

Sheonath Bhar and ors. Vs. the State

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Court : Allahabad

Decided On : May-08-1990

Reported in : 1990CriLJ2423

Judge : S.R. Bhargava, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 395, 411 and 412; Arms Act - Sections 25 and 25(1)

Appeal No. : Criminal Appeal No. 1309 of 1986

Appellant : Sheonath Bhar and ors.

Respondent : The State

Advocate for Def. : A.G.A. and ;Rameshwar Nath, Adv.

Advocate for Pet/Ap. : P.N. Misra and ;K.K. Tripathi, Advs.

Judgement :

S.R. Bhargava, J.

1. This appeal is directed against judgment and order dated 8th April, 1985 passed by Sri Ghanshyam Das, Ist Addl. Sessions Judge, Ghazipur, convicting appellants Shoenath Bhar, Sheo Shankar, Kailash Bhar, Patiram and Satya Deo with offence of dacoity Under Section 395, IPC and sentencing each of them to rigorous

imprisonment for ten years and further convicting appellant Kuber Bhar with offence of dishonestly retaining stolen property, possession of which was transferred by dacoit, under Section 412, IPC and sentencing him to rigorous imprisonment for five years.

2. In appeal it is not challenged that on the night between 19th and 20th August, 1976 at about 11.30 p.m. armed dacoity was committed in the house of Krishna Deo Narain, PW 1 in village Jogapur, Police Circle Mohammdabad, distt. Ghazipur. It is further not challenged that some of the dacoits were armed with guns. They threatened the inmates of the house with their weapons. A woman inmate of the house was assaulted with Lathi, Guns were fired by the dacoits for terrorising the villagers. The inmates of the house and the villagers were put to fear. Then according to the prosecution story dacoity was committed by unknown persons for about 3/4th of an hour. It is further not challenged that during dacoity the unknown dacoits were seen and recognized in electric light and light of torches. Following morning at 9.12 a.m. Krishna Deo Narain, P.W. 1 produced written report Ext. Ka 7 at police station situated at a distance of about six miles from the spot of occurrence. Chik report was prepared in terms of written report and the case was registered in the general diary. According to the FIR the property looted in the dacoity was described at the foot of the written report and it included wrist watch Henry Sandos 17 Jewels, behind which number was 196, 1788. It had black dial and frame of stainless steel. It further had white steel chain instead of strap.

3. The then station officer Sri Deena Nath Dubey, P.W. 14 of Police Station Mohammadabad took over the investigation of the case soon after investigation. He made recoveries at the scene of crime and after inspecting the scene of crime, prepared site plan which is not material for the case. During investigation he came to know of complicity of appellants Sheonath, Sheo Shankar and others in the dacoity. On 22nd August 1976 he came to know presence of three suspected dacoits in village Silaich who were to proceed to Kherawari. Hence he proceeded with his force. Near Railway crossing he effected arrest of appellants Sheo Nath, Sheo Shankar and Kailash. From Sheo Nath he recovered unlicensed Pistol and three cartridges. From Sheo Shankar he recovered three unlicensed cartridges

and from Kailash he recovered two unlicensed cartridges. He prepared recovery memo and made all the three of them Baparda. On the same day he arrested appellant Satya Deo and made him Baparda. All the aforementioned four suspects were escorted to police station Barda and were kept Baparda at the police station. On 22nd August, 1976 itself he came to know that looted property could be recovered from the house of appellant Sheo Shanker. Hence the investigating Officer raided his house. He found Smt. Surji Devi mother of appellant Sheo Shankar present in the house. He searched the house and found looted property in the house. On 25th August, 1976 he effected arrest of suspect Mahendra and after making him Baparda, brought him to police station. On 11th October, 1976 he arrested appellant Kuber at the crossing of Tiwaripur and recovered wrist watch looted in the dacoity as described above. He prepared recovery memo Ext. Ka 4. He further prepared site plan of the spot of recovery. Recovery memo was inter alia signed by witnesses. On 13th October, 1976 the investigating officer arrested appellant Pati Ram from near a petrol pump. A Dhoti having a torn corner was found in his custody. Recovery memo was prepared and even this appellant was made baparda and was taken to police station Baparda.

4. On 31st August, 1976 appellant Sheonath, Sheo Shankar, Kailash, Satya Deo and suspect Mahendra were put up for test identification before the Executive Magistrate. Twelve witnesses including Krishna Deo Narayan, P. W. 1 and Arun Kumar, PW 2 went to identify the suspects. Identification memo ext Ka 26 shows that out of 12 witnesses, ten (including Krishna Deo Narayan and Arun Kumar) correctly identified the five suspects. The other two witnesses had also good performance. Witness Dashrath Pandey correctly identified four suspects without committing any mistake. Witness Amirullah correctly identified four suspects and committed only one mistake. Appellant Pati Ram was put up for test identification before the Executive Magistrate on 25th October, 1976. Identification memo Ka-27 shows that 11 witnesses including Krishna Deo Narayan and Arun Kumar went to identify him and out of them, four could correctly identify Pati Ram without committing any mistake. Since test identification proceeding of Pati Ram was subsequent, the performance of the witnesses in two identifications has to be clubbed. It becomes obvious that performance of witnesses Krishna Deo Narayan and Arun Kumar was as good as six out of six.

5. Then it appears that identification proceeding of the recovered property was also held. Ultimately charge sheets for offences of dacoity, possessing unlicensed arms and ammunitions and dishonestly retaining stolen property punishable under Section 395 IPC. Section 25(1)(a) of Arms Act and Section 412, IPC. were submitted.

Appellants, Smt. Surji Devi and Mahendra Rai were charged with different offences. They pleaded not guilty and claimed trial.

For bringing home the guilt against all of them, prosecution examined 14 witnesses and relied upon large number of documents and material Exts. Appellants, Smt. Surji Devi and Mahendra Rai reiterated their denial.

6. Learned Addl. Sessions Judge did not believe complicity of Mahendra Rai in the dacoity. He did not believe recovery, except from appellant Kuber. He found sanction for prosecution under Arms Act defective. He, therefore, convicted and sentenced the appellants as stated earlier. He acquitted Sheonath with offence under Section 25, Arms Act. He further acquitted Mahendra Rai and Smt. Surji Devi.

7. Being aggrieved, appellants filed the present appeal challenging their conviction and sentences. State did not file any appeal against acquittal of Sheonath for offence under Section 25, Arms Act and acquittal of Mahendra Rai and Smt. Surji Devi.

8. I have heard learned counsel for the parties at length and perused the record. It is evident that the learned Addl. Sessions Judge did not believe the recovery of looted property from some of the appellants. He based conviction of appellants Sheonath, Sheo Shankar, Kailash, Patiram and Satya Deo on identification evidence only. It was argued on behalf of the appellants that identification evidence was too good to be believed and no conviction could be based on the same. I am in agreement with this contention. It is obvious from prosecution story itself that some of the dacoits were armed with guns. One of the inmates of, the house where the dacoity was committed was assaulted. Inmates were terrorised and were frightened. Dacoits fired guns for scaring the villagers and there was a

reign of terror during dacoity. Still in the former identification 10 out of 12 witnesses had totally correct performance and even the performance of other two witnesses was good. Then it is evident that Krishna Deo Rai, PW 1 and Arun Kumar, PW 2 correctly identified Patiram in subsequent identification. Their performance was thus six out of six. Such a brilliant identification by witnesses who were bound to be under fear or terror, must be called too good to be believed and suspicious. In the case of Chunnu v. State 1954 Cri. L.J 1762 : (AIR 1954 All 795), similar identification performance in similar state of mind of the witnesses was found to be suspicious and was not found fit for being basis of conviction. This view has been accepted as settled view and has been followed even in recent rulings which for sake of avoiding voluminousness need not be cited. I hold that the learned Addl. Sessions Judge ought to have been careful in scrutinising the performance of the witnesses in the two identifications and then only he could have properly appreciated the identification evidence. Appreciation of identification evidence by the learned Addl. Sessions Judge was improper. Conviction of appellants Sheonath, Sheo Shankar, Kailash Bhar, Pati Ram and Satya Deo for offence of dacoity under Section 395, IPC and their consequent sentences must be set aside.

9. It is still more unfortunate that the learned Addl. Sessions Judge did not pay attention to the fact that prosecution did not adduce entire link evidence with regard to safe custody of the appellants soon after arrest till their entry in jail. Prosecution could examine only the investigating officer as the arresting officer and he alone provided the link evidence. It is evident that the explanation offered by the prosecution was that the relevant general diaries were weeded out due to lapse of time and so complete link evidence could not be adduced. When the case was pending the relevant general diaries could have been preserved under special order of the Superintendent of Police. At any rate, the explanation offered by the prosecution cannot discharge the burden of the prosecution to adduce formal and link evidence about the safe custody and Baparda custody of the accused. This was additional reason why the identification should not have been made basis of conviction.

10. Then it may be noted that only two eye witnesses were examined in the court they were Krishna Deo, PW 1 and Arun Kumar, PW 2. In his cross examination Arun Kumar, PW 2 admitted that all the six dacoits identified by him were wearing Dhatas during dacoity. Still he added that he could recognize them because their eyes, nose and mouth were visible. It is evident from his admission that the entire faces of the dacoits whom he could recognize during dacoity were not exposed. It is not said that the appellants convicted on the basis of identification had special features in their eyes, nose or mouth. It has to be, therefore, said that the two eye witnesses examined in the case could not have reasonable opportunity to see and recognize the unknown dacoits. This could be the third reason for not basing conviction on identification evidence.

11. Then the case of appellant Kuber has to be scrutinised. He denied recovery of wrist watch. Investigating Officer Deena Nath Dubey, PW 14, proved recovery of wrist watch from Kuber on 13th October, 1976. Then he further proved recovery memo Ext Ka 4 and site plan of spot of recovery Ext. Ka 17. Nothing material could be found in his cross examination. Recovery witnesses Govind PW 7 and Ram Bricha PW 8 did not want to support recovery. Hence they turned hostile in their examination-in-Chief itself. On the prayer of the prosecution they were declared hostile and were cross examined by the prosecution. In their cross-examination they said that Daroga had caught hold of the accused before these witnesses reached the spot. They denied that any recovery was made in their presence. But they said that Daroga prepared memo and read out the same and then they signed the memo. It is evident that they are suborn witnesses. Still they proved the recovery memo Ext. Ka 4. It is not necessary that the testimony of suborn witnesses should be thrown out in toto. It is open to the court to consider their evidence and to rely upon parts of their testimony which appears trustworthy. Having perused the testimony of recovery officer I am of the opinion that parts of the testimony of PW 7 and PW 8 relating to the recovery memo are correct. Thus the testimony of recovery officer regarding recovery of the watch from appellant Kuber stands duly corroborated by the recovery memo. I hold that recovery of writ watch from appellant Kuber is quite reliable.

12. Even though the question arises what offence did Kuber commit. Description of the wrist watch given in the FIR and the recovery memo tallies. Hence it can be said that the wrist watch was looted in the dacoity under consideration. It was certainly a stolen property. Appellant Kuber denied his possession of stolen wrist watch. It is thus obvious that he was dishonestly retaining stolen property. If the case against him stops here, he can be guilty of offence under Section 411 IPC only. For offence under Section 412 IPC prosecution is bound not only to prove that the accused was dishonestly retaining stolen property but should also prove that the accused knew or had reason to believe that possession of the stolen property had been transferred by the commission of dacoity or that the accused dishonestly received the stolen property from a person whom he knew or had reason to believe to belong or could have belonged to a gang of dacoits. In the instant case recovery was made after one month and 21 days of the dacoity. There is no evidence to prove that the appellant Kuber knew or had reason to believe that the possession of the wrist watch had been transferred by the commission of dacoity or that he dishonestly received the watch from a person whom he knew or had reason to believe to belong or could have belonged to a gang of dacoits. Having considered the entire evidence on record, I am of the opinion that the prosecution could not prove the necessary ingredients of offence under Section 412, IPC. against appellant Kuber Bhar. All that the prosecution succeeded in proving was the offence under Section 411, IPC. against appellant Kuber Bhar. Hence even the conviction of appellant Kuber Bhar has to be altered under Section 411, IPC.

13. Coming to the question of sentence to be awarded to the appellant Kuber Bhar under Section 411, IPC. it should not be forgotten that about 14 years have elapsed since the commission of offence by appellant Kuber Bhar. Now sending him to jail for short term is not likely to serve any useful purpose. He had already remained in Jail for about a month. Value of watch noted by the recovery officer was Rs. 250/- I am of the opinion that the sentence already undergone by appellant Kuber Bhar and fine of Rs. 125/- for offence under Section 411, IPC. shall serve the ends of justice.

14. In result this appeal in respect of appellants Sheo Nath, Sheo Shanker, Kailash Bhar, Pati Ram and Satya Deo is allowed. Their conviction and sentences under Section 395 IPC are set aside. They are on bail. Their bail bonds are cancelled and sureties are discharged. They need not surrender. In respect of Appellant Kuber Bhar this appeal is partly allowed, his conviction under Section 412 IPC. is set aside and he is convicted under Section 411, IPC. His sentence under Section 412, IPC. is also set aside. For offence under Section 411, IPC. he is sentenced to the period already undergone and fine of Rs. 125/-which he shall deposit within two months. He is also on bail. His bail bonds are cancelled and sureties are discharged. He need not surrender.

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