

(1962) 09 BOM CK 0023

Bombay High Court

Case No: Criminal A. No. 430 of 1962

Parshottam Mahadev
Patharphod

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision: Sept. 27, 1962

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 165
- Evidence Act, 1872 - Section 3
- Penal Code, 1860 (IPC) - Section 411

Citation: (1963) MhLj 157

Hon'ble Judges: M.G. Chitale, J; H.R. Gokhale, J

Bench: Division Bench

Advocate: I.C. Dalal, for the Appellant; V.S. Deshpande, Asstt. Govt. Pleader, for the Respondent

Final Decision: Dismissed

Judgement

M.G. Chitale, J.

This is a criminal appeal by accused No. 4 against the order of conviction and sentence passed against him u/s 411, Indian Penal Code. Prosecution case briefly stated is as follows:

One Pokhraj Ghemaji carries on business in fountain pens etc. at Calcutta. His brother Bhavarlal Ghemaji carries on business in fountain pens etc. in Bombay. On July 21, 1961, Pokhraj purchased a half passenger ticket, and against that half passenger ticket booked a parcel containing fountain pens etc. of the value of about Rs. 2,900 with the Railway, and obtained a luggage receipt from the Railway in respect of that parcel. Pokhraj posted that luggage receipt to his brother Bhavarlal at Bombay. Bhavarlal did not receive that luggage receipt. According to the prosecution, Bhavarlal received a list of the articles sent by his brother Pokhraj by

ordinary post in the evening of July 23, 1961. Bhavarlal went to the Luggage Office at V.T. Station on July 24, 1961, and there made inquiries about the package sent by Pokhraj from Calcutta. Bhavarlal was then informed that the package had arrived at the luggage office at V.T. Station on the previous day and that package had been duly delivered. Bhavarlal then lodged a complaint with the railway authorities. On the next day, i. e. on July 25, 1961, Bhavarlal lodged his first information report with the V.T. Railway Police. Investigation thereafter followed. A major portion of the goods were taken charge of from accused No. 4, and five gross of refills were taken charge of from one Inayatalli. An identification parade was held on August 6, 1961, and after completing the investigation of this case, the present appellant and three others were charge-sheeted. According to the prosecution, luggage-clerk at V.T. Railway station, Mr. Prannath Girotra, delivered the package in question to accused Nos. 1 and 2, and one more person who is absconding. Accused No. 2 sold some of the goods contained in that package to accused No. 4, the present appellant; so also accused No. 3 sold some goods from that package to prosecution witness Inayatalli. The present appellant and three others were prosecuted.

2. The defence of the present appellant briefly stated is: He does not know as to who sent the goods in question to Bombay, and who took delivery of the same. He, however, admits that the wooden case, part of Exh. 7, was taken charge of by the police from his room. He further says that goods similar to the goods marked Exh. 7 were taken charge of by the police from his room. He also says that he had sold five gross of refills to accused No. 3 for Rs. 225, but he does not know whether accused No. 3 sold the same to Inayatalli. He admits that the refills shown to him while recording his statement u/s 342, Criminal Procedure Code, were similar to the refills, which he sold to accused No. 3. He admits that at about 2-30 a. m. on July 26, 1961, Head-constable Tike took charge of the wooden case along with fountain pens etc. from his room. He adds that the goods taken charge of from him were similar to Exh. 7. He further says that he did not know that the goods in question, Exh. 7, were stolen property. He says that he purchased the same from accused No. 2 for Rs. 2,600.

3. The learned trial Judge believed the evidence led by the prosecution to establish that the goods, Exh. 7, were stolen property, that soon after the theft they were found in possession of accused No. 4, and that accused No. 4 either knew or had reason to believe that the goods in his possession were stolen property. Hence he convicted him, i.e. accused No. 4, u/s 411, Indian Penal Code, and sentenced him to rigorous imprisonment for two years. It is against this order of conviction and sentence that the present appeal is filed.

* * * *

[After referring to questions not material to this report, the judgment proceeds.-]

4. Mr. Dalai during his arguments did not seriously dispute that Pokhraj, brother of complainant Bhavarlal, sent goods as stated by Pokhraj. It is also not disputed that some persons, who had no legal right to the goods sent by Pokhraj, obtained delivery of the same from the luggage clerk, Mr. Prannath Girotra. What Mr. Dalai disputed was the identity of the goods in question, and also whether accused No. 4 had knowledge that the goods in question were stolen property.

5. The first question for our consideration, therefore, is whether the property that was admittedly found in possession of accused No. 4, is established to be part of the property sent by Pokhraj beyond reasonable doubt. On that point, we have the evidence of Bhavarlal and Pokhraj; the statement of accused No. 4 also would be very material on this point. With regard to the identity of the property found in accused No. 4's possession, Bhavarlal says:-

AS directed, I have brought the goods to Court today along with the wooden case, The Spl. P.F. tenders the nibs, pencils, fountain pens ,holder pens, erasers, refills, writer pens, stylo pens and the wooden case). The goods and the wooden ease are put in and marked as Ex. No. 7 (Colly.). These goods and the wooden case were taken charge of by the police from the room of accused No. 4 in the presence of two panchas....

In the cross-examination Bhavarlal says:-

I cannot say if any other dealer besides me soils goods like Ex. No. 7 in Bombay. Likewise I cannot say if any of the merchants besides me sells goods like the refills marked X-1 in Bombay.

6. Mr. Dalai severely criticised the evidence of Bhavarlal. Mr. Dalai points out that Bhavarlal applied to the learned committing Magistrate for getting possession of the goods in question, and the learned Magistrate allowed him to have possession of these goods, on his undertaking to produce them in Court, whenever necessary. Mr. Dalai contends that in a case where the identity of the goods is disputed, it was wrong on the part of the learned Magistrate to allow the goods to go in the possession of the complainant. This contention seems to be well founded, and this may have thrown a serious doubt on the question of identity of the goods. All the same, in the present case Bhavarlal has stated that he kept in fact the property in question at his residence. He produced it in the Sessions Court at the trial, when he was required to do so. At the trial no grievance seems to have been made about this fact, viz., the goods in question were allowed to go in the complainant's possession; it is to be noted that accused No. 4 was at the trial represented by an advocate; hence we do not think that any prejudice is caused to accused No. 4 on this account. Moreover, on the statement of accused No. 4 himself, as we will presently point out, it is quite clear, and there can be no doubt, that the goods that Bhavarlal produced at the trial were the goods taken charge of from accused No. 4's possession. Mr. Dalai also criticised Bhavarlal's evidence, because he denies that he sold any goods

to Inayatalli, while there is an entry in Inayatalli's account-book produced at the trial, showing purchase from Bhavarlal. This entry was not put to Bhavarlal, and hence we cannot draw any adverse inference against Bhavarlal, merely because Inayatalli chose to make the said entry in his account-book. The learned trial Judge has not placed reliance on Inayatalli's evidence, presumably because he himself was in possession of stolen goods. Mr. Dalai also criticised the method of sending goods adopted by Pokhraj to his brother, complainant Bhavarlal, at Bombay. Instead of sending the goods in a Straightforward manner, they were surreptitiously sent by a passenger train on a child ticket. That cannot have much bearing on the identity of the goods in question. In the present case, we are not holding the identity of the goods established only on the evidence of Bhavarlal and Pokhraj; we find that their evidence receives a very strong corroboration from accused No. 4's own statement.

7. Pokhraj in his evidence identifies the goods found in accused No. 4's possession, Exh. 7, as part of the goods sent by him from Calcutta. It is urged that the merchants at Calcutta from whom Pokhraj purchased the goods are not examined. We are unable to see how their evidence would be more helpful to establish the identity of the goods in question. It is brought out in Pokhraj's evidence that the address of Bhavarlal, which was written in green ink on the wooden case, is erased. This, according to Mr. Dalai, is a suspicious circumstance. Pokhraj in his cross-examination says that the wooden box, part of Exh. 7, is similar to the box sent by him. Reliance is placed on this to contend that Pokhraj himself is not sure as to its identity. Wrest from its context, this statement may indicate as if Pokhraj said that the said box was similar. Pokhraj has, however, made it quite clear in his evidence, at least so far as the goods in question are concerned, that he is quite sure that the goods found in accused No. 4's possession were part of the goods sent by him. We are inclined to believe the evidence of Bhavarlal and Pokhraj with regard to the identity of the goods in question. That evidence receives strong corroboration if one compares the two lists, Exhs. 20 and 21, which are the lists of the goods sent by Pokhraj, with the description of the property found in accused No. 4's possession, as described in the panchnama, Exh. 23. Exhibit 20 is the list received by Bhavarlal through post; Exh. 21 is the carbon copy of that list, which was taken charge of from Pokhraj. If one compares the description of the goods in these lists with the description of the goods found with accused No. 4, as shown by the panchnama, Exh. 23, it will be clear that the same type of goods, as are found in the lists, Exhs. 20 and 21, were found with accused No. 4. What is important is that the particular combination of the various types of goods is surprisingly similar, and hence we think that if Exhs. 20, 21 and 23 are considered together, they lend a good deal of support to the evidence of Bhavarlal and Pokhraj.

8. As stated above, accused No. 4's own statement also lends a good deal of corroboration to the evidence of Bhavarlal and Pokhraj. Mr. Dalai contends that all that accused No. 4 stated is that the goods found with him were similar to the goods in question. He has not, according to Mr. Dalai, in terms admitted the identity of the

goods in question. From his statement we find that accused No. 4 has clearly admitted the identity of the wooden case. He has clearly stated that the wooden case (part of Exh. 7) was taken charge of by the police from his room. He further says goods similar to Exh. 7 were taken charge of by the police from his room. What is, however, more important is the following question and answer:-

Q. It is alleged by the prosecution that between 2 and 2-30 a. m. on 26th July 1961 H.C. Tike took charge of the fountain pens etc. and wooden case (Ex. No. 7) and the ground mat (Ex. No. 8) from you in the presence of two panchas. What have you to say about this?

A. This is correct.

9. It is important to note that while putting this question the goods in question along with the wooden case were specifically shown to the accused, and it was asked whether that was taken charge of by the police from his possession, and the accused has unambiguously stated "this is correct". Accused No. 4, however, seems to have realised that he made a wrong admission, and hence to the next question he answered "the goods taken charge of from me were similar to Exh. 7". He then goes on to say that he had purchased the goods in question from accused No. 2 for Rs. 2,600. Reading the statement of accused No. 4 as a whole, we have not the slightest doubt with regard to the identity of the goods in question.

10. Thus, on the evidence discussed above, it is clear that certain goods were sent by Pokhraj from Calcutta, delivery of those goods was taken by some persons, who had no right to those goods, and were not entitled to take delivery of the same, from P.W. Prannath Girotra, and subsequently a part of those goods were found in possession of accused No. 4. It is not disputed that the delivery of the goods in question was taken sometime in the evening on July 23, 1961; it is also not disputed that accused No. 4 was found in possession of goods, as shown by panchnama, "Exh. 23, at 2-30 a. m. on July 26, 1961. According to the statement of accused No. 4 himself, he purchased the goods found with him from accused No. 2 on July 23, 1961, some time after 5 p.m. Thus on evidence we are satisfied that very soon after the delivery of the goods in question was taken from P.W. Prannath Girotra, accused No. 4 was found in possession of a part of these goods. The question for consideration is whether these goods can be said to be stolen property, as defined by section 410, Indian Penal Code. On the evidence on record it is quite clear that the railway was in possession of the goods on behalf of Pokhraj, So also Prannath Girotra, who is a railway employee, was in possession of the goods on behalf of the railway, and thus also on behalf of Pokhraj. Delivery of these goods was given to some persons, who were clearly not entitled to take delivery of these goods, on production of the luggage ticket, Exh. 11. Prannath Girotra says:-

The luggage received at the V.T. 1uggage office is handed over to the persons producing the luggage receipts. Before delivery of the luggage is made it is usual to

take the signature of the person demanding delivery in the delivery book.

Nothing is brought out in the cross-examination to show that this statement of Prannath Girotra is incorrect. Thus it appears that on production of the luggage ticket, Exh. 11, the goods were delivered by Prannath Girotra. It is pertinent to note that Exh. 11 is a luggage ticket, although loosely called a receipt, issued on a passenger ticket, and hence "prima facie it appears that delivery of the goods mentioned in such a luggage ticket would be given to the bearer on the mere production of the luggage ticket. It is true that at the back of the luggage ticket, Exh. 11, there is a printed notice, which indicates that if the railway authorities doubt whether the person producing the luggage ticket is entitled to take delivery, they can withhold delivery until the doubt is removed. Considering the fact that the goods were sent on a luggage ticket, issued on a passenger ticket, and also the evidence of Prannath Girotra, it appears that merely on the production of the luggage ticket or luggage receipt, Exh. 11, delivery of the goods was given to the person seeking delivery by P.W. Prannath Girotra. Hence, there seems to be no occasion for making any representation, and if there was no occasion for making any representation, and if in fact there was no representation, it cannot be said that the goods in question were acquired by cheating. It is urged that the production of the luggage ticket itself involves an implied representation that the person presenting the luggage ticket is either the owner, or a person duly authorised by the owner to receive the goods mentioned in the luggage ticket, and hence delivery of goods can be said to have been on a false representation, though implied. If goods can be delivered to the bearer of a luggage ticket merely on the production thereof; we are not quite sure that mere production necessarily implies a representation. Even assuming, however, that there is such an implied representation, in our opinion, the property can still be held to be stolen property. In order to establish that the property in question is stolen property, i.e. subject-matter of a theft, it must be proved that the property in question was dishonestly taken out of the possession of the real owner, without his consent. In the present case, there can be no doubt that the property was taken out of the possession of the railway, who must be deemed to be in possession on behalf of the real owner, Pokhraj. It is urged that for removal consent of Prannath Girotra was obtained, although it may have been obtained on an implied false representation, but even such consent would take the property out of the category of stolen property. We are unable to accept this contention, in view of section 90, Indian Penal Code. Relevant portion of section 90 reads thus:-

A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows or has reason to believe, that the consent was given in consequence of such fear or misconception

Thus it is clear that if consent is given under a misconception of facts, it would not be a valid consent. In *re Jaladu* I L R 36 Mad. 453 the Madras High Court has laid down that a consent given on a misrepresentation of facts is one given under a misconception of facts within the meaning of section 90, Indian Penal Code, and as such is not useful as a consent under the Penal Code. A misrepresentation as to the intention of a person in stating the purpose for which the consent is asked is a misrepresentation of a "fact" within the meaning of section 3 of the Evidence Act. Relevant observations are at page 456, which read thus:--

...But it appears that the second accused obtained the consent of the girl's guardian by falsely representing that the object of taking her was only to gather presents for a festival. The question is, whether in these circumstances it can be said that the guardian gave her consent to the taking of the girl within the meaning of section 361, Indian Penal Code. Section 90, Indian Penal Code provides "A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury or under a misconception of fact, and if the person doing the act knows or has reason to believe that the consent was given in consequence of such fear or misconception". We are of opinion that the expression "under a misconception of fact" is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In section 3 of the Evidence Act illustration (d) that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married. In considering a similar statute, it was held in England in *E. v. Hopkins*, (1842) Car. & M., 254 that a consent obtained by fraud would not be sufficient to justify the taking of a minor. See also Halsbury's Laws of England, volume 9, page 623. In Stephen's Digest of the Criminal Law of England (sixth edition, page 217), the learned author says with reference to the law relating to "Abduction of girls under sixteen" thus.. "If the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person".

This decision is followed in *Emperor v. Mt. Soma* A.I. R. 1916 Lah. 414. So also in *Maung Ba Chit v. King Emperor* I.L. R. 7 Rang. 821 : A I R 1930 Rang. 114, the Rangoon High Court has taken the same view. The relevant observations appear at page 836. After referring to section 90, Indian Penal Code, the Court observes (p. 837).

...It seems to me, however, that in the circumstances just described it must be held that the consent has been given under a misconception of fact. Had the responsible officer who agreed to accept the revenue and to the issue of the removal pass and the bill of title been aware that the timber in question was timber which the licensee had no right whatsoever to fell, there can be no doubt that the consent to the

removal would never have been given. Consent was given on the understanding that the timber to be removed was timber covered by a licence. If in fact it was timber not covered by a licence at all, there was a misconception as to the property for which consent was given. I think, therefore, that in such a case it must be held that there was no such consent as is meant by section 378 of the Indian Penal Code, and that in such circumstances the offence of theft was completed." This decision of the Rangoon High Court follows a decision of this Court in somewhat similar facts, *Reg v. Hanmanta* I L R 1 Bom. 610. In the present case, even assuming that the persons, who took delivery, made a false representation, though implied that they were entitled to take delivery, and thus obtained delivery, that only means that they obtained the consent of Prannath Girotra, who was in possession on behalf of the real owner, Pokhraj, by making a false representation, which led to a misconception of facts on the part of Prannath Girotra. Thus if the consent is obtained by a false representation, which led to a misconception of facts, it would not be a valid consent as contemplated under the Indian Penal Code. There may or may not be a representation by the persons taking delivery from Prannath Girotra; but in either case it is quite clear that Prannath Girotra agreed to deliver the goods against the luggage ticket under a misconception of facts, viz. the persons taking delivery were entitled to take it, and there can be no doubt that persons taking delivery knew that Prannath Girotra consented to give delivery under such misconception of facts. Thus, in our opinion, all the ingredients required for a theft are established, and there can be no doubt that the goods in question must be held to be stolen property.

11. As stated above, accused No. 4 was found in possession of stolen property soon after the theft was committed, i.e. soon after the delivery of the property in question was taken from Prannath Girotra, and hence a presumption u/s 114, Illustration (a) of the Indian Evidence Act would arise against accused No. 4. In his statement accused No. 4 says that he purchased the property in question for Rs. 2,600 from accused No. 2, on July 23, 1981, some time after 5 p. m. Although this was a transaction relating to goods admittedly worth Rs. 2,600 there is nothing beyond the bare interested word of accused No. 4 to show that in fact the goods in question were obtained by him from accused No. 2 on paying adequate consideration, and without knowledge that the said goods were stolen property. As stated above, we are satisfied as to the identity of the goods. On the bare interested word of accused No. 4 we are not prepared to hold that he purchased the goods in question from accused No. 2. The very proximity of time between the delivery of the goods by the railway and the alleged purchase by accused No. 4 is highly suspicious. Hence, we hold that accused No. 4 has not satisfactorily explained his possession of the goods in question, which are proved to be stolen property.

12. Mr. Dalai raised some other contentions, which we shall briefly deal with. Mr. Dalai urged that Head-constable Tike was not authorised in writing to carry out the search at accused No. 4's residence, and without such authority Head-constable

Tike had no legal right to carry that search, and hence that search itself must be held to be illegal. No such grievance was made in the trial Court, and we cannot allow a new questions, which is essentially a question of fact, to be raised for the first time in appeal. We have already dealt with Mr. Dalal's contention that even before the trial the goods were wrongly allowed to go into the complainant's possession even though the identity of the goods was the material question at the trial.

13. It is also urged that a copy of the Panchnama of the search of accused No. 4's residence was not furnished to him, as required by section 165, Criminal Procedure Code. Here again no grievance on this account was made in the trial Court, and it is too late to start a fresh question of fact in appeal.

14. For reasons indicated above, we hold that the learned trial Judge was right in convicting accused No. 4 u/s 411, Indian Penal Code.

15. Mr. Dalai, while addressing on the question of sentence stated that accused No, 4 has been suffering from T.B. We have given him an opportunity to produce a medical certificate. Hence, we shall pass order as to sentence on Monday, October 1, 1962. The accused shall continue on bail.

16. Mr. Dalai has not produced a satisfactory medical certificate. Mr. Dalai lastly urged that the sentence is unduly harsh, and should be reduced. As against that, Mr. Deshpande, the learned Assistant Government Pleader, submits that accused No. 4 has four previous convictions, and hence the sentence cannot be said to be unduly harsh. Conviction slip was produced before us. We have perused it, and we do not wish to interfere with the order as to sentence also.

17. The appeal is, therefore, dismissed and the order of conviction and sentence is confirmed. The accused shall surrender to bail.