

A.F.R.

Judgement Reserved on 21.08.2019

Judgement Delivered on 30.08.2019

Case :- CRIMINAL APPEAL No. - 5207 of 2018

Appellant :- Arvind Parmar @ Bunti Raja And 2 Others

Respondent :- State Of U.P.

Counsel for Appellant :- Ram Datt Dauholia, Nanhe Lal Tripathi

Counsel for Respondent :- G.A.

Hon'ble Ram Krishna Gautam, J.

1. This Appeal, under Section 374 (2) of Code of Criminal Procedure, 1973 (In short hereinafter referred to as 'Cr.P.C.'), has been filed by the convict-appellants, Arvind Parmar @ Bunti Raja, Rajan @ Rajendra, and Rahim Khan, against the judgment of conviction, dated 24.07.2018 and sentences awarded therein, by the Court of Additional Sessions Judge/Special Judge (U.P. Dacoity Affected Area Act), Lalitpur, in Sessions Trial No. 48 of 2013 (State vs. Arvind Parmar @ Banti Raja and others), arising out of Case Crime No. 701/2012, under Sections 457, 380 and 411 of Indian Penal Code (Hereinafter, in short, referred to as 'IPC'), Police Station- Kotwali, District Lalitpur, whereby convict-appellants, Arvind Parmar @ Bunti Raja, Rajan @ Rajendra and Rahim Khan have been sentenced with five years' rigorous imprisonment and fine of Rs.5,000/-, each, under Section 380 IPC, and Ten years' rigorous imprisonment, with fine of Rs.10,000/-, each, under Section 457 IPC, and three years' rigorous imprisonment, with fine of Rs.3,000/-, under Section 411 IPC. In case of default of deposit of fine of Rs.10,000, they will have to serve one year's simple imprisonment, in default of deposit of fine of Rs.5,000/-, they will have to serve six months'

simple imprisonment and in default of deposit of fine of Rs.3,000/-, they will have to serve three months simple imprisonment, with further direction for concurrent running of sentences and adjustment of previous incarceration, if any, in this very case crime number, with this contention that the Trial court failed to appreciate facts and law placed before it and the judgment of conviction and sentence, awarded, therein, is illegal, perverse and against the weight of evidence on record. It was passed on the basis of surmises and conjunctures.

2. The occurrence had been said to have taken place on 7.4.2012 and a first information report was lodged on 17.4.2012 as Case Crime No. 701 of 2012, under Sections 457 and 380 IPC, Police Station- Kotwali, Lalitpur, District Lalitpur. Subsequently, arrest of Arvind Parmar @ Buntty Raja, appellant no.1, Jeetu Parihar, Rajan, appellant no.2, and Naval Ahirwar, was shown to have been made by the Police on 14.8.2012, whereas Shivam Tiwari, Arvind Pal and Rahim Khan, appellant no.3, said to have fled from the spot. Recovery of golden ornaments was said to have been made from joint possession of arrested accused persons. Though the occurrence was said to have occurred 7.4.2012, but the first information report was lodged on 17.4.2012. As per statement of PW-4, S.I., Sunit Kumar, arrest of appellant nos. 1 and 2 was made on 14.8.2012 and alleged recovery of golden ornaments was said to have been made from them, while appellant no.3 was said to have fled from spot, whereas it was a false recovery and false implication as there was no credible evidence against appellants, constituting offence under Sections 457, 380 IPC. Hence, this Criminal Appeal with above prayer.

3. Heard Sri Nanhe Lal Tripathi, learned counsel for the appellant and learned AGA, appearing for the State and gone through the impugned judgement as well as record of the Trial court.

4. From very perusal of the record, it is apparent that the First Information Report, Exhibit Ka-1, dated 17.4.2012, was got lodged by the informant, Smt. Prem Lala Jain, at Police Station-Kotwali Lalitpur, District Lalitpur, with this contention that on 6.4.2012, she was at Bomby, in connection with the treatment of her ailing husband and her son was at home, and while, her son, went to Chanderi at about 01.00 PM, locking the home, her brother-in-law, Nilesh Kumar Jain, came to her house on 7.4.2012 where he has seen that the locks are broken. He gave information at the Police Station and communicated to the informant telephonically. Informant, after coming to Lalitpur, on 8.4.2019, found that her two golden Kangan (Bracelet), about 2 Tola, three rings, about 1.5 Tola, two ear rings, one Mangalsutra, about 2 Tola, Bangles of 8 Guria, 4 pair, about 2 Tola, silver anklate, about 500 gram, 4 Vintex Bangles, one wad of Rs.10/- currency notes, in total Rs.1,000/-, 400 Kaldar, one Wad (*Gaddi*) of 10 rupees currency notes and change money amounting to Rs.3,00/ were stolen. Hence, this report. Case Crime No.701 of 2012, under Sections 457 & 380 IPC was got registered against unknown thieves on 17.4.2012.

5. On 14.8.2012, while SOG Incharge, Sumit Kumar Singh, alongwith his Police Team was on surveillance duty, informer gave information about presence of thieves near Cremation Ghat, Chandi Mata Temple. This was immediately communicated to Inspector, Incharge, Kotwali Lalitpur, District Lalitpur, Sri Uday

Bhan Singh and called him to Varni Four-way Junction. A Police Team led by him, with this Inspector, proceeded for Chandi Mata Temple. On being pointed by the informer towards few persons, sitting thereat, Police Team apprehended four persons at 15.15 PM. On being asked to disclose identity, first one told his name Arvind Parmar @ Bunt Raja, resident of Nai Basti, Police Station Kotwali, Behind Little Flower School, Lalitpur, from whose personal search, one Mangalsutra of yellow metal, appearing to be gold, with cash of Rs.10,000/-, was recovered, other one disclosed his identity as Rajan, Son of Govind Singh Bundela, Resident of Cremation Ghat, Nai Basti, Police Station Lalitpur, from whom golden chain of yellow metal, with cash of Rs.12,000/- was recovered, third one disclosed his name as Jitu Parihar, Son of Parmanand, resident of Railway Crossing, Gandhinagar, Police Station Kotwali, Lalitpur, from whom, ear ring of gold of yellow metal was recovered, and fourth one disclosed his identity as Naval Ahirvar, Son of Har Naryan, resident of Nehru Nagar, Infront of Masjid, Police Station Kotwali, District Lalitpur, from whom three rings of gold, Rs.32,000/-, in cash, and one Pendent of yellow metal was recovered whereas Shivam Tiwari, Arvind Pal, Banti Dhobi and Raheem managed to escape from the spot. Smt. Prem Lata Jain, Pramod Kumar, Akhilesh Kumar Sharma, Smt. Gita, Satendra Singh Parmar (informant), Balram Pachauri, Niraj Nayak, Sanjay Tiwari and many others rushed to the spot, who identified those apprehended persons to be residents of above locality. Upon being investigated, those apprehended persons confessed offence of theft committed by them and also confessed that Mangalsutra and one golden ring was stolen from the house of Smt. Prem Lata Jain, whereas one golden chain and Rs.2,000/-, in cash, were stolen from the house of Balram Pachauri, two

golden rings, with cash of Rs.20,000/-, was stolen from the house of Akhilesh Kumar Sharma, two ear rings were stolen from the house of Sanjay Tiwari, Pendent of Mangalsutra was stolen from the house of Niraj Nayak and Rs.5,000/-, in cash, was stolen from the house of Bharat Patel, Rs.2,000/- was stolen from the house of Gita and Rs.5,000/-, in cash, was stolen from house of Pramod. Remaining stolen articles were taken away by Shubham Tiwari, Arvind Pal, Bunti Dhobi and Rahim. Alleged recovered stolen articles were identified by those public men, who were informants in various cases of theft, lodged by them, being Case Crime Nos.1150/2012, 1210/2012, 2420/2012, 1492/2012, 701/2012, 778/2012, 1613/2012, 1617/2012 and 1612/2012, under Sections 457, 380, 411 and 413 IPC. It was presumed that those accused persons were habitual offenders of theft, hence they were taken into custody and recovery memo was got prepared on the basis of which this implication, under Sections 457, 380, 411 was made.

6. On the basis of investigation, chargesheet was filed and after hearing learned Public Prosecutor as well as learned counsel for defence, charges for offence, punishable under Section 380, 457, 411 IPC were framed. Charges were readover and explained to the accused persons, who pleaded not guilty and requested for trial.

7. Prosecution examined PW-1, Smt. Premlata Jain, informant, PW-2, Constable, Suravali Yadav, PW-3, Varun Pratap Singh, Sub Inspector, PW-4, Sunit Kumar, Sub Inspector, PW-5, Sub Inspector, Rakesh Raj Gautam, PW-6, Head Constable, Radheshyam Sachan and PW-7, Sub Inspector, Man Singh Pal.

8. Statement of accused persons were got recorded, under Section 313 Cr.P.C. in which prosecution version was denied and false investigation, with no confession, was said. No evidence in defence was led and after hearing arguments of learned Public Prosecutor and the counsel for defence, impugned judgment of conviction for offence, punishable under Sections 380, 457 and 411 IPC.

9. After hearing over quantum of sentence, impugned sentence was passed.

10. First Information Report, Exhibit Ka-2, was formally proved by PW-1, informant, Smt. Premlata Jain, and it has specifically been lodged against unknown thieves, because this witness was not present at her home at the time of alleged occurrence of theft. In examination-in-chief, this witness has said that it so happened that, while on 6.4.2012, the informant was away from her home at Bombay, leaving behind her son at home, for the last one and a half months, in connection with the treatment of her husband, who was undergoing treatment for Cancer, her son, locking the home went to her paternal aunt's home (Bua-father's Sister), at Chanderi, Madhya Pradesh, on next day, i.e. 7.4.2012, her brother-in-law (Devar), Nilesh Jain, found locks put on the door of her home broken. He gave information of this incident at the concerned Police Station as well as to the informant telephonically. On coming back to her home on 8.4.2012, she found her house hold articles scattered here and there and occurrence of theft by unknown thieves took place. Two golden Kangan (Bracelet), about 2 Tola, three rings, about 1.5 Tola, two ear rings, one Mangalsutra, about 2 Tola, Bangles of 8 Guria, 4 pair, about 2 Tola, silver anklete, about 500 gram, 4 Vintex

Bangles, one wad (*Gaddi*) of Rs.10/- currency notes, in total Rs.1,000/-, 400 Kaldar of 10 rupees and change money amounting to Rs.3,00/ were stolen by unknown thieves. After 4-5 months of the incident, Police claimed to have recovered one Mangalsutra, one golden garland and one golden ring from some thieves, which she identified, whereas in cross-examination she has said that recovered articles were not produced before her in the court nor she has given any specific mark of identification of Mangalsutra. When the Police made recovery, she had seen the recovered articles in the office of Superintendent of Police. When the recovery was made and who made recovery was not known to her nor she identify any thief nor she has ever seen them. She did not know any of the accused persons nor she was aware about the name and address of them. Stolen articles were not produced before her nor has she seen anyone committing theft. Meaning thereby, neither there was any specific mark of identification of stolen articles nor any recovery memo was prepared on the spot nor the same were produced before the court during trial nor this witness was previously acquainted with accused persons. Thus, this witness does not support prosecution case at all.

11. PW-2 is Constable Suryavali Yadav, who registered the first information report, has formally proved registration of registering first information report. He, in his, examination-in-chief, has stated that, while he was posted at Police Station Kotwali, Lalitpur, as Head Moharir, on 20.4.2012, he has registered first information report of Case Crime No. 701/12, under Section 380 and 457 IPC, against unknown thieves, on the application of Smt. Premlata Jain, Wife of Sunil Kumar Jain, Resident of Gandhi Nagar, Lalitpur, which was in his hand-writing

and under his Signature. First information report is paper no. 5Ka and exhibited as Exhibit Ka-2. In his cross-examination, this witness, has said that on the day of registration of first information report, he was on duty. He registered first information report on the basis of the order of the Station Officer, passed on the application of the informant. Informant was present thereat. The report was against unknown persons. From the testimony of this witness, registration of first information report against unknown persons is proved.

12. PW-3 is Sub Inspector Varun Pratap Singh. This witness, in his testimony, has stated that on 27.8.2012, while he was posted as Chowki Incharge of Nehru Nagar Chowki, under Kotwali Lalitpur and was on duty with the Inspector, Kotwali, Lalitpur, at 7.30 PM, on that very day, they arrested one thief at at a nearby place of Juvenile Care Centre, Nehru Nagar, who disclosed his name Shivam Tiwari. On his personal search, Rs.5,000/ cash was recovered. He confessed in front of them that he, alongwith his other accomplices, committed various occurrences of theft and recovered amount was given to him as his share. This recovered article was stolen from the house of Sunil Kumar Jain, whereas in his cross-examination, this witness has said that he did not remember time entered in the G.D. regarding his departure from Police Chowki as well as arrival at the Police Chowki. He also did not remember that how many copies of recovery memo were prepared or where recovery memo was prepared and how many persons signed recovery memo or what was the boundary mentioned in recovery memo. On what date, which occurrence of theft was committed by the accused persons is not known to him. Identification proceeding of the recovered articles was not conducted. Meaning thereby,

testimony of this witness, which is full of contradictions and discrepancies, is not worth credit and is of no avail to the prosecution.

13. PW-4 is Sub Inspector Sunit Kumar. He, in his examination-in-chief, has stated that, while being posted as Incharge, SOG, Lalitpur, on 14.8.2012, he, alongwith his Police Team, and with the help of Police personnel of Kotwali, on the information, received from the informer, have arrested four persons, from whom ornaments of gold and silver as well as cash were recovered. Those accused persons have confessed to have committed various thefts in the District of Lalitpur. On the spot, one Mangalsutra and one golden ring, stolen from the house of Smt. Premlata Jain, Informant, were recovered, which were identified by Smt. Premlata Jain, on the spot. Recovery memo, Exhibit Ka-4, was prepared by him on the spot, which was got signed by the accused persons and the police personnel, accompanying him. Arrested persons disclosed their names, Arvind @ Banti, Jitu Parihar, Rajan and Nava, whereas in his cross-examination, this witness has said that name of the accused persons was not mentioned in any of the first information reports nor was there any eye witness account of occurrence of theft. Identification proceeding of the recovered articles was not conducted. He did not remember, whether copy of the recovery memo was given to the accused persons or not. Who gave information to the informant of the first information report, about arrest and recovery, was not known to him. Recovered articles was not produced before him. Meaning thereby, there is discrepancies and contradictions between examination-in-chief and cross-examination of this witness,

which is also at variance and as such testimony of this witness is not credible and not credit worthy at all.

14. PW-5 is Sub Inspector, Rakesh Raj Gautam, who, in his examination-in-chief, has said that, while he was posted as Sub Inspector at Kotwali, Lalitpur, on 22.8.2012, he has been entrusted with the investigation of Case Crime No.701 of 2012, under Sections 457 and 380 IPC in which final report was submitted by the previous Investigating Officer, but an information regarding recovery of articles, pertaining to this incident of occurrence of theft, was received by him. He got the statements of accused persons recorded. He also got statement of Incharge, SOG, Sunit Kmar, who arrested accused persons, recorded. He also got statements of other police persons recorded. After collecting evidence, he filed chargesheet, under Sections 457, 380, 411 and 413 IPC, which is Paper No.3Ka, Exhibit Ka-5, in his handwriting and under his signature. In his cross-examination, this witness has stated that he did not get any identification proceeding of the accused conducted nor of recovered articles. He did not remember entries made in the General Diary (G.D) nor the same were produced before him nor he recollects number of the G.D. nor recovered articles were produced before him. Meaning thereby, testimony of this witness is of no relevance to the prosecution and is shaky as such is of no avail to the prosecution.

15. PW-6 is Head Constable, Radheshyam Sachan. This witness, in his examination-in-chief, has said that this case was partly investigated by Sub Inspector Nanhe Lal Yadav. Site Plan, Exhibit Ka-6, which is on record, was in his writing and under his signature. He remained posted with him and, therefore, he

identified his signature and handwriting, whereas in his cross-examination, he denied of site plan being prepared before him. Since, G.D. containing entry of his departure and arrival was not before him, he was not able to tell whether he went on the spot or not. He could not tell as to whether the site map has been rightly prepared or it was incorrect. He also did not remember, the period during which Nanhe Lal Yadav was posted with him. He said that it is wrong to say that he is not aware of handwriting or signature of Nanhe Lal Yadav. There are contradictions in the testimony of this witness. Moreover, the Testimony of this witness does not appear to be of any relevance to the prosecution.

16. PW-7 is Sub Inspector, Man Singh Pal. He, in his testimony, has stated that while he was posted at Nai Basti, under P.S. Kotwali, Lalitpur, on 17.9.2012, he accompanied his Station Officer, Uday Bhan Singh, in connection with search of accused of various occurrence of theft, on the information of informer, reached at Govind Sagar Dam, and found a suspected person sitting thereat, whom informer pointed to be Banti @ Rajan. After rounding him up, he has been apprehended at about 23.40 PM. On personal search being made, ankletes of silver, about 250 gms, were recovered from him, which, he confessed to have been stolen from the house of Niraj Nayak and he got those ankletes as share of that theft. Recovery memo, on the dictation of Station Officer, was got prepared. Niraj Naiyak was called on the spot and recovered article was got identified by him. On 27.7.2012, also, while he, alongwith his Station Officer, was on round of the area in connection with search of accused of occurrence of theft, on an information of the informer, they reached at Juvenile Centre Triway-junction where a suspect was

seen and on pointing of the informer him to be Shivam Tiwari, Police Team rounded him up and arrested at about 19.30 PM. On personal search being made, Rs.5,000/- in cash, one ring of about 1.5 Tola and one Silver Box (*Dibiya*) was recovered, which, he confessed to have got as share of theft, which he committed, alongwith his other accomplices, in the house of Niraj Nayak. Niraj Nayak has identified the recovered article on the spot, alongiwht Kalyan and and Sanjay Tiwari. Recovery memo was got prepared, on the dictation of Station Officer, by Varun Pratap Singh, which was readover and signature of other Police personnel was got. While, in his cross-examination, this witness has stated that he did not recollect case crime number. In first information report, there was no specific mark of identification of stolen articles and identification proceeding was not conducted as per law. There was no independent public witness nor any accused was named in the report nor occurrence of theft was seen by the informant nor any mark of identification of accused was given. There was no independent public witness of recovery. He did not remember whether copy of recovery memo was got prepared or not. Independent public witnesses were asked to become witness, but their names and address were not mentioned in the recovery memo nor he was able to tell who were asked to give evidence. Meaning thereby, this witness neither was able to tell case crime number nor there was any specific mark of identification of articles stolen nor any identification proceeding was conducted in accordance with law nor there was any independent public witness either of occurrence of theft or of recovery, so made, by the Police, resulting testimony of this witness not worth credit and full of contradiction and at variance as well and as such does not support case set up by the Prosecution.

So far as testimony with regard to arrest of Banti @ Rajan and Shivem Tiwari by the Police is concerned, since they are not appellants in this appeal, hence, testimony of this witness is of not much relevance to the prosecution in this Appeal.

17. Examination-in-chief and cross-examination of the witnesses produced by the prosecution are full of variance and contradictions. Moreso, even single iota regarding offence, punishable under Section 380 IPC or 457 IPC is there, on record, against present convict appellants, except their alleged confessions, that too, when they were apprehended by the Police, which was not admissible in evidence. If entire prosecution case is admitted for the sake of argument, it may be said that those accused persons were apprehended with possession of those recovered articles, but there is neither any specific mark of identification nor there is any corresponding evidence for connecting with above offence of theft was there on record, which was a condition precedent for offence, punishable under Section 411 IPC.

18. Section 457 of Indian Penal Code (IPC) provides that 'whoever commits lurking house-trespass by night, or house breaking by night, in order to committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine, and, if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years'.

19. In present case, learned Trial Judge has convicted appellants for this offence with sentence, whereas no evidence of

lurking house-trespass by night or house breaking by night is there. Theft stands defined in Section 378 IPC. To complete offence, under Section 457 IPC, the ingredient is that burglar, or house breaker by night, should have an intention to commit theft. Theft or an intention to commit theft does actually carry out his intention to commit theft. Theft or an intention to commit theft is in no way a necessary essential ingredient in either of the offences. It frequently happens that lurking house-trespass or house-breaking by night is followed by theft, but the offence can be committed without theft or any intention to commit it. For conviction, under Section 457 IPC, the accused must be proved to have committed lurking house-trespass or house breaking. A charge, under Section 457 IPC must be substantiated by evidence and cannot be assumed from nothing. If a person is charged of house breaking and theft and the commission of theft is established, it would not follow that commission of other offence of house-breaking has also been established. When evidence does not justify a finding that the accused, who entered inside the house, had same intention to commit an offence, it is not trespass. So, then Section 457 IPC goes out of the way.

20. Allahabad High Court in **41 Cr.L.J, 623 (Allahabad), Chhadami v. Emperor**, has propounded that in order to constitute lurking house-trespass, the offender must take some active means to conceal his presence. Regarding presumption under illustration (a) to Section 114, Evidence Act, may also attract a graver offence, like one, under 457 IPC, where the accused is found in possession of articles stolen and obtained by house-breaking, it cannot be inferred that he has committed an offence of house-breaking and theft. Presumption, under Section 114,

Evidence Act, can be drawn only when the accused, when asked, is unable to explain his possession.

21. In present case, no evidence of house breaking by night or lurking house-trespass by appellants was there, except alleged recovery of cash, but the same were not established by specific mark of identification or by denomination of currency notes recovered, which were alleged to have been stolen from the house of the informant to co-relate with the property alleged to have been stolen from above house-breaking or recovery of above ornament from convict-appellants.

22. Section 411 IPC provides that whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

23. Apex Court in ***AIR 1954 SC 39, Trimbak vs. State of Madhya Pradesh***, has propounded ingredients of offence, under Section 411 IPC, i.e., ingredients, which prosecution has to establish: (1) that the stolen property was in possession of the accused, (2) that some person, other than accused, had possession of the property before the accused got possession of it and (3) that the accused had knowledge that the property was stolen property.

24. In present case, neither property was duly identified by any specific mark of identification nor it was established before Trial court by way of producing the same nor its identity was established in identification parade nor the same was recovered

in presence of informant, who had disputed alleged preparation of recovery memo.

25. Under Section 380 IPC, essential ingredient for offence, punishable under Section 380 IPC is that accused committed theft, i.e., theft was committed in any building, tent or vessel and that such building, tent or vessel was used as human dwelling or was used for custody of the property. Hence, prosecution has to prove points required for proving of an offence, under Section 379 IPC plus that the moveable property was taken away or moved out of a building, tent or vessel and that such building, tent or vessel was being used for human dwelling or custody of moveable property. Intention to take this dishonestly must be proved.

26. In present case, offence of theft was got registered by informant against unknown thieves. Subsequently, alleged recovery of alleged stolen cash money was said to have been made from convict-appellants. Offence of theft or taking of articles from building, by convict appellants, was not proved by any witness and on the basis of possession and presumption, under Section 114, Evidence Act, offence under Section 380 IPC was deemed to be proved whereas identification of alleged recovered cash, with no specific mark of identification, was neither established, by way of identification parade, or by way of proving it before Trial court.

27. Hence, learned Trial court failed to appreciate facts and law placed before it and thereby passed judgment of conviction and sentences therein, against evidence on record.

28. In view of what has been discussed above, this Criminal Appeal deserves to be allowed.

29. Accordingly, this Criminal Appeal succeeds and is allowed. The impugned judgment and order of conviction dated 24.07.2018, passed by the Trial Court, is hereby set aside and the appellants are acquitted of all the charges. The appellants are in jail. They shall be released forthwith, if not wanted in any other case.

30. Keeping in view the provisions of section 437-A Cr.P.C. appellants are directed to forthwith furnish a personal bond and two reliable sureties, each, in the like amount, to the satisfaction of Trial court before it, which shall be effective for a period of six months, along with an undertaking that in the event of filing of Special Leave Petition against the instant judgment or for grant of leave, the appellants, on receipt of notice thereof, shall appear before the Hon'ble Supreme Court.

31. Let a copy of this judgment along with lower court's record be sent back to the court concerned for immediate compliance.

30.08.2019

bgs/-