1974 KHC 692
Supreme Court
**V. R. Krishna Iyer; R. S. Sarkaria, JJ.*
Tukaram Ganpat Pandare v. State of Maharashtra
Crl. A. No. 185 of 1970
06 February, 1974

Penal Code, 1860, S.34 - Culpability is not excluded by mere distance of accused from scene of crime -- Penal Code, 1860), S.454, S.380 -- Evidence Act, 1872, S.114. (Para 10, 11, 14)

JUDGMENT

V. R. Krishna Iyer, J.

1 An old case of house breaking, allegedly by five persons, resulted in the acquittal of the 3rd accused by the magistrate and on appeal the 5th accused's guilt also was held not proved. The 2nd accused has appealed against his concurrent conviction while accused Nos. 1 and 4 have resigned themselves to their sentences.

2 40 bundles of copper wire kept in the godown of M/s. Lee and Muirhead (India) Pvt. Ltd. as Sewri in Bombay were admittedly burgled on Sunday, September 25, 1966, in the morning and removed in a lorry of driver Hassan. A4 had hired the lorry, taken a few hammals (head load carriers), loaded the vehicle with the copper wire, the godown watchman being absent, and on its way the lorry was stopped at the weigh bridge where the brokers for sale of the stolen property were also present. The story of the break in is substantially established and the involvement of Al and A4 is proved. Two of those whose roles were important, according to the prosecution version, have got off in Court. The appellant pleads innocence on the hopeful circumstances of absence of direct evidence connecting him and on the inconclusive probativeness of the sole circumstance found against him of the recovery of the duplicate key of the godown discovered as a result of his statement to the police.

3 Mr. V. S. Desai, with suasive reasoning, argued that his client was suspected on irrelevant grounds and proof of guilt needed more than the hesitant testimony of possession of a duplicate key after the occurrence, an accessory after the fact, assuming the worst against his client, being no abettor under the Indian law. A few more facts will illumine the lines of argument, the focus being turned only on accused No. 2.

4 A2 was found in possession of Rs. 4,800/-, all in hundred rupee notes, and a bunch of keys identified as duplicates of the godown keys. Notwithstanding some defects, the Trial Court concluded:

"*I therefore accept his evidence and find that the bunch of keys in the ring (Ex. D) and a sum of Rs. 4,800/- were recovered from the possession of accused 2 from his room. Complainant Noronha swears that they were the duplicate keys of the Moon Mill Godown.*"

Regarding the large amount -- suspiciously large for a small employee drawing a monthly salary of around Rs. 300/-, the Trial Court took the benignant view that "by no stretch of imagination can it be said that the amount of Rs. 4,800/- recovered from accused 2, as well as amount of Rs. 1,500/- recovered from accused 5, be said to be the sale proceeds of the stolen property or of any part thereof. The recovery of Rs. 4,800/- from accused 2 cannot therefore

incriminate him." Was it stretching the inference too far? But the High Court has not disturbed this view and we are not disposed to reconsider this two tier holding.

5 However, the keys tell a different tale. The learned Judge, in affirmance of the lower Court has observed:
"I have, therefore, no doubt that these keys which were found in possession of accused No. 2 were the keys which were used for the purpose of unlocking the lock and then stealing the copper wire. The offence was committed on 25-9-1966, the keys were found in possession of accused No. 2 on 28-9-1966."

6 We may advert to one more fact -- the presence of 2nd accused at the weigh bridge shortly after the theft. The Magistrate records that:

"Witness Manrupchand Chinnaji states that when accused 3 took him to the weigh bridge on that morning, he saw a stationary lorry laden with coper wire bundles and accused Nos. 1 and 4, near the lorry and that accused 3 introduced accused 2 to him as the owner of the goods. I accept this statement of the witness. It is true that there is no evidence to show that accused 2 was present either at the loading of the goods from the Moon Mill godown or at the unloading of the goods at M/s. Ashok Metals.

But the evidence of Manrupchand clearly shows that accused 2 was present when the lorry laden with the stolen goods was brought for weighment to the weigh bridge and that accused 3 then represented that accused 2 was the owner of these goods."

The appellate Court disagreed with this conclusion, in view of certain material contradictions, and said:

"*In so far as the connection of accused No. 2 by Manrupchand is concerned, Manrupchand says that accused No. 2 was introduced as the owner of the contraband article. His statement before the Police, however, is inconsistent with this evidence before the Court. He named accused Nos. 1 and 4 as the owners of the contraband property. Evidently, therefore, his connecting accused No. 2 also cannot be said to be a reliable piece of evidence.*"

We read it to mean not that Court totally disbelieved the presence of accused No. 2 at the weigh bridge but only the incriminating embellishment that he was introduced to the broker as the owner of the copper bundles.

7 An additional fact, inconclusive in itself but serving as a facilitatory background material, is the absence on leave of A2 on Saturday -- the day prior to the break in. It is suspicious, not more.

8 To sum up, we have some facts which cast suspicion on Accused No. 2 and two circumstances which go much beyond. His presence at the bridge near the loaded lorry on its way from the godown is a guilty pointer. And now the keys. Much argument was addressed on the unreliability of the witnesses who spoke to the keys recovered from accused No. 2 as being duplicates and about the surrounding circumstances militating against the acceptance of the case of the missing duplicates later recovered from the appellant. We cannot, except in far more exceptional circumstances, reassess evidence and must proceed to understand the legal inference available from the relevant portions of the appellant's statement leading to the discovery of the duplicate keys and the factum of his possession of these guilty keys.

9 The panchanama, Ex. R. contains the statement under S.27, Evidence Act, and only so much of it as relates clearly to the discover of the keys is admissible. "I will point out two Godrej keys ....I will point out the keys and the cash from my room". These keys are by evidence aliunde, shown to be duplicate keys of the burgled godown. How do these keys come into accused No. 2's room and he is able to point it out unless he has kept it there? To be in possession of the keys used for house breaking hot upon the burglary brings the crime kinship close to the accused. His presence at the weigh bridge reinforces this nexus. Even so, is he guilty under S.34 read with S.454 and S.380, I.P.C.?

10 Mere distance from the scene of crime cannot exclude culpability under S.34 which lays down the rule of joint responsibility for a criminal act performed by a plurality of persons. In Barendra Kumar Ghosh v. The King Emperor, (1924 52 1A 40 : AIR 1925 PC 1) the Judicial Committee drew into the criminal net those 'who only stand and wait'. This does not mean that some form of presence, near or remote, in not necessary, or that mere presence, without more, at the spot of crime, spells culpability, Criminal sharing, over or covert by active presence or by distant direction, making out a certain measure of jointness in the commission of the act is the essence of S.34. Even assuming that presence at the scene is a pre requisite to attract S.34 and that such propinquity is absent. S. 107, which is different in one sense, still comes into play to rope in the accused. The act here is not the picking the godown lock but house breaking and criminal house trespass. This crime is participated in by those operating by remote control as by those doing physical removal. Together operating in concert, the criminal project is executed. Those who supply the duplicate key, wait at the weigh bridge for the break in and bringing of the booty and later secrete the keys are *participes criminis*. And this is the role of accused No. 2, according to the Courts below, Could this legal inference be called altogether untenable?

11 The 2nd accused has no explanation for the possession of the godown keys nor for the presence at the weigh bridge. Guilt is writ large in the custody and discovery of the duplicate keys found missing from the premises of the factory. S.114, Evidence Act, enables the Court to presume the existence of probable facts, regard being had to human conduct and the common course of events, and common sense being used as a judicial tool. We cannot, in reversal of twice found facts, dissolve the conviction.

12 Considerable reliance was placed on a few rulings which may be briefly mentioned. In Mahamad Tadvi v. State, AIR 1956 Bom 186 at p. 188 it was observed:

"*The only evidence the learned Sessions Judge relied upon for convicting the third accused was firstly that the third accused pointed out a sword from the field of one Yadav Kiparu after digging up in a heap of thorns and took out the sword which was lying underneath it. It is not suggested that the sword belonged to any of the witnesses for the prosecution or that it was lost in the commission of the offence.*

At best the evidence would indicate that the third accused knew that in the field of Yadav Kiparu there was a sword lying underneath a heap of thorns but that evidence cannot, in our judgment, lead to an inference that he had participated in the commission of the offence of dacoity. It is true that there is evidence of witnesses for the prosecution that some of the dacoits were armed with swords but there is no evidence to prove that the sword before the Court, and which was pointed out by the third accused was one of the swords used in the commission of dacoity."

Some sword, not the sword was found with the accused there. Here, not some key but the key was in accused's custody.

13 In In re Ravipudi Venkanna, AIR 1948 Mad. 261 the Court held those accused guilty on whose information some identifiable bag with currency notes was recovered but did not draw a similar incriminatory presumption where the accused merely gave information regarding stolen jewels kept in another person's house with which the accused had nothing to do. Govinda Menon, J. in In re Periyaswami Thevan, AIR 1950 Mad. 714 at p. 715 explained:

"*The question of the weapon with which the offence committed being discovered as a result of information given by the accused is also probable. But in such a case the mere fact that a weapon, which could have been used for the commission of a crime like this, was discovered with bloodstains on it on information given by the accused, would not by itself, be sufficient to show that he was the murderer. But whatever that might be the only important circumstance in the case. Viz. that the bloodstained committed was unearthed as a result of information given by the accused, would not by itself be sufficient to bring home the guilt to the appellant.*"

If the recovered weapon was proved as the one used for the commission of the crime the injurious inference is reasonable. If the weapon is just one which could have been, but was not proved to have been used, the presumption is not necessary, grave though the suspicion be. These decisions do not clinch the issue and are distinguishable.

14 We are not disposed to demolish the conviction but, in the circumstances, reduce the sentence to six months rigorous imprisonment.
