



HIGH COURT OF ANDHRA PRADESH
TUESDAY ,THE TWENTY SECOND DAY OF FEBRUARY
TWO THOUSAND AND TWENTY TWO

PRSENT

THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI
CRIMINAL REVISION CASE NO: 1452 OF 2008

Between:

1. C.GURAVIAH , S/o. Venkataiah,
R/o. Chakali Street,
Udyagiri Village and Mandal,
Nellore District.

...PETITIONER(S)

AND:

1. STATE OF A.P., REP BY PP., rep.by Public Prosecutor
High Court of A.P.,
Hyderabad.

...RESPONDENTS

Counsel for the Petitioner(s): R CHANDRA REDDY

Counsel for the Respondents: PUBLIC PROSECUTOR

The Court made the following: ORDER



THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

CRIMINAL REVISION CASE No.1452 of 2008

JUDGMENT

Heard Sri R.Chandra Reddy, learned counsel for the petitioner/revisionist and Sri Soora Venkata Sainath, learned Spl.Asst.Public Prosecutor for the respondent/State.

2. This criminal revision case under Section 397 read with Section 401 of the Code of Criminal Procedure (for short "Cr.P.C") has been filed by the petitioner/convict/Juvenile No.2 (Juvenile in conflict with law) challenging the judgment of the Sessions Judge-cum-V Additional District Judge, Tirupati, dated 18.04.2008 in Criminal Appeal No.35 of 2007, dismissing the petitioner's appeal and confirming the judgment in C.C.No.82 of 2006, dated 19.02.2007 of the Judicial Magistrate of First Class, Juveniles, Tirupathi.

3. The Sub-Inspector of Police, Udayagiri Police Station, Nellore District filed the charge sheet against the Juveniles Nos.1 and 2, namely, Udayagiri Srikanth (J-1) and the petitioner/J-2 in Cr.No.30 of 2006 for the offences punishable under Sections 457, 380 or 411 IPC, which was taken on file by the Judicial Magistrate of First Class, Juveniles, Tirupathi on 22.11.2006.

4. The prosecution case in brief is that PW.1-Mahammad Rafi is running a wholesale shop under the name and style of Rafi Traders in Udayagiri. On 07.07.2006 at about 6.30 a.m he went to his shop in order to open and after opening the shutter of the shop he found one iron sheet of the roof of the shop was cut by some unknown offenders making a hole and as such he suspected about the theft in the shop. On verification of the things he found missing of one bundle of gold filter



cigarette consisting 50 packets, 10 numbers of Raja kaini packets, 10 numbers of safari packets and 10 numbers of Tiranga packets, all worth Rs.2,310/-. Some unidentified offenders gained entry into the shop through the roof and committed theft in the shop.

5. PW.1 reported the matter to the police under Ex.P1. The Sub-Inspector of Police, Udayagiri P.S. (LW.10) registered a case in Cr.No.30 of 2006 under Sections 457 and 380 IPC and took up investigation. During the investigation, on 14.07.2006, the investigating officer secured the presence of P'Ws.2 and 3 as mediators and caught J-1 and found 25 packets of gold filter cigarettes, 5 packets of Raja Kaini, 5 packets of Tiranga in a gunny bag in his possession. On interrogation, Juvenile-1 confessed about the commission of offence along with Juvenile-2. The same was reduced to a mahazar, dated 14.07.2006, under Ex.P2. The arrest of J-1 in the presence of PW.2 was also recorded in the said mahazar. Subsequently, on 02.11.2006 J-2 was also caught by the police holding a polythene bag, from which 25 packets of gold filter cigarettes, 5 packets of Raja Kaini, 5 packets of Tiranga and 5 packets of safari were seized in the presence of mediator PW.3. J-2 confessed before the mediators about the commission of offence along with J-1 from the scene of offence. A mahazar was prepared for the arrest of J-2 and seizure of the property in the presence of PW.3 under Ex.P3.

6. On production of Juveniles Nos.1 and 2 before the court of the Judicial Magistrate of First Class, Juveniles, Tirupathi, copies of documents were furnished to them as required under Section 207 Cr.P.C. They were examined under Section 251 Cr.P.C for the offence punishable under Section 411 IPC, for which they denied and claimed to be tried.

7. The prosecution to prove its case examined PWs.1 to 3 and marked Exs.P1 to P3 and M.Os.1 to 4.



8. After completion of the prosecution evidence, the juveniles were examined under Section 313 Cr.P.C explaining the incriminating evidence against them for which they denied the allegations, but did not report for any defence evidence.

9. The Judicial Magistrate of First Class, Juveniles, Tirupathi found J-1 and J-2 guilty for the offence punishable under Section 411 IPC and convicted them for the said offence. With regard to the sentence, the learned Magistrate sent J-1 and J-2 to Special Home for Boys, Hyderabad for a period of one year under Section 15(1)(g) of Juvenile Justice (Care and Protection of Children) Act, 2000.

10. J-2/petitioner herein preferred Criminal Appeal No.35 of 2007 which was also dismissed by the Special Sessions Judge-cum-IV Addl.Sessions Judge, (FAC) V Addl.Sessions Judge, Tirupati by judgment, dated 18.04.2008 and thereby confirmed the conviction and sentence imposed by the trial court.

11. The present revision has been filed challenging the appellate judgment.

12. The learned counsel for the petitioner/revisionist submits that finding of conviction recorded by both the courts below cannot be sustained as the prosecution failed to prove its case beyond all reasonable doubt, and particularly, in view of the fact that the investigating officer was not examined as witness. His submission is that non-examination of the investigating officer is fatal to the prosecution case as in such a situation the F.I.R was not proved and the seizure memo recovery of the stolen property was not established, and has placed reliance on the judgments in the cases of ***S.K.Rashid and Ors. vs State of Bihar***¹,

¹ 1987(35) BLJR 335 = MANU/BH/0173/1986



Parshu Ram Dhadhi vs. State of Bihar² (in Criminal Appeal No.592 of 2005 (DB) of Patna High Court, decided on 21.10.2011) and ***Ram Gulam Chaudhary v. State of Bihar***³, in support of his contentions.

13. The learned Spl. Asst. Public Prosecutor submits that non-examination of the investigating officer, by itself, is not fatal to the prosecution case, as on the basis of the evidence on record the charge is proved by the prosecution beyond all reasonable doubt. His further submission is that the accused/convict has to establish the prejudice caused to the accused because of non-examination of the investigating officer, but the petitioner has failed to point out what prejudice was caused to him because of non-examination of the investigating officer. He has placed reliance on the judgment of the Apex Court in ***State of Karnataka v. Bhaskar Kushali Kotharkar***⁴ in support of his contentions.

14. I have considered the submissions advanced by the learned counsels for the party and perused the material on record.

15. The only point that arises for consideration, in view of the submissions advanced, is

“Whether in the present case, non-examination of the investigating officer, is fatal to the prosecution case, and on that count, the judgment under challenge deserves to be set aside?”

16. The Judicial Magistrate of First Class for juveniles, Tirupati, in its judgment has elaborately dealt with respect to the non-examination of the investigating officer and its effect and has recorded that “no doubt the prosecution could not examine the investigating officer, however, when the mahazar witnesses PWs.2 and 3 have supported the case of the

² Cri.A.592 of 2005 DB of Patna High Court

³ (2001) 8 SCC 311

⁴ (2004) 7 SCC 487



prosecution and Exs.P2 and P3, are the material documents to be relied upon, Exs.P2 and P3 are covered arrest of the juveniles as well as the seizure of the property. Therefore, the dishonest possession of M.Os.1 to 4 by the Juvenile at the time of arrest is a proved fact.”

17. The appellate court also dealt with the question of non-examination of the investigating officer and recorded that from the evidence of PW.1 and PW.3 the theft and seizure of the stolen property was proved from the possession of the appellant. PW.2 also spoke about recovery of the stolen property from the possession of the appellant under cover of mediators report Ex.P3 and as such the non-examination of the investigating officer was not fatal to the prosecution case.

18. In ***Ram Gulam Chaudhary*** (supra) the Hon'ble Supreme Court held that for non-examination of the investigating officer the prosecution case need not fail and it would not be correct to contend that if the investigating officer is not examined the entire case would fail to the ground as the accused were deprived of the opportunity to effectively cross-examine the witnesses and bring out contradictions. It was held that the case of prejudice likely to be suffered must depend upon facts of each case and no universal strait-jacket formula should be laid down that non-examination of investigating officer *per se vitiates* the criminal trial.

19. It is apt to re-produce paragraphs Nos.26, 27, 28, 29 and 30 in ***Ram Gulam Chaudhary*** (supra) as under:

“26. In the case of *Ram Dev v. State of U.P(1995 Supp(1) SCC 547* this Court has held that it is always desirable for the prosecution to examine the investigating officer. However, **non-examination of the investigating officer does not in any way create any dent in the prosecution case much less affect the credibility of the otherwise trustworthy testimony of the eyewitnesses.**

27. In the case of *Behari Prasad v. State of Bihar (1996) 2 SCC 317* this Court has held that for non-examination of the investigating officer



the prosecution case need not fail. This Court has held that it would not be correct to contend that if the investigating officer is not examined the entire case would fall to the ground as the accused were deprived of the opportunity to effectively cross-examine the witnesses and bring out contradictions. It was held that the case of prejudice likely to be suffered must depend upon the facts of each case and no universal straitjacket formula should be laid down that non-examination of investigating officer per se vitiates the criminal trial.

28. In the case of *Ambika Prasad v. State (Delhi Admn.)* {(2000) 2 SCC 646} it was held that the criminal trial is meant for doing justice not just to the accused but also to the victim and the society so that law and order is maintained. It was held that a Judge does not preside over the criminal trial merely to see that no innocent man is punished. It was held that a Judge presides over criminal trial also to see that a guilty man does not escape. It was held that both are public duties which the Judge has to perform. It was held that it was unfortunate that the investigating officer had not stepped into the witness box without any justifiable ground. It was held that this conduct of the investigating officer and other hostile witnesses could not be a ground for discarding evidence of PWs 5 and 7 whose presence on the spot was established beyond any reasonable doubt. It was held that **non-examination of the investigating officer could not be a ground for disbelieving eyewitnesses.**

29. In the case of *Bahadur Naik v. State of Bihar* (2000) 9 SCC 153 it was held that **non-examination of an investigating officer was of no consequence when it could not be shown as to what prejudice had been caused to the appellant by such non-examination.**

30. In our view, in this case also non-examination of the investigating officer has caused no prejudice at all. All that Mr Mishra could submit was that the examination of the investigating officer would have shown that the occurrence had taken place not in the courtyard but outside on the road. The investigating officer was not an eyewitness. The body had already been removed by the appellants. The investigating officer, therefore, could not have given any evidence as to the actual place of occurrence. There were witnesses who have given credible and believable evidence as to the place of occurrence. Their evidence cannot be discarded merely because the investigating officer was not examined. **The non-examination of the investigating officer has not led to any prejudice to the appellants.** We, therefore, see no substance in this submission.”



20. In ***Bhaskar Kushali Kotharkar*** (supra) the Hon'ble Supreme Court held that it is true that as a part of fair trial the investigating officer should be examined in the trial cases especially when a serious session's trial was being held against the accused. If any of the prosecution witnesses give any evidence contrary to their previous statement recorded under Section 161 Cr.P.C or if there is any omission of certain material particulars, the previous statement of these witnesses could be proved only by examining the investigating officer who must have recorded the statement of these witnesses under Section 161 Cr.P.C. The Hon'ble Supreme Court referred to ***Behari Prasad v. State of Bihar***⁵ in which it was held that non-examination of the investigating officer was not fatal to the prosecution case especially when no prejudice was suffered by the accused, and to the case of ***Bahadur Naik v. State of Bihar***⁶ in which it was held that when no material contradictions have been brought out, the non-examination of the investigating officer as a witness for the prosecution was of no consequence, and under such circumstances no prejudice had been caused to the accused by such non-examination.

21. In ***Baldev Singh v. State of Haryana***⁷ the Hon'ble Supreme Court reiterated that no doubt it is always desirable that prosecution has to examine the investigating officer/police officer who prepared the *rukka*, but mere non-examination of investigating officer does not in every case cause prejudice to the accused or affects the credibility of the prosecution case. Whether or not any prejudice has been caused to the accused is a question of fact to be determined in each case. Paragraph No.16 in ***Baldev Singh*** (supra) reads as under:

“16. The contention at the hands of the learned Senior Counsel for the appellant is that non-examination of Chander Singh, SI who prepared

⁵ (1996) 2 SCC 317

⁶ (2000) 9 SCC 153

⁷ (2015) 17 SCC 554



rukka and who investigated the case raises serious doubts about the prosecution case. The material on record would show that Chander Singh, SI who investigated the case was not examined by the prosecution in spite of several opportunities. No doubt, it is always desirable that prosecution has to examine the investigating officer/police officer who prepared the rukka. Mere non-examination of investigating officer does not in every case cause prejudice to the accused or affects the credibility of the prosecution case. Whether or not any prejudice has been caused to the accused is a question of fact to be determined in each case. Since Ram Singh, PW 1 was a part of the police party and PW 1 has signed in all recovery memos, non-examination of Chander Singh, SI could not have caused any prejudice to the accused in this case nor does it affect the credibility of the prosecution version.”

22. In ***S.K.Rashid*** (supra) on which much reliance is placed by the learned counsel for the petitioner, the Patna High Court held that true that non-examination of investigating officer is not necessarily fatal to the prosecution, but a court has to see whether the evidence of the investigating officer is essential for the case of the prosecution to succeed or not. The court has to see at the same time that the accused is not unnecessarily harassed and unless it sees that for unavoidable reasons the prosecution failed to produce the investigating officer, it may pronounce the judgment without the evidence of the investigating officer.

23. In ***S.K.Rashid*** (supra) the appellant No.1 therein was convicted under Section 302/142 IPC and appellant No.2 was convicted under Section 302 IPC and both were sentenced to undergo rigorous imprisonment for life. In the trial, although several witnesses were produced, except the informant/PW.7, none had supported the prosecution case. The Patna High Court has observed that it could have proceeded on the sole testimony of the informant-PW.7 who stood for the test of cross-examination, but for serious lapse on behalf of the prosecution in not examining the investigating officer, it shall not be



proper to act upon the alone evidence of PW.7. It was found that the appellants therein, i.e., the convicts, could legitimately complain that due to non-examination of the investigating officer they have been prejudiced in their defence. This Court finds that in **S.K.Rashid** (supra) out of several witnesses, only the informant PW.7 stood for cross examination and the rest of the witnesses became hostile. As such, the Patna High Court did not find it proper to maintain the order of conviction on the sole testimony of PW.7, the informant. A reading of the judgment shows that the conviction was not set aside merely because of the non-examination of the investigating officer, but in the facts of that case, there being the only evidence of the informant and the other witnesses becoming hostile, coupled with the non-examination of the investigating officer, which the Court found resulting into likely prejudice to the accused. Whereas, in the present case both the Courts below found that the evidence oral and documentary on record has proved the guilt of the accused. The present is also not a case of the only evidence of the informant.

24. In **Parshu Ram Dhadhi** (supra), upon which also much reliance has been placed by the learned counsel for the petitioner, the Patna High Court held that it is settled law that the non-examination of the investigating officer *ipso facto* does not discredit the prosecution version, and the right of bringing on record the contradictions in the statement of witnesses made before the investigating officer is a very valuable right of the accused and by showing that, the witness has made improvements or has given evidence which contradicts his earlier statement, the accused is able to satisfy the court that the witness is not a reliable witness. The non-examination of investigating officer is a serious infirmity in the prosecution case which results in prejudice to the accused.



25. There cannot be dispute on the aforesaid proposition of law but for its applicability the petitioner's counsel could not show any contradictions in the evidence of the witnesses *qua* any of their earlier statements under Section 161 Cr.P.C, if any, or any improvements having been made by the witnesses so as to contend that the non-examination of the investigating officer was a serious infirmity. It is not the contention here that there is any contradiction in the statements of the prosecution witnesses before the Court and recorded by the investigating officer and as such, any of the valuable rights of the accused has been prejudiced.

26. The submission of the petitioner's counsel that the first information report was not proved by the prosecution in failing to examine the investigating officer is misconceived. It is relevant to mention that in ***Bhaskar Kushali Kotharkar*** (supra) it was held that the non-examination of the head constable who recorded FI statement was not of serious consequence as PW.1 was examined to prove the fact who had given the statement before the police. The Apex Court held that the High Court was not justified in reversing the order of the Sessions Court by holding that the non-examination of the investigating officer and the head constable who recorded FI statement had caused prejudice to the case of the accused. In the present case also Ex.P1 was proved by PW.1 who gave such information and both the courts below have concurrently dealt with this aspect of the matter as well, recording that PW.1 in his statement has proved the contents of Ex.P1. What prejudice was caused by non-examination of the investigating officer to the petitioner on this aspect could also not be explained by the learned counsel for the petitioner.

27. The Courts below have recorded concurrent finding of fact that there was theft and the petitioner was found in possession of the stolen



property which was recovered from him vide Ex.P3, which was proved by the evidence of PW 1, and of the mediators/Mahazars PWs.2 and 3, the independent witnesses. The findings recorded by both the Courts below are based on appreciation of the evidence on record and could not be shown to be suffering from any perversity or on any ground calling for interference in the exercise of revision jurisdiction. Merely because of non-examination of the investigating officer, when there is other evidence on record to prove the guilt, and in the absence of any prejudice shown to have been caused to the accused, this Court finds it to be not fatal to the case of the prosecution.

28. For all the aforesaid reasons, the criminal revision case has got no force and is hereby dismissed.

Pending miscellaneous petitions, if any, shall stand closed in consequence.

RAVI NATH TILHARI,J

Date: 22.02.2022
Dsr

Note:
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