Karnal Singh Uttam Singh

Vs

State of Maharashtra

Criminal Appeal No. 133 of 1971

(P. K. Goswami, M. H. Beg JJ)

19.11.1975

JUDGMENT

BEG, J. -

1. The appellant before us by special leave was charged as follows by the Presidency Magistrate of Bombay :

I. B. P. Saptarshi, Presidency Magistrate 6th Court, Mazgaon, Bombay, do hereby charge you :

Karnal Singh s/o Uttam Singh as follows :

That you on or about the 20th day of February, 1968 at Bombay alongwith one Balwant Singh, s/o Uttam Singh who has absconded, at 171, Kazi Sayyed Street, being entrusted with certain property to wit M/Lorry No. 7372 valued at Rs. 52,000 belonging to the complainant Shankar Dhondiba Sutar as driver committed breach of trust in respect of the said property and aided and abetted to the absconding accused in commission of the said offence and thereby committed an offence punishable under Section 408 r/w 114 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried by me on the said charge.

2. The prosecution evidence in the case was : One Shankar Dhondiba Sutar a member of the Ex-servicemen Transport Co-operative Society Ltd., Bombay, had purchased the truck No. MRS. 7372 after taking a loan of Rs. 50,000 from the Society out of which he had paid up Rs. 43,000. He had entrusted Balwantsingh Uttamsingh, the brother of the appellant, with the truck. He had a contract with Balwantsingh Uttamsingh under which he used to get a net income of Rs. 2,000 to Rs. 2,200 p.m. from Balwantsingh Uttamsingh who was running the truck and seemed to be incurring all necessary expenses over it. This amount was paid regularly upto December, 1967. Thereafter, Balwantsingh Uttamsingh, the driver, avoided meeting the purchaser of the truck and was said to be absconding. On March 4, 1968, the truck met with an accident and Balwantsingh Uttamsingh is said to have sent information of it to S. D Sutar. On March 9, 1968, according to Sutar, Balwantsingh himself went to Sutar. And, when the owner asked him to take him to the truck, it is alleged that he did not comply with this request. As Shankar Dhondiba Sutar had not paid up the whole amount due for the truck which he had borrowed from the Society, the owner of the truck, as entered in the insurance papers, was the Society itself. S. D. Sutar stated that he found the truck at Thana Katha where he also found the appellant before us, Karnalsingh Uttamsingh, who had been, apparently, driving the truck. The first information report was lodged on April 20, 1968 at 12.30 p.m. by S. D. Sutar. It is against Balwantsingh Uttamsingh and makes no allegations against the present appellant.

It is said that Balwantsingh Uttamsingh had met S. D. Sutar again on March 12, 1968 and told him that he would turn up again. Vazir Singh Gaya Singh, PW 2, the Secretary of the Bombay Ex-Servicemen Transport Co. deposed that S. D. Sutar was a shareholder in the company and proved the terms of his contract with Balwantsingh. He also made no complaint whatsoever against the present appellant. All that he said was that the truck was seen near Kashali Bridge and the present accused was its driver. Sub-Inspector Ramesh Damodar, PW 3, stated that, on May 13, 1968, Vazir Singh, PW 2, and a police constable brought the truck to Pydhonie police station and that it was being driven by the present appellant at that time. That is all the evidence against the appellant.

3. The only question that the appellant was asked by the learned Magistrate under Section 342, Criminal Procedure Code and the appellant's reply are :

> Q. What do you wish to say with reference to the evidence given and recorded against you ?

A. I do not know whether M/Lorry No. MRS 7372 was handed over to the complainant on sale-purchase agreement and that the complainant had paid Rs. 43,000 towards the installment. I do not known whether the price was fixed at Rs. 50,000. Balwantsingh is my brother but I do not known if the complainant had given lorry in his possession in his capacity as a driver. I do not known whether Balwantsingh left with M/Lorry in December 1967. I do not known anything about Balwantsingh not meeting the complainant thereafter. Mangal Singh told me that this lorry had met with an accident and that I should invest the amount over repair, and after the amount is recovered from the plying of the lorry, the lorry would be returned to him. It is true that Vazir Singh and one P. C. had told me to take the lorry at the Pydhonie police station. I was the driver on the said vehicle at that time. I do not know where is my brother at present. He meets me at times. I have not spoken to him about the case. I want to lead defence witness.

4. He led some evidence in defence. Mangaldas Purshottam, DW 1, stated that one Kartar Singh the driver of the truck had sent him a trunkcall from Jalan that the truck in question had met with an accident on March 4, 1968 and that he gave this message to S. D. Sutar. As the accident was serious and the damage was considerable S. D. Sutar was unable to meet with the money required to repair it. According to Vazir Singh, PW 2, the claim against the insurance company was of Rs. 11,000. According to Mangaldas, DW 1, the complainant had agreed that the appellant should repair the truck and deduct its expenses out of the income he could make from plying the truck on hire. He proved Exhibit 1 dated March 12, 1968 containing a writing, signed by S. D. Sutar. It has been translated as follows :

> # Ext. '1' Dated 12-3-68National Indian Roadways,##

I, Shanker Dhondiba give you in writing today that my Lorry No. MRS 7372 which had met with an accident, I am bound to pay total costs whatever comes to of its reparation.

> # (Sd) Shanker Dhondiba Sutar.##

This was put to S. D. Sutar in cross-examination. He admitted his signature under the writing and gave no explanation about it. It is significant that it is was executed on the very day on which, according to an admission of S. D. Sutar, Balwantsingh also saw S. D. Sutar. Perhaps the defence has also not come out with the whole truth. It is, however, quite inconceivable that S. D. Sutar would be completely unconcerned as to what had happened to the truck if he had not entrusted it to

somebody other than Balwantsingh Uttamsingh for repairs to it. The matter seems to have been reported to the police only as a result of some quarrel or differences between parties. Moreover, nobody would repair the truck without being paid for it. The explanation given by the appellant was, on the face of it, quite reasonable and credible. It was not merely supported by Mangaldas Purshottam, DW 1, whose cross-examination did not elicit anything to show that he was unreliable but also, indirectly by Ashok Jagannath, DW 2, the Superintendent of the Commonwealth Insurance Co., who proved the bills supplied to the company on the strength of which the insurance company had paid Rs. 6078.35.

5. It was, therefore, clear that somebody had got the truck repaired and realised the amounts to be paid for repairs from the insurance company. The beneficiary of the contract of insurance was the Bombay Ex-Servicemen Transport Co. of which S. D. Sutar was a member. Apparently, the amount had been realised by somebody on behalf of this company. The bills could have been given by the appellant. In the absence of any proof as to who else could have or had repaired the truck the version of the appellant could not be said to be quite unbelievable.

6. A remarkable part of the case is that the trying Magistrate had convicted the appellant under Section 411, Indian Penal Code and sentenced him to six months' rigorous imprisonment and to pay a fine of Rs. 500 when he was not even charged with this offence. The High Court has maintained this conviction and the sentence and had not even mentioned the defects in the trial. There was neither a charge under Section 411, I.P.C. nor was the appellant asked to explain his possession of the truck although he did account for it. The appellant's explanation appeared quite plausible. It may have been difficult to hold that the appellant could not have been prejudiced by the omission to frame a charge or by the manner in which he was put one omnibus question under Section 342, Criminal Procedure code, without giving him an intimation of the offence of which he was likely to be convicted, if these questions had been seriously raised. However, as these question do not appear to have been argued in the High Court and were not even raised in the grounds of appeal in this Court, we will not consider them further.

7. We think that this appeal is bound to succeed on the view of the facts we have taken above. The presumption from recent possession of stolen property is an optional presumption of fact under Section 114, Indian Evidence Act. It is open to the Court to convict an appellant by using the presumption where the circumstances indicate that no other reasonable hypothesis except the guilty knowledge of the appellant is open to the prosecution. In the case before us, the appellant had given a fairly acceptable explanation. The prosecution had been unable to repel the effect of it. The owner of the truck, S. D. Sutar, has made admissions which indicated that the prosecution case of an unlawful possession on the part of the appellant was not likely. It is more likely that the appellants had been entrusted with the truck in order that he might repair it and realise the costs. However, we express no opinion on this aspect of the matter as the existence of such a contract may involve a civil liability. All we need say is that the explanation which the appellant had given was good enough to raise serious doubt about the sustainability of a charge Section 411, Indian Penal Code on the strength of what was laid down in Otto George Gfeller v. King (AIR 1943 PC 211, 214-215 : 45 Cri LJ 241), the appellant was entitled to an acquittal. It was held there (at p. 215) :

> The appellant did not have to prove his story but if his story broke down the jury might convict. In other words, the jury might think that the explanation given was one which could not reasonably be true, attributing a reticence or an incuriosity or a guile-lessness to the appellant beyond anything that could fairly be supposed.

In that case, the question had to go before the jury and the charge was found to be defective. The principle of benefit of doubt, on question of fact, applies whether the verdict is of a jury or the finding is to be given by a judge or a magistrate. The principle laid down in Gfeller's case (supra) (at p. 214) was :

. . . that upon the prosecution establishing that the accused were in possession of goods recently stolen they may in the absence of any explanation by the accused of the way in which the goods came into their possession which might reasonably be true find them guilty, but that if an explanation were given which the jury think might reasonably be true, and which is consistent with innocence although they were not convicted of its truth the prisoners were entitled to be acquitted inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused.

8. Consequently, we allow this appeal and set aside the conviction and sentence of the appellant. His bail bonds are discharged.

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