Poshaki And Anr. vs State on 23 October, 1952

Equivalent citations: AIR1953ALL526, AIR 1953 ALLAHABAD 526

JUDGMENT

B.D. Mukerji, J.

1. This is an appeal by two persons, Poshaki who has been convicted under Section 395, I. P. C. and sentenced to six years' R. I. and Azimullah who has been convicted under Section 412, I. P. C and sentenced to three years' R. I.

2. The facts which give rise to this appeal, briefly stated, are as follows: On the night between 8th and 9th August 1949 near about midnight a dacoity was committed in the house of one Rewaram by 14 or 15 persons. Rewaram's house is situate in village Gahlol within the police station, Sahaswan in the district of Budaun. A first information report was made on the morning of the 9th at 11-30 by Rewaram himself. The police station where the report was made was four miles from village Gahlol. In this first information report Rewaram gave no names because he was unable to identify anyone, taking part in this dacoity, as having been known to him from before. Rewaram also gave the details of the property which had been taken away from his house. From the list it appears that the bulk of the looted property consisted of clothes and some ornaments. A sum. of Rs. 600/-, in ten and five rupee notes, was also alleged to have been looted.

3. As a consequence of the information received by the police of the dacoity at Rewaram's house investigation followed and ultimately six accused persons stood their trial before the learned Sessions Judge of Budaun. The learned Judge after a consideration of the evidence, adduced in the case, acquitted four out of the six accused before him, and convicted the two appellants in the manner indicated earlier. The two appellants before me were arrested on 13-8-1949 from their residential village of Barni which is not far from village Gahlol--the scene of the dacoity.

4. The prosecution put forward two types of evidence against the two appellants--one consisted of the usual identification by witnesses and the other was the proof of a statement by the accused to the investigating officer which led to the discovery of a well which, in term, yielded a box from which certain articles were recovered--articles which were identified at the trial to belong to the complainants. In the latter group also fall two other recoveries which were made by the police as a consequence of what the two appellants are alleged to have told the police. In the case of Poshaki appellant, it related to the discovery of a Kuthia (some kind of earthen receptacle) from which two female dhotis were recovered and in the case of Azimullah, which led to the discovery of a golden nose-ring.

5. I shall first dispose of the evidence of identification, Poshaki was identified by only two witnesses, Gangaram and Hetram. Gangaram made four mistakes and identified three correctly while Hetram made four mistakes and identified four correctly. The value of this identification, therefore, is, in my judgment, very poor and it would be very unsafe, to rely on this identification for the purposes of upholding the conviction of the appellants before me. The identification parade at which the aforementioned witnesses identified the accused was conducted on 26th October. There was, therefore, a long gap between the date of the dacoity and the identification parade. Further, Gangaram in the first round made one mistake and in the third round he made three mistakes. That indicates that by the time he was having his third round he was relying completely on chance and not on memory.

6. The position in regard to Hetram is no better. He picked out Poshaki in the second round and in that very round he made one mistake. Then in the third round he made three mistakes and in the fourth round he identified nobody correctly but made one mistake.

7. I shall now take up the other evidence against the appellants. According to the prosecution both Poshaki and Azimullah made a statement to Head Constable, Mujibullah P. W. 26, in the presence of the Station Officer. Mujibullah gives a synopsis of the statement in his deposition. What he says is this:

> "On the directions of S. O. I went with Patra alias Azimullah and Poshaki accused to a jungle beyond Mohaloli. Patra told me that he and Poshaki had brought a box and put it in a well. Poshaki also gave the same information. These accused brought me to a place at some distance from a well. I put Patra accused at that place in the jungle and I and witnesses went to the well with Poshaki and Poshaki took us there. He told us that the box was there in the well. Then I put Poshaki away and brought Patra and on the well he gave the same information. Then a 'ghotakhor' went inside the well and he brought out a box therefrom. That is Ex. 7. I prepared recovery list therefor which is Ex. P 16."

8. From the statement of this witness, it would appear that information in regard to the well and what was inside the well was conveyed to the police, more or less, jointly by the two appellants. The actual well was, however, pointed out by the accused one by one--first by Poshaki and subsequently by Azimullah. The recovery list which is Ex. P. 16 records this:

> ".....First Azimullah aforesaid accused pointed out a well lying between the villages of Mah-mudpur and Gaichulyan. Later on Azimullah was moved away from that neighbourhood and Poshaki pointed out the same well in the presence of the witnesses aforesaid. Accordingly both of them pointed out the same well subsequently."

It would, therefore, appear that there is an inconsistency between what was recorded by Mujibullah in Ex. P 16 and what was stated by him in court. Exhibit P 16 does not make a record of 'that information' given by the accused which related 'distinctly' to the fact thereby discovered. There is

also a variation, in regard to which the two accused first pointed out the well in the version recorded in Ex. P 16 and the version given in court.

The prosecution led evidence to prove the statement made by the accused presumably under Section 27, Evidence Act. On account of the variation in the two versions, one recorded in Ex. P 16 and the other as stated in court, it becomes a bit suspicious, in my opinion, as to what exactly did the accused say. Be that as it may, Mr. Saksena, appearing for the appellant Poshaki, has argued that it was not open to the prosecution to rely on Section 27, Evidence Act, to prove the discovery as against either of the two appellants. Mr. Saksena's contention was that Section 27 has to be strictly construed and that it refers only to a discovery that is made as a result of the statement of 'one' particular individual and it does not contemplate the proof of successive recoveries of the same thing being proved as a result of successive statements by different accused persons.

In support of this contention of his he points out that the words used in the section are "Information received from a person". He, therefore, says that the section contemplates the action of an individual. In support of his contention he relies on the decision of -- 'Puttu v. Emperor', AIR 1945 Oudh 235 (A). In this case Misra and Kaul JJ. as Judges of the Chief Court of Oudh held that "Section 27 ought to be construed strictly. The use of the word "a person" in singular, in Section 27, is somewhat significant. The word was used in singular designedly because the joint statement of a number of persons, cannot be said to be an information received from any particular one of them. When a fact is discovered in consequence of information received from one of several persons charged with an offence, and when others give like information, it is impossible to treat the discovery as having been made from the information received from, each one of them."

The learned Judges relied on an observation of Straight J. made in -- 'Queen Empress v. Babu Lal', 6 All 509 (B). The observation of Straight J. on which reliance was placed is in these words :

> "It is not a proper course, where two persons are being tried, to allow a witness to state "they said this", or "they said that" or "the prisoner then said". It is certainly not at all likely that both the persons should speak at once, and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words he individually used. And, I may add, where a statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact or certain facts, the strict precision should be enjoined on the witness so that there may be no room for mistake or misunderstanding..... detailing statements of this kind which are alleged to have led to discovery, it is of the essence of things that what each prisoner said should be precisely and separately stated. If the evidence was not clear upon this point and the witness refused to be more explicit, the Judge should have paid no attention to it."

The above quoted observations of Straight, J. indicate that the law expects a good deal of precision in regard to the statement which police officers wish to bring on the record under the enabling provisions of Section 27, Evidence Act. The evidence in regard to the statements made by Azimullah or Poshaki which led to the discovery is, in my judgment, thoroughly unsatisfactory because it lacks

precision. The statement ascribed to the accused as recorded in Ex. P 16, if strictly construed, could not be said to contain such information as related distinctly to the discovery of the incriminating article and, therefore, in my judgment, it did not strictly fall within the ambit of Section 27, Evidence Act.

9. Mr. Saksena also relied on two other decisions in support of his contention--one was the case of -- 'Budha v. Emperor', AIR 1922, Lah 315 (C) and the other -- 'Kudaon v. Emperor', AIR 1925 Nag 407 (D). In the former case a learned Single Judge of the Lahore High Court held that:

> "Once property has been discovered in consequence of information received from a suspected person, it cannot be re-discovered in consequence of information received from another suspected person. It is only the in-formation that was given by the first person and which led to the actual discovery which may be proved under the terms of Section 27 of the Evidence Act."

In the second case, namely, the Nagpur case which again is a decision by a learned Single Judge, this was what was held:

> "Section 27 must be very strictly construed. Where one accused has agreed to point out a place where a fact would be discovered in pursuance of his statement to point out that place, the section does not cover similar statements of the other accused in police custody."

On the authority of the two aforementioned decisions, one of the Lahore High Court and the other of Nagpur, it is possible to prove the statement of that accused who comes first on the scene and whose statement leads to the discovery first of all. With respect I am of the same opinion and I would have given effect to the law so stated, if it was possible for me to be certain as to which of the two appellants made the first statement which led to the discovery first of the well and subsequently to the box, but, as I have already stated earlier, the prosecution have not been able to prove who was the accused who made the statement first or who first showed the well because, as I have already noticed, there is a grave contradiction about it. The result, therefore, is that I have got to discard the evidence of the recoveries as against both the appellants.

10. There is to be noticed the discovery which was made of two pieces of dhotis from Kuthia--a discovery made as a consequence of the pointing out of appellant Poshaki; "the dhotis which were recovered, do not, in my opinion, tally with the description of the dhotis given in the first information report and therefore, this can be of no value to the prosecution.

11. Appellant, Azimullah, is alleged to have pointed a place from where a 'bulak' was recovered. This 'bulak' (gold nose pendant) is different from the gold nose pendant (item 25 of the list of stolen property) lost by Rewaram. The description of the gold nose pendant in the list of property is given at p. 4. "Gold nose pendant, studded with stones weighing seven rattis--Rs. 8/-" while gold nose pendant that was discovered has been described as follows : "Gold nose pendant of "Dal" design, studded with a red stone in the middle weighing about four annas." In my judgment, therefore, the

ornament that was recovered on 13-8-1949 was not the article that had been lost by Rewaram in the dacoity. It is, however, interesting to note that this article was identified by some witnesses as belonging to Rewaram.

12. The result, therefore, is that, in my judgment, there is not enough evidence against either of the two appellants to justify their conviction. I, therefore, allow the appeal, set aside their convictions and sentences, Poshaki is said to be on bail. He need not surrender to his bail. His bail bonds are cancelled.

Azimullah appellant will be set at liberty forth with unless he is wanted for some other offence.