

Jaffar Hussain Dastagir

Vs

State of Maharashtra

Criminal Appeal No. 84 of 1968

(S. M. Sikri, G.K. Mitter, P. Jagmohan Reddy JJ)

11.09.1969

JUDGMENT

MITTER, J. –

1. The appellant along with two other persons were prosecuted on a charge under Section 379/34 of the Indian Penal Code for committing theft of a valuable parcel of diamonds from the person of one Wadilal C. Mehta in a railway train between Masjid Bander and Byculla railway stations on November 9, 1965 in furtherance of their common intention. One of these two other persons (hereinafter described as accused No. 2) was acquitted by the Chief Presidency Magistrate but the appellant and accused No. 3 were each sentenced to undergo rigorous imprisonment for 12 months. In appeal to the High Court the conviction of the appellant was altered to one under Section 411 and the sentence was reduced to one of nine months' rigorous imprisonment. The appellant has come up to this Court by special leave his main contention being that a statement ascribed to him as having been made to the police was artificial and false and in any event there was no discovery of any fact made as a result of that statement to render it admissible in evidence against him under Section 27 of the Indian Evidence Act.

2. The case for the prosecution was as follows. Mehta who had about 215 pieces of diamonds in paper packets wrapped in a silk handkerchief in the inside breast-pocket of his garment got into a local train at Masjid Bander along with a companion at about 8 p.m. on 9th November, 1965. As the compartment which they wanted to board was already full of passengers, he and his companion had to stand in the passage outside the compartment where there were many other persons already standing including accused Nos. 2 and 3. Taking exception to the posture of accused No. 2 who was in close contact Mehta asked him to stand erect and at the same time happened to notice a piece of his silk handkerchief lying on the floor of the compartment. Feeling his garment he realised that his pocket had been picked and the packet of diamonds had disappeared. Mehta and his companion caught hold of accused Nos. 2 and 3 and searched their persons but to no purpose. At Byculla railway station they were dragged out of the train on to the platform by Mehta and his companion but the former managed to get free and slip back into the train. On shouts being raised the train was brought to a halt but the two accused could not be found. Mehta went on to Victoria Terminus Railway Station and lodged a complaint there about the happening. He was shown a number of photographs kept at the police station and he pointed out therefrom three of the persons resembling the suspects concerned in the theft of his diamonds. The police immediately got busy and on the basis of some information received started looking for the appellant but were not able to trace him that night. The next morning (10-11-1965) the complainant went to the V.T. Railway station once more and identified the photographs of accused No. 2. The appellant was arrested at 12-30 p.m. on November 10, 1965 and accused No. 2 was apprehended very shortly thereafter. Both of them were

brought to the C.I.D. office for interrogation. Apparently being familiar with the modus operandi of pick pockets the police went round the offices of several newspapers in Bombay and at the office of Bombay Samachar Press S.I. Gaud was told by Pawri, the advertisement manager of the Bombay Samachar, that two persons had come to their office on that day at about 11 a.m. for the purpose of putting in an advertisement about the recovery of a packet of diamonds. S.I. Gaud learnt from Pawri the name and address of one D.S. Parekh as one of the two persons who had earlier interviewed Pawri for the insertion of the advertisement. Attempts to contact Parekh by S.I. Gaud were however unsuccessful. On the morning of 11th November, 1965 the appellant made a statement before Inspector Mokashi and S.I. Gaud and this was recorded in the presence of Panchas. The portion of the Statement with which we are concerned reads :

"I will point out one Gaddi alias Ramsingh of Delhi at Bombay Central Railway Station at III Class Waiting Hall to whom I have given a packet containing diamonds of different sizes more than 200 in number."

3. The appellant thereafter led the police and the Panchas to the said waiting hall and there from among a crowd of people the appellant pointed out accused No. 3 to the police. D.S. Parekh was also there. The appellant is alleged to have repeated there the same statement which he had made earlier at the police station. Accused No. 3 produced a handkerchief containing a packet in which 271 diamonds were found. Both accused No. 3 and D.S. Parekh were put under arrest. The diamonds were identified by Mehta as a portion of those which he had lost on the night of 9th November. An identification parade was held by a Justice of the Peace at 4-15 p.m. at which Mehta and his companion identified the appellant as also accused Nos. 2 and 3 as being persons who were standing in the passage outside the first class compartment of the local train when Mehta's pocket was picked.

4. The High Court came to the conclusion that the complicity of the appellant with the crime alleged rested only on two pieces of evidence brought forward at the trial. The first was his identification by Mehta and his companion at the identification parade to the effect that he was present in the train on the material date and at the material hour. By itself this means nothing because there were a number of other persons who were standing in the passage at the same time and there is no suggestion and indeed there could be none that any of these persons were connected with the crime. To fasten the guilt on the appellant the prosecution had to rely on the evidence furnished by the statement alleged to have been made by the appellant to the police and the Panchas in consequence whereof he was said to have led the police party to the Bombay Central Railway Station waiting hall and to the discovery of the diamonds from accused No. 3. As the statement of the accused recorded above was in the nature of a confession it would come under the embargo of Section 26 of the Evidence Act unless it can be brought within the ambit of Section 27 of the Evidence Act which reads :

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

In order that the section may apply the prosecution must establish that the information given by the appellant led to the discovery of some fact deposed to by him. It is evident that the discovery must be of some fact which the police had not previously learnt from other sources and that the knowledge of the fact was first derived from information given by the accused. If the police had no

information before of the complicity of accused No. 3 with the crime and had no idea as to whether the diamonds would be found with him and the appellant had made a statement to the police that he knew where the diamonds were and would lead them to the person who had them, it can be said that the discovery of the diamonds with the third accused was a fact deposed to by the appellant and admissible in evidence under Section 27. However, if it be shown that the police already knew that accused No. 3 had got the diamonds but did not know where the said accused was to be found, it cannot be said that the information given by the appellant that accused No. 3 had the diamonds and could be pointed out in a large crowd at the waiting hall led to the discovery of a fact proving his complicity with any crime within the meaning of Section 27. The fact deposed to by him would at best lead to the discovery of the whereabouts of accused No. 3.

5. Under Section 25 of the Evidence Act no confession made by an accused to a police officer can be admitted in evidence against him. An exception to this is however provided by Section 26 which makes a confessional statement made before a Magistrate admissible in evidence against an accused notwithstanding the fact that he was in the custody of the police when he made the incriminating statement. Section 27 is a proviso to Section 26 and makes admissible so much of the statement of the accused which leads to the discovery of a fact deposed to by him and connected with the crime, irrespective of the question whether it is confessional or otherwise. The essential ingredient of the section is that the information given by the accused must lead to the discovery of the fact which is the direct outcome of such information. Secondly, only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused. Thirdly, the discovery of the fact must relate to the commission of some offence. The embargo on statements of the accused before the police will not apply if all the above conditions are fulfilled. If an accused charged with a theft of articles or receiving stolen articles, within the meaning of Section 411, I.P.C. states to the police, 'I will show you the articles at the place where I have kept them' and the articles are actually found there, there can be no doubt that the information given by him led to the discovery of a fact i.e., keeping of the articles by the accused at the place mentioned. The discovery of the fact deposed to in such a case is not the discovery of the articles but the discovery of the fact that the articles were kept by the accused at a particular place. In principle there is no difference between the above statement and that made by the appellant in this case which in effect is that "I will show you the person to whom I have given the diamonds exceeding 200 in number". The only difference between the two statements is that a "named person" is substituted for 'the place' where the article is kept. In neither case are the articles or the diamonds the fact discovered.

6. The section was considered by the Judicial Committee of the Privy Council in *Pulukuri Kotayya v. King Emperor*. (76 IA 65). A question there arose as to what part of a statement of the accused leading to the recovery of a knife in a murder case was admissible in evidence. The statement read :

"About 14 days ago, I Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank. We all beat Boddupati China Sivayya and Subbayya to death. The remaining persons Pullayya, Kotayya and Narayana ran away. Dondapati Ramayya who was in our party received blows on his hands. He had a spear in his hand. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kotayya."

The Board held that the whole of the statement except the passage "I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come" was inadmissible. Holding that the extent of the information admissible must depend on the exact nature of the fact discovered to which

such information was required to relate the Judicial Committee pointed out that "the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to the fact". The Board was careful to observe that "information as to past user, or the past history of the object produced was not related to its discovery in the setting in which it was discovered."

7. This Court had to consider the scope of Section 27 of the Evidence Act in *K. Chinnaswamy Reddy v. State of Andhra Pradesh*. (1963-3 SCR 412). There the appellant was convicted under Section 411, I.P.C. by an Assistant Sessions Judge. He was tried along with another person who was convicted under Sections 457 and 380, I.P.C. A house had been burgled and valuable articles stolen. During the course of investigation the police recovered 17 ornaments on the information given by the appellant. The other accused had also given information on the basis of which another stolen ornament was recovered. The Assistant Sessions Judge came to the conclusion that the other accused had actually committed house breaking and had removed the ornaments from the house burgled and had handed over 17 of them to the appellant. He also came to the conclusion that the 17 ornaments recovered at the instance of the appellant were in his possession and he therefore found him guilty under section 411, I.P.C. On appeal the Sessions Judge held that the appellant had not been proved to be in possession of the 17 ornaments which were recovered at his instance from a garden. According to the Sessions Judge the full statement of the appellant that "he would show the place where he had hidden them (the ornaments)" was not admissible against him. The Sessions Judge held that the part of the statement of the appellant which related to his having hidden the ornaments was inadmissible. There was a criminal revision to the High Court and retrial was ordered and it was against that order that the appeal to this court was directed. Overruling the interpretation of the Session Judge, this Court held that the whole of the statement related distinctly to the discovery of the ornaments and was admissible under Section 27 of the Evidence Act. It was said :

"These words (namely, where he had hidden them) having nothing to do with the past history of the crime and are distinctly related to the actual discovery that took place by virtue of that statement."

The contention that in a case where the offence consisted of possession even the words "where he had hidden them", would be inadmissible as it amounted to an admission by the accused that he was in possession of them was rejected on the ground that if the statement related distinctly to the fact thereby discovered it would be admissible in evidence irrespective of the question as to whether it amounted to a confession or not. There can be no doubt that the portion of the alleged statement of the appellant extracted by us would be admissible in evidence.

8. The question still remains as to whether the said statement was really a discovery of a fact deposed to or whether there was no discovery within the meaning of Section 27 of the Evidence Act because the police was already in possession of the fact that the accused No. 3 was a person who had the diamonds. In order to find out the extent of the knowledge of the police as to the whereabouts of the diamonds it is necessary to look at the testimony of S. I. Gaud and Pawri, the advertisement manager of the Bombay Samachar. Gaud stated at the trial that he had taken up the investigation at about 11 p.m. on the night of 9th November, 1965 and after going to V.T. Railway Station he had gone to Kamathipura 8th lane to trace the appellant on the basis of some information received at the railway station. He learnt the next day about the identification of the photograph of the second accused by the complainant and arrested the appellant at 12.30 p.m. and the second accused at 1 p.m. on the same day. The same afternoon he visited different newspaper

establishments including that of Bombay Samachar Press and received information from the advertisement manager, Pawri in consequence whereof he went to find D.S. Parekh. He did not succeed in tracing him and continuing the interrogation of the appellant and the second accused he called panchas on the morning of 11th November to have the statement of the appellant recorded. Thereafter he went to the Bombay Central Railway Station and there found the diamonds with the accused No. 3 pointed out to him by the appellant. In cross-examination he said that he had contacted Pawri at 3 p.m. on 10th November but he had not asked Pawri to produce the advertisement material nor was the same shown to him. His testimony was that he had only asked for the name and address of the person who had given him the advertisement material and Pawri had done so from memory. He denied having seen any letter or any advertisement material at Pawri's office. He also denied that he had told Pawri not to publish the advertisement. It is to be noted that Police Inspector Mokashi examined before S. I. Gaud at the trial had stated in his examination-in-chief that at 2.30 p.m. on 10-11-1965 he had asked Gaud to visit different newspaper establishments including Bombay Samachar to find out whether the appellant had sent anyone there to surrender the diamonds as unclaimed.

9. Pawri's evidence was that two persons had come to see him on November 10, 1965 for the purpose of putting in an advertisement relating to the finding of a packet of diamonds. According to Pawri the two persons had given him a text of an advertisement to be published along with a covering letter signed by one and counter-signed by the other that the third accused was one of the persons who had met him at his office and that the covering letter as well as the advertisement material had been signed by both the persons who had met him. The charges for advertisement amounting to Rs. 40/- had been paid by one of them and a receipt taken. One of the two persons had also produced a card of Dawood Suleman attached to the covering letter in response to a request for identification. The letter dated 10-11-1965 shows that it was addressed to the manager, Bombay Samachar, signed by Ramsingh Santram and Dawood Suleman Ghanchi and the text of it was :

"We have found diamond packets on (Platform) No. 3 of Masjid Bander Station at eight o'clock at night on the date 9-11-1965. A public notice in respect thereof is sent herewith. Please publish the same on the first page of the issue dated 11-11-1965, Thursday."

The text of the statement meant for insertion in the newspaper ran :

"A diamond packet has been found at Bombay Central Railway Station on 9-11-65. Please contact Bombay Samachar by proving identity and paying the charges for the public notice."

#Below the above were the words : 'Case of Anand Savarorup Samma, Market, West Malad. Ramsingh Santram, Dawood Suleman Ghanchi, Choghari Mohalla, 136, Niaz Building Ground Floor, Bombay - 3.##

Pawri stated that Bombay Central Railway Station had been written by him after scoring out Masjid Bander. In cross-examination he said that the two persons had brought the diamonds and wanted to leave the same at the newspaper office but this was declined. They had come to the office at about 11 a.m. and seen a director before meeting the witness. The advertisement was to be published on the morning of 11th but this was not done because the police had given instructions to the contrary. The police had gone to their office in the afternoon when he had told them what had taken place in the morning.

10. In view of the evidence of Pawri and Mokashi it is not possible to accept the testimony of Gaud. It is incredible that Gaud who had gone to the newspaper office specially for the purpose of finding out whether anybody had approached the newspaper people to surrender the diamonds would not ask Pawri in detail about the persons who had met him or what they had told him or what they had done about the publication of the finding of the diamonds. Pawri's definite statement was that he had told the police all that had happened in the morning. In our view, Pawri must have shown Gaud the advertisement material, the covering letter with the card and the names of the two persons and the address of one of them. He could not possibly have failed to tell Gaud that the two persons who had come to him had even offered to hand over the diamonds. There is no positive evidence as to whether Gaud had asked the Bombay Samachar people not to insert the advertisement on the morning of the 11th. But nothing turns on that. It was 11 o'clock in the morning when Parekh and accused No. 3 had gone to the newspaper office and it was about 3 in the afternoon that Gaud met Pawri for the purpose of making enquires. Gaud's statement that Pawri had given him Parekh's address from memory cannot be accepted. Besides it is absurd to suggest that Gaud would not have asked Pawri to show him the documents made over by Parekh and accused No. 3 or that there would have been any reluctance on the part of Pawri to tell Gaud about it when he knew that the police were making investigations about a packet of diamonds picked from the pocket of some one who had lodged a complaint with the police.

11. In our view Gaud must have learnt that Parekh and/or accused No. 3 had the custody of the diamonds. Therefore the statement of the appellant that accused No. 3 had the custody of the diamonds would not be something unknown to the police so as to constitute "a fact deposed to as discovered in consequence of the information received" from the appellant. The discovery, if any, merely related to the whereabouts of accused No. 3. There was no discovery of any fact deposed to by the appellant within the meaning of Section 27. If the police had not gone to the office of the Bombay Samachar and had not learned of the complicity of the third accused with the crime, the statement of the appellant would amount to information received from him relating to the discovery of the diamonds in the custody of accused No. 3.

12. In the result although the statement might otherwise have been admissible in evidence, there was no discovery of a fact connecting the appellant with the receipt of the diamonds which were stolen within the meaning of Section 27 of the Evidence Act because the police already knew that the third and/or the fourth accused had the diamonds. The appeal must be allowed and the appellant directed to be set at liberty.

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