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Court : Allahabad

Decided On : Nov-29-1961

Reported in : AIR1961All612; 1961CriLJ744

Judge : A.N. Mulla, J.

Acts : Evidence Act, 1872 - Sections 9; Code of Criminal Procedure (CrPC) , 1898 - Sections 207A

Appeal No. : Criminal Appeal Nos. 474 and 507 of 1960

Appellant : Maikoo

Respondent : State

Advocate for Def. : S.P. Misra, Adv.

Advocate for Pet/Ap. : S.D. Misra and ;J.S. Trivedi, Advs.

Disposition : Appeals allowed

Judgement :

A.N. Mulla, J.

1. These are two connected Criminal Appeals arising out of the same case. Maiku is the appellant in Criminal Appeal No. 474 of 1960, while Holi and Sheo Bechan are the appellants in Criminal Appeal No. 507 of 1960. All the three appellants

have been convicted under Section 395 I. P. Code and sentenced to ten years' rigorous imprisonment each. Two other accused persons Buddha and Chhedu were also prosecuted in this case, but they were acquitted by the trial court. The appellants are represented by two different counsel.

2. Briefly stated the prosecution story is that a dacoity was committed at the house of Munnu Singh, (P. W. 2), a resident of village Rasulpur, police station Khairabad, district Sitapur, on the night between the 3rd and 4th of August, 1959. This dacoity was committed by about 20 to 25 dacoits, who possessed various kinds of arms including fire-arms. In the course of this dacoity Munnu Singh and several of his relations were injured. Munnu Singh himself received gunshot injuries, though not of a serious character. His servant Ajodhya, his daughter-in-law Shrimati Mohini, his son-in-law Inderpal Singh and his son Vishnu Prakash were the other injured persons, who received injuries of a simple character by a blunt weapon.

It is claimed that at the time of the dacotiy two laaterns were burning one inside and the other outside the house of Munni Singh and there were torches with the witnesses as well as with the dacoits. It is further claimed that as it was the month of August lightning was flashing repeatedly at the time of the incident. It was in this light that the witnesses succeeded in seeing the features of the dacoits.

3. Next morning a report of this incident was lodged by Munnu Singh at police station Khairabad which was four miles away at 9.30 A- M. No names were given and only a meaningless and nauseating description of the dacoits was given in the report which clearly indicates that the report was not the one indicated by Munnu Singh but it was edited by the police scribe who put in the usual formula about the description of the dacoits which is put in in such reports. We do not know how the police traced out this crime. All that we know is that Holi and Sheo Bechan appellants were arrested on the 17th August, 1959 and Maiku was arrested on the 20th of August, 1959.

I may mention that the time of arrest is challenged by the defence and I will deal with this point later on. No stolen property was recovered from any of the arrested persons and identification proceedings were held on the 9th of September, 1959. In this parade all the three appellants were identified by more than two witnesses

and the case against them rests on this evidence of identification alone. The trial court accepted this evidence of identification and convicted the three appellants.

4. The conclusions reached by the trial court are assailable both an the ground of prudence and caution and also on the ground of not following the directions given by the High Court. So far as the second ground is concerned, the conduct of the trial court might be excusable because there is a Bench decision of our High Court which supports the view taken by the trial court. If I had disagreed with the conclusions of the trial court on this ground alone, I would not have preferred my opinion, but would have referred the matter to be placed before the Chief Justice for forming a bigger Bench.

But on the first ground the trial court acted in an extremely credulous manner and it is difficult to escape from the conclusion that the trial court has not yet acquired any judicial maturity. It has shown its immaturity by the way it assessed the evidence in this case. As on this ground alone the conviction of the appellants cannot be upheld it is not necessary for me to delay the disposal of this case by referring the matter to the Chief Justice for forming a bigger Bench, specially when one of the appellants is in Jail.

5-6. In a case of dacoity where the only evidence is of identification, the question, of light is of paramount importance. This should be approached in a careful and judicious manner and not in an unintelligent and wooden manner. (After criticising the approach by the trial court to the identification evidence and the tainted nature ot investigation, his Lordship proceeded.)

7. For the reasons given I am satisfied that no prudent man could have accepted the evidence of identification as the investigation was badly tainted and, therefore, the evidence of identification must be rejected.

8. In view of what I have observed above it is not necessary for me to deal with the legal aspect of the case, but I think I should express my opinion again on the point. The trial court relied on a decision of this Court in Asharfi v. State, 1960 All LJ 595: (AIR 1961 All 153) for coming to the conclusion that the evidence of identification given by those witnesses who are not examined in the committing Magistrate's

court does not suffer from any legal defect and it can be accepted. On the other hand there is a long string of decisions of our own High Court which is against that view. Two of these decisions are given by me sitting singly in Rameshwar v. State (Criminal Appeal No. 386 of 1959, D/- 16-12-1959) and Baijnath v. State (Criminal Appeal No. 254 or 1959, D/- 9-4-1960) and so I will not rely on those decisions for they only represent my opinion, but there are also two other Bench decisions which express the contrary view. Unfortunately these Bench decisions are not reported and so the trial courts do not know what has been observed in those decisions. In this particular case, however, the trial court was shown a copy of one of these Bench decisions, but the trial court preferred the view expressed in the decision in Asharfi's case, 1960 All LJ 595: (AIR 1961 All 153). This was no doubt open to the trial court. The two decisions which have expressed a view that the evidence of an identifying witness who is produced for the first time in the trial court possesses very little evidentiary value are Lalla Singh v. The State (Criminal Appeal No. 291 of 1958, D/- 15-12-1959) and State of U. P. v. Ram Dayal, (Criminal Appeal No. 330 of 1960, D/- 27-10-1960).

It is really surprising that the decisions ire Lalla Singh's case, Cri. Appeal No. 291 of 1958, D/- 15-12-1959 (All) and Asharfi's case, 1960 All LJ 595: (AIR 1961 All 153) were dictated by the same Judge and he made two contradictory approaches to the question. I agree with the view expressed by James, J. in Lalla Singh's case, Cri. Appeal No. 291 of 1958, D/- 15-12-1959 (All) I have already mentioned that sitting singly I have expressed that view again and again. The second Bench decision in Criminal Appeal No. 330 of 1960, D/- 27-10-1960 (All) has been given by my brother Nigam and my brother Misra. I would like to quote a passage from this decision. The learned Judge observed:

'So far as the facts of the particular case are concerned, the prosecution has given no explanation for not examining Bindau and Ram Dayal ice the court of the Committing Magistrate. It is difficult to escape the conclusion that the prosecution did not want to run the risk of these witnesses making mistakes in the court of the committing Magistrate. We also note that the only witness examined in the court of the committing Magistrate, P. W. 1 Ganga Dayal was a damaged witness In fact, his evidence of identification of Ram Dayal was really not worth anything inasmuch

as he had committed one mistake while correctly pointing out Ram Dayal. It is thus clear that the prosecution examined one damaged witness thereby avoiding much of the risk for the prosecution kept back the two other witnesses who had identified both the respondents correctly without committing any mistake. Where such non-examination is due to oblique motives and it appears to us that this may be the normal reason for the prosecution's failure to examine identifying witnesses in the committing court, suspicion must attach to the testimony of these witnesses. We emphasise that the Courts have always held the evidence of identification to be a weak kind of evidence. It is, therefore, necessary for the prosecution to strengthen that weak evidence in every manner they can and not to weaken it further by any conduct of theirs. We are, therefore, of opinion that in the particular circumstances of the case the evidence of P, W. 2 Bindau and P. W. 6 Ram Dayal was rightly rejected.'

9. It would thus be seen that the weight of authorities is not in favour of the view expressed in Asharfi's case, 1960 All LJ 595: (AIR 1961 All 153) but against it. But there is another approach to the question. The Legislature cannot take away the rights of the courts of law as to how they should interpret the words of the statute. So far the definition of the word 'proved' in the Indian Evidence Act has not been changed by the Legislature. The definition of 'proved' is

''a fact is said to be proved when after considering the matters before it the Court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists.'

The definition makes it clear that a prudent approach is to be made and this is entirely the province of law courts to determine what is a prudent approach and what is an imprudent approach. As an instance there is nothing in law that says that when an accused is put up for identification he should be mixed up with so many under-trials in order to make the test acceptable. The High Court, however, stressing the rule of prudence and caution has observed in several decisions that where there are only one or two suspects, at least ten under-trials should be mixed with each suspect. Where this direction given by the High Court is not observed,

the High Court has not accepted the results of identification. In other words, what should be the approach of prudence is not a question of statute but a question on which the High Court formulates its Own approach and its own rules. Therefore where the High Court does not accept the identification made by a witness at the trial court, unless that identification is also supplemented by an earlier identification in the committing Magistrate's court, it is really not a question of interpreting the statute but observing a rule of caution. The terminology of the amended Section 207-A Cri. P. Code is, therefore, quite irrelevant in deciding this question and even if it is permissible under the terminology of that section the results would still be suspect under the rule of prudence and caution.

In Asharfi's case, 1960 All LJ 595: (AIR 1961 All 153), with all respect to the learned Judges, only an attempt was made to interpret the words of Section 207-A, Criminal P. C. and what I have observed above was not considered. In my opinion Section 207-A was introduced only to speed up and simplify the procedure and not to lessen the degree of proof but the prosecuting agency misinterpreted this purpose and is abusing it by suppressing material evidence. Where there is no separation of the judiciary from the executive, it is idle to expect that the Magistrates would insist upon fair play. It is, therefore, for the High Court to give directives of prudence and caution for the prosecuting agency cannot be permitted to interpret the provisions of Section 207-A as an excuse for not presenting the evidence in such a manner that it may create confidence in the mind of a prudent man.

I am, therefore, of the opinion that where the circumstances are such from which a reasonable inference can be drawn that a witness was suppressed because the prosecution did not want to subject him to be tested at that stage, the rule of prudence demands that the evidence of that witness should not be accepted. I am, therefore, in entire agreement with the view expressed by Nigam and Misra, JJ. in Cri. Appeal No. 330 of 1960, D/-27-10-1960 (All). I find that that decision has been approved for reporting. It will clarify the position a great deal.

10. For reasons given above I reject the evidence of identification against all the three appellants and set aside their conviction and sentencesunder Section 395, I.

P. Code. Their appeals areallowed and they are acquitted. Holi and Maikuare on bail. They need not surrender. Their bailbonds are cancelled. Sheo Bechan should bereleased forthwith, unless wanted in connectionwith some other case.

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