

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No.458 of 1992

Date of decision : August 31, 2007

State of H.P.	...Appellant.
Versus	
Mohd. Salim alias Kagzi	...Respondent.

Coram

The Hon’ble Mr. Justice Surjit Singh, Judge.

The Hon’ble Mr. **Justice Surinder Singh, Judge.**

Whether approved for reporting? No

For the Appellant : Mr. Som Dutt Vasudeva, Additional Advocate General, with Mr. D.S. Nainta, Deputy Advocate General.

For the Respondent : Mr. Dev Raj Dev, Advocate.

Surjit Singh, Judge(Oral)

2. State is aggrieved by the judgment of the trial Magistrate whereby the respondent, who was sent up for trial for offences, punishable under sections 457 and 380 of the Indian Penal Code, has been acquitted.

3. Prosecution story, as per evidence on record, may be summed up thus. There is a temple of Vishva Karma at Paonta Sahib. PW-3 Chetan Dass was the priest-cum-care taker of that temple. On the night intervening 1st /2nd March, 1987, he heard the sound of knocking near the temple around 2 a.m. and woke up. He went towards the temple from his *Kuttia* and saw a boy running away. He did not know the name of that boy, but knew him by face as he had earlier seen him several times sitting in the *Paan Khokha*

Whether reporters of the local papers may be allowed to see the judgment?

of his brother near Sabji Mandi. He chased that boy, but could not nab him. Matter was reported to the police at 9.30 a.m. on 2.3.1987. Respondent was arrested by the police on 6.4.1987. He made a disclosure statement leading to the discovery of two *Chhattars*, which had been stolen from the temple on the aforesaid night.

4. Trial Court charged the respondent, under Sections 457 and 380 I.P.C. On his pleading not guilty, he was ordered to be tried. On the conclusion of the trial he was acquitted with the reasoning that his identity as the person who was spotted by the *Pujari* on the relevant night, did not stand established, there was delay in lodging the FIR and there was contradiction in the testimony of the *Pujari* Chetan Dass (PW-3) and the earliest version which he gave to the police.

5. We have heard the learned Additional Advocate General and gone through the record.

6. In the FIR, as noticed hereinabove, the identity of the man, who had been seen running through the back door of the temple, was described as a *Mohammadan* boy who used to sit at the *Pan Khokha* of his brother near Sabji Mandi. However, while appearing as PW-3, Chetan Dass stated that he identified the man running away from the temple to be the boy, who used to work at a *Khokha* near the bus stand and his name was Mohammad Salim. In the FIR he specifically stated that he did not know the name of the boy.

7. Again, the FIR was lodged by PW-3 Chetan Dass at 9.50 a.m. as is clear from the FIR Ext.PW3/A, but while in the witness box he testified that the FIR was lodged by him with the police at

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12.30 a.m. The contents of the FIR are also contradictory to the testimony of PW-3 Chetan Dass. In the FIR it is recorded that the sound of knocking (Khatkhat) was heard at 2 a.m. but in the Court he stated that it was heard at 12.30 in the night and immediately thereafter he went to the police station and lodged the FIR.

8. PW-3 Chetan Dass has stated in the cross-examination that a tube light was installed at a distance of about 40 metres from the door of the temple where he saw the thief. He has also stated that he saw the thief from his back when he was running away. Further, he stated that even though initially the face of the thief was uncovered, but while running away he had covered his face with a blanket. All these facts make it highly doubtful if the witness was in a position to identify the thief correctly.

9. Recovery under Section 27 of the Indian Evidence Act is alleged to have been effected from an open place after more than a month and, therefore, possibility of the same having been planted, cannot be ruled out.

10. In view of the above stated position, it cannot be said that the finding returned by the trial Court is not possible on the basis of the evidence on record or that the same is perverse. Hence, the appeal is dismissed.

(Surjit Singh), J

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(Surinder Singh), J