

## Sapattar Singh vs State on 28 February, 1952

**Equivalent citations: AIR1953ALL136, AIR 1953 ALLAHABAD 136**

ORDER

P.L. Bhargava, J.

1. This is an application in revision by Sapattar Singh, son of Sanmukh Singh, a resident of village Tabar, P. S. Nakur, in the district of Saharanpur. The applicant was convicted by a Magistrate of the first class of Saharanpur for an offence punishable under Section 411, Penal Code and he was sentenced to undergo rigorous imprisonment for three months and to pay a fine of Rs. 100/- or, in default of payment of fine, to undergo two weeks' further rigorous imprisonment. Against his conviction and sentence the applicant filed an appeal in the court of the Sessions Judge of Saharanpur, who upheld the conviction as well as the sentence-Now, the applicant has filed this revision.

2. It has been found by the courts below that three she-buffaloes belonging to the complainant, Kundan, were stolen in the night between the 29th and the 30th September 1949; that on the 12th October 1949, Malkhan Singh, P. W., saw one of the three she-buffaloes tied in the applicant's 'gher' and informed the police about it; and that the Sub-Inspector of Police recovered the she-buffalo from inside the applicant's 'gher'.

3. After the theft was discovered an alarm was raised the same night and a search for the she-buffaloes was started but they could not be traced. No report of the theft was, however, lodged with the police until the 11th October 1949. As a result of the investigation which followed the recovery, the applicant was prosecuted under Sections 380 and 411, I.P.C. The Magistrate acquitted him of the charge under Section 380 and convicted him under Section 411, I.P.C.

4. The applicant admitted that the she-buffalo was recovered from inside the 'gher'; but he alleged that he had not kept her there, that she might have been tied there by somebody and that he had no knowledge about it.

5. There is nothing on the record to show that the applicant had kept the she-buffalo there, and, from the fact that the she-buffalo was recovered from inside the 'gher' of the applicant, the courts below have raised a presumption, under Section 114, illustration (a), Evidence Act, that the applicant was in possession of the she-buffalo and had received the same knowing it to be stolen property. Evidently, the courts below did not consider the explanation offered by the applicant sufficient.

6. Learned counsel for the applicant has, in this revision, contended that having regard to the circumstances of the case no presumption under Section 114, illustration (a), Evidence Act, could or

should have been raised. He has pointed out that, according to the evidence available on the record, the 'gher' was open and accessible to everyone; and in support of this contention reliance has been placed upon the facts found by the courts below that Malkhan Singh, while passing by the 'gher', had noticed the she-buffalo tied inside it and that the Sub-Inspector was able to recover the same. He has also pointed out that the 'gher' was practically abandoned; that it was not alleged that the Sub-Inspector had, before recovering the she-buffalo, to make any effort to have the 'gher' opened; and that a bad character occupied the 'gher' adjoining the gher from which the she-buffalo was recovered.

Reference has already been made to the findings of fact recorded by the courts below. It appears from the evidence that the 'gher' from where the she-buffalo was recovered, was at a distance of about two furlongs from the house of the applicant, and that it was not being used the applicant or anybody else. The fact that Malkhan Singh was able to see the she-buffalo tied inside the 'gher' goes to show that it was open. In the recovery list, the 'gher' has been described as a thatched 'kotha'; consequently, unless it was open, what was there inside could not be seen by a person passing by the 'gher'. Further, if the 'gher' was not being used, it was hardly necessary to close it.

It also appears from the evidence that adjoining the 'gher' from where the she-buffalo was recovered there is the 'gher' of one Sona, who is said to be a bad character. The omission on the part of the investigating officer to prepare a site plan is significant and the applicant can take advantage of it. In the circumstances, stated above, the possibility of some person other than the applicant putting the she-buffalo inside the 'gher' unnoticed is not wholly ruled out.

7. Learned counsel holding the brief of the Government Advocate has pointed out an observation in the judgment of the court below to the effect that the accused's relations were nearby in the plots and argued that if any stranger had taken the she-buffalo inside the 'gher' the relations of the applicant must have seen him and protested. There is nothing on the record to show who these relations were. The evidence on the record only shows that some relations of the applicant were cutting grass in the fields. How far away those fields were and whether the persons in the fields were seated in a position so as to be able to notice the entrance door of the 'gher' and the persons entering through it, is not at all clear from the evidence.

8. The presumption under Section 114, illustration (a), Evidence Act, can be raised only if the person found in possession is unable to account for his possession. In this case, it has not been established beyond doubt that the applicant alone was in possession of this 'gher' and as such of the she-buffalo kept therein. It appears from the evidence on the record that the applicant has got a father and two brothers and that all of them live together and have joint cultivation. In view of the evidence just referred to, it is difficult to hold that the applicant alone is the owner in possession of the 'gher', from where the she-buffalo was recovered. Even if we assume that the applicant alone was in possession of the gher, his explanation that the she-buffalo might have been put in the 'gher' by somebody unnoticed under the circumstances mentioned above, cannot be ruled out as wholly unreasonable or untrue or impossible.

9. Even if the explanation offered by the applicant were not proved by any convincing evidence, it could have been considered as probable and reasonably true, and sufficient to raise a doubt in the mind of the Court as to the guilt of the applicant. It was for the prosecution to establish all the circumstances upon which a presumption could be raised under Section 114, illustration (a), Evidence Act, and there was no question of burden being shifted on to the applicant at any stage. He was only bound to account for his possession and offer an explanation which might reasonably be true. The contention put forward on behalf of the applicant that the presumption under Section 114, illustration (a), Evidence Act, could and should not have been raised in the circumstances of this case must, therefore, be upheld.

10. If the presumption under Section 114, illustration (a), Evidence Act, cannot be raised in the circumstances of this case, there is no other evidence on the record on which the conviction of the applicant under Section 411, Penal Code, can be rested. In this view of the matter, this revision is allowed, the conviction of, and the sentence imposed upon the applicant are set aside. The applicant, who is on bail, need not surrender. The bail bonds executed by him are cancelled. The fine, if paid, will be refunded.