust come under extended significance given to these words. The essence of the

offence of receiving stolen property u/s 411 consists in the receipt or retention, with full knowledge at the time of receipt or retention that the

property was obtained in one of the ways specified in section 410. It is immaterial whether the receiver knows or not who stole it. The section

does not apply to the actual thief. The class of persons against whom it is directed is a class to whom these alternative words apply ""knowing or

having reason to believe the same to be stolen property.

20. In Trimbak Vs. The State of Madhya Pradesh, The Supreme Court laying down the ingredients of offence u/s 411, I.P.C. lays down that the

prosecution is to establish: (1) that the stolen property was in the possession of the accused, (2) that some person other than the accused had

possession of the property before the accused got possession of it, and (3) that the accused had knowledge that the property was stolen property.

21. To sustain conviction u/s 411, the identity of the property recovered from the possession of the accused with the property stolen must be

established.

22. Offence of theft being distinct from the offence of receiving stolen property, the person charged for offence of theft only cannot be connected

for receiving or retaining stolen property.

Section 397 I.P.C. reads as under:--

Section 397. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or

attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven

years.

23. Sections 397 and 398 do not create any offence but merely regulate the punishment already provided for robbery and dacoity. This section

fixes a minimum term of imprisonment when the commission of robbery and dacoity has been attended with certain aggravating circumstances, viz.,

(1) the use of a deadly weapon, or (2) the causing of grievous hurt, or (3) attempting to cause death or grievous hurt.

24. Section 397, I.P.C. does not make any act an offence. It only provides minimum punishment for some offences under certain circumstances

i.e. when deadly weapon is used for grievous hurt is caused or attempt to cause death or grievous hurt is made. Section 397, I.P.C. only provides

for enhancement of the term of imprisonment in certain cases when offender uses a deadly weapon or causes grievous hurt to any person.

Conviction should be u/s 392 read with section 397, I.P.C. if the charges are found proved.

25. Section 397, I.P.C. cannot be applied constructively. It relates only to the offender who actually uses the deadly weapon himself or caused

grievous hurt or attempted to cause death or grievous hurt at the time of committing loot or dacoity.

26. Charging accused u/s 397, I.P.C. simpliciter, framing of charge u/s 397 only is defective. It is to be famed alongwith section 392 or section

395, as the case may be. Section 397, I.P.C., being not a substantive offence, but only a rider to section 392, I.P.C. a single charge need be

formed for an offence u/s 392, read with section 397, I.P.C.

27. To bring home the enhanced penalty u/s 397, I.P.C. the prosecution is to establish: (a) that the accused persons committed robbery or the

accused (five or more) committed dacoity, (b) that any of them while committing dacoity either used a deadly weapon or caused a grievous hurt to

any person or attempted to cause grievous hurt or death to any person. Then enhanced punishment would be attracted to the very accused who

used deadly weapons or attempted to cause death or grievous hurt or caused grievous hurt.

28. In view of the aforesaid legal position, accused cannot be convicted and sentenced separately u/s 397, I.P.C.

29. In the backdrop of the aforesaid legal position of the offences punishable u/s 392 read with sections 397 and 411, I.P.C. we have

reconsidered and made reappraisal of the evidence led by prosecution to prove the charges framed against accused.

30. Perusal of impugned judgment shows that both the witnesses i.e. P.W. 1 and P.W. 2, were pre-known to each other, although they had

expressed their non-acquaintance to each other. Mohar Singh, P.W. 1 has admitted that in number of criminal cases lodged by him another

witness, Malik Jalil Ahmad, P.W. 2 had stood prosecution witness for him and Malik Jalil Ahmad, P.W. 2 has similarly admitted that in more than

one case instituted by him, Mohar Singh, P.W. 1 has stood prosecution witness for him. Both the witnesses, P.W. 1 and P.W. 2 have deposed

that looted articles were recovered from the possession of accused persons, but none of those articles have been produced by the prosecution.

Non production of case properties during trial undermines the sanctity of recovery.

31. In the First Information Report, P.W. 1, Mohar Singh has named the accused Nawab son of Ashik Husain with his address, but he has not

disclosed as to whether the aforesaid accused Nawab had put his country made pistol at his chest to frighten him in order to loot or he was the

person who actually looted the victim. The learned Trial Court has rightly held that had Mohar Singh, P.W. 1 been pre-acquainted with accused

Nawab, he would have assigned the specific role against him, but non assigning the specific role against accused Nawab tells heavily against the

prosecution.

32. It has come in the evidence of I.O. (P.W. 3) of the case that during the course of recovery accused persons had fired upon the police party

who were more than ten in number, but non sustaining injury by police party casts a serious doubt on the veracity of mode and manner of recovery

and the arrest of the accused persons. The police does not claim that in order to apprehend the accused persons they fired upon them in self

defence. This appears to be improbable and unnatural.

33. Recovery memo, Ex. Ka-2 and Ka-3, disclose that there were two prosecution witnesses, namely Pooran Lal son of Lochi Murao and

Surendra Kumar Saxena son of Rang Bahadur Saxena, but none of them have been produced to prove the factum of recovery. The place of

recovery is a busy road. Incident took place in broad day light but none of the independent witness came forward to support the recovery. It is

fatal to prosecution.

34. The recovery memos prepared show that Rs. 122/-, khatauni extracts and an application alongwith two plain papers and a small chit of papers

were recovered from the possession of the accused Nawab, but Mohar Singh, P.W. 1 says that, only cash, application and khatauni extracts were

recovered from him. Meaning thereby that no other thing was recovered from him. Malik Jalil Ahmad, P.W. 2 has deposed that from the purse a

paper extract containing address was recovered from the possession of accused Nawab. He had not deposed that plain papers were also

recovered from him. Similarly as regards recovery of watch of Mohar Singh, P.W. 1 according to the prosecution, it was recovered from the

accused Gandhi Rana. Mohar Singh, P.W. 1 deposed that on the day of incident it was given to him by his brother, but contradicting this fact, the

I.O. (P.W. 3) has deposed that the aforesaid Mohar Singh, P.W. 3 had given statement to him u/s 161 Cr.P.C. that he was wearing this watch

since long and it was given to him by his father himself. The factum of robbery as well as recovery of aforesaid articles from the possession of

accused Nawab and Gandhi Rana renders unreliable and, therefore, they have rightly been disbelieved by the learned Trial Court.

35. Since prosecution has failed to prove its case beyond reasonable doubt, there is no need for the Court to probe into the defence case stated

by accused in their examination u/s 313 Cr. P.C. where in accused, Gandhi Rana stated that he had come to Piyara from where he was arrested

by the police to kill him in a fake encounter, but police party could not succeed in their effort due to interference by some persons of public, hence

they falsely implicated him in this case. Likewise, accused Nawab stated that he was arrested from his house on 24.6.1983 and was brought to a

jungle to kill him in a fake police encounter, but on account of arrival of public they could not do so and ultimately, he was falsely implicated in this

case.

36. Para. 8 of the judgment delivered by Division Bench of this Court in State of U.P. Vs. Ram Ajorey and Others, reads as under:--

8. The law is well settled that appeals from acquittal are allowed only in exceptional circumstances. It is an extraordinary remedy. The appeal by

Government should be made judiciously and only in cases where the judgment is so clearly wrong that its maintenance would amount to a serious

miscarriage of justice or when a principle is involved or the question is one of great importance or of great public importance. The burden is on the

Government to show that the acquittal is wrong and strong and urgent grounds must be made out to justify interference. When there is reasonable

doubt as to the guilt of deceased, the High Court will not interfere nor will it interfere merely because upon evidence the lower Court might have

come to the conclusion of guilt, unless it is quite clear that the acquittal is wrong. The High Court will not also interfere merely because it might

itself, as an original Court, have arrived at a different conclusion. Where an appeal against acquittal turns on the facts it would only succeed if the

judgment of acquittal is clearly wrong and involves a miscarriage of justice or when the trial judge has erred in failing to draw the clear, indubitable

and irresistible inference from the facts or when the trial Courts appreciation of evidence is vitiated by failure to take note of a very important fact

or where finding of fact is based on an erroneous rejection of evidence. Thus the High Court will only interfere if it is proved without any doubt not

only that the accused is guilty, but that he has been acquitted on unreasonable grounds.

37. The view taken by the learned Trial Court is the appropriate view in the facts, circumstances and in the light of evidence adduced by the

prosecution, therefore, the aforesaid impugned judgment and order dated 4.7.1984 needs no interference by this Appellate Court. In view of the

above, appeal lacks merit and is accordingly dismissed.