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Court : Patna

Decided On : Jan-12-2000

Judge : D.P.S. Choudhary, J.

Appeal No. : Criminal Appeal No. 276 of 1994 (S.J.)

Appellant : Shridhar Koeri

Respondent : State of Bihar

Disposition : Appeal Allowed

Prior history : D.P.S. Choudhary, J. 1. The appellant Shridhar Koeri has preferred this appeal against the judgment and order dated 19.4.1994 passed by the 6th Additional Sessions Judge, Rohatas at Sasarm in Sessions Trial No. 346 of 1992 convicting the appellant under Sections 399 and 402 of the Indian Penal Code (hereinafter referred to as the 'I.P.C.') and sentenced him to undergo R.I. for five years and three years respectively. The sentences are to run concurrently. 2. The prosecution case in brief is th

Judgement :

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2. The prosecution case in brief is that in his written report dated 14.2.1991 the Officer Incharge, Kargahar Police Station Shri Ramanuj Rai (P.W. 1) alleged that on 13.2.1991 at 8.00 P.M. he received secret information that criminals were about to assemble for committing dacoity and they were to assemble at village Bastalwa and they had also committed an offence of abduction. The Inspector of Sasaram P.S. was also present at that time at the Police Station. The informant lodged a station diary entry and a raiding party was organised. The raiding party reached Kochus P.S. at 9.00 P.M. and from there S.I., B.N. Girt and other Constables and Chaukidar were included in the party. They proceeded towards the village and at the canal, they got information that the culprits had hid themselves in the village school. The raiding party surrounded the school and in the flash of torch light, they saw 6-7 criminals out of whom accused Sri Kishun Ram and Bhukhan Ram were identified by the informant (P.W. 1) and B.N. Giri, S.I. identified one of Baradi. It is also alleged that they were chased but others fled away except one who as caught hold by Inspector B.N. Giri and fire-arms including a country-made gun and 10 live cartridges of 12 bore were recovered from the possession the accused who was caught. He disclosed his name as Shridhar Koeri (the appellant). The accused further disclosed that such arms were kept inside the room of the school and on whose direction, the raiding party recovered those articles. Seizure list was prepared in presence of the independent witnesses, a copy of which was handed over to the accused Sridhar Koeri. The raiding party also rescued a boy, namely, Manoj Kumar from the said room. The arrested accused disclosed that he had abducted the boy on 12.2.1991 and he also disclosed the name of other associates. He also confessed his guilt in presence of the raiding party and stated that they had assembled with an intention to commit dacoity. On the basis of the report, the case was registered and after investigation the charge-sheet submitted against four accused-persons and others showing to absconders. After cognizance, the trial proceeded in the Court below. The appellant, along with three other accused, was charged under Sections 399 and 402 of the I.P.C. and

Sections 25(1B)A, 26, 27 and 35 of the Arms Act. The trial Court acquitted the appellant and other accused persons under the charge of Arms Act and also acquitted other three accused persons for want of evidence and for want of proper sanction under the Arms Act. Only the appellant was convicted and sentenced as' indicated above.

3. In support of its case, the prosecution has examined seven witnesses and brought on record exhibits which are written report (Ext. 1), the signature on the seizure list of the witnesses (Exts. 1/1), formal F.I.R. (Ext. 4) and the sanction order (Ext.5).

4. P.W. 1 (Ramanuj Rai) is S.I. of Police and Officer Incharge posted at Kargahar P.S. in the year 1991. He is informant of the case and has deposed as an eye-witness. He stated that he was member of the raiding party and when they reached near the school in the village on confidential information, they saw 6-7 persons variously armed with who fled away after seeing the police party. He has identified accused Sri Kishun Ram and Bhukhan Ram beside the appellant who was caught on the spot after chase and disclosed his name and also his associates. Arms were recovered from his possession and on his disclosure rifle and Katta were also recovered from the room of the school. He further stated that kidnapped boy Manoj Kumar was recovered from the room of the School and arrested accused Sridhar Koeri stated that he was kidnapped on 12.2.1991.

5. P.W. 2 (B.N. Giri) is another S.I. of Police who was posted at Kochus P.S. on the date of occurrence. He had accompanied the raiding party. He supported the factum of occurrence as stated by P.W. 1 regarding the surrounding of the School and chase of the culprits and subsequently, arrest of one of them, namely, the appellant. He also corroborated the evidence of P.W. 1 about the recovery of arms and ammunition from the possession of accused appellant Sridhar Koeri and recovery of other arms from the room of the school. However, he failed to identify accused Sridhar Koeri in the dock and instead of him he caught hold of Ramji Ram in the dock stating that he is the appellant Sridhar Koeri.

6. P.W. 3 (Mani Lal Sharma) is a witness on the seizure-list but he did not support the prosecution case on the point of recovery of arms and ammunition from the

possession of the accused-persons, though he admitted his signature on the seizure list.

7. P.W. 4 (Ram Byas Sah) was declared hostile by the prosecution while P.W. 5 (Sheomangal Ram) was tendered by the prosecution for cross-examination. P.W. 6 (Mahendra Prasad), a clerk in the Legal Section of Rohtas Collectorate is a formal witness, who has proved the sanction order (Ext. 5). P.W. 7 (Biresh Prasad Sinha) is Inspector of Police and was a member of the raiding party. He supported the evidence of P.W. 1 on the point of occurrence including the raid and surrounding of the school building. He further stated that after chase of the culprits, the appellant Sridhar Koeri was caught and from his possession country made pistol and cartridges were recovered. He also supported the evidence of P.W. 1 with respect to recovery of three rifles and some cartridges from the room of the school building. However, like P.W. 2 he also failed to identify the appellant Sridhar Koeri in the dock and instead of him he wrongly caught Ram Bhukhan Ram.

8. The trial Court has relied on the evidence of P.W. 1 and the other circumstances including the arrest of the appellant on the spot and recovery of the arms from his possession and accordingly convicted him under Sections 399 and 402 of the I.P.C.. The trial Court believed the evidence of P.Ws. 1, 2, and 7 on the point of recovery of arms from the possession of the appellant and also recovery from the school building but on the technical ground of sanction not being in accordance with law acquitted the accused under the Arms Act.

9. The learned appellant's lawyer submitted that 37 witness were named in the charge-sheet but not a single witness of the locality has been examined on behalf of the prosecution nor there is any satisfactory explanation for their non-examination. The learned Lawyer further submitted that on the sole testimony of P.W. 1, the prosecution has failed to prove that accused-appellant was arrested from the spot. In view of the evidence of P.Ws. 2 and 7 he failed to identify the accused in the dock, the alleged arrest of accused-appellant on the spot becomes doubtful.

10. In reply, the learned A.P.P. submitted that the conviction of the appellant based on the single testimony of P.W. 1 is in accordance with law. There is no reason to doubt his testimony who is a Police Officer having no animosity with the accused. P.Ws. 2 and 7 who were members of the raiding party failed to identify the accused in the dock only because they were examined after lapse of long period. Besides, they had seen the accused in the night when he was arrested on chase, therefore, there was possibility of wrong identification. The learned A.P.P. further submitted that from the judgment of the Court below, it appears that all steps were taken for production of the witnesses but they did not turn up which is a common practice these days.

11. From the submissions made on behalf of both the parties, I find substance in this contention of the learned A.P.P. that there can be conviction of the accused on the single testimony if his evidence is otherwise reliable and consistent. However, in this case the evidence of P.W. 1 on the point of identification of the accused has not been corroborated by the evidence of P.W. 2 who identified another person instead of the appellant in the dock leads to the conclusion that identification of the accused that he was arrested after chase is not beyond reasonable doubt. The seizure-list witnesses including P.W. 3 have not stated that arms were recovered from the possession of the accused appellant in their presence, though P.W. 3 has admitted his signature on the seizure-list but there is no reliable evidence on record to support the prosecution case that at the time of alleged arrest of the accused-appellant, arms and ammunition were recovered from his possession, which could have been strong circumstantial evidence against the accused if proved beyond all reasonable doubt by the prosecution.

12. The learned appellant's Lawyer further submitted that charge under Sections 399 and 402 of the I.P.C. has not been proved legally against the appellant. As stated above, P.Ws. 1, 2 and 7 have stated that about 6-7 persons including the appellant had assembled in a school building of the village in the night and seeing the police party they fled away but after chase the appellant was arrested and some arms and ammunition were recovered from his possession and also there was recovery of some arms from the school building. But, these facts are not sufficient to prove the prosecution case that the appellant along with other

accused-persons had assembled for the purpose of committing dacoity or for making preparation to accomplish that object. The possibility that the appellant and other accused might have collected for some other purpose could not be safely eliminated. Learned appellant's Lawyer submitted that the apex Court in a case reported in : 1979 CriLJ1090 Chaturi Yadav v. State of Bihar has held that only because the appellant was arrested on the spot at a lonely place and some arms were recovered from his possession cannot be found guilty for the offence under Sections 399 and 402 of the I.P.C. unless the prosecution proves beyond doubt that the appellant and his other associates had assembled for committing the purpose of dacoity or were making preparation to accomplish that object. The learned Lawyer further stated that the facts of the case referred to above is similar to the facts of this case because there also the accused was arrested on the spot and some arms were recovered from his possession. But, mere arrest on the spot and the recovery of some arms, the inference cannot be drawn to the effect that he, along with other accused had assembled at a lonely place for the purpose of committing dacoity or they were making preparation to commit dacoity. The evidence led by the prosecution merely shows that persons had assembled in a school building in the night and from the school premises some arms were recovered and the appellant was arrested on the spot after chase with arms in his possession. But, these facts and evidence do not itself prove that appellant had assembled for the purpose of committing dacoity or he was making preparation with other accused to accomplish that object. The learned lawyer further submitted that alleged confession of the appellant before the police officer that he had assembled along with his associates with an object to commit dacoity is not admissible and the prosecution should have adduced some other evidence in order to prove its case that the assemblence of the appellant with his associates was only with the purpose of committing dacoity or making preparation for committing dacoity in the instant case, such evidence is lacking hence the charge under Sections 399 and 402 of the I.P.C. have not been proved against the appellant beyond all reasonable doubts.

13. In support of the above contention the learned appellant's Lawyer further placed reliance on the decision of this Court reported in 1988 Cr. LJ 1391 Gholtu Modi and Ors. appellants v. State of Bihar and also on a recent decision of the

apex Court reported in : 1999 CriLJ2525 Suleman and Anr. v. State of Delhi.

14. Placing reliance on the above decisions and considering the facts and circumstances of the case, it is clear that Sections 399 and 402 of the I.P.C. are confined to making preparation for commission of dacoity of have no reference to any other offence. There, the prosecution must prove, from some evidence directly or indirectly or from the attending circumstances that the accused, along with his associates, had assembled for no other purpose that to make preparation for commission of dacoity. If the evidence fall short of it the case must fail. The prosecution must show some such conduct to prove the factum of preparation by the assemblance and the accused-persons have conceived any such design for committing dacoity. Therefore, the mere fact that the accused-appellant was arrested on the spot and some articles including fire-arms were recovered from his possession would not be sufficient to prove the charge that he had assembled for making preparation for commission of dacoity.

15. The learned A.P.P. submitted that arrest of the appellant from the spot and recovery of the arms from his possession and on his confession some fire-arms were also recovered from the premises of the school building are sufficient evidence both directly and circumstantial to lead inference that he had assembled at the place of occurrence along with his associates for committing dacoity. However, I am not inclined to accept this contention of the learned A.P.P. for the reasons as stated above that the prosecution has not adduced any evidence to show that the accused had assembled along with his associates at the lonely place only for the purpose of committing dacoity or was making preparation to commit dacoity. The aid of Section 108 of the Evidence Act be taken in a criminal trial only when the prosecution has led evidence which if believe will sustain a conviction or which makes out a prima-facie case. Unless this is done no burden of proving anything would lie on the accused. If there was any fallacy in explaining the position on the part of the accused-persons that would not absolve the prosecution from primary obligation to make out a prima-facie case under Sections 399 and 402 of the I.P.C. against the accused-appellant.

16. From the evidence discussed above, I come to the conclusion that there was no material from which it could be said with any amount of certainty that the appellant had assembled with his associates at the place of his arrest for preparation for committing dacoity and for on other purpose. In such circumstances, there is no option but to hold that the prosecution has failed to prove the charge under Sections 399 and 402 of the I.P.C. against the accused-appellant.

17. In the result this appeal is allowed. The judgment and order of the Court below is set aside and the appellant is acquitted of all the charges framed against him and is also discharged from the liabilities of the bail bonds. The Jail authority is directed to release the appellant forthwith if not wanted in any other case.

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