

ishwari Vs. State

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Court : Allahabad

Decided On : Oct-29-1979

Reported in : 1980CriLJ571

Judge : H.N. Kapoor, J.

Appellant : ishware

Respondent : State

Judgement :

H.N. Kapoor, J.

1. This appeal has been filed by Ishwari against the order and judgment dated 7-1-1975 of III Addl. Sessions Judge, Etah in Sessions Trial No. A-318 of 1974 convicting him under Section 412, I. P. C. and sentencing him to four years' R. I. He was also prosecuted under Section 395, Indian Penal Code but was acquitted under that section. Zalim Singh, Sheopali, Rupram, Khamani and Kashi Ram were also tried under Section 395, Indian Penal Code along with him in this very trial court but all of them were acquitted of the charges under Section 395, I.P.C. According to the prosecution case a dacoity was committed at the house of Latoori (P. W. 1) on the night between 27th and 28th of May, 1973 at about 12 in the night in village Kar-sari Hiyat Garhi, police station Kasganj, district Etah, Six named persons along with six other persons were said to have committed dacoity at his house. They had looted the ornaments valuing about Rs. 3,850/- Some of the

ornaments were on the persons of Belwati (P. W. 2) daughter-in-law of Umrao Singh had (sic) Latoori Singh. Faces of the dacoits were said to have been seen in the light of the lantern, torches and of burning Koorra. Many of the dacoits were said to be covering their faces with dhataas but their faces got uncovered. The dacoits were armed with fire-arms and threatened to kill if anybody cried. After the dacoity was committed Latoori Singh dictated a report to Nathu Ram (P. W. 14). Latoori Singh then took that written report to the police station and lodged it on the next day i.e. 28-5-1973 at 10 A. M. A case was registered under Sections 395/393, I. P. C. against Zalim Singh, Sheopali, Rupram, Khamani, Kashiram and six other unknown persons.

2. S. I. Deviprasad Sharma (P. W. 13) took up the investigation of the case. He went to the site, inspected the site and prepared the site plan marked Ex. Ka 10 and interrogated P. W. Latoori, Belwati and others. He found five empty cartridges, belts and Tikli lying at the place of occurrence. He took them in his possession. He also took in his possession the sample of the ash. He saw the lantern and found it in working order. He then made a search for the accused persons but they were not available,

3. On 30-5-1973 Iswari appellant was arrested by S. I. J. P. Gautam (P. W. 10) at the culvert of the canal near Bilram. The accused on seeing the appellant (sic) tried to avoid him and ran away. The police Inspector, therefore, felt suspicious and arrested him after giving him a chase and arrested him with the help of passers-by including Alladin (P. W. 11) Lal Ram and others. The accused gave his name as Ishwari. He took search of his person and from his faint a pair of, silver Barahs (material Ext. 1) was recovered from his possession, A recovery memo was prepared at the spot and the signatures of the witnesses Alladin and Lal Ram were obtained on that recovery memo. Recovered articles were sealed in a bundle. The accused, under arrest along with the recovered articles was taken to the police station. He was locked in the hawalat and the article was deposited in the Malkhana and an entry was made in the general diary about the same. Iswari was said to have been sent baparda to the district Jail and the sealed bundle containing the recovered article was subsequently sent to Sadar Malkhana. Ishwari and one Megh Singh were put up for test identification before the

Magistrate, S. K. Gupta (P. W. 12) on 15-12-1973. The recovered property was, however, put up for test identification before the same Magistrate on 7-11-1973. It was correctly identified by Smt. Belwati (P. W. 2). Natthu Ram husband of Smt. Belwati had also gone to identify the article but he could not identify it. The identification memo is Ex. Ka 9.

4. After completing the investigation the Investigating Officer submitted the charge-sheet against Ishwari and five other persons who have been named under Section 395, I. P. C. Ishwari was also prosecuted for the offence under Section 412, I. P. C. The named accused persons denied the prosecution allegation and stated that they were falsely implicated on account of enmity. Ishwari also denied the prosecution allegations and stated that he was falsely implicated in this case on account of enmity. He denied that he was arrested at the place as stated by the prosecution or that any article was recovered from his possession, He stated that he was arrested from his house and taken to the police station, He did not claim that article as belonging to him,

5. The learned Sessions Judge after considering the entire evidence on record came to the conclusion that the possibility was not ruled out that the named accused were falsely implicated on account of enmity. Therefore, he acquitted them under Section 395 I. P. C. He also arrived at the conclusion that Ishwari was entitled to be acquitted under Section 395, I. P. C. as Smt. Belwati had stated in her cross-examination that a circle officer of police had brought Ishwari accused under arrest in the village and she had then seen him. He, however, found the evidence of recovery sufficient against him and convicted and sentenced him under Section 412, Indian Penal Code. Feeling aggrieved he has filed this appeal.

6. The evidence of arrest and recovery consists of J. P. Gautam (P. W. 10) and Alladin .(P. W. 11). On the point of identification there is a solitary evidence of Smt. Belwati (P. W. 2). The identification was conducted by Sri S. K. Gupta, Magistrate (P. W. 12), It may be stated that there was a mention of this article in the F. I. R. which was lodged without delay. This article was described as Bara Silver one pair 250 Grams valuing Rs. 140/-. It is also shown as belonging to Smt. Belwati wife of Natthu Ram. In the recovery memo Ex. Ka. 13 the recovered article is shown as

'Ek. Jori bara kare chandi istemali purane ghise huye jo kojni se upar pahanne ke hain wajni 10-11 tola'. At this stage it may be stated that the original recovery memo had been lost but the secondary evidence was allowed to be given. The original had been copied out by the Investigating Officer in the case diary. That copy has been proved and marked Ex. Ka. 13. It shows that the witnesses of recovery were Alladin and Lala Ram. The evidence of S. I. J. P. Gautam (P. W. 10) -has been fully corroborated by Alladin (P. W. 10) Alladin, no doubt stated that he had appeared as a prosecution witness in one or two other cases. He, however, stated that he had never appeared as a witness in any case prosecuted by J. P. Gautam. His evidence need not be discarded simply because he had appeared as a witness for the prosecution in one or two other cases. There is nothing to show that he was disbelieved in those cases or held to be liar. Smt. Belwati (P. W. 2) was examined a day earlier. She has, no doubt, stated that Deputy Sahab of police had come in a jeep with Ishwari to the village and then she had seen him. The State was permitted to cross-examine her, She then stated that her earlier statement was correct that she had seen the accused at the time of dacoity and then at the time of identification. It is, however, surprising that S. I. Gautam was not even cross-examined on this point. Only a general question was put to him that nothing was recovered from the possession of the accused and he was falsely implicated in this case in collusion with the witnesses. He denied this suggestion. There can thus be no doubt that the accused was taken to the police station directly after his arrest with the recovered article. Even if the statement of Smt. Belwati is believed that Ishwari was brought by Dy, S. P. in a jeep it would refer to some subsequent stage. There could certainly be no possibility of planting this article on the accused as it had already been shown, as having been looted in the F. I. R. There can thus be no doubt that the article Ex, 1 which was shown to have been re-covered from the possession of Ishwari was actually recovered from his possession,

7. I may next consider the evidence of identification. It is true that it was identified by Smt. Belwati alone and could not be identified by Nathu Ram (her husband). It belonged to Smt. Belwati, she was, therefore, right person to identify it. The evidence of identification is challenged on account of the fact that she had stated that two other Baras were also kept at the time of test identification but they had

been made differently (Farq banawat ke the) and so she identified it. She also described her Baras as being narrower at both the ends and that at both the ends they were of eye-shape formation. Much emphasis was laid on this statement of Smt. Belwati and it was argued that this shows that the articles mixed up were not similar. The learned Magistrate has stated that four pairs of Barahas which were similar to Ex. 1 has been mixed up at the time of test identification. His statement is also corroborated by identification memo Ex. Ka. 9. The article Ex. 1 has been described as old, used, slightly dented, roughed up (pichka huwa ghisa huwa), ordinary without nakkasi design and the ends slightly dark having designs. In the column of precaution taken, it was stated that the old used Baras were mixed up and at the ends chits were pasted on all the Baras. The identification memo clearly shows that all such marks which were prominent and which could have affected the identification have been concealed. It is a different matter that an owner or the person who used the article could still identify the article by noticing some minute details, which could not ordinarily be noticed by a stranger. The requirement of law is that similar articles are to be mixed for identification. It is not required that the identical articles should be mixed. Similarly for identification of a person similar persons are mixed. Two persons are never identical. No. doubt in the case of property it is possible to have identical articles as some articles are prepared by using the machine. But in that case it will not be possible even for the real owner to identify his lost article. The requirement of law is satisfied if similar articles are mixed which would only mean that if there are some prominent marks of dissimilarity they can be concealed, they are required to be similar in the same sense as similar persons are to be mixed up with the accused persons in the test identification. A contractor is expected to bring the articles for mixing up on the basis of description given in the recovery memo. The articles need not be shown to the contractor for bringing similar articles. The main object is that there should not be such prominent marks on the articles about which an identifying witness could be informed and such witness might be able to identify that article even if it did not belong to him or her. The main evidence is of that witness. The court has only to be satisfied with the aid of evidence of identification that the article really belonged to that witness and he or she could be able to identify simply because it belonged to her, without any outside aid. After considering the entire evidence on

record and the circumstances of the case I am satisfied that the prosecution has succeeded in proving its case against the appellant Ishwari under Section 412, I. P. C. and he was rightly convicted. The sentence too cannot be considered to be excessive. The recovery was made within three days after the commission of the dacoity. The accused belonged to a neighbouring village and so there is a presumption that he must be knowing about the commission of dacoity and also knowing that the article which was in his possession had been looted in a dacoity.

8. In the result the appeal is dismissed. The conviction and sentence of the appellant are maintained. The appellant Ishwari is on bail. He shall surrender to his bail bonds and be taken into custody forthwith to serve out the sentence awarded to him.

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