(1930) 02 BOM CK 0029

Bombay High Court

Case No: None

Emperor		APPELLANT
	Vs	
Shivputraya Baslingaya		RESPONDENT

Date of Decision: Feb. 25, 1930

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 307
- Penal Code, 1860 (IPC) - Section 395

Citation: 126 Ind. Cas. 876

Hon'ble Judges: Mirza, J; Broomfield, J

Bench: Division Bench

Judgement

Mirza, J.
This is a reference made by the Additional Sessions Judge, Belgaum, u/s 307 of the Criminal Procedure Code in a case he tried with a Jury in which the accused were charged with having committed offence under Sections 457 and 395 of the Indian Penal Code. The Jury returned an unanimous verdict of not guilty. The Sessions Judge differing from that verdict has made this reference and is of opinion that the accused could be convicted of offences under those sections.

2. The case for the prosecution rests upon the identification of accused Nos. 1, 3, 4 and 5 and upon the production of part of the stolen property by accused Nos. 1 to 4 jointly and by accused No. 2 from his own house.

3. There can be no doubt that an offence of house-breaking and theft was committed in the house of the complainant Adiveppa on the night of September 11, 1929. At that time the only occupant of the house was Adiveppa''s daughter-in-law Basavanewa. The evidence of Basavanewa is that on that night her husband was absent from the house and as she was the only inmate she had closed all doors and had gone to sleep, that she had got up owing to a noise proceeding from the kitchen and had lighted her lamp. The persons who had made an entry into the

house came up, blow out the lamp, and thereafter effected an entry into the God room of the house from which they removed a tin-box containing certain articles of value. According to her she saw and identified accused Nos. 1, 3 and 4 who were previously known to her and she also saw a dark tall man whom she subsequently identified as accused No. 5. Accused No. 2 was not mentioned by her as having been among the persons who had entered the house this night. The robbers chained up the door of the house from outside when they left it. The infirmity in this evidence is that the next morning when the house was opened from outside by a passer-by, a woman also of the name Basavanewa, in consequence of the witness Basavanewa calling out to her for help, Basavanewa gave out that thieves had entered her house and had chained the door from outside after having stolen property from the house, but she did not mention the names of the accused Nos. 1, 3 and 4 as having been among the dacoits. At 7 A.M. in the morning her father-in-law Adiveppa returned from his field and coming to the house was informed by Bisavanewa of what had occurred. On this occasion the evidence of both Adiveppa and Basavanewa is that Basavanewa told Adiveppa the names of accused Nos. 1, 3 and 4 and stated also that there was a dark tall man whom she could identify if she again saw him. At about 9 o''clock the same morning Adiveppa gave the first Infermation to the Patil but the information was in general terms and he did not disclose the names of accused Nos. 1, 3 and 4 to the Patil. At this time a Police Jamadar Jangumiya was staying in the house of the Police Patil in connection with the Ganpati festival. Jangumiya assisted the Police Patil in the investigations which were started immediately after Adiveppa had given the information to the Police Patil. Certain Panchas were summoned and a Panchnama of the house was made in the presence of Jangumiya and the Police Patil. Adiveppa was present at the time the Panchnama was made. Even then the names of the dacoits were not disclosed. The Police Sub-Inspector arrived in the village at 4 or 4-30 p. m. of the same day, September 12. It was after the arrival of the Police Sub-Inspector that the names of accused Nos. 1, 3 and 4 were disclosed to him by Basavanewa and the complainant as persons who had taken part in the dacoity. The Sub-Inspector of Police gave instructions to the Police Patil to keep a watch on these three accused. The Police Patil did so and as the result of his following the three accused to a public meeting, which was held that night at 11 P.M. in the village, gathered certain information which he communicated to the Sub-Inspector of Police on the following day, September 13. The Police Sub-Inspector sent for accused Nos. 1 to 4 and in consequence of certain information he got from them they were taken to certain fields which did not belong to them where they individually and by turns pointed out places from which some of the stolen articles were recovered. The evidence does not show what statements each of the four accused made in consequence of which the discovery of the stolen articles was made. Later in the afternoon of the same day in consequence of information given by the accused Nos. 1 to 4 accused No. 5 was arrested, and an identification parade was held at which Basavanewa identified him as the fourth person who had entered her house and taken part in the dacoity on

the night of September 11.

4. In order to convict the accused of offences of house-breaking and theft it would be necessary in the first place to believe the evidence of Basavanewa as to her identification of accused Nos. 1, 3, 4 and 5. It is clear the offence was committed during the night. Basavanewa was asleep at the time when the dacoits entered the house. Having been awakened by the noise she lighted the lamp, but the lamp was blown out soon after it was lighted. She has stated that some of the accused came up to her. But she has also stated that after the lamp was blown out she was unable to see or identify the persons who were standing near her. She has also stated that some of the persons present threatened her not to raise an alarm. Had this evidence of Basavanewa received support from the First Information given the next morning to the Police Patil we might have regarded it with some confidence. The explanation given by Adiveppa that he suppressed this information from the complaint he lodged with the Police Patil because he was afraid the Police Patil might shield the culprits and help them to do away with the stolen property is not one which we could easily accept. If the Jury disbelieved this part of the evidence of Basavanewa and Adiveppa we would not be able to say that they were not justified in doing so or that they acted in a perverse manner.

5. The learned Government Pleader has urged that the evidence of Basavanewa and Adiveppa regarding the identification of the accused Nos. 1, 3 and 4 has received sufficient corroboration with reference to the stolen articles that were produced by them. The evidence with regard to the production of the stolen articles by accused Nos. 1, 3 and 4 does not show that the articles were produced from their possession. All that it amounts to is that, those accused along with accused No. 2 pointed out places where the stolen articles were concealed. The only value that could be attached to the discovery of these articles would depend upon any relevant statement the accused may have made which led to the discovery. It is not shown from the evidence what statement each of the accused made which led to the discovery of the articles. Under these circumstances we cannot say that the Jury was wrong in not attaching importance to the discovery of the articles made in consequence of the accused Nos. 1 to 4 having pointed out the places where the articles lay hidden. Where the articles are not shown to have been in the possession of the accused no presumption would arise that they had come by it by means of an offence. The prosecution have not succeeded, in our opinion, in proving that the accused admitted or were otherwise proved to have been in possession of the stolen articles at any time.

6. With regard to the case of the fifth accused it depends solely upon his identification by the witness Basavanewa. It has not been shown that he was in possession of any stolen article or pointed out any. We cannot say that the Jury were wrong or perverse in not relying upon the evidence of Basavanewa against the 5th accused. We are not prepared to take a different view from the one taken by the Jury

in his case.

7. With regard to the case of accused Nos. 1, 3, 4 and 5 we are of opinion that the verdict of the Jury is proper.

8. With regard to the case of the 2nd accused, Basavanewa has not identified him as one who entered the house. The theory of the prosecution is that accused No. 2 must have been outside the house guarding the entrance and facilitating the commission of the offence by the other accused. The evidence against accused No. 2 is that he produced from his house articles Exs. B and F which are proved to have been part of the stolen property. As these articles were produced from the house of the 2nd accused by the 2nd accused himself it is satisfactorily proved in our opinion that he must be deemed to have been in possession of them. A presumption would arise u/s 114, ill. (a), of the Indian Evidence Act that the 2nd accused was either the thief or had received the goods knowing them to be stolen unless he can account for his possession of the stolen articles. The dacoity was committed on the night of September 11 and the discovery of the stolen articles in the possession of the 2nd accused was made on September 13. The second accused in his statement simply denied that the articles found in his house were in his possession and gave no explanation as to how they came to be in his house which would be consistent with his innocence. The learned Judge does not seem to have placed this aspect of the case against the second accused before the Jury. It is possible that if the Jury had been properly directed on this point they might have convicted the second accused of an offence in the alternative of either having committed dacoity or of having committed the offence of dishonestly receiving stolen property. The evidence against the second accused would justify us in holding that he is guilty of this alternative offence. We convict the second accused of an offence in the alternative under Sections 395 and 411 and sentence him to eighteen months'' rigorous imprisonment.

9. The Registrar, Appellate Side, should provide each accused who has been acquitted and discharged with single third class Railway fare by a passenger train from Bombay to Kambar Ganvi Railway Station, M. and S.M. Railway, near Dharwar, and to pay to each such accused six annas for three days'' expenses in advance.

Broomfield, J.

10. I agree with my learned brother that it is impossible to place much reliance on the evidence of the girl Basavanewa as to her identification of accused Nos. 1, 3 and 4 in view of the fact that the names of these accused were nor communicated until the arrival of the Sub Inspector. The mention of the names of alleged offenders in the First Information is always and quite properly relied upon by the prosecution as affording strong corroboration of evidence of identification. Bu conversely when the names are not mentioned at the earliest opportunity it must necessarily follow that the evidence of identification is rendered more or less suspect, unless some

satisfactory explanation is forthcoming of the failure to mention the names. In this case the explanation given by Adiveppa the complainant is that he was afraid that the Police Patil might be desirous of shielding the accused. This story, however, is not in the least probable. Although there appears to be some relationship between the Patil and accused No. 2 he is not in any way connected with the other accused, and accused No. 2 happens to be just the one whom Basavanewa does not claim to have identified. Further, it appears that the Police Patil so far from shielding the accused took a very active part in working up the case. As far as I can see there is no reason whatever why the complainant should not have mentioned the names of the accused if he had really known them, practically in view of the fact that the Police Patil was accompanied by a Police Head Constable, Jangumiya, who, for some reason which is not very apparent, has not been examined as a witness for the prosecution.

11. In the case of accused No. 5 there is no evidence at all except the fact that Basavanewa picked him out in an identification parade held on September 13. When she made her statement to the Police Sub-Inspector at 4 o''clock on the 12th she is said to have stated that one of the dacoits whose name she did not know was a tall dark man. We have seen accused No. 5 as well as the rest of the accused in Court, and it does not appear to us that he is markedly distinguished from the others either in respect of his complexion or his height. I think it would be unsafe to convict accused No. 5 merely on the strength of this identification by the girl.

12. There remains, therefore, only the evidence relating to the property. Now it appears to be a fact that accused Nos. 1, 2, 3 and 4 pointed out certain places in fields not belonging to them in which some of the property stolen in the dacoity was concealed. It is important to note that the fields where the property was found do not belong to these accused. The property was not, therefore, in their possession, and the position in that respect has not been properly explained to the Jury by the learned Judge in his charge. What he says about this production of property is: "If an accused is in possession of stolen property he must explain how he came to be in possession of the property or he is presumed to be a thief or receiver of the stolen property [Section 114, ill. (a)]." If the Jury, instead of acquitting accused Nos. 1, 3 and 4, had convicted them, relying upon this presumption in the Indian Evidence Act, and the matter had come before us, it would have been necessary to consider whether there had not been a misdirection. The mere fact that an accused person points out the place in which stolen property is concealed does not give rise to any presumption u/s 114, or justify his conviction of the offence of receiving stolen property, still less of the offence of theft or dacoity. In that connection I may refer to Queen-Empress v. Gobinda 17 A. 576 : A.W.N. (1895) 226. To justify the finding that the accused Nos. 1, 3 and 4 had been in possession of the property which they pointed out it would be necessary further to rely on certain statements alleged to have been made by these accused to the Police. A number of statements have been placed upon the record in the body of the various Panchnamas made which are

obviously irrelevant and should never have been admitted at all. There are certain other statements of the accused deposed to by witnesses which might conceivably be admissible under the terms of Section 27 of the Indian Evidence Act." But in order to apply that section it is necessary to know exactly what the statements were; because they are admissible only so far as they lead to the discovery of some fact and no further. That is a proposition which has been frequently laid down by the Courts. I need only refer to the case of Reg. v. Jora Hasji 11 B.H.C.R. 242. Here the evidence which has been given as to the statements made by the accused is in this form. Exhibit 21, the Police Patil, says that the Sub-Inspector came and questioned the accused. They gave some information and offered to point out the place where the property had been hidden. The Sub-Inspector, Ex. 25, says similarly: "Accused Nos. 1 to 4 came. I questioned them. They gave me information and offered to point out the places where the stolen property had been concealed." He then goes on to say that each accused independently pointed out the same place. The Panch witness Gangappa Ex. 15 says: "The first four accused led us to the places where they said they had secreted the ornaments. They took us to a place near the Patil''s tank. There was near by a prickly pear hedge. They could not be seen from outside. All the accused pointed out the same place as the one where they had secreted the stolen jewellery. Then again later on: "Accused Nos. 1 and 2 offered to show us another place near Nichanki where they said they had concealed the tin box (article I). They took us to a hedge of prickly pear in a field belonging to the Patils." Again in cross-examination this witness says: "First accused No. 1 was questioned by us as to the place where the stolen articles were hid." The statements of the accused being deposed to as having been jointly made in this manner, it is not clear whose statement led to the discovery of the property. When a fact is discovered in consequence of information given by one accused, and other accused persons also give the same information, it is not legitimate to say that the fact is discovered within the meaning of Section 27 from the information given by all of them: see Queen-Empress v. Bashya 2 Bom. L.R. 1089 and The Queen v. Ram Churn Chung 24 W.R. 36 Cr. Farther, owing to the form in which these statements of the accused have been deposed to, it is not even possible to say that the statement which actually led to the discovery of the property was an incriminating statement at all. In that connection I may refer again to the judgment of West, J., in Reg. v. Jora Hasji 11 B.H.C.R. 242 where the learned Judge says (p. 244 Page of B.H.C.R.--[Ed.]):

> For instance, a man says: ''You will find a stick at such and such a place. I killed Rama with it.'' A Policeman, in such a case, may be allowed to say he went to the place indicated, and found the stick; but any statement as to the confession of murder would be admissible.

13. For anything we know to the contrary the statements made by the accused in this case may have been "you will find the property at such and such a place" and they may then have gone on to make further statements incriminating themselves which, however, would not in that case be legally admissible in evidence, I agree

with my learned brother in holding that in the case of accused Nos. 1, 3 and 4 the fact that they pointed out the places where the stolen property was concealed would not justify their conviction of the offence charged or any offence, once it has been held that the evidence of identification is not reliable. The case of accused No. 2, however, stands on a different footing altogether. It is proved by evidence which there seems to be no mason to distrust that certain gold ornaments, which are identified as forming part of the stolen property, and one of which was mentioned and described in the list of property given by the complainant immediately after the offence was discovered, were produced by this accused from his house. From that circumstance the presumption u/s 114, ill (a) of the Indian Evidence Act properly arises, and I agree with my learned, brother that this accused ought to be convicted in the alternative of dacoity or of receiving stolen property, and I further agree that under the circumstances the sentence which ought to be imposed is one of eighteen months'' rigorous imprisonment.

Per Curiam.

14. The remaining accused, accused Nos. 1, 3, 4 and 5 are acquitted and discharged and ordered to be set at liberty.