

Govind and ors. Vs. State of U.P.

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Court : Allahabad

Decided On : Apr-19-1995

Reported in : 1996CriLJ445

Judge : Giridhar Malaviya and ;S.N. Saxena, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 396; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Criminal Appeal No. 2602 of 1979

Appellant : Govind and ors.

Respondent : State of U.P.

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : Janardan Sahai and ;Srijesh Sahai, Adv.

Disposition : Appeal allowed

Judgement :

S.N. Saxena, J.

1. This criminal appeal is directed against the judgment and order dated 30-8-1979 passed by Shri S. K. Srivastava, learned IX Additional District & Sessions Judge, Bareilly, in Sessions Trial Nos. 560 of 1977, 370 of 1977 and 123 of 1978,

convicting the appellants under Section 396 IPC and sentencing each Of them to undergo life imprisonment. Appellant No. 2, Feizoo died about 8 years ago and the appeal so far as he was concerned stood abated.

2. The incident of dacoity with murders that had given rise to the aforesaid Sessions Trials had taken place on 22-4-1977 at about 6.30 P.M. in village Mahoba under Police Station Aligarh district Bareilly in the house of Kailash Chand Pathak, During the commission of the dacoity, the dacoits had murdered Munna Lal, Smt. Lilawati, Girish Singh and Shanker Lal. All the dacoits were unknown to the complainant and the other eye-witnesses and they were tried on the basis of the evidence of identification against them during the test identification proceedings held in the jail after their arrests. They were arrested at different times and, therefore, put for test identification in different parades held on different dates. A number of other co-accused persons also were tried for the same offence along with the appellants, but they were acquitted.

3. The facts of the case were as follows :-

Complainant Kailash Chand Pathak on 23-4-1977 lodged FIR Ext-Ka-1 with the Police at Police Station Aliganj, about the dacoity that had taken place at his house in Village Mahoba at about 6.30 P.M. on 22-4-1977. 14-15 dacoits armed with guns, Kanta and Lathis entered the house at the aforesaid date and time through the main door. He along with his father, uncle, aunt and other family members was inside the house. Four of the dacoits stood on guard duty while the remaining dacoits ransacked the house and tortured the inmates thereof to find out the details of property. Complainant Kailash Chand Pathak along with his father, uncle, aunt and servant went to the roof of the house and raised hue and cry and also threw brick - bats at the dacoits. The deceits got infuriated and started firing blindly from inside the house and also from the main door. They were constantly going in and coming out of the house during the course of the dacoity. The story further goes on that the gun firing and hue and cry of the complainant and other family members attracted a number of persons towards the house of the complainant. The indiscriminate firing by the dacoits resulted in the murders of complainants father Shanker Pathak, his uncle Munna Lal, aunt Smt. Leelwati and

servant Girish Singh, who died upon the roof itself. The villagers also returned fire and mounted pressure upon the dacoits who therefore, made good their escape along with the booty, including two licensed double barrel guns belonging to the complainant and his uncle and a large quantity of cartridges. The day light was there in which the villagers and the family members of the complainant had been able to see and mark the features of the faces of the dacoits.

4. The case was registered at the Police Station and investigation followed as usual. The dead bodies were sent for postmortem examination. Two constables were also sent along with the dead bodies with necessary papers. The Police arrested the suspects and after getting held the test identification submitted charges sheets on different dates against them in the court concerned. The trial resulted in the said conviction and sentence as mentioned above and feeling aggrieved, the appellants have preferred this appeal.

5. The defence of appellants Govind and Bhaiyya consisted of the denial of their guilt. Accused Govind in his statement under Section 313 Cr. P.C. stated that he was kept by the Police in the lock-up for three days and shown to the prosecution witnesses. Further, he stated that the prosecution witnesses know him from before this incident. He also stated that he was a wrestler and used to participate in wrestling in Kanny fair. Accused Bhaiyya in his statement under Section 313, Cr. P.C. stated that he was not made Bapardah by the Police and that he was arrested from his house and kept in Kotwali for one night where he was shown to the prosecution witnesses. He also stated that he was not kept Bapardah when he was taken to jail by the Police after his arrest.

6. A large number of persons, besides those dead, had received injuries during the commission of the dacoity and were examined by Doctor - vide injury reports of Kailash Chand Pathak, Dina Nath, Ram Pal, Ram Niwas Summed, Janki Prasad, Narendra and Ram Kumar Sharma Exts. Ka-7 to Ka-14 respectively. Exhibits Ka-40 to Ka-43 are the postmortem examination report on the dead bodies of Munna Lal, Girish Singh, Smt. Nilawati and Shanker Pathak respectively.

7. The prosecution, in order to establish the guilt of the accused persons, had examined 17 witnesses out of whom PW-1 Kailash Chand Pathak and PW-2 Ram

Pal Singh were the only two witnesses relied upon by it to prove the guilt of the appellants, as they only had correctly identified them in the jail as well as in the court room during their statements in the trial. The learned Sessions Judge, instead of mentioning the names of the accused persons, who were identified by the witnesses before him in the court room, preferred to mention the names of the accused persons whom they had not been able to identify and thereafter, recorded that all the remaining accused persons were identified by them during their statements as members of the gang of the dacoits which had committed this dacoity. It was thus by exclusion of the names of the accused persons, who were not identified by the witnesses in the court room that the learned lower court recorded that the remaining accused persons had participated in the dacoity. As a matter of fact, the accused persons whom the witnesses had identified in the court room during their statements should have been mentioned by name in the statements of the witnesses, but the learned lower court preferred to adopt a rather short cut which could have resulted in misreading of the evidence, as it had been scribed in a very bad handwriting. Anyway, it was on the basis of the aforesaid identification of the two appellants in the court room as well as in the jail that the finding of guilt was returned against them by the learned lower court. The evidence against each of the two appellants, however, was the bare minimum which the law required for conviction of an accused in a case of the like nature. It was not a case in which there was only one eye-witness due to which the prosecution was not in a position to examine any other witness. From the narration of the facts of the case, it was evident that there was no dearth of the eye-witnesses, who claimed to have witnessed the incident of dacoity, but even then the evidence of identification against the appellants consisted of the bare minimum required by law for holding them guilty of the offence of dacoity with murder.

8. PW-3, Sumeri Lal and PW-4 Bhoop Ram also were examined by the prosecution as eye witnesses of the incident. Sumeri Lal stated about the factum of the dacoity and claimed to have witnessed the same in day light. He, however, stated that he had not been able to see the dacoits, as they were inside the house of the complainant and that he had seen their faces when they were coming out of the house. He had identified accused Babu Kunjara, who, however, is not an appellant in this appeal. PW-4 Bhoop Ram Stated about the factum of the dacoity,

but did not identify any of the accused as a member of the gang of the dacoits which had committed the dacoity. He, therefore, was declared hostile and was cross-examined by the prosecution. He, however, denied the suggestion that he had deliberately helped the accused persons by giving false statement.

9. PW-5 Mooipga Lal C. P. 590 and PW-6 Chaudhary, S. I. had deposed about certain accused persons other than the appellants and their testimonies are not relevant so far as the appellants are concerned.

10. PW-7 Dr. D.P. Singh, had examined the injuries of PW-1 Kailash Chand Paihak and stated about the same. He proved the injury report Ext. Ka-4 and further stated that the injured could have received the same at about 6 P.M. on 22-4-1977.

11. PW-8 S. I. Raja Ram Arya was posted at P.S. Aliganj on 7-5-1977. He claimed to have arrested appellant Govind on 7-5-1977 at 11.30 A. M. in the Kundali of Ram Ganga. He further stated that he made him baparda and took him to Police Station, Aliganj where he lodged him in the lock-up and covered the gate of the lock up with a blanket so that no one may be able to see him. In his cross-examination, he denied the suggestion that he had arrested Govind accused three or four days prior to 7-5-1977 from his house, kept him at Police Station, Aliganj and had also shown him to the prosecution witnesses at the Police Station.

12. P.W-16 Dirg Pal Singh C. P. 222 had not stated anything about either of the appellants.

13. PW 10 Rahtu Singh, the then Station Officer, P. S. Aliganj, had investigated this case. He gave the details of the investigation done by him. He stated to have interrogated appellant Govind on 7-5-1977 after his arrest. He had submitted report for test identification proceedings and after realising(?) the results of the same submitted charge sheet against him and a few other accused persons.

14-15. PW-11 Deep Singh, the then Station Officer Meerganj, had arrested accused Bhaiyya on 26-10-1977 from a place on Meerganj Rampur road. He stated that he kept appellant Bhaiyya Baparda and had lodged him in the lock up

at 3.30 a.m. The relevant entry in this regard in the general diary was proved by him as Ext. Ka-25 In his cross-examination he denied the suggestion that he had arrested appellant Bhaiyya from his house at 2.15 a.m. on 26-10-77, and had taken his photograph. This witness stated about some other accused persons, who are not appellants in this appeal, as they were acquitted after trial.

16. PW-12 Vijendra Pal Singh C.: P. 834 had escorted appellant Bhaiyya from the lock-up to the jail and stated that the appellant was kept Baparda by him till in his custody.

17. PW-13 S. I. Shri Bawab Singh RW-14 Anil Kumar C. P. 1019, and PW 15 S.O. Dharmm Chand stayed nothing about the appellants.

18. PW 16 G.D. Rastogi, the then S.D.M. Aorla had got conducted the test identification proceedings of appellant Bhaiyya on 16-12-1977 in district jail. Bareilly. He stated about the same and proved the identification memo vide Ext-Ka-33.

19. PW-17 Dr. J.S. Jauhary, on 24-4-1977 had performed the postmortem examination on the dead bodies of Munna Lal, Girish Singh Smt. Lilawati and Shanker Pathak. He stated about the same and proved the ipostmortem examination reports Exts. Ka-40 to Ka-43.

20. The accused persons did not examine any defence witness.

21. During the arguments in the appeal, learned counsel for the appellants did not challenge the factum of the dacoity. The abovenamed four eyewitnesses of the incident consistently stated about the factum of the dacoity and we did not find sufficient reasons to disbelieve them so far as this aspect of the case was concerned. Their testimonies were corroborated by the above mentioned medical evidence. The witnesses further stated that the incident had taken place at about 6.30 p.m. and they had been able to see the faces of the dacoits in day light. This part of their statements also appeared to be true. The incident had taken place on 22-4-1977 and it need not be mentioned that sufficient sun light used to be there at about 6.30 p.m. in the fourth week of April. The learned Sessions Judge, therefore,

rightly held that the prosecution had been able to establish the factum of the dacoity and presence of sufficient light in which the witnesses could have the opportunity to see the faces of the dacoits.

22. For the appellants, however, it was vehemently argued that the evidence of identification which was the bare minimum required for conviction was not worth reliance and the learned lower court had wrongly relied upon the same for returning verdict of guilt against the appellants. For appellant Govind, it was argued that the prosecution had not been able to adduce complete link evidence due to which the evidence of identification against him could not be relied upon. Learned counsel contended that the prosecution had not adduced any evidence worth the name to prove that from the Police lock-up, appellant Govind was escorted Baparda to the jail and no presumption could be drawn that during this period also he was kept Baparda. We have carefully gone through the evidence on the record and find that the aforesaid contention of the learned counsel for appellant Govind was correct. No doubt, after his alleged arrest on 7-5-1977, appellant Govind was taken and lodged in the lock up of the Police Station Baparda, but no witness had been examined to prove his Baparda escort from Police lock-up to the jail. A most vital piece of link evidence, thus, was withheld by the prosecution for which it shall have to thank itself alone. A crime of great magnitude in which four persons had lost their lives had taken place, but at the same time it was surprising that the prosecution did not carefully get conducted the trial as a result of which the aforesaid lacuna, which was fatal to the case of the prosecution so far as appellant Govind was concerned, remained there. The evidence of identification against appellant Govind, therefore, should not have been relied upon by the learned lower court and he too should have been acquitted along with the other co-accused persons.

23. The other argument which covered both the appellants about the unreliability of the evidence of identification consisted of inordinate delay in holding the test identification parades of the appellants. Learned counsel for the appellants relied upon Hon'ble Supreme Court decision reported in : (1982)3SCC368 Soni v. State of U.P. in which it was held as follows :-

'After hearing counsel on either side we are satisfied that the conviction of the appellant for the offence of dacoity is difficult to sustain. The conviction rests purely upon his identification by five witnesses, Smt. Koori, Pritam Singh, Kewal, Chaitoo and Sinru, but it cannot be forgotten that the identification parade itself was held after a lapse of 42 days from the date of the arrest of the appellant. This delay in holding the identification parade throws a doubt on the genuineness thereof apart from the fact that it is difficult that after lapse of such a long time the witness would be remembering the facial expressions of the appellants. If this evidence cannot be relied upon there is no other evidence which can sustain the conviction of the appellant. We, therefore, allow the appeal and acquit the appellant.'

24. The Hon'ble Supreme Court, thus held that after a lapse of 42 days witness could not be expected to remember the features of a particular dacoit so as to be able to identify him in the jail after his arrest. Appellant Govind was put for identification after 61 days while the test identification proceedings of appellant Bhaiyya had taken place after 233 days of the occurrence. He was put for test identification on 16-12-1977 while the occurrence had taken place on 22-4-1977. Thus, in view of the aforesaid decision of the Hon'ble Supreme Court, we cannot take a contrary view of the matter and it was, therefore, not possible to agree with the contention of the learned Government Advocate that the evidence of identification against appellant Govind could safely be relied upon, as inordinate delay in holding the test identification proceedings was not there.

25. Another insurmountable difficulty in the case of appellant Govind was the absence of the link evidence about his Baparda custody during his escort from the Police lock up to the jail.

26. Another insurmountable difficulty in the case of appellant Govind was the absence of the link evidence about his Baparda custody during his escort from the Police lock up to the jail.

27. Regarding appellant Bhaiyya, it was rightly not asserted for the prosecution that his test identification proceedings had not been inordinately delayed. A period of 233 days was a very long period and a witness could not be expected to

remember the features of a particular dacoit for such a long time so to be able to identify him in the jail after his arrest.

28. Learned counsel for the appellants relied upon a Division Bench decision also reported in 1991 Cri LJ 1258 (Cal) Habal Shaikh v. The State, where in the evidence of identification was considered very carefully and it was held that when no explanation was given for delay in holding the test identification parade, there was room for doubt as to whether delay in holding test identification parade was in order to enable the identifying witnesses to see the accused in the Police lock up or in the jail premises and make a note of his features. It was further observed as follows :- (Para 12)

' Early opportunity to identify tends to minimise the chance of the memory of the identifying witnesses fading away by reason of long lapse of time. The long lapse of time, about 4 to 5 months from the date of occurrence is a crucial factor in determining what evidentiary value to be attached to such identification evidence. Delay in holding identification parade raises a doubt as to whether it is in order to enable the identifying witnesses to note the features of the accused in lock up or jail.'

29. After carefully considering this aspect of the case, we find that the evidence of identification so far as appellant Bhaiyya was concerned could not safely be relied upon. The prosecution has no explanation worth the name of the inordinate delay in holding the test identification proceedings of appellant Bhaiyya. He was arrested on 26-10-1977 i.e. after about six months of the occurrence but even then the prosecution made no effort to put him for test identification soon, thereafter, for no good reason. He was put for test identification on 16-12-1977 i.e. after 50 days of his arrest. There was, thus ample opportunity for the investigation to get his features observed by the eye-witnesses of the occurrence and the fact that they had been able to identify him in the jail even after 233 days of the occurrence suggested that the same was availed also successfully by it. In any view of the matter, we are of opinion that the evidence of identification against appellant Govind and Bhaiyya was not sufficient for returning verdict of guilt against them and they were entitled to get the benefit of doubt.

30. The appeal is allowed. The convictions and sentence of the appellants Govind and Bhaiyya are set aside and they are acquitted of the charge levelled against them. They are in jail and shall be released forthwith unless wanted in some other case.

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