



**IN THE COURT OF I ADDITIONAL DISTRICT AND
SESSIONS JUDGE, SHIVAMOGGA**

DATED THIS THE 3rd DAY OF SEPTEMBER, 2024

PRESENT

MARULASIDDARADHYA.H.J., B.A.L, LL.M.,
I ADDITIONAL DISTRICT AND SESSIONS JUDGE,
SHIVAMOGGA.

CRIMINAL APPEAL NO.121/2022

Appellant : **1. State by Sub-Inspector of Police,**
Agumbe Police Station,
Thirthahalli Taluk,
Shivamogga District.
(By Public Prosecutor, Shivamogga)

-V/s.-

Respondents : **1. Mahammed Hanif @ Hanif**
S/o. Cheriyan Byari,
Aged about 46 years,
R/at. Santhekoppa, Hedduru,
Kattehakkalu Post,
Thirthahalli Taluk,
Shivamogga District.

2. Prasanna.S.R.
S/o. Late. Rangappa Gowda,
Aged about 38 years,
R/at. Salgadi Village,
Kattehakkalu Post,
Thirthahalli Taluk,
Shivamogga District.

(By Sri. S.T.Ranganath, Advocate)

JUDGMENT

1. This appeal is preferred by the appellant-prosecution against the respondents-accused no.1 and 2 under Section 378 of the Code of Criminal procedure, 1973 (hereinafter will be referred to as “the Cr.P.C”) challenging the judgment of acquittal passed by the learned Senior Civil Judge and Judicial Magistrate of First Class, Shivamogga, in C.C.No.90/2018 dated 24-02-2022, by acquitting the appellant-accused no.1 and 2 of the offences punishable under Section 457 and 380 of the Indian Penal Code, 1860 (hereinafter will be referred to as “the I.P.C”).

2. **The brief facts leading to this appeal are as follows:**

Informant is the resident of Hosakoppa Village, Thirthahalli Taluk. On 01-11-2016 a theft is committed in Sri Umamaheshwari Temple of Hosakoppa Village, by breaking open entrance door of the temple with an iron rod. One silver face mask worth Rs.43,000/- and Rs.10,000/- cash kept in offering box of the temple has been stolen by

breaking open the lock. Accordingly, on the next day at about 3:00 PM information is lodged before Agumbe Police Station, registered as its Crime No.113/2016. The Investigating Officer during investigation discovered that, the accused no.1 and 2 stolen silver face mask from the temple and given that to Om Gold Refinery of C.W-13 to melt and the same has been seized by the Investigating Officer in presence of C.W-10 to 12 in biscuit form weighing 1.094 Kilo Gram. Accordingly, charge-sheet has been submitted against the accused with a list of 24 witnesses for the offence punishable under Section 457 and 380 of the I.P.C.

- 3.** After submitting the charge-sheet, the learned Magistrate took cognizance against the accused to the aforesaid offences. Complied the provision under Section 207 of the Cr.P.C by furnishing charge-sheet material to both the accused. The charges have been read over and has been explained to both the accused. Both the accused pleaded not guilty and

claimed to be tried.

4. The prosecution examined P.W-1 to 14 and got marked Ex.P-1 to 14 and M.O-1 and 2.
5. The statements of both the accused have been recorded by the learned Magistrate under Section 313 of the Cr.P.C. Both the accused denied incriminating evidence against them. But, did not choose to lead any defense evidence.
6. The learned Magistrate after hearing both the learned Assistant Public Prosecutor and defense counsel, considered 2 points on proving the case of the prosecution for the offences under Section 457 and 380 of the I.P.C. After perusing the oral and documentary evidence on its record, the learned Magistrate by negatively answered both the points, acquitted both the accused no.1 and 2 to bot the offences.
7. The prosecution being aggrieved by the judgment of

the learned Senior Civil Judge and Judicial Magistrate of First Class, Thirthahalli, preferred this appeal on the grounds that, all the prosecution witnesses examined as P.W-1 to 14 supported the prosecution case and nothing is elicited from their mouth during their cross-examination to deny the prosecution case. The same has not been appreciated in proper perspective by the learned Magistrate. Further, Ex.P.8-seizure panchanaama has been proved by the evidence of P.W-8 and 13. The observation of the learned trial Judge that, P.W.8 and 13-pancha witnesses are not independent, but, public servants and thereby, considering the evidence of the prosecution as not relevant, is not sustainable in law.

- 8.** P.W-9, who examined to prove the recovered articles and he was present during the drawing of Ex.P.8-panchanaama. He deposed to has seen the accused and himself also deposed about seeing production of 4 silver biscuits and the same have been seized in his

presence. All the Police witnesses deposed in support of the prosecution case. P.W-10 deposed about recording voluntary statements of accused relevant under Section 27 of the Indian Evidence Act, 1872, as he also effected recovery of silver biscuits in present of panchaas and drawn panchanaama. But, the learned Magistrate has not considered voluntary statements marked as per Ex.P-11 and 12 and the same has not been denied by the learned defense counsel. Hence, having sufficient grounds the prosecution prays to allow the appeal by setting aside the impugned Judgment and Order of acquittal passed by the learned Magistrate and to convict the accused to both charged offences.

9. After service of notice, both respondent no.1 and 2 appeared through Sri. S.T.Ranganath, Advocate. This Court secured records from the learned Magistrate.

10. Heard both sides.

11. The learned Public Prosecutor argued that, there are sufficient recoveries based on voluntary statement of accused no.1 and 2. Prayer to re-issue summons to C.W-13 has been dropped by the learned Magistrate and even evidence on record is sufficient to convict both the accused. Further, she argued that, marking of signature of accused is not mandatory to prove the contents of voluntary statements. Accordingly, she prays to allow the appeal.

12. The learned defense counsel on the other hand argued that, the voluntary statements are even though marked through prosecution witnesses as Ex.P-11 and 12, signature of the accused are not marked. Even relevant portion in the said exhibits are also not marked to consider them as evidence in support of the prosecution case. The material objects alleged to have been stolen are not tallying with that of the recovery. C.W-13 has not been examined from whose shop recovery has been effected by the Investigating Officer. There is no identification of

either the accused or the recovered articles. Hence, having no grounds the learned respondent counsel prays to dismiss the appeal.

13. The learned respondent counsel has relied upon the following judgments;-

(1) The judgment of the **hon'ble High Court of Karnataka**, in the case of **Sri. Yarriswamy -V/s.- State of Karnataka**, passed in **Criminal Revision Petition No.927 of 2013**, dated **10-06-2022**.

(2) The judgment of the **hon'ble Supreme Court of India**, in the case of **Mookkiah and another -V/s.- State represented by Inspector of Police, Tamil Nadu**, reported in **2013 (1) KCCR SN 24 (SC)**.

(3) The judgment of the **hon'ble High Court of Karnataka**, in the case of **Thamanna Shivalingappa Teli -V/s.- State of Karnataka and another**, reported in **2004 (4) Kar. L.J. 451**.

14. Perused the oral and documentary evidence on record and also grounds of the appeal memo.

15. The following points arise for my consideration:

I. Whether the appellant-prosecution has proved beyond all reasonable doubt that,

on 01-11-2016 accused no.1 and 2 have break open entrance door of Sri Umamaheshwari Temple of Hosakoppa Village, using an iron rod and then breaking open lock of the main door and thereby, committed the offence punishable under Section 457 of the I.P.C?

- II.** Whether the appellant-prosecution has proved beyond all reasonable doubt that, on the aforesaid date, time and place, after breaking open main entrance door and main door lock with an iron rod of Sri Umamaheshwari Temple of Hosakoppa Village, both accused no.1 and 2 have committed the theft of silver face mask worth of Rs.43,000/- and took away cash of Rs.10,000/- kept in offering box of the temple and thereby, committed the offence punishable under Section 380 of the I.P.C?
- III.** Whether the judgment of the learned trial Court is justifiable?
- IV.** Whether the findings of the learned trial Judge is called for interference?
- V.** What Order?

16. My findings on the above said points are as under:

Point No.1	:	In the Negative;
Point No.2	:	In the Negative;
Point No.3	:	In the Affirmative;
Point No.4	:	In the Negative;
Point No.5	:	As per final Order, for the following;

REASONS**17. POINT NO.1 AND 2:**

Both these point no.1 and 2 are taken together for discussion to avoid repetition of facts and evidence on record.

18. The prosecution alleged that, on 01-11-2016 one silver face mask worth Rs.43,000/- and cash of Rs.10,000/- kept in offering box of Sri Umamaheshwari Temple of Hosakoppa Village, have been stolen by some unknown persons after breaking open entrance door and main door lock of the temple. Accordingly, after registering F.I.R during investigation accused have been arrested and effected some recoveries related to the case.

- 19.** The prosecution for establishing its case, examined the informant as P.W-1 and got marked Ex.P-1 through him. He deposed about articles stolen from the temple, about drawing spot mahazar, taking photographs and receiving the silver from the Police Station, which have been recovered from the conscious possession of the accused.
- 20.** He admitted in his cross-examination by the learned defense counsel that, he came to know the fact of converting silver face mask into silver biscuit through the Police and he received the same. None of the accused confess before him about stealing silver face mask or cash from the temple and themselves only get it melted with the assistance of C.W-13.
- 21.** The prosecution has examined P.W-2, 4 and 5 as supporting and mahazar witnesses and all of them deposed about themselves present at the spot and Police visited and drawn panchanaama by seizing broken lock in their presence. Themselves have seen

theft of one silver face mask of the temple along with cash about Rs.15,000/- kept in offering box. None of them deposed about the exact articles stolen from the temple and the contents of Ex.P.6-panchanaama, drawn at the spot. In their respective cross-examination, they admitted that, they have not went inside the temple to see which are the articles stolen from the temple and they came to known through C.W-5.

22. P.W-3 specifically admitted in his cross-examination that, he did not know who broken the lock of the temple and he has not seen locked temple earlier to the incident. He did not see, which are the articles stolen, before the Police came to the spot. He deposed to has not given any statement that, accused only stolen the articles from their temple.

23. P.W-5 and 7 are the pancha witnesses, who deposed about production of about 15 to 16 articles related to god and temples stolen by the accused and the same

have been seized in their presence under Ex.P-7. P.W-5 specifically admitted in his cross-examination that, he did not see where the accused have been caught by the Police, but, they were under Police custody when they see them. Neither of the accused are known to the witnesses and they have been personally searched by the Police in their presence. Further, he admitted that, he cannot say which article are recovered from which pocket of the accused. Further he admitted that, he did not know where the accused brought articles and he has not dictated the contents written in Ex.P-7.

- 24.** P.W-7 in his cross-examination, pleaded ignorance about the reason for calling him by the Police and he has no license to test gold and silver articles. He has been taken by the Police from his house. Further, he did not know from where the accused have been brought by the Police and they only given him the stolen articles to test. He cannot say which articles have been taken from which person for testing them.

25. P.W-8 and 13 are examined by the prosecution as additional pancha witnesses, in whose presence accused took Police and panchaas to the shop of C.W-13 with the name Om Gold Refinery at Koppa main road. C.W-13 produced 4 silver biscuits, which are melted from of silver articles stolen by the accused. Accordingly, in their presence panchanaama has been drawn.

26. P.W-8 admitted in his cross-examination that, none of the localites have been called by the Police and he cannot say the weight of 4 silver pieces recovered from the shop of C.W-13, but, the same have been returned. He denied the other suggestions of the learned defense counsel.

27. P.W-9 in his cross-examination, admitted that, he did not know where the silver biscuits have been melted, but, they were kept in the shop of C.W-13 when himself have been brought as witness. Panchanaama has been drawn by the Police Sub-Inspector, but, he

cannot read and write Kannada language. He did not know the contents of panchanaama. But, the same has been read over to them by the Police Sub-Inspector. He only told them that, theft has been taken place behind the shop, but, he did not know when the theft has been taken place. He denied other suggestions of the learned defense counsel.

28. P.W.10-Police Officer deposed that, both accused no.1 and 2 have been arrested when found in suspicious circumstance along with weapon and stolen articles. They conducted mahazar and recovered articles as per Ex.P-8. Subsequently, the voluntary statement of accused have been recorded and by visiting gold refinery shop with panchaas along with accused and recovered silver articles.

29. P.W-11 supported the evidence of P.W-10 about himself accompanying P.W-10 and arrested the accused along with seizure of silver articles along with other items under panchanaama. He admit in

cross-examination that, no mahazar drawn at the place of apprehending the accused. He don't know, who brought the panchaas to the spot to draw panchanaama. Further, he denied other suggestions of the learned defense counsel.

30. P.W-12 also deposed similar to P.W-10 and corroborated the prosecution case. He also admitted in cross-examination that, none of the localities visited to the spot of apprehending the accused. Both the accused have been apprehended at different places. He deposed to have called the panchaas and invited them to participate in panchanaama.

31. Another Investigating Officer as P.W-14 deposed about conducting spot mahazar, recording statement of witnesses, receiving properties and also submitting charge-sheet.

32. The prosecution along with its oral evidence of P.W-1 to 14, it has also got marked Ex.P-1 to 14 and M.O-1

to 4. Ex.P-1 is the first information statement, Ex.P-2, 6 to 8 and 14 are the mahazars drawn by the Investigating Officer during investigation, while Ex.P-11 and 12 are the voluntary statements of accused no.1 and 2.

33. The above analysis of oral and documentary evidence makes it clear that, C.W-1 lodged first information as per Ex.P-1 on the next day of incident before the jurisdictional Agumbe Police Station by alleging theft, taken place in the Sri Umamaheshwari Temple of Hosakoppa Village. Immediately, jurisdictional Police visited the temple and found missing silver face mask weighing 1 Kilo Gram worth Rs.45,000/- along with Rs.15,000/- from offering box. Panchanaama has been drawn as per Ex.P-2 at the temple and subsequently, one more panchanaama drawn after one hour of the incident in presence of panchaas, as the spot shown by the accused.

34. Voluntary statements of both accused no.1 and 2

marked as per Ex.P-11 and 12 reveal, discovery of gold and silver articles in the possession of accused no.1 and 2 and the Police recovered the same in presence of panchaas.

- 35.** The recoveries effected by the Investigating Officer based on the voluntary statements of accused no.1 and 2 under Ex.P-11 and 12 must have their nexus with the contents of first information marked as per Ex.P-1 and the allegations against accused no.1 and 2. The contents of complaint reveal, stolen silver face mask from the temple and during investigation, Investigating Officer recovered melted hard silver biscuits by alleging that, accused have given silver face mask to the C.W-13 to melt it and accordingly, they seized the melted silver face mask.
- 36.** In this record, even though the Investigating Officer listed C.W-13 from whose possession melted face mask has been recovered, but, the said witness has not been examined by the prosecution.

37. Even though, the prosecution contended that, C.W-13 has been dropped by the learned Magistrate for not tendering him by the prosecution and re-issuing summons has not served any purpose, it can secure the witness by applying for re-calling the witness before the learned Magistrate. But, the records of the learned trial Court not reveal making any such efforts by the prosecution to re-call order and examine C.W-13 as material witnesses to establish nexus between the accused, recovery and the commission of alleged theft in Sri Umamaheshwari Temple of Hosakoppa Village, as alleged by the prosecution.

38. The material link in the chain of circumstance has not been proved by the prosecution by non-examination of the C.W-13. There is no evidence on record on prosecution side that unequivocally suggested that, except these accused no.1 and 2, no other person has committed the offence of theft in Sri Umamaheshwari Temple of Hosakoppa Village and the recovery of melted silver in hard biscuit form is

nothing but the face mask found missing from the Sri Umamaheshwari Temple of Hosakoppa Village.

- 39.** The learned respondent counsel relied upon the judgment in Yarriswamy's case (supra), wherein the hon'ble High Court of Karnataka held serious discrepancies in the evidence of prosecution would result in raising serious doubt and the benefit of the same shall be given to the accused.
- 40.** In another judgment of Mookkiah's case (supra), the hon'ble Supreme Court of India observed that, in case of acquittal of the accused the Appellate Court must consider double presumption existing in favor of the accused. First one that of presumption of innocence and another one that of acquittal of the accused, which are reinforced, reaffirmed and strengthened the presumption of innocence by the trial Court.
- 41.** Further, in another judgment of hon'ble High Court of Karnataka in Thamanna Shivalingappa Teli's case (supra), the hon'ble Court observed that, when the

gold ornaments seized in the form of ingot from the possession of the respondent no.2, identity of the property lost.

42. Accordingly, in the instant case, in view of existing serious discrepancies, absence of link in the chain of circumstances, applying presumption of innocence and the reinforced, reaffirmation of the same by trial Court's judgment of acquittal, are sufficient to conclude that, accused are entitled to be acquitted to both the charged offences.

43. As the case of prosecution is completely based on circumstantial evidence, in view of absence of proving each link in chain of circumstances by the prosecution, I am of the opinion that, the prosecution fail to bring home guilt of the accused no.1 and 2 beyond all reasonable doubt. Accordingly, I answer both the **point no.1 and 2 in the negative.**

44. POINT NO.3 AND 4:

Both these point no.3 and 4 are taken together for

discussion to avoid repetition of facts and evidence on record.

45. The learned trial Judge in the impugned judgment discussed the entire oral and documentary evidence on its record and justifiably applied its mind to conclude in negatively to the points raised by it and consequently, acquitted both the accused to both the charged offences.

46. Even though, the prosecution preferred this appeal by challenging the impugned judgment of the learned trial Judge for not considering the evidence on record, nowhere the findings of the learned trial Judge appears to be erroneous or without application of mind. Consequently, the judgment of the trial Judge is justifiable and not called for interference. Hence, I answer **point no.3 in the affirmative** and **point no.4 in the negative.**

47. POINT NO.5:

In view of my findings on point no.1 to 4, I proceed to

pass the following;

ORDER

The appeal preferred by the appellant under Section 378 of the Cr.P.C, is hereby dismissed.

The impugned judgment of the learned Senior Civil Judge and Judicial Magistrate of First Class, Thirthahalli, passed in C.C.No.90/2018 dated 24-02-2022, is hereby confirmed.

Send back the records of the trial Court along with the copy of this judgment.

(Dictated to the Stenographer Grade-III transcribed by him, after corrections, pronounced by me in the Open Court on this the 3rd day of September, 2024)

(Marulasiddaradhya.H.J.)
I Additional District & Sessions Judge,
Shivamogga