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Court : Allahabad

Decided On : Jan-20-1997

Reported in : 1997CriLJ2270

Judge : B.K. Sharma, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 392 and 398

Appeal No. : Criminal Appeal No. 1593 of 1980

Appellant : Hari Ram

Respondent : State

Advocate for Def. : A.G.A.

Advocate for Pet/Ap. : P.N. Misra, Adv.

Disposition : Appeal allowed

Judgement :
ORDER

B.K. Sharma, J.

1. This is an appeal against the judgment and the order dated 4-7-1980 passed by the then VI th Addl. District & Sessions Judge, Shahjahanpur Shri Krishna Kumar in ST No. 46 of 1979, whereby he convicted the accused-appellant of the offence

under Section 392, IPC and sentenced him to undergo R.I. for a period of 3 years and pay a fine of Rs. 500/- and in default of payment of fine to further undergo R.I. for a period of 6 months.

2. Heard learned counsel for the parties and also perused the record.

3. From the evidence of informant Bulaki Ram (PW 1) and Ganga Ram (PW 2) it is established beyond doubt that an incident did take place on 7-4-1987 at about 8 p.m. in which the properties (sic) i.e. Paraat, Thalis and cash of Bulaki Ram informant, Dari, Rajayee and cash of Ganga Ram, besides the properties of Rameshwar, were looted from two bullock-carts, on which the same' were being carried from the Mela of Kalanpur after dismantling of their shops at the conclusive of the Mela. The robbers were armed with guns and Riphilas and (sic) were threatening to shoot down anyone who interfered with the loot.

4. According to the prosecution, the loot was committed by Hari Ram accused-appellant and his three companions who were unknown.

5. The material question is, whether the prosecution has succeeded in connecting the accused-appellant beyond every shadow of doubt with the crime. The informant claimed that he knew the accused appellant from before the right of occurrence. The defence also does not dispute it. In all robberies there is the intention to make illicit gain of property and force or violence is used to effectuate that intention. But in the present case, according to the prosecution, the accused appellant had a different motive in committing the occurrence, which is said to be the annoyance generated by an incident that took place earlier in the evening at the shop of (sic) the informant in the Mela at about 5 p.m. about the payment of the charges of the Chaat which the accused appellant and his three companions consumed from the Chhat shop of the informant Bulaki Ram in the Mela. It has been not a case in which the aforesaid previous incident is not admitted. There is difference only in (sic). According to the prosecution, the accused-appellant and his three companions consumed chaat worth Rs. 18/- the informant's chaat shop in the Mela and when the informant was demanding Rs. 187- the accused-appellant was paying only Rs. 10/- though after the altercation the accused-appellant ultimately paid the money. But the defence plea was that the accused-

appellant had alone gone to consume chaat and that he consumed chat worth Rs. 2/- and gave a currency note of Rs. 10/- and the informant returned him old and torned notes of Rs. 8/-, whereupon altercation and Dhakka-mukki took place.

6. The prosecution claimed that the occurrence was committed by the accused-appellant and his companions as a sequel to the chaat incident of 5 p.m. The defence claim is that the accused-appellant was falsely implicated in this case because of the said incident about the payment of the charges of the Chhat. The defence claim further is that Hari Ram accused-appellant who was of Vaishya community belonging to a well to do family, was least likely to commit the robbery as claimed by the prosecution on account of the Chaat incident, particularly when according to the informant's testimony at the trial he was paid off the charges. It was, of course not stated in the FIR that the payment was made by the accused-appellant about the Chaat, but the fact remains that at the trial the informant has admitted the payment. When the payment had been made to the informant by the accused-appellant he was hardly likely to commit the occurrence and rob not only the informant of his article being carried in bullock-cart but also rob away the articles of Ganga Ram (PW 2) and of one more person Rameshwar. It is also significant here that no injury was inflicted or attempted to be inflicted on the body of the informant. So, it is obvious that the culprits were not those with whom the alleged incident about Chhat had taken place. Bulaki Ram informant did not say anywhere in his statement at the trial that he or the other persons present at the spot at the time of the occurrence were inflicted any injury. Ganga Ram (PW 2), another person looted in the occurrence, claimed in his cross-examination that they were assaulted with Ballam and that they had received small injuries, due to which they kept lying there for sometime and after the departure of the bad characters they got up and sat again on their carts. He also claimed that he had shown his injuries to the Station Officer at the police station and that Naresh and Bulaki had also shown their injuries to the Station Officer (I.O.). However, there is no mention of any injury in the FIR and there is no medical report whatsoever. When the police was registering the case under Section 392/398, IPC they were not likely to conceal the injuries of the victims if these really existed. Of course, the existence of the injuries on the person of the victim was not essential in the robbery. If the victims yielded or submitted to the culprits i.e. they did not resist the

loot they might not be subjected to physical injury. But if the occurrence was committed due to the annoyance on account of the Chaat incident of the accused-appellant, the likelihood was that stress would have been on inflicting physical injuries, it does not stand to reason that on account of a quarrel about the payment of the charges of the chaat worth Rs. 13/- only the aggrieved person would commit or would get committed robbery of the articles of the shop of the informant being carried on cart and even the articles of two others who were accompaning him, while the articles of Ganga Ram (PW 2) was kept in the same cart and those of Rameshwar were kept in a separate cart, in which Beche Ram and Pyare were sitting and these articles of Rameshwar too were looted in the occurrence. It is only the intention of wrongful (sic) about which could have led to the robbery of articles of both the carts by putting the victims in fear of death or hurt. To what extent the informant knew the accused-appellant is not material because it is not the defence plea that there was no chaat incident or that the accused-appellant was not known to the informant. The defence case is that the accused-appellant runs a Khaad agency in Kalanpur. The informant claims only ignorance about it and does not make denial of the suggestion. However, Ganga Ram (PW 2) claimed that he came to know at the time of the Chaat incident that the name of the accused-appellant was Hari Ram and before that he did not know his name and there were other victims Rameshwar and Naresh and there were other witnesses too. It was not stated that the accused-appellant was known to them also from before the occurrence. So in the ordinary course one would expect that the accused-appellant would be put up for test identification parade as far as the victims and the witnesses other than the informant were concerned. The Investigating Officer does not appear to have done so. Further the prosecution has been very careless. It did not examine the Investigating Officer in the witness box even while there was positive evidence of the two witnesses. Neither the prosecution case is to examine the investigating Officer, nor the learned Sessions Judge tried to get the Investigating Officer in the witness box. Except in these cases where all the witnesses are hostile the prosecution in any case must examine the Investigating Officer and the Court also must insist that the Investigating Officer is examined at the trial. Further more it was necessary to examine the clerk constable who prepared the chik report and registered the case.

From the failure of the prosecution to examine these witnesses, the defence was bound to be prejudiced on account of not getting the opportunity to cross-examine the police official who prepared the chik report and recorded the G.D. entry about the registration of , the case and the Investigating Officer about the lodging of the FIR, preparation of the chik report and the registration of the case and also about the manner in which the investigation was conducted and to elicit circumstances which could show the reason of false implication of the accused in the case. In fact it is the duty of the trial Court also that the defence gets such an opportunity.

7. Of course, where all the prosecution witnesses are hostile and the case has to end in acquittal the Court need not and ought not to insist upon the production of the formal evidence but otherwise it is the boundent duty of the Court to give the accused full opportunity to defend himself at the trial.,

8. It is also to be noted in this case that the occurrence is of 8 p.m. and the evidence of the informant itself on record is that the place of occurrence was one mile from the site of the Mela from where the informant and others were coming after dismantling their temporary shops. It has also come in his evidence that in the Mela there is an outpost of police with Sub-Inspector and constables in camp for watch and ward duties. It may be that the informant stated that he did not know whether the indicents of quarrels or theft in the Mela are reported in the police outpost situated in the Mela campus or not. In the ordinary course there is police camp in every Mela area where the victims could approach for help in hours of need. If the distance was just one mile as has come in evidence the victims were expected to rush to the police camp in the Mela after the occurrence, particularly if one or all the culprits were known from before and seek the assistance of the police in the arrest and recovery of the looted articles. But no effort appears to have been made in this regard.

9. According to the chik report, the FIR was lodged at the police station Mirzapur in the night at 12.30 a.m. The distance of the police station from the scene of the occurrence is recorded therein as three miles. The informant has himself admitted that after the occurrence he reached at Mirzapur at 10 p.m. So, in the ordinary course, one would expect that he (informant) should have gone to the police

station straightway and lodged the written FIR there. But on his own showing he did not go there straightway. He claims that he went to the 'house of Chhokhe Lal where the accused-appellant lived and enquired about the name of father and brother of the accused-appellant. The accused-appellant is a resident of village Kalan, which would mean that he went from Mirzapur to Kalan to the house of the accused-appellant and collected the said information. He has then stated that at 10 p.m. he went first to the police station and when he did not learn the name of the father of the accused-appellant then he went to house of Choke Lal to enquire the name of the father of the accused-appellant and returned after 15 minutes and lodged the report at the police station 2-2 1/2 hours later. His explanation is that till then the Investigating Officer had not come at the police station and the police constable had gone to call him. He further claimed that when the Investigating Officer came he was in his official dress. The defence was denied the opportunity to cross-examine the Investigating Officer with reference to the records of the police station, whether he was at the police station at 10 p.m. when the informants claimed to reach there or he was away from the police station during the period 10 p.m. to 12.30 a.m. in the night on the date of occurrence so as to testify the testimony of the informant about the lodging of the FIR. In the ordinary course, if the informant had reached the police station at 10 p.m. alongwith the written FIR he should have lodged the FIR then and there and would not have waited for the coming of the Investigating Officer to the police station. If he was waiting for the Investigation Officer, it might be that the written FIR was prepared at the police station belatedly with the consultation of the Investigating Officer.

10. One point of importance that must be placed on record is that the occurrence took place at 8 p.m. on the date of occurrence in Banjar in the Jungle. It is admitted by Ganga Ram (PW-2) that it was a dark night at the time of the occurrence. The question of artificial light at the time of occurrence assume great importance. If there was no light or there was no sufficient light the identification of the culprit or culprits could not be made or could not be reliable. In the FIR an artificial source of light has been set out in the form of a burning patromax. It has been claimed in the FIR that Ganga Ram was moving with both the carts carrying a burning patromax with him. At the trial the informant claimed in his evidence that Ganga Ram was moving on foot in front of his cart carrying the patromax. Ganga

Ram (PW-2) also made a statement that at the time of the occurrence he was carrying a burning patromax in his hands when the culprits came out from inside the grove and committed the occurrence. The prosecution evidence about the artificial source of light has been severely criticised by the learned counsel for the accused-appellant. At the time of arguments it was claimed by him that such type of evidence could never be believed. The argument of the defence counsel is that it could not be believed that a person will move on foot in front of the carts all along the way i.e. for a distance of one mile from the site of the Mela from where they had started. When the occurrence took place in the Jungle, in the ordinary course the persons accompanying the carts would be sitting in the carts. It seems that the difficulty was countenanced in showing an artificial source of light at the spot in such a location so as to enable the identification of the culprits who came from the vicinity and committed the loot. The evidence of source of artificial light is highly doubtful and has to be rejected and once it is done, the identification of any assailant at that time and place of occurrence also becomes highly doubtful and if the accused appellant has been named in the FIR as one of the culprit, it has to be necessarily inferred that this implication of the accused-appellant has been made by way of suspicion on account or the Chaat incident that took place three hours earlier in the Mela camp. It may be mentioned here that there is no evidence whatsoever on record to share recovery of any looted property from the possession of the accused-appellant at any time. Consequently, the appeal has to be allowed.

11. The appeal is accordingly allowed. The conviction and sentence of the accused-appellant for the offence under Section 392 IPC is set aside and he is acquitted of the same. He is on bail from this Court. He need not surrender to it. His bail bonds are cancelled and sureties are discharged.

12. Let a copy of this judgment be certified to the learned Sessions Judge concerned within a week from today for information and compliance. Thereafter these report shall be submitted by the learned Sessions Judge concerned to this Court within a month from today.

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