

Ghani and anr. Vs. State

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Court : Allahabad

Decided On : Aug-08-1961

Reported in : 1962CriLJ411

Judge : D.P. Uniyal and; Kailash Prasad, JJ.

Appellant : Ghani and anr.

Respondent : State

Judgement :

ORDER

Kailash Prasad, J.

1. These are two connected appeals which arise from the judgment of the Additional Sessions Judge of Muzaffarnagar. Appeal No. 136 of With. has been filed by Ghani and Shafi and appeal No, 168 of 196.1' has been filed by Nizamuddin and Isbaq alias Katta, These tour appellants, along with two others, were put up for Was Under Section 396 I.P.C. The Additional Sessions Judge convicted these four appellants and sentenced them each to imprisonment for life. The other two accused were acquitted by him.

2. According to the prosecution, on the night between 13th and 14th May, 1960 there was a dacoity at the house of Baru in village /Nasirpur, district Muzaffarnaf&r.; Barn and. his cousin Hafeullah were sleeping in from of their

house Baru's wife Smt. Midan and his daughters were sleeping inside the house.

At about midnight Baru woke up on hearing the alarm raised by his wife and children. He found two persons, armed with lathis, standing beside him. He also noticed that the main door of his house was open. He tried to get up, but the two persons, who were standing by his side, threatened that they would kill him if he got up and moved; out of the bed. He, therefore, remained lying on the cot. His cousin Hafizullah managed to escape and run away, raising alarm. Baru then heard his wife saying that she had caught hold of a dacoit. Whereupon another dacoit, who was on the roof of the house, fired at Baru's wife. A dacoit was heard asking for a piece of cloth saying that he was hurt. On hearing the alarm and the report of the gun, many persons of the village came there.

The dacoits who were inside the house, came out and joining the two dacoits standing outside the house, made good their escape. They were seven in number. They ran away towards east and then went towards north. It was a moon-lit night. One of the neighbours, Mutchu, set fire to a heap of pawns at a distance of 10 or 15 paces towards east from the door of Baru's house.

Some of the villagers, who collected there had torches with them. The villagers saw the dacoits when they were running away. The dacoit did not take any property except an 'Orhani' or the daughter of Baru. This 'Orhani' was snatched in dress the wound of the dacoit who was injured.

When the dacoits went away, Baru went inside his house and found his wife Smt. Midan dead. Baru lodged the first information report at the police station Kotwali on 14th May, 1960 at 6-05 A. M. Sri Kana Harish Chand Jung Sub-inspector was present when the first information report was made.

He proceeded to the place of occurrence immediately after the report. There an inquest was held on the dead body of Smt. Midan. The dead body was then sent for the post mortem examination which revealed that Smt. Midan had a number of gunshot injuries as a result of which her skull was broken and the membranes were ruptured. In the opinion of the doctor death was caused by shock and haemorrhage resulting from gunshot injuries.

3. After investigation six persons were put up for trial. All of them denied the charge and pleaded not guilty. Two of them were acquitted and these four accused were convicted by the Additional Sessions Judge as mentioned above.

4. The fact that a number of miscreants entered the house of Baru on the night between 13th and 14th May, 1960 is satisfactorily proved by the testimony of the prosecution witnesses, including Baru and Hafizullah. It has also been proved that one of the miscreants, who was armed with a gun, fired a shot at Smt. Midan. The shot hit her and caused her death. These facts are not seriously disputed by the appellants.

5. The conviction of the appellants rests solely on the evidence of witnesses of identification. We have, therefore, to see if there was enough light and the witnesses were in a position to see the dacoits.

6-16. (After reviewing the evidence his Lordship held that Ghanj and Nizamuddin were entitled to the benefit of doubt) and that there was good evidence of identification against the remaining appellants. Then he proceeded to state as follows): It was pointed out by the learned, counsel for the appellants that none of these witnesses, namely, Mukha, Abdul Mawasi Chhota and Hashmat were examined before the committing Magistrate and so their testimony cannot be accepted. We find ourselves unable to agree with this contention.

By introducing Section 207-A in the Cr.PC the legislature has considerably altered the law relating to the procedure to be adopted in commitment proceedings instituted on a police report. Clause (4) of Section 207-A gives to the prosecution absolute discretion in the matter of production of witnesses of the actual commission of the offence. It further empowers the magistrate to take evidence of any one or more of the other witnesses for the prosecution, if he considers it necessary in the interest of justice. If, in the exercise of its discretion the prosecution did not produce all the witnesses in the committal proceedings, and the magistrate, too, did not consider it necessary to take the evidence of any of the other witnesses for the prosecution, no inference adverse to the prosecution can justifiably be drawn from such non-production of witnesses before the committing magistrate. There is no principle of law by which the prosecution can be penalised for

exercising a right conferred upon it by the statute.

The learned Counsel for the appellants relied upon, State v. Ram Bilas 1961 All LJ 403 : A.I.R. 1961 AH 614, We have carefully perused that decision. It does not lay down as a legal proposition that 'he evidence of identification of a witness, who had not been produced before the committing magistrate, must be discarded. It only discusses the question as to what weight is to be attached to the evidence of the witnesses of identification who have not been examined in the committing court. Whether or not a particular person should be believed because he has not been examined in the committing court, cannot be a question of law. Every case has to be judged in the circumstances and on the facts of its own case. Even as a master of prudent approach, it is impossible to lay down that the evidence of identification of a witness who was not produced before the committing magistrate must invariably be rejected. What prudence demands is only this that such evidence should be scrutinised searchingly as identification is a weak type of evidence.

17. In the present case we have made a strict scrutiny of the evidence. This is why we are not accepting the testimony of Baru and of the witnesses who saw the dacoits from the bath room of the mosque. We do not find that these witnesses were not in a position to see the dacoits. They did see the dacoits, but the amplitude of the Opportunity which they had of seeing the dacoits was not such as to exclude every possibility of their getting an incorrect or feeble impression of the dacoits. We are only relying upon the evidence of the witnesses who were in the enclosure of Baru and who directly saw the dacoits full in their faces for some length of time. When the dacoits took a turn to the north, these witnesses saw the dacoits from a close range in the full blaze of the light of the burning Powal, These witnesses had, therefore, every opportunity of marking, clearly and distinctly, the features¹ of the dacoits.

In our opinion, it will be wrong to discard this evidence simply because these witnesses were not produced before the committing magistrate. Shaft and Ishaq alias Katta were identified by the witnesses who were in Jjaru's enclosure. As the evidence of those witnesses passes the strict test, we have no hesitation in

accepting it. We, therefore, maintain the conviction and sentence of Shafi and Ishaq alias Katta.

18. The result is that the appeals are partly allowed. The conviction and sentences of Ghani and Nizamuddin are set aside. The appeals Shafi and Ishaq alias Katta are dismissed and their conviction and sentences are maintained. Ghani and Nizamuddin shall be released forthwith unless required to be detained in some other connection.

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