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Court : Allahabad

Decided On : Nov-25-1977

Reported in : 1978CriLJ381

Judge : S. Malik and; M.M. Gupta, JJ.

Appellant : Aas Mohammad and ors.

Respondent : State

Judgement :

S. Malik, J.

1. This is an appeal by Aas Mohammad, his brother Ehsan AH and Hasan Khan, the brother-in-law of Ehsan Ali, against the judgment dated 1H-9-1972 of the Civil and Sessions Judge, Rampur, convicting them Under Section 396 of the Indian Penal Code and sentencing each to imprisonment for life.

2. The prosecution has proved by cogent evidence including the statements made by P. W. 1 Mohammad Jan, P. W. 2 Shaqoor and P. W. 3 Maseeta that an armed da-coity was committed by about ten persons during the night between the 26th and 27th of Oct. 1971 at about midnight in village Chakia Mazra in the house of P. W. 1 Mohammad Jan at a distance of about five miles from police station Kemri. During the dacoity Mohammad Nabi, the father of Mohammad Jan and also Mohammad Jan were beaten by the dacoits in order to extract information about

the valuables and Mohammad Nabi was shot dead. First Information Report of the incident was lodged by Mohammad Jan at police station Kemri on the 27th morning at 4.10 A. M. After the report was lodged, Mohammad Jan was sent by the police to Kemri Hospital where he was medically examined by Dr. G. D, Agnihotri whose statement is Ex. Ka 26 on the record. The doctor found blunt weapon injuries on the person of the victim which, according to the doctor, could have been caused at about midnight during the night of the incident. Autopsy on the body of the deceased was done by Dr. H. A. Khan on the 27th of Oct. 1971 at 5.00 P. M. He found one ante-mortem gunshot punctured wound 4 cm. x 4 cm. x cavity deep on the left side of the chest 5 cm. below the nipple. The post-mortem examination report is Ex. Ka 3 on the record, while the statement of Dr. M. A. Khan is Ex. Ka 27.

3. According to the prosecution; during the night of the dacoity a kerosene lamp was kept lighted in the western room of the house of the victim where P. W. 1 Mohammad Jan had slept with other members of the family. Some of the dacoits had entered that room and had dug out and removed the valuables besides looting the same from other places. The father of the informant had slept in the courtyard near which there was a lighted lantern. During the dacoity fire was set by the villagers who were attracted to the scene of the incident by the alarm raised by the inmates, to two heaps of straw and dry millet plants on either side of the entrance to the informant's house. Due to the light from these sources outside the house, some of the neighbours who had assembled towards east of the house in the lane, were able to see the faces of the dacoits when they ran out of the house and were also going in and coming out of the same. Mohammad Jan also saw the faces of the dacoits who had entered the room in which Mohammad Jan was beaten. The dacoits were all strangers.

4. During investigations Aas Mohammad was arrested by P. W. 7 Sub Inspector Gajendra Singh on 30-11-1971 and the prosecution has adduced evidence to prove that his face was covered as soon as he was arrested and it was kept covered till he was got admitted to jail on the next day. The prosecution has also adduced evidence to prove that as Mohammad was arrested with the gun (Ex. 1) which was packed and sealed after its recovery and the Ballistic Expert P. W. 12

Shariq Ali found that the empty cartridge shell recovered from the scene of the incident had been fired from the recovered gun (Ex. 1). The other two appellants along with one Sa-dao, father of appellant Hasan Khan were arrested on the 22nd of Nov., 1971 by P. W. 15 Jagbir Singh who investigated the case. The prosecution has also adduced evidence to prove that the faces of these appellants were kept covered and that they were sent to jail on that very date. It may be mentioned that Sadaq has been acquitted by the lower court. All the three appellants were put up for identification in jail and identification proceedings were conducted by P. W. 4 Shri K. K. Pant, a Magistrate 1st Class, on the 7th of Jan., 1972. Aas Mohammad was correctly identified in jail and in the court below by the three eye-witnesses, P. W. Mohammad Jan. P. W. 2 Shaqoor and P. W. 3 Maseeta. Ehsan Ali was also correctly identified by the same prosecution witnesses, while Hasan Khan was correctly identified by Shaqoor and Maseeta only.

5. All the appellants pleaded not guilty and alleged that they were shown to the witnesses by the police after their arrest. Aas Mohammad denied the recovery of the gun from his possession. In their defence the appellants examined three witnesses in the lower court.

6. As regards Ehsan AH and Hasan Khan, it was rightly contended by their learned counsel that no reliance can be placed on the evidence of identification because it is apparent that the Investigating Officer who arrested them, did not act honestly while investigating this case and tried to concoct evidence by trying to show some of the accused who had surrendered while they were in judicial lock up in the court compound. As has been observed by the learned Sessions Judge, the defence adduced evidence to prove that the brothers of appellants Aas Mohammad, and Ehsan Ali, namely, Nura, Sheru and Sher Ali surrendered before the Magistrate concerned at Rampur on 22nd Nov., 1971. According to them, they surrendered because they apprehended that the police would arrest them also like their brothers. After they surrendered, they were taken to the lock up in the court compound. There is evidence to show that the Investigating Officer, Jag-bir Singh (PW 5) along with another sub-inspector tried to show the faces of the said accused who had surrendered while they were in the judicial custody. When this

fact came to the notice of their lawyer and his clerk D. W. 2 Mohammad Sharif, the Bar Association took a serious view of the matter and tried to move the District Judge for taking contempt proceedings against Jagbir Singh. The matter appears to have been hushed up, but the fact remains that Jagbir Singh acted dishonestly and did not hesitate to create evidence by showing the faces of the said accused. It appears that the persons who had surrendered were also put up for identification in this case.

7. It is significant to note that on that very date i. e. 22nd Nov., 1971 Ehsan Ali and Hasan Khan were arrested by the same witness P. W. 15 Jagbir Singh in the early hours during the night and during the day these appellants were also at Rampur where their warrants were obtained in order to lodge them in jail. Under the circumstances, it is quite probable and cannot be ruled out that the accused who had surrendered, were being shown to the witnesses of this very case and if such tactics could be adopted by the Investigating Officer against the accused who had surrendered, there is no guarantee that he had not adopted the same methods for creating evidence against Ehsan Ali and Hasan Khan also who were at the mercy of his subordinates, the constables who escorted them. Once it is proved, as in this case, that the investigating agency acted in such a dishonest manner in respect of some of the accused on a particular date at Rampur. it is difficult to believe that he did not try to adopt the same method against the other accused who happened to be present at Rampur on the said date. From the very beginning when Ehsan Ali and> Hasan Khan were put up for identification, they took the plea that they were shown by the police to the witnesses

8. The learned Sessions ;Judge was wrong in brushing aside all these circumstances by observing that the defence witnesses did not prove that the persons to whom Jagbir Singh tried to show the surrendered accused, were witnesses of this case According to the prosecution itself, the witnesses were strangers to the accused and in the commotion the clerk and the other defence witness, namely, Noora were unable to notice who those witnesses were.

9. As regards Aas Mohammad. the prosecution has proved its case beyond reasonable doubt by cosent evidence. Aas Mohammad was not arrested by P. W.

15 Jagbir Singh, but was arrested by P. W. 7 Gajendra Singh on the 30th Nov.. 1971. The prosecution has proved by cogent evidence that his face was covered after his arrest and no one was allowed to see his face till Aas Mohammad was got admitted to jail without any unusual delay on the very next day. The Magistrate P. W. 4 Shri K. K. Pant proved that necessary precautions were taken and Aas Mohammad was correctly identified in jail by Mohammad Jan (PW 1). Shaoor (PW 2) and Maseeta (PW 3). Nothing could be brought to our notice due to which these witnesses could be disbelieved as regards Aas Mohammad P. W. 7 Gaiendra Singh has also proved that the gun (Ex. 1) was recovered from his possession at the time of his arrest. We see no reason why this witness should have tried to prove that the recovery was made from Aas Mohammad if the gun had been recovered from some other person. What clinches the issue is the statement made by the Ballistics Expert P W. 12 Shariq Ali who has proved that the emntv cartridge shell recovered from the place of the dacoity was fired from this very gun.

10. The learned counsel for Aas Mohammad pointed out that though, according to the Investigating Officer, only eight sealed bundles containing recovered articles of this case were deposited at the police station, ten bundles were sent to the Sadar Malkhana. This fact does not in any way help the defence. There is nothing to show that the eight bundles were not sent to the Sadar Malkhana. Some mistakes may have been committed regarding the two extra bundles which may have been of some other case. The matter would have been different if lesser number of bundles had been sent to the Sadar Malkhana than the number deposited at the police station.

11. The prosecution witnesses have proved that there was light from the kerosene lamp and the lantern inside the room and in the courtyard inside the house, while there was ample light outside due to the burning heaps of straw. Mohammad Jan stated that one of the dacoits who was carrying a gun, had entered the house, shot dead his father and also fired at Mohammad Jan, but Mohammad Jan saved himself by taking shelter behind the door. Mohammad Jan, moreover was beaten. He therefore, had an opportunity of seeing the dacoits including the dacoit who had a gun, from close quarters. He stated in the lower court that Aas Mohammad

was the dacoit who was using the gun during the dacoity. The other witnesses, namely, Shaqoor and Maseeta who were outside the house where the dacoity was being committed, also had ample opportunity of seeing the faces of the na-coits. Shaqoor stated in his cross-examination that Aas Mohammad was the dacoit who was carrying a gun.

12. Under the circumstances, after considering the entire evidence on the record and in view of the reasons discussed, we give the benefit of the doubt to Ehsan Ali and Hasan Khan, set aside the order passed by the lower court convicting and sentencing them Under Section 396 of the IPC and acquit them. They are on bail. They need not surrender and their bail bonds are hereby discharged. We, however, find that the prosecution has proved its case against Aas Mohammad beyond reasonable doubt as already observed and confirm the order of conviction and the sentence passed by the lower court against him. He is in jail. He shall serve out the sentence as recorded by the lower court The appeal is decided accordingly.

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